Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14293/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 6 March 2018	**On 29 March 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NISHA LIMBU

Respondent

Representation:

For the Appellant: Mr K Hibbs, Senior Home Presenting Officer
For the Respondent: Mr M Puar instructed by Everest Law Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Frazer) promulgated on 31 July 2017. By that decision the First-tier Tribunal allowed the appeal of the respondent (whom I shall refer to hereafter the "Claimant") against a decision of the Secretary of State dated 19 May 2016 refusing her indefinite leave to remain (ILR) under the Rules and Art 8 of the ECHR.

2. The Secretary of State appeals with permission of the First-tier Tribunal Judge (E M Simpson) granted on 9 October 2017.

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3. The appellant was represented by Mr K Hibbs, Senior Home Office Presenting Officer and the Claimant was represented by Mr M Puar.

The Background

4. The Claimant is a citizen of Nepal who was born on 20 October 1988. Her father was a serving Gurkha solider. He died in service in 1990 when the Claimant was 2 years old. Following his death, the Claimant lived in Nepal together with her mother and brother.

5. Between 1994 and 2008, the Claimant was educated at boarding school in India. She returned to Nepal during the holidays to live with her mother.

6. On 14 July 2007, the Claimant's mother was granted indefinite leave to enter the United Kingdom as, and it was not disputed before the judge or before me, the widow of a Gurkha soldier.

7. In fact, at the same time, the Claimant also applied for indefinite leave to remain as a dependent when she was 17 years of age. By the time of the ECO's decision, the Claimant was 18 years of age and her application under the Immigration Rules was refused on the basis that her mother was, at the time, resident in Nepal.

8. The Claimant's mother came to the UK on 14 July 2007. The Claimant's mother sadly died on 24 October 2009.

9. Prior to her mother's death, the Claimant again applied for indefinite leave to enter in 2008. That application was refused on the basis that the ECO was not satisfied that the Claimant was dependent on her mother nor was he satisfied that the Claimant would be adequately accommodated without recourse to public funds. I take those facts from para 11 of Judge Frazer's determination. None of the decisions were placed before me but equally neither representative suggested that Judge Frazer's summary in para 11 was inaccurate. It would appear, however, that an appeal was lodged against the refusal of indefinite leave to enter on 29 July 2008 but the Claimant's mother (who was of course in the UK) died on 24 October 2009 and the Claimant is unaware of what happened to the appeal. Mr Hibbs indicated that the appeal was unsuccessful. However, he did not place before me the decision of the Immigration Judge and it is, perhaps, not surprising that the appeal was unsuccessful once the Claimant's sponsor (her mother) had died.

10. At para 12 of her decision, Judge Frazer recounts what occurred following the High Court decision in R (Limbu) and Others v SSHD [2008] EWHC 2261 (Admin). Following the publication of revised policy guidance dealing with former Gurkhas and their families, the Secretary of State wrote to the Claimant on 13 July 2009 and on 27 July 2010 seeking further information. However, the judge records that no further documentation was produced but the Claimant was interviewed on 15 December 2009. It would appear that her application was then considered under para 317 of the Immigration Rules and Art 8 and the Secretary of State went on to confirm the decision to refuse the Claimant indefinite leave to enter.

11. Thereafter, on 18 October 2012, the Claimant entered the UK as a Tier 4 Student. She undertook a degree at the University of Sunderland (London Campus) and in 2015 she graduated with an upper second-class honours degree.

12. In para 13 of her determination, Judge Frazer records the evidence before her concerning the circumstances during the Claimant's time at university as follows:

> "The Claimant has been dependent on her paternal aunt, Ms. Netra Kala, for her fees and maintenance. The claimant has lived in London throughout her studies but has stayed with her aunt and cousins in Llanelli in the holidays. Her aunt and family have taken in the Claimant as one of their own, so as to speak."

13. At para 14, the judge identified the claimant's dependence both emotionally and financially upon her aunt in the UK as follows:

> "The Claimant depends on her aunt for emotional and financial assistance. She has a brother in Nepal who has wife and two children. He is unable to provide for her as he is the sole breadwinner and can only support this immediate family. The appellant has grandparents but they are both over 80 and are in poor health.

