Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
HU/01129/2020 [UI-2021-000738]
HU/01130/2020 [UI-2021-000739]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons** Promulgated
On the 28 February 2022	**On the 20 April 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) YUBRAJ GURUNG
(2) PREM BAHADUR GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Jafar, Counsel
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants, who are related to each other as brothers, appeal from the decision of the First-tier Tribunal (Judge Kainth sitting at Hatton Cross on 9 April 2021) dismissing their appeals against the decision of the respondent to refuse to grant them leave to enter as the adult dependent children of their father, who was a former member of the Brigade of Gurkhas.

Relevant Background

2. The appellant's sponsor was born in Nepal on 5 December 1944, and he joined Her Majesty's Forces in Nepal on 6 December 1961. He served in the British Armed Forces for about 15 years, and he was discharged from the Brigade of Gurkhas on 8 October 1976. Following his discharge, the sponsor got married and went on to have eight children, seven of whom are still living. The first appellant was born on 1 May 1997, and the second appellant was born on 11 June 1988.

3. As the result of the amended Immigration Policy published in May 2009, the sponsor became eligible to apply for settlement as a Gurkha who had retired before 1 July 1997. The sponsor's evidence is that he wished to apply for settlement with his wife and the two appellants, but he was not able to obtain a family relationship certificate (aka "Kindred Roll") from the British Gurkha Records Office in Pokhara to confirm that the appellants were his children. Accordingly, after waiting for almost a year and a half, he decided only to pursue a settlement application for himself and his wife. He and his wife were granted unlimited leave to enter on 3 May 2011 and they arrived in the UK on 2 November 2011. He says that he and his wife went back every year, apart from 2014, to visit the appellants and to make inquiries at the Records Office in Pokhara regarding the progress of his application for a family relationship certificate. The answer that he got was that it was under investigation.

4. Eventually, on 5 July 2019 a family relationship certificate was issued to him by the Records Office in Pokhara after he and the appellants had conducted a DNA test to prove their relationship. On 16 September 2019 the appellants applied for entry clearance to the UK as his adult dependent children.

5. In the refusal decision directed to the second appellant, it was acknowledged that he might receive some financial support from his father and that he remained in contact with him. However, he had not demonstrated that he was financially and emotionally dependent upon his father beyond that normally expected between a parent and adult child. It was also noted that he had stated in his visa application form that he had previously travelled to the Kingdom of Saudi Arabia on 1 April 2014 in order to take up paid employment. The fact that he travelled overseas alone for this employment after his father had already settled in the UK demonstrated emotional and financial independence. This fact was not undermined by his subsequent return to Nepal and residence in his parents' house. Even if the refusal might be interference with private life, it was not accepted that he had established family life with his parents over and above that which an adult child and his parents would have, or that he demonstrated real or committed or effective support from his parents. He had not demonstrated that Article 8 was engaged.

6. In the refusal directed to the first appellant, it was accepted that he might receive financial assistance from his father. Nonetheless, he was able to look after himself. Furthermore, he had not demonstrated that any financial assistance he received could not continue, or that he could not

continue to reside in Nepal. The respondent was also satisfied that he had close family to turn to for support in Nepal, if so required. The respondent was mindful of the fact that he had stated in his visa application form that he had previously travelled to Malaysia on 10 March 2016 in order to take up paid employment. The fact that he had travelled overseas alone for this employment after his father had already settled in the UK demonstrated emotional and financial independence. The respondent was also mindful of the fact that when his father settled in the UK, he appeared to have made no special arrangements for his support and had been content to leave him to look after himself. This was despite the fact that he was a minor when his father was granted his settlement visa in 2011. The respondent was not satisfied that he had established family life with his father over and above that between an adult child and a parent, or that Article 8 was engaged.

The Decision of the First-tier Tribunal

7. The appeal hearing took place on the Cloud Video Platform on 9 April 2021. Both parties were legally represented. At paragraph [11] of his subsequent decision, the Judge said that the sponsor continued to own property in Nepal where the appellants resided with their older brother and his family. The sponsor had seven living children. His youngest daughter was married and settled with her family in India. His second daughter, Mrs Yasoda Gurung, was married to Mr Shree Bahadur Gurung who had given evidence in the appeal, and who was currently a British Army Soldier. The sponsor's other children were all married (apart from the appellants) and living with their families in remote villages in Nepal.

8. At paragraph [13], he said that, prior to the sponsor coming to the UK, he had lived with the appellants and some of their siblings at the family house in Nepal. The sponsor frequently visited Nepal, and at paragraph [10] of his witness statement he set out the dates he had returned to Nepal - namely 2013, 2015, 2016, 2017, 2018, 2019 and 2020. He was told by the witness who gave evidence that the sponsor remained in Nepal and was unable to return back to the UK due to Covid-19. The Judge continued:

> "On the lower burden of proof I take into account the above findings, and find that the Appellant enjoys some limited family life with the sponsor, thereby disposing of the first **Razgar** question."

9. At paragraph [14], the Judge went on to observe that the immigration decision prevented the appellant and sponsor living in the UK against their wishes. Of itself, the failure to respect their wishes did not have the potential to engage Article 8. But there were other factors. The sponsor was granted leave to enter based on his services as a Gurkha in the UK Army. The sponsor had every right to reside in the UK - a decision which he chose to exercise in 2011. The Judge continued:

> "The decision refusing entry clearance may have consequences of such gravity as potentially to engage the operation of Article 8, thereby disposing of the second **Razgar** question."

10. The Judge went on to answer the third and fourth **Razgar** questions in favour of the respondent. The Judge's discussion on proportionality began at paragraph [24]. After extensive citation from a number of authorities, including **Kugathas -v- SSHD [2003] INLR 170, Ghising & Others (Historic wrong - weight) [2013] UKUT 00567 (IAC)**, and **Jitendra Rai -v- ECO (New Delhi) [2017] EWCA Civ 320**, the Judge made a series of findings and observations.

11. At paragraph [34], he said that the claimed level of financial dependency had been exaggerated. In his assessment, it was no more than the sponsor providing the sponsor with additional spending money rather than it constituting essential financial support.

12. At paragraph [35], he said that surprisingly there were no telephone logs submitted to identify the frequency of communication between the appellant and his parents. Such logs would, he said, have assisted with respect to the questions that need resolution.

13. At paragraph [36], he said that the question of whether family life had endured beyond the initial separation between the appellants and their parents to the present day was obviously central to the finding that it continued to subsist. Just because the appellants were not married did not mean that they were not leading independent lives with/from their parents. He had not been provided with any detailed breakdown regarding how long their parents had remained in Nepal when visiting

14. At paragraph [38], he contrasted the facts of the case before him with the facts of **Ghising**. The appellant (singular) in this case was not in the same position as the claimant in that case. He was a decade older, and he had not lived with the sponsor for nearly 9 years, and there was a gap of at least 5 years in the evidence of dependency. He had close relatives still living in Nepal, and the sponsor had other children in the UK to assist him.

15. At paragraph [39], he found that the documentary evidence of emotional and financial dependency to be sparse, particularly during the years immediately after the sponsor left Nepal for the UK. The evidence of financial support was evidenced by one money transfer receipt for August 2019. While the sponsor claimed that he had given cash to friends and family of the appellant, no evidence to support this had been provided at any stage.

16. At paragraph [40], he said that there was no documentary evidence of the appellants being financially supported by the sponsor until 2019. The first appellant was about 12 years of age when his parents came to the UK. He was looked after by his elder siblings. As to evidence of emotional support, there was an absence of telephone call logs. In essence, there was an absence of continuing emotional and financial dependency from when their parents arrived in the UK to the present day.

17. At paragraph [41], the Judge gave his conclusion on the issue of proportionality:

> "While the respondent accepted that the sponsor could have settled in the United Kingdom earlier, were it not for the historic injustice, it is the case that the sponsor left the Gurkha Regiment in 1976 whereas the Appellants were not born until 1988 and 1997 and thus they would not have been able to accompany their father. Given the foregoing findings, I have limited the weight which I have attached to the historic injustice issue. I conclude that considering all matters, including the Appellants' limited emotional and financial dependency on the sponsor, that the circumstances are insufficiently compelling to outweigh the public interest considerations applicable in this case."

The Reasons for the Grant of Permission to Appeal

18. On 20 October 2021, First-tier Tribunal Judge Brannan granted the appellants permission to appeal for the following reasons:

> "The grounds assert that the Judge erred in law by reducing the weight of historic injustice in paragraph 41. The Judge has arguably misdirected himself by ignoring the possibility of the appellants being born in Britain but for the historical injustice. As this appears to be the basis for reducing the weight given to the historical injustice it constitutes an arguable material error of law."

The Respondent's Rule 24 Response

19. On 29 November 2021 Mr Willocks-Briscoe of the Specialist Appeals Team settled a Rule 24 Response in which he did not oppose the application for permission to appeal. He said that while the respondent was the ostensible winning party in the appeal, the respondent challenged the decision of Judge Kainth, following **Devani [2020] EWCA Civ 612**. This was because the Judge had made contradictory findings of fact. The Judge had found that the appellants both did have and did not have family life with the sponsor. As such, the determination should be set aside in full and remitted to the First-tier Tribunal for a *de novo* hearing.

