



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-003615
UI-2023-003616
First-tier Tribunal Nos:
HU/00840/2021
HU/00842/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 02 November 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

**KANGSA RAJ LIMBU (1)
KHARKA BAHADUR LIMBU (2)
(NO ANONYMITY ORDERS MADE)**

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr West, counsel, (instructed by Everest Law Solicitors)
For the Respondents: Ms Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 24 October 2023

DECISION AND REASONS

Background

1. This matter concerns linked appeals against the Respondent's decision letters of 22 December 2020, refusing the Appellants' applications made on 17 October 2020.
2. The Appellants are brothers, and the children of their father the Sponsor, Mr Harka Bahadur Limbu. They applied in substantially the same terms for entry clearance as the children of a former Gurkha discharged before 1997.

3. The Respondent refused the Appellants' claims by letters in substantially the same terms dated 22 December 2020 ("the Refusal Letters"). These stated that the applications had each been considered with reference to Article 8 of the European Convention on Human Rights (ECHR) and having also considered the applicants as dependent relatives under Paragraph ECDR.1.1 of Appendix FM of the UK Immigration Rules. The Refusal Letters accepted that the Sponsor had been granted a settlement visa as a former Gurkha on 24/11/2018 and had settled in the UK on 19/12/2018. However, the Respondent considered the Appellants had not proved dependency on the Sponsor; nor that there was any real, committed, or effective support beyond normal emotional ties between Appellants and Sponsor; nor were there any exceptional circumstances, nor was article 8 engaged. Even if article 8 was engaged, the Respondent said the decision was not disproportionate having taken into account the historical injustice and cases of Gurung & Ors, R (on the application of) v SSHD [2013] ECWA Civ 8 and Ghising and others [2013] UKUT 00567 (IAC).
4. The Appellants appealed the refusal decisions.
5. Their appeals were heard together as linked appeals by First-tier Tribunal Judge Cohen ("the Judge") at Taylor House (virtually) on 28 July 2022. The Judge subsequently dismissed the appeals in his decision promulgated on 6 February 2023.
6. The Appellants applied for permission to appeal to this Tribunal on two grounds described/headed as follows:
 - Ground 1: The Judge failed to properly assess the evidence;
 - Ground 2: The threshold for assessing financial support was too high.
7. Permission to appeal was granted by First-tier Tribunal Judge Austin on 11 August 2023, stating:
 - "1. The application is out of time due to an administrative error made by the appellants' solicitors. The reason for the application being made out of time is accepted and the application is admitted.
 2. The grounds assert that the Judge erred in material errors of law. The grounds present arguable grounds that material errors of law were made by the decision being affected by findings of fact made in the absence of evidence regarding those findings, such as the level of education of the appellants, their employability, and the employment rate prevalent in Nepal, and that these findings may have infected adversely the decisions reached."

The Hearing

8. The matter came before me for hearing on 24 October 2023 at Field House.
9. Ms Ahmed attended for the Respondent and Mr West attended for the Appellants.
10. Ms Ahmed confirmed that the Respondent had not filed a response to the appeal but said that the grounds of appeal were opposed.

11. I asked whether it was agreed that the Refusal Letters had assessed the Appellants under the immigration rules in place at the time concerning adult dependant relative rules, and then under the Respondent's policy applicable to relatives of a Gurkha discharged prior to 1 July 1997, and then article 8 ECHR. Both representatives did so agree that this was the basis of the refusals.
12. I also asked whether a copy of the said rules and policy had been in the bundle before the Judge as I could not see neither before me.
13. Mr West could not answer as to whether a copy of the rules and policy was before the Judge and referred me to a skeleton argument which could also not be located. He considered the lack of these documents was not of particular relevance or importance because the Appellants accepted that neither the rules nor requirements of the policy could be met (as they were both aged over 30 and had lived apart from their parents for over two years). Rather, the principal issue was the engagement of article 8 and the proportionality exercise to be conducted thereafter. He said the Appellant's case before the Judge had been that family life existed and because of this and the historical injustice, the public interest was outweighed in the balancing exercise. He said it was not being suggested that the Judge had erred in not applying the correct provisions, but that he had erred in his analysis concerning article 8.
14. Ms Ahmed agreed that the issue before the Judge was article 8, as indicated in [13] of the Judge's decision.
15. Mr West took me through the grounds of appeal in detail, with his main point concerning ground 1 to be that the Judge bases his findings in [15] and [16] on three factors (educational background, employment and timing of the applications), all of which are flawed by his failure to properly consider the evidence. As regards ground 2, he candidly admitted this was in the same vein as, or could have been contained in, ground 1 and the main point was that the Judge had failed to assess or properly assess the significance of the Appellants continuing to reside in the family home; this was an important factor going to whether there was real, committed or effective support and/or dependency. He said the Judge had also not considered the Appellants' evidence that neither of them was married or had children, and had set out the wrong test in [25], which should have been real, committed *or* effective support rather than 'and'. He said overall, the Judge has carried out a flawed assessment concerning article 8 which was the core issue, such that the decision as a whole was unsustainable. He said had the Judge not so erred, he could have found that article 8 was engaged and therefore, given the historic injustice, and the fact that no other negative factors were being held against the Appellants in the balancing exercise, the outcome could have been different. He asked that the matter be remitted to the First-tier Tribunal for hearing afresh.
16. Ms Ahmed said that she had started with the view that whilst the grounds perhaps did raise errors, they were not necessarily material but having heard Mr West's submissions, said she may be in some difficulty. She went on to outline how the Judge was entitled to make the findings he did concerning the Appellants' education but then agreed that the Judge's approach to the factors of employment and the timing of the applications was questionable. She also agreed that the Judge appeared to make some leaps from the evidence before

