**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: OA/10146/2012
OA/10154/2012

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 30 April 2013** | **On 12 July 2013** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**AMRITA KOIRALA**
**ANUJA KOIRALA**

Appellants

**and**

**ENTRY CLEARANCE OFFICER-NEW DELHI**

Respondent

**Representation:**

For the Appellants: Ms R. Stichler, Counsel, instructed by N.C. Brothers Solicitors
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants are citizens of Nepal, born on 1 October 1988 and 1 October 1990, respectively. They are sisters. On 16 February 2012 they made applications for entry clearance as dependant relatives. Following the refusal of their applications under paragraph 317 of HC 395 (as amended) they appealed to the First-tier Tribunal. Their appeals were

dismissed by First-tier Tribunal Judge Hague after a hearing on 21 January 2013.

2. Permission to appeal was granted on the basis of arguable errors of law in the judge's Article 8 assessment. The appeal before me was pursued only on the basis of Article 8 of the ECHR

*Submissions*

3. The submissions on behalf of the parties can be summarised. On behalf of the appellants Ms Stichler relied on her skeleton argument. She submitted that the judge had misdirected himself in terms of the appropriate legal test for the assessment of whether there was family life between the appellants and their parent. Furthermore, there was no appropriate balancing exercise. I was referred to the decisions in Kugathas [2003] EWCA Civ 31 and Ghising (family life-adults-Gurkha policy) Nepal [2012] UKUT 160 (IAC). In relation to the latter decision, the judge had not taken it into account although he was referred to it.

4. The appellants had never broken away from the family unit. Their mother did not come to the UK until 2011 even though she was granted permission to stay in June 2009. She and the two appellants, and her son, all applied together but she remained with them. In February 2012 her son's application was granted but those of the appellants were refused.

5. Judge Hague accepted that the appellants were being subsidised financially by their mother. However, at [8] and [17] he appeared to emphasise the appellants' prospects of obtaining employment in Nepal even though there was no evidence before him on that issue.

6. So far as proportionality is concerned, there is no reasoning on the issue. The judge should have considered the 'historic injustice' (Sharmilla Gurung [2013] EWCA Civ 8). There was evidence in the witness statement of the appellants' mother that had their father been allowed to he would have settled in the UK.

7. Mr Jarvis referred to the appellant's skeleton argument and the authorities relied on. He submitted that the question of family life was fact-sensitive. The judge had recognised the appropriate test in terms of family life between adult children and parent, notwithstanding the criticism of the language he used.

8. Various aspects of the evidence were referred to in Mr Jarvis' submissions. The appellants are not living in the family home but are studying in Kathmandu. It is evident from [8] of the determination that the sponsor played down the prospects of the appellants becoming employed, not only in the context of Nepal but also in the UK. The judge was entitled to find that the nature of their education was such that ultimately they would have a desire to obtain employment. Although it

was found that they are financially dependant, they are away from home and pursuing educational qualifications.

9. In reply Ms Stichler accepted that the question of family life is a question of fact but it must be decided with reference to the correct legal test. The judge had not referred to relevant authorities.

*My assessment*

10. It was not contended before me that the appellants are able to succeed under the Immigration Rules, and indeed in the determination at [12] it was conceded on behalf of the appellants that they could not meet the requirements of paragraph 317. Neither was it suggested to me that they come within any policy applicable to the children of Gurkhas and there has been no challenge to the decision of the First-tier judge on that issue.

11. At [5] of the determination Judge Hague set out the appellants' family history, including the fact of the appellants' father having applied for settlement as an ex-Gurkha soldier and his having died before his application was decided.

12. It was concluded by the First-tier judge that the appellants do not have family life with their mother. At [17], he stated that "In the case of Kugathas it was held that family life, for the purposes of Article 8, is not established between adult children and parents save in circumstances of *special dependency*" (my emphasis). The appellants' skeleton argument and submissions contend that this phrase does not represent what was said in Kugathas.

13. I agree that in referring to what was decided in Kugathas, Judge Hague did use an expression that does not appear in that decision. The phrase in Kugathas is in terms of there being evidence of further elements of dependency "involving more than the normal emotional ties." However, I do not consider that what the judge said in his determination indicates that he used the wrong test in deciding the issue of whether there is family life between the appellants and their mother. His use of the phrase "special dependency" was obviously intended to reflect what was said in Kugathas. In addition, when [17] is read as a whole, it is clear that the judge was aware of what had to be established in terms of family life between adult children and a parent.

14. Complaint is made about the judge's reference to the appellants' ability to obtain employment, submissions before me being to the effect that there was no evidence as to their prospects of employment in Nepal. However, it was in my view legitimate for the judge to conclude at [8] that there was no apparent impediment to their becoming economically self-reliant and independent of their mother. In this context I note that in the notices of decision the Entry Clearance Officer suggested that the appellants were clearly studying at a higher level so that they could

take employment and that there was no reason why they could not do so. In the Entry Clearance Manager's review it is suggested that the appellants are healthy adults who are capable of making a living. Those observations do not appear to have been contested by or on behalf of the appellants in the grounds of appeal or in their evidence.

15. For the same reasons, I consider that as part of the assessment of whether the appellants have family life with their mother, it was legitimate for the judge to take into account what he described as their "employment prospects" at [17] of the determination.

16. It is true that the judge did not expressly refer to the decision of the Upper Tribunal in Ghising. I accept that he was referred to it. However, it seems to me that Judge Hague gave effect to what was said in that decision about the need not to apply too restrictive an approach to the issue of family life, especially between adults. At [17], after referring to Kugathas and "special dependency", he said that this is "not a hard and fast rule". He noted that family life does not automatically cease on a child reaching the age of 18 years. Although I was referred to the decision of the Court of Appeal in Sharmilla Gurung, I cannot see that that decision indicates any error in approach by Judge Hague in this case.

17. He took into account the appellants' ages (they were aged 23 and 21 at the dates of application). He noted that they are financially dependant on their mother but that they lived away from home, were studying and had employment prospects. At [11] he referred to the fact that for the majority of the time they would be living away from their mother's home in Pokhara, even if she were still living in Nepal. He also noted in the same paragraph that there is a wider family group in Nepal including three aunts and their families in Kathmandu, with three uncles and their families in Pokhara.

18. As the authorities make clear, and as was accepted on behalf of both parties before me, the issue as to the existence of family life is a fact-sensitive one. Of course, the facts must be applied within the correct legal framework. In these appeals, I am satisfied that the judge did make his decision within the context of a correct appreciation of the legal framework. He reached conclusions on the facts that were open to him and applied those facts to that framework.

19. I am satisfied that he was justified in concluding that the appellants did not enjoy family life with their mother, notwithstanding their financial dependence on her and their contact with her.

20. On that basis, he had no need to go on to consider the proportionality of the respondent's decision. Even if the proportionality assessment could otherwise be found wanting, any error of law in the proportionality assessment could not have affected the outcome of the appeals.

Decision

21. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeals under the Immigration Rules and under Article 8 stands.

Upper Tribunal Judge Kopieczek

11/07/13