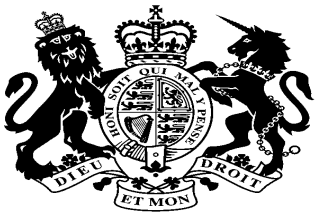


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08675/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2019 & 12 April 2019	**On 07 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

PURUSOTTAM GURUNG
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is the appeal of Purusottam Gurung, a citizen of Nepal born 11 March 1985, against the decision of the First-tier Tribunal (Judge Reid) of 23 August 2018 to dismiss his appeal, itself brought against the Respondent's decision of 14 July 2017 to refuse his application to join his father in the UK as an adult dependent relative; the decision was treated as the refusal of a human rights application.

Introduction and application process

2. The Appellant had originally applied for entry clearance, unsuccessfully, aged 25, in October 2010. The Appellant's present application, made on 4 April 2017, was to join his father Indra Kumar Gurung, a former Gurkha, who had come to the UK

on 24 October 2009 having been granted entry clearance on 31 August 2009. The Appellant's mother was granted entry clearance on 29 September 2010 and came to the UK in July 2012, though she had habitually resided with the Appellant in Nepal subsequently, returning to the UK twice for 1-2 months at a time, once to access medical treatment. Mr Gurung Senior had been discharged in October 1985, then returning to Nepal absent any opportunity to settle in the UK.

3. Normally an adult dependent relative has to demonstrate that they have serious healthcare needs which cannot be met abroad, but the Secretary of State has set out a policy instruction, in the light of lengthy litigation, addressing the circumstances of the family members of Gurkhas, including their adult dependents. However the relatives of Gurkhas benefit from a specific policy designed to cater for their needs in the light of the historic injustice visited upon former Gurkhas who were discharged under a procedure that denied them the appropriate opportunity to settle in the UK.

4. The application was refused because the Respondent took the view that the Appellant had been living apart from the Sponsor for more than two years, that dependency was not clearly established, that he was over 30 years of age, and that there were no exceptional compelling circumstances to override these considerations. That reasoning was upheld by an Entry Clearance Manager on 27 February 2018.

5. The Appellant appealed to the First-tier Tribunal against the refusal, arguing that he had applied at the first available opportunity after the policy's amendment in January 2015, and had been unable to do so sooner as he had lacked the relevant information to make an application (as it had been necessary for his father to seek the assistance of the Veteran's Association), that his dependency on his parents exceeded the normal emotional ties as shown by his mother's return to Nepal to reside with him, and included a financial element because he had been unable to achieve financial independence because he lacked education, unlike his siblings.

The First-tier Tribunal decision

6. The Tribunal summarised the Appellant's case, and made findings of fact, noting that the Appellant was born shortly before his father was discharged, and that he was aged 24 when his father moved to the UK in 2009. When his mother obtained her entry clearance he was aged 27. He was unmarried and lived at home with his mother; he was a man of 32, not a young adult.

7. He had lived without his father in Nepal for around 8 years and had not seen him since 2009, was physically fit, and save for a reference to his being forgetful, no medical evidence was adduced as to any mental health difficulties. He had obtained A levels notwithstanding his claim to have lacked education. He was familiar with Nepal and had friends and played sports there. It could be presumed he had a social network of friends in the area where he was settled. He was fit,

well and educated, and so not unemployable, notwithstanding that he did not work presently; the Judge expressly found that he must have worked at times, and any financial dependency on the Sponsor was thus not of necessity. He had a good relationship with his father, being in regular telephone contact, but the Sponsor was not closely involved in his daily life, and had not been since 2009, however supportive he was generally. It was not suggested that the Appellant could not cope when his mother was absent in the UK.

8. The First-tier Tribunal found that the Sponsor had been involved in the push to obtain settlement rights for the children of Gurkhas, and so should not have needed to obtain further information by travelling to London to gain information from the Veteran's network. Both he and his wife had by now made successful applications under the system. The Appellant's mother had returned to the UK to maintain her indefinite leave to remain.

