IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001085

First-tier Tribunal No:
HU/51874/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd February 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

DEVI GURUNG
(NO ANONYMITY ORDER IN PLACE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr V Ogunbusola, counsel by Direct Access
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 7 February 2024

DECISION AND REASONS

1. The appellant appeals against a decision of the Secretary of State made on 14 February 2022 to refuse her entry clearance to the United Kingdom to settle with her parents.

Background

2. The appellant is a citizen of Nepal born on 27 July 1969 who applied together with her mother for entry clearance to the United Kingdom as dependent family members of her late father, a Gurkha soldier, on 14 August 2018.

3. It is not in dispute that the appellant's father served in the British Gurkha regiment from 23 December 1961 to 26 July 1976. He died on 24 February 2016 and at that point he was married to the appellant's mother, his second wife. The appellant's father's first wife died on 6 January 2014 and his third wife, whom he married on 22 June 2015, survived him.

4. The mother's application was successful but the appellant's application was refused on 29 October 2018 on the basis that she did not meet the requirements for a grant of leave to remain under the Immigration Rules nor under the Gurkha policy. It was not accepted that the appellant had a family life with her mother for the purposes of the Human Rights Convention. She appealed against that decision.

The first appeal in 2018

5. The appeal to the First-tier Tribunal against the 2018 decision was dismissed by First-tier Tribunal Judge Scolly on 16 July 2019. The appellant applied successfully for permission to appeal against that decision to the Upper Tribunal.

6. On 30 November 2020 Upper Tribunal Judge Jackson found an error of law in that decision and set it aside. Certain findings were preserved [see paragraph 47].

7. The appeal was re-made by the Upper Tribunal following a remote hearing on 9 March 2021. On this occasion Upper Tribunal Judge Jackson found:-

(i) That a family life continued to exist between the appellant and her mother [22] but observed [23] as follows:-

> "On behalf of the Appellant and in light of the preserved finding of fact that the Appellant's father did not and would not have applied for residence in the United Kingdom at any time prior to his death; Mr Joseph [Counsel for the appellant] accepted that although this is broadly a Gurkha case, this is not one which involved any historic injustice to the Appellant or her family. As such, this is not a case in which the public interest in immigration control, without more, would be outweighed by a historic injustice if Article 8(1) is engaged".

(ii) Although there was a strong family life between the appellant and her mother which had existed for her entire life [25] the public interest was not outweighed and the interference with it through refusal of entry clearance was proportionate [29].

The second application and appeal

8. Subsequent to this decision the appellant made a further application for leave to enter the United Kingdom which was refused on the basis that she

did not fall within the discretionary policy relating to the children or other dependent relatives of former Gurkhas; did not fall within paragraph EC-DR.1.1. of Appendix FM and was not satisfied that Article 8 was engaged, and the Entry Clearance Officer not being satisfied that family life exists "between the appellant and her parents [sic]", nor were they satisfied that even if Article 8 were engaged, that the effect of the historical injustice in respect of Gurkhas was such that she had been prevented from leading a normal life.

9. The appeal against that decision came before First-tier Tribunal Judge Lester sitting at Newport on 24 November 2022. In his decision promulgated on 13 January 2023 the judge noted that the appeal had previously come before the Upper Tribunal finding [9] that this decision binds him in this particular case noting that Judge Jackson had made preserved findings of fact. Having set out in effect the whole of the material parts of Judge Jackson's decision and having directed himself in the light of **Devaseelan** [16] noting [20] that the appellant was seeking to rely on the preserved findings but then disregarded the concession that the historic injustice did not apply but found no reason why the Upper Tribunal's findings in the decision should be disregarded. In the alternative the judge considered there was insufficient evidence that would permit a departure from the previous decision.

10. The appellant sought permission to appeal against that decision which was granted by the Upper Tribunal, in this case again Judge Jackson, on 9 May 2023. In a detailed grant of permission, the judge gave the preliminary view that the First-tier Tribunal had erred by treating the previous Upper Tribunal decision in an earlier case as binding in circumstances where it should only have been the starting point and it was on that basis the decision should be set aside and a further hearing take place to re-make the appeal in the Upper Tribunal.

