Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19459/2016**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Wednesday 25th November 2020	**On Wednesday 09th December 2020**

Before

UPPER TRIBUNAL JUDGE L SMITH
DEPUTY UPPER TRIBUNAL JUDGE R THOMAS

THIR BAHADUR THAPA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Jaja, Counsel instructed by Howe & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, who is 53 years of age, is Nepalese. He is married and has two children aged 14 and 24. His wife and children remain in Nepal. The Appellant's mother, Phistimaya Thapa, is 89 years of age. Her late husband - the Appellant's father - served in the Gurkha Brigade from 1948 to 1964 and he died in Nepal in 2002. She obtained entry clearance for settlement as a Gurkha widow on 10th July 2014 and arrived in the United Kingdom in September of that year.

2. The Appellant obtained entry clearance as a family visitor and entered the United Kingdom on 23rd October 2015 with leave until 29 March 2016. He applied for leave to remain on 7th March 2016 on the grounds that to remove him would involve a disproportionate interference in the family life he enjoys in this country with his elderly mother. The Appellant relies in particular on the weight to be given to the 'historic injustice' suffered by former soldiers of the Gurkha Brigade who had been treated less favourably than other comparable non-British Commonwealth soldiers serving in the British army by not being permitted to settle in the United Kingdom on completion of their service.

3. The Respondent refused his application in a decision of 28th July 2016 on the grounds that he did not have a family life in the UK and therefore Article 8(1) was not engaged. On 13th September 2019, Immigration Judge Kimnell allowed the Appellant's appeal. That decision was set aside on 10th March 2020 by the Upper Tribunal (Upper Tribunal Judges Craig and Smith) on the grounds that it involved an error of law and directions were made for a resumed hearing. That decision is appended below. The resumed hearing took place on a face to face basis on 25th November 2020.

The Hearing

4. In support of his case, the Appellant relied upon the *Amended Consolidated Bundle of Appellant's Evidence in Support*. That contained his witness statement, two witness statements from his mother, letters from his wife and on behalf of two community organisations with whom the Appellant has been volunteering, his mother's medical records, banks statements, and information confirming his father's service. He also relied on a *Supplementary Bundle* that was prepared for this hearing, containing an updated statement from his mother, an additional letter from her GP, and further financial information. We have considered carefully all that material.

5. The Appellant gave oral evidence. He adopted his witness statement and was asked additional questions about the recently served statements from Standard Chartered Bank in Nepal. In cross-examination, he was asked: about the domestic and financial arrangements when he lived in Nepal with his mother and wife and children: about the extent of the emotional support he provides in the UK to his mother: and about the extent to which he assists with her obtaining medical treatment and with her day to day care. He was asked also about what other support was available to his mother, who would care for her if he got a job, and about why it was that there was a change to the original plan that she would return with him. We address his evidence and our findings below.

6. His mother, Phistimaya Thapa, also gave oral evidence. She adopted her statements. She is illiterate and very hard of hearing but was able to confirm through an interpreter that someone had read the statements to her and she had signed them. Ms Cunha sensibly confined her cross-examination to one area, namely the assistance she had been provided by a family friend whilst in the UK alone. Again, we address our findings on her evidence below.

7. The parties made submissions and we reserved our judgment.

Our Approach

8. In Jitendra Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320, the Court accepted the Secretary of State's submissions that there were three stages of analysis in a case of this kind: first, the application of the Immigration Rules; second, the consideration of the Appellant's case under Article 8; and third, the question of whether there were exceptional circumstances under the policy.

9. The discretionary policy in Rai - and all the other relevant authorities to which we have been referred - was that under Immigration Directorates' Instructions ('IDI'), Ch 15, section 2A paragraph 13.2 and 'Annex A (of March 2010)' which provided:

> '**Dependents**
> …
> Children over the age of 18 and other dependent relatives will not normally qualify for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the UK under the relevant provision of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act [*sic*]. Exceptional circumstances may be considered on a case by case basis. For more information on exceptional circumstances in which discretion may be exercised see Section 13.2.'

10. That policy has been superseded and we have to consider firstly whether the introduction of the policy now found in 'Annex K – Adult Dependent Children of Former Gurkhas' that applies to all applications after 5th January 2015 necessitates a different *approach*. Whether it has a *substantive* impact on our decision is a separate question addressed as part of the proportionality assessment (at paragraphs 38-39 below).

11. Annex K provides for adult children of former Gurkhas who completed their service in the Brigade of Gurkhas of the British Army between 1948 and 1997 to be granted settlement in certain circumstances. The policy is available only to applicants outside the United Kingdom and applies only to those under the age of 31. It is common ground the Appellant would not qualify given his age and of course this is an application for leave to remain, not enter. The concluding paragraphs of Annex K are therefore pertinent:

> **"Refusal Cases**
> 26. Where an application falls for refusal under this policy, the decision maker must consider whether Article 8 otherwise requires them to be granted leave on the basis of exceptional circumstances in accordance with the guidance contained in Appendix FM 1.0b: Family Life (as a Partner or Parent) and Private Life: 10- year Routes.

27. As part of any proportionality aspect of this consideration, decision makers must take account of the following relevant case law:

The Court of Appeal confirmed in *Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] ECWA Civ 8 (21 January 2013)* that the 'normal position is that they (adult dependent relatives) are expected to apply for leave to enter or remain under the relevant provisions of the Rules or under the provisions of Article 8 of the European Convention on Human Rights'. The Court also found that the historical injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 consideration of the case but was not determinative. 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'.

