



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06667/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 January 2018 and 30 July 2018

Decision and Reason Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

BISHAL GURUNG
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri (Counsel) (both hearings)
For the Respondent: Ms J Isherwood (Specialist Appeals Team; January 2018)
Ms A Everett (Specialist Appeals Team; July 2018)

DECISION AND REASONS

1. This is the appeal of Bishal Gurung, a citizen of Nepal born 13 April 1989, against the decision of the First-tier Tribunal of 16 February 2017 dismissing his appeal, itself brought against the decision of 2 September 2015 to refuse his human rights claim.
2. His application was made to join his mother in the UK, Nanda Maya Gurung, born 1 January 1948, the widow of his father, who had served in the Gurkha Brigade prior

to his discharge in 1969. At that time, only one of the children, now deceased, had been born. Mrs Gurung arrived in the UK on 11 August 2011 when she was granted indefinite leave to remain to settle in the UK, after her husband's death in 2008.

3. The application was refused, on the basis that although there were no instructions to Entry Clearance Officers to consider the admission of the adult children of ex-Gurkha widows, it was nevertheless appropriate to consider the exercise of discretion exceptionally. Additionally the application was considered with reference to the Immigration Rules on adult dependent relatives. The decision maker concluded that there were no exceptional circumstances present, given
 - (a) The Appellant was a fit and independent adult living alone, who had not shown he was unable to work;
 - (b) The financial support he received from his mother was nothing out of the ordinary;
 - (c) He had close older siblings and extended family to turn to, as shown by the Kindred Roll that supported his application;
 - (d) Absent confirmation that he received regular remittances monthly from his mother, it was not accepted he had established that he was not working.
4. As to the right to private and family life, it was not accepted that there were emotional ties exceeding the norm between mother and son, and his mother had applied to settle in this country in the "full knowledge" that adult children had no right to join parents to settle here whilst her son grew up in Nepal. Family life could continue on the present basis without interference, and it was not thought that there was any material impact on the case from the historic injustice visited upon Gurkha serviceman.
5. The First-tier Tribunal recorded evidence from the Appellant's mother, summarising it to the effect that she had twice returned to Nepal since settling in the UK, and she had eight children in total: one daughter had died, two lived in Nepal, two sons lived in Dubai, one in Malaysia, and the Appellant in Nepal. She was responsible for her son's support, as the other siblings just worked enough to keep their families; her daughters in Nepal did not support him either.
6. The Sponsor presently rented a room in a shared house and would have to find another room if he came to the UK: he would be able to look for work here. She received pension credit of £400 a month; the army pension received in Nepal was made available to the unmarried daughter who still lived in the family home. Her son had left that location in order to hide from the Maoists.
7. In her witness statement, the Sponsor had stated that her husband had served the British Army from 1958 until 1969, in India, Malaya, Hong Kong and Borneo. It was very hard to live in the UK when she knew her son remained alone in Nepal. Coming to the UK to settle was very difficult because of her precarious financial situation and she had had no idea as to how to make an application for her son to join her. She eventually learned how to do so from friends in the community, and

raised the necessary funds. She had continued to support him financially and contacted him via telephone cards, and more recently, via Viber. Recent years had been very tough as her son was increasingly depressed without other family members around him. She had travelled to Nepal to see her son. She had never stopped thinking about him.