11. On 6 June 2023 in his reply pursuant to Rule 24, the Secretary of State said that he did not oppose the application for permission to appeal and agreed with the preliminary view that the decision should be set aside but observing that there was no materially different evidence to depart from the previous findings of Judge Jackson in her earlier appeal.

12. In a decision promulgated on 5 October 2023 Upper Tribunal Judge Jackson found an error of law in light of the Rule 24 letter referred to above and directed that the matter be listed de novo before the Upper Tribunal with updated witness statements for any person attending to give evidence.

13. Pursuant to a transfer order made on 8 December 2023 the matter then came before me.

The Hearing on 7 February 2024

14. Neither the appellant nor her mother was present at the hearing. I draw no inferences from that given that the appellant is overseas and her mother is unwell and unable to travel to Cardiff.

15. Mr Ogunbusola sought to rely on an additional bundle of documents including additional witness statements from the appellant and her mother.

16. Mr Ogunbusola expressly stated that he was not seeking to go behind the concession that this was not a case in which historic injustice applied. On that basis the hearing proceeded on the basis that the issue was proportionality, it also being conceded there being no submission that the appellant falls within the terms of the Immigration Rules. Mr Ogunbusola submitted that in this case the public interest in the maintenance of immigration control was outweighed, the circumstances in which the appellant's elderly mother was reliant upon her and would assist her in living comfortably and living a normal life.

17. Ms Rushforth relied on the refusal letter and skeleton argument. She submitted that on the basis that the historic injustice does not apply, this was an ordinary Article 8 case. She submitted that Article 8 was not engaged and little weight could be attached to the witness statements as they were not supported by any corroborative evidence. She submitted that even if family life did exist in this case it must be weaker than it was and significant weight should be attached to the public interest given that the Immigration Rules cannot be met.

18. In reply, Mr Ogunbusola submitted that the appeal should be allowed on the basis that it is very exceptional and that the sponsor would gain from the support from her daughter and that she would not be a burden on the state.

The Law

19. It is for the appellant to demonstrate that the refusal to issue her with entry clearance is a breach of her rights under the Human Rights Convention, in this case article 8 of that Convention.

20. The proper approach in such cases is to determine if the appellant qualifies under the Immigration Rules and then to consider where, outside the Rules to refusal of entry clearance would amount to a breach of article 8, that is whether the refusal would result in unjustifiably harsh consequences for the appellant or (in this case) her mother, applying in particular the principles set out in Agyarko [2017] UKSC 11 at [47]. I note also what was held in I note what was held in TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109] at [28];

> 28. The consideration of article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether

> someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life (see the examples given in *Agyarko* at [51] and [52] which include the distinction between being in the UK unlawfully and temporarily). Decisions such as those in *Chikwamba* and *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159 describe examples of how the weight or cogency of the public interest is affected. It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay, the rights of a British partner who has always lived here and whether it can reasonably be expected that s/he will follow the removed person to keep their relationship intact: that is, by way of example, the circumstances identified in *EB (Kosovo)* or the circumstance described in *Chikwamba* where the removal of an appellant who is the spouse of a British citizen could be followed by a right of re-entry.

21. While this is a case which concerns Entry Clearance, the importance of the maintenance of immigration control remains the same.

22. In this case, the applicable rules are those relating to adult dependent relatives. It is not, however, submitted that those requirements are met. Mr Ogunbusola did set out any proper basis on which it is said the appellant falls within the terms of the Immigration Rules.

23. In Mobeen v SSHD [2021] EWCA Civ 886 Carr LJ recognised that the test is "rigorous and demanding" [41]. She observed also [68] that the requirement to be met by an adult dependent relative seeking to settle in the United Kingdom will be a powerful factor in any Article 8 assessment of proportionality.

Discussion

24. The first issue was whether a family life existed in this case. In doing so I note Judge Jackson's direction when finding an error of law that the matter was to be heard de novo. On that basis, I must consider again whether the family life that he had found to exist continues to exist and indeed had continued to exist after Judge Jackson's first decision in 2021.