him to arrive at his findings. She considered that the findings at [24] possibly salvaged these matters but said she would leave it in my hands.

17. Mr West replied to say he did not consider that [24] was sufficient to save all of the points made and reiterated, with reference to some of the evidence, that the Judge had not appeared to engage properly with the evidence when reaching his decision.
18. At the end of the hearing, I said I was of the view that there were errors contained in the Judge's decision but that I needed to clarify my thinking concerning materiality and so reserved my decision.

Discussion and Findings

19. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge.
20. The Judge's decision is fairly brief. Whilst brevity is often to be lauded, it must not be at the expense of sufficient explanation and reasoning (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal – see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).
21. The Judge correctly sets out, at [1] – [4] of his decision, the basis upon which the Appellants had applied for, and been refused, leave to enter the UK. At [3] he states that:

“The requirements to be met by a person seeking leave to enter the UK as the dependent family member of a former Gurkha are detailed in Annex K of the Immigration Rules.”
22. And at [4] that:

“The appellant's representatives lodged grounds of appeal on the appellant's behalf on 26 January 2021. It was submitted that the decision was not in accordance with the Immigration Rules and breached the parties' human rights. Discretion should have been exercised differently. The decision was in breach of appropriate case law. The respondent was not minded to reverse his decision in the light of the grounds of appeal.”
23. Whether the relevant immigration rules were met was therefore in issue and I note the Judge's finding in [29] that “I do not find that the appellants meet the appropriate requirements of appendix K of the immigration rule”.
24. I cannot see that the Judge anywhere sets out what the requirements of either Annex K to the rules, or the Respondent's policy concerning the relatives of Gurkhas discharged prior to 1 July 1997 are. This is despite what he says at [3] and despite the Appellants' cover letters to the applications taking the form of

responses to “IDI, CHAPTER 15, SECTION 2A, ANNEX K” (stated in the heading to those letters). As discussed at the hearing, I cannot see that any documents containing the text of these rules or policy were in the bundles before the Judge and it appears from looking at the archived version of the immigration rules in force at the time of the hearing, that the reference to ‘Annex K’ was erroneous. Instead, the appropriate part of the rules appears to have been ‘Appendix Armed Forces’.

25. At the hearing, the representatives were in agreement that, despite this and what is said in [4], and the finding at [29], the only issue in dispute was the question of a potential breach of article 8. I therefore simply say that, had they not so agreed this, then without the rules/policy (which have since changed) being before the Judge and without the Judge having set out the requirements therein, I would not have been able to make findings as to whether the Judge properly assessed whether the Appellants had shown they met the correct applicable requirements to the relevant standard.

26. As regards article 8, I note the Judge cites the correct case law at [14]. The case of Rai [2017] EWCA Civ 320 cites the previous cases of Gurung & Ors, R (on the application of) v SSHD [2013] ECWA Civ 8 and Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC). These cases confirm the general position that adult dependent children of Gurkhas are expected to apply for leave to enter or remain under the relevant provisions of the immigration rules or under article 8 ECHR, and that the historic injustice concerning Gurkhas is a factor to be considered when conducting the proportionality exercise under article 8(2). Paragraphs 17-20 of Rai discuss the approach to be taken to family life under article 8 concerning adult children and further cite Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

"24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

27. The Judge’s findings are set out in [13] to [32].

28. As above, (somewhat surprisingly) no issue is taken with the legal basis on which the Judge sought to adjudicate the appeal. Rather, the two grounds of appeal are effectively the same i.e. that the Judge did not properly consider the evidence before him which led him to carry out a flawed assessment as to article 8 and arrive at his finding at [22] that “no family life exists between the appellants and sponsor”.

