



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

Appeal Numbers: HU/02346/2015
HU/02348/2015
HU/02350/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15 December 2017**

**Decision & Reasons
Promulgated
On 16 March 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**KANSI MAYA GURUNG
JAGAN KUMARI GURUNG
JAGAN SHRI GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms N Nnamani, Counsel, instructed by Howe & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are all nationals of Nepal whose dates of birth are respectively 13 June 1984, 27 November 1986 and 13 May 1988. All of them are the daughters of the sponsor, Mr Lal Prasad Gurung, who is an ex-Gurkha soldier who was issued with entry clearance on 27 October

2009 and settled in the UK on 29 November 2009. It is agreed between the parties that but for what is now regarded as the “historic injustice” concerning former Gurkha residents the appellants’ father would have been entitled to apply for settlement at a time when the three appellants were all minor children and that he would have done so. It is not contested that at that time he indisputably had family life with the three appellants and that they would have applied and been granted settlement along with him at that time. The law with regard to the treatment of the now adult children of Gurkha veterans who would but for the “historic injustice” have been entitled to and would have applied for settlement when they were eligible is now that the fact of the historic injustice alone is not sufficient to entitle them to leave but where it is shown that there has been a continuation of family life after the date when otherwise the whole family would have applied for settlement and that that family life has continued until the date of decision, their Article 8(1) rights to family life are engaged and it will usually be the case that the weight to be given to the fact of the historic injustice is sufficiently high as to outweigh the weight normally to be given to the need to ensure that immigration is fairly controlled. The most important issue in these cases is to determine whether or not a child applicant who falls into this category still enjoys a family life with his or her Gurkha veteran father.

2. Accordingly, as was common ground between the parties, the appeals turned essentially on the issue of whether or not these appellants enjoyed family life with their father at the time of decision. The respondent having concluded that they did not, their appeal against this decision was heard at Taylor House before First-tier Tribunal Judge Cassel on 9 March 2017 and in a surprisingly brief decision amounting to some six pages in all which was promulgated on 24 March 2017 Judge Cassel dismissed the appeals. The basis of his decision was that he did not accept that there was extant family life between the appellants and their father. Having so found, he did not need to consider proportionality because Article 8 not being engaged there was no other basis upon which their appeal could be allowed.
3. The question of whether or not family life has continued to exist between adult children and their parents has been considered in a number of cases of which the leading cases are probably *Kugathas* [2003] EWCA Civ 31 and now *Rai* [2017] EWCA Civ 320, both decisions of the Court of Appeal. Affirming what was said in *Kugathas* at paragraphs 37 to 39 of *Rai* the Court of Appeal effectively upheld the submissions made by the applicant’s Counsel in that case (set out at paragraph 36) in which it was argued that “the concept to which the decision-maker will generally need to pay attention is ‘support’ – which means, as Sedley LJ put it in *Kugathas*, ‘support’ which is ‘real’ or ‘committed’ or ‘effective’ ...”. It is common ground that financial support on its own is not sufficient to show family life but financial support is an important aspect of the support which must be real and there must be dependence on that support.

4. When granting permission to appeal in this case, First-tier Tribunal Judge Page, setting out the reasons for granting permission, stated as follows:

“The grounds of appeal are arguable given the paucity of reasoning in the judge’s decision at paragraphs 17 - 24 of the decision. A number of points are raised in the application but it is unnecessary to go through them all in detail. The overarching complaint is that the judge has not considered material evidence fully and the judge’s findings are inadequate. Complaint is made that the judge has not found whether it is accepted that the appellants had been studying between 2010 and 2015 and whether they were emotionally dependent upon their sponsor. Complaint is made that the judge has failed to consider the large number of pre-decision payment transfer receipts included at pages 209 - 218 of the appellants’ bundle and erroneously focused upon postdecision transfer receipts at pages 32 - 54 of the bundle without having regard to the early receipts. Plainly, the assessment of financial dependency was material to the consideration of the issues in the appeal”.

5. On behalf of the appellants before me, Ms Nnamani referred to the clear evidence of financial support which had been given to these appellants before the decision in order to demonstrate that the finding made by the judge at paragraph 19 that “the evidence that was produced of payments to the three, with one apparent exception produced at page 32, all postdate the decision made by the ECO and there is simply no credible evidence of financial dependency at any other time” was simply wrong. This submission is unanswerable, and Mr Tufan was obliged to accept in the course of his submission that this finding was not sustainable. Ms Nnamani also submitted that the judge failed to make adequate findings as to family life because his findings (set out at paragraph 24) were simply that “on the balance of probabilities I find that the appellants have not discharged the burden upon them” to establish family life, and the only reference that is made to any emotional dependency is that there was contact by phone which showed “nothing more than the ordinary concern and affection between a father and his adult children”. There was in fact, as recorded at paragraph 20, a letter signed by each of these three appellants (which does not appear to have been kept within the file and of which neither the appellants’ Counsel nor Mr Tufan now have a copy) which did refer to their dependence on the sponsor but the judge specifically gave no consideration to this letter stating instead that “bearing in mind the guidance in *Tanveer Ahmed* [2002] UKIAT 00439 STARRED it is for the appellants to show that a document lodged can be relied on and it is for the Tribunal to decide whether reliance can be placed on it after considering the evidence in the round” in accordance with which “I place little weight on this letter”. While the judge has correctly set out the guidance given in *Tanveer Ahmed* he cannot on any view be said to have properly considered the evidence in the round, given that he failed to take into account the considerable evidence of financial support having been given pre the decision as accepted by the respondent. Mr Tufan, while not conceding the point, did accept that in

light of this error in the decision his difficulty in seeking to persuade the Tribunal to uphold the decision was increased._

6. In my judgment it is clear that the judge had not adequately considered the question of dependency and the issue of whether or not these appellants have maintained family life with their parents since they left Nepal to settle in this country has not adequately been considered. There is a fair amount of evidence of financial dependency and whether or not they remain emotionally dependent on their parents needs to be adequately considered. Accordingly it is necessary to set aside Judge Cassel's decision, which will now have to be remade. As the decision does not contain proper findings of fact it must be set aside in its entirety and there are no findings contained within it which can properly be maintained. It follows that the decision will have to be remade afresh and for this reason the appropriate course is to remit it back to the First-tier Tribunal, sitting at Taylor House, to be reheard by any judge other than Judge Cassel and I will so direct.

Decision

I set aside the decision of First-tier Tribunal Judge Cassel as containing material errors of law and direct that the appeal be remitted to Taylor House to be heard by any First-tier Tribunal Judge other than Judge Cassel.

No anonymity direction is made.

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