



**UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)  
HU/27645/2016**

**APPEAL NUMBERS:**

**HU/27646/2016**

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**On: 29 January 2018**

**Decision and Reasons  
Promulgated**

**On: 26 February 2018**

**Before**

**Deputy Upper Tribunal Judge Mailer**

**Between**

**ENTRY CLEARANCE OFFICER**

**and**

**SUK BAHADUR PUN  
HEM BAHADUR PUN  
(NO ANONYMITY DIRECTION MADE)**

**Appellant**

**Respondents**

**Representation**

**For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer**

**For the Respondents: Mr E Raw, counsel, instructed by Howe & Co**

**DECISION AND REASONS**

1. I shall refer to the appellant as the entry clearance officer and to the respondents as the claimants.
2. The claimants are nationals of Nepal, born on 24 May 1973 and 1 July 1982 respectively. They were aged 43 and 34 at the date of the First-tier Tribunal's decision. Their appeals against the entry clearance officer's

decision dated 22 November 2016 refusing their applications for entry clearance to join their mother, the sponsor, a “widower” (sic) of their late father, an ex-Gurkha soldier, was allowed by First-tier Tribunal Judge A M S Green, on human rights grounds. The decision was promulgated on 23 October 2017.

- 3.** The entry clearance officer appeals with permission against that decision. First-tier Tribunal Judge Parkes granted permission on 4 December 2017.
- 4.** Judge Green had regard to the witness statement of the sponsor: Her late husband was discharged from the British Army in 1969. There was no Gurkha settlement policy then. He also said he was discharged in 1982. Although this caused him confusion it was not material to the decision when he was discharged, given the timings for Gurkhas to settle in response to the historic injustice.
- 5.** The sponsor claimed that she feels sure that her late husband would have applied to settle in the UK with her. He never lived in the UK but died in 2005.
- 6.** The sponsor had four children including the claimants. One of his daughters lives in Nepal, away from the claimants, and the other lives in Hong Kong; she is married.
- 7.** The claimants share a house. The sponsor asserted that they are now totally dependent on her for their maintenance and live off her pension. She has been to Nepal.
- 8.** In her oral evidence she said that the claimants live in a two room house. Her daughter who lives in Hong Kong also sends them money to assist with the building costs. The claimants built the house. They lived off her pension as well as occasional money which her daughter sends them. She did not think that the claimants could survive without her support. She thought they might get some work on a farm or washing dishes.
- 9.** In cross-examination she stated that when she came to the UK in 2011 she had not applied for them to join her as she did not have enough money. She had paid for their applications. She had financial support from a local group of people who collected money on her behalf.
- 10.** She has a daughter in Nepal who was not in the application. She is married and no longer lived in the home village. Her youngest daughter lives in Hong Kong and sends money to the claimant.
- 11.** She was taken to travel receipts in the claimants' bundles. The travel dates did not show the year. They were return flights to Kathmandu. She did not know when she travelled. She could not remember “because she is an old woman” [8iv]. She thought she went to Hong Kong in 2016 to see her daughter.
- 12.** Both claimants are learning to drive. She was not sure why, but it could be to enable them to work as drivers but she had no idea. They earned a little money by helping on a farm and dancing. She had not sent them money

from the UK to Nepal although her daughter would sometimes send them money.

- 13.** She was asked about the phone call record in the bundle at A35. There are telephone calls shown for the period 1 April 2017 to 22 September 2017. She had no idea why she did not produce evidence earlier than 1 April 2017. Some of the calls are to India as well as the UK. There are several to Hong Kong.
- 14.** During cross examination it was put to her that she had two sons aged 43 and 34 who had lived in Nepal for six years without her. When asked why she could not continue in this way she said that everything is expensive in Nepal. She lived alone and they had no job. She suffers from blood pressure problems. The claimants were not married and she could support them before marriage. If they came here it would be much easier for her. They could get work and marry [8vii].
- 15.** The Judge noted at [14] that he was dealing with two adult children of an ex- Gurkha. He referred to the decision in Rai v ECO (New Delhi) [2017] EWCA Civ 320. He was guided by Ghising and the decision of the Court of Appeal in Gurung and Others [2013] EWCA Civ 8 at [14]. If Article 8 is engaged and but for the historic wrong, the appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour where matters relied on consist solely of the public interest in maintaining a firm immigration policy [14].
- 16.** The Judge noted that the claimants are adults who are not married. They live together in the same house. The claimants enjoy their mother's pension which they supplement with occasional sums remitted by their sister living in Hong Kong. The pension and money paid for their house to be built. He accepted that the claimants supplemented their income with occasional earnings from farm work and dancing as well as dishwashing. They are learning to drive but it is not clear why and what they intend to do once they pass their driving tests.
- 17.** The Judge "believed" that the claimants have shown that they live and have a financial dependency on the sponsor that goes beyond "to some extent" as referred to in JB (India) v ECO [2009] EWCA Civ 234. The Court of Appeal stated that financial dependence "to some extent" on a parent did not demonstrate the existence of strong family ties between adult children and the parent, nor did weekly telephone calls evidence anything more than the normal ties of affection between a parent and her adult children.
- 18.** Judge Green concluded that they are almost entirely dependent on their mother's pension and could manage without it [15]. (Mr Raw submitted that clearly the Judge intended to find that they could not manage without it).
- 19.** He accepted that she had lived with them until 2011 when she came to the UK. She did not have enough money to sponsor an application then.

