



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/08748/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 October 2017**

**Decision & Reasons  
Promulgated  
On 7 November 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MAMATA YAKHA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr R Jesurum of Counsel, Everest Law Solicitors  
For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. In a decision promulgated on 18 January 2017 Judge of the First-tier Tribunal C Greasley allowed the appellant's appeal under Article 8 of the ECHR. The appellant in this appeal is the Secretary of State and the respondent is Ms Yakha but for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal where Ms Yakha was the appellant. Ms Yakha is a 22 year old citizen of Nepal and appealed to the First-tier Tribunal against the decision of the Secretary of State refusing her entry for the purposes of settlement as the adult dependent relative of her mother, the widow of a late ex-Gurkha soldier.

2. The Secretary of State appeals with permission, granted on 7 May 2017. Mr Wilding confirmed that the grounds relied on were as follows:

Ground 1. It was asserted that the judge had failed to address the elements of dependency that go beyond normal ties in finding that Article 8(1) of the ECHR was engaged;

Ground 2. It was submitted that given the long passage of time between the appellant's father being discharged from service as a Ghurkha in 1972 it was argued that the judge's findings that the appellant's father would have settled in the UK, and presumably have been financially secure, were unsustainable and noted that the appellant was born in 1995, 23 years after her father was discharged.

### **Decision on Error of Law**

3. For the reasons set out below I am not satisfied that any error of law was made out and I dismiss the Secretary of State's appeal. Mr Wilding referred to the judge's findings at [29] of the decision and reasons where several factors were noted including how often the appellant spoke to the sponsor, her mother, noting financial dependency and noting the difficulties the sponsor has in the UK. Mr Wilding submitted it was not clear how that assists the appellant in engaging Article 8(1). It was submitted that realistically the judge had failed to engage properly with all the issues that might be relevant to the assessment of whether Article 8 is engaged including what the appellant is doing in Nepal and that the sponsor left the appellant in Nepal to travel to the UK. Mr Wilding considered that these cases are narrowly focused as to what the historic injustice means in a particular case but that Article 8(1) was always important in terms of whether or not it was engaged.
4. Mr Wilding submitted that the second error (set out in paragraph 5 of the Secretary of State's grounds of permission to appeal) related to the finding of a direct correlation between the father's intentions, his adult life after service and the current situation and it was submitted that the injustice was somewhat dampened between the sponsor's husband, who is now deceased, being discharged in 1972 and now. With regards to Section 117B, where it had been argued in the grounds of permission to appeal that the judge had failed to apply the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002, Mr Wilding accepted that this would not take him anywhere in itself in that the provision provides that little weight should be attached, not must be attached, to private life. However he did not concede the point.
5. The background to this case is that the appellant's father was an ex-Ghurkha soldier who passed away on 2 February 2010. The appellant's sponsor, her mother Mrs Gurung Nir Kumari is the widow of the appellant's father and was issued with a settlement visa on 22 November 2013, arriving in the UK on 16 December 2013. The respondent in the refusal letter dated 22 September 2015 was not satisfied that the appellant met

the requirements of paragraph EC-DR.1.1. of Appendix FM. It was conceded at the First-tier Tribunal that the appellant could not meet the existing Immigration Rules. However it was the appellant's case before the First-tier Tribunal that she would already be in the United Kingdom and be British had the Secretary of State not committed the historic injustice in relation to Nepalese soldiers serving in the British Army. The judge at [23] accepted that this was an historic injustice case.

6. In terms of the first ground I am satisfied that the judge made adequate findings, (it was not argued that they were perverse) that the appellant was still dependent on the sponsor. The judge found at [24] that a period of separation does not necessarily split a family unit and that the key question is whether an adult child has formed their own independent life and whether they remain part of the parents' family unit, together with practical, emotional and financial dependency.
7. The judge properly directed himself in relation to the relevant jurisprudence including **Ghising (family life - adults - Ghurkha policy) Nepal [2012] UKUT 160**. It was not disputed and it was accepted by the judge, that the appellant in this case continued to reside with the sponsor until the sponsor travelled to the UK to take up settlement. The appellant has no family of her own. There was also no dispute to the judge's findings that the appellant continues to depend on the sponsor for accommodation purposes and that the appellant was still studying in Nepal at the time.
8. Although Mr Wilding submitted that the sponsor leaving the appellant in Nepal to move to the UK was relevant to the question of whether Article 8 is engaged, the judge addressed this at [28] of the decision and reasons. The judge properly reminded himself that both the appellant's rights and those of the sponsor were to be considered and accepted that sponsor then faced a choice of either taking up settlement or losing it after two years. The judge was correct to take into consideration the reasons for the separation. The judge also found that the appellant remains financially dependent on the sponsor through remittances as were shown in the appeal bundle. Again there was no challenge to that finding. I accept that the real issue in this case, in determining dependency, was whether, as a matter of fact, the appellant had demonstrated that she had a family life with her mother, which had existed at the time of her departure to settle in the UK and which had endured beyond it notwithstanding her having left Nepal. **Rai v Entry Clearance officer [2017] EWCA Civ 320 and Gurung [2013] EWCA Civ 8** applied the issue of support (
9. A proper reading of the decision indicates that the judge found there to be continuing mutual support and dependency between the appellant and the sponsor, including in his findings of the sponsor's continuing difficulties with her health and that the appellant continues to support her through sometimes daily phone calls. This assists in maintaining what the judge described as the important emotional ties (it was accepted by both parties

