IAC-BFD-MD-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/05294/2015 &

HU/05296/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 July 2017** | **On 11 July 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD**

**Between**

**SBT – FIRST APPELLANT**
**NT – SECOND APPELLANT**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr R Rai, Counsel.
For the Respondent: Mr S Whitwell, Home Office Presenting Officer.

**DECISION AND REASONS**

1. The Appellants are nationals of Nepal who appealed against the Respondent's refusals of 17 August 2015 and 18 August 2015 of their

applications for entry clearance as the adult dependent sons of KBT, a former Gurkha soldier. Their applications were refused.

2. Consequent upon the private health issues raised in this appeal it is appropriate that an anonymity order is made.

3. In the case of the first Appellant the application was refused under paragraph 9(4) and 14 of Annex K on the basis that he was 33 at the date of application and thus outside the 18 to 30 year old age range and under paragraph 9(5) on the basis that he had not demonstrated financial dependence on the Sponsor. The decision went on to find that there were no exceptional circumstances and that Article 8 did not require that the application be granted.

4. The second Appellant's application was refused under paragraph 9(5) of Annex K on the basis that he had not demonstrated financial dependence on the Sponsor and that Article 8 did not require that application be granted.

5. The Appellants sought permission to appeal which was initially refused by Judge of the First-tier Tribunal Colyer. His reasons for so doing were:-

> "1. The appellants seek permission to appeal against a decision of the First-tier Tribunal (Judge Anstis) who, in a determination promulgated on the 17th October 2016, found that the appellant had no right of appeal in relation to the respondent's refusal to grant their applications for entry clearance to the UK as the adult dependent sons of a former Gurkha soldier.
>
> 2. The appellants seek permission to appeal to the upper tribunal on the grounds set out in the 8 page reasons for appealing. In summary:
>
> a. the judge failed to have regard to historic injustice and the relevance to the circumstances of the family.
>
> b. The judge failed to have any regard to paragraph 9 of annex K chapter 15, section 2A (this is relevant to determining the lawfulness of the decision in the exercise of discretion and any article 8 assessment.)
>
> c. The judge fails to provide sufficient and/or any proper reason for why the applicant's do not engage article 8. And/or the judge acts irrationally, amounting to an error of law when finding that the applicants do not engage article 8.
>
> 3. Permission to appeal may be granted if I am satisfied that there may have been a material error of law that would have made a material difference to the outcome of the original appeal. This could be due to adverse or irrational findings or a lack of findings

on core issues as established in the case of **R (Iran etc) v SSHD [2005] EWCA Civ 982**.

4. I have considered the decision and reasons. In a well reasoned determination the Tribunal judge gave adequate reasons for the findings. A clear analysis was made by the Tribunal judge in respect of the evidence before the tribunal. It is clear from that the judge was aware of the appellants' circumstances and the appellants could not meet the Immigration Rules' requirements.

5. It is clear that the judge gave full consideration to the requirements of the immigration rules and article 8 ECHR plus the appropriate case law including **Gurung** and **Ghising** The judge has appropriately applied the immigration rules and considered article 8 ECHR. The judge concludes that the appellants' circumstances were not exceptional and describes public interest in maintaining effective immigration control.

6. The grounds amount to nothing more than a disagreement with the findings of the judge, findings which were properly open to the judge on the evidence before the Tribunal. They disclose no arguable error of law.

7. Permission to appeal to the Upper Tribunal is refused".

6. However, following a renewed application to the Upper Tribunal the applications were granted. Upper Tribunal Judge McWilliam's reasons were:-

> "The Appellants seek permission to appeal against the decision of FtT Judge Anstis to dismiss their appeals against the decision of the ECO to grant them entry clearance.
>
> It is arguable that the judge has not properly reasoned why Article 8 (1), at the date of the decision, was not engaged. All grounds are arguable".

