



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

Appeal Number: HU/08337/2020
[UI-2021-001375]

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On: 22 March 2022

On: 10 May 2022

Before

**UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE THOMAS QC**

Between

**KALPANA RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:

For the Appellant: Mr R Jesurum, of Counsel, instructed by Everest Law
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Easterman, promulgated on 3rd November 2021. Permission to appeal was granted by the First-tier Tribunal on 5th January 2022.

Anonymity

2. No anonymity direction was made by the First-tier Tribunal. Considering the facts of this case and the circumstances of the Appellant and her family, we could see no reason for making a direction.

Background

3. The Appellant's father enlisted in the 7th Gurkha Rifles in 1956, at the age of 15. He fought in two conflicts (in Borneo and Malaya). He was discharged in 1971. In what has now been recognised as a historic injustice, he was denied any opportunity at that stage to settle in the United Kingdom.
4. In 2009, when provision was made for settlement by Gurkha veterans discharged before 1st July 1997, the Appellant's father applied for and was granted indefinite leave to enter (on 26th June 2010). The Appellant's mother joined him the following year, and, on 2nd October 2012, her brother, Jitendra Rai, then 26 years of age, applied for entry clearance to settle in the UK as an adult dependent child. He was ultimately granted indefinite leave to remain, though not before the Court of Appeal had considered his case: *Jitendra Rai v ECO, Delhi* [2017] EWCA Civ 320.
5. In December 2019, the Appellant and her sister (Chandra Rai) made applications for entry clearance as the adult dependent children of their father. Both those applications were refused on the basis they had failed to demonstrate they were dependent on their father. Their cases were considered together by the First-tier Tribunal. Chandra Rai's appeal was allowed on the grounds that '*family life has continued between Chandra and both her father and mother, with the support coming from them jointly*'. This Appellant's case was dismissed on the grounds that '*family life did not continue and has not been restored*'.

The Law

6. When the brother's case was considered in *Jitendra Rai v ECO, Delhi*, the Court accepted the SSHD'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.

7. However, *Rai* involved a consideration of the position under 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.

8. The parties agreed that the introduction of '*Annex K - Adult Dependent Children of Former Gurkhas*' that applied to all applications after 5th January 2015 ultimately does not result in a different approach. 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 (born on 1st January 1975) would not qualify given her age. 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.

9. 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* 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 (see *Gurung* at paragraph 43) and was not required as part of any ‘exceptionality’ consideration.
10. 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). If it does not, it will not be possible to compensate for the historic injustice. The First-tier Tribunal was therefore required to consider whether Article 8(1) was engaged by the family life the Appellant asserted she enjoyed with her parents (now 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 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 the First-tier Tribunal was required to take any historic injustice into account.
11. The key issue in this appeal is whether Article 8(1) is engaged. The legal principles 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 that they include the following key principles:

- (i) Dependency should be read as 'real' or 'committed' or 'effective' support (*Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 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 *Kuthagas* 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).

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

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.

The decision of the First-tier Tribunal

13. The First-tier Tribunal considered the written evidence relating to this Appellant. She lived in the family home until she married in 2000 and a son was born in 2002. Her husband left Nepal in 2002 for work (the Appellant's father paying for his travel and the agent's fee). For a short time, the husband sent money to support her and her son, but then contact was broken and there has been no subsequent contact or support. She then turned back to her father for support and it was provided. She returned to live in the family home and was living there when her father and mother moved to the UK in 2010 and 2011 respectively. At that point, the Appellant and her son moved to Kathmandu to facilitate her son's schooling, and her father sent money for food, rent, and school fees. The

Appellant took occasional labouring work but relied on the financial support provided by her parents. The Appellant's mother would visit from the UK, spending a week in Kathmandu with the Appellant and grandson, and then travelling to visit her son and other daughter (Jitendra and Chandra). The Appellant's father died with COVID in January 2021 and the Appellant and her mother were in almost daily contact during that time. They now speak about four times a week.

14. The First-tier Tribunal accepted (as does Ms Isherwood today) that even if there was a point at which family life no longer continued, it could be reconstituted, and whether it is reconstituted requires an application of the same test, namely the existence of real or effective or committed support. In dismissing the appeal, the First-tier Tribunal approached the evidence in the following way:
 - (i) A finding was made the Appellant started an independent life when she married and had a child.
 - (ii) The evidence that, following her husband's disappearance, she returned to the family home and then, when the Appellant's father and mother left for the UK, she moved to Kathmandu where "*her father was paying for her son's education and her support*" was accepted. However, it was said by the First-tier Tribunal that "*[i]t is not unusual for parents to assist children with additional funds, particularly if they are in a position to do so, with regard to schooling and other matters...*".
 - (iii) The evidence of parental visits was accepted and there appeared to be no dispute regards the evidence of emotional support and regular contact. It was said however, this "*does not amount to more than I would expect of a relationship between an adult daughter with a grandchild and her parents, who are also grandparents*" and "*one would not expect anything less in any ordinary family where people are separated as this family is*".
15. The First-tier Tribunal found that in this Appellant's case, family life had not continued and had not been reconstituted, and it follows Article 8(1) was not engaged. The appeal was dismissed.

