



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

Appeal Numbers: HU/12495/2015  
HU/12496/2015

**THE IMMIGRATION ACTS**

**Field House**

**On 16<sup>th</sup> April 2019**

**Determination  
Promulgated**

**On 07 May 2019**

**Before**

**THE VICE PRESIDENT MR CMG OCKELTON  
UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**CHANDRA KUMARI PUN (1)  
LILA PUN (2)  
(ANONYMITY ORDER NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr D Ball, of Counsel, instructed by Howe & Co Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

## *Introduction*

1. The appellants are sisters and citizens of Nepal born in 1989 and 1991. They applied for entry clearance to join their parents in the United Kingdom in September 2015, those parents having been granted indefinite leave to enter in November 2010, and having entered the UK in May 2011. The applications for entry clearance were refused on 4<sup>th</sup> November 2015. The appeals against the decisions were dismissed by First-tier Tribunal Judge Geraint Jones QC in a determination promulgated on the 5<sup>th</sup> May 2017.
2. Permission to appeal was granted by Upper Tribunal Judge Canavan on 12<sup>th</sup> March 2018 on the basis that it was arguable that the First-tier judge had erred in law in distinguishing previous cases relating to historic injustice to Gurkhas by stating that public policy considerations are now reflected in the respondent's policy, Annex K dated January 2015. It was also found to be arguable that the First-tier Tribunal took an erroneous approach to the evidence as set out in the other grounds.
3. The matter came before us.

## *Submissions & Conclusions – Error of Law*

4. In the grounds of appeal it is firstly argued that the First-tier Tribunal erred at paragraph 32 and paragraph 33(ix) in making a factual finding that there was no evidence of money transfers to the appellants in Nepal prior to the date of application, when in fact there was and there had been reference to this in oral submissions and in a skeleton argument. In any case the key date was that of decision, applying s.85(4) of the 2002 Act. As due to the lack of such evidence the First-tier Tribunal then found that the appellants' application lacked credibility there was a clear unfairness to the appellants by virtue of this First-tier Tribunal error in relation to existing facts; and thus in turn an error of law as per the Court of Appeal decision in E & R.
5. Secondly, it is argued that the First-tier Tribunal erred in law in failing to consider the issue of family life in the context of the emotional dependency of the parents on the appellants, particularly as the appellants' father is 75 years old and there was evidence that he needed the appellants' support. There was evidence that was unchallenged at the hearing, as there was no presenting officer and the judge did not ask any questions on these issues (see paragraph 18 of the decision), that the parents speak to the appellants every other day; that the parents had visited the appellants in Nepal; that separation is hard for them as they are a close family; that in Nepali culture it is the appellants' duty, as daughters, to look after their parents and the father is also expected to look after his unmarried daughters. This evidence could not procedurally fairly have been disregarded as it was not

challenged in any way. The finding at paragraph 37(ii) of the decision, that if the parents had a cultural sense of family life despite the appellants being no longer children they would have not come to the UK, ignores the historic injustice point which led the father to be granted settlement years late. It was also illogical to have found that the telephone contact was not indicative of a close family because it was what you would expect, although all families are different (paragraph 36(v)) as this statement is ultimately meaningless, and also to have found that because the second appellant has a social life that she does not have family life with her parents (paragraph 33(v)).

6. It is argued that the requirement to show that there were real, committed and effective family life bonds between the appellants and their parents is clearly met as the appellants were 26 and 24 at the time of decision; they had always lived with their parents until they moved to the UK in 2011; there was evidence of financial dependency; there was evidence that the appellants' father paid for their education; the appellants speak to their parents every other day; the parents have visited the appellants in Nepal; and there is unchallenged evidence about their emotional ties.
7. Thirdly, it is argued that there was a failure to follow the reported authorities from the Upper Tribunal and the Court of Appeal which mean that ordinarily if Article 8 ECHR is engaged by showing a family life relationship between the appellants and their parents then the appeal will be determined in the appellant's favour absent criminal conduct or a very poor immigration history, see Ghising and others (Gurkhas/ BOCs: historic wrong; weight) [2013] UKUT 567. The introduction of s.117B of the 2002 Act or Annex K of the IDI Guidance does not affect this approach as the weight to be given to the maintenance of immigration control cannot affect cases which succeed because the respondent accepts that there was a historic unfairness and Gurkhas were wrongfully excluded from the UK by being wrongly excluded from the Armed Forces Concession. Further Annex K is not, as it is stated in the decision, parliament declaring its policy, as this is a policy of the executive and not part of the Immigration Rules approved by parliament.
8. Mr Clarke accepted that the First-tier Tribunal had materially erred in law. He accepted that there were documents showing money transfers prior to the date of decision, and that the error of fact, in finding that there were not, had been relied upon by the First-tier Tribunal in concluding that the appellants lacked credibility, and so this amounted to an error of law. He accepted that there had been procedural unfairness in not putting matters the judge disputed to the witnesses. He noted that the First-tier Tribunal had failed to follow the decision of the Court of Appeal in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 as there was a failure to consider firstly whether the appellants had family life with their parents before they travelled to the UK, as the focus had entirely been on the criticism of the evidence of

financial and other contact since that time. There was also an error in giving weight against the appellants due to their parents' choice to come to the UK, which was identified as a mistaken approach at paragraphs 38 to 40 of Raj. There was a further error in placing reliance on s.117B of the 2002 Act when the Court of Appeal had indicated at paragraphs 55 to 57 that they could not see how this provision could affect the outcome of such an appeal. Mr Clarke accepted that the First-tier Tribunal had erred in believing that Annex K was a policy approved by parliament, although it was something which could have some relevance to a proportionality decision the caveats within that policy would have to be properly observed if that were done. In all the circumstances the decision of the First-tier Tribunal was unsustainable.

9. At the end of the submissions we indicated that we found for the reasons set out by Mr Clarke that the First-tier Tribunal had materially erred in law and that the decision should be set aside in its entirety.
10. Mr Clarke submitted that the matter should be remitted to the First-tier Tribunal for re-making but we did not find that to be appropriate and decided instead that we would remake the matter in the Upper Tribunal. We did not find that it would be just for the respondent to be able to challenge the evidence of the appellant's parents, sister and brother-in-law in the remaking hearing when he had chosen not to do so before the First-tier Tribunal, and would only now be able to do so if we were to permit this by the unfortunate intervening circumstance of the First-tier Tribunal Judge making errors of law. Mr Clarke did not seek to argue that our decision was wrong on the facts of this case.
11. We therefore informed the parties that we would remake the decision on the basis of the uncontested evidence put before the First-tier Tribunal. Mr Clarke submitted that the respondent did not accept that this evidence showed that family life had continued from 2011 when the appellants entered the UK. He accepted that this was the only issue we needed to determine to remake the appeal. We informed Mr Ball we did not need to call upon him.
12. We reserved our decision.

#### *Conclusions - Remaking*

13. We remind ourselves of the test for finding family life between adult children such as the appellants and their parents as set out in Kugathas v SSHD [2003] EWCA Civ 31 and other authorities. We are looking for something more than normal emotional ties, and more than love and affection, but not necessarily evidence of exceptionality. Our decision will be based on the careful consideration of all of the relevant facts. We set out the key salient evidence which is found in the bundle noting that the appellants parents and their sister and brother-in-law attended the First-tier Tribunal to give oral evidence as set out in their statements and confirmed these statements to be true and correct.

14. The appellants lived with their parents at the time when they travelled to the UK and were both single at the date of decision. They are both daughters and their parents' youngest children - this being supported by documents from the Village Development Committee and Records Office of the British Gurkhas in Pokhara. They did not apply to accompany their parents in 2011 as the family could not afford all four visa application fees at once, so instead they applied two years later in 2013. They were refused in 2013, and they could not afford to pay for any legal advice at that time and so did not appeal the decisions. They reapplied for entry clearance in October 2015 in the belief that a new policy of the respondent would mean that they would be granted entry clearance as they were under 30 years old. We find that this evidence is indicative of the fact that the appellants and their parents wanted to continue to live together as a family in the UK from the time the parents came to settle.
15. The appellants' parents have continued to pay for the appellants' rented home since they left to live in the UK. The appellants withdraw money using a cash card from their father's Standard Chartered Bank account for their living expenses along with receiving monthly money transfers from their parents, some of which are evidenced in the appeal bundle. The appellants have not worked due to high unemployment rates and a lack of contacts to find employment in Nepal, but the second appellant has studied in a graduate programme which her parents have paid for and the first appellant has done some short study courses. It is seen in Nepali culture as the duty of a father to provide support to his unmarried daughters, and the appellants and their parents are keen to reunite so that the appellants can care for their parents with face to face practical and emotional support particularly as father is now 75 years. The appellants and their parents speak on the telephone every other day and sometimes have contact via Viber or Facebook, and there are telephone records in the bundle supporting this contact. The appellants have also been visited by their parents in Nepal on two occasions, once in 2013 and once in 2015. The appellants assert that they are financially and emotionally dependent on their parents.
16. Looking at this evidence in the round we are satisfied that notwithstanding the fact that they are adults the appellants have continued their family life relationships with their parents after they came to settle in the UK, and this is reflected in their settled intention to join their parents in the UK through making applications; their high level of telephone contact and the parents' visits to see them; the fact that the appellants have not established families of their own; and the prevailing Nepali cultural expectations of their remaining under their father's care until they marry and that they have strong duties to care for their parents in this situation too. We also find that it is consistent with our finding of a family life relationship that all of the appellants' living expenses are paid by their parents. We find that the relationships amount to more than normal emotional ties, and are accompanied by a significant level of financial dependency. It follows that the refusal of

entry clearance to the appellants interferes with their family life relationships with their parents.

17. In accordance with Ghising and Others (Gurkhas/BOCs: historic wrong: weight), having found that Article 8 ECHR is engaged, we find that this determines the outcome of the Article 8 ECHR proportionality assessment in the appellants favour as we accept that the appellants' father would, but for the historic injustice to Gurkhas, have settled earlier in the UK following his retirement from the British Army in 1970, and as we find that there are no issues of a bad immigration history or criminal behaviour which weigh against the appellants.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. We set aside the decision of the First-tier Tribunal
3. We re-make the decision in the appeal by allowing it on Article 8 ECHR grounds.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 1<sup>st</sup> May 2019