8. The First-tier Tribunal accepted that the Appellant was a single young man living alone in Nepal, although this seemed to be a matter of choice, given that only one elder sister occupied it presently. Only the Sponsor had referenced his fear of the Maoists and the judge felt they were not being told the whole truth as to his circumstances. The elder sister could accordingly be expected to offer him support in the family home if required. The Appellant's father had made no effort to migrate to the UK between 2004 and 2008, and the Sponsor had stated that she believed he probably would have done had the opportunity arisen, though she was uncertain of the reality. The Tribunal was not satisfied that the father had ever intended to move to the UK prior to his death, and accordingly there was no historic injustice which could have carried over to affect the Appellant. Contrary to his claim that he would already have been in the UK had his father not suffered that wrong, he was in much the same position as he would otherwise have found himself in, had his mother not migrated.
9. The First-tier Tribunal did not accept there were particularly strong emotional ties between the family members: it presumed that the Sponsor had lived in the family home with her daughter before coming to the UK, absent contrary evidence, and it was uncertain as to when the Appellant left that home: he might have departed before his mother migrated. The remittance of funds to Nepal was unsurprising but did not show exceptionally strong support or connections.
10. The Sponsor was not in a position to support the Appellant who would arrive in the UK with no right to claim public funds, and whose expectation of finding work in this country was unrealistic given he was apparently unemployable in Nepal. Her expenditure of £330 of her £480 monthly income already left her with very limited funds to spare.
11. Accordingly the appeal was dismissed, as on these findings there was no disproportionate interference with the family's Article 8 rights.
12. Aggrieved with this decision, the Appellant lodged somewhat discursive grounds of appeal, arguing that there was no proper staged enquiry conducted here and that the First-tier Tribunal had erred in law:
 - (a) Failing to conduct any examination as to whether the adult child had formed their own independent life and whether the Appellant remained part of the family unit before his mother's departure for the UK;
 - (b) Failing to consider Paragraph 9 of Annex K which stated the conditions that "the adult child of a former Gurkha under this policy" would *normally* have to meet, which showed that the policy catered for the possibility of

exceptional circumstances and which accordingly should have received judicial consideration in assessing the proportionality of removal, particularly having regard to the proper approach to the assessment of historic wrong;

- (c) Failing to appreciate that the mother had demonstrated she could support her son without further recourse to public funds.
13. Permission to appeal was granted by the Upper Tribunal on the basis that the First-tier Tribunal may have erred in its approach to assessing the impact of the historic injustice on the family, which may have impacted on its approach to other dimensions of the case.
14. Mr Jaisri submitted that the appropriate question on which the Tribunal below should have concentrated was whether the Gurkha would have settled in the UK sooner but for the historic injustice. The opportunity to do so had not arisen by the time of the father's death: only those who had retired after 1997 received this dispensation, following *Gurung* in 2008. It was accordingly wrong to hold inaction from 2004 to 2008 against the Appellant's father. As to family life, it was clearly established given the witness statement and other evidence from the Sponsor. If there was any gap in the evidence, that was because it was only with the decision of *Rai* that the real importance of this issue was generally realised.
15. Ms Isherwood argued that there was no error in the approach to family life, and there was no overt evidence that the father had intended to migrate to this country earlier. There was a lack of evidence to discharge the Appellant's case to the balance of probabilities. The financial remittances were taken fully into account. There was a gap in the evidence regarding the timing of the Appellant leaving the family home, though she acknowledged that the central relevance of this question generally became apparent only following the decision of the Court of Appeal in *Rai*.

Findings and reasons: Error of law hearing

Gurkhas and Home Office policies

16. Various policies have over time been applicable to the dependant relatives of Gurkhas. the most recent one is Annex K addressing *Adult Children of Former Gurkhas* (22 January 2015):

"Definition of an adult child of a former Gurkha

2. For the purposes of this policy, an adult child is the son or daughter of a former Gurkha. See further guidance on the relationship to the sponsor in paragraph 11 of Annex K of this guidance.

...

Settlement for adult children of former Gurkhas

9. In order for settlement to be granted to the adult child of a former Gurkha under this policy, a valid application for entry clearance must be made in accordance with paragraphs 24-30 of the Immigration Rules and the Appellant will normally have to meet the following conditions:

1. The former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements; and
 2. The Appellant is the son or daughter of the former Gurkha; and
 3. The Appellant is outside the UK; and
 4. The Appellant is 18 years of age or over and 30 years of age or under on the date of application (including Appellants who are 30 as at the date of application); and
 5. The Appellant is financially and emotionally dependent on the former Gurkha; and
 6. The Appellant was under 18 years of age at the time of the former Gurkha's discharge; (or if the Appellant was born after discharge see guidance in paragraph 16 of Annex K of this guidance) and
 7. The Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available before 1 July 1997; and
 8. The Appellant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the Appellant lived away); and
 9. The Appellant has not formed an independent family unit; and
 10. The Appellant does not fall to be refused on grounds of suitability under paragraph 8 or 9 of Appendix Armed Forces to the Immigration Rules or those provisions of Part 9 of the Immigration Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces.
11. The former Gurkha sponsor must have settlement under the 2009 discretionary arrangements, or be in the process of being granted settlement in the UK under the discretionary arrangements at the same time as the Appellant. If this condition is not met the application must be refused on this basis.