9. His relationship with his mother was not one exceeding normal emotional ties absent physical or mental dependency, and there was here no financial dependency of necessity. Nevertheless, given the evidence that his mother relied on him for support, and in the light of the health issues for which she had been treated, it had to be recognised that he was also needed to look after his parents too.

10. The Appellant's relationship with the Sponsor showed no dependency exceeding the norm. Although the Appellant's mother spent long periods of time apart from her husband, this did not show she had special ties with her son. She had presumably been free to have departed Nepal for the UK from 2010 onwards, given that the Appellant could look after himself. Based on these considerations the Judge concluded that there was no family life between the Sponsor, his wife and the Appellant sufficient to engage Article 8 ECHR.

11. Assessing the claim in the alternative, the First-tier Tribunal went on to assess proportionality. Having regard to the policy in Annex K to the IDI, the Appellant:

    (a) Was over 30 when he applied, over 2 years after the policy was announced, a significant period even having regard to the associated cost – it seemed that what had changed in the intervening period was his parents' realisation that they would like the Appellant to be available to support them in their old age (9.4);

    (b) Was not financially dependent on the Sponsor out of necessity, nor emotionally dependent on him (9.5);

    (c) Had lived apart from the Sponsor for around 8 years (9.8).

12. There were numerous factors indicating that the immigration decision was not disproportionate: he did not meet the policy which enshrined the important public

interest in ensuring veterans' family's cases were addressed fairly and consistently. Had he met the criteria of the Annex K policy, that would have counted in his favour in the assessment of proportionality; but he did not, so could not rely on that factor. His financial dependency on his father indicated that he was not financially independent which meant that this particular section 117B factor was against him. The public interest represented by section 117B was not here overcome by the historic injustice committed against the Gurkhas given the Appellant did not fall within the policy. There was no dependency exceeding the norm and he was in good health, his parents could contribute towards his maintenance if required, and he had lived with his mother without any significant practical or emotional issues having arisen.

13. There were factors in the Appellant's favour, such as the fact that the family's evidence was that he would have settled in the UK had that been possible whilst still a dependent minor, that his original application in 2010 had been made before he was 30 and when he had not yet lived part from his father for two years, and that his mother had been forced to live between the UK and Nepal, all this arising in the context that his father had carried out exemplary service for the Gurkhas. These did not outbalance the negative factors, because the historical injustice was tempered by the fact the Appellant did not apply promptly (Annex K para 9(18)), given that family life could continue in the future as it had done in the past, with his mother travelling as she wished.

Appeal to the Upper Tribunal

14. The grounds of appeal alleged that the decision was flawed because

    (a) The approach to family life failed to apply the test of "effective and committed support" but rather sought some elevated level of necessity;

    (b) The family life assessment also failed to take account of the impact of the mother's extended presence in Nepal, which showed a failure to have regard to the family life that the mother was entitled to enjoy with her husband as well as her son, overlooked the possibility that her presence in Nepal demonstrated family ties exceeding the norm, and discounted the reciprocal ties between mother and son;

    (c) Proportionality had been mis-assessed: proportionality was a matter for the judge assessing the appeal without giving undue weight to the Secretary of State's policy scheme, and wrongly treated section 117B NIAA 2002 as being relevant, whereas *Rai* had established that those considerations should not count against an applicant in a case where the "historic injustice" had force.

15. The First-tier Tribunal refused permission on 9 October 2018, but permission to appeal was granted by the Upper Tribunal on 7 January 2019.

Error of law hearing

16. At the hearing of 19 February, it was submitted for the Appellant that this was a case where family life was clearly established; family life was recognised by the authorities as being indivisible, and here the mother's circumstances living between two countries had to be carefully factored into the balance. There was no elevated threshold of "necessity" before family life was engaged. The historic injustice was found in the Appellant's inability to apply to join his father during his minority, not simply in whether he met the more detailed requirements of Annex K. The assessment as to the historic wrong should focus on whether the family should now be settled here: it was the inability to settle at the date of discharge that was relevant, not the inability at the date that the policy was announced. In the event the Upper Tribunal accepted a material error of law had been committed, a re-hearing would be necessary, as further oral evidence was required.