The Hearing in the Upper Tribunal

20. At the hearing before us to determine whether an error of law was made out, Ms Ahmed handed up a copy of the above Rule 24 Response which we had not seen. After establishing that both Ms Ahmed and Mr Jafar were in agreement that the decision of the First-tier Tribunal should be set aside in its entirety, and that the appeal should be remitted to the First-tier Tribunal for a *de novo* hearing, we informed the representatives that we were satisfied that the decision of Judge Kainth was vitiated by a material error of law such that it should be set aside in its entirety and remitted to the First-tier Tribunal for a *de novo* hearing, and that our written reasons for so finding would follow.

Discussion and Conclusions

21. As is pleaded in the application for permission to appeal settled by Mr Jafar on 6 August 2021, the respondent's policy on adult children of former Gurkhas contained in Annex K states as follows at paragraph 17: "*In order to qualify for settlement under this policy, the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here).*"

22. Judge Kainth limited the weight which he attached to the historic injustice principle on the ground that, because the appellants were not born until long after the sponsor left the Gurkha Regiment, they would not have been able to accompany him if he had been able to apply for settlement in the UK before 1988 (in the second appellant's case), or before 1997 (in the first appellant's case). However, it is apparent from the terms of the policy set out in Annex K that it applies to all dependent children of the sponsor, and not just those who have already been born by the time of the sponsor's discharge. Accordingly, the Judge materially erred in law in reducing the weight to be given to the historic injustice principle on the ground that the appellants would not have been able to accompany the sponsor to the UK as they were unborn.

23. In addition, as submitted by the respondent in the Rule 24 Response, the Judge also materially erred in law in making inconsistent findings as to whether Article 8(1) was engaged. When he first addressed the topic at paragraphs [13] and [14] of his decision, he applied the wrong standard of proof. He applied the lower standard of proof, when he should have been asking himself whether questions 1 and 2 of the **Razgar** test should be answered in the appellants' favour on the balance of probabilities. He also introduced irrelevant considerations into the assessment. The fact that the sponsor had every right to take up residence in the UK in 2011 is relevant to the issue of proportionality, but it does not cast any light on the question of whether the refusal of entry clearance to the appellants has consequences of such gravity as to engage the operation of Article 8(1) from a family life perspective.

24. It is only much later on in his decision, when he is discussing proportionality, that the Judge poses the crucial question, which is whether family life between the appellants and their parents has endured beyond their initial separation "*to the present day".*

25. At paragraph [37], the Judge said that the appellants had been at least partially financially supported by the sponsor and that there had been some physical contact, and continued: "*I do consider this to be evidence of a level of dependency beyond what could be expected of a normal loving family.*"

26. However, the Judge then went on to make findings which went the other way, including at paragraph [40] where he held that there was an absence of continuing emotional and financial dependency from when the appellants' parents arrived in the UK to the present day.

27. As a consequence of the Judge's inconsistent findings leading up to paragraph [41], it is unclear in paragraph [41] whether he is adhering to, or resiling from, his earlier finding that Article 8(1) is engaged. When the Judge refers to the appellants' limited emotional and financial dependency on the sponsor, it is not clear whether the limited emotional dependency is nonetheless sufficient in the view of the Judge to justify questions 1 and 2 of the **Razgar** test being answered in the appellants' favour with regard to them having subsisting family life with the sponsor.

28. In conclusion, we find that the decision of the First-tier Tribunal is vitiated by material errors of law such that the decision should be set aside in its entirety, and that none of the findings of fact made by the First-tier Tribunal should stand.

Disposal

29. In view of the fact that the appeal will need to be re-heard in its entirety, we consider that it is appropriate that the appeal is remitted to the First-tier Tribunal for a *de novo* hearing.

Anonymity

30. The Judge did not make an anonymity direction, and we have not been asked to do so. We consider that there is no good reason to impose an anonymity direction, having regard to the importance of open justice and the *Presidential Guidance Note No.1 2013*.

Notice of Decision

31. The decision of the First-tier Tribunal contained material errors of law, and accordingly the decision is set aside in its entirety.

Directions

32. The appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing before any Judge apart from Judge Kainth, with none of the findings of fact made by the First-tier Tribunal being preserved.

Signed
Date 6 March 2022

Deputy Upper Tribunal Judge Monson