Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09067/2014
IA/09068/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd June 2015	**On 3rd August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR GANESH KUMAR PUN
MRS JYOTI PUN
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Jaja, Counsel instructed by Howe & Co
For the Respondents: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nepal, husband and wife, and born on 10th February 1977 and 22nd November 1987, thus aged 38 years and 28 years respectively. Mr and Mrs Pun appealed the refusal of the Secretary of State dated 30th January 2014 to grant them leave to remain as the adult dependants of a former member of the Brigade of Gurkhas, Mr Ril Bahadur Pun, who is now present and settled in the UK.

He was enlisted in the Brigade of Gurkhas in 1968 and was discharged from that service on 18th March 1989.

2. The second appellant arrived in the UK on 27th October 2010 with leave as a Tier 4 (General) Student and the first appellant arrived in the UK on 28th November 2011 as a dependant spouse. They were granted leave to enter until 30th April 2013. On 11th April 2013 the appellants applied for indefinite leave to remain in the UK as the adult dependent relatives of the first appellant's father.

3. A brief history to this appeal is that Judge Youngerwood of the First-tier Tribunal heard and allowed the appeals on 16th September 2014. The judge found no family life as the appellants had no physical or mental problems, were both working and were no longer children or even young adults and there was no emotional dependency but he found they had established a private life and purported to follow **Gurung (CA) [2013] 1 WLR 2546,** which highlighted that the historic injustice of the less favourable treatment accorded to Gurkha veterans was a substantial factor to be weighed in the proportionality balancing exercise although not determinative.

4. The decision of Judge Youngerwood was challenged by the Secretary of State who identified that **Gurung (CA)** and **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) (Nepal) [2013] UKUT 567**, established that where there was an interference with family life sufficient to engage Article 8, recognition that a family had been the victim of a "historic injustice" may well be relevant in determining proportionality under Article 8(2), **JB (India) & Ors v Entry Clearance Officer [2009] EWCA Civ 234** (11th February 2009), but in this particular case the judge found that there was no family life and as such the consideration of historic injustice was irrelevant to the proportionality assessment.

5. An error of law was found and the decision was set aside.

6. At the resumed substantive hearing Ms Jyoti Pun gave oral testimony. She confirmed that she and the first appellant married in 2005 and that her husband was living in the family home and she joined them. Her father in law came to the UK in 2009 and she came in 2010 and her husband joined her in 2011. Her application for her son to join them had not been allowed. She stated that her father in law paid for her college fees. She would help take her mother in law to hospital. The father in law could not take her to hospital as he was working full time. On the day of the hearing, however, another close relative who lived nearby was assisting her. The second appellant had been working part-time since 2011 but had stopped working when she became pregnant. Since 2005 she had remained living with her parents in law. She also had family in Nepal who were 2 hours travel away from where she lived in Nepal.

7. Under cross-examination she stated that she and her husband sent money for their son John in Nepal. Both she and her husband paid for the bills. She now paid for shopping her child in the UK. She finished studying in 2013. Since her husband had come to the UK in 2011 he had been working. He had helped her whilst she was studying. When she came to the UK she brought money with her from Nepal which

she had saved. Her father in law had helped. Her own family in Nepal had a shop and a business.

8. Ganesh Pun, the second appellant gave oral testimony. He confirmed he was 38 years old. He had always stayed with his parents in Nepal and had continued to do so because of Nepalese culture, which stated that a son should look after his parents. He had a younger sister who lived in Hong Kong. He worked in the same restaurant in Colchester as his father. He worked regularly 5 days a week. He earned approximately £700 per month. He used it for rent and food and bills. When he came to the UK he confirmed that he had intended to stay. He added that he did work for one year whilst in Nepal repairing computers. He left school at the age of 25 or 26 years. At present some relatives were living in his parents' house in Nepal. The appellant then changed his evidence and stated that he left college at the age of 25 or 26 years.

9. Ril Bahadur Pun gave oral evidence. He worked full time at a restaurant and his son worked with him. He did not own the business. When his daughter in law came to the UK she lived with him. He paid for her tickets and her fees. He stated that he wanted his son to be with him all the time because he was his son. He confirmed that his son worked in Nepal for about 9 months. It was the culture in Nepal for the son to live with the parents and to take responsibility.

10. Under cross-examination, he confirmed that he did not know when the daughter in law had finished her course of studies. He confirmed that he once paid the tuition fees when she came in 2010. The college was paid from Nepal. The sum was approximately £2,500. His son contributed to the bills of the household. The witness confirmed he earned about £1,000 per month. He stated that his son and daughter decided they did not wish to return until the end of 2012. He claimed his son finished his studies in Nepal at the age of 20. He finished school at 17 years and commenced a commerce course of 2 to 3 years. He completed the course at 20 years. He would then help cultivate the land at home. When challenged about the discrepancy between the first appellant's evidence and his regarding the date of leaving school he stated that his son kept failing his examinations. He could not remember whether he paid for a second tranche of fees for the second appellant.

11. In submissions Ms Pal referred to the Reasons for Refusal letter. She denied there was family life. The appellants had a son in Nepal whom they continued to support. The first appellant worked on a regular basis. There was no indication that the appellants were dependent financially on the father-in-law. They paid bills on a regular basis. On his own evidence the first appellant earned not far off that which the father earned. The family life was with the child in Nepal and the new baby. It was proportionate that they return to Nepal. Historic injustice only 'bit' where there was dependency but there was none in this case. She referred to paragraphs 50 and 51 of **Gurung (CA)**. The appeal should be dismissed.

12. Ms Jaja referred to the approach adopted in **Ghising (family life)** paragraphs 50 to 62. She submitted that Nepalese culture, such that the son would live with his father, was not dealt with by **Gurung (CA)** and the facts need to be considered. She referred

to the Reasons for Refusal letter which indicated that the appellant had re-established family life in the United Kingdom. She referred to **Ghising (Ghurkhas/BOCs: historic wrong: weight)** [2013] UKUT 00567 which identified that the historic wrong suffered by the Gurkhas should be given substantial weight in the Article 8(2) balancing exercise. The family were not on benefits. Article 8 was fact sensitive and this family were in Nepal together. She accepted that the historic injustice applied to family life.

Conclusions

13. Article 8 of the European Convention on Human Rights provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

14. We also note **Huang v The Secretary of State for the Home Department** [2007] 2 AC 167, which reads at [18]:

> "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."

15. It is clear from the authorities that should *family life* be engaged historic injustice should be given substantial weight. As stated in **Gurung (CA)**

> "in the absence of countervailing factors appeals should ordinarily be determined in an appellant's favour where Article 8 is engaged and, but for the historic wrong, the appellants would have been settled in the UK a long time ago."

16. If the respondent can point to matters over and above the public interest in maintaining a firm immigration policy which argue in favour of removal or the refusal of leave to enter, these too must be given appropriate weight. Thus a bad immigration history and/or criminal behaviour may still be sufficient factor to effect refusal. It is accepted that being an adult child of a Gurkha is *not* a trump card.

17. We therefore considered first whether family life was established in this case and addressed the question of when does an adult cease to enjoy family life with his parents?

18. **Ghising (family life - adults - Gurkha policy)** [2012] UKUT 00160 (IAC) explored the concepts in relation to Article 8 and set out the principles in relation to family life

and adult children. **Ghising (family life)** at [62] accepted that each case is highly fact-sensitive and that rather than applying a blanket rule with regard to adult children each case should be analysed on its own facts.

19. As stated in **Gurung** (CA) [45]:

> "Ultimately, the question whether an individual enjoys **family life** is one of fact and depends on a careful consideration of all the relevant facts of the particular case…"

and at [46]

> "… the Ghising case [2012] UKUT 160 contains a useful review of some of the jurisprudence and the correct approach to be adopted"

20. Paragraphs 53-55 the court in **Ghising (family life)** recorded

> '53. In **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31 at [14], Sedley LJ cited with approval the Commission's observation in **S v United Kingdom** [1984] 40 DR 196:
>
> > "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."'
>
> '54. Sedley LJ accepted the submission that 'dependency' was not limited to economic dependency, at [17]. He added:
>
> > "But if dependency is read down as meaning "support" in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies".
>
> 55. Arden LJ said at [24] and [25]
>
> > "24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life
> >
> > 25. Because there is no presumption of family life, in my judgment a 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 tie might exist if the appellant were dependent on his family or vice versa." '

At paragraph 61 of **Ghising (family life),** the court stated that:

> "Recently the ECtHR has reviewed the case law in **AA v United Kingdom (Application no 8000/08)**, finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them."

21. The test is however is that the ties must be over an above the normal emotional ties and in **Etti Adegbola [2009] EWCA Civ 1319 Pill LJ identified at [23]**

> 'I follow that a distinction between underage children and adult children may for many purposes properly be drawn. It is, however, common knowledge that many children, both in this jurisdiction and possibly in other member states, do remain in family homes beyond the age of majority and at least until they are well into their twenties. Having regard to the ordinary use of words, I find it difficult to say that family life determines, subject to exceptional circumstances, when the child or children attain their majority'.

22. Although family life can continue beyond the age of 18 years, there must come a time when that link will be cut and in these circumstances even when it was presented as 'normal' in the Nepalese culture that families lived together for many years it must be that once an adult child is married and has children, that his family life, although continuing for the purposes of family links, may no longer be protected for the purposes of Article 8.

23. **AA v United Kingdom (Application no 8000/08)**, established that a significant factor in relation to whether or not the adult child has founded a family of his own. If he is still *single* and living with his parents, he is likely to enjoy family life with them.

24. At [47] **AA** states

> 'However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in Onur v. the United Kingdom, no. 27319/07, §§ 43-45, 17 February 2009, BAILII: [2009] ECHR 289, the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional element of dependence normally required to establish "family life" between adult parents and adult children. In A.W. Khan v. the United Kingdom, no. 47486/06, BAILII: [2010] ECHR 27, § 32, 12 January 2010, the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34-year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration'.

25. In assessing the relevant factors for family life Arden LJ in **Kugathas** identified that

> '24. 'There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life'.

26. The first appellant was born in 1977 entered the United Kingdom at the age of 34 years approximately four years ago having previously married in Nepal in 2005. He claimed that he and his wife the second appellant had always lived in his family home. His father, came to the United Kingdom in 2009. The second appellant came in 2010 and the first appellant in 2011. Thus there was a period when the first and

second appellant were living together without the sponsor in Nepal albeit in the family home. That said the first appellant also gave evidence that before he came to the UK he worked for a period of approximately one year repairing computers. Prior to that he also worked on the family land (although not on a commercial basis). He was educated to the age of at least 20 years (according to his father) and 25 or 26 years according to the first appellant.

27. If the word 'support' is to have meaning in the emotional sense, it must be the case that the 'real' emotional support that is derived is between the spouses. That would include the relationship between the first appellant and second appellant and the sponsor and his wife. Although it was stated that there was emotional dependence between the father and mother and son and daughter in law we cannot accept this as constituting or substituting for real emotional support such as that between spouses. Even though the various personnel lived together the evidence regarding their own emotional support was in fact limited and although the family must share family links the real emotional bonds must be within the husband and wife relationship. There was also some element of contradiction in the evidence between the first appellant and his father as to when he left school. Had they been that close emotionally we find that their evidence would have been more in unison and we also concluded that the second appellant had expanded his time at school to have bolstered his apparent dependence.

28. The case was also put forward and argued on the basis of economic dependence. The sponsor was said to work full time and support the son and his family. In fact both the son and the daughter had been working since they entered the UK and the son confirmed that he contributed to rent, food and bills. The appellants also confirmed that they sent money to their son in Nepal to pay for his schooling in the sum of approximately £100 to £200 per month. The financial arrangements were more akin to shared housing where the family split the bills. We found no particular support in the financial sense.

29. We also note that the appellants are deriving support both emotionally and financially from the support that is being afforded to their son in Nepal from the second appellant's parents because he lives with them.

30. The second appellant came to the UK having been sponsored by the father in law. She came on the basis of being a student and not as part of any family reunion. The sponsor was said to have paid her tuition fees. The sponsor was clear in his evidence that he only paid one tranche in the sum of approximately £3500. The invoice was split into two and payments were made in two separate years with the total sum of £7,000 paid. There was no evidence of remittance receipts made to either appellant whilst in Nepal and although it may be the case that some payments were made for the second appellant to come to the UK, and an initial sum paid for fees the father was adamant that he paid only the first tranche. A second sum was paid and this would have been the responsibility of the second appellant and no doubt her husband.

31. Financial support is said to be expected in Nepalese culture and thus even though the son and daughter in law were said to live in the family home in Nepal this does not suggest a bond over and above that usually to be expected from the relationship between adult parents and their children particularly in Nepal.

32. The son, the first appellant, came to the United Kingdom as the second appellant's dependent, and not under the Gurkha Policy (Chapter 15 Section 2A Of the Immigration Directorate Instructions) as an adult dependent child. There was no application made for entry clearance as a family member of the Gurkha father despite policies in relation to Gurkhas being in force at that time.

33. Subsequent to entering the United Kingdom the appellants had another child in December 2014 in the United Kingdom. They now have a child in Nepal aged 7 years old and the key family life in this matter is that between the appellants and their minor children, one of whom remains in Nepal, and whom they state they support, and the their child here whom they state they also support. Although the minor child is not party to the appeal any decision must take into account her best interests as a primary factor and that is to remain at such a young age with her parents. She, as is the appellants, and the son in Nepal, Nepalese.

34. Evidence was given that the second appellant assisted with hospital visits but on the day of the hearing the wife was assisted by another relative who lived nearby. Evidence was given that the wife had access to the National Health Service and even though the husband works we do not accept that dependency is established. There were no health needs expressed by the appellants.

35. In sum we do not accept that the first appellant and thus the second appellant has engaged a family life within the United Kingdom with Bahadur Pun and his wife. We cannot accept that a son who has been educated and worked and has reached the age of 38 years, and is in good health, and has married and now has two children, one of whom is still in Nepal, can still be said to be dependent emotionally or in the United Kingdom economically on his parents. Consequently we do not accept that there is any family life between the second appellant and her father and mother in law in the United Kingdom.

36. Ms Gaja submitted that the Secretary of State's refusal letter accepted that family life had been re-established in the United Kingdom but a careful reading of that letter discloses that the respondent did not accept that the relationship between the appellants and their sponsors went beyond the normal emotional ties.

37. On the basis that family life is not engaged we considered the proposition that historic injustice should apply to private life. It was argued at the error of law stage that the concept of 'family life' was necessary in 'out of country' cases because there was no obligation to respect the private life of a person in Nepal but the Tribunal was required to do so in removal cases. It submitted that it was irrelevant whether the bonds were labelled as family or private life as the Convention looked at substance and not form. We note **AA v UK [2011] ECHR 8000/08** at [49] states:

> "However it is not necessary to decide the question given that as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of private life within the meaning of Article 8. Thus regardless of the existence or otherwise of a family life the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on family life rather than private life it observes that in practice the factors to be examined in order to assess proportionality of the deportation measure are the same regardless of whether family or private life is engaged."

38. As stated at paragraph 41 of **Gurung [2013]**,:

> "The crucial point is that there was a historic injustice in both cases **the consequence of which was that members of both groups** were prevented from settling in the United Kingdom. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is settled in the United Kingdom 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.
>
> …"

39. To date we find that the case law has applied historic injustice as a factor in relation to assessing proportionality when family life, not private life, is engaged and family life has not been made out here.

40. We turn, however, to the assessment of the appellants' private life and applying the five stage test from **Razgar** [2004] UKHL 27. There is no doubt that private life has been established as both the first and second appellants have been here for four and five years respectively. The second appellant has studied here. The engagement for the establishment of private life under Article 8 is low **AG (Eritrea)** [2007] EWCA Civ 801. Applying Appendix FM and Paragraph 276 ADE, which is the starting point, **SS Congo v SSHD** [2015] EWCA Civ 387 both appellants are Nepalese and their child here is Nepalese and thus they cannot take advantage of Appendix FM. There is no qualifying child. Neither appellant has been in the United Kingdom for 20 years. The second appellant entered as a student in 2010 and the first appellant entered in 2011. We do not accept that there would be significant obstacles to their return. They have relatives in Nepal and indeed their child in Nepal is with the second appellants' parents there who have a business and shop. There is still the property that they stayed in previously which is at present inhabited by yet further relatives. The decision taken by the respondent is in accordance with the law and framed as being necessary for the protection of the rights and freedoms of others.

41. Ms Jaja conceded that the application of the historic injustice factor applied primarily to family life cases and not those with private life. Previously it had been argued that because the cases were entry clearance cases private life had not come into the equation. It would appear, however, that the Court of Appeal considered the appeal in **Gurung** the case of Shani Gurung who appealed against indefinite leave to remain

in the United Kingdom. Part of his appeal was against the finding that the Secretary of Sate's refusal to consider the claimant under the terms of the extra-statutory policy was lawful. In the discussion on the policy the Court of Appeal stated this at [20]

> 'The general rule stated in the policy in relation to the **dependent** [our emphasis] adult children of Gurkhas is not so ambiguous in its scope as to be misleading as to what would be a sufficient reason to substantiate a discretionary claim to settlement. On the contrary, the general rule is clearly stated in Annex A. It is that dependent adult children will not 'normally qualify for the exercise of discretion in line with the main applicant.'

and at [24] that

> '… the purpose of the policy was stated by the Secretary of State to be to remedy the historic denial to Gurkhas of a right to settle in the UK.'

42. It would appear that the case of Mr Gurung was framed by way of his private life but he relied on his claim to have retained a family life to use the historic injustice principle. Thus there was a recognition that family life was still required in order to enlist the assistance of historic injustice.

43. We add as further justification for our rejection that historic injustice applies to private life, that the discretionary policy, which attempt to set out redress for historic injustice, refers to 'dependents' and are not applicable to circumstances where no such dependency and only private life is engaged. The policies do not refer to a married couple or group of individuals who have come to the UK on a completely separate basis - in this instance as a Tier 4 dependant under the Points Based System. It is Gurkhas and their dependents and adult dependent children who were to be given the advantage of the relevant policy. In effect it is being requested in this appeal, that the principle also be extended to non-dependents dependents (the appellants' children). The fact that private life is being relied on is indicative in itself that the link between the appellants and the sponsor has indeed been broken for the purposes of historic injustice.

44. Specifically, **Ghising (CA)** would appear to be predicated on the basis that where family life was not engaged historic wrong would *not* come into play. The reference to family/private life in the context of **Ghising (Gurkhas /Bocs)** was a discussion of the reversal of burden of proof not an acceptance that historic injustice applied in cases where family life was not found.

45. Even for family life historic injustice is not a trump card but still to be weighed in the balance. The Tribunal in **Ghising (Gurkhas /Bocs)** confirmed

> "47. We reject Mr Jesurum's submission that, whatever the nature and quality of family life, the Appellants had a right to enjoy it, and therefore Article 8(1) was inevitably engaged. That this proposition is not correct can be seen from paragraph 14 of Patel, where Sedley LJ said:
>
> > 'You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds

which constitute family life will no longer be there, and art. 8 will have no purchase'.

48. But as Sedley LJ immediately went on to say 'what may constitute an extant family life falls well short of what constitutes dependency'. In this regard, we note the useful analysis by the Tribunal in **Ghising** (at paragraphs 50 to 62) of the case law on family life between parents and adult children, culminating in the finding that:

'62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1).'"

46. Therefore even if historic injustice does apply in relation to private life, which we do not accept, we contend that it would be afforded far less weight in these circumstances.