7. Thus the appeals came before me today.

8. At the outset Mr Rai handed up the authority of **Rai v Entry Clearance Officer, New Dheli [2017] EWCA Civ 320**. He relied on it and urged me to find that Judge Anstis had materially erred in his approach to Article 8. In particular he drew my attention to paragraphs 19, 33 and 35 of **Rai** which state:-

> "19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed

> (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".
>
> 33. But the real weakness in the Upper Tribunal judge's conclusions with regard to article 8(1), as I see it, is one of substance, not merely of form.
>
> 35. The Upper Tribunal judge referred in paragraph 21 of his determination to the evidence of the appellant's continuing "financial dependence" on his father and mother, which was undisputed and which he accepted. In paragraph 23 he acknowledged the difficulty in assessing "emotional dependence". But he referred to factors which seemed to him to indicate the appellant's parents' view that the appellant was "able to exist independently, emotionally, physically or otherwise so long as he was provided with money unless or until he obtained employment or gained financial independence through some other means". The single factor which seems to have weighed most heavily in that conclusion was the appellant's parents' willingness to leave Nepal to settle in the United Kingdom when they did."

9. He submitted that the Judge had materially misdirected himself in fact and fails to have regard to historic injustice and its relevance to the circumstances of this family. Further that the Judge misdirected himself in law by failing to have any regard to paragraph 9 of Annex K, Chapter 15, Section 2A which is relevant in determining the lawfulness of the decision in the exercise of discretion and to any Article 8 assessment. Finally the Judge had failed to provide sufficient and/or any proper reason for why the Appellants cannot succeed on Article 8 grounds. He asserted that the only reason given for finding that the Appellants did not engage with Article 8 is that the family life they sought to make is in two separate countries. This ignores other findings including the fact that the family have spent four of the last six years together, that the second Appellant suffers from schizophrenia and is dependent upon the other Appellant, both Appellants are financially and emotionally dependent upon their Sponsor, that since March 2015 the Sponsor's own illness has prevented any return to Nepal, neither Appellant is married or has formed their own family unit and at the time of the applicant the first Appellant was 30 years of age.

10. Mr Whitwell relied on the Respondent's Rule 24 notice of 6 June 2017 and submitted that the First-tier Judge's decision is well-reasoned and he has clearly had regard to the Appellants' individual circumstances as well as established case law, that the Judge has given reasons for his findings in relation to Article 8 and that the Appellants' arguments are no more than a disagreement with the Judge's findings.

11. Mr Rai urged me to find not only that the Judge materially erred for the reasons given in the grounds but also that it was now open to me to remake this decision by allowing the appeal.

12. I find that there is here a material error of law. During the course of the hearing Mr Whitwell accepted were I to find ground 3 made out then grounds 1 and 2 would fall by the wayside. That is the exact position. The Judge has failed to provide sufficient and/or any proper reason for why the Appellants cannot succeed under Article 8. In fact only one reason has been given as to why Article 8 is not engaged and that is that the family has sought to make their lives in two separate countries. Paragraph 39 of **Rai** states: -

> "39. The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "… not compulsory but … voluntarily undertaken …" (paragraph 20), "… having made the choice to come to the [United Kingdom]" (paragraph 21), "… the willingness of the parents to leave …" (paragraph 23), and "… their voluntary leaving of Nepal and leaving the Appellant …" (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."

13. I am satisfied that the Judge has given inadequate reasons for dismissing the appeal under Article 8. The Judge's analysis has not taken into account the totality of his findings. Having come to that conclusion, and irrespective of it, I am satisfied that grounds 1 and 2 are also made out.

14. I have carefully considered whether I can go on to remake the decision in this appeal. I conclude that for all the reasons set out in the grounds the decision of the First-tier Tribunal contains errors of law and has to be set aside in its entirety. In the circumstances it is appropriate for these appeals to be heard again and for the totality of the evidence in relation to both private and family life to be reconsidered and all matters decided afresh by the First-tier Tribunal.

## Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any Judge aside from Judge Anstis.

## Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 July 2017

Deputy Upper Tribunal Judge Appleyard