The grounds of appeal to the Upper Tribunal

16. The first ground of appeal was that the First-tier Tribunal had failed to apply the correct test, namely that dependency should be read as 'real' or 'committed' or 'effective' support. Whilst the Appellant's counsel's submissions as to the correct test was recorded (at paragraph 64), the First-tier Tribunal had failed to direct itself according to that test and to apply it to what was undisputed evidence. The second ground of appeal was pleaded as 'failure to give adequate reasons' but in fact amounted to

further particularisation as to how the First-tier Tribunal fell into error in failing to apply the correct test, namely by focusing on whether the support provided was out of the ordinary rather than asking whether, in addition to normal emotion ties, there was real, committed or effective support. At the hearing before us, Mr Jesurum sensibly focused on the failure to apply the correct test.

17. The Respondent did not provide a Rule 24 response. Ms Isherwood informed us that the Respondent did not accept there had been an error of law. As set out below, Ms Isherwood acknowledged the difficulties in formulating the Respondent contention that the correct test had been applied.

The hearing

18. Mr Jesurum adopted his grounds of appeal and asked us to consider his skeleton argument in the court below. He emphasised that the First-tier Tribunal, instead of asking whether the support provided to the Appellant was real, committed, or effective, had - explicitly in paragraphs 81, 82, and 85 - applied a different test, namely whether the financial support and emotional support was of a greater level than might be expected in circumstances where people are separated as this family is. This, he argued, amounted to a failure to apply the established law (as summarised at paragraph 11 above). It was a material error of law given the evidence as accepted by the First-tier Tribunal demonstrated that in addition to the normal ties of love and affection, there was real, committed and effective support, both financial and emotional.
19. Ms Isherwood did not dispute Mr Jesurum's summary of the legal principles. Ms Isherwood accepted also that she was in some difficulty in responding to Mr Jesurum's submissions - and our questions - on the First-tier Tribunal's approach in paragraphs 81, 82 and 85 in which, she accepted, the First-tier Tribunal had apparently conceded financial and emotive support but had applied a different test. We understood her position to be, notwithstanding those difficulties, we should infer from the factual findings that the First-tier Tribunal had applied the correct test or that any error was not material because the Appellant had moved out of the family home and that, whilst family life can be resurrected, on the facts of this case it had not.

Decision on Error of Law

20. The law is indeed, 'not controversial'. We do not repeat here the summary of the law set out at paragraph 11 above. In reaching its finding as to whether family life existed (and thus Article 8(1) was engaged) the First-tier Tribunal was required to consider whether, in addition to the

normal ties of love and emotion, there was real, committed, or effective support. If there was, 'dependency' was established and with it, family life. It is no part of the test to ask whether the support was in any way unusual and there is no requirement for evidence of exceptional dependency (*Ghising (family life - adults - Gurkha policy)* at paragraph 56).

21. At no stage does the First-tier Tribunal purport to direct itself to the correct test and in considering whether the support provided was more than might be expected and/or unusual, the First-tier Tribunal applied the wrong test. There was a clear error of law.

Re-making the decision

22. Both parties agreed that in the event we found there was an error of law, the appropriate course would be for us to re-make the decision rather than remit to the First-tier Tribunal, and both parties agreed we could make that decision without further submissions or evidence.

The Law

23. We adopted the approach set out at paragraphs 6 - 12 above.

Is Article 8(1) engaged?

24. In addition to the normal ties of love and affection, the uncontested evidence demonstrates there is dependency, in the form of real, committed, and effective support. This is primarily financial, in that the Appellant and her son are reliant on the financial support provided for food, rent, and school fees. The Appellant is able to earn some money, albeit from unpredictable employment, but the financial support she received from her parents was a very substantial part of her income, and there is no requirement that the support provided is anything more or less than real, committed and effective. There was, in addition, mutually dependent emotional support through very regular contact.
25. For a short period, in around 2000-2002, it does appear that the Appellant lived independently, but on the undisputed evidence, family life was re-established. Article 8(1) is engaged.

Article 8(2): Is the interference proportionate?

26. 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?”

27. 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.

28. 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.

29. 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."

30. In this case, the Respondent has not sought to rely on 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.
31. 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 her family 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 making of the decision of the First-tier Tribunal involved an error of law.

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

No anonymity direction is made.

**Signed: Richard Thomas
2022**

Date: 31 March

Deputy Upper Tribunal Judge Thomas QC