IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001737,
UI-2023-001738,
UI-2023-001739,
UI-2023-001740.

First-tier Tribunal Nos: HU/57939/2022,
HU/57940/2022,
HU/57942/2022,
HU/59934/2022.

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SARA RAI
MANI RAI
LAXMI RAI
DHANI RAI
(NO ANONYMITY ORDERS MADE)

Respondents

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr E Wilford of Counsel

Heard at Field House on 18 August 2023

DECISION AND REASONS

Introduction and Background

1. The Secretary of State for the Home Department challenges a decision of First-tier Tribunal Judge Farmer signed on 23 March 2023 allowing on human rights grounds the appeals of Sara Rai, Mani Rai, Laxmi Rai, and Dhani Rai against respective decisions variously dated 23 September 2022 and 9 November 2022, to refuse entry clearance to the United Kingdom.

2. Although before me the appellant is the Secretary of State and the Rais are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall continue to refer to the Rais as the Appellants and the Secretary of State as the Respondent.

3. The Appellants, national of Nepal, are siblings. Their personal details are a matter of record on file.

4. In April 2022 the Appellants each made applications for entry clearance to the UK as the adult dependent children of their mother Mrs Rana Kumari Rai ('the Sponsor'), the widow of their father Mr Bhakta Bahadur Rai who had served in the Brigade of Gurkhas from 18 February 1948 until 12 January 1966. (Further details of Mr Rai's service, and his immigration history, and the immigration history of the Sponsor and another child who entered the UK in November 2021, are contained in the documents on file and summarised in the decision of the First-tier Tribunal.)

5. The applications were considered on the basis of being made by adult children of a Gurkha discharged prior to 1 July 1997, and also with reference to Article 8 of the European Convention on Human Rights (ECHR), and paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules.

6. The applications were refused in identical terms for reasons set out in respective decision notices. The reasons are adequately summarised at paragraph 8 of the decision of the First-tier Tribunal.

7. The Appellant appealed to the IAC.

8. Each of the appeals was allowed for reasons set out in the 'Decision and Reasons' of Judge Farmer.

9. In summary, the Judge noted that the Respondent's representative "*confirmed that there were no credibility issues in the appeal*" (paragraph 12), and found:

> (i) When the Appellants' father had been discharged from the Army in 1975 there had been no right of settlement; further, "*but*

for [this] historic injustice their father would have come to the UK and they would have been born here" (paragraph 13, and see similarly paragraphs 27 and 39).

(ii) Prior to the Appellants' parents relocating to the UK in April 2016 having been granted settlement, the Appellants had always lived with their parents. Had there been a route available, the Appellants would have relocated with their parents, (paragraphs 15-16).

(iii) The Appellants had continued to be financially dependent and materially dependent (by provision of the family home) on their mother from the time of her relocation to the UK (paragraphs 18-19).

(iv) "*[A] high level of emotional support in addition to the financial support*" was evident (paragraph 21).

(v) The Appellants "*are financially dependent on their mother for all their basic needs such as suitable shelter kept in good repair, food, clothing and other basic utilities of daily life. This support is real, it is committed as it has been sustained since their father's departure from Nepal and since his death and it is effective as it provides the appellants with their only source of income (and a home). I further accept that the appellants lived with their parents, prior to their departure for the UK, which they have done for all their life.*" (paragraph 22, and see similarly paragraph 31).

(vi) "*[T]he evidence is more than sufficient to meet the threshold of support which is real, or effective or committed and that the appellants and their sponsor share bonds which are within the protection of Article 8(1).*" (paragraph 23, and see similarly paragraph 31-33).

(vii) There was an interference with the Appellants' family and private life (paragraph 26, and see also paragraph 34).

(viii) It was common ground that there was no history of a poor immigration history or criminality (paragraph 28).

10. The Judge evaluated the only remaining live issue – proportionality under Article 8 – in the context of these findings.

11. Having made reference to relevant jurisprudence (paragraphs 36 and 37), the Judge found the 'historical injustice' was such as to determine the issue of proportionality in the Appellants' favour (paragraphs 38-41). The appeals were allowed accordingly.

12. The Respondent applied for permission to appeal to the Upper Tribunal in all of the appeals. In the first instance permission was refused by the First-tier Tribunal on 3 May 2023. The Respondent renewed the application to the Upper Tribunal, and permission to appeal was granted on 22 June 2023.

Analysis

13. The language used in the Judge's findings in respect of the nature of the relationship between the Appellants and the Sponsor (and by implication between the Appellants and their father prior to his death) - "*[A] high level of emotional support in addition to the financial support*", "*This support is real, it is committed as it has been sustained since their father's departure from Nepal and since his death and it is effective* - reflects relevant jurisprudence in respect of Article 8(1) in the context of Gurkha cases: e.g. see **Pun [2011] UKUT 00377** and **Rai [2017] EWCA Civ 320**, both cited by the Judge. Necessarily this informed the Judge's conclusion to the effect that the issue posed at paragraph 9(a) of the Decision was to be answered in the Appellants' favour.