Financial and emotional dependency on former Gurkha

15. The Appellant must be financially and emotionally dependent on the former Gurkha sponsor. Evidence of financial dependency may include the fact that the Appellant has not been supporting him or herself and working but has been financially supported, out of necessity by his or her former Gurkha sponsor, who has sent money regularly from the UK.

Age at time of former Gurkha's discharge

16. The Appellant must have been under 18 years of age at the time of the former Gurkha's discharge. If this age condition is not met, the application must be refused under this policy on this basis. Please note that an adult child born after the sponsor's discharge will qualify under this policy if all other conditions are met.

Historical Injustice

17. In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here). If a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement will normally be considered to have been met.

18. Examples of countervailing evidence might include situations where:

- the sponsor did not apply promptly when the discretionary police was announced; or
- the sponsor has a history of dishonesty;
- the former Gurkha did not return to his family in Nepal on discharge (e.g. because he went to work elsewhere).

If the decision maker does not feel that this requirement is satisfied and they have referred the matter to a senior decision maker, they should normally propose refusal of the application on this ground.

Living Apart

19. The Appellant must not normally have lived apart from the Gurkha sponsor for more than two years on the date of application or at any time, unless the family unit was maintained albeit the Appellant lived away, for example time spent at boarding school, college or university as part of their full-time education where the Appellant lived at university or college during term time but resided in the family home during holidays. If these conditions are not met the application must be refused under this policy on this basis.

Living Independently

20. The application must also be refused if the Appellant is living independently in a different family unit (for example, the Appellant is living with relatives who are acting in a parental capacity), or where the Appellant has formed their own independent family unit by getting married or entering into a civil partnership or a relationship akin to marriage/civil partnership."

17. This guidance provides the context within which an Article 8 claim is to be assessed. The extent to which an Appellant satisfies the relevant publicly expressed policy requirements is highly relevant when assessing proportionality. As stated by

Richards LJ in *Tozhlukaya* [2006] EWCA Civ 379 (and applied in *AG Kosovo* [2007] UKAIT 00082):

“If a policy tells in favour of the person concerned being allowed to stay in this country, it may affect the balance under article 8(2) and provide a proper basis for a finding that the case is an exceptional one.”

18. This principle remains relevant under the system of Immigration Rules expressly addressing family life. In *SS (Congo) & Ors* [2015] EWCA Civ 387, it was said that “it is accurate to say that the general position ... is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules”. At §48 the Court goes on:

“What does matter, however - whether one is dealing with a section of the Rules which constitutes a "complete code" (as in *MF (Nigeria)*) or with a section of the Rules which is not a "complete code" (as in *Nagre* and the present appeals) - is to identify, for the purposes of application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules in the particular context in question (which will not always be the same: hence the guidance we seek to give in this judgment), as well as the other factors relevant to the Article 8 balancing exercise in the particular case (which, again, may well vary from context to context and from case to case).”

19. Notwithstanding the fact that the decision in *SS (Congo)* was overturned by the Supreme Court in *MM (Lebanon)* [2017] UKSC 10, therein Lady Hale and Lord Carnwath confirm this reasoning remains extant §77: “Instructions ... have to be taken into account as part of the overall scheme: on the one hand, they might so mitigate the effects of the Rules as to make them compatible with the Convention rights when they would not otherwise have been so”. Accordingly the extent to which the Appellant satisfied the criteria of this Guidance and the policy imperatives that underlie it were (and are) relevant to the assessment of proportionality.

