IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-000724
UI-2023-000725
First-tier Tribunal Nos:
HU/58474/2021- IA/18382/2021
HU/58475/2021- IA/18385/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

CHANDINI LAWATI (FIRST APPELLANT)
YANGNIM KERUNG (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: M E Wilford , Counsel, instructed by Bond Adams Solicitors
For the respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 22 June 2023

DECISION AND REASONS

Introduction

1. The appellants are citizens of Nepal. The first appellant is the mother of the second. The first appellant was born in May 1985 and her daughter in February 2020. The first appellant is the daughter of an ex-Gurkha soldier who served in the British Army between 1978 and 1993 (“the sponsor”).

2. The appellants appeal with permission against the decision of First-tier Tribunal Judge Seelhoff ("the judge"), promulgated on 12 December 2022, by which he dismissed their appeals against the respondent's refusal of their human rights claims. Those claims were predicated on the historic injustice done to ex-Gurkha soldiers in respect of their inability to have applied for settlement in the past, with the consequence that dependents had been precluded from accompanying or joining sponsors in the United Kingdom.

The judge's decision

3. The judge set out a summary of the case history and referred to two well-known cases on Gurkhas and historic injustice: Rai v ECO [2017] EWCA Civ 320 and Ghising and Others (Gurkhas/BOCs - historic wrong - weight) [2013] UKUT 00567 (IAC).

4. At [20] and in the first sentence of [21], the judge found that there was extant family life as between the sponsor and the appellants by virtue of effective and committed financial or emotional support by the former to the latter.

5. The judge then identified what he considered to be "the problem" with the case, namely that there was no evidence from the sponsor to indicate that he would have sought settlement in the United Kingdom at the point of leaving Army service in 1993 "but for" the historic injustice. Connected to this was the judge's apparent finding that there had been a gap in the family life between the sponsor and the first appellant at the time that the sponsor applied for settlement towards the end of 2018. At that point in time, the first appellant had been living with her ex-husband in Japan.

6. As a result, the judge concluded that:

> "22… That it was not the historic injustice that prevented the Appellant from joining her father in the UK but the fact that her father had no intention to settle in the UK until the end of 2018 at which time she was living in Japan

> and married to a husband and had therefore form an independent life and had no intention to come to the UK with them. This is in line with the reasoning in Rai above which requires us to consider whether the family life existed at the date of the application for settlement as well as at the time of the application. On the facts of the case before me I do not find that but for the historic injustice the Appellant would have come to the UK any earlier or even with her father at the time he applied.
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> 23. It follows that my findings are that whilst there is family life between the Appellants and the Sponsor, I do not accept that it is the historic injustice which has prevented the Appellants from settling in the UK."

7. The judge then went on to consider proportionality in a wider sense. Ultimately, he concluded that the respondent's refusals of the human rights claims were proportionate and he accordingly dismissed both appeals.

The grounds of appeal and permission

8. Two grounds of appeal were put forward: firstly, it was said that the judge erred in finding there to have been a gap in the family life enjoyed between the sponsor and the first appellant and had erred in respect of the "but for" issue; secondly, the judge had allegedly failed to have regard to relevant evidence relating to the alleged gap in the family life.

9. Permission to appeal was granted by the Upper Tribunal on both grounds.

The hearing

10. Mr Wilford relied on the grounds and made helpful oral submissions. In essence, he submitted that the judge had failed to have regard to evidence from the sponsor as to his intentions when he left the Army in 1993, and that the ratio in Rai did not include a requirement that family life had to have existed as at the date of an application for settlement in order for a claim based on Article 8 to succeed.

11. Having heard Mr Wilford submissions, Ms Lecointe conceded that the judge had erred in respect of both grounds of appeal.

12. At the end of the hearing I announced my conclusion that the judge had indeed materially erred in law and that his decision should be set aside.

Reasons

13. I take account of the principal that I should not interfere with a decision of the First-tier Tribunal simply because I disagree with its conclusions. I must be satisfied that there are sufficiently clear errors of law and these could have been material to the outcome.

