Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00495/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2017	**On 23 October 2017**

Extempore judgement

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SABITRI ALE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr E Wilford, Counsel instructed by Everest Law Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as "the Appellant" as she was before the First-tier Tribunal.

2. The Appellant is a citizen of Nepal and her date of birth is 10 May 1986. She made an application for entry clearance to settle in the United Kingdom as an adult dependent relative of her father (the Sponsor), Mr Dabilal Ale, an ex-Ghurkha soldier. He was discharged from the British Army in 1984 after 24 years service. The Entry Clearance Officer refused the application on 5 May 2015 (the application was made on 9 April 2015).

The Sponsor was granted indefinite leave to remain in 2009 and he was joined in the UK by the Appellant's mother in 2010.

3. The Appellant appealed and her appeal was allowed by Judge of the First-tier Tribunal Robison in a decision that was promulgated on 19 January 2017, following a hearing on 10 January 2017. Permission was granted to the Secretary of State by Judge of the First-tier Tribunal Brunnen on 18 August 2017.

4. Judge Robison heard evidence from the Sponsor. His evidence was that the Appellant is unemployed, unmarried and wholly dependent upon him. When he came to the UK she was aged 24 and therefore could not benefit from the policy then in place. The Sponsor has been to Nepal on three occasions since coming to the UK to visit his daughter and she remains a part of the family unit and will do so until she is married. This is part of Nepalese culture. She is emotionally, financially and morally dependent upon her parents. She lives in Kathmandu in rented accommodation and has done so since 10 October 2011, but she finds living on her own difficult. She has lost weight and is physically weak.

5. The Respondent's case was that Article 8 is not engaged because there was no dependency beyond normal emotional ties, there was an absence of bank records and evidence to establish financial dependence and the Respondent attached weight to the Appellant living independently in Kathmandu. The Respondent's case was advanced on the basis that the Appellant had chosen not to marry and that she had lived apart from the family unit in excess of two years.

6. The Appellant at the hearing before the judge relied on the case of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) and her case was advanced on the basis that there was family life and she had lived with her parents prior to settlement. Her father had faced a difficult choice of either taking up settlement in the UK or losing it after two years if he had chosen to remain in Nepal. It was accepted that the Appellant's appeal could not succeed under the Rules or the relevant policy.

7. The judge made extensive findings and those are set out in his decision at paragraphs 32 to 45:-

> "32. In this case, I accepted Mr Witford's submission that that (sic) the question whether the appellant can meet the terms of the rules is irrelevant. I also accepted Mr Witford's submission that this is a (sic) 'extremely straightforward' case to be decided under Article 8, because in light of the Ghising case the 'heavy lifting has been taken out'.
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> 33. Following Ghising (sic), I considered then that the focus of scrutiny in this case was the question whether Article 8(1) was engaged at all. The refusal is an interference by the state, and so the question is, following Razgar, whether that interference will have consequences of such gravity as potentially to engage the operation of Article 8?

34. Following the principles regarding the establishment of family life set out above, I considered first whether there was 'more than the normal emotional ties' between the parents and the daughter in this case. I took account of the fact that there is no presumption of family life, but that the answer depends on the particular factors operating in this case.

35. The appellant's case is that she is dependent on her parents for financial, emotional and moral support. She is unmarried, and intends to remain so. She has never worked, and has no skills or experience which would enable her to get a job. With regard to financial dependency, the appellant's evidence and that of her father is that she relies entirely on him for financial support as she has no income. She now lives in a rented flat, as I understood it, paid for by her father. Her evidence is that her father sends her money transfers as evidenced by the transfer receipts. Although these relate only to 2015 and beyond they do predate the refusal and the appellant's father explained that he had not retained receipts prior to that. The appellant also withdraws money through an ATM, as evidenced by receipts which she had lodged, and by statements of account from November 2010. Although this is in joint names, his first wife died in October and the patterns of withdrawals apparently continued after October 2016. I therefore accepted that the appellant was wholly dependent on her father for financial support.

36. With regard to emotional and moral support, in this case, I considered that the forms and frequency of contact were relevant to the assessment. The appellant has lodged almost 100 pages of telephone records showing very regular telephone calls from the appellant to the UK. Since coming to the UK, the appellant has been visited by one or other of her parents from 9 August 2009 to 28 October 2010, from 12 September to 6 December 2012 5 to 17 August 2013 (sic), and from 8 July to 12 September 2014. I accepted the appellant's evidence that she had continuous and frequent contact with her parents over the years since their separation.

37. I considered that it was appropriate to take account of the prevailing cultural traditions which vary between the UK and Nepal (following Huang v SSHD [2007] 2 AC 167 per Bingham L at [18]). While in the UK an unmarried daughter living apart from her parents for over four years between the ages of 24 and 28 may well be considered to be independent, I accepted the appellant's evidence that unlike western culture, in Nepalese culture a daughter remains part of the family until she is married.

38. Ms Ellis relied on Annex K of the guidance, relating to adult children of Former Ghurkas, which she said was developed in response to the decision in Ghising. She relied in particular on paragraph 9.8 of the policy that the appellant should not have been living apart from the former Ghurka for more than two years, and paragraph 15 that the appellant must be financially and emotionally dependent on the former Ghurka spouse. She stressed that any such financial support should be 'out of necessity' and submitted that in this case the evidence confirms that the appellant has chosen her lifestyle, in the same way that her sister has chosen to be educated in Japan and therefore this was not 'out of necessity'.