25. I accept that the appellant's mother was able to travel to the United Kingdom owing to the historic injustice whereby her late husband, a Gurkha, was not able to relocate to the United Kingdom. I am unclear why it was conceded that the appellant herself was not the victim of that historic injustice, but I cannot go behind the concession on that issue.

26. I have considered the evidence afresh. I note the letter from the mother's social worker of 26 October 2020 who states that:

> My assessment concluded that due to Mrs Gurung's ongoing medical conditions and her declining cognitive abilities, she would require care support to aid with all her activities of daily living. Mrs Gurung is not

> able to independently complete any personal care tasked without support from others and equipment. Mrs Gurung is not able to complete any kitchen tasks or provide herself with a nutritionally beneficial diet or fluids which requires frequent monitoring due to her diabetes. Mrs Gurung can be incontinent and has difficult using the commode in situ and is not able to empty and cleanse this regularly.
>
> Mrs Gurung is reliant on Mr Limbu to assist her with her activities of daily living and that of the Nepali community in the area to provide the physical and mental well being that is current required. This in turn long term, could cause substantial carer's issues due to the deterioration and complexity of Mrs Gurung's conditions.

27. Mr Limbu, referred to in the letter, is a retired Major in the Gurkha regiment, and his statement appears in the bundle before me. He has responsibilities for welfare under the Gurkha Welfare Trust. He states his belief that the appellant's presence will bring immense relief and comfort to her mother.

28. I have no reason to doubt this evidence. Taken together with the witness statements from the appellant and her mother,

29. While it is clear that several years have passed since the findings by Judge Jackson in 2021 (see [7] above), I have had regard to the evidence before me that there has been no material change in the position between the appellant and her mother. Whilst they have lived apart for a longer period, the mother has aged, is unwell and the level of dependency has not materially changed. Accordingly, I am satisfied that a family life still exists and that Article 8 is engaged.

30. I am satisfied also that the appellant's mother has significant mental and physical problems which affect her daily life, and that she is understandably emotionally dependent on her daughter.

31. I now turn to the issue of proportionality. The concession that there was no historic injustice has been maintained and no attempt was made to persuade me that I should disregard that or to withdraw that concession.

32. In adopting a balance sheet approach to this case, I consider that significant weight is to be attached the public policy in immigration control. In addition, bearing in mind the factors set out in Section 117B of the 2002 Act, I find that in reality, having had regard to the evidence before me that at least to begin with there will be a reliance on public funds given that the appellant has no immediate prospect of employment and her mother is reliant on an pension and some savings. Accordingly, I am not satisfied that the appellant would not be a burden on public funds given that she has no relevant work experience. Although she speaks English there is no indication that she would be able to find a job given her lack of work experience and it would be difficult for her to rely on the income available to her mother, given that her costs of living will be higher

in the United Kingdom. Not being a burden would, in any event, be a neutral factor.

33. In assessing the factors in the appellant's favour, I note the multiple problems that the appellant's mother faces. She is in poor mental and physical health, and it is wholly unrealistic for her to return to Nepal, given the level of support she now requires. It will, I accept be increasingly difficult owing to her infirmities and cognitive impairment for her to maintain the family life that exists between her and the appellant.

34. In this case, the status quo is that the appellant and sponsor have a family life which exists despite the physical separation. That, however, is unlikely to be capable of being maintained, given the deterioration in the mother's cognitive abilities and physical health and mobility. Physical contact may make up for some of that; its absences is likely to result in the family life that exists being diminished to the extent that it is slowly extinguished.

35. These are weighty factors in the appellant's favour. They are, to an extent, unique arising out of an unusual situation where the widow of a Gurkha is left on her own, in the United Kingdom, in poor and deteriorating health, and separated from her daughter on whom she increasingly relies for emotional support.

36. Taking all of these factors into account, and bearing in mind the great weight to be attached to the public interest in maintaining immigration control, I am satisfied that, on balance, the consequences for the appellant would be harsh, and that thus the refusal of entry clearance is disproportionate. I therefore allow the appeal on human rights grounds.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remake the appeal by allowing it on human rights grounds.

Signed Date: 20 February 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal