



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

Appeal Number: HU/10391/2015  
HU/10393/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 August 2017**

**Decision and Reasons  
Promulgated  
On 18<sup>th</sup> August 2017**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**BHAM MAYA PAIJA PUN  
AND  
DIL MAYA PAIJA PUN  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER  
NEW DELHI**

Respondent

**Representation:**

For the Appellant: Mr S Jaisri of Counsel, instructed by Sam Solicitors  
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants are sisters who challenge the determination of First-tier Tribunal Judge L K Gibbs dismissing their joint appeals against the respondent's refusal on 12 October 2015 to grant them entry

clearance to join their parents in the UK. They are Nepalese nationals, born on 13 April 1984 and 29 November 1986 respectively. The appeal was dismissed by way of a determination promulgated on 17 May 2017 following a hearing at Hatton Cross on 27 April 2017. Their father was a Gurkha for fifteen years and was discharged in October 1969.

2. The appellants made an earlier application for entry clearance; that was refused in 2009 and an appeal against the decision was dismissed by First-tier Tribunal Judge Wilson in December 2010. The appellants' parents who applied at the same time were successful in their applications and moved to the UK in February 2010. Since then, they have made four visits back.
3. Judge Gibbs took account of the determination of the previous Tribunal. She accepted that there had been family life in 2010 and she found that there continued to be genuine love and affection between the appellants and their parents. She also accepted that they were allowed to use their father's pension in Nepal for their expenses. She concluded, however, that when the appellants' parents left Nepal, the appellants were already living outside the family home and that the evidence did not show that there was dependency that went beyond what was expected. She found that seven years had passed since the first determination and that the second appellant had even moved to study in Japan for at least 18 months. She found that in total the parents had spent 12 months in Nepal on visits since their departure. She concluded that there was no family life between the appellants and their sponsor.
4. The appellants sought and obtained permission to appeal. The grounds argue firstly, that the judge placed significant weight on the fact that the appellants were living away from home when their parents left Nepal even though this was considered by Judge Wilson who still found there were strong emotional bonds. It is argued that the judge should have taken this finding as a starting point and not re-assessed it.
5. Secondly, it is maintained that the judge adopted an erroneous approach akin to that identified by the Court of Appeal in Rai [2017] EWCA Civ 320 and that the critical question was whether family life continued to subsist notwithstanding the decision of the parents to leave the appellants in Nepal.
6. Thirdly, it is argued that, whilst the judge made findings with regard to the lack of communication between the second appellant and her parents when she was in Japan, she did not address the circumstances of the first appellant. Nor did she take account of the

three-month visit by the parents in November 2011. As a result, it is maintained that her finding on family life was flawed.

7. In her Rule 24 response, the respondent maintained there were no errors of law, that the judge had taken note of the previous determination and that a significant period of time had passed since that decision. Subsequent events were said to be relevant to the assessment of family life and to also shed light on the historic situation.

## **8. The Hearing**

9. At the hearing before me on 2017, I heard submissions from the parties. Mr Jaisri submitted that Judge Wilson's determination should have been the starting point but Judge Gibbs had re-assessed the situation as it had been at that time. Notwithstanding the fact that the appellants had been living away from home and studying, Judge Wilson had found that there were strong emotional bonds between them and their parents and that there was economic dependency. It was not, therefore, open to Judge Gibbs without good reason to re-evaluate family life on the evidence before Judge Wilson.
10. Mr Jaisri also submitted that the decision of the appellants' parents to move to the UK and leave them in Nepal could not be construed as the end of family life. He relied upon the judgment of the Court of Appeal in Rai (*op cit*). He submitted Judge Gibbs took the wrong approach when she found that their separation from their parents meant there was no dependency beyond the norm.
11. The third and last complaint was that no findings had been made on ongoing family life between the first appellant and her parents. She had not left Nepal to study elsewhere and given Judge Wilson's determination, there were no findings on whether the family life he had found to exist in 2010 was continuing for this appellant.
12. Mr Jaisri clarified that Judge Wilson had dismissed the appeal in 2010 because of the extant case law at the time. Since his determination there had been the cases of Gurung [2013] 1 WLR 2546 and Ghising (family life - adults - Gurkha policy) [2012] UKUT 160 and the respondent had formulated policy about former Gurkhas and their families. Under current law, Judge Wilson's proportionality assessment would be erroneous.
13. Mr Armstrong responded. He relied on the respondent's Rule 24 response as his starting point. He submitted that the judge was

required to assess the circumstances as at the date of the decision and the judge had therefore properly taken account of the events occurring since the earlier decision. The judge was aware of the history of the case and gave reasons for her conclusion that there was no family life. Rai was promulgated after her decision. The parties had lived apart in different countries for some eight years. There was no material error. The grounds were just a disagreement with the decision of Judge Gibbs.

- 14.** In reply, Mr Jaisri submitted that the judge had accepted that there was a reliance on the sponsor's pension and that he had also paid the tuition fees and expenses of the second appellant whilst she was in Japan. Judge Wilson had found there was no independent family unit and so Judge Gibbs had to consider whether they were still emotionally and financially dependent upon the sponsor. At the conclusion of the hearing, I reserