Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01501/2015
HU/01497/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 01 December 2017**

Before

THE HON. LORD MATTHEWS
DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

S R
J R
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellants: Mr A Jafar, Counsel instructed by Gurkha International Limited
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are adult citizens of Nepal who are the children of a retired member of the Brigade of Gurkhas. His wife, their mother, died in 2005,

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and he has since remarried. His remarriage has resulted in a younger sibling for the Appellants.

2. In June 2011 the Appellants' father was granted entry clearance for the purposes of settlement with his wife and their infant child, the Appellants' youngest sibling. The Appellants applied for entry clearance as his dependent adult children in 2015 on the basis that were it not for their inability to do so under the Immigration Rules, they would have applied for entry clearance, along with their father, and immediate family members, rather earlier. The Entry Clearance Officer refused their applications on 18 May 2015, but their appeals against those decisions only came before First-tier Tribunal Judge Miles sitting at Hatton Cross on 3 January 2017. That delay is unexplained. The Judge dismissed the appeals by way of decision promulgated on 10 January 2017. The Appellants duly applied to the First-tier Tribunal for permission to appeal, and that was granted to them by a decision of First-tier Tribunal Ford on 25 July 2017. So the matter comes before us. This is the decision of us both.

3. The hearing before us today commenced with Mr Jarvis, on behalf of the ECO, very properly making a number of concessions in relation to the content of Judge Miles' decision and his approach to the evidence that was before him as disclosed within that decision. Put bluntly, it is conceded before us that he made a number of material errors of law in his approach to the evidence. First, there was before him evidence that documented the transmission of money from the UK to Nepal, which was said to record remittances from the sponsor to the Appellants. That evidence was relied upon as corroboration of the claim by the sponsor that the Appellants were entirely financially dependent upon him, and not simply economically dependent upon him in part by virtue of his grant of permission to them to live in the family home in Nepal, and to farm by way of subsistence farming the land he owned in Nepal. It is conceded before us that as a human rights appeal the Judge failed to adopt the correct approach to that evidence, apparently declining to give it any weight, simply because the majority (although not in fact all) of those documents were dated after the ECO's decision of 18 May 2015. That approach was wrong even on the Judge's own analysis of the law, since not all of the documents were dated as he assumed. However the entire approach was in our judgement wrong, since this was an Article 8 appeal concerning the Article 8 rights of not only the Appellants in Nepal, but also the members of their immediate family living in the UK; the position needed to be assessed as at the date of the hearing. On one view of this appeal we could stop there and simply dispose of the appeal by way of setting aside the decision, and remittal of the appeal for rehearing. However there are other problems with the decision of Judge Miles which in the circumstances it would be only right and proper for us to engage with for the benefit of those who may come to this appeal in the future.

4. When the Judge's decision was promulgated on 10 January 2017, he would not have had the benefit of the guidance of the Court of Appeal to be found within Rai v Entry Clearance Officer [2017] EWCA Civ 320 because

that decision was only promulgated on 28 April 2017. He would however had had the benefit of earlier relevant jurisprudence, not least the decision in Ghising & Others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 567 (IAC) and Gurung & Others [2013] EWCA Civ 8. We regret to note therefore that there is no reference within the decision of Judge Miles to any of the relevant jurisprudence. It is not at all clear from his brief decision that he bore the correct principles in mind when approaching the evidence.

5. Moreover, within a very brief decision, the only findings of fact that can be identified are those that can be drawn from the text of paragraph 15. We regret to have to record therefore that the decision simply fails to offer the analysis of the evidence that was required, in order to analyse whether or not the Appellants had established that they did indeed enjoy a "family life" for the purposes of Article 8 with their father, their stepmother and their youngest sibling in June 2011, or indeed at any later date. It should be clear by now that the approach to that question is not answered by a simple focus upon the movement of money from the UK to Nepal, or by the financial support, if any, offered to an adult child by the sponsoring retired Gurkha soldier. Equally, it should be obvious by now that the focus of the decision maker needs to be upon the strength and nature of the various relationships as at both the date of departure from Nepal of the sponsoring soldier, and, at the date of the hearing. If "family life" is established at that date of departure, then an analysis is needed as to what has happened since, in order to consider whether that state of affairs has remained the same, has eroded with time, or, has strengthened - not simply as a result of the effluxion of time, but recognising and evaluating the various changes in circumstances that can occur with any person with the passage of time.

6. In the circumstances the decision discloses a material error of law that renders the dismissal of the appeal unsafe, and the decision must in the circumstances be set aside and remade. We have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, or whether to proceed to remake it in the Upper Tribunal. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for her case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. Having reached that conclusion, with the agreement of the parties we make the following directions;

   i) The decision is set aside, and the appeal is remitted to the First Tier Tribunal for rehearing de novo at the Hatton Cross hearing centre. The appeal is not to be listed before Judge Miles. No findings of fact are preserved.

ii) A Nepalese interpreter is required for the hearing of the appeal.

iii) There is presently anticipated to be the sponsor as a witness, and the time estimate is as a result, 2 hours.

7. Having said that, we consider it sensible to record that Mr Jarvis very properly and fairly offered to consider further on behalf of the ECO, the evidence currently available, if there were to be provided to him a short statement from the sponsor confirming that there had been no change in the circumstances of the Appellants. It is anticipated that this evaluation of the evidence can take place within a very short time, and well before the re-listing of this remitted hearing. We leave it to the parties to make the necessary arrangements to ensure that this can take place as soon as possible to avoid further delay. In the event that what is planned does not occur for whatever reason, then the matter will be re-heard as directed above. We would hope that given the delay since this application was submitted to the Entry Clearance Officer in April 2015 steps can be taken to expedite the listing of any necessary hearing of the remitted appeal.

Notice of decision

8. The decision promulgated on 10 January 2017 did involve the making of an error of law sufficient to require the decision to be set aside and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo with the directions set out above.

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 Dated 30 November 2017

Deputy Upper Tribunal Judge J M Holmes