Historic wrong

20. The historic immigration wrong suffered by a group when deciding whether an interference with family life is proportionate is something which can be attributed significant weight, given *NH (India)* [2007] EWCA Civ 1330 which discusses the past injustice suffered by British Overseas Citizen female heads of households who were unable to apply to settle in the United Kingdom, and may be decisive in the appropriate case. *Gurung* looked at the applicability of this principle to Gurkha cases, the Court concluding that:

“[40] ... unless there is some evidence to suggest that there is a real risk that (i) the Gurkha's adult dependant child may not be given leave to enter, for example, because there is adverse information of a serious nature about him, or (ii) leave granted to the Gurkha or his child may be abrogated in the future, the difference between the two groups should be given little weight ...

[41] ... the Appellant dependant child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy. There is no place in the balancing exercise for making fine judgments as to whether one injustice is more immoral or worthy of condemnation than another

[42] If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."

21. The First-tier Tribunal found that there was no evidence that, but for the historic injustice, the Appellant's father would have applied for settlement earlier than in fact he did. However, this finding fails to appreciate the relevant chronology. As explained in *Ghising* [2013] UKUT 567 (IAC):

"For many years Gurkha veterans were treated less favourably than other comparable non-British Commonwealth citizens serving in the British army. The Secretary of State had a concessionary policy outside the Immigration Rules which allowed Commonwealth citizens subject to immigration control who were serving and former members of the British Armed Forces to obtain, on their discharge, indefinite leave to enter and remain in the UK, but Gurkhas were not included in the policy. In October 2004 Immigration Rules A76 E-K were introduced to enable Gurkha veterans with at least four years' service who had been discharged from the armed services within the past two years to apply for settlement in the UK. However only Gurkhas who had been discharged on completion of engagement on or after 1 July 1997 were eligible to apply. At the same time the Secretary of State introduced a policy outside the Rules under which Gurkhas were permitted to settle in the UK even if they had been discharged before 1 July 1997 and/or more than two years prior to the date of application if there were strong reasons why settlement in the UK was appropriate in the particular case by reason of the individual's existing ties with the UK. Entry clearance guidance was contained in the Diplomatic Service Procedures Chapter 9, paragraph 14, replaced in January 2009 by the Settlement Entry Clearance Guidance Chapter 12, paragraph 16."

22. Accordingly it can readily be seen that the Appellant's father could not have applied for settlement in the UK between 2004 and 2008, the very period of delay the First-tier Tribunal held against him. Accordingly there was a clear error of law in the appreciation of whether or not the family had suffered from the historic injustice in question.

Family life

23. The decision of the Strasbourg Court in *Advic v UK* (1995) 20 EHRR CD 125 is sometimes cited for the proposition that the normal emotional ties between a parent and an adult son or daughter will not, without more, be enough: *Kugathas* [2003] EWCA Civ 31. As shown by the useful review of the authorities in *Ghising* [2012] UKUT 00160, this is not the whole picture, however, and as Buxton LJ emphasised in *MT (Zimbabwe)* [2007] EWCA Civ 455 at [11] *Advic*, “whilst stressing the need for an element of dependency over and above the normal between that of a parent or parent figure and adult child, also stresses that everything depends on the circumstances of each case”.
24. The courts have given guidance on assessing the existence of family life where the separation of the parties has been exacerbated by a “historic injustice”. In *Patel* [2010] EWCA Civ 17, Sedley LJ stated at [14] that “what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right”. In *Rai* [2017] EWCA Civ 320 at [36]-[37] Lindblom LJ found that the Upper Tribunal had erred in law in assessing the existence of family life by “looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant’s dependence upon his parents as a necessary determinant of the existence of his family life with them.”
25. The First-tier Tribunal considered that the claim of family life between mother and son had been exaggerated. The relevance of circumstances appertaining at the date of the initial migration to the UK decision has become increasingly clear with a succession of decisions of the higher courts.
26. *Rai* was handed down on 28 April 2017. The Court of Appeal made it especially clear that it was the pre-migration situation, rather than the fact of a decision being made by a parent to depart from Nepal to settle in the UK, that should be the primary focus of assessment. As Lindblom LJ put it therein §39, the Upper Tribunal below had concentrated unduly on what they perceived as a choice to migrate, which:
- “... was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”
27. The Court of Appeal in *Rai* went on to conclude that an error of law in the assessment of family life would itself be likely to render any proportionality assessment unlawful. In any event, when evaluating proportionality, the approach of Sedley LJ in *Patel* at [15] is relevant here:
- “... [The] effect of this is to reverse the usual balance of [article] 8 issues. By the time they come to seek entry clearance, adult children may well no longer be

