



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

Appeal Number: HU/13303/2019 (V)
HU/13305/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House via Skype for
Business
On 18 May 2021**

**Decision & Reasons
Promulgated
On 2 June 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

**(1) MR EKRAJ LIMBU
(2) MISS ANJU LIMBU**

Appellants

-and-

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellants: Mr P Saini, Counsel instructed by Gordon and Thompson solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against the decision of First-tier Tribunal Judge Moon promulgated on 27 October 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellants' appeals against the Respondent's decisions dated 28 June 2019 refusing their human rights claims. Those claims were made in the context of a decision refusing the Appellants entry clearance to

join their parents who are settled in the UK. Their father is a former Gurkha soldier.

2. The Appellants are a brother and sister now aged 42 and 39 years respectively. Their father settled in the UK in August 2006. He was joined by their mother in 2008. Since then, the Appellants' parents have lived in the UK although they have travelled back to Nepal on an annual basis to visit the Appellants.
3. It is common ground that the Appellants do not meet the Immigration Rules for entry clearance as adult dependent relatives. It is also common ground that the Appellants do not fall within the Respondent's policy in relation to the dependents of former Gurkha soldiers. The appeals therefore turn on the issue whether family life is engaged under Article 8(1) ECHR.
4. The Judge accepted that the Appellants were financially dependent on their parents at the time that both their parents moved to the UK ([32] of the Decision). However, he was not satisfied that they remained financially dependent as there was insufficient evidence of their outgoings ([33]). In relation to emotional dependency, the Judge accepted that the Appellants' parents travel to Nepal each year to visit their children. However, he did not accept that they maintained contact to the extent asserted between those visits due to lack of evidence. He concluded that the Appellants had failed to show that they currently enjoy family life with their parents. He therefore concluded that Article 8(1) was not engaged.
5. The Appellants appeal on the basis that the Judge has misdirected himself in law and in his consideration of the facts when assessing the question of family life between adult children and their parents. They contend that the Judge applied too stringent a test. They also say that the Judge failed to take into account the Appellants' dependency on their parents prior to 2006/2008 when they were continuing to live in the family home and failed to ask himself the right question namely whether that family life endured after that time.
6. Permission to appeal was refused by Upper Tribunal Judge Martin as a First-tier Tribunal Judge on 8 December 2020 in the following terms so far as relevant:

“...3. The grounds are unarguable. The judge found inadequate evidence of dependency prior to their former Gurkha father leaving Nepal and inadequate evidence of their current circumstances to justify a finding of dependency now.

4. Furthermore, so far as that dependency is concerned, it is significant that the appellants have been living in Nepal without their father for 13 years before making this application.

5. Neither the grounds nor the Decision and Reasons disclose any arguable error of law.”

7. Following renewal of the application for permission to appeal to this Tribunal, permission to appeal was granted by UTJ Kamara on 20 January 2021 on the basis that it was arguable that the Judge had erred in his approach to Article 8(1) for the reasons set out in the grounds.
8. So it is that the matter came before me to determine whether the Decision contains an error of law and, if I so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
9. The hearing took place remotely via Skype for Business. There were no technical difficulties affecting the conduct of the hearing.
10. As the Respondent had not filed a rule 24 reply, Ms Everett indicated that she wished to set out the Respondent's position at the outset. Without objection from Mr Saini, I permitted her to do so. She indicated that she had "some sympathy" with the Appellants' grounds for reasons which I explain below. Having sought clarification of the basis of the concession, I accepted it. I therefore indicated that I found an error of law and set aside the Decision in its entirety.
11. The Appellants made a rule 15(2A) application prior to the hearing before me which included evidence which will need to be taken into account in an evaluation whether the Appellants currently enjoy family life with their parents. There will therefore need to be an entirely fresh assessment of the nature and extent of the Appellants' relationship with their parents. Since that will involve starting again from scratch and will require a number of factual findings to be made, it was agreed that it would be appropriate for the appeal to be remitted to the First-tier Tribunal for redetermination.
12. I therefore found there to be an error of law in the Decision. I set the Decision aside in its entirety and remitted the appeal to the First-tier Tribunal. I indicated to the parties that I would give short reasons in relation to the error of law and next steps which I now turn to do.

DISCUSSION

13. Ms Everett accepted that there was an error of law in the Decision because the Judge had failed to set his consideration whether family life existed in context. The Judge had to consider the position prior to the departure of the Appellants' parents. As was pointed out in the grounds, the Judge had failed to take into account that, when earlier applications were refused in 2007 (in other words, just after the departure of the Appellants' father), the Respondent had not disputed that family life existed between the Appellants and their parents.
14. Ms Everett indicated that she was not prepared to concede the appeals outright. She accepted that it would be open to another Judge to find that family life did not exist between the Appellants and their parents on these facts. Equally, however, she accepted that, if a Judge placed the issue in the

context which applies in Gurkha cases, beginning the evaluation with the position when the Appellants' parents left Nepal, it might well be open to another Judge to find in the Appellants' favour.

15. In short summary, the Respondent's concession is based on the Judge having found that family life did not exist because of the lengthy geographical separation of the Appellants from their parents. That might be a relevant factor but could not be a sole reason. The Judge had failed to assess the evidence in the right way and did not ask himself the right questions.
16. Whilst, as I have indicated, the length of the geographical separation of the Appellants from their parents might be a relevant factor when assessing whether family life continues to exist, I am persuaded that the Respondent is correct in her concession. The Judge has determined the issue of emotional dependency based on that factor without taking into account the position as it was prior to the departure of the Appellants' parents in 2006/2008 and without due regard to the parents' visits to Nepal on a regular basis.
17. I do not necessarily read the Decision as having accepted that there is a continuing financial dependency but since that issue will need to be determined with the benefit of the further evidence advanced by the Appellants, I say no more about that. In any event, the issue whether family life continues to exist depends on a holistic assessment of all the evidence and not solely on a finding that there exists either financial or emotional dependency or even both. I do not for that reason, preserve any of the findings made in the Decision.

CONCLUSION

18. For the foregoing reasons, I conclude that there is an error of law disclosed in the Decision. I do not preserve any of the findings. I therefore set the Decision aside in its entirety. For the reasons set out at [11] above, it is appropriate for the appeals to be remitted to the First-tier Tribunal as all factual findings will need to be made afresh.

DECISION

The Decision of First-tier Tribunal Judge Moon promulgated on 27 October 2020 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Moon.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 21 May 2021