17. Ms Jones replied that the Appellant's age, and the question of historic injustice, were clearly considered via clearly reasoned findings. The findings were readily unsustainable.

Decision and reasons – error of law hearing

18. Annex K (22 January 2015) addresses *Adult Children of Former Gurkhas*:

> "**Definition of an adult child of a former Gurkha**
> **2.** For the purposes of this policy, an adult child is the son or daughter of a former Gurkha. See further guidance on the relationship to the sponsor in paragraph 11 of Annex K of this guidance.
> **…**
> **Settlement for adult children of former Gurkhas**
> **9.** In order for settlement to be granted to the adult child of a former Gurkha under this policy, a valid application for entry clearance must be made in accordance with paragraphs 24-30 of the Immigration Rules and the Appellant will normally have to meet the following conditions:
>
> 1. The former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements; and
> 2. The Appellant is the son or daughter of the former Gurkha; and
> 3. The Appellant is outside the UK; and
> 4. The Appellant is 18 years of age or over and 30 years of age or under on the date of application (including Appellants who are 30 as at the date of application); and
> 5. The Appellant is financially and emotionally dependent on the former Gurkha; and
> 6. The Appellant was under 18 years of age at the time of the former Gurkha's discharge; (or if the Appellant was born after discharge see guidance in paragraph 16 of Annex K of this guidance) and

7. The Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available before 1 July 1997; and

8. The Appellant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the Appellant lived away); and

9. The Appellant has not formed an independent family unit; and

10. The Appellant does not fall to be refused on grounds of suitability under paragraph 8 or 9 of Appendix Armed Forces to the Immigration Rules or those provisions of Part 9 of the Immigration Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces.

Financial and emotional dependency on former Gurkha

15. The Appellant must be financially and emotionally dependent on the former Gurkha sponsor. Evidence of financial dependency may include the fact that the Appellant has not been supporting him or herself and working but has been financially supported, out of necessity by his or her former Gurkha sponsor, who has sent money regularly from the UK.

Age at time of former Gurkha's discharge

16. The Appellant must have been under 18 years of age at the time of the former Gurkha's discharge. If this age condition is not met, the application must be refused under this policy on this basis. Please note that an adult child born after the sponsor's discharge will qualify under this policy if all other conditions are met.

Historical Injustice

17. In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha 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). If a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement will normally be considered to have been met.

18. Examples of countervailing evidence might include situations where:

- the sponsor did not apply promptly when the discretionary police was announced; or
- the sponsor has a history of dishonesty;
- the former Gurkha did not return to his family in Nepal on discharge (eg because he went to work elsewhere).

If the decision maker does not feel that this requirement is satisfied and they have referred the matter to a senior decision maker, they should normally propose refusal of the application on this ground.

Living Apart

19. The Appellant must not normally have lived apart from the Gurkha sponsor for more than two years on the date of application or at any time,

> unless the family unit was maintained albeit the Appellant lived away, for example time spent at boarding school, college or university as part of their full-time education where the Appellant lived at university or college during term time but resided in the family home during holidays. If these conditions are not met the application must be refused under this policy on this basis.
> **Living Independently**
> **20.** The application must also be refused if the Appellant is living independently in a different family unit (for example, the Appellant is living with relatives who are acting in a parental capacity), or where the Appellant has formed their own independent family unit by getting married or entering into a civil partnership or a relationship akin to marriage/civil partnership."

19. This guidance provides the context within which an Article 8 claim is to be assessed. The extent to which an Appellant satisfies the relevant publicly expressed policy requirements is highly relevant when assessing proportionality. As stated by Richards LJ in *Tozlukaya* [2006] EWCA Civ 379 (and applied in *AG Kosovo* [2007] UKAIT 00082):

> "If a policy tells in favour of the person concerned being allowed to stay in this country, it may affect the balance under article 8(2) and provide a proper basis for a finding that the case is an exceptional one."

20. This principle remains relevant under the system of Immigration Rules expressly addressing family life. In *SS (Congo) & Ors* [2015] EWCA Civ 387, it was said that "it is accurate to say that the general position … is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules". At §48 the Court goes on:

> "What does matter, however – whether one is dealing with a section of the Rules which constitutes a "complete code" (as in *MF (Nigeria*)) or with a section of the Rules which is not a "complete code" (as in *Nagre* and the present appeals) - is to identify, for the purposes of application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules in the particular context in question (which will not always be the same: hence the guidance we seek to give in this judgment), as well as the other factors relevant to the Article 8 balancing exercise in the particular case (which, again, may well vary from context to context and from case to case)."

21. Notwithstanding the fact that the decision in *SS (Congo)* was overturned by the Supreme Court in *MM (Lebanon)* [2017] UKSC 10, therein Lady Hale and Lord Carnwath confirm this reasoning remains extant §77: "Instructions … have to be taken into account as part of the overall scheme: on the one hand, they might so mitigate the effects of the Rules as to make them compatible with the Convention rights when they would not otherwise have been so". Accordingly the extent to

which the Appellant satisfied the policy imperatives expressed by Annex K was relevant to the assessment of proportionality. However, the case law on historic injustice visited upon the Gurkhas also demonstrate that the Annex K policy represents the starting point for an application's assessment, and is not a complete answer to it.

Family life

22. Lord Bingham stated in *Huang* [2007] UKHL 11 at §24:

> "Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

23. The decision of the Strasbourg Court in *Advic v UK* (1995) 20 EHRR CD 125 is sometimes cited for the proposition that the normal emotional ties between a parent and an adult son or daughter will not, without more, be enough: *Kugathas* [2003] EWCA Civ 31. As shown by the useful review of the authorities in *Ghising* [2012] UKUT 00160, this is not the whole picture, however, and as Buxton LJ emphasised in *MT (Zimbabwe)* [2007] EWCA Civ 455 at [11] *Advic*, "whilst stressing the need for an element of dependency over and above the normal between that of a parent or parent figure and adult child, also stresses that everything depends on the circumstances of each case". The Upper Tribunal President wrote in *Lama* [2017] UKUT 16 (IAC) §32 that "at its heart, family life denotes real or committed personal support between or among the persons concerned."

24. In *AA v United Kingdom* (Application no 8000/08; 20 September 2011) the European Court of Human Rights stated that:

> "An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."

25. Scott Baker LJ in *HK (Turkey)* [2010] EWCA Civ 583 at [16]:

> "Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the

> respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority."

26. The courts have given guidance on assessing the existence of family life where the separation of the parties has been exacerbated by a "historic injustice". In *Patel* [2010] EWCA Civ 17, Sedley LJ stated at [14] that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right". In *Rai* [2017] EWCA Civ 320 at [36]-[37] Lindblom LJ found that the Upper Tribunal had erred in law in assessing the existence of family life by "looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them."

27. The Court of Appeal in *Rai* made it especially clear that it was the pre-migration situation, rather than the fact of a decision being made by a parent to depart from Nepal to settle in the UK, that should be the primary focus of assessment. Lindblom LJ in *Rai* §38-41, identifying the flawed approach of the Upper Tribunal below which had concentrated unduly on what they perceived as a choice to migrate, stated:

> "Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach. … [this] was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did … in consequence of the "historic injustice", it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children … the stark choice they had had to make was either to remain with the appellant … in Nepal or to take up their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, "an integral part of the family unit" even after his parents had settled in the United Kingdom."

28. The Court of Appeal in *Rai* went on to conclude that an error of law in the assessment of family life would itself be likely to render any proportionality assessment unlawful. In any event, when evaluating proportionality, the approach of Sedley LJ in *Patel* at [15] is relevant here:

> "… [The] effect of this is to reverse the usual balance of [article] 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of [article] 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of [article] 8(1), the balance of factors determining proportionality for the purposes of [article] 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago."

29. As this passage makes clear, the central question is proportionality rather than a search for exceptionality. The Rules and Guidance are not necessarily determinative of the compatibility of the decision appealed against with the family life in play in the appeal. It remains necessary to assess all relevant circumstances, having regard to the starting point in *Patel* and the absence of any overt public interest factors counting against the application's success.

