**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2021-000595
First-tier Tribunal No: HU/04170/2020

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 16 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**ROMAN RAI**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**(NO ANONYMITY ORDER MADE)**

**Representation:**
For the Appellant: Mr G. Dingley, instructed by Aaryan Solicitors
For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

**Heard at Field House on 06 April 2023**

## DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 23 December 2019 to refuse a human rights claim in the context of an application for entry clearance as the dependent adult child of a Gurkha widow. The appellant applied for entry clearance with his mother, who was granted entry, but he was refused. His father, who served in the Brigade of Gurkhas, died in 2006.

2. First-tier Tribunal Judge G. Ferguson ('the judge') dismissed the appeal in a decision sent on 29 June 2021. He accepted that the appellant was not married and had not formed an independent family life of his own. He had applied for entry clearance to come to the UK with his mother. The judge accepted that family life continued with his mother, who is now in the UK, and that Article 8(1) of the European Convention was engaged [15].

3. The judge went on to consider the Court of Appeal decision in *R (Gurung & Others) v SSHD* [2013] EWCA Civ 8 and the subsequent Upper Tribunal decision in *Ghising & Others (Gurkhas/BOCs; historic wrong; weight)* [2013] UKUT 00567

(IAC). He considered the terms of the respondent's policy relating to adult children of Gurkha's which stated that the Home Office needed to be satisfied that the former Gurkha 'would have applied to settle in the UK on discharge, with the dependent child' [18]. He noted that there could be no direct evidence from the appellant's father, but that his mother had said that he would have brought her to the UK. The judge went on to consider the family dynamics, including the fact that the appellant's mother was his father's second wife [19]-[21]. The judge went on to conclude:

> "22. Although there was no opportunity for Dhanbahadur Rai to settle in the UK on his discharge from the Regiment of Gurkhas in 1970, what is known of his family situation at that time and immediately afterwards does not establish that he would have settled in the UK with one or other of his wives. His marital relationships are not clearly established. It is not established that he resided in India only from the time shortly before Roman Rai was born in 1988. The appellant's mother accepts that she saw her husband "rarely" and that he spent most of his post-army life in India and that she was not financially supported by him in any regular or effective way.
>
> 23. On the facts of Roman Rai's particular situation, the proportionality of the decision is not determined by the correction of the "historic wrong" since it is not established that his father would have settled in the UK on discharge from the army if that had been an option. His father's situation at that time is entirely speculative and the account of the circumstances of his marriage to Roman Rai's mother, his second wife, is uncertain. The evidence demonstrates that he had very limited family life with his second wife and the children of that marriage. He did not live with the sponsor and his children in Nepal. The "historic injustice" exception does not apply on the facts of this particular case.
>
> 24. Nothing else in the evidence establishes that the decision is a disproportionate breach of the Article 8 right to a family life of Roman Rai and his mother. Roman Rai is a healthy32 year old adult who is able to work in Nepal sufficient to support himself with his basic needs. Although he receives some financial support from his mother in the UK, that has only been for a period of about one year prior to the appeal hearing. Prior to that the family circumstances in Nepal permitted him and his mother to live a "content" life. He continues to have family relationships of equal value with his siblings in Nepal. Pokchi Rai did not herself wish to come to the UK, she had to be encouraged to do so by a charity. Absent the weight of the historic injustice, the decision of the respondent is a not a disproportionate breach of Article 8".

4. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds, which were particularised more clearly than the original pleadings in Mr Dingley's skeleton argument.

(i) The First-tier Tribunal erred in law by failing to apply the principles outlined in *Gurung* and *Ghising* correctly.

(ii) The First-tier Tribunal failed to give adequate consideration to relevant evidence, such as the sponsor's evidence that her husband would have wanted to take advantage of settlement in the UK and would have brought her and the children with him.

(iii) The First-tier Tribunal erred in finding that the appellant was must show that his father 'would' have settled in the UK rather than whether he 'would have been able' to accompany the former Gurkha after his

discharge. There was no legal test requiring a person to show that they would have settled in the UK.

## Decision and reasons

*Error of law*

5. It is not necessary to give detailed reasons for finding that the First-tier Tribunal decision involved the making of an error of law because the parties agreed that it did. I also agreed that the analysis relating to Article 8(2) contained flaws rending that part of the decision unsustainable.

6. The historic injustice suffered by Gurkhas and their family members is a broad principle. The relevant case law of *Gurung* and *Ghising* does not set out a strict set of requirements that a person must show in order for the historic injustice to apply. Those cases discussed the weight that should be given to the historical fact of the injustice.

7. It seems that the respondent's reference to the policy at the hearing might have nudged the judge's analysis in the wrong direction [18]. The policy is just that, a reflection of the Secretary of State's approach to certain types of cases, and is not in itself law. The appellant's representative accepted that he did not come within the strict terms of the policy. The fact that the policy stated that the Home Office needed to be satisfied that the former Gurkha would have applied to settle in the UK on discharge for discretion to be exercised under the policy was not applicable to a proper assessment of the balancing exercise under Article 8(2) of the European Convention. It was not a 'requirement' as described by the judge [18].

8. The judge seems to have been concerned by the fact that the appellant's mother was his father's second wife. His findings suggest that he found the marital situation unclear. In fact, the sponsor's statement made clear that his first wife was her sister and that they married after her sister died. The fact that the appellant's father married his deceased wife's sister is consistent with cultural practice that still continues in some parts of the world.

9. In my assessment, the question of what weight to place on the historic injustice does not rely on a technical or theoretical analysis of the facts of the case to discover whether the appellant's mother was married to his father at the date of discharge. The whole scheme was designed to correct a broad historic injustice that arose before the immigration rules were amended in 2004.

10. The principles applicable to the assessment of Article 8(2) are outlined in *Gurung* and *Ghising*.
For the purpose of Article 8(2) the extent of any factual analysis needed to go no further than asking whether the person is the family member of a relevant Gurkha, and but for the historic injustice, whether the family might have wanted to take the opportunity to settle in the UK at a much earlier stage. Despite being the second wife, appellant's mother was recognised to come within the scheme. If the historic injustice applied to her there was no good reason to suppose that it would not be applicable to the appellant.

11. Even if a fact sensitive assessment was required to the extent conducted by the judge, which for the reasons given above I find was not required, there is some

force in the argument that the judge failed to give adequate weight to the uncontested evidence of the appellant's mother that her husband would have brought her and their children to the UK if he had been given the opportunity. The likelihood that, but for the historic injustice, her husband might have applied to settle in the UK at a much earlier stage to access opportunities here, was also supported by the fact that her husband had migrated to India to find work after his discharge.

12. For these reasons, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The finding that the right to family life was engaged with reference to Article 8(1) is preserved. The findings relation to the proportionality assessment are set aside.

*Remaking*

13. Ms Lecointe submitted that it was a matter for the Upper Tribunal to determine proportionality with reference to Article 8(2). The Court of Appeal in *Gurung* made clear that the weight to be given to the historic injustice to Gurkhas and their family members was not necessarily determinative of the proportionality assessment because there might be other factors to be weighed in the balance. However, the Upper Tribunal in *Ghising* made clear that, absent other factors that might weigh in favour of maintaining an effective system of immigration control, such as a bad immigration history or criminal behaviour, the historic wrong will 'ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.'

14. No additional factors over and above the maintenance of immigration control have been identified in this case. For this reason, I conclude that having established that family life is engaged, the historic wrong done to Gurkha families is a matter that outweighs the public interest in maintaining an effective system of immigration control. The decision to refuse entry clearance amounts to a disproportionate interference with the appellant's right to family life under Article 8(2) of the European Convention.

15. I conclude that the decision to refuse entry clearance is unlawful under section 6 of the Human Rights Act 1998.

**Notice of Decision**

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is ALLOWED on human rights grounds

**M.Canavan**
Judge of the Upper Tribunal
Immigration and Asylum Chamber

06 April 2023