Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07211/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 11 March 2019 **On 20 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MISS DURGA DEVI GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum of Counsel, instructed by Everest Law Chambers
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal born on 13 October 1983. She applied for entry clearance to join her father and sponsor, Suk Bahadur Gurung, who was a former Gurkha soldier who became settled in the UK on 18 August 2016. The application for entry clearance was refused on 17 May 2017. The appellant appealed against that decision, her appeal came before First-tier Tribunal Judge Davidson for hearing on 2 August 2018 and in a decision and reasons promulgated on 22 August 2018, the appeal was dismissed. The Appellant made an in-time application for permission to appeal to the Upper Tribunal and following a hearing on 29 November

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2018, I found material errors of law in the decision of the First-tier Tribunal Judge and set that decision aside for a resumed hearing before the Upper Tribunal. A copy of that decision is appended.

Hearing

2. At the hearing before the Upper Tribunal, Mr Jesurum sought to rely on his skeleton argument dated 10 March 2019. Mr Avery on behalf of the Secretary of State agreed that there had been no challenge to the judge's finding that there is family life between the appellant and the sponsor and although the sponsor attended court and was willing and able to give evidence through a Nepalese interpreter, the parties were content to proceed on the basis of submissions only.

3. In his submissions, Mr Jesurum stated that the fundamental reason that Gurkha cases are different is causation and that a different approach to proportionality is required. He submitted that the only reason that the appellant was not born a British citizen was due to the historic injustice suffered by the father. He submitted that this is at the heart of the ratio of the historic injustice cases see Patel [2010] EWCA Civ 17. The Court of Appeal in Gurung [2013] 1 WLR 2546 found they were bound by that decision, projecting the view taken by the Upper Tribunal in Ghising [2012] UKUT 160 (IAC) that a distinction ought to be drawn between British Overseas Citizens and the Gurkhas. At [41] of *Gurung* the court emphasised that Article 8 rights in these circumstances should be vindicated notwithstanding immigration policy, which Mr Jesurum submitted is unusually strong language from the Master of the Rolls.

4. He submitted that it was clear the Court considered that they were dealing with people who should already have been in the UK. Mr Jesurum submitted that a decision founded upon an injustice means that removal is not necessary in a democratic society and therefore it is also unnecessary to go on to look at proportionality. He submitted it would appear from the approach taken in *Patel (op cit)* albeit not expanded upon, is that the issue is whether it is powerfully relevant to necessity. Whether one sees it as necessity or an absence of weight on the respondent's side or increased weight on the appellant's side, Mr Jesurum submitted the outcome is the same.

5. In respect of family life, he submitted one cannot assess what otherwise the family life would have been had it not been for the injustice. He further submitted that the respondent's insistence that the issue had arisen because of the sponsor's choice was an incorrect approach, given that the sponsor has not attained settlement e.g. through a PBS route and secondly that he had to wait for 44 years to come to the UK and was then only given a month to decide whether or not he wished to avail himself of British citizenship. Mr Jesurum submitted that a restitutionary approach would clearly be a correct course of action and that the appeal should be allowed.

6. In his submissions Mr Avery essentially sought to rely on the position set out by the Entry Clearance Officer and the statutory obligations set out in Section 117B of the NIAA 2002.

7. In reply Mr Jesurum sought to rely on page 27 of his grounds of appeal, where it was clear from the sponsor's evidence that he would have come to the UK earlier if he had been able to do so and this was also clear from [10] of his statement in the respondent's bundle. I reserve my decision, which I now give with my reasons.

Findings and reasons

8. As Mr Jesurum correctly identified at [2] of his skeleton argument, in light of the findings of fact by the First tier Tribunal Judge that there was family life between the Sponsor and the Appellant and the refusal was an interference with her right to a private and family life and that these findings were unchallenged by the Respondent, the issues that require determination are:

   (i) whether there is support between the Appellant and her father and sibling which is real, effective or committed: Rai [2017] EWCA Civ 320 at [36];

   (ii) whether the Respondent relies on anything more than the ordinary interests of immigration control e.g. a bad immigration history or criminality?

   (iii) if not, the injustice will normally require a decision in the Appellant's favour.

9. Mr Jesurum submits and I accept, that the historic injustice Gurkha cases represent an exception to the normal approach to immigration control. This was the position of then Master of the Rolls, Lord Dyson in *Ghising (op cit)* at [41]:

> *"The crucial point is that there was an historic injustice in both cases, the consequence of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant 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."*

10. The Sponsor's evidence is that the Appellant remains wholly dependent on him financially and that she continues to reside in the family home in Rupandehi. Her mother died in 2015 and her remaining four siblings are all married and live with their own families. The Appellant's younger sister resides with the Sponsor in the UK. This evidence has not been challenged by the Respondent. There is evidence in the addendum bundle of ongoing contact between the Sponsor and the Appellant in the form of telephone

calls and messages and of extended visits by the Sponsor to Nepal. I am mindful of the guidance set out by Lord Justice Lindblom in *Rai* at [42] that the crucial issue is whether family life between the parties subsisted at the time the Sponsor left Nepal and was still subsisting at the time of the Upper Tribunal's decision. In light of the evidence in the addendum bundle of screenshots of ongoing contact in the form of telephone calls and messages, I find not only that family life was subsisting at the time the Sponsor left Nepal but that it continues to date and that there is real, effective and committed support at the heart of the relationship between the Sponsor and the Appellant.

11. Notably, in the covering letter to the entry clearance application the Sponsor stated at [7]: *"I would have moved to the UK soon after my discharge had I been allowed to do so. It would have made a profound impact in my life by providing me with so much more opportunities to make better lives for myself and my family. During my years in service, such an opportunity was something that we (my colleagues and I) all wished for but could not have."* Again, this evidence was not challenged by Mr Avery. I find, therefore, that historic injustice is relevant in this case in that the Sponsor would have moved to the UK at an earlier stage had he been permitted to and that he would have brought the Appellant with him if he had been able to do so.

12. The Respondent did not seek to rely on anything in addition to the ordinary interests of immigration control. I find that, in light of the role of historic injustice, as relied upon by Mr Jesurum [4. above refers], that the continued exclusion of the Appellant is not necessary in a democratic society. I have, in any event, proceeded to consider whether the decision of the Entry Clearance Officer is proportionate and I have concluded in light of the historic injustice jurisprudence, that it is not. In light of the judgment of Lord Justice Lindblom in *Rai* (op cit) at [55]-[57] the public interest considerations set out in sections 117A-D of the NIAA 2002 do not assist the Respondent, in light of my finding that Article 8 is engaged.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Rebecca Chapman Date 18 March 2019

Deputy Upper Tribunal Judge Chapman

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 (adjusted where full award not justified) for the following reason.

Signed Rebecca Chapman Date 18 March 2019

Deputy Upper Tribunal Judge Chapman

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07211/2017

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Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MISS DURGA DEVI GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors (19-20 Chambers)
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born on 13 October 1983. She applied for entry clearance to join her father and Sponsor, Suk Bahadur Gurung, in the United Kingdom. Mr Gurung is a former Gurkha soldier who settled in the United Kingdom on 18 August 2016. The Respondent refused the application for entry clearance on 17 May 2017 on the basis that the Appellant did not meet the requirements of either the Immigration Rules or the policy in respect of the 2009 discretionary arrangement for the dependants of former Gurkha soldiers.

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2. The Appellant appealed against this decision and her appeal came before First-tier Tribunal Judge Davidson for hearing on 2 August 2018. In a Decision and Reasons promulgated on 22 August 2018, the judge dismissed the appeal, finding that the issue of historic injustice was not relevant to this Appellant and finding that although the decision to refuse entry clearance was an interference with her right to private and family life, the refusal was proportionate, taking into account the Respondent's legitimate aim in exercising and managing immigration controls.

3. An application for permission to appeal, in time, was made to the Upper Tribunal on the basis that the judge had erred in that there had been procedural unfairness in relation to the issue of historic injustice. It was submitted that the judge heard no evidence or submissions regarding whether the Sponsor would have settled earlier in the UK because the point was never in issue in that it was not raised in the refusal decision or the Entry Clearance Manager's review, the Sponsor was not cross-examined on the point nor did the Respondent make any submissions on the point and there is no record of the First-tier Tribunal Judge having raised the issue at the hearing. It was submitted that the issues in dispute had been identified by the parties, in particular in the decision of the Entry Clearance Officer, and it was arguably procedurally unfair for a judge to take an issue of his or her own motion without giving the parties the opportunity of addressing it and if necessary obtaining evidence. This all relates to the finding at [18} that: *"I have heard no evidence or any submission that that Sponsor would have come to the United Kingdom at an earlier date"*, which was the basis of the judge's conclusion at [19] that the issue of historic injustice is not relevant to the appeal.

4. It was further submitted that the point in any event had been unfairly dealt with for the following reasons:

There was in fact evidence on the point: the Sponsor made very clear in his letter to the Respondent (dated 6 March 2017, included at page 41 of the Respondent's bundle *"I would have moved to the United Kingdom at the time of my discharge had I been allowed to do so"* and this evidence was not disputed by the Respondent.

Secondly, the approach is arguably illogical in that the Respondent has impliedly accepted that the Sponsor would have applied for settlement on discharge by granting him settlement in recognition of the injustice done to him and his family, and

that the judge fails to ask the right question, which is not *"would"* the Sponsor have done in terms of settling earlier but *"might"* he have settled earlier: see Patel v ECO (Mumbai) [2010] EWCA Civ 17 at [13] to [15] per Sedley LJ.