Historic wrong

30. The historic immigration wrong suffered by a group when deciding whether an interference with family life is proportionate is something which can be attributed significant weight, given *NH (India)* [2007] EWCA Civ 1330 which discusses the past injustice suffered by British Overseas Citizen female heads of households who were unable to apply to settle in the United Kingdom, and may be decisive in the appropriate case. *Gurung* [2013] EWCA Civ 8 looked at the applicability of this principle to Gurkha cases, the Court concluding that:

> "[40] ... unless there is some evidence to suggest that there is a real risk that (i) the Gurkha's adult dependant child may not be given leave to enter, for example, because there is adverse information of a serious nature about him, or (ii) leave granted to the Gurkha or his child may be abrogated in the future, the difference between the two groups should be given little weight ...
> [41] ... the Appellant dependant 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 the maintaining of a firm immigration policy. There is no place in the balancing exercise for making fine judgments as to whether one injustice is more immoral or worthy of condemnation than another ... .

> [42] 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."

31. In *Ghising* [2012] UKUT 00161 (IAC) the UT stated:

> "121. Since the Respondent has provided a scheme for remedying the historic injustice in appropriate cases, there is a strong public interest in ensuring that the entry of Gurkha veterans and their families is decided fairly and consistently in accordance with the scheme."

32. However, the Master of the Rolls for the Court of Appeal *Gurung* in disapproved that statement, in these terms:

> "43 ... We confess to having some difficulty in following the reasoning at paras 117 to 119 and in seeing, in particular, why the fact that an adult dependant child may be permitted to settle here in "exceptional circumstances" leads to the conclusion that the weight to be given to the historic injustice in conducting the article 8(2) balancing exercise is limited. The flexibility of the "exceptional circumstances" criterion is such that it does not require the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice, if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in article 8(2) itself, and it is ultimately for the court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependant child to settle here in exceptional circumstances. Accordingly, we reject this additional reason given by the UT for holding that the weight to be given to the historic injustice is limited."

Conclusions: Error of law hearing

33. Having set out that necessarily lengthy summary of the salient legal authorities, I gave my reasons accepting that material errors of law were committed by the First-tier Tribunal.

34. This was a case where numerous aspects of the Annex K policy were satisfied: the Sponsor had been granted settlement under the discretionary arrangements, and the Appellant is his son living outside the UK who has not formed an independent family unit, and who satisfies the suitability criteria. The concerns raised by the First-tier Tribunal related to whether the Appellant was financially and emotionally dependent on the Sponsor, and whether there was a justification for relaxing the normal requirement that he be under 30 years old, bearing in mind he

had lived apart from the Sponsor for more than two years and had not applied as promptly as he might have done.

35. Firstly, the search for family life set too high a threshold. The enquiry into whether Article 8 ECHR is engaged is highly fact-sensitive. The accepted facts before the Tribunal indicated that the Appellant's mother, who of course is the Sponsor's spouse, had considered it necessary to live apart from her husband in order to reside with the Appellant in Nepal. This was a very strong indication that family life was engaged between them.

36. As the Strasbourg Court observed in *AA v UK*, where a young person remains in the family unit after reaching majority, family life is not interrupted. I did not consider that one can say it will necessarily be subsequently interrupted thereafter merely by the natural maturing process where the individual in question nevertheless remains living with one parent, absent some other express indicia of independence such as starting a family. The fact is that emotional dependency is likely to increase as the natural result of living together. That is precisely the point recognised by Lord Bingham in *Huang.*

37. It seemed to me that the First-tier Tribunal's repeated references to the absence of some specific health-related evidence indicated it was looking for some exceptional feature that the case law does not in truth require. It could not be said of these facts that the Appellant was "no longer … part of the family life" of lawful migrants to the UK, to use Sedley LJ's words in *Patel.* It was a material error of law to fail to assess family life against the apposite benchmark.

38. Secondly, the First-tier Tribunal referred to the Appellant's mother's evidence that her increasing age-related frailty counted was increasing her physical dependency upon him. It appeared that the Judge (understandably) accepted this evidence. However, it was not readily discernible how it was that this ostensibly express evidence of elevated dependency was considered inadequate to reach the family life threshold: cogent reasons would be required to explain such a conclusion.