The Upper Tier Tribunal found in *Ghising and others [2013] UKUT 00567 (IAC)* that where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the Appellant's favour, where the matters relied upon by the Secretary of State/entry clearance officer (ECO) consist solely of the public interest in maintaining a firm immigration policy.

If the Secretary of State/ECO can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Secretary of State/ECO's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

12. On the face of Annex K, the three stages of analysis identified in Rai are now reduced to two stages, namely, a consideration firstly under the Immigration Rules and, secondly, under Article 8. But if there is any distinction it is immaterial to this case: There is no suggestion the Appellant falls within the Immigration Rules, and the approach to Article 8 in Gurung and Ghising and others (Gurkhas/BOCs: historic wrong, weight) is expressly preserved by Annex K. The Appellant's case is squarely advanced on Article 8 grounds (as opposed to any residual exceptionality) and neither advocate contends for anything other than a conventional approach to Article 8. The requirement to take the 'historic injustice' into account has always been part of the proportionality assessment under Article 8 and was not required as part of any 'exceptionality' consideration (see Gurung at paragraph 43).

13. The approach we adopt therefore is to consider whether Article 8(1) is engaged by the family life the Appellant asserts he enjoys with his elderly mother in the UK and, if it is, to consider whether, pursuant to Article 8(2) the interference which would result from the Appellant being refused leave to remain is proportionate to the legitimate end sought to be achieved. It is as part of that striking of the fair balance between the Article 8(1) right and the public interest in maintaining a firm immigration policy that we must take any historic injustice into account.

Is Article 8 engaged?

The competing positions

14. The Appellant gave evidence that he has always had a family life with his mother: They lived together in Nepal as a family unit together with his own wife and children. They were mutually dependent on each other: He and his wife would provide emotional support to his mother and help her with her various ailments. He did work as a tutor but he and his wife's income was very limited and the family relied heavily on his mother's pension to pay for their accommodation and household expenses. The recently served statements from Standard Chartered Bank in Nepal show his mother's army widow's pension being paid into the account and withdrawals in cash. The early withdrawals in 2015 were by him, and the withdrawals subsequently have been by his wife who now relies on that money. In response to questions asked in cross-examination, he said that that is as far back as he was able to obtain electronically, and he would have to be physically present in Nepal to make an application for more historic statements. Asked to explain why his wife's letter did not mention the cash withdrawals or her reliance on the pension income, his evidence was that the purpose of the letter was to confirm she was his wife and that she understood his obligation to look after his mother.

15. He and his mother both gave evidence about their regular telephone contact when they were living in separate countries. Since he came to the United Kingdom, he has lived with his now particularly frail and elderly mother, cooked for her on a daily basis, taken her to regular medical appointments and acted as her translator. Despite giving evidence through an interpreter, the Appellant provided some answers in English demonstrating a good working knowledge of the language and the medical records confirm both that he acts as a translator and that communication had been difficult prior to his arrival. He obtains and ensures she is able to take her medication. He is financially dependent on his mother as he is not permitted to work in the United Kingdom. If granted leave to remain he would seek work, but in a part time and flexible way to ensure he could continue to care for his mother.

16. It is said on his behalf by Ms Jaja that we should not forget that in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 the court was considering the extent to which family life extended beyond cohabiting dependents where it was the norm to find there was family life. This submission was no doubt founded on Sedley LJ citing with approval at paragraph 14 the Commission's observation in in S v United Kingdom (1984) 40 DR 196 to the effect that generally, the protection of family life under Article 8 involves cohabiting dependents but that it may extend more widely if there were further elements of dependence. Ms Jaja submits the Appellant's co-habitation with his mother both in Nepal and the UK was and is strong evidence of family life and that would be the obvious conclusion that Article 8(1) was engaged. In any event, there was dependency in the sense of real, committed, or effective support: he was financially dependent on his mother,

and she was dependent on him for emotional and practical support and that was the case both in Nepal and now in the UK. Care, it is said, should be taken not to interpret Kugathas too restrictively.

17. The Respondent did not accept, in its decision letter, that Article 8(1) was engaged '*with regard to your relationship with your mother in the UK*'. However, at the resumed hearing, and having seen the further evidence submitted for this hearing and heard the oral evidence, Ms Cunha conceded on behalf of the Respondent that the required standard of dependency is met and the Appellant does now enjoy a family life with his mother in the UK. Article 8(1) is therefore engaged, and we must go on to consider whether any interference would be proportionate. She submitted however that whilst the Appellant may have been cohabiting with his mother in Nepal prior to her coming to the UK in September 2014, there was insufficient evidence of the requisite dependency and, furthermore, there was no such dependency in the period his mother was in the UK alone between that date in 2014 and the Appellant's arrival on 23rd October 2015. This would be of relevance, she submitted, when it came to the balancing exercise, despite her concession on Article 8(1).

The legal principles

18. Given the procedural history to this case, and given the approach to the 'dependency' that engages Article 8(1) also has some relevance to the discussion on the approach to 'historic injustice' as part of the proportionality exercise under Article 8(2), it is necessary, despite Ms Cunha's concession, to address our approach and findings on this aspect of the case.

19. The legal principles relevant to the issue of whether Article 8(1) is engaged are, as noted by Lord Justice Lindblom when considering the issue in Rai, now '*not controversial*'. In Gurung, the Court expressly endorsed (at paragraph 46), as '*useful*' and as indicating '*the correct approach to be adopted*', the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy) [2012] UKUT 00377. In Rai (at paragraphs 16-20) the Court again reviewed the authorities. It is unnecessary to review them in full here and it suffices to say that they include the following key principles:

    (i) Dependency should be read as 'real' or 'committed' or 'effective' support (Kugathas at paragraph 17).

    (ii) Family life is not established between an adult child and his surviving parent unless something more exists than normal emotional ties of love and affection (Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 at paragraph 24).

    (iii) Such ties might exist if the appellant is dependent on his parent or family or *vice versa* (per Arden LJ at paragraph 24 of Kugathas).

(iv) Care must be taken not to interpret the judgments in Kugathas too restrictively. There is no requirement for evidence of exceptional dependency (Ghising (family life – adults – Gurkha policy) at paragraph 56).

(v) The question of whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of a particular case. The issue is highly fact sensitive and can result in different outcomes in cases which have superficially similar features (Gurung, at paragraphs 45-6).

20. In Ganesh Pun (Nepal) & anr v The Secretary of State for the Home Department [2017] EWCA Civ 2106, the Court of Appeal considered whether, in a case involving 'historic injustice' there was any helpful distinction between 'private' and 'family' life, concluding (at paragraph 20):

> "The critical feature for the right to rely on the historic injustice is dependency. Whether one categorises any particular candidate for dependency as having a family life or a private life may well be 'arid and academic' but the question of dependency is vital."

Findings

21. Ms Cunha was right to concede that the Appellant does currently enjoy a family life with his mother. We accept the Appellant's evidence as to the extent of the care he provides to his mother. She presented as particularly frail. She will be 90 in January, is illiterate and has significant health difficulties. The Appellant's gave clear evidence as to his role in ensuring she obtains the treatment she requires and his role in ensuring she obtains and takes the correct medication. They live together and he cooks meals for her on a daily basis. We accept his - and her - evidence as to the emotional support which he provides and that this, along with the practical support already mentioned, has meant her physical and mental health has improved considerably. There is independent corroborative evidence of the support he provides from members of the community and the GP, and within the medical records.

22. The Appellant is his mother's only carer. Her evidence was that she had received some support from a friend called 'Bhim' in the period when she was in the UK alone. The Appellant explained this was a 'fellow villager' they had known for a number of years and that he had 'helped her get stuff done'. She still spoke to 'Bhim' and he would help her. There was no evidence that he had provided, nor was able to provide, the intensity of care that she evidently needs. This was clear from her evidence as to how, on his arrival, the Appellant's care and support resulted in marked improvements to her health. The Appellant provides real, committed, and effective support and his mother is dependent on the Appellant.

23. The Appellant is also financially dependent on his mother. In the UK, he is unable to work given the current restrictions on his ability to work and they survive on the pension benefits she receives. Nationwide bank statements providing evidence of income and expenditure were provided. The Appellant gave a well-considered and

sensible answer about obtaining part time work with flexible shift patterns when pressed in cross-examination about whether his mother would remain dependent on him if he was able to work in the future.

24. Article 8(1) is therefore engaged. Ms Cunha's submissions on the question of whether there was also family life in Nepal were directed to the proportionality exercise and so we shall address this evidence at that stage.

Article 8(2): Is the interference proportionate?

25. Once Article 8(1) is engaged, Lord Bingham in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 at paragraph 17 identified the five now familiar questions that must then be asked:

> "(1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

26. If the Appellant was required to return to Nepal it would amount to an interference in the Article 8(1) right that has been engaged. It would not be reasonable to expect his mother, who is exercising rights to settle in the UK much delayed as result of the historic injustice, to leave the UK, particularly in light of her evident fragility and the extent of the treatment she is receiving. It is common ground that it is the fifth of those questions on which we must focus. In doing so, we are required by Guring and Ghising and others (Gurkhas/BOCs: historic wrong, weight) to take into account the historic injustice as part of the balancing exercise. We are also required to consider the public interest considerations applicable in all cases (section 117B, Nationality, Immigration and Asylum Act 2002).

The weight to be given to the historic injustice

27. The extent to which the historic injustice suffered by those who served with the Gurkha Brigade and their families informs the proportionality exercise is clear from Gurung, Ghising and others (Gurkhas/BOCs: historic wrong, weight), Jitendra Rai and Ganesh Pun (Nepal): It is not a 'trump card' and it does not reverse the burden of proof as distinct from 'normal' Article 8 appeals. There is still a requirement to take into account the relevant factors, to weigh up the competing considerations on each side, and to make a careful and informed evaluation of the facts of a particular

case. This is the familiar approach contended for by Lord Bingham in Huang [2007] UKHL 11 and EB (Kosovo) v Home Secretary [2009] 1 AC 1159.

28. That said, the Tribunal in Ghising and others (Gurkhas/BOCs: historic wrong, weight) accepted the Appellant's submission that '*where Article 8 is held to be engaged, and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in the Appellant's favour*'. The explanation for this was to be found in the weight to be afforded to the historic wrong in the proportionality balancing assessment: '*In other words, the historic injustice will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described*' [paragraph 59]. The Tribunal concluded:

> "60. Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the 'public interest in maintaining of a firm immigration policy', which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour *may* still be sufficient to outweigh the powerful factors bearing on the Appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a 'trump card', in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of *Gurung* , then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour."

Is this a 'historic injustice' case?

29. It is convenient to consider therefore, before embarking on the balancing exercise, whether the Appellant can rely, as he seeks to do, on a compensatory approach to the historic injustice.

30. The Appellant's mother explains in her evidence the family sacrifices resulting from her husband's exemplary service in the Gurkha Brigade; he was permitted only three years of accompanied service which meant they were separated for many years. She was proud of his service and her husband much admired the United Kingdom. In evidence she explains the family's position thus:

> 'I have taken up the right to come to the UK because my husband, the father of my son, never had the right to come here. If he had, we would all be here already living together and living our lives.'

31. In the absence of countervailing evidence, a statement that, had the opportunity been available, the former Gurkha would have settled in the UK will normally be accepted (see Annex K, paragraph 17). A delay between the announcement of the

discretionary policy and the making of an application might amount to such countervailing evidence. The Appellant gave evidence that the delay between 2009 (when the policy was announced) and 2014 (when his mother arrived) was because, initially, his mother was not aware of the discretionary policy. She first heard about it by word of mouth and was immediately keen to apply, but it was difficult to obtain legal advice in Nepal about if, and how, she could make an application. We accept the evidence of the intention to settle and the reasons for the delay. The 'but for' test is therefore met.

32. There is, however, a feature of this case that distinguishes it from Ghising and others (Gurkhas/BOCs: historic wrong, weight) and the other authorities relating to former Gurkha soldiers referred to above. They involved dependent children whereas the family life on which the Appellant relies involves a mutual dependency: the Appellant's mother is dependent on him in terms of care and emotional support, and the Appellant is dependent on her for financial support. It has not been suggested to us by either advocate that this has any impact on the approach to the historic injustice, but we have given the issue careful thought, nonetheless.

33. Ms Jaja submits the historic injustice is the same in both types of cases; 'but for' that injustice the Appellant's father would have come to the UK on discharge, the Appellant would have been born in the UK, and he would now have been in a position to enjoy a family life with his mother (whether that amounted to him being dependent on her, or she on him).

34. The correcting of the historic injustice in Guring, Ghising and Rai took place sufficiently expeditiously to allow the appellants to settle as dependent adult children. But how dependency manifests itself plainly can change over the long course of a family life. Depending on the date of discharge from the Gurkha Brigade, a family life now, *if it exists*, can be at different stages. As we emphasise, however, a compensatory approach to the historic wrong depends on Article 8 having '*purchase*' (per Sedley LJ at paragraph 14 of Patel v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17). In many cases, as Sedley LJ recognised, the passage of time will mean it does not: if family life is 'only' the normal emotional ties of love and affection it will not be possible to compensate for the historic injustice. But where Article 8(1) rights do exist, an Appellant has a strong claim to have those rights vindicated (Gurung, at paragraph 41). If the touchstone for the right to rely on the historic injustice is dependency (Pun, paragraph 20), where dependency can go both ways between generations (Arden LJ in Kugathas), and where that dependency has been established, then we cannot see any basis on which to divert from the approach in Gurung and Ghising and others (Gurkhas/BOCs: historic wrong, weight). Indeed, we did not understand Ms Cunha to argue to the contrary.

The balancing exercise on the particular facts of this case

35. On behalf of the Appellant, Ms Jaja's submission is grounded firmly on the reasoning of the Tribunal in Ghising and others (Gurkhas/BOCs: historic wrong,

weight) at paragraph 60. She submits the Respondent has not pointed to any factors over and above the public interest in maintaining a firm immigration policy. There is no evidence of the bad immigration history or criminal behaviour that would be required to outweigh the powerful factors bearing on the Appellant's side, namely the historic injustice. In those circumstances, the weight to be given to the historic injustice will normally require a decision in the Appellant's favour and requires one in this case.

36. We are grateful to Ms Cunha for her careful submissions on what she characterised as a 'finely balanced' case. She did not suggest the Respondent was relying on additional features over and above the importance of maintaining a firm immigration policy but stressed the importance of that policy. She also submitted, correctly, that the balancing exercise still needs to be undertaken even in cases of historic injustice. The features she submitted meant the historic injustice should not, on the particular facts of this case, require a decision in the Appellant's favour were two-fold:

37. Firstly, Ms Cunha submitted that Annex K had operated to address further the historic injustice and that whilst cases falling outside the policy could be considered under Article 8, a more restrictive approach than adopted in Ghising and others (Gurkhas/BOCs: historic wrong, weight) would now be appropriate. We understood that, in effect, this meant less weight should be afforded to the historic injustice.

38. The difficulty with this submission is that Annex K expressly preserves, for those not falling within the policy, the approach to the proportionality exercise in Gurung and Ghising and others (Gurkhas/BOCs: historic wrong, weight), and goes as far as to repeat, in particular, the conclusions in paragraph 60 of the latter judgment to which we have made reference. In those circumstances, we take the view that Annex K does not require us, or even permit us, to take a different approach.

39. Secondly, the Appellant's family life, on her submission, was established only in the UK and at a time when the Appellant had leave to remain only for a limited period. We find the Appellant has been in the United Kingdom lawfully. He applied for Entry Clearance as a visitor and we accept the evidence of both the Appellant and his mother that the intention at the time was for them to return together to Nepal. We also accept the Appellant's explanation that it was evident to him upon arrival that his mother's poor health necessitated treatment and that she was not in a position to travel. Because of the support she received from him (as outlined above) her health improved. She then decided she wanted and needed to stay in the United Kingdom because of the treatment she was receiving as well as financial benefits and because of other factors including a lack of air pollution. His mother was frank in her evidence that, in addition, her son's then presence in the UK was also a reason why she changed her mind.

40. At one stage during the hearing, there appeared to be a tentative suggestion from Ms Cunha that the Appellant had not in fact intended to return when applying for Entry Clearance. Mindful of the comments made by the Tribunal at paragraph 61 of

Ghising, Ms Cunha was asked to clarify whether she was suggesting the Appellant had misled the Entry Clearance Officer. She confirmed that she was not. Her submission was instead that the family life he enjoys in the UK was established at a time when the Appellant's immigration status was precarious (albeit lawful) and should thus be given little weight.

41. There was something of a paucity of evidence as to the exact nature of the family life in Nepal. That was no doubt because the focus of the Appellant's case was on whether Article 8(1) was engaged now. Having considered the matter carefully, we take the view it is unnecessary to reach any factual findings as to the position in Nepal now more than five years ago. We note that the appellant in Ghising and others (Gurkhas/BOCs: historic wrong, weight) had come to the UK for a temporary purpose before making an application for leave to remain. Even on the assumption that Ms Cunha is correct that family life commenced only in the UK and whilst he had limited leave, this is not something that should be accorded sufficient weight such that the significant weight we are required to give to the historic injustice is displaced to the extent a different conclusion than the one 'normally require[d]' is appropriate.

42. Of the other considerations we are required by section 117B of the Nationality, Immigration and Asylum Act 2002 to take into account, we have recorded above the Appellant's ability to speak English and accept his evidence of being willing and able to obtain work. Whilst he is dependent currently on the benefits which his mother receives, that is not a factor which weighs against him as she would be entitled to those benefits irrespective of his presence.

43. Having accepted this is a case in which we must take account of the historic injustice, and having conducted the balancing exercise, we have taken the same approach as the Tribunal in paragraph 60 of Ghising and others (Gurkhas/BOCs: historic wrong, weight) and concluded that in this case the historic injustice suffered by the Appellant and his mother outweighs the interests of maintaining firm immigration control and therefore the interference in the Article 8(1) right is disproportionate. It follows the Respondent's decision is unlawful as contrary to Section 6 of the Human Rights Act 1998.

Decision

The appeal is allowed on human rights grounds (Article 8 ECHR).

Signed *Richard Thomas*

Deputy Upper Tribunal Judge R Thomas Dated: 30th November 2020

APPENDIX

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19459/2016**

THE IMMIGRATION ACTS

Heard at Field House, London
On Tuesday 18 February 2020

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE CRAIG
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THIR BAHADUR THAPA

Respondent

Representation:
For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: Ms A Jaja, Counsel instructed by Howe & Co Solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Kimnell promulgated on 13 September 2019 ("the Decision") allowing the Appellant's appeal on human rights grounds (Article 8 ECHR). The Appellant is a national of Nepal. His

human rights claim is based on his relationship with his mother who is settled in the UK as the widow of a Gurkha soldier. The Appellant's father died in 2002. He served in the Gurkha forces from 1948 to 1964. The Appellant's mother came to the UK in 2014.

2. The Appellant is aged fifty-two years. He has a wife and children still living in Nepal. He entered the UK as a family visitor on 23 October 2015 with leave until 29 March 2016. He applied to remain on family and private life grounds on 7 March 2016. The Respondent refused that application on 28 July 2016. It is common ground that the Appellant does not qualify on the basis of his status as the child of a former Gurkha soldier under the Immigration Directorate Instructions at Annex K ("the Annex K policy") as that policy only applies to applications for entry clearance and only to those aged between eighteen and thirty years. Nonetheless, it is said on the Appellant's behalf that he qualifies for leave to remain based on the historic wrong done to Gurkha veterans and their families.

3. The appeal was initially determined by the First-tier Tribunal on 18 April 2018, but that decision was set aside by the Upper Tribunal and the appeal remitted for re-hearing.

4. Judge Kimnell accepted that family life existed between the Appellant and his mother on the basis of his mother's dependency on the Appellant due to her age and state of health ([19] of the Decision). Having so found, the Judge determined that no other issues arose in relation to proportionality ([25]). That was notwithstanding the acceptance by the Judge at [19] of the Decision that "the appellant and his mother may not have been entirely straightforward with the Entry Clearance Officer when the visit visa was applied for".

5. The Respondent challenges the Decision on two grounds. First, it is said that the Judge has failed to provide any or adequate reasons for the finding that family life is established in this case. Second, it is said that the Judge has failed to consider the proportionality of the decision refusing leave to remain.

6. Permission to appeal was granted by Resident Judge J F W Phillips on 24 December 2019 in the following terms so far as relevant:

> "..3. So far as the first ground is concerned in finding that family life exists between the Appellant and his mother the Judge gives the reasons at paragraph 19 and to an extent in the following paragraphs. The critical sentence is 'the Appellant's mother is heavily dependent upon her son because of her age and state of health'. It may be arguable that in assessing dependency the Judge has failed to explain why the support that the Appellant's mother received from others prior to the Appellant's arrival has been take on by the Appellant.
> 4. The stronger ground is the second one. Having found that Article 8.1 is engaged the Judge does not appear to deal with Article 8.2 proportionality at all or to conduct a balancing exercise. This is an arguable error of law.
> 5. Permission to appeal is granted."

7. The matter comes before us to determine whether the Decision contains a material error of law and, if it does, to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

THE EVIDENCE AND THE DECISION

8. Before we turn to consider the grounds, it is appropriate to set out the relevant passages of the Decision so that the discussion which follows can be understood in context.

9. The issues which arose based on the parties' cases are principally set out at [2], [5] and [7] of the Decision as follows:

> "2. …It was asserted that the appellant qualified for indefinite leave to remain in the UK as the adult child of a Gurkha veteran, notwithstanding that he had a family of his own who continue to reside in Nepal."
> "5. It was accepted that the appellant's father had served as a Gurkha from 1948 to 1964 and that he died in Nepal in 2002. It was accepted that the appellant's mother had been issued with entry clearance for settlement as a Gurkha widow on 10 July 2014 and that she entered the UK about two months later. The appellant does not qualify for leave under the Immigration Directorate Instructions at Annex K. The policy applied only to applications for entry clearance made from outside the United Kingdom. The policy applied to applicants age between 18 and 30, whereas the appellant at that time was age 49. The appellant was not considered financially or emotionally dependent on the former Gurkha, his father having died several years before. The appellant had also formed an independent family unit, having a wife and child in Nepal."
> "7. When considering a proportionality exercise on Article 8 principles outside the Immigration Rules, the respondent acknowledged that where Article 8 is found to be engaged and where the appellant would have been settled in the UK long ago, that would ordinarily determine the outcome of any Article 8 proportionality assessment in the appellant's favour. If the Secretary of State can, however, point to matters over and above the public interest in maintaining a firm immigration policy which argue in favour of removal or refusal of leave, those matters are to be given appropriate weight. Thus, a bad immigration history or criminal behaviour may still be sufficient to outweigh the factors on the appellant's side of the balance. Since the appellant has a wife and child living in Nepal it was not accepted that Article 8 was engaged in relation to the appellant's mother in the UK. The appellant's private and family life was firmly established in Nepal."

10. It was common ground that the Appellant is unable to meet the Immigration Rules ("the Rules") based on his family life with his mother. It is also common ground that the Appellant cannot succeed under the Annex K policy. If the Appellant is entitled to succeed in his appeal, he can do so only based on Article 8 outside the Rules. Having set out the competing cases as above, the Judge summarised what he saw as the issues at [18] of the Decision as follows:

> "…The principal issue in contention between the parties is whether or not there is family life in existence between the appellant and his mother since both are adults, and the appellant has another family unit, i.e. his wife and child residing in Nepal."

11. The evidence is set out in short summary at [13] to [16] of the Decision:

> "13. I heard evidence from the appellant who adopted his witness statement which he had read and which he confirmed to be true. The appellant's parents lived with him in Nepal before the death of his father. The appellant's mother having heard about the United Kingdom from her husband wanted to come to the UK. The appellant is unable to find employment or have recourse to public funds because of the conditions attached to his entry clearance but if the appeal is successful, he will look for employment and indeed has a job offer.
> 14. The appellant gave evidence about the content of the medical documents from page 7 of the bundle onwards. The records show that he has been present with his mother when she keeps medical appointments. Before his arrival, friends and neighbours would accompany the appellant's mother to hospital appointments. Where there is reference on page 18 to a brother, it is in fact a neighbour.
> 15. The appellant has three brothers residing in Nepal.
> 16. I also heard evidence from the appellant's mother, Phistimaya Thapa, who adopted her witness statement as evidence-in-chief."

12. The Judge's findings then appear at [19] to [26] of the Decision as follows:

> "19. It is obvious that family life does exist between the appellant and his mother on the facts of this case. There is more than the normal emotional and practical dependence that one might expect to find between an adult child and a parent. The appellant and his mother have been residing together under the same roof for a period of almost exactly four years. Importantly, the appellant's mother is heavily dependent upon her son because of her age and state of health. I am afraid the appellant and his mother may not have been entirely straightforward with the Entry Clearance Officer when the visit visa was applied for because an indication was given that the appellant's mother was unhappy with life in the United Kingdom and wished to return to Nepal with her son, whereas in her current statement at paragraph 5, Mrs Thapa says that there life was far better in the UK than it was in Nepal. She does say at paragraph 6 that she wanted to return to Nepal to see her family and at paragraph 9 that the appellant came to the UK to return to Nepal with her, but of course once the appellant's son arrived in the United Kingdom his mother was able to enjoy the improvements in her life that her son gave her, for example, the practical and emotional support he gives her day by day and also his ability to help her with language and visits to the hospital and general practitioner for treatment.
> 20. The appellant's mother refers to the medication she takes regularly to control her blood pressure, cholesterol and other ailments (paragraph 5). She refers at paragraph 8 to having difficulty remembering the dates of her appointments and she found it hard to keep her documents in order and to answer the telephone. Circumstances have improved now her son resides in the UK.
> 21. In her closing submission Ms Jaja drew attention to the identity of those accompanying the appellant's mother when she kept her medical appointments. It is apparent that the appellant has been a constant support to his mother since his arrival.
> 22. There is further evidence from the Musgrove Park Medical Centre at page 5 of the bundle, which is more or less up to date, as to his mother's various health issues.

> 23. It is also apparent from the documents, for example at page 21, that without her son to help her communication between Mrs Thapa and the practitioners is very difficult.
> 24. The degree of emotional and practical dependency on the appellant is sufficient to engage Article 8 notwithstanding the fact that the appellant has a wife and child living in Nepal. It is possible to have family life with more than one person and in more than one place. I find Article 8 ECHR is engaged.
> 25. As the respondent said in the refusal letter there may be reasons such as criminality or a bad immigration history why, notwithstanding the engagement of Article 8, it is proportionate to refuse leave, but no such consideration applies in this case. Therefore, the proportionality balancing exercise is to be resolved in the appellant's favour.
> 26. Section 117B factors include the fact that significant weight attaches to the maintenance of immigration control, but that was taken into account by the Court of Appeal. The appellant's linguistic ability is not in evidence, but he is capable of maintaining himself without being a burden on public funds. There are no minor children's best interests in play in this case."

Based on that analysis, the appeal was allowed on Article 8 grounds. We will need to return to the Judge's findings at [19] and [25] of the Decision in particular in the discussion which follows.

13. Before turning to the relevant law, we also need to say something about the Respondent's decision under appeal since Ms Jaja focussed much of what she said on that decision and her assertion that, as a matter of natural justice, that should be our focus also. In essence, she submitted that the Respondent's grounds misunderstand the issues in the appeal and that the Judge did not need to deal with any issue other than that to which he referred at [18] of the Decision. That is because, she said, the other potential issue, namely the historic injustice argument based on the Appellant's status as the adult dependent child of a former Gurkha soldier, had been accepted in the Appellant's favour. Once that was accepted, the only issue was whether family life existed between the Appellant and his mother. Proportionality was not relevant.

14. We begin with that part of the Respondent's decision dealing with the Appellant's entitlement to succeed based on the Annex K policy, notwithstanding that both parties accept that he cannot do so. The Respondent's reasons for rejecting that entitlement appear at [10] of the Respondent's decision. The application was for leave to remain and not entry clearance. The Appellant was aged over 30 years at the time of the application. The Appellant's father had died in 2002 and the Appellant could not be financially and emotionally dependent on him. The Appellant had been employed as a teacher in Nepal since 1989 and had his own wife and children in Nepal. He had therefore formed an independent family unit.

15. Having considered the Appellant's case under the Rules and concluded that he could not succeed on that basis (as is common ground), the Respondent turned to consider the case under the heading "Exceptional Circumstances". The Respondent set out her understanding of the Appellant's case outside the Rules

as being that, if the Appellant's father had been able to settle in the UK when he retired, the Appellant would have been born here. In addition, the Appellant's mother had been supporting the Appellant financially while he had been in the UK and the Appellant wished to remain living with her.

16. The Respondent then set out the case law emerging from the case of R (oao Gurung and others) v Secretary of State for the Home Department [2013] EWCA Civ 8 ("Gurung") and Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) ("Ghising") concerning the historic injustice suffered by Gurkha veterans. We will come to that below. The Respondent then set out what is repeated at [25] of the Decision which we have already cited. As Ms Jaja pointed out, that is a citation taken directly from the guidance in Ghising save for the Judge's finding on the application of the proposition to this case.

17. The Respondent then continued as follows:

> "As noted above, it is acknowledged that your father was a serving Gurkha from 1948 until 1964. He died in Nepal in 2002. Your mother was issued with entry clearance for settlement as a Gurkha widow on 10 July 2014. She entered the UK on 11 September 2014. You are currently living with your mother.
> However, you have a wife and child in Nepal, and were also employed there in a profession for over 25 years, it is not accepted that Article 8 is engaged with regard to your relationship with your mother in the UK. Your family life is clearly with your wife and children in Nepal, as is your private life as you are employed as a teacher there and have spent the vast majority of your life in Nepal. Therefore, **having taken into account the relevant case law, it is not appropriate to grant you any form of leave on an exceptional basis**."
> [our emphasis]

18. We can say now that we reject Ms Jaja's submission that the historic injustice issue was not in dispute between the parties. It is abundantly clear from the last sentence cited above, that it was not accepted that the case law in that regard entitled this Appellant to succeed. However, there remains an issue whether the Respondent's conclusion in that regard was erroneous. For that reason, before we turn to consider whether the Decision contains a material error of law, it is necessary to summarise the case law which deals with this issue.

RELEVANT CASE LAW

19. The way in which the Courts and Tribunals have dealt with the historic injustice argument in Gurkha cases emerges most clearly from the Court of Appeal's judgment in Gurung and this Tribunal's guidance in Ghising to which cases we have already referred as being those on which the Respondent relied.

20. We begin by noting that, although the majority of the appellants in Gurung were appealing against decisions of entry clearance officers, several were in the UK as

either widows or adult dependent children of former Gurkha soldiers. The Court of Appeal was therefore not dealing only with entry clearance cases. We do not propose to cite from the judgment but instead draw the following points from it.

21. First, the Court of Appeal upheld the entitlement of the Respondent to apply her then policy which was that dependent adult children would "not normally qualify" for leave in line with the main applicant as a matter of discretion. They were expected to apply for leave to enter or remain under the Rules based on their dependency or under Article 8 ECHR.

22. Second, it follows from the foregoing, that the relevant focus in relation to this aspect of the policy is the dependency of child on parent and not vice versa. That is apparent from what is said about the policy objective at [26] of the judgment.

23. Third, the policy proceeded on the basis that the consideration of the weight to be given to historic injustice properly fell within the assessment whether there were exceptional circumstances. The Court of Appeal accepted that this was a permissible approach. We also note the Court of Appeal's acceptance at [38] of the judgment that the historic injustice issue "is not necessarily determinative". Nonetheless, as is apparent from what follows, it is an important factor. As the Court of Appeal said at [42] of the judgment "[i]f a Gurkha can show that, but for the historic injustice, he would have settled in the United Kingdom at a time when his 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 adult child to join his family now".

24. The way in which the Court of Appeal's judgment is to be applied appears from the Tribunal's guidance in Ghising. Since the proportionality issue is the focus of the Respondent's second ground, we have set out the guidance in full (applying our emphasis to the passage which we consider to be most relevant in this case):

> "(1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.
> **(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).**
> (3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.
> **(4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment**

in an Appellant's favour, where the matters relied upon by the Secretary of State/entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

25. Finally, even though it is accepted that the Appellant cannot satisfy the Annex K policy, we record Ms Jaja's submission that it is relevant to note that the Appellant can satisfy certain of the criteria within that policy.

DISCUSSION AND CONCLUSIONS

26. With that somewhat lengthy preamble, we can now deal more shortly with our conclusion that there is an error of law in the Decision.

27. Although the Respondent's two grounds might appear at first sight to be entirely separate, we consider that there is a significant overlap and for that reason we take them together.

28. We begin by accepting that, if this were not a Gurkha case, then the Judge's reasoning as to the existence of family life at date of hearing may well be adequate. Again, if this were not a Gurkha case, the issue which would then arise is whether removal of the Appellant would be proportionate. That would involve a consideration whether the Appellant's mother could seek care from other quarters and whether weight should be given to the need to maintain immigration control in circumstances where the Appellant came to the UK as a visitor only apparently intending to stay for two months but has remained beyond that time and now wishes to stay for a longer period. It would be relevant for a Judge to consider whether the Appellant ever was a genuine visitor and what impact that finding had as to proportionality of removal, the Appellant having effectively formed/strengthened his family life by presenting the Respondent with a fait accompli. That would include consideration whether family life existed at the point in time when the Appellant sought to enter.

29. As this is a Gurkha case, however, the issue as to the existence of family life is, we conclude, a somewhat different one from that which the Judge considered. As we have pointed out, the rationale for the policy objective behind allowing the adult dependent children of former Gurkhas to settle with their parents in the UK is because they form part of the family unit which has transferred to the UK and are dependent on that unit. Whilst we of course accept that family life is a two-way street, the focus of the existence of that family life for the purpose of the historic

injustice argument is based on the child's dependency on the parent and not vice versa. That is the relevance of paragraph 317(i)(f) of the Rules cited in Gurung. That relates to the adult child's dependency on the parent and not the parent's dependency on the child.

30. Moreover, there are, as the guidance in Ghising, makes clear two issues which the Appellant must establish in his favour before the historic injustice argument might entitle him to succeed. The first is as to the existence of family life. The second is to show that the Appellant's father would have settled in the UK had he been permitted to do so at a relevant time when the Appellant would have come with him as his dependent child.

31. We do not need at this juncture to make any finding as to whether the Appellant can make out his case on those two issues as we are only dealing with whether the Decision contains an error of law (although we observe that the evidence currently does not appear to engage with those issues in the way in which we have set them out). The difficulty we find with the Judge's reasoning is there is no engagement with either of those two issues in the context in which they arise in this appeal. We have already indicated our disagreement with Ms Jaja's submission that the issues did not arise because the second, at least, was accepted by the Respondent.

32. As such, the error is, we conclude, the Judge's failure to make findings as to the two central issues which arise in a Gurkha case, namely whether family life exists between the Appellant as the adult dependent child of the widow of a former Gurkha soldier and his mother and whether, if it does, he can show that his father would have settled in the UK had he been permitted to do so following his discharge from the Gurkha army and at a time when the Appellant was still a dependent child. We note in this regard that the Appellant's mother was permitted to settle in the UK following the death of his father but did not apply to do so until several years after the change to the policy which entitled her to do so and we note (or at least assume) that the Appellant did not seek to enter the UK at that time with his mother. We also note however that the Appellant's father was discharged from the Gurkhas in 1964 before the Appellant was even born.

33. Whether the Appellant can succeed in this regard is a matter on which evidence will be required. As we observed during the hearing, there is no need for this appeal to be remitted. It has already been remitted once. However, for those reasons we agree with Ms Jaja that a resumed hearing with evidence will be required and the Appellant may well wish to adduce further evidence given the issues we have identified as requiring resolution. We have therefore given directions to that effect below.

34. There is one final issue which arises concerning proportionality. As we have already noted, the Judge did not engage with this issue finding, at [25] of the Decision, in effect that his conclusion as to the existence of family life was the end of the matter. However, the Judge remarked at [19] of the Decision that he was "afraid the appellant and his mother may not have been entirely straightforward

with the Entry Clearance Officer when the visit visa was applied for". Although Ms Jaja is right to point out that, thereafter, the Judge has set out the evidence of the Appellant and his mother about the reasons given for the visit, the Judge did not reach any finding on that evidence and in particular did not engage with the issue whether the Appellant was a genuine visitor or whether he had intended all along to come here to remain with his mother. That has an impact also on the Judge's finding as to family life because, as with the position if this were a non-Gurkha case, the essential question is whether that family life existed when the Appellant came to the UK.

35. We have concluded, in light of what we say about the issues which arise, that it is not appropriate to preserve any of the Decision and therefore the Judge's observation at [19] forms no part of our future consideration of the appeal. However, the Appellant may also wish to provide further evidence as to his motivation in coming to the UK and what it is said changed following his arrival in the UK. The issue whether he was a genuine visitor may still be relevant as part of the proportionality assessment, even if it is accepted that the historic injustice argument succeeds in this case bearing in mind of course that the overall issue for the Tribunal to determine is whether the decision refusing leave to remain is disproportionate and therefore a breach of the Appellant's Article 8 rights.

CONCLUSION

36. For the foregoing reasons, we are satisfied that the Decision contains a material error of law. We set aside the Decision. We have made directions below for a resumed hearing.

DECISION

We are satisfied that the decision of First-tier Tribunal Judge Kimnell promulgated on 13 September 2019 discloses an error of law. We set aside that decision. We make the following directions for a resumed hearing:

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which she wishes to rely.**
2. **The resumed hearing is to be relisted before UTJ Smith on the first available date after six weeks from the date when this decision is sent with a time estimate of ½ day. A Nepalese interpreter is to be booked for the hearing unless the Appellant indicates otherwise.**

Signed: Dated: 10 March 2020
Upper Tribunal Judge Smith