Since then, she has provided financial support and visited her sons in Nepal and is in regular telephone contact with them. He also heard why she wants her sons to be with her. She wants them to help her as she gets older and her health deteriorates. That would be easier if they were with her. She wants them to marry and develop their own family life. [16]

- 20.** He found what the sponsor said to be relevant. Account must be taken of the parent's need for the children and the totality of the family relationships must be considered. He referred to ZB (Pakistan) v SSHD [2009] EWCA Civ 834.
- 21.** He accordingly accepted that the claimants have established that they enjoy family life with the sponsor. The claimants are close relatives, who are brothers and the sponsor's sons. The decision interferes with their family life because it prevents family reunion between mother and sons.
- 22.** He had regard to Shamin Bux [2002] UKIAT 02212. The Judge should consider whether there had been an unjustified lack of respect for private and family life and the focus should be on whether, in the light of the positive obligations on the UK to facilitate family reunion, there has been a failure to act in the particular circumstances of the case. He referred to Mostafa (Article 8 – entry clearance) [2015] UKUT 112 where it was held that the decision in Shamin is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision [17].
- 23.** The Judge concluded that there was no reason to doubt the sponsor's evidence that had it been possible for her husband to settle after he had completed his service he would have wanted to settle within the UK with his wife and children long ago. He could not do so on discharge but died before the policy came into force to redress the historic injustice. The claimants did not have a poor immigration history.
- 24.** He stated 'In conclusion there is family life, the (claimants) would have settled in this country long ago but for historic injustice and this determines (their) Article 8 proportionality assessment in their favour' [18]. He accordingly allowed the appeal on human rights grounds.
- 25.** Ms Holmes relied on the grounds of appeal (apart from ground 3). She submitted that the nub of the appeal is whether it had been open to the Judge to find that there was family life. There were no clear findings as to why he reached the conclusion other than to point to the blood relationship, the regular recent telephone contact and the sponsor's desire to be with her children. Given that they did not satisfy the requirements of the immigration rules, it is open to the sponsor to enjoy any family life with her sons in Nepal.
- 26.** However, it would appear that her desire to be with them is not so great. It appeared that the claimants are living a life independent of their mother. They are mature, healthy men who have been living apart from the sponsor for six years. They have their own adult lives which include occasional work and make their own lifestyle decisions such as learning to

drive. Accordingly she submitted that Article 8(1) is not engaged in this case.

- 27.** The reference to the sponsor's pension "only goes so far." This does not result in a dependency beyond the normal familial relationships. Apart from reliance on her pension, Ms Holmes submitted that the "ties are not great." She submitted that in the circumstances the decision should be re-made and their appeals dismissed.
- 28.** On behalf of the claimants, Mr Raw referred to the ECO's grounds. He noted the blood relationships and telephone calls. However, this overlooked the fact that the relationship continues. He referred to the sponsor's visits to Nepal as well as telephone calls made [8.iv and vi].
- 29.** He referred to paragraph [15] where the Judge noted that the claimants rely on their mother for financial support. They "enjoy their mother's pension." The totality of the evidence must be looked at. The claimants and their mother lived together until 2011. He referred to the subsequent telephone calls and travel by the sponsor.
- 30.** Mr Raw submitted that they are not living independent lives. It was noted that the sponsor wanted her sons to be with her, particularly as she gets older and her health deteriorates.
- 31.** He referred to [42] of Rai, supra. The question is whether the family life with them subsisted when she left Nepal and was still subsisting at the date of hearing. He frankly acknowledged that there has been no evidence as to the sponsor's pension or the amount. It was also stated that the claimant's sister in Hong Kong gives them money as well. Another sister remains in Nepal.
- 32.** He submitted with regard to the proportionality of the decision that although there has been a four year gap, the relationship has continued. He noted that the sponsor was unable to sign her statement. She is illiterate. He accepts that she gave vague evidence.
- 33.** He referred to the decision of Lord Justice Bateson at [60] in Rai. The Tribunal alone is the judge of the facts and as noted by Baroness Hale in AH (Sudan) v SSHD [2007] UKHL 49 the Tribunal alone is the judge of the facts when the decision should be respected unless it is quite clear that they have misdirected themselves.
- 34.** Mr Raw noted that at [61] of Rai there is no requirement of 'exceptionality'. This all depends on the facts; there must be something more than love and affection between an adult and his parents or siblings which will not itself justify a finding of family life.
- 35.** In reply, Ms Holmes submitted that this is not a "hand in glove situation." The evidence is one sided. It has come from the sponsor. However, there was insufficient evidence demonstrating that something more existed than normal emotional ties between adult claimants and the sponsor.