39. Thirdly, the repeated search for some particularly close relationship with the father rather than the mother effectively compartmentalised the family life in play to an unrealistic degree. Given the natural state of spouses is to cohabit, it was essential to give careful attention to the extent to which this ageing couple could not live together because of the perceived need for the mother to reside in Nepal. The repeated references to the Appellant's lack of close emotional connections to the father failed to have regard to the full extent of family life interests that the facts entailed.

40. Of course, the First-tier Tribunal rejected the appeal on grounds of proportionality as well as family life. Here too unfortunately it fell into error.

41. The misdirection on family life inevitably impacted on the assessment of proportionality, as the Judge clearly believed that a higher threshold needed to be crossed before family life was established than is in fact the case. Accordingly the strength of family life potentially in play here was afforded the wrong weight in the scales. This error inevitably infected the consideration of the factors set out in Appendix K at paragraph 9 generally.

42. Furthermore, the Judge failed to appreciate that the usual balance of Article 8 issues is reversed in these cases. This was demonstrated by the Judge's reliance on section 117B factors which represent the routine immigration control considerations that are relevant in the normal migration case. However, the Court of Appeal expressly found in *Rai* §56, accepting the Appellant's submissions made before it, 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*."

43. Finally, one gets no sense from the FTT decision that it appreciated that the primary question in assessing proportionality was that identified by the Court of Appeal in *Gurung* §42: ie that subject to other public interest factors such as criminality,

> "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."

44. Thus I held that that the decision of the First-tier Tribunal could not stand. As the parties agreed, the fact-finding remaining is of relatively narrow compass though the legal issues are relatively complex, and so it is appropriate to retain the matter in the Upper Tribunal for final determination.

Decision and reasons – continuation hearing

45. At the resumed hearing Mr Clarke took a realistic position on behalf of the Secretary of State, recognising that there was no real basis to defend the appeal once the law was properly applied to the evidence. In those circumstances I can be relatively brief in my reasoning.

46. It is clear that family life endures here between the Appellant and his sponsoring parents. He has not set up an independent family unit and continues to reside with his mother for significant periods. Their relationship is a very close one and as his mother has become older she undoubtedly has become more physically and emotionally dependent on him. This plainly satisfies the test for family life between adults, bearing in mind that the Appellant cannot fairly be treated as

having left the family home of his own volition. Rather it has had to be reconstituted in Nepal.

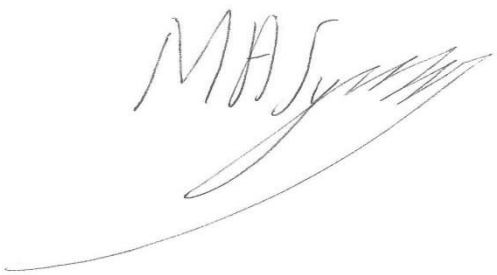
47. The family life of the Appellant, Sponsor and the Appellant's mother is subject to very significant interference indeed by the need for his mother to spend much of her time living separately from her husband in the UK in order to enjoy family life with her son in Nepal. Equally the Appellant is prevented from living with his father, in a family unit that was split geographically only because of his father taking up the wrongfully delayed opportunity to settle in the UK.

48. The evidence establishes on balance of probabilities that the Sponsor would have settled in the UK, had the opportunity arisen, at a time when his son could have obtained indefinite leave to remain alongside him as his dependent child. The general policy consideration to limit applicants to the age of thirty is not an answer on the facts of this case where there continues to be real family life evidenced amongst the members of the family unit, particularly between the son and his mother. There are no public interest factors present to militate against the grant of entry clearance. The Appellant is of good character and the application for him to join his parents in the UK has been made via the appropriate procedures. I accordingly accept that the refusal of his application for entry clearance was a disproportionate interference with the family life involved.

Decision:

The decision of the First-tier Tribunal contained material errors of law and was set aside.
Following re-hearing in the Upper Tribunal, the appeal is allowed.

Signed: Date: 12 April 2019



Deputy Upper Tribunal Judge Symes