Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08204/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th December, 2017	**On 18th January 2018**

Before

Upper Tribunal Judge Chalkley

Between

ANIL RANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Puar of Counsel instructed by N C Brothers & Co Solicitors
For the Respondent: Mr T Melvin, a Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 5 January 1986. In August 2015, he applied for entry clearance to the United Kingdom as the adult dependent of a former Ghurkha soldier who was settled in the United Kingdom, namely Mr Chitra Bahadur Rana.

2. The appellant's application was refused on 18 September 2015 and the appellant appealed to the First Tier Tribunal. The Entry Clearance Officer

considered the application under the Home Office policy Annex K. It was said that the appellant had lived apart from his parents for more than two years since their move to the United Kingdom. A concern was also expressed about the appellant's identity and date of birth. Let me make it clear here those two issues were satisfactorily dealt with by the judge. The judge was satisfied that the appellant was born when he said he was born in 1986. The judge was also satisfied that the appellant was the son of the sponsor and that family life existed between the appellant and his parents.

3 At paragraph 36 of his determination, the judge says that there is one other issue of fact and this relates to whether the appellant would have come to the United Kingdom in 1978 if he had had the opportunity to do so. As Counsel pointed out to me 1978 was in fact incorrect. The relevant date would have been 5th January 2004, on the appellant's majority. He was wrong to focus on the date of the appellant's father's discharge from the Gurkha regiment.

4. The judge found that the evidence as to whether or not the appellant would have come to the United Kingdom if he had had the opportunity to do so at an earlier date was not at all clear. The appellant's father left Hong Kong after his retirement and returned with his wife to Nepal to find work. He was unable to find work and therefore returned to Hong Kong where he could work and look after his three younger children who were born in Hong Kong. He returned to Nepal in 2005. The sponsor worked in Hong Kong because that was where his daughters wanted to live and he was able to work and be with them. The judge concluded that having regard to the appellant's age and the fact that he had been separated from his parents since 2013, the decision of the Secretary of State to refuse the application was proportionate.

5. Mr Puar suggested that at paragraphs 36 to 40 of the determination the judge had applied the incorrect test. In paragraph 11 of *Ghising and Others (Gurkhas/BOCs: historic wrong: weight)* [2013] UKUT 00567 the court referred to paragraph 41 of *Gurung* and make it clear that the test is:

> *"If a Gurkha can show that but for the historic injustice he would have settled in the UK at a time when he is dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18 that is a strong reason for holding that it is proportionate to permit the child to join the family now. To that extent the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general Rule, the weight accorded to the injustice should be substantially different in the two cases."*

6. Mr Puar suggested that the relevant date was 5th January 2004, and that the judge had been wrong to focus on the date when the sponsor retired from the Gurkha regiment in 1978. The family at that time wanted to settle in Hong Kong. Mr Puor suggested that there was no difference in reality between Hong Kong and the United Kingdom, because the Gurkha

regiment were based in Hong Kong. It is clear that the appellant's siblings wanted to live in Hong Kong, because that is where they were born.

7. At paragraph 46, the judge says that the factual background on which he assesses proportionality is that the father chose to work in Hong Kong because his daughters wanted to live there and he and his wife only chose to come to the United Kingdom when the opportunity arose after 2008. That, suggested Mr Puar was wrong. The judge had been considering what the father wanted to do in 1978, rather than as at the date of the appellant's majority in 2004. He was addressing his mind as to whether the sponsor would settle in the United Kingdom, but it makes no difference whether it is the United Kingdom or Hong Kong.

8. Mr Melvin suggested that the findings of the judge were open to the judge to make on the evidence before him. There was no evidence as to the date when the appellant's father decided that he wanted to come to the United Kingdom. It had been the appellant's father's choice to work in Hong Kong and the historical injustice was not relevant, given that there was a choice. The sponsor simply wanted to support his family and it was the appellant's siblings who wanted to remain in Hong Kong. There was simply no evidence before the judge that as at the date of the appellant's majority to show that the sponsor wanted to retire to the United Kingdom. He invited me to uphold the decision. Addressing me in closing Mr Puar emphasised that the judge had focussed on the wrong date. I reserved my determination.

9 I have read the statement of the sponsor. In it he refers to there having been a lot of publicity in Nepal about the children of Gurkhas who were born in Hong Kong and whether or not they were Nepalese. This was in 1996 just before Hong Kong was handed back to the Chinese government. It was suggested that they were not allowed to return to live in Hong Kong and that they were told to register with the British Embassy to receive British national overseas passports. This he did for his three eldest children, who wanted to live in Hong Kong, but he says his wife and their Nepalese children were not allowed to go with them. Only one parent was allowed to go and so he and his wife decided that if he went, he would be able to work and earn money to support everybody.

10. After he retired, he was not able to obtain work in Nepal and this left him with very little money, so knowing that he was able to work in Hong Kong, he decided to go and look after his three eldest children and work there. He stayed in Hong Kong with his three eldest daughters, visiting his wife and younger children as often as he could. He stayed there until 2005, when he decided to return to Nepal to be with his wife and with the respondent. Sadly, the respondent was not well and needed a kidney replacement. The respondent's mother donated one of her kidneys. In 2010, the sponsor heard that Gurkhas were being allowed to settle in the United Kingdom. He saved hard, so that by the late winter of 2013, he had sufficient monies to be able to settle with his wife in the United Kingdom.

He came to the United Kingdom expecting to be able to apply for the respondent to join them quickly.

11. I have concluded that the judge has erred in his determination. The error stems from paragraphs 36, 37 and 38 of the determination. The judge clearly focussed on the wrong date. The issue before him was whether the appellant could have come to the United Kingdom on obtaining his majority in 2004. The sponsor makes it clear that he was not given the opportunity of settling in the United Kingdom when he left the army and returned to Nepal. However, it is quite clear from the evidence presented to the judge and the appellant's father's subsequent action, that he very clearly would have settled in the United Kingdom had he been able to do so on his retirement.

12. The judge assessed the evidence of the sponsor and concluded that this was not a case in which the respondent's parents had established that they would have settled in the United Kingdom on retirement. However, it seems to me that the judge overlooks the fact that at the earliest opportunity they took steps to ensure that they did locate to the United Kingdom. It is clear from the sponsor's statement that it was in 2010, when he heard that he might be permitted to settle in the United Kingdom. The sponsor makes it clear that he saved as hard as he could so that it was in 2013 that he and his wife would be able to settle in the United Kingdom. I believe that one can infer from that evidence that it is quite clear that if the sponsor had been allowed to settle in the United Kingdom on his retirement, he would have done so.

13. I believe that the judge was wrong to suggest, therefore, that the historic injustice principle was of less importance in this appeal because the father chose to work in Hong Kong because his daughters wanted to live there. In fact, in reality the sponsor had little choice: he had no opportunity to come to the United Kingdom at that time and there was no work available to him in Nepal. In the circumstances, I believe that the historic injustice principle was relevant and that had the judge properly considered the matter he would as I had been led inevitably to conclude that the decision of the respondent is in all the circumstances disproportionate. I find that the decision of First-tier Tribunal Judge Widdup does contain an error on a point of law. **I set aside his decision and remake it myself**. I find that the decision of the respondent is disproportionate and I allow the respondent's appeal.

Notice of Decision

The appeal is allowed.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have

considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. The appeal is allowed.

Richard Chalkley
Upper Tribunal Judge Chalkley