14. In the present appeals, I am satisfied that the judge erred, as contended for in the grounds and as conceded by Ms Lecointe at the hearing.

15. I cannot be certain as to the full extent of the sponsor's oral evidence to the judge and I acknowledge that his witness statement did not state in terms that he would have applied for settlement when leaving the Army in 1993 if he had been able to do so. However, there was clear evidence from the sponsor in the respondent's bundle at G3 that he would indeed have applied but for the historic injustice. This was plainly relevant evidence. In finding that the sponsor had not provided any evidence of a causal link between settlement and the historic injustice, the judge erred by overlooking material evidence before him. In my judgment, that error undermines the core conclusions reached by the judge for dismissing the first appellant's appeal. If the sponsor had wished to apply for settlement in 1993, the first appellant, as his then-minor child, may well have accompanied him or joined him at some point relatively shortly thereafter.

16. Further, it is somewhat unclear to me as to what the judge was in fact finding as regards the first appellant's position in 2018. In any event,

I accept that Mis Lecointe's concession in respect of ground 2 was appropriate. There was evidence before the judge to indicate that the first appellant's marriage was in significant difficulties whilst she was residing in Japan and that she was relying on, at least, significant emotional support from the sponsor then. That evidence was relevant to whether (a) the pre-existing family life had not been broken at all; or (b) if it had been broken, that it had then been re-established earlier than the judge appreciated. The judge failed to address this evidence and this was, in the circumstances, an error of law.

17. I would note in passing that I see force in Mr Wilford's submission that the *ratio* of Rai does not include a general requirement that family life must have existed at the time of the settlement application. What was said by the Court at [39] and [42] might be said to have constituted additional reasons for concluding that the Upper Tribunal had erred in law. The actual ground of appeal with which the Court was concerned was discussed at [34]-[37] and a conclusion favourable to Mr Rai stated at [37]

18. There was no suggestion from the respondent that the second appellant's appeal could properly be severed from that of her mother. Therefore, the errors of law committed in respect of the first appellant means that the decision on the second appellants appeal is also unsustainable.

Disposal

19. Having canvassed the views of the parties, I concluded that the appropriate course of action was to retain these appeals in the Upper Tribunal. Neither party suggested that there should be a resumed hearing and both accepted that I should re-make the decision based on the evidence currently before me. I expressly preserved the judge's finding that family life existed as at the date of the hearing before him in December 2022.

20. In the interests of fairness, I gave the parties an opportunity to provide concise written submissions prior to my final determination of the appeals. The appellant was to file and serve written submissions no later than 4pm on 26 June 2023, and the respondent was to do the same no later than 4pm on 30 June 2023.

21. In the event, Mr Wilford provided written submissions, dated 26 June 2023. There was no response from the respondent.

Re-making the decision

22. Before going on to re-make the decision in these appeals I considered whether it remained fair and in the interests of justice to proceed with the course of action canvassed at the error of law hearing. In all the circumstances, I concluded that it did.

23. I have taken account of the evidence which was before the First-tier Tribunal, together with Mr Wilford's most recent written submissions.

24. Certain matters are not in dispute. I find that the first appellant is the sponsor's daughter and that the sponsor is a veteran of the Brigade of Gurkhas who served in the British Army between 1978 and 1993. The second appellant is the minor daughter of the first. I find that the sponsor was granted settlement in United Kingdom in December 2018 (he in fact first arrived in this country in January 2019).

25. I find as a fact that the sponsor would have applied for settlement on or soon after his discharge from the British Army if he had been permitted to do so. I take account of the absence of any express statement to that effect in his witness statement, but it is quite clear from the other evidence before me, in particular what is said in the sponsor's letter dated 27 September 2021 and at G1-G5 of the respondent's bundle that this would have been his intention. There has

been no challenge to the truthfulness of the sponsor's evidence and I have no proper reason to conclude that he is in any way unreliable.

