IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07112/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2020	**On 13 January 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

DIL MAYA RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M Moriarty, Counsel instructed by Everest Law Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 31 October 1988. Her father, who died in 2002, served in the Ghurkhas between December 1960 and November 1969 (eight years and 348 days).

2. The appellant's mother settled in the UK in February 2019.

3. The appellant's application to settle in the UK, made on 31 October 2018, was refused on 19 February 2019. She appealed to the First-tier Tribunal, where her appeal was heard by Judge of the First-tier Tribunal Housego ("the judge"). In a decision promulgated on 8 January 2020 the judge dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

4. The judge accepted that the appellant and her mother enjoy a family life that engages Article 8(1) ECHR (paragraph 56) but found that refusing entry clearance to the appellant would be proportionate under Article 8(2), for the following reasons:

   (a) The judge found that it is more likely than not that the appellant's late father would have stayed in Nepal and not come to the UK even if he had been permitted to move to the UK. The judge reached this conclusion because there was not "any firm evidential basis" on the question of whether the appellant's father would have moved to the UK (paragraph 49); it would not have occurred to the appellant's father that moving to the UK was a possibility (paragraph 53); he was steeped in Nepalese culture and tradition and had ancestral lands (paragraph 54); and there was no evidence he ever expressed regret before his death about not moving to the UK (paragraph 54).

   (b) The judge found that a very long period of time has passed since the appellant's father served in the Ghurkhas. The judge stated at paragraph 57.1:

   > "At some point the length of time that has passed must weaken the weight to be given to the historical injustice argument in favour of a child of a former Ghurkha soldier."

   (c) The judge found that the appellant served only a short period of time in the Ghurkhas (paragraph 57.2).

   (d) The judge found that the appellant is not "in want" in Nepal and her mother has the option to live with her (paragraph 57.3).

   (e) The judge also found that the appellant will be a burden on the taxpayer as she lacks skills and does not speak English (paragraph 57.4).

Grounds of Appeal

5. The grounds of appeal focus on the judge's finding that the appellant had not established that her father would have settled in the UK when he retired from the army in 1969 had he had the opportunity to do so. It is argued that the judge erred by:

   (a) rejecting (or ignoring) the evidence of the appellant's mother on this issue when all her other evidence was accepted and her evidence on this point was not challenged;

(b) applying the wrong standard of proof; and

(c) not providing adequate reasons.

6. It is also argued that the judge erred by taking into consideration that "it would not have occurred" to the appellant's father that he could move to the UK. The grounds submit that this indicates the judge failed to appreciate the restitutionary nature of remedying the historic injustice to Ghurkhas.

7. The grounds submit that the judge erred by finding that the length of time that elapsed between the appellant's father retiring from the Ghurkhas and the appellant applying for entry clearance reduces the weight to be attached to the historic injustice.

8. It is also submitted that it was erroneous to characterise the appellant's father's service as being short when he served for almost nine years.

Submissions

9. I heard submissions from Mr Moriarty on behalf of the appellant and Mrs Aboni on behalf of the respondent.

10. Mr Moriarty submitted that this appeal turns on a simple and important point, which is that the judge ignored the unchallenged evidence of the appellant's mother that her husband would have settled in the UK had he been permitted to do so. He added that if the judge doubted the evidence of the appellant's mother on this point it should have been put to her so that she could address any concerns.

11. He also argued that the judge fell into error by finding that the appellant's circumstances were such that he did not have a wish to leave Nepal when the evidence of the appellant and her mother was that the family lived in poverty.

12. Mrs Aboni argued that the judge directed himself appropriately and reached a conclusion that was open to him. She argued that it was not erroneous for the judge to find that there was not a firm evidential basis for determining whether the appellant's father would have settled in the UK as there was indeed an absence of firm evidence on this issue.

Error of Law

13. The judge's reasoning for finding that the appellant's father would not have settled in the UK had he been permitted to do so contains several flaws, including:

(a) First, the consistent evidence of the appellant's mother (both in her written statement and orally at the hearing, as acknowledged in paragraph 40 of the decision) was that her husband would have settled in the UK had he been given the opportunity. The judge failed to explain why this evidence was rejected even though the rest of her evidence was accepted and no adverse credibility findings were made. The judge's reasoning on this point is erroneous in law because it is not possible to discern from the decision why the judge believed

the appellant's mother in all other aspects of her evidence but not on this discreet point.

(b) Second, the judge appears to have treated as material to the question of whether the appellant's father would have settled in the UK that when he retired from the army in 1969 no one thought about settling in the UK. This is legally erroneous because it is plainly immaterial to the question of whether the appellant's father would have settled in the UK had he been afforded the opportunity to do so that he did not consider settling in the UK at a time when such an opportunity was not available. Indeed, the absence of consideration of the possibility of settling in the UK was an inevitable (and direct) consequence of the historic injustice he faced.

(c) Third, the judge failed to take into consideration the evidence of the appellant's mother that the family lived in poverty, without an army pension, and experienced difficult circumstances in Nepal. The reference in paragraph 54 of the decision to the family having "ancestral lands" paints an entirely different picture to that of the appellant's wife, who stated in her statement:

> "He was discharged without any Pension. He had no option but to remain in Nepal. We were very poor and lived in the most difficult circumstances in Nepal. My husband could not find any work. We remained as farmers as that was the last option.…
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> We had [a] small piece of land where we grew crops to feed us and our children. It was never enough and we had to help other farmers in return for food. Sometimes [we] were paid cash for loading jobs. Living generally was tough. We still do not have gas or electricity. Water has to be fetched from far away. It takes 30 minutes to one hour, depending on the season, to fetch water from the streams. We have to make several journeys in a day. We also use firewood for cooking and heating. The wood is collected once or twice in a week. It takes a whole day to collect needed wood. There are no roads where we live. The nearest paved road is up to 2 hours walk."

14. For these reasons, I find that the reasons given by the judge for concluding that, irrespective of the historic injustice faced by former Gurkhas, the appellant's father would not have settled in the UK, are not sustainable. The error is material for the reason summarised succinctly in paragraph 42 of R (*Gurung) v SSHD* [2013] EWCA Civ 8, where it is stated:

> "If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent 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."

15. The judge also fell into error by reducing the "weight to be given to the historical injustice" because the appellant's father had served only "a short period of time" in the army. This is misconceived because a period of almost nine years, which is the time the appellant's father served in the army, is not a short period of time. In fact, it is over double the length of time required under the respondent's policy.

16. A further error arises from the judge reducing the weight to the historic injustice because the injustice occurred so long ago. There is nothing in the respondent's policy or in the case law on Ghurkhas to indicate that the historic injustice is reduced, or carries less weight, if the injustice occurred a long time ago. The length of time that has elapsed since the appellant's father retired is immaterial to the question of whether refusing entry to the appellant is proportionate and therefore it was erroneous for the judge to take this into consideration.

Remade decision

17. Both parties agreed that I should proceed to remake the appeal.

18. Aside from the question of whether, but for the historic injustice, the appellant's father would have settled in the UK, the factual matrix is not in dispute and it was common ground that the findings of the First-tier Tribunal should be preserved.

19. The following findings of fact are not contentious:

    (a) The appellant's father, who died in 2002, served as a Gurkha for over eight years.

    (b) The appellant's mother and the appellant have a close relationship: they lived together until the appellant's mother came to the UK, they are in frequent contact, and the appellant relies on her mother for financial support.

    (c) The appellant's mother settled in the UK in 2019.

    (d) The appellant lacks skills, qualifications or knowledge of English that would facilitate finding employment in the UK.

    (e) Neither the appellant nor her mother have an adverse criminal or immigration history.

20. The one area of contention is whether the appellant's father would, but for the historic injustice, have settled in the UK. The consistent evidence of the appellant's mother was that her husband would have settled in the UK with his family had he been afforded the opportunity to do so. The credibility of her evidence has not been challenged and no reason was advanced by Mrs Aboni as to why she should not be believed. Moreover, the appellant's father did not receive an army pension and lived in poverty. He therefore had a strong economic incentive to relocate to the UK. For these reasons, I am satisfied that it is more likely than not that the appellant's father would, had he been given the opportunity, have settled in the UK after he retired from the army.

21. There are two questions to be determined. The first question is whether article 8(1) ECHR is engaged. If it is not engaged, the appellant cannot succeed. If it is engaged,

then the second question must be considered, which is whether refusing entry is disproportionate under article 8(2).

22. The first question must be answered in the affirmative because the unchallenged finding of the First-tier Tribunal was that article 8(1) is engaged. This is, in any event, plainly correct given the close relationship between the appellant and her mother, who have lived together for the entirety of the appellant's life (until her mother moved to the UK) and have a relationship characterised by a significant degree of mutual support.

23. The Court of Appeal has made clear that, in a case such as this, where there is no criminality or poor immigration history, the proportionality assessment under article 8(2) – which is the second of the two questions to be addressed - cannot fall other than in favour of the appellant. Elias J in *AP (India) v The Secretary of State for the Home Department* [2015] EWCA Civ 89 explained:

> In *R (on the application of Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8, the Court of Appeal was faced with a similar, if not quite so culpable, historic injustice perpetrated on those who had been veterans of the Gurkha brigade and had served in the British army. The Master of the Rolls, Lord Dyson, referred to Sedley LJ's comments in paragraph 15 of *Patel* to the effect that the historic injustice may perhaps be decisive, but he emphasised the word "perhaps". Consistently with that observation, Lord Dyson added (para.38) that any historic injustice was only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. However, later in his judgment he emphasised the considerable weight which should be afforded to that factor where it is applicable (para.42):
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> > ".. 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."
>
> He noted that this principle would apply whether the historic injustice was to the Gurkhas or the British citizens from East Africa.
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> More recently the Upper Tribunal in *R (Ghising) v Secretary of State for the Home Department* [2013] UKUT 00567 has interpreted these decisions as saying that where the only justification for refusing entry is in order to maintain firm immigration policy, the historic injustice should always outweigh that consideration. Accordingly, entry should be granted as a matter of course in such cases. It is only if there is some other factor weighing in favour of refusal, such as the commission of criminal offences or a bad immigration record, that it will not be decisive.
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> Ms McGahey very properly informed us that on 5 January this year the Immigration Directorate issued instructions which have accepted the analysis in *Ghising* for Gurkha cases; and the Secretary of State further accepts that no different rule can be applied to BOC cases. Accordingly, Ms McGahey accepts that if the appellant had been able to demonstrate that but for the historic injustice, his father would have settled in the UK earlier, with the consequence that the appellant would have sought entry as a minor

> rather than as an adult, his appeal ought to have succeeded. Her case is that he failed to establish the causal connection which was critical to this part of his application.

24. Reaffirming the assessment in *AP*, the President of the Upper Tribunal stated in *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC):

> The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.

25. Applying these authorities to the facts of this case, it is plain that although I must weigh against the appellant, in the article 8 proportionality assessment, that the maintenance of effective immigration controls is in the public interest and that it is in the public interest that immigrants to the UK speak English and are financially independent (see Sections 117B(1) – (3) of the Nationality, Immigration and Asylum Act 2002), because of the historic injustice experienced by her father, the weight attached to these public interest considerations is greatly reduced to the extent that they are outweighed by the family life of the appellant and her mother.

Notice of Decision

The decision the First-tier Tribunal involved the making of an error of law and is set aside.

I re-make the decision and allow the appeal.

No anonymity direction is made.

Signed

D Sheridan
Upper Tribunal Judge Sheridan

Date 5 January 2021