part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of [article] 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of [article] 8(1), the balance of factors determining proportionality for the purposes of [article] 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago."

28. Indeed, citing more of the judgment from *Rai* §40 it can be seen that these issues went to the "heart of the matter":

"in consequence of the "historic injustice", it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children ... the stark choice they had had to make was either to remain with the appellant ... in Nepal or to take up their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, "an integral part of the family unit" even after his parents had settled in the United Kingdom."

29. The evidence before the First-tier Tribunal on this issue was rather unclear, but given the hearing took place some two months before *Rai* was published, that was understandable. I also noted in my "error of law" findings that the conclusion of the judge below, who felt she had not been told the whole truth, was somewhat equivocal, and failed to take account of the fact that the Sponsor, notwithstanding her modest resources, had twice returned to Nepal, in circumstances where she had stated that her son's present situation was of great concern to her. I accordingly considered that it would be unfair to find that the error of law regarding historic injustice was not material having regard to the broader context of the appeal.
30. Thus the decision of the First-tier Tribunal could not stand. As the fact-finding remaining was of relatively narrow compass though the legal issues were relatively complex, it was appropriate to retain the matter in the Upper Tribunal.

Findings and reasons following from the continuation hearing

Further relevant evidence and submissions

31. The updated and detailed witness statement of Nanda Maya Gurung set out that her husband was discharged in April 1968 having enlisted in November 1958. She and her late husband had 8 children. Her daughter Sarkini had passed away in 1980. Her daughter Keshari lived an independent life in Kaski District. Her son Shivaji lived in Nepal, having previously worked in Kuwait; he was married with one son, in Pokhara. Her son Kushal was married and they had a son; they lived in Pokhara. Her son Padamprasad lived and worked with his wife in Dubai. His daughter Nima

lived in Pokhara, supported by her husband in Dubai. Suman was unmarried and worked in Dubai.

32. The Appellant Bishal had applied for entry clearance on 12 August 2015, that application being refused on 2 September 2015; he was aged 26 and 3 months when he applied. There was no provision made in the Rules at that time for the adult children of the widows of deceased Gurkhas to come to the UK. It could be seen that Bishal's siblings lived their own independent lives, either alone or having married. The Sponsor was the only family member that remitted him funds via Xpress Money, Samsara Remit and Himal Remit; she also left him with funds equivalent to around £700 on each occasion she visited. There was no guarantee of work for him in Nepal and he had so far found no vacancy. He was financially and emotionally dependent on her. She managed on the public funds she received in the UK by way of Pension Credit, Housing Benefit, and Winter Fuel allowance. She was settled in this country and felt unable to return to Nepal.
33. Had her family been able to apply to come to the UK sooner, they would have done so. But they were not allowed to apply for settlement until relatively recently, and Bishal was born after her husband had retired from the army. He was under 30 at the time he had applied. She had found it very difficult to live separately from him and was in frequent communication via telephone. If he was in the UK he could help her manage with cleaning and shopping, whereas she could continue to give him financial support. Their culture was such that she felt responsible for him until he married. She had to fulfil the role of both parents.
34. She had travelled to see him from January to April 2013, February to April 2015, and during February 2018. They lived together as mother and son during these visits. Their case had previously been inadequately prepared by their former representatives.
35. Ms Gurung adopted her witness statement and gave live evidence. Cross examined, she said that Bishal did not have an independent family unit of his own, unlike his siblings. Bishal had been with her throughout the time she had lived in Nepal, sharing her home in Pokhara.
36. Ms Everett submitted there was inadequate evidence to establish family life between the Appellant and Sponsor. The application was not made as swiftly as it might have been. These issues aside, maintaining the decision would be disproportionate given the approach set out in the authorities.
37. Mr Jaisri noted that the Entry Clearance Officer had permitted the Sponsor to come to the UK in 2008 which demonstrated that there was official acceptance, after her husband's death, that it was appropriate and proportionate to allow a family member to come to the UK notwithstanding that the spouse who had served in the Brigade of Gurkhas had passed away. There was pension available to the family which would help support the family. The visits to Nepal clearly concentrated on

seeing Bishal rather than the other siblings which corroborated the strength of asserted family life.

Findings and reasons

38. No challenge has been made to the historical facts advanced by the Appellant before me, and, given that the matters that concerned the Judge in the First-tier Tribunal have now been resolved by a more detailed witness statement, I accept the evidence put forward by the Sponsor as credible.
39. The essential history then is this. The Sponsor's husband served in the British Army from 1958 to 1969. The Appellant was born in 1989. From 2004 to 2008 the Sponsor's husband sought to settle in the UK, but his attempts to do so were frustrated by the government policy that was subsequently identified as embodying a historic injustice against the Gurkhas. In 2008 he died without achieving that ambition. The Appellant resided with his parents (and with his mother alone following his father's death) until his mother was granted entry clearance to settle in the UK, travelling in August 2011.
40. It took some years for the Sponsor to save up funds such as to be able to afford to make the application to bring him to the UK; when the application was made in August 2015, Bishal was slightly over twenty-six years of age. In the meantime she visited him on three occasions, remaining in Nepal for a significant period on each occasion.
41. On the basis of this history, I accept that family life was extant at the date the Sponsor left Nepal. She was then cohabiting with a son who whilst not an adult, had not flown the family nest and was not independent; they lived within a culture where the expectation is that children will remain with their parents until marriage. The ECtHR in *AA v United Kingdom* (Application no 8000/08) found on 20 September 2011 that "An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."
42. It is clear that the Appellant and Sponsor have maintained a close emotional relationship notwithstanding the mother's departure to live in the UK; the importance the Sponsor has attached to making extended visits to Nepal, given that money is in short supply, demonstrates as much. In any event, as shown by *Rai*, their separation was the product of the "historic injustice" and family life should not be taken to have been broken by the fact of migration alone.
43. As demonstrated by *Patel*, the normal resolution of the proportionality balance, all things being equal, will be that the family should be allowed to reunite, unless there is some particular public interest factor that causes the scales to be weighed differently. I can see no such factor in this particular case. The Appellant has not formed an independent family unit, and is clearly financially and emotionally dependent on the Sponsor; he had not lived separately from her before she departed from Nepal. It was not suggested in the submissions made to me that the letter

and/or the spirit of the various provisos in the Guidance cited above were not satisfied in this case, which is relevant given that those factors can be seen as a general expression of the relevant public interest considerations.

44. The only difference between this case and the paradigm one where the former Gurkha sponsors their child to come to the UK is the fact that the Sponsor's husband is deceased. However, the very fact that the policy's ambit was effectively extended to her by the grant of indefinite leave to remain demonstrates the way that the UK authorities have struck the balance for this family in the past.
45. The section 117B factors remain relevant, no doubt, but there should be no additional recourse to public funds occasioned by the Appellant's arrival in the UK. He will foreseeably be able to find work given he has studied in higher education, and no doubt he will be able to master English with reasonable proficiency soon after arriving. There is no question of precariousness of residence here, given the Sponsor was granted settlement in the circumstances set out above.
46. I conclude that the immigration decision was disproportionate to the private and family life with which it seriously interfered.


Decision:

The decision of the First-tier Tribunal contained material errors of law.

Following the continuation hearing the appeal is allowed.

Signed:

Date: 9 September 2018

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes