Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16931/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated:**
On 23 October 2018	**On 04 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ISHA PUN
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the respondent: Mr Hoa Dieu, Solicitor with N.C. Brother & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal to allow the claimant's appeal against the Secretary of State's decision to refuse her entry clearance as the adult child of a deceased member of the Brigade of Gurkhas, pursuant to Article 8 ECHR. The claimant is a citizen of Nepal who seeks to join her widowed mother in the United Kingdom, the Gurkha father having died.

Background

2. The claimant's father was discharged from the Gurkhas on 30 July 1976. He did not then settle in the United Kingdom because of the historic injustice. The claimant's parents have 5 children, two now in the United Kingdom, one in India and one in the United Arab Emirates (Dubai).

3. The claimant was born in April 1987. She is now 31 years old. The claimant's father died on 1 January 2005. Her mother was granted a settlement visa as his widow, on 18 February 2011, but no application was then made for the claimant, who would have been 19 years old.

4. The claimant's application was not made until 25 May 2016, when she was 29 years old. Her mother had been in the United Kingdom for 5 years and the claimant had continued her education, supported by her mother, who relied on public funds in the United Kingdom to top up her late husband's army pension and her own United Kingdom pension entitlement.

5. With her mother's help, the claimant has trained and qualified as a nurse in Nepal. She has lived alone and apparently has an independent life. She had no medical conditions and was a fit and capable adult, able to look after herself and not in need of long-term personal care to perform everyday tasks.

Refusal letter

6. The Secretary of State did not state in the refusal letter whether he accepted that when the mother went to the United Kingdom there was family life between mother and daughter; he made his decision on the basis that the claimant was an adult when her mother settled in the United Kingdom and family life could continue as it 'may have done'.

7. The Secretary of State considered that while the claimant's mother could afford to support her from those limited resources, while the claimant was in Nepal, the claimant's arrival in the United Kingdom would inevitably entail additional dependence on public funds.

8. The Secretary of State considered that the interference with any private life between the mother and the claimant was proportionate and refused entry clearance. Annex K made no provision for family reunion between settled Gurkha widows and their adult children.

First-tier Tribunal decision

9. For the claimant, Mr Dieu accepted that the claimant could not bring herself within the provisions in Annex K specific to Gurkha dependents. The First-tier Judge found that there was no breach of the Immigration

Rules but then considered whether the appeal should be allowed under Article 8 ECHR outside the Rules.

10. The First-tier Judge noted the omission of provision for the adult children of the settled widows of deceased Gurkhas, although at [5] in Annex K, the policy stated that:

> "5. Spouses, civil partners, unmarried or same sex partners, children under 18 and widows of former Gurkhas are covered by existing published guidance (see background to the policy in paragraphs 6-8 below) and are therefore outside the scope of this policy."

11. The Judge noted that the provisions of Annex K, itself an addition to earlier guidance, dealt only with the relationship between the former Gurkha and his adult children:

> "38. It is unclear from the published guidance whether this is a deliberate exclusion or an inadvertent omission. It would have been helpful to me, when weighing the balance in the proportionality issue, to have been made aware of the basis of the exclusion of adult children of deceased former Gurkhas from the policy, since it would then have been possible for me to balance the public interest in immigration control which would or might have been served by the exclusion of this class, against the interests of the [claimant]."

12. The Judge went on to consider that 'on the balance of probabilities and the on the totality of the evidence the [claimant] has discharged the burden of proof' and allow the appeal.

13. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

14. Permission was granted on the basis that the First-tier Judge had failed to ask herself whether any family life which existed between mother and daughter in 2011 endured at the date of hearing, or to follow the guidance given by the Court of Appeal in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, *Butt v Secretary of State for the Home Department* [2017] EWCA Civ 184 and *Rai v Secretary of State for the Home Department* [2017] EWCA Civ 320.

Rule 24 Reply

15. The claimant filed a Rule 24 Reply, albeit out of time. Her solicitors argued therein that the Judge had considered Article 8 and the proportionality assessment properly, and that having regard to [55]-[57] in *Rai,* and in the light of the historic injustice, there was nothing which would have affected the outcome of the appeal in this case. The claimant's solicitor argued that the First-tier Tribunal's assessment of proportionality was sound and sustainable.

16. I did not admit the Rule 24 Reply but have treated it as a late skeleton argument. The solicitors are required to write to the Upper Tribunal explaining the delay.

17. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

18. For the claimant, Mr Dieu apologised for the lateness of the Rule 24 Reply. The evidence for family life was the financial and emotional support the sponsor had given, including 3 visits to Nepal in the 6 years she had been away. The substance of the Judge's Article 8(1) analysis was there and there had been no challenge to whether the evidence placed before the First-tier Tribunal was genuine.

19. The sponsor had given oral evidence. Mr Dieu could not remember whether she was cross-examined. Her witness statement showed that she had made regular telephone calls on a calling card, sent money, that the claimant was living in the former family home and had been mostly studying, except between 2011 and 2013. She had not finished most of the courses she started but had finally completed a nursing course. She was currently undertaking voluntary work in Nepal as she had difficulty finding work as a nurse. Mr Dieu was unable to explain why there was no witness statement from the claimant herself, nor from any other family members apart from the sponsor mother.

20. Mr Dieu argued that Annex K was not a complete resolution of the difficulties caused by the historic injustice, which remained an important factor in non-Annex K cases. There were no decided cases dealing with the dependants of Gurkha widows, but the same historic injustice principle should apply, and the same test as for a Gurkha parent. Mr Dieu relied on the decision in *Gurung & Ors, R (on the application of) v Secretary of State for the Home Department* [2013] EWCA Civ 8 at [27] for the correct approach to the historic injustice.

21. Mr Dieu asked that if the appeal were allowed, it should be remitted to the First-tier Tribunal for further findings on family life to be made.

22. For the Secretary of State, Mr Melvin said that the real question was whether the First-tier Judge had done enough to establish family life before moving to proportionality reasoning. On both heads, the reasoning was not very clear. The claimant's Gurkha father had died 12 years ago. There was not much evidence of payment in the bundle.

23. I reserved my decision, which I now give.

Analysis

24. The provisions of Annex K constitute an indication by the Secretary of State as to how his discretion will be exercised, and are in effect binding on him as a matter of policy. I note that when Annex K applies, the adult

child of a living Gurkha father must be under 30 years of age when making the application to join their parent here.

25. The Secretary of State's discretion to grant entry clearance beyond the provisions of Annex K is at large on general Article 8 principles. There is no finding in the decision of the First-tier Tribunal as to whether family life continued once the claimant was a qualified nurse. It is right that she lives in the former family home and receives money from the sponsor, but she does have a nursing qualification and there was no evidence from the claimant herself about how she lives, the nature of any dependency, the difficulty in obtaining employment or any of the other factors which might have supported a finding that the claimant remained *Kugathas* dependent on her mother. That is particularly striking, given the evidence in the mother's statement (unsigned) on 3 November 2017 that she had just returned from a visit to Nepal to see the claimant.

26. I have had regard to the guidance in *Gurung.* While at [27], the Court recognised the historic injustice, at [38]-[43] they found that the historic injustice was only one of the factors to be weighed against the need to maintain a firm and fair immigration policy, not necessarily determinative: 'If it were, the application of every adult child of a United Kingdom-settled Gurkha who establishes that he has a family life with his parent would be bound to succeed'.

27. At [43]-[46], the Court considered what weight should be given to the historic injustice in Article 8(2) exceptional circumstances cases, and when family life is engaged:

> "43. …The flexibility of the 'exceptional circumstances' criterion is such that it does not *require* the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice, if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the Article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in Article 8(2) itself, and it is ultimately for the Court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependent child to settle here in exceptional circumstances. …
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> 45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. Ms McGahey submits, therefore, that the caselaw, both domestic and European, can be of only limited assistance. She (rightly) accepts that, as a matter of law, in some instances an adult child (particularly if he does not have a partner or children of his own) may establishment that he has a family life with his parents. It all depends on the facts.
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> 46. We think that the cases are of some assistance to decision-makers and Tribunals who have to decide these issues. Paragraphs 50-62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at paragraph 62 that 'the different outcomes in cases with

> superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive'. ..."

28. The burden is on the claimant to demonstrate that she still has family life with the sponsor, her mother. That must be established to the usual standard of balance of probabilities, on the evidence before the First-tier Tribunal. There is no clear finding in the First-tier Tribunal decision on this important factual question and that is a material error of law.

29. The decision in this appeal will be set aside and remade in the First-tier Tribunal on a date to be fixed, with no findings of fact or credibility preserved.

DECISION

30. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Date: 30 November 2018 Signed Judith AJC Gleeson Upper

Tribunal Judge Gleeson