that the first reference to appellant in the final sentence of paragraph [29] should have been to sponsor). The judge made no error in taking all these factors into account in finding that the ties between the appellant and her sponsor went beyond normal adult ties and that in this case family life was engaged for all the reasons given from [24] through to [29].

10. Mr Wilding was in error in his submission that the judge did not address the issue of what the appellant is doing currently, as the judge accepted she was studying in Nepal but in so doing that she remains financially and emotionally dependent on her mother as well as being dependent for accommodation purposes. The judge also had in mind the relatively young age of the appellant who was born in September 1995. I also note that Mr Wilding quite properly did not rely on his first ground of appeal which was that the judge was incorrect to rely on **Ghising (family life - adults - Ghurkha policy) Nepal [2012] UKUT 160** when the respondent had introduced a more generous policy in January 2015 and the **Ghising** approach was of limited relevance. That cannot be the case and the approach in **Ghising** and **Gurung** was endorsed by the Court of Appeal in **Rai**.
11. The judge gave more than adequate reasons as to why in this particular case Article 8 was engaged and the ties between the sponsor and the appellant went beyond normal emotional ties. No error of law is disclosed under ground one.
12. In relation to the second ground, although Mr Wilding submitted that the judge's finding was perverse, I am not satisfied that the very high bar to establish irrationality has been reached. As I indicated, this is all the more the case, given that the appellant's sponsor has already been admitted to the UK, despite the fact that the Ghurkha (her husband) was discharged from service in 1972.
13. The appellant's father and the sponsor married in 1970 and the appellant's father, the Ghurkha was discharged from the British Army in 1972. In order to qualify for settlement under Home Office policy, in relation to Ghurkha families, the Home Office needed to be satisfied that the former Ghurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then, but otherwise the child would have been born here. The judge did not err in taking into account the evidence which included the witness statement of the sponsor that the appellant's father used to talk about the United Kingdom and repeated on several occasions that he hoped that the family would be able to settle in the United Kingdom following his discharge. In 2009 when the new policy was announced the appellant's father was bedridden and too old to take advantage of it. Again no dispute was made in relation to those facts which the judge set out at [15].
14. The judge also took into account that the separation between the appellant and her sponsor was less than two years, which is another factor considered in the Ghurkha policy. I am of the view therefore that the

judge gave adequate reasons and made no error in his approach to the proportionality balance in Article 8 and it is incorrect to say that he did not consider the provisions of Section 117B and as already noted, Mr Wilding conceded that he could not succeed on this ground alone. The judge conceded that there was no evidence of the appellant's proficiency in English. However I am not satisfied there was any error in the weight that the judge gave to the historic injustice. It is not the case, as argued in the grounds of permission to appeal although not maintained by Mr Wilding, that in effect the Tribunal has considered only the injustice argument as the primary issue, when in reality there are many factors. The judge considered all of the relevant factors including Section 117B. However, he made no error in treating the historic injustice as a matter of significant weight. It is a strong factor to be taken into consideration and based on the judge's findings of fact the conclusion he came to and the weight he attributed to the relevant factors could not be said to be irrational.

**Notice of Decision**

15. I dismiss the Secretary of State's appeal. The decision of the First-tier Tribunal to allow the appellant's appeal shall stand.

No anonymity direction was sought or is made.

Signed

Date: 11 October 2017

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**  
**FEE AWARD**

No fee was paid or payable so no fee award is made.

Signed

Date: 11 October 2017

Deputy Upper Tribunal Judge Hutchinson