14. On 21 December 2015, the Claimant made an in-time human rights application for indefinite leave to remain in the UK outside the Immigration Rules under Art 8 as the dependent child of a former Gurkha.

15. That application was refused by the Secretary of State on 19 May 2016.

16. The Claimant appealed that decision to the First-tier Tribunal and it is the resulting decision of Judge Frazer promulgated on 31 July 2017 allowing the Claimant's appeal under Art 8 which is the subject of this appeal by the Secretary of State to the Upper Tribunal.

The Decision of the First-tier Tribunal

17. The essential facts, which I have related above and largely derived from the determination of Judge Frazer, were not in dispute before her.

18. In essence, Judge Frazer accepted that there was "family life" between the Claimant and her aunt in the UK based upon emotional and financial dependency. Having concluded, therefore, that the decision engaged Art 8.1, the judge found that the decision was disproportionate having regard to the "historic injustice", namely that the Claimant had lost the opportunity to settle in the UK with her mother as a child of a former Gurkha who had died in service. The judge found that that that "historic injustice" outweighs the public interest. I have already set out paras 13 and 14 of the judge's decision as relevant. The remainder of her reasons are found at paras 15-19 as follows:

> "15. The particular circumstances of the Appellant's case can be considered in line with the case law on historic injustice. In **Limbu** it was recognised that Gurkhas had been treated less favourably than comparable commonwealth members of HM Forces. Settlement then became available to Gurkhas and their family members.

16. In R (Gurung) v Secretary of State for the Home Department [2013] EWCA Civ 8 in the context of Article 8 ECHR the Court of Appeal held at paragraph 42 that if a Gurkha could show that but for the historic injustice he would have settled in the United Kingdom 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 would be a strong reason for holding that it was proportionate to permit the adult child to join his family now.

17. It is clear from the applications that the Appellant's intention and that of her mother was to bring the Appellant over as a dependent. I note that the first application that the Appellant made was when she was 17 but that it was determined by the Respondent when she had reached her majority. All things being equal, had the Respondent's policy guidance applied to the appellant prior to 2006 she would have been granted entry clearance as a dependent child. She had been in boarding school in India but had been dependent on her mother and had stayed with her during the school holidays.

18. The Appellant has strong ties to her aunt and her family in the UK. Her aunt feels a sense of responsibility towards the Appellant. The Appellant's aunt is the sister of the Appellant's father. The Appellant was supported by her father's pension when she was in Nepal but when that stopped her aunt supported her financially. She has funded the Appellant's education in the United Kingdom and accommodates her during the holidays. The aunt has been the Appellant's only relative in the United Kingdom and there is a significant degree of emotional support which comes from the aunt given that the Appellant has now lost both of her parents.

19. Having heard the evidence, I am satisfied that he bonds between the Appellant and her aunt go beyond normal emotional ties and that there is family life existing between them. Her aunt and cousins are in effect her surrogate family. The refusal represents an interference of sufficient gravity as to engage Article 8 ECHR. Such interference is in accordance with the law and is necessary for the maintenance of an effective immigration policy. However having regard to the proportionality I find that but for the historic injustice, had the Appellant had an opportunity to settle in the United Kingdom with her mother as a child of a former Gurkha who had died in service she would have done so. This outweighs the public interest in this case. I have also had regard to the factors under s.117b and I note that the Appellant speaks English and is financially dependent on her aunt so is not dependent on public funds. I therefore allow the appeal under Article 8 ECHR."

The Secretary of State's Challenge

19. The Secretary of State's grounds, upon which permission to appeal was granted, raised essentially two points. First, the judge had been wrong to find "family life" between the claimant and her aunt. The relationship did not demonstrate the required dependency "beyond the normal emotional ties between adults" as required by the case law such as Kugathas v SSHD [2003] EWCA Civ 31 and AAO v Entry Clearance Officer [2011] EWCA Civ 40. In addition, it is said that the Claimant's bonds with her aunt are "immaterial to her application as the adult dependent relative of a Gurkha soldier, as plainly, her aunt is not a Gurkha."

20. Secondly, the grounds contend that the judge was wrong to conclude that the "historic injustice" applied. It was "pure speculation" that the Claimant's mother would have settled in the UK upon the death of the Claimant's father and, in any

event, the Claimant had been given an opportunity to enter the UK in 2006 and 2008 and both applications had been unsuccessful.

21. In his oral submissions, on the first ground Mr Hibbs was content to rely upon the grounds and made no specific submissions

22. In relation to the second ground, Mr Hibbs accepted that the Claimant's mother had bene admitted, as a policy decision, as a widow of a Gurkha soldier who had died in service. He submitted that the "historic injustice" had been corrected by a consideration of the Claimant's applications for indefinite leave to enter in 2006 and 2008. However, those applications were unsuccessful. He took me briefly to a number of policy documents dealing with former Gurkha soldiers and their families, in particular he referred me to the most recent policy document entitled "Gurkha discharged before 1 July 1997 and their family members" (28 December 2017). He submitted that there was no provision in this policy or indeed in the policies in force in 2009, namely SET 12 concerning the children of widows of Gurkha soldiers.

The Claimant's Case

23. On behalf of the Claimant, Mr Puar submitted that the judge had made clear factual findings in relation to the "family life" established between the Claimant and her aunt applying the correct approach that the ties between the Claimant and her aunt went "beyond normal emotional ties" as specifically set out in para 19 of her determination.

24. Further, Mr Puar submitted that the judge had made a clear finding that the claimant's mother would have come to the UK following the death of the Claimant's father in 1990 if there had been no "historic injustice" against former Gurkha soldiers and their families, including their widows. The Claimant's mother would have been able to meet the policy guidance as a widow and, indeed, when the guidance came into effect, she was granted indefinite leave to enter as the widow of a former Gurkha soldier. The judge also clearly found that had the Claimant's mother been granted indefinite leave to enter after 1990 and the Claimant (as her dependent child) would also have been granted entry clearance. He reminded me that the Claimant was 2 years of age in 1990. In the light of that, Mr Puar submitted that the judge was entitled to take into account the "historic injustice" that applied to the Claimant and to give it the significant weight recognised by the Upper Tribunal in Ghising and Others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC). There was, Mr Puar submitted, nothing in the facts that gave rise to contrary factors such that the historic injustice could not lead to a finding that the decision was not proportionate.

Discussion

25. The "historic wrong" perpetrated against former Gurkha servicemen and their families have been considered in a number of cases, for example R (Limbu) v SSHD [2008] EWHC 2261 (Admin) and R(Gurung and others) v SSHD [2013] 1 WLR 2546. The essence of that "historic wrong" was that for former Gurkha servicemen discharged before 1 July 1997, they and their family were denied until 2004 an

opportunity to apply for settlement in the UK, by contrast to other ex-pat Commonwealth servicemen and their families.

26. Since 2004, the government has acknowledged the debt owed to former Gurkha servicemen and their families and since that time have introduced policies seeking to correct that injustice both for these former Gurkha servicemen and their families. The first such policy to withstand judicial scrutiny was introduced in May 2009 and known as "SET 12", together with an IDI, Chapter 15, s.2A. They are found respectively at pages 40-44 and 45-47 of the Claimant's bundle before the First-tier Tribunal. An earlier Diplomatic Service Procedure from 2006 is also found at pages 36 -39 of the Claimant's bundle. An updated version of the IDI (from March 2010) is at pages 48-51 of the bundle. A further updated edition of Chapter 15, s.2A (dated June 2015) is contained within the file. Finally, as I have already indicated, Mr Hibbs put before me the most recent policy concerning "Gurkhas discharged before 1 July 1997 and their family members" dated 28 December 2017.

27. The position of former Gurkha servicemen and their family members discharged after 1 July 1997 is contained within the Immigration Rules (HC 395 as amended) at Part 7. They, of course, had no relevance to this appeal as the Claimant's father died in 1990 and therefore prior to 1 July 1997.

28. I have not found it easy to pick my way through the relevant policy guidance and I was not taken through it systematically by the representatives.

29. It was common ground between the parties that the Claimant could not succeed (as an adult) under any Immigration Rules as an "adult dependent relative". Her only claim was under Art 8 outside the Rules which, in essence, required her to establish the "historic injustice" perpetrated to her through her mother and, ultimately, her father as a former Gurkha servicemen.

30. It was also common ground between the parties that the Claimant's mother had been granted indefinite leave to enter in 2007 under the (then) relevant policy as the widow of a Gurkha servicemen who had died in service prior to 1 July 1997.

31. In SET 12 (dated 25 June 2009) the bulk of the document is concerned with applications for settlement by former Gurkha servicemen and their families following discharge on or after 1 July 1997. However, Annex A deals with "discretionary arrangements for former Gurkhas discharged before 1 July 1997". This provides for settlement by a former Gurkha soldier based upon at least four years' service and also provides for a discretion to permit settlement for "dependants" and "widows and orphans". Provision for "dependants" is as follows:

> "**Dependants**
>
> Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same-sex partners and dependent children under the age of 18.
>
> Children over the age of 18 and other dependant 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 provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human rights Act. Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see Section.13.2."

32. Annex A provides for "widows and orphans" as follows:

"**Widows and Orphans**

Applications from widows and orphans of former Gurkhas should be considered in line with the guidance set out in Chapter 15 Section .2A. Where an application for settlement in the UK is received from the widow, widower, civil partner, bereaved unmarried or same-sex partner or orphan of a deceased Gurkha and where the latter's death occurred in connection with operation service, discretion will normally be exercised to grant settlement.

Where the former Gurkhas' death was not in connection with operation service their dependants would not normally qualify for entry under the terms of this guidance and would be expected to qualify under another a category of the Immigration Rules (for example, paragraph 317 if they have close family in the UK). Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see s.12.3 and 13.5."

33. That document, IDI, Chapter 15, s.2A was updated in March 2010 where Annex B deals with "discretionary arrangements for former Gurkhas widows whose husbands were discharged before 1 July 1997" as follows:

"This scheme recognises the unique nature of the service given by the Brigade of Gurkhas and is offered to them and their widows alone on an exceptional basis.

Widows of former Gurkhas discharged prior to 1997 may apply for settlement. The applicant should qualify for settlement if it can be shown that her late husband and former Gurkha would have met the criteria set out at Annex A above.

Where the deceased former Ghurkha was married to more than one wife under Nepalese law, UKBA will only recognise one widow of a former Gurkha to be eligible to apply for settlement in the UK under this concession and that will be the first wife recorded on the Kindred Roll (British Army records).

Where there is proof that the first widow permanently waives her right, we may accept applications under this arrangement from the next in turn according to date in which they were married which can be verified by the details of their Kindred Roll (British Army Records).

If a widow who would otherwise have qualified under these criteria has remarried they will not be eligible to apply to come to the UK under this Discretionary Arrangement.

This Discretionary Arrangement only applies to widows. Children or other dependant relatives of former Gurkhas will have to meet the relevant Immigration Rules or other appropriate discretionary criteria.

Widow and Orphans

Applications for widows and orphans of former Gurkhas post 1 July 1997 should be considered in line with the guidance set out in Chapter 15 Section 2A. Where an application for settlement in the UK is received from the widow, widower, civil partner,

> bereaved unmarried or same-sex partner or orphan of a deceased Ghurkha and where the latter's death occurred in connection with operational service, discretion will normally be exercised to grant settlement.
>
> Where the former Gurkhas' death was not in connection with operational service their dependants would normally qualify for entry under the terms of this guidance and would be expected to qualify under another category of the Immigration Rules (for example paragraph 317 if they have close family in the UK). Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see s.12.3 and 13.5.
>
> Under the guidance it will only be possible for one Gurkha widow to come to the UK.
>
> Where the deceased former Gurkha was legally married to more than one wife under Nepalese law, this arrangement will apply to the first widow on the kindred role.
>
> Where there is proof that the first widow permanently waives her right, we will accept applications under this arrangement from the next in turn according to the order in which they were registered on the kindred role.
>
> For the purposes of this guidance UKBA would not regard anybody as a widow if they had remarried."

34. Mr Hibbs accepted (as did the Secretary of State in the decision challenged in this appeal) that the Claimant's mother was granted indefinite leave to enter as the widow of a former Gurkha soldier. It is, therefore, unnecessary to unpack the guidance and any lack of clarity as to its application to widows. It seems both a sensible and humane interpretation and conclusion that it applied to the Claimant's mother (whether her husband died in service or after discharge) which if not right would run the risk of perpetrating a further injustice to the family members of former Gurkhas.

35. For completeness, I should add that the policy guidance dated June 2015 in Chapter 15, s.2A at Annexes A and B was not suggested to be materially different.

36. It will be noted that in the relevant provisions cross-reference is made to "s.12.3 and 13.5" albeit in the context of a former Gurkhas' death which was not in connection with operational service and there is an application by their dependants for settlement. I was not provided with s.12.3 and 13.5 of the guidance prior to that contained in Chapter 15, s.2A in effect from June 2015. Those sections deal with applications by former Gurkha servicemen and their families. The provisions dealing with widows is in s.12.3. Again, it provides for discretion which will "normally be exercised to grant settlement" if certain criteria are satisfied, and, in the case of a spouse's death not in connection with operational services "in exceptional circumstances". S.13 deals with "children" and refers to the situation where

> "One parent...is being admitted for or being granted settlement on the same occasion under the HM Forces Rule…and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care",

providing that the child is under the age of 18, not leading an independent life or formed an independent family unit and there is no general ground for refusal.

Importantly, the policy states: "caseworkers should note the lack of any maintenance or accommodation requirements".

37. Dependents over the age of 18 are dealt with in s.13.2 and adult children are dealt with in Annex K. The latter sets out the position for "settlement for adult children of former Gurkhas" at paras 9-27. It only applies to applications made on or after 5 January 2015. I was not taken to it by the representatives. It does not directly contemplate an application by an adult child (such as the appellant) relying upon her mother's settlement in the UK as a widow of a former Gurkha servicemen as opposed to settlement by the soldier himself.

38. The picture is not entirely clear in its detail and I was not, as I have indicted, taken systematically through the various policy documents. Mr Hibbs submitted, and Mr Puar accepted in his submissions, that the policy guidance did not explicitly deal with the position of a child of a widow - such as the Claimant would have been following the death of her father in 1990. The overall thrust relevant to the 'historic injustice' argument is, however, less opaque.

39. It was the Claimant's case before the judge that the "historic injustice" arose because after her father's death in 1990, her mother as a widow of a former Gurkha soldier would have been granted indefinite leave to enter (absent that injustice) and that the Claimant would have been able to accompany her to the UK. The judge, of course, found – and it is not challenged – that had that option been available the Claimant's mother would have sought indefinite leave to enter (and be granted it) after 1990 and she would have sought to bring the Claimant (who was two years of age in 1990) with her.

40. As is clear, therefore, it is not contended that the Claimant's mother would not have been able to seek settlement after 1990 in those circumstances nor that she would not in fact have successfully done so. The judge accepted that the Claimant would also have been able to accompany her mother when she found, at para 17 of her determination:

> "all things being equal, had the respondent's policy guidance applied to the appellant prior to 2006 she would have been granted entry clearance as a dependent child".

41. The Claimant was, of course, 2-years of age in 1990 and living with her mother. Her dependence upon her mother could not be sensibly gainsaid in those circumstances. On the basis of the policy documents, it is, perhaps, unclear precisely what the position would be for a dependent child of a widow of a former Gurkha serviceman who has been granted indefinite leave to remain on the basis of her dead husband's service. It requires an understanding both of what would have been the policy position if a policy had applied in 1990 and also an assessment of the factual position, now 28 years later. As I have said, it was common ground that the policies did not explicitly deal with the position of a dependent child of a widow. It is, however, worth noting that in the case of children that "no maintenance or accommodation requirements" apply. The position would have been, in my judgment, either that the Claimant would have had to succeed under the 'child settlement' rule then in force in paras 52 and 53 of HC 251 or that a residual discretion would have been exercised in

her favour. Paras 52 and 53 of HC 251 (which preceded para 297 of HC 395 in effect from 1 October 1994) do contain maintenance and accommodation requirements. Given the antiquity of the factual enquiry, it is perhaps unsurprising that the matter of maintenance and accommodation in 1990 was not canvassed by either party. The position of the Claimant's mother was as a widow of a former Gurkha soldier with, presumably, a pension. It was not suggested before the judge that the Claimant's mother was unable to accommodate or maintain herself.

42. Mr Hibbs placed some reliance upon the findings (set out at para 11 of the judge's decision) in relation to the Claimant's earlier application, in particular her application in 2008 when the Secretary of State was not satisfied that the Claimant would be adequately accommodated without recourse to public funds. That was a situation which, even if correct, arose sixteen years later.

43. In any event, given that in 1990 the Claimant was 2-years of age, her father was dead and her mother was coming to the UK with indefinite leave to enter, I find it difficult to conceive that an ECO would not have exercised discretion in the Claimant's favour to accompany her mother. To suggest the contrary would result in the Claimant having been left in Nepal with her mother in the UK and, so far as the facts before me disclose, a brother living in Nepal.

44. In my judgment, it was open to Judge Frazer to find that but for the "historic injustice" the Claimant would have been able to accompany her mother to the UK following the death of her father if the policy in relation to widows of former Gurkha servicemen had applied at that time.

45. In my judgment, therefore, Judge Frazer was entitled – if Art 8.1 was engaged – to take into account the "historic injustice" which through her parents was perpetrated upon the Claimant in not being able to enter the UK accompanying her mother with indefinite leave to enter after her father's death in 1990. I see nothing in Judge Frazer's assessment at para 90 to indicate that she gave other than proper weight to that "historic injustice" in accordance with the approach set out by the Upper Tribunal in the Ghising case, namely "substantial" or "significant" weight ([56] and [59]) such that it is "likely to outweigh [the public interest in maintaining a firm immigration policy]" in the absence of a "bad immigration history and/or criminal behaviour" (see [59] and [60]). I do not accept Mr Hibbs' submission that the 'historic wrong' has, so to speak, been purged because the appellant has been able to make (albeit unsuccessfully) subsequent applications in 2006 and 2008. To have determined the merits of the applications by the (more onerous) rules then in force would, of course, merely have been to perpetuate the "historic injustice" rather than remedy it. In the absence of any bad immigration history or criminal behaviour to counteract the powerful factors on the Claimant's side, in carrying out the balancing exercise inherent in proportionality the judge was entitled to find that the "historic wrong" outweighed the public interest.

46. That then leaves the first ground concerning the judge's finding that there was "family life" established between the Claimant and her aunt and which would be sufficiently interfered with if the Claimant were removed and so engaged Art 8.1.

47. It was common ground between the parties that the approach, in the case where an adult claims family life existed with another adult relative, is set out by the Court of Appeal in the Kugathas case. The approach in Kugathas has been approved on numerous occasions by the Court of Appeal, most recently in R (Britcits) v SSHD [2017] EWCA Civ 368; Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 151 and SSHD v Onuorah [2017] EWCA Civ 1757**.**

48. In Kopoi, Sales LJ set out the approach at [17] – [19] as follows:

> "17. The leading domestic authority on the ambit of 'family life' for the purposes of Article 8 is the well-known decision of this court in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31; [2003] INLR 31. The court found that a single man of 38 years old who had lived in the UK since 1999 did not enjoy 'family life' with his mother, brother and sister, who were living in Germany as refugees. At para. [14] Sedley LJ accepted as a proper approach the guidance given by the European Commission for Human Rights in its decision in *S v United Kingdom* (1984) 40 DR 196, at 198:
>
> > 'Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.'
> >
> > He held that there is not an absolute requirement of dependency in an economic sense for 'family life' to exist, but that it is necessary for there to be real, committed or effective support between family members in order to show that 'family life' exists ([17]); 'neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together', sufficient ([19]); and the natural tie between a parent and an infant is probably a special case in which there is no need to show that there is a demonstrable measure of support ([18]).
>
> 18. The judgments of Arden LJ and Simon Brown LJ were to similar effect. Arden LJ also relied on *S v United Kingdom* as good authority and held that there is no presumption that a person has a family life, even with members of his immediate family ([24]) and that family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties, such as ties of dependency ([25]).
>
> 19. *Kugathas* remains good law: see e.g. *R (Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368, [61] and [74] (Sir Terence Etherton MR), [82] (Davis LJ) and [86] (Sales LJ). As Sir Terence Etherton MR pithily summarised the position at [74], in order for family life within the meaning of Article 8(1) to be found to exist, 'There must be something more than normal emotional ties'."