29. I agree that there are concerns arising from the Judge's findings and as set out in the grounds, which I shall now discuss.

30. At [15] the Judge states

"I note that both appellants are reasonably well educated and have recently been learning English. They are both fit and well. The appellants are in their 40s. It was claimed before me that neither had worked. It was additionally claimed that neither had got married or had children or formed their own independent life. I do not find this to be credible bearing in mind the appellants' ages, educational background and noting that the unemployment rate in Nepal is just 4%. I do not find that an accurate depiction of the appellants' circumstances has been put forward to me".

31. Whilst the underlying evidence leading to the finding that the Appellants are "reasonably well educated" is not referenced by the Judge, I do not consider this finding to be so problematic as to be an error. The words 'reasonably well' do not necessarily mean the Judge meant well educated according to UK standards and there was evidence of the Appellant having received some education. For example, the Second Appellant's application letter dated 19 October 2020 said "I have completed my school level certificate" and the Judge's decision at [9] records that one of the Appellants (it is unclear which one) had "studied a little, most recently English in case he came here". The lack of completion of secondary level studies does not mean a 'reasonable' level of education was not attained.

32. The reference to the unemployment rate in Nepal is problematic, however, as it is simply not clear where this comes from. Neither representative could point me to any objective evidence containing this statistic that was before the Judge and neither said it had been referred to in submissions. It is regrettable that the Judge does not provide any description of the submissions to confirm whether they mentioned this statistic. As it is, it appears this information came from the Judge's own, unreferenced, research and there is nothing to demonstrate he raised this point at the hearing to enable the Appellant to consider or respond to it. This was procedurally unfair and was an error. Ms Ahmed appeared to accept this. It is unclear what weight was afforded to the unemployment factor but it is clear that it was one of the three reasons stated in [15] (the others being age and education) for the Judge finding it not credible that the Appellants had not formed their own independent lives. The Judge's reliance on these factors alone also appears to ignore the Appellants' evidence from other sources concerning their being unmarried and unemployed, such as the letters from the local ward chairperson.

33. The Judge finds at [16] that:

"I note that the appellants' sister's application was made in 2018. I find that if the appellants had themselves formed part of the family unit with the sponsor that their applications would have been made simultaneously. I find the fact that they were not made until late 2020 to be indicative of the fact that the appellants were not part of the sponsor's family unit in Nepal at the time that he left the country in order to come and settle in the UK".

34. In my judgment, to find the Appellants were not part of the family unit simply due to the timing of the applications is a leap, as there could be many reasons why the applications were not all made at the same time and there were other things to consider. As with the employment rate, it is unclear from the Judge's

decision whether the timing of the applications was either raised by the Respondent or put to the Appellants at the hearing. It again appears to have been a point of the Judge's own raising and if so, was procedurally unfair.

35. The grounds of appeal say it is clear that the applications were not made simultaneously due to financial reasons but I cannot see that this has been given as the reason in any of the witness evidence, albeit the Sponsor does refer in his witness statement to having borrowed money to make applications. As such and at best, this is a reason which could have been provided had the Appellants been asked about the matter. But even without the procedural unfairness, there is a lack of reasoning and this is an error.
36. Similar issues can be found with the Judge's findings in [17] that:
- "I have not been provided with bank statements for the appellant's or a breakdown of their income or expenditure. I find this to be indicative of the fact that the appellant's are employed in Nepal and have additional income which would be demonstrated in their bank accounts if disclosed."
37. It is again a leap to conclude that the Appellants are likely employed and have additional income simply because they have not produced any bank statements, and again it is not clear where this point came from and whether it was put at the hearing. It does indicate that the Judge had not digested the Appellants' evidence as to their living circumstances, for example paragraph 6 of the First Appellant's witness statement which says:
- "I fetch water from a tube well. I, as well as my brother, go to the nearby forest at least once every week to collect order and firewood. We have a couple of goats, couple of pigs and few chicken".
38. And paragraph 3 of the Sponsor's witness statement which says:
- "I worked as a farmer. I had a small plot of land in which we grew paddy, maize and millet. The produce would hardly suffice for around six months. We had to buy food items for the rest of the year. My army pension was meagre at that time. I faced a lot of difficulty to raise my children."
39. Whether this evidence is sufficient to mount a finding that bank statements could not be obtained is arguable, but it does provide enough information to mean the easy obtaining of bank statements could not be presumed. As such, the Judge's apparent assumption that they could have been obtained and/or have deliberately not been provided requires some/further explanation.
40. The grounds of appeal also argue that the Judge failed to assess or properly assess the significance of the Appellants continuing to reside in the family home. I agree it is not clear whether the Judge has considered this aspect, which is confirmed in paragraph 1 of both of the Appellants' witness statements. I cannot see that the Appellants have explicitly said they do not have to pay anything in respect of this accommodation, but the fact that they live in their parents' home does not appear to have been challenged by the Respondent and does raise the question of whether they paid for their accommodation, which could be seen as a form of support.