### **Assessment**

- 36.** The claimants did not make any statement in support of their appeals. The only statement came from their mother. There was also evidence relating to the sponsor's pension credit in the UK and a statement of the sponsor's bank account in Nepal between September 2016 and September 2017.
- 37.** In her witness statement, the sponsor "submitted" that her sons are totally dependent on her. They are dependent on her emotionally. Apart from those assertions however no further evidence has been provided as to the nature and extent of the relationship between the sponsor and her sons. No explanation has been given as to why the claimants have not produced any evidence at all regarding the asserted dependency between them and their mother.
- 38.** The sponsor stated in evidence that she wants them to be with her, particularly to help her as she gets older and her health deteriorates.
- 39.** The only evidence provided by the sponsor relating to any medical matter was a cancer screening programme sent to her on 7 July 2015. She was informed that the result of the bowel cancer screening showed that she was normal.
- 40.** There was no further evidence provided or relied on regarding any health issue. The sponsor did not assert that she is suffering from any medical or other problem or that she has any significant health problems. A letter from her GP dated 8 July 2015 informed her that the doctor would like to see her to discuss a recent blood test. However no further evidence apart from that letter has been provided.
- 41.** The First-tier Tribunal Judge had regard to the decision of the ECO Sierra Leone v Kopoi [2017] EWCA Civ 1511. Lord Justice Sales affirmed (and the other Lord Justices agreed) that Kugathas remains good law. In order for family life within the meaning of Article 8(1) to be found to exist, there must be something more than normal emotional ties [22].
- 42.** The evidence produced referred to their use of her pension and her relatively recent telephone contact with the claimants. No further evidence regarding the nature, quality and extent of their relationships was produced or relied on.
- 43.** The claimants were 43 and 34 years old at the date of the hearing. They had lived for six years without the sponsor. Although she claimed that she suffered from blood pressure problems, no evidence regarding that or any health problem was provided. When asked why they could not continue to live in Nepal as before, the sponsor stated that everything was very expensive in Nepal. She had lived alone and had no job [8 (vii)].
- 44.** There was also evidence that the claimants had learned to drive. The sponsor stated that she was not sure why but it could be to enable them to work as drivers. They had earned money by helping on a farm "and dancing." The sponsor did not send any money to them from the UK. Her daughter, however, "would sometimes send them money" [8].

45. The First-tier Tribunal Judge did not make any clear finding or give any cogent reasons for his conclusion that there is family life between the claimants and the sponsor, apart from having regard to the relationship, the recent telephone contact between them and the fact that they enjoy their mother's pension, which they then supplement with remittances from their sister in Hong Kong. He also accepted that the claimants supplement their income with occasional earnings from farm work, dancing and "dish washing."
46. It was on that basis that the Judge "believed" that the claimants had shown a level of financial dependency going beyond "some extent" as referred to in the decision of JB. However, there has been no assessment of the nature and extent of the emotional connection between them.
47. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law.
48. I re-make the decision. I take into account the evidence produced and relied on in their appeal, which I have set out.
49. The claimants are 43 and 34 years old. They have lived in Nepal for six years without their mother. Although there may be emotional ties felt on both sides, there is nothing to indicate that these go beyond the normal emotional ties experienced by family members.
50. I have had regard to their activities in Nepal as referred to by their mother. They have their own lives which involves occasional work and making decisions such as learning to drive. There has been no evidence suggesting that they have any health problems. The sponsor has visited Nepal albeit that she was unaware of the dates.
51. The evidence as a whole however does not demonstrate that the relationship between them goes beyond normal emotional ties.
52. I accordingly find, on the basis of the evidence before the Tribunal, that it has not been shown that family life exists for the purpose of Article 8.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set it aside and remake the decision allowing the entry clearance officer's appeal.

No anonymity order made.

Signed Deputy Upper Tribunal Judge

Dated 20 February 2018