26. Therefore, I find that the sponsor was the victim of historic injustice.

27. I find that if the sponsor had been able to apply for settlement on or soon after his discharge from the British Army, it is highly likely that the first appellant would have accompanied him to this country. It follows that there is a causal link between the historic injustice suffered by her father and her own position.

28. There has been no dispute that the first appellant enjoyed family life with sponsor at least up until the point at which she followed her ex-husband to Japan in 2016. I find that family life did in fact exist between her birth and that point in time.

29. I have considered the evidence as to the particular circumstances surrounding the first appellant's marriage, her time in Japan, and what occurred on her return to Nepal in 2018 and then again in 2019. The first appellant claims that the marriage in 2011 was arranged and although she moved out of the family home for a brief period, she returned to live with the sponsor soon afterwards whilst her ex-husband remained in Kathmandu. She claims that her ex-husband went to Japan in about 2014 without telling her. She then followed him, hoping to make the marriage a success. The ex-husband showed no respect, and the relationship deteriorated. The first appellant believed that her ex-husband was having an affair. She returned to Nepal in 2018, spent some time at her ex-husband's family home, but also stayed with the sponsor before returning to Japan. She finally returned to Nepal in 2019. Her evidence is that the ex-husband taunted her and had no positive input in her life. Ultimately, she commenced divorce proceedings.

30. This evidence has not been challenged in respect of this re-making decision. I find the first appellant to have given truthful evidence, albeit

that this was not tested by way of cross-examination (the respondent accepted that no further hearing was necessary). Her evidence on the unhappy marriage is fully supported by the sponsor's witness statement, which I regard as a reliable source.

31. Importantly, the sponsor's evidence is that, following his initial entry to the United Kingdom for settlement in January 2019, he then returned to Nepal shortly thereafter and resided there until February 2022. He then came back to the United Kingdom for approximately a month and then returned to Nepal. A further period was spent residing in the United Kingdom between July and October 2022.

32. Having regard to the evidence as a whole, I find that, at most, there might have been a break in the pre-existing family life between the first appellant and the sponsor when she initially went to Japan and resided there with her ex-husband for a period of time. However, I am satisfied that the family life had, on the facts of this particular case, been resurrected in 2018, at least for a short time before the first appellant went back to Japan. It is clear, however, that the first appellant was increasingly relying on her father's support during 2019, given the difficulties in the marriage. I am satisfied that the sponsor's return to Nepal from the United Kingdom in early 2019 was indicative of his need to provide the first appellant with committed, direct emotional and financial support. Although the first appellant's evidence indicates that after her return from Japan she did not permanently reside with the sponsor until the beginning of 2021, the particular circumstances of this case satisfy me that there was committed support provided by the sponsor to his daughter prior to that. Subsequently, and as found by the judge, family life had been demonstrated up until the date of hearing.

33. In summary, I find that any gap in the family life was *minimal* and, on the particular facts of this case, cannot be said to have a material impact on the outcome.

34. Whilst not strictly speaking necessary for my decision, my view is that [39] of Rai is not part of the *ratio* of that case, for reasons set out earlier in this decision. What was said at [39] related to the facts before the Court: the reference to "in this case" makes that clear enough. The core points here are that there is a causal link between the historic injustice and the first appellant's current circumstances.

35. Therefore, even if there was a break in family life which was more than minimal, the first appellant's case is not fatally undermined by Rai.

36. As to Article 8(2), the well-known case law makes it clear that the historic injustice, whilst not dispositive of the proportionality exercise, is nonetheless a very significant factor in the first appellant's favour. There are no material countervailing factors. I have had regard to section 117B of the NIAA 2002, as amended and refer to what was said at [55]-[57] of Rai. All-told, I conclude that the strong public interest in maintaining effective immigration control is outweighed by the historic injustice factor.

37. The respondent's refusal of the first appellant's human rights claim was disproportionate and therefore unlawful.

38. In respect of the second appellant, there has been no suggestion that her appeal should be decided differently from that of the first appellant. The respondent's refusal of the second appellant's human rights claim is also disproportionate and unlawful.

Anonymity

39. There is no need for an anonymity direction in these cases.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeals

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 7 July 2023