



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08473/2015
HU/08476/2015

THE IMMIGRATION ACTS

Heard at Field House
On: 10 August 2017
and 10 November 2017

Decision and reasons Promulgated
On: 29 November 2017

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR SHREE CHANDRA RAI
MISS SUSHMA RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jesurum of Counsel

For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nepal born on this 16 May 1987 and 19 December 1988 respectively. They appealed against the decisions of the respondent dated 23 September 2015 to refuse to grant them entry clearance as the adult dependent son and daughter of their parents

present and settled in the United Kingdom under the Gurkha Policy set out in Annex K of IDI Chapter 15.

2. The appellants appeal was dismissed by First-tier Tribunal Judge Mace following a hearing at Hatton Cross on 11 May 2017. Leave to appeal was granted by First-tier Tribunal Judge Ford, stating that it was arguable that the Tribunal erred in its consideration of Article 8, in particular when finding that Article 8 was not engaged in respect of family life.

First-tier Tribunal Judge's decision

3. The Judge acknowledged that the grounds of appeal rely only on family life of the appellant's pursuer to Article 8 because it was accepted that the provisions of Annex K are not met by the appellants. The Judge's first consideration was whether there are sufficient links exists between the appellants and their sponsor to give rise to the protection of Article 8.
4. The Judge considered the guidance in the case of **Kugathas v SSHD [2003] EWCA Civ 31**, that relationships between adults would not necessarily require the protection of Article 8 without evidence of further elements of dependency, involving more than the normal emotional ties. The Judge understood that dependency is not limited to economic dependency and that family life may continue between a parent and child even after the child has attained his or her majority.
5. The Judge stated that the witness statements of both appellants are in identical terms. The appellant's both state that before their parents went to live in the United Kingdom they were living as a family unit in Nepal. The Judge stated that the appellants and the sponsor have been in regular contact and share a very special bond with each other. The judge noted that the sponsor, Mr Rai gave evidence that he has returned to Nepal twice in October 2013 until January 2014 and February 27 of March 2017 for a month and his wife has also visited Nepal three times. In respect of financial support, the Judge noted there are money transfer remittances covering the period of 2011 to November 2016. The amounts vary but are generally around £300 but there are also some significantly larger transfers in amounts of £1500- £3,000.
6. The Judge noted that the first appellant in his statement had a work permit for Malaysia and claims that he did not travel and work in Malaysia. The first appellant's explanation is that his parents did not let him go to Malaysia as they heard that many Nepalese labourers are being exploited in Malaysia without payment. Also, he did not want to leave his sister alone in Nepal.

7. The Judge noted that the first appellant asserted in her statement that she has only completed her +12 exams and was unable to continue her education due to their financial condition. However, he stated, a higher secondary education board certificate was produced indicating a pass in a number of subjects including accountancy, economics, business studies and marketing which demonstrates later education which was not indicated by the sponsor.
8. The Judge stated that he accepts that there are genuine ties of love and affection between the appellants and their parent's. However, the Judge stated that when considering the evidence of emotional ties, he notes firstly that the statements of the two appellants are almost completely identical in their content. The statements talk about conversations that they have had with their parents as to whether their father is taking his medication are exactly the same. He stated that this is the type of enquiry that any adult child might make of an elderly parent. There is no personal detail as to the particular issues with which the sponsors have given emotional support to the appellants.
9. The Judge concluded by stating that the evidence does not demonstrate dependence over and above that which any other close adults may have with their parents. The appellants are single and do not live with their parents and have not done so for a considerable length of time. In conclusion, the Judge stated that while he accepts that there is genuine love and affection between the appellants and the sponsors, the right to a family life is not engaged. The Judge stated that the proportionality of the decision is not therefore an issue. He dismissed the appellants appeals

The grounds of appeal

10. The grounds of appeal are extremely lengthy and in summary states that the First-tier Tribunal Judge in finding that family life is not engaged at all under Article 8 (1) has materially erred in law. The Judge failed to appreciate that this is a case under the Gurkha policy and his consideration of Article 8 does not indicate that he took this into account when assessing whether family life exists between the appellants and their sponsors in the United Kingdom. The Judge failed to appreciate that due to the historic injustice, once family life is confirmed to exist for the purposes of article 8 (1), the Judge should have gone on to consider the correction of historic injustice within the proportionality assessment. It would appear that the Judge fell into the same errors as the Upper Tribunal in the case of **Rai v entry clearance officer (New Delhi) EWCA Civ 320 [2017]** handed down on 28 April 2017. The grounds of appeal

also refer to jurisprudence on the issue of adult children under the Gurkha policy.