14. In the premises, there is no challenge to the Judge's conclusion that Article 8 was engaged on the basis that family life existed between the Appellants and the Sponsor.

15. The Grounds of Appeal submitted to the First-tier Tribunal in the initial application focus upon paragraph 40 of the Decision, and argue that its contents reveal an approach erroneous in law. Paragraph 40 is in these terms:

> "*When considering the section 117B factors I find that any lack of English language skills or financial independence is a consequence of the historic injustice. The policy for adult children of Gurkhas does not contain any requirements of maintenance and accommodation and I therefore attach little weight to those factors.*"

(The reference to 'the section 117B factors' is, of course, a reference to the public interest considerations set out in part VA of the Nationality, Immigration and Asylum Act 2002.)

16. The renewed Grounds of Appeal submitted to the Upper Tribunal in substance repeat the initial grounds, but with additional emphasis and engagement with the reasoning of the First-tier Tribunal in refusing permission to appeal.

17. In substance the Respondent pleads that the Appellants' lack of income and limited employment prospects "*were not considered adequately*" in the proportionality assessment, nor was there any consideration to where they might live and the possibility of statutory overcrowding were they to live with the Sponsor. The initial Grounds submit that because the case was ultimately decided with reference to Article 8 rather than within the parameters of the Gurkha policy (which did not apply directly to the Appellants), there was an obligation to consider "*the public interest aspects of this case*" (Grounds to the First-tier Tribunal, paragraph 2); there had been no assessment as to how the Sponsor would be able to provide maintenance and accommodation in circumstances where the limited financial evidence available suggested the sponsor would not have adequate means, and there was no evidence as to the Appellants' abilities to support themselves.

18. In amplification of the Grounds, Mr Avery emphasised that the public interest considerations at section 117B could not be disregarded in any particular case: there was a statutory obligation to have regard to the considerations listed in section 117B in all cases where the Tribunal is required to determine whether Article 8 rights would be breached in a way that would be unlawful under the Human Rights Act 1998 – (i.e. the statutory duty identified in section 117A).

19. Mr Avery observed that in a case where Article 8 was engaged, and the requirements of the Immigration Rules were met, there was still an obligation on the Tribunal to have regard to the public interest considerations under section 117B albeit that any public interest concerns would in substance be met by the fact of satisfying the Rules. By analogy, he accepted that in a case where a policy outside the Rules was met it would also be likely that any public interest concerns were satisfied - albeit a Tribunal Judge would still be bound to go through the process of considering section 117B. The Appellant's case satisfied neither the Rules nor any applicable policy; the obligation to comply with the statutory duty was the more critical, and any failure so to do would more likely be material. In this context Mr Avery accepted the proposition that the extent to which policy might be relevant to a section 117B assessment would depend on the facts of any particular case.

20. Mr Wilford in substance argued that the Judge had had adequate regard to section 117B. In the alternative, bearing in mind the jurisprudence in respect of 'historical injustice', any defect in the consideration of section 117B was ultimately immaterial.

21. In my judgement: it is manifest that the Judge did have regard to the public interest considerations under section 117B; moreover such consideration was adequate - both generally, and more specifically bearing in mind the issues that were put before the Judge – and does not reveal any error of law.

22. Mr Avery was not immediately able to identify the way in which the public interest considerations had been put to the First-tier Tribunal on behalf of the Respondent.

23. The starting point is the Respondent's decision letters. Whilst initial focus is on policy and Rules, towards the end of the decisions reference was made to the jurisprudence of **Ghising** and **Gurung**: in the first instance it was averred that Article 8 was not engaged; the matter was then put in the alternative:

> "*However, in the alternative if it is considered that Article 8 is engaged, I must take into consideration how the historical injustice has affected you individually. Given the above I consider that the effect of the historical injustice has not been such that you have been prevented in leading a normal life. Therefore, it does not outweigh the proportionality assessment under Article 8 and I consider that refusing this application is justified and proportionate in order to protect the rights and freedoms of others and the economic wellbeing of the country.*"

24. There is no obvious justification by reference to case law or otherwise why a factor such as 'not having been prevented from leading a 'normal life'' should sound against the Appellants in any proportionality balance at all – and more particularly should sound to such an extent as in substance negate the weight to be accorded to the element of 'historic injustice'. The Respondent's reasoning in this regard does not seem to respect, or understand, or otherwise follow the jurisprudence. As such the decision-maker does not give adequate weight to the 'historical injustice' aspect of the case.

25. Moreover, the formulaic wording of the public interest considerations – "*to protect the rights and freedoms of others and the economic wellbeing of the country*" – contains no specificity.

