Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13186/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2019	**On 30 August 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

MISS JYOTI MAYA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Jaisri of Counsel instructed by Sam Solicitors
For the Respondent: Ms V Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 1 August 1977. She applied in February 2018 for an entry clearance to settle in the United Kingdom as the dependent daughter of the sponsor, Kes Bahadur Gurung, a former Ghurkha soldier. This application was refused by the respondent on 2 May 2018 on the grounds that she did not meet the conditions of the policy set out in Appendix K or the requirements of Appendix FM of the Immigration Rules. The appellant at the age of 40 did not fall within the scope of the appendix and in any event she had not been part of the family unit for more than two years. Appendix FM did not apply as the appellant did not declare any personal incapacity. The case was also considered under

Article 8 in the light of the impact of the historic injustice identified in **Gurung & Ors [2013] ECWA Civ 8** and **Ghising & Ors [2013] UKUT 00567**. It was concluded that it was proportionate to refuse the appellant's application. The appellant appealed and her appeal came before a First-tier Judge on 2 May 2019. The judge summarised the evidence before her as follows:

> "6. The tribunal heard from the sponsor, Kes Bahadur Gurung via a Nepali interpreter. He adopted his witness statement and was cross examined. His evidence was as follows:
>
> a. He was born in Nepal in 1944 and enlisted in the Brigade of Gurkhas on 28 November 1961. He was discharged in 1970 after more than 8 years' service.
>
> b. He was married to Kumaya Gurung until her death on 23 September 1978. They had two children, a son N. and the Appellant.
>
> c. He married his current wife Khum Kumari Gurung in 1983 and they have no children together. Although his second wife is the Appellant's stepmother, she has been involved in her upbringing since the age of 6 and they have formed a close bond.
>
> d. His son lives in Nepal with his wife and two children.
>
> e. He was granted settlement in the United Kingdom as a former Gurkha on 28 August 2009 and arrived in the United Kingdom in October 2009. His wife joined him in March 2010 and they are present and settled in the United Kingdom.
>
> f. When he applied for settlement, he would have included the Appellant in the family application but the policy was not in force at the time and did not cover dependents under the age of 30.
>
> g. He had wanted to apply for settlement on retirement from the Gurkhas in 1970 but was not allowed to do so until 2006. When the sponsor was discharged from the Army, the Appellant was not over 18.
>
> h. Since he has settled in the United Kingdom, he has visited Nepal frequently to spend time with the Appellant. He sends money to her and she has no other source of income. She collects the money in cash and does not use a bank account, which is not unusual in Nepal. She has no job and no independent life in Nepal.
>
> i. She attempted to look for a job but with no success. She has no qualifications which makes it hard to look for work. As a female, it is hard to find work but she looked for work as a waitress in a hotel but she did not get that job. It is not the system to apply for jobs, just to ask around. She has asked around and has been told that there are no jobs. She has not tried looking for jobs again as she is not physically strong.

j. She spends her day looking after herself, cooking and living on the money sent by the sponsor. The sponsor was not aware if the Appellant had any hobbies or if she had any friends or boyfriends.

k. The Appellant and her brother get together at festival times and speak regularly but he has his own family to worry about.

l. The sponsor believes that it will be in the Appellant's best interests to come and live in the United Kingdom where she would be able to find a job and she would not be a burden on the public purse.

7. The Appellant's step-mother submitted a witness statement which was in virtually identical terms to the sponsor's statement and she did not give oral evidence although she attended the tribunal hearing".

The judge notes the case for the respondent observing:

"10. The Respondent submits that the application has been contrived to meet the considerations in *Ghising* and *Gurung*. The sponsor has no information about the Appellant's day to day life in Nepal. It appears that she sits at home and does nothing except cook her meals. She has applied for one job and that was not even a proper job application, just an enquiry. It is submitted that it is unlikely that the Appellant has not formed an independent life in the eight years since her parents moved to the United Kingdom".

2. It was also submitted that the relationship between the sponsor and the appellant did not go beyond the normal father/daughter relationship and it was not disproportionate to refuse entry clearance. For the appellant it was argued that there was real and effective support between the sponsor and her. The sponsor looked after his family until he had the right to come to the United Kingdom and he continued to visit his daughter and lived with her when he visited Nepal. She had no opportunity to apply to come to the UK until 2015 and even before that date he was sending her financial support and it was denied that the situation had been contrived. There was no significance in the appellant not having a bank account as it was a cash economy and there were no formal job application processes in Nepal "people just go round asking for jobs". Family life continued between the sponsor in the United Kingdom and the appellant within Article 8(1).

3. The judge reviewed the law and set out her conclusions as follows:

"18. In January 2015, a new policy was introduced in relation to applications for Adult Dependent Children including Annex K to Chapter 15, Section 2A of the Immigration Directorate Instructions (Annex K). One of the requirements of Annex K is that the adult dependent child is between the ages of 18 and 30 and that they have not lived apart for more than two years.

19. If the Appellant does not meet the requirements of Annex K, the tribunal must consider whether Article 8 applies. Article 8 provides a qualified right to respect private and family life except

where necessary in a democratic society to provide for the interests of national security, public safety or the economic well-being of the country.

20. The weight to be given to the historic injustice will normally require a decision in the Appellants' favour (*Ghising* [2013] UKUT 567).

21. paragraph EC-DR1.1 of Appendix FM of the Immigration Rules sets out the requirements for entry clearance for an adult dependent relative. These include in E-ECDR 2.4 the requirement that the applicant, as a result of age, illness or disability, require long-term personal care to perform everyday tasks.

22. The Respondent must also consider the case outside the rules on the basis of exceptional circumstances as contained in the published guidance.

23. The burden of proof lies on the Appellant. The standard of proof is the balance of probabilities.

F. FINDINGS AND DECISION

24. I find that the Appellant does not fall within the scope of Appendix K. She is over 40 years of age and, at the time the sponsor applied for settlement, she was over the age of 30 and therefore fell outside the scope of the adult dependent provisions.

25. In addition, the sponsor and his wife relocated to the United Kingdom in 2010 and no longer lived in a family unit with the Appellant after that date. This is a period of more than two years. Although the sponsor has visited frequently, he appears to have no knowledge of how the Appellant lives day to day and how she occupies her time and I do not regard them as living in the same household.

26. Having found that Appendix K does not apply, I must consider the application under the Immigration Rules, in particular Appendix FM. Section EC-DR deals with applications by adult dependent relatives. There is no evidence that the Appellant as a result of age, illness or disability, requires long-term personal care to perform everyday tasks. She therefore does not qualify under the Rules.

27. I now go on to consider the application under Article 8(1) right to family life. The case law authorities provide that I must take into account the historical injustice of Gurkhas not being able to settle in the United Kingdom until many years after the date of their discharge. If I am satisfied that the sponsor would have settled earlier if he was able to, I can take that into account if the result of the injustice is that his children, who would have qualified on age grounds then, no longer qualify. The sponsor applied for settlement in 2009 and there is no evidence that he wanted to include the Appellant on that application.

28. I therefore conclude that the issue of historical injustice is not relevant to this Appellant.

29. It is submitted that the Appellant does not have any skills and qualifications which is why she depends on money being sent by

family in the United Kingdom. It is also submitted that she would be able to work if she came to the United Kingdom so that she would not have recourse to public funds. There is no explanation why she would be able to work in the United Kingdom but not in Nepal, where she speaks the language and has experience of life there.

30. I find that there is no reason why the sponsor cannot continue to send the Appellant financial support while she is in Nepal. Further, there is no reason why they cannot continue their family life in Nepal, the sponsor having lived there for nearly all his life.

31. I find that the decision to refuse the Appellant entry clearance is an interference with her right to a private and family life. However, I find that the refusal is proportionate taking into account the Respondent's legitimate aim in exercising and managing immigration controls and taking into account the historic injustice factor.

32. I find that there are no reasons to exercise discretion to allow the appeal outside the rules and Article 8".

4. The judge accordingly dismissed the appeal. Permission to appeal was granted by the First-tier Tribunal on 17 July 2019. In ground 1 a fairness argument was deployed – issue was taken with what the judge had said in paragraph 25 about the sponsor apparently having no knowledge of how the appellant lives day-to-day and how she occupied her time. It was said that this matter was not put to the sponsor and she had not had a fair hearing – reference was made to **AM (fair hearing) Sudan [2015] UKUT 656**.