Rule 24 response

11. The respondent in her Rule 24 response stated the following, in summary. The respondent opposes the appellant's appeal and submits that the Judge directed himself appropriately. The grounds of appeal challenged the Judge's finding that he was not satisfied that family life existed between the appellants and the sponsors. This is inevitably a fact sensitive assessment and the determination shows that the Judge carefully considered the evidence. He noted the very similar statements of the appellants and their lack of detail, this inevitably informed his assessment of family life. The Judge's conclusions are fully reasoned and founded on the weakness of the evidence.

The hearing

12. At the hearing, I heard erudite submissions from both parties which were of great assistance.

Discussion and decision as to whether there is an error of law

13. I have considered the first-tier Tribunal Judge's decision with care as I have considered the submissions made by the parties. Permission was granted only in respect of the Judge's lack of consideration of the appellants right to a family life under Article 8 of the European Convention on Human Rights. There is no dispute that the appellants did not meet the requirements of the Immigration Rules.
14. In respect of his consideration of his Article 8, the Judge found that there was no family life worthy of protection under Article 8 between the sponsors and the appellants after having considered all the evidence.
15. The evidence before the Judge was of financial remittances to the appellants in Nepal. The Judge accepted that the sponsors in the United Kingdom send the appellants money. The Judge accepted that there was contact between them. The Judge accepted that there are genuine ties of love and affection between the appellants and their sponsors.
16. The Judge however placed undue reliance on the identical witness statements of the appellants to find that there is no family life between the appellants and their sponsors. The Judge stated that the contents of conversations with their father in their statements were exactly the same such as enquiring about their father's health and whether he is taking his medication. He found that this is the type of enquiry that any adult child might make of his elderly parent and as such there was no

personal detail as to the particular issues with which the sponsors have given emotional support to the appellants.

17. It is clear from this finding that the Judge only considered the appellants family life with their parents and not the other way around. It is incumbent on the decision maker to consider the family life of all members of the family who enjoy family life with each other. The appellant sponsor is a Gurkha soldier who was entitled to settle in this country and it follows that they are also equally entitled to continue their family life with those they were forced to leave behind. The Judge did not consider the family bonds and emotional dependency of the sponsors with their adult children which led him into a material error.
18. The Judge also did not consider the cultural implications of the appellants and their sponsors when determining whether family life exists between them. The Judge correctly relied on the case of **Kugathas** but failed to appreciate that this was an appeal under the Gurkha policy where the historical injustice needs to be addressed.
19. The Judge has also confused evidence which goes to proportionality and evidence which goes to whether there is an existing family life between the appellants and their sponsors. Under Article 8(1) the appellants must demonstrate that they had a family life with their parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding them having left Nepal when they did.
20. It might be that when the proportionality exercise is properly done, the appellants may not succeed but to find there is no family life between the appellants and their sponsors is not a conclusion that was available to the Judge on the evidence and given that this was an appeal by adult children of a former Gurkha soldier. Proper consideration was not given to the case of **Rai v entry clearance officer (New Delhi) EWCA Civ 320 [2017]**.
21. There is a material error of law in the decision of the First-tier Tribunal Judge in respect of Article 8 of the European Convention on Human Rights and I set it aside. The appeal be placed before an Upper Tribunal Judge on the first available date, for the appeal to be re-heard based only on the submissions of the parties.

Hearing on 10 November 2017

22. At the hearing, Mr Jesurum and the senior presenting officer agreed that since new evidence was going to be produced, the appeals be sent back to the First-tier Tribunal for a hearing *de novo* for findings of fact to be

made. I direct that the appeal be placed before any other First-tier Tribunal Judge other than Judge Mace on the first available date.

Signed by
2017

Dated this 26th day of November

A Deputy Judge of the Upper Tribunal
Mrs S Chana