5. Permission to appeal was granted by First-tier Tribunal Judge Ford in a decision dated 2 October 2018, on the basis that it was arguable that there was a lack of procedural fairness in the manner in which the Tribunal dealt with the Appellant's appeal.

Hearing

6. At the hearing before the Upper Tribunal, Mr Jesurum on behalf of the Appellant sought to rely on the grounds of appeal. He submitted that the judge at [18] appears to just make a passing reference to historic injustice. He submitted that the policy in its current form was not promulgated until 2015 and thus the Appellant was unable to apply for settlement as her father's dependant during her minority as she was 22 by that time. He drew my attention to the letter from the Sponsor, which formed part of the application for entry clearance dated 6 March 2017, in which he expressly stated that he would have come to the UK at an earlier date if he had been able to.

7. In her submissions, Ms Pal for the Respondent submitted that the Appellant had been represented, albeit by different Counsel, at the appeal hearing. She submitted that the judge heard no submissions as to whether or not the Sponsor would have settled earlier and the point was raised in the refusal decision at pages 2 to 3. She submitted that it was then a live issue and the parties should have engaged with it and, as a consequence, there was no procedural unfairness. This was the basis of the judge recording at [18] that she had heard no evidence or submission that the Sponsor would have come to the UK at an earlier date. She submitted that the judge ought to have been referred to the letter from the Sponsor in the course of the hearing, rather than hope that the judge might read it and then raise it as a point later on. She submitted that whilst at [23] the judge found that the decision represented an interference with the Appellant's private and family life, this was proportionate and that there was no material error of law in the decision of the First-tier Tribunal.

8. In reply, Mr Jesurum submitted that, contrary to Ms Pal's submission, the refusal decision of 17 May 2017 does not address the issue of whether the Sponsor would have settled in the UK upon being discharged. All the Respondent says about this, having referred to the judgment in *Gurung* [2013] EWCA Civ 8 and *Ghising* [2013] UKUT 00567 (IAC), is that he was satisfied that the reasons for refusal outweigh the consideration of historical injustice and that the effect of historical injustice has not been such *"that you have been prevented in leading a normal life"* and therefore does not outweigh the proportionality assessment.

9. Mr Jesurum submitted rather than, as the Respondent suggested, it being for the Appellant to draw attention to the evidence, the judge was not entitled to ignore evidence that was before her. He submitted that how would the representative know that this point was troubling the judge since it has not been raised in order to give her the opportunity to comment or draw attention to the evidence on the point. In particular, the judge at [12] noted the judgments in *Gurung* and *Ghising* and their findings, providing as follows: *"If the Gurkha would have settled in the United Kingdom earlier if he had been allowed to, and at that time the Appellant would have been under 18, that is a strong reason for holding that it is proportionate to permit the adult child to join the family now."*

That being the case, it was incumbent upon the judge, if she was troubled that she had not heard evidence or submissions on this point, to raise it in order to give both parties the opportunity to make submissions.

10. Mr Jesurum submitted that the judge accepted at [23] that the decision represented an interference with the Appellant's right to a private and family life and the only point which prevented the operation of the judgment in *Ghising* was the finding that there was no causation, i.e. an absence of evidence as to whether the Sponsor would have come to the UK at an earlier date. He submitted that, given the Sponsor had put forward undisputed evidence, which had not been challenged by the Respondent, this point was met.

11. Mr Jesurum further sought to rely on the Sponsor's certificate of service following his service for twelve years until his discharge in 1972 and the fact that he had been described therein as an honest man.

My Findings

12. I find material errors of law in the decision of Judge Davidson. I find in light of the fact that at [12] the judge was aware of the importance of determining whether or not the Gurkha Sponsor would have settled in the UK earlier if he had been allowed to that it was incumbent upon her to determine this issue on the basis of the evidence before her. At [18] the judge held: *"I have heard no evidence or any submission that the Sponsor would have come to the UK at an earlier date"*.

13. The difficulty with this, in my finding, is twofold. Firstly, there was evidence before her in a letter from the Sponsor dated 6 March 2017, in which he clearly stated that he would have come to the UK earlier if he had been able to. That being the case, then his daughter would clearly have been a minor dependant and would have been able to accompany him, along with the rest of the family. Secondly, whilst I accept it clearly would have assisted the judge had the Appellant's representatives drawn her attention to the letter from the Sponsor, it is the case that the Respondent did not cross-examine the Sponsor on this point nor make any submissions as to why his evidence in this respect should not be accepted.

Notice of decision

14. In light of the fact that this is a key issue in the appeal, I set the decision aside and adjourn the appeal for a hearing *de novo* before the Upper Tribunal. I make the following directions:

DIRECTIONS

1. The appeal shall be listed for 1 and a half hours on the first available date.

2. A Nepali interpreter shall be required.

3. If the parties wish to rely on any further evidence this should be served on all parties 5 working days prior to the resumed hearing date.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman 13 December 2018