



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

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

THE IMMIGRATION ACTS

**Heard at Field House
On 5 October 2017**

**Decision & Reasons Promulgated
On 10 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

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

Claimants

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Claimants: Mr J Khalid of Counsel

DECISION AND REASONS

1. I shall refer to the parties as follows; to “the Secretary of State” who is the appellant in this matter and to the Claimants. This is an appeal by the Secretary of State in respect of a Decision and Reasons by First-tier Tribunal Judge R Sullivan (“FTT”) promulgated on 25 January 2017 in which the FTT allowed the appeals of the Claimants under Article 8. The Claimants are aged 30 and 31. They applied for entry clearance as adult dependents of their father, who was a former Gurkha soldier and settled in

the UK. At the FTT appeal it was argued that the Secretary of State's policy in 2009 applied or reliance was placed on **Ghising & others (Gurkhas/BOCS:historic wrong:weight) [2013] UKUT 00567 (IAC)**, and that Article 8 was engaged outside of the Rules. The appeal was on human rights grounds.

2. In the grounds it was contended that the FTT erred in law by finding that there was family life which engaged Article 8 which contradicted its findings that there was no dependency above and beyond the normal family ties. Secondly, it was contended that the FTT failed to consider Section 117 Nationality Immigration & Asylum Act 2002 ("the 2002 Act") in the Article 8 assessment.
3. Permission was granted on both grounds.
4. I heard submissions which are set out in the record of proceedings and considered the Decision and Reasons. The First-tier Tribunal was quite clear in making specific findings that failed to show evidence of dependency above and beyond the normal family ties following **Kugathas [2003] EWCA Civ 31** [20, 21 & 27]. The FTT found that there was an independent family household as between the Claimants and their sister who was working as a doctor in Nepal [22]. The FTT was not satisfied that the Claimants were unable to work whereas their sister was working as a doctor and did not accept that she made no financial contribution [25]. The FTT found no evidence of any day to day decisions taken by the sponsor on behalf of and as claimed by the Claimants [27]. The FTT found that there was frequent contact and the family enjoyed affectionate relationships [27]. The FTT qualified this finding by stating that the various texts between the Claimants and the sponsor failed to demonstrate any emotional dependency or reliance on the sponsor in everyday life. The FTT found that there was "some" financial dependency on the sponsor [25]. In addition the FTT also made the finding that the visits failed to establish any element of dependency above and beyond the normal family ties [20]. The family life as found by the FTT to engage Article 8 was based on finance, frequent contact and enjoyment of affectionate relationships [28]. The FTT then considered proportionality concluding that the Secretary of State had not identified any other public interest factors and that significant weight was to be placed in the historic injustice following **Ghising**.
5. The FTT has made findings on the different aspects of family life and concluded that Article 8 is engaged on the basis of some financial dependency, the level of contact, interest and affection [28]. In **Vikas and Manesh Singh (2015) EWCA Civ 630** the CA said there was no legal or factual presumption as to the existence or absence of family life under Article 8 in the case of adult children. **Kugathas** did not include any requirement of exceptionality. It all depended on the facts. The love and affection between an adult and his parents would not itself, justify family life. A young adult still living with his parents will normally have a

family life to be respected under Article 8 and a child enjoying family life with his parents did not suddenly cease to have family life at the moment he turned 18. On the other hand, a young adult living independently of his parents might not have a family life for the purposes of article 8.

6. I am satisfied that the conclusion reached that Article 8 is engaged cannot be supported by the FTT's findings in the light of the contradictory findings made in particular that the Claimants live in an independent household with their sister. I reject the submissions made by Mr Khalid that seen in the round the decision is sustainable. I fully accept that the FTT did make findings in respect of each aspect of family life, but those findings failed to establish a "protected family life" given the contradictory findings and the absence of any reference to anything to show that the family life established at [28] was above and beyond the normal ties.
7. Further more I am satisfied that the FTT erred in failing to consider section 117 of the 2002 Act which is a requirement when looking at proportionality under Article 8 ECHR outside of the Rules. I accept that there may have been evidence of language and finance but the FTT was required to consider it. The FTT's consideration under section 117 was inadequate and amounts to an error in law.
8. Accordingly I find an error of law that is material to the decision. I allow the Secretary of State's appeal. The decision and reasons is set aside. The Claimant's appeals are dismissed. I rely on the findings made by the FTT and the absence of findings showing something more than the normal family ties.

Notice of Decision

9. The Claimants appeal are dismissed.

No anonymity direction is made.

Signed

Date 6.10.2017

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 6.10.2017

Deputy Upper Tribunal Judge G A Black