That statement of the law was described as "authoritative" by Singh LJ (with whom Sales and Gloster LJJ agreed) in Onuorah at [30].

49. In this case, Judge Frazer clearly had in mind that approach when she found that the ties between the Claimant and her aunt went "beyond normal emotional ties". She found that the Claimant's aunt and her cousin were "in effect her surrogate family". Earlier, the judge recognised that the position was that the Claimant was emotionally and financially dependent upon assistance from her aunt in the UK since she entered as a student in October 2012. Although the judge recognised that the living arrangements were that the Claimant lived away at university during term time, she returned to live with her aunt and cousins in the holidays. She noted, at para 13, that the Claimant's "aunt and family have taken in the [claimant] as one of their own, so to speak."

50. The judge noted at para 14 that the Claimant had a brother in Nepal who had a wife and two children and was unable to provide for her. Her parents were both over 80 and in poor health.

51. In my judgment, it was not irrational or perverse, in the light of evidence, for the judge to conclude that although an adult, the Claimant had formed a dependency upon her aunt, both financial and emotional, that went beyond the ordinary ties between an adult niece and her aunt. The judge found, in effect at para 13 that the Claimant had been taken in by the aunt as part of her family. She was, so far as the evidence before the judge was concerned, wholly dependent upon her aunt and the arrangement of a student living at university during term time and living at home during holiday is not inconsistent with family life existing if that individual has not formed an independent life of his or her own (see, e.g. Singh and Singh v SSHD [2015] EWCA Civ 630 at [24] *per* Sir Stanley Burnton).

52. I am satisfied, therefore, that the judge's finding that family life existed between the Claimant and her aunt was properly open to her on the evidence.

53. The final point raised in the grounds, but not elaborated upon by Mr Hibbs in his oral submissions, is that unlike the usual case involving the family members of former Gurkha servicemen, here the Claimant is not able to establish family life with either of her parents. They are, of course, both now dead. The suggestion in the grounds is that, therefore, there is no causative connection between the "historical injustice" and the interference with the Claimant's family life if she were not allowed to remain in the UK. I do not accept that argument. A "historic injustice" has undoubtedly been perpetrated upon the Claimant through her (now) deceased parents. Had there been no "historic injustice", she would have been in the UK since sometime after 1990 with her mother until her mother's death in 2009. She would then, albeit 2-years plus of age, have been in no better position than she was when she entered the UK in 2012. Her only family in the UK would have been her aunt and who would have been the only family to which she could turn for support. This point was not specifically raised by the respondent before Judge Frazer and it is, in my judgment, too late now to suggest an absence of causative connection based upon a series of hypothetical events dating back some 27 or 28 years.

54. This is not a case where the Claimant cannot establish any interference with "family life" in the UK and has to rely upon "private life" where her claim based upon

"historic injustice" would be somewhat weaker (see Pun (Nepal) v SSHD [2017] EWCA Civ 2106). In this case, to use the word adopted by the Court of Appeal in Pun, the Claimant has an appropriate "peg" upon which to hang her "family life" and the relevance of the "historic injustice" perpetuated against her in assessing the proportionality of any interference with that family life. It seems to me that the inference of a causative link, given the antiquity of that "injustice", reasonably falls to be resolved in the Claimant's favour.

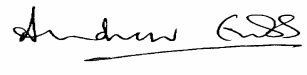
55. For these reasons, the judge did not materially err in law in allowing the Claimant's appeal under Art 8 of the ECHR.

Decision

56. The First-tier Tribunal's decision to allow the Claimant's appeal under Art 8 stands.

57. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

27, March 2018

TO THE RESPONDENT
FEE AWARD

Judge Frazer made a full fee award in the Claimant's favour and, as I have dismissed the Secretary of State's appeal to this Tribunal, I see no basis to do other than confirm that fee award.

Signed

A Grubb
Judge of the Upper Tribunal

27, March 2018