41. In addition to the factors discussed above, the Judge finds it indicative of the fact that the Appellants have formed independent lives that there is limited evidence of contact between the Sponsor and Appellants [18], that there is no evidence of the Sponsor having visited Nepal since coming to the UK [19] and that the Appellants' sister is returning to Nepal to get married [20]. These factors are mentioned in the grounds of appeal at paragraph 2. I do not understand why the return of the Appellants' sister is said to be indicative of the Appellants having independent lives, as they are separate people living in different circumstances. This is particularly so given the Judge says at [26] that "the appellants' cases are distinguished from their sister based upon their gender and personal circumstances". The reference to the lack of visits does not consider why there may have been a lack of visits.
42. Having considered all of these factors, the Judge finds in [22] that:
- "..no family life exists between the appellants and sponsor. I find based on their ages, the fact that I have found that they have formed independent lives and limited contact between the sponsor and themselves that their relationship does not extend beyond normal family ties. I do not find that the refusal of entry clearance causes interference with the rights of the parties to enjoy family life".
43. Given that I have found a lack of reasoning and procedural unfairness concerning the factors leading to this conclusion, I find this conclusion to be unsafe and infected by material errors of law. It cannot be said with certainty that the Judge would have reached the same conclusion as to there being no family life had he not so erred.
44. Ms Ahmed queried whether the Judge had not salvaged matters by saying in [24] that:
- "Weighing up the evidence in the appellants' cases, I find that the appellants are not supported by the sponsor financially to the extent that without the assistance they could not continue to live in Nepal.
45. I do not see how this paragraph salvages anything. I can see it indicates that, despite the finding that no family life exists, the Judge has nevertheless gone on to conduct a proportionality exercise. However, the finding concerning financial support is necessarily linked to the earlier flawed finding at [17] that the lack of bank statements is indicative of the Appellants being employed and having additional income, as discussed above.
46. The Judge's further findings at [25] to [28], which include that there is no degree of genuine dependency, appear similarly to be based on the factors already discussed as there is no reference to any evidence in support of these conclusions which would indicate something different has been considered.
47. I find ground 2 to be rather unclear, which Mr West appeared to accept. To the extent that it is an addition to, or furtherance of, the argument that the Judge failed to properly consider the evidence, I find it to be made out. However I am not persuaded that the Judge misconstrued the threshold for assessing financial support by referring to "a genuine need" of the Appellants requiring support; this could simply be a turn of phrase. Similarly, the use of the word "and" is not necessarily indicative of the Judge having used a conjunctive test rather than the

disjunctive test set out in paragraph 14 of Kugathas v SSHD [2003] EWCA Civ 31 as this could simply be a typing slip. For both of these findings however, there is a lack of reasoning and reference to evidence such that it cannot be said with certainty that the Judge did in fact have in mind the true nature of the correct test in Kugathas and/or had taken on board the development and application of that test in the other cases cited – Gurung, Ghising etc.

48. Overall, I find the decision as a whole lacks sufficient reasoning, and does not sufficiently or accurately refer to the evidence used to arrive at the findings made, which is a material error. It is well-established that reasons for a decision must be given. As per the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), heard by the then President of this Chamber as a member of the panel:

“(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal’s decision.

(2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.”

49. I find the errors found infect the decision as a whole such that it cannot stand.
50. In these circumstances, given the amount of fact finding needed, I find the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh.
51. As an aside, and it was not a point raised by either representative, I note the appeal was heard by the Judge on 28 July 2022 and the decision was promulgated on 6 February 2023, some seven months later. The lapse of time between hearing and decision could be a reason, albeit not an exculpatory explanation, for some of the matters discussed above. I leave it there.

Conclusion

52. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.
53. Given that the material errors identified fatally undermine the findings of fact as a whole, I set aside the decision of the Judge and preserve no findings.
54. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Cohen.

Notice of Decision

55. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
56. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.

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57. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 October 2023