26. It is not possible to identify that there was advanced before the First-tier Tribunal any more specific formulation of case in respect of countervailing factors to outweigh the historic injustice. For example, it is not apparent that any issue in respect of potential statutory overcrowding was raised, or there was any attempt to explore such a matter with the Sponsor who attended to give evidence. In this context the Judge, having identified that the first issue between the parties was the engagement of Article 8(1), observed that the second issue was "*Does the respondent rely on anything more than the ordinary interest of immigration control such as a bad immigration history or criminality?*", (then adding "*If not the injustice*

will normally result in a decision in the appellant's favour" – reflecting the wording in the decision in **Ghising** – see further below) (paragraph 9(b).

27. The Respondent's representative acknowledged that there was no issue in respect of a poor immigration history or criminal behaviour: "*It is not disputed that there is no question about immigration history or criminal behaviour*" (paragraph 28).

28. In the circumstances it seems to me adequately clear that these matters informed the Judge's evaluation at paragraph 38 "*that there are no public interest factors that have been highlighted by the respondent which would count against the appellants settling in the UK with their mother*", and the conclusion that "*there are no countervailing considerations when assessing public interest*" (also paragraph 38). In substance, the Judge determined the two issues identified at paragraph 9 within the parameters of the evidence and arguments advanced by the parties.

29. In any event, in my judgement it is manifest that the Judge did have regard to section 117B: paragraph 40 begins with the words "*When considering the section 117B factors...*".

30. In its entirety paragraph 40 is in these terms:

> "*When considering the section 117B factors I find that any lack of English language skills or financial independence is a consequence of the historic injustice. The policy for adult children of Gurkhas does not contain any requirements of maintenance and accommodation and I therefore attach little weight to those factors.*"

31. As noted above, Mr Avery accepted that the extent to which a policy might inform an evaluation of the public interest considerations under section 117B would depend upon the facts of the particular case. In the first instance, it is to be noted that this is an acknowledgement that, in principle, the Judge was entitled to give consideration to the nature and terms of the policy in reaching her own evaluation of the weight to be accorded to the public interest considerations. Whilst it may be that the Respondent disagrees with the weight accorded by the Judge, I am not remotely persuaded that it has been shown that the Judge fell into any error of law in determining that "*little weight*" should be given to the factors identified.

32. It is also manifest that the Judge performed a balancing exercise, weighing such factors against the particular circumstances of the Appellants: "*I find that this outweighs any consideration of legitimate aim...*" (paragraph 41).

33. In this context it is to be noted that the Judge considered "*the historic injustice is of particular significance in this case*", with reference to the probability that the Appellant would otherwise have been born in the UK, and the significant period of their father's service (paragraph 39).

34. The Judge's overall approach – and indeed conclusions on proportionality – are entirely consistent with the jurisprudence in this area. It is particularly pertinent to note the quotation from Lord Dyson MR in **Gurung [2013] EWCA Civ 8** quoted by the Judge at paragraph 36:

> "*If a Gurkha can show that, but for the historical 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 dependent child under the age of 18 years, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now.*"

35. I also note the reasoning in **Ghising and others (Ghurkhas / BOCs: historic wring; weight) [2013] UKUT 00567 (IAC)** – which was cited by the Judge (paragraph 37), and manifestly informed the identification of the issues in the appeal (paragraph 9(b)). The formulation of paragraph (4) of the headnote in **Ghising** is germane:

> "*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 on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.*"

36. It seems to me that the Respondent's Grounds run contrary to the established jurisprudence pursuant to **Ghising** and **Gurung**. The matters highlighted by the Respondent relate to the usual public interest considerations that do not outweigh the significance of the historical injustice. Before the First-tier Tribunal, it was acknowledged by the Respondent's representative that there was "*no bad immigration history or criminal behaviour*" (paragraph 28), and, seemingly, no other "*public interest factors [were] highlighted by the Respondent*" (paragraph 38).

37. Be that as it may, for the reasons given, I reach the following conclusions:

> (i) The Judge manifestly had regard to the public interest considerations, including in respect of the section 117B factors, and offered reasons for her conclusions.

(ii) Although the decision was made on human rights grounds, rather than specifically under the Gurkha policy, the Gurkha policy was relevant, and to that extent the Judge was entitled to have analogous regard to it.

(iii) No argument in respect of suitability of accommodation was raised before the First-tier Tribunal.

(iv) In any event the Judge was entitled to conclude that little weight should be accorded to issues of maintenance and accommodation – in significant part because there were no such requirements to be met under the Gurkha policy.

(v) In any event, the Judge was entitled to conclude that such matters did not outweigh the factor of historic injustice, and as such the proportionality question was to be determined in the Appellants' favour.

38. In all the circumstances I find that there is no error of law on the part of the First-tier Tribunal: her Decision in respect of each Appellant must stand accordingly.

Notice of Decision

39. The decision of the First-tier Tribunal contained no material error of law and stands.

40. The appeals of Sara Rai, Mani Rai, Laxmi Rai, and Dhani Rai remain allowed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

23 August 2023