39. This of course is a policy direction, and as far as both representatives were aware, there is no case law considering the implementation of the policy or the extent to which it might in fact comply with Article 8 considerations. I did not consider on the facts of this particular case that the fact that she had been separated from her parents for more than two years meant that Article 8 was not engaged. Nor did I accept, in regard to the reference about necessity, that that meant that the appellant was forced to rely on her parents for financial support. Rather that appellant was unmarried, was not working, stated that she had little prospects of obtaining a job, and therefore having no income she necessarily relied on her parents for financial support. I did not consider therefore that these factors, taken with the other evidence, could be relied on to support an argument that Article 8 was not engaged in this case. I accepted that the appellant's continued reliance on her parents' support even though she had not lived with them for some time meant that family life continued in this case.

40. The appellant's father's evidence is that he would have brought his daughter to the UK but he was initially himself prevented from settling in the UK and then when he did take up the (time limited) offer for doing, he was not able, because of the respondent's policy at the time, to do so. I accepted that would have been his intention but for the policy which requires to be viewed in light of Article 8 considerations. So I also accepted that but for the historic wrong the appellant would have settled witnesses her parents in the UK. Ms Ellis submitted that he knew at that time that his daughter would not be able to come with him, but I did not accept that meant that she was not otherwise dependent on her father, or that he did not intend that they should live together.

41. I therefore concluded that this is a case where Article 8 is engaged. Following Ghising, where I find that Article 8 is engaged and that the appellant would have settled in the UK long ago but for the historic wrong, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour, where the matters relied on by the ECO consist solely of the public interest in maintaining firm immigration policy.

42. The proportionality argument will not automatically be determined in the appellant's favour (there being no reversal of the burden of proof as such). However in this case there was no suggestion of behaviour of the kind which the Upper Tribunal indicated would argue in favour of refusal, such as a bad immigration history or criminal behaviour.

43. Although Ms Ellis confirmed that the focus of her argument was that Article 8(1) was not engaged at all, she argued that in any event refusal was not disproportionate. However, in that regard, I understood her only to rely on the fact that the appellant was, in her submission, by choice leading an independent life. I did not consider that these factors, discussed above, were in any way analogous to the types of behaviour which the Upper Tribunal had in mind or which were in any way sufficient to conclude that refusal in this case was proportionate.

44. I was aware that, in assessing the public interest, I am directed by Parliament to take account of the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002, however in light of the

guidance in Ghising, I considered that they were not relevant in this particular case.

45. In all the circumstances of this case, and considering the evidence in the round, I concluded that Article 8 is engaged, and that there are no additional factors which the respondent can rely upon, beyond the need for firm immigration controls, which make refusal proportionate. The appeal therefore must succeed."

8. Permission was granted to the Secretary of State in respect of ground 3 only. Ground 3 challenges the judge's proportionality assessment and makes specific reference to paragraph 44 of the judge's decision. It is asserted that the approach of the judge was erroneous in respect of section 117B of the 2002 Act. The judge failed to address the evidence concerning the ability of the Appellant to integrate into UK society and lack of financially independence and language skills. The proportionality assessment is incomplete and the historic injustice argument is just one of many aspects that should have been considered.

9. I heard brief submissions from Mr Melvin. Mr Wilford relied on the Rule 24 notice and brought to my attention the case of Jitendra Rai [2017] EWCA Civ 320. Mr Melvin in his submissions indicated that in the light of the decision of Rai he would "not labour the point too much."

10. In the Appellant's case, as a matter of fact, there was no challenge to the finding that there has been historic injustice. I have considered the decision of the Upper Tribunal in Ghising and others, specifically paragraphs 59 and 60;

> "59. That said, we accept Mr Jacobs' 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 an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional 'burdens' but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:
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> > 'were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy'.
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> In other words, the historic injustice issue 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.

> 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."

11. Mr Wilford directed my attention to the case of Rai which postdates the decision of the First-tier Tribunal. He specifically referred me to paragraphs 55 and 56 which state as follows:-

> "55. With effect from 28 July 2014, section 117A of the Nationality, Immigration and Asylum Act 2002, requires that where a court or tribunal is considering the public interest, and whether an interference with article 8 rights is justified, it must have regard, in cases not involving deportation, to the matters set out in section 117B, including that the maintenance of effective immigration control is in the public interest (section 117B(1)), that it is in the public interest that those seeking entry into the United Kingdom speak English (section 117B(2)), and that it is in the public interest that those seeking entry be financially independent (section 117B(3)).
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> 56. Mr Jesurum pointed out that the Upper Tribunal judge did not consider the matters arising under those provisions of the 2002 Act. He submitted, however, that in view of the 'historic injustice' underlying the Appellant's case, such considerations would have made no difference to the outcome, and certainly no difference adverse to him. Ms Patry submitted that if the Upper Tribunal's decision was otherwise lawfully made, the considerations arising under section 117A and B could not have made a difference in his favour."

12. In this case the judge found family life between the Appellant and the Sponsor. Article 8(1) is engaged and that decision cannot be interfered with because the grant of permission was limited to the proportionality assessment. The judge found historic injustice, but properly directed himself that this was not determinative of the outcome. On a proper reading of the decision, I am not persuaded the judge did not apply section 117B. In my view, his conclusions at [44] are poorly expressed, but read together with [43], it is more likely the judge, in the light of the Respondent's limited submissions in respect of proportionality, properly considered the factors in section 117B, but concluded that the balance weighed in favour of the Appellant. There were no submissions made in respect of language, integration and financial independence and therefore it is likely that the judge considered that it was not necessary to engage

with these issues in any detail. In any event, whether the judge made an error in respect of section 117B of the 2002 Act is not material in this case in the light of the historic injustice and the lawful and sustainable findings made by the judge in respect of family life. There is no material error of law. The decision of the First-tier Tribunal to allow the appeal is maintained.

13. No anonymity direction is made.

Signed Joanna McWilliam Date 20 October 2017

Upper Tribunal Judge McWilliam