47. When considering proportionality the interests of the child now born in the United Kingdom must be considered as a primary factor under Section 55. A child's best interests at such a young age is to remain with her parents both of whom will be removed together. Her family and private life are identified with her parents **ZH (Tanzania) v SSHD** [2010] EWCA Civ 207. She is Nepalese and has not even started education in the United Kingdom. She would in Nepal have the benefit of her sibling. Although Section 55 does not apply to the child in Nepal his interests should have some bearing on the matter. Although he is living with his grandparents he is separated from his mother and father who are forging a life without him thousands of miles away. He has been brought up in the Nepalese culture and there is no evidence that he can speak English. His interests, like his sister's interests, are to be with his parents and to be able to live and be brought up in his own native culture.

48. The appellants in this instance entered the UK as a student and her dependent. They have been in the UK since November 2011 and October 2010 respectively, the second appellant four and half years and the first appellant three and half years. The first appellant although entering as a dependent and on a temporary basis stated that it was his intention to remain in the UK when he entered. They have lived with the family as described above since entry but this, as found above, was on a sharing basis. Both appellants knew when they entered the United Kingdom that there was no guarantee that they would be able to remain here and declared that it was their intention to return when they applied to come.

49. Section 117B of the Nationality Immigration and Asylum Act 2002 must also be considered.

'117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in

> the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

50. As can be seen from the deliberations above not only is the first appellant unable to speak English, the second appellant could speak in halting English, but in addition the private life of both appellants was formed when their status was known by both of them to be precarious. **AM (S 117B) Malawi** [2015] UKUT 00260 (IAC) confirmed that an appellant can gain no positive right to a grant of leave to remain from either S117B(2) or (3) no matter the strength of his financial resources. Indeed the case was being presented on the basis that the appellants were at present financially dependent, albeit on the sponsor. There was no suggestion that private rather than NHS healthcare had been enlisted for the birth of the second child to the appellants which occurred in the United Kingdom.

51. It is necessary to look at the totality of social ties between settled migrants, and the community in which they live, as part of the consideration of their private lives and it will no doubt be an interruption of the ties that have been formed by the appellants and the father and mother with whom they live. We have taken into account the needs of the father and mother, who are settled migrants, and their health needs but as stated above they have each other, access to funds, the NHS and relatives here. The appellants and the relatives in the UK can keep in touch through modern methods and there is nothing to stop them visiting and continuing financial support as was effected previously. The second appellant has had the advantage of education in the United Kingdom which will stand her in good stead on return. The appellants have relatives and the prospect of housing in Nepal either with in the home which is retained, which would appear to have some land or with the parents of the second appellant.

52. Any private life will continue in respect of all its essential elements and there is the prospect that the appellants' family life will be enhanced. We take into account the judgments of **Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)** and **Patel and**

Others v SSHD [2013] UKSC 72, in particular that Article 8 is not a general dispensing power.

53. We repeat the words of Sedley LJ at paragraph 14 stated in **Patel [2010] EWCA Civ 17** because of their relevance and importance in this case*:*

> 'You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase'.

54. We find that there is no family life in this instance and thus the principle of historic injustice does not apply. The chain of family life had been broken not least by the marriage of the first and second appellants. Even if it is asserted that family life was reasserted in the UK as pointed out in **Y v Russia** [2008] ECHR 1585, a consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. That must be the case here. Even if the principle of historic injustice does have purchase in the context of private life it must have less weight than the 'substantial' weight afforded in family life cases not least because the appellants have forged their own independent bonds and their responsibilities, which now lie with each other and their own children.

55. The right that has been established is such that the weight to be afforded to the respondent's position outweighs the weight to be afforded to that of the appellants. Applying **Huang v Secretary of State for the Home Department** [2007] UKHL 11 we were not persuaded that the private life of the claimants would be prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. We find that the decision is a necessary and proportionate response to any interference in the Article 8 rights.

Order

Appeals dismissed.

Signed Date 1st July 2015

Deputy Upper Tribunal Judge Rimington

In the light of the decision to re-make the decision in the appeal, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I make no award as the appellants have been unsuccessful in all aspects of their appeals.