5. In ground 2 it was asserted that the judge had erred in paragraph 27 in concluding that the historical injustice did not apply given that in 2009 over 18 dependants did not qualify.

6. In ground 3 it was submitted that the correct test was set out in **Jitendra Rai v Entry Clearance Officer New Delhi [2017] EWCA Civ 320**. Two extracts were quoted, one from paragraph 39 "whether the applicant 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". The second extract was taken from paragraph 40 "whether, as a matter of fact, the appellant himself still enjoyed a family life with his parents …".

7. It was submitted that the judge had failed to address this in her determination.

8. In ground 3 it was submitted that the judge had not assessed Article 8(1) life as clarified in the case of **Jitendra Rai** and that the test in **Kugathas [2003] EWCA Civ 31** did not require more than real or committed or effective support. Reference was again made to paragraph 39 of **Rai**.

9. At the hearing Ms Isherwood lodged without objection the Presenting Officer's notes of the proceedings before the First-tier Judge. This she said was mostly in relation to ground 1.

10. Mr Jaisri submitted that ground 1 was not his most significant ground. He referred to paragraph 42 of **Rai**, the crucial question was whether

> "Even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under Article 8(1)".

He submitted there was real and effective and committed support at the time of their departure and at the date of hearing. The approach of the First-tier Judge had been in error. Article 8 had to be assessed at the appropriate time. The fundamental error in the case was the assessment of Article 8.1.

11. In relation to the Record of Proceedings that had been supplied, this broadly reflected his own note. This was not a ground he had intended to pursue. It was not a fundamental or significant point.

12. Ms Isherwood submitted that the way ground 1 had been dealt with had a knock-on effect on the remainder of the determination. What had been said by the judge, for example in paragraph 6.j about the appellant spending her day looking after herself, cooking and living on the money sent by the sponsor, had been precisely reflected in the Record of Proceedings. The judge had in mind as appeared from paragraph 13 of the decision the submission that there was real and effective support between the sponsor and the appellant and she had not ignored the relationship prior to the sponsor's departure from the United Kingdom. She had been entitled to make her findings in paragraphs 24 and 25 of the decision. The judge had acknowledged the weight to be given to the historic injustice. Ms Isherwood referred to paragraph 43 of **Rai** "whether the appellant did enjoy family life at the relevant time was, of course, a question of fact for the Upper Tribunal ...". While the determination was short there was no material error of law.

13. In response, Mr Jaisri submitted that it would have been no point in applying for an entry clearance in 2009 given that the appellant would not have qualified.

14. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

15. The judge heard oral evidence from the sponsor. As is submitted by Ms Isherwood the decision is a short one but none the worse for that. Ground 1 is accepted by Counsel not to be his strongest ground and the allegation of unfairness has no merit at all given the note of proceedings lodged by Ms Isherwood. What the judge said in the determination precisely reflects

the points raised at the hearing in cross-examination. It was argued on behalf of the respondent as recorded in paragraph 10 that the application had been contrived. The judge properly went through the appellant's case finding that she did not fall within the scope of Appendix K or the Immigration Rules before turning to Article 8(1), the right to family life. The judge had in mind the issue of the historical injustice and did not err in concluding as she did that there was no evidence that the sponsor wanted to include the appellant on that application.

16. As Ms Isherwood submitted if ground one failed this had a knock-on effect when considering the remaining arguments. It is arguably implicit from the judge's observations in paragraph 25 that family life was no longer subsisting between the sponsor and the appellant.

17. In any event the judge in paragraph 31 made it clear she had taken into account both the issue of interference with family and private life and the "historic injustice factor" when considering the question of proportionality. It was properly open to her to conclude that the refusal was proportionate in all the circumstances.

18. I do not find that the decision of the First-tier Judge was materially flawed in law.

Appeal dismissed.

Anonymity Direction

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date: 22 August 2019
G Warr, Judge of the Upper Tribunal