



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

Appeal Numbers: HU/05120/2015
HU/05119/2015

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On May 28, 2019

**Promulgated
On June 04, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR KESHAB SING GURUNG
MR KAMAL SING GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Khalid, Counsel instructed by Goulds Green Chambers

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are Nepalese nationals and are now 33 and 34 years of age respectively. They lodged applications to join their father and sponsor, Sarsing Gurung, as adult dependants. The respondent refused their applications on August 13, 2015 finding they neither satisfied the Immigration Rules nor did they fall within the 2009 discretionary arrangements for family members of former Gurkhas.

2. The appellants appealed those decisions under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 and their appeals originally came before Judge of the First-tier Tribunal Sullivan who allowed their appeals in a decision promulgated on January 25, 2017.
3. The respondent appealed those decisions and Deputy Upper Tribunal Judge Black set the decisions aside and remade the decision without further evidence and dismissed the appeals in a decision promulgated on October 10, 2017.
4. The appellants appealed that decision seeking leave to appeal from the Court of Appeal but Upper Tribunal Judge Coker, on February 9, 2018, found there had been a procedural irregularity in the way Deputy Upper Tribunal Judge Black had dealt with the matter and under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 she set aside that decision to the extent that she remitted the appeal back to the First-tier Tribunal for findings to be made.
5. The appeals were reheard by Judge of the First-tier Tribunal Hussain, hereinafter referred to as “the Judge”, who in a decision promulgated on 22 March 2019, dismissed the appeals finding there was no family life for the purposes of Article 8 ECHR or, even if there was family life, it was not disproportionate to refuse them entry.
6. Judge of the First-tier Tribunal Gumsley granted permission to appeal on May 2, 2019 finding it was arguable that the Judge had erred in his approach to the evidence.
7. No anonymity direction is made.

PRELIMINARY ISSUES

8. Mr Tarlow conceded that the phraseology used by the Judge in paragraph 23 of the decision gave the impression of a predetermined view on the matter and this amounted to an error in law.
9. I raised with both Mr Khalid and Mr Tarlow whether this was a case that should be returned, once again, to the First-tier Tribunal or whether it was a case that could be retained in this Tribunal and dealt with today by further submissions. Both representatives agreed this latter option was their preferred approach and in light of the history of this matter and the actual issues in the case, I agreed to deal with the matter.
10. I preserved the following findings:
 - (a) The appellants were financially dependent on their father based on the Judge’s findings in paragraphs 23 and 25 of his decision.
 - (b) The appellants could not satisfy the requirements of either the Immigration Rules or any discretionary policy that applied to former Gurkha family members.

11. Mr Khalid indicated he would still be inviting the Tribunal to consider whether historic injustice was a factor that tipped the scales in their favour despite the fact it had previously been conceded before the First-tier Judge that this was a stand-alone Article 8 appeal.

FINDING ON ERROR IN LAW

12. I find there was an error of law for the reason conceded by Mr Tarlow, namely that the Judge gave the impression, unfairly, that “young men of the Indian subcontinent can become very choosy about the types of job they will do to support themselves”.
13. Having established the error of law I invited submissions from both representatives.

SUBMISSIONS

14. Mr Tarlow submitted that the appeal should be dismissed because neither Article 8 was engaged for the purposes of family life nor was it disproportionate to refuse their applications because their decision to rely on their father financially was through choice rather than necessity. There was no evidence that either appellant had any disability which would prevent either of them from seeking employment and that they had simply chosen not to work. He submitted that the principles of Kugathas [2003] EWCA Civ 31 applied and this was not a case where historic injustice played any role for the reasons previously conceded at the First-tier Tribunal hearing.
15. Mr Khalid invited the Tribunal to find that Kugathas was the applicable law and that if the Tribunal found that family life existed then he submitted that due to the historic injustice, suffered by Ghurkha family members, the scales were tipped in their favour and they should be granted admission to the United Kingdom. The appellants chose to be supported by their father out of necessity, rather than choice, and that their father’s financial support was effective support that enabled them to survive in Nepal. There was an emotional attachment that went beyond normal emotional attachments and, in particular, their culture dictated that parents supported family until they were married. He invited the Tribunal to allow their appeals.

