



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/04864/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

**Oral determination given following
hearing**

On 15 December 2017

On 16th March 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**MR NIR BAHADUR THAPA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant (Secretary of State): Mr E Tufan, Senior Home Office
Presenting Officer

For the Respondent (Mr Thapa): Ms A O'Callaghan, Counsel, instructed by N C
Brothers & Co Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal M A Oliver, promulgated on 16 February 2017, following a hearing at Hatton Cross on 19 January 2017, in which he had allowed Mr Thapa's appeal against the Secretary of State's decision refusing to grant him

settlement as the family member of a former Gurkha veteran. For ease of reference, throughout this decision I shall refer to Mr Thapa, who was the original appellant, as “the claimant”, and to the Secretary of State, who was the original respondent, as “the Secretary of State”.

2. The claimant is a 30 year old national of Nepal, who was born on 28 December 1986. He applied for clearance to settle with his father, a Gurkha veteran who had served from 16 January 1980 to 1 July 1997 and who had been discharged with an exemplary record of service. The basis of the application was that but for what has now in Gurkha cases been confirmed as being an “historic injustice” the claimant’s father would have applied for and would have been granted settlement at a time when the claimant, as a minor dependent child, would have been entitled to settlement with him.
3. It has now been established within Gurkha cases and is common ground between the parties that in circumstances such as this, where family life has continued between the adult child and his Gurkha veteran father, unless there is some other factor (such as criminal conduct on behalf of that child) it will normally not be proportionate to refuse him settlement because in these circumstances the weight to be accorded to the historic injustice is sufficiently high as to outweigh the weight which has to be given to the need to maintain effective immigration control. The issue in these cases is effectively whether or not family life can truly be said to have continued and that is an issue which has to be determined on the specific facts of each case in accordance with current jurisprudence which has developed since the case of *Kugathas* [2003] EWCA Civ 31, in which the judges in the Court of Appeal (specifically Sedley LJ and Arden LJ) had given guidance as to the test to be applied. Simon Brown LJ had given a concurrent judgment in that case. The case law has been developed since in various decisions including a decision of this Tribunal (Lang J presiding over a panel hearing) in *Ghising (family life – adults – Gurkha policy)* [2012] UKUT 00160 and also in the Court of Appeal decision in *Rai* [2017] EWCA Civ 320).
4. In his decision, Judge Oliver found at paragraph 17 that “I am satisfied that the [claimant] enjoys a family life with his parents which amounts to emotional dependency” and for this reason considered that under existing jurisprudence he was entitled to settlement.
5. The Secretary of State’s argument, permission to appeal having been granted by First-tier Tribunal Judge Page, has been put concisely by Mr Tufan. He submits that the judge’s reasons for finding that “the [claimant] enjoys a family life with his parents which amounts to emotional dependency” are not sufficient to establish that Article 8(1) of the ECHR is engaged, which is essential before an adult child can succeed in an application for settlement. Mr Tufan submits that what is required following *Kugathas* is something beyond the normal emotional attachment to be expected between an adult child and his parents. In his submission at the very least the judge’s finding is not adequately reasoned.

6. On behalf of the claimant, Ms O'Callaghan refers to the reasoning which she says has been given by the judge in support of his finding. First, the judge has referred to his finding that the claimant has no other means of financial support beyond that provided by his parents. Secondly, he is not living independently. Thirdly, he was the only member of his close family to be left behind in Nepal, after the rest of his family had left. In this regard she refers the Tribunal to what is said by the Upper Tribunal panel in *Ghising*, referring to the decision of the ECtHR in *AA v United Kingdom (Application No.8000/08)*, in which that court had found "that a significant factor would be whether or not the adult child had founded a family of his own". Although in that case the court considered that aspect in conjunction with whether a child was still single and living with his parents, in *Kugathas* it was held in terms that family life could continue even if the child applicant and his parents were living in different countries – see per Arden LJ at paragraph 25 where she states that "it is not, however, essential that the members of the family should be in the same country". Ms O'Callaghan argues that following *Ghising* the fact that the claimant has no other family support in Nepal is, in the words of the European Court of Human Rights in *AA* "a significant factor". The judge also in this case had in mind that the claimant's parents had not chosen to leave their son behind because he was by then independent but had had no choice other than to come, which was a factor considered by the Court of Appeal to be significant in *Rai* (see at paragraph 42). In other words, this was yet another case where the parents had not deliberately left their child behind because they considered he was independent but had given consideration to his position and, as the judge had noted at paragraph 16, "he obviously was aware that the claimant and his brother intended to apply as soon as they are able to do so because that is precisely what they did do". So this was not a case where the fact that the parents came was any indication that family life had stopped.
7. Further, this case had the additional factor which the judge had referred to in his decision that the claimant had been involved in a motorcycle accident which had increased his emotional dependence on his parents; his mother had subsequently gone back to Nepal in order to support him which not only extended the dependence but also demonstrated that as far as this family was concerned the claimant's first port of call was his mother as would be expected in a family which was as close-knit as it is said that this family is.
8. I do not have to consider in this case whether or not I would necessarily have reached the same decision as Judge Oliver, although on the facts of this case I may very well have done so. It is sufficient that I am satisfied that on the basis of the material which he considered, Judge Oliver was entitled to reach the conclusion that he did that the claimant still enjoyed family life with his parents while he was still an adult up to the time of the decision. In my judgment even though the Secretary of State's submissions were advanced persuasively as well as succinctly by Mr Tufan, they are founded on semantics and lack substance. It is quite clear from the decision that Judge Oliver did understand what he was required

to do. Indeed, as Mr Tufan accepted, his exposition of the history of the Gurkha litigation is very helpful and is entirely accurate. He had in mind the factors that he ought to have in mind when considering the extent of the dependency between the claimant and his parents, and the fact that he does not use the same phraseology as used in *Kugathas* does not indicate that he applied the wrong test. He considered that the claimant was still dependent on his parents and that for the reasons he has given that dependency went beyond that of a typical adult child. In light of the weight which must be given to the "historic injustice" I am satisfied that it was entirely open to the judge to find as he did that the claimant's appeal should be allowed on human rights grounds.

9. It follows that there being no material error of law in Judge Oliver's decision, the Secretary of State's appeal must be dismissed and I will so find.

Notice of Decision

There being no material error of law in Judge Oliver's decision, the Secretary of State's appeal against that decision is dismissed, the consequence being that Judge Oliver's decision, allowing the claimant's appeal, is affirmed.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig", is written over a light blue rectangular stamp.

Upper Tribunal Judge Craig
2018

Date: 14 March