FINDINGS

16. The two appellants are the sponsor’s children and from the evidence presented it seems that their elder brother is serving with the British Army and their sister was a doctor. Both appeared to have obtained employment and careers outside of the support of their father. Their father had previously served for the British Army between 1973 and 1988 and had been granted indefinite leave to live in the United Kingdom, although that leave was not through any discretionary policy applied by the United Kingdom but for other reasons.

17. This matter came before the First-tier Tribunal and Counsel for the appellants accepted that neither the Immigration Rules nor the various policies applicable to family reunion of former Gurkhas applied to these appellants. That finding, which is not challenged, was set out at paragraphs 9 and 10 of the Judge's decision.
18. At today's hearing Mr Khalid sought to go behind the concession based on the witness statements provided by both appellants.
19. There is no dispute that the sponsor sent money to both appellants and Mr Tarlow did not suggest that the appellants were not in contact with their father. The issue was whether article 8 was engaged for the purposes of article 8 ECHR.
20. The Court of Appeal, in Kugathas, stated that in order to establish family life it was necessary to show that there is a real, committed or effective support or relationship between the family members and that normal emotional ties between a parent and adult child would not without more be enough but each case required a fact-sensitive approach. There has been subsequent case law including Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160, Pun & Anor (Nepal) v Secretary of State for the Home Department [2017] EWCA Civ 2016 and Singh [2015] EWCA Civ 630, to mention but a few.
21. These appellants are in their early thirties and they claim that they rely on their father for their day-to-day living expenses. The Court of Appeal, in JB (India) & Ors v ECO [2009] EWCA Civ 234, made clear that financial dependence to some extent on a parent did not demonstrate the existence of strong family ties between adult children and a parent, nor did weekly telephone calls evidence anything more than the normal ties of affection between a parent and adult children.
22. Case law suggests the appellants must demonstrate further elements of dependency which go beyond normal emotional ties and whilst money sent to them, by their father, raised an element of dependency, it would not, on its own, be sufficient because the provision of such money could be as much an insulation against family life as evidence of it.
23. Refusing their appeals did not mean the appellants would not continue to receive payments from their father and such payments would maintain the status quo and would not interfere with their current family life.
24. The appellants' witness statements refer to the fact that they have tried to find jobs but without success due to the fact that job opportunities are very few and far between in Nepal. They both failed to be granted admission to the British Army.
25. Ultimately, this is an appeal about whether Article 8 was engaged between adult dependants who are in their early thirties and their father, who has resided in the United Kingdom for over thirteen years.

26. The Court of Appeal in Vikas and Manesh Singh [2015] EWCA Civ 630 made clear that the factors to be examined in order to assess proportionality were the same regardless of whether private or family life was engaged. Unless the appellants could demonstrate evidence of anything beyond the normal bonds of affection then such financial support that they received could not lead to a finding of family life.
27. Mr Khalid further argued that the historic injustice suffered by Ghurkha family members was a factor that should tip the scales in the appellants' favour. I accept that the appellants' father was a Gurkha but it was not argued that he had been granted entry clearance based on any discretionary policy relating to Ghurkhas.
28. Whilst I take on board the fact that the appellants remain financially dependent on their father, I accept Mr Tarlow's submission that this was primarily out of choice. There was a lack of evidence of any steps taken by the appellants to obtain work. To suggest that all Nepalese men, in their early thirties, are unable to obtain work has no evidential basis.
29. I am satisfied that the appellants have made a transition to independent living notwithstanding the degree of financial dependence. The fact the appellants' father was a Gurkha is not a factor, on the facts of these appeals, that tips the scales in the appellants' favour.
30. I therefore find that whilst there is a reliance upon their father financially, this is through choice and not out of necessity. I am not satisfied that the emotional bond demonstrated by the father and appellants go beyond the mere emotional bonds of a father/adult child relationship. Article 8 ECHR is therefore not engaged, but even if I accepted that Article 8 was engaged, on the basis that they are connected by virtue of being father and sons, I am satisfied that on the facts of these appeals refusing entry clearance would not be disproportionate. The family life that they have had since the father went to the United Kingdom can continue in much the same way as it has done since 2006.

NOTICE OF DECISION

31. I find there was an error in law, and I set aside the original decision.
32. I have remade the decision but have dismissed the appeals having reassessed the evidence submitted.

Signed

Date

30/5/2019



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award is made because the appeals are dismissed.

Signed

Date

30/5/2019

A handwritten signature in black ink, appearing to read "SPAL" with a flourish underneath.

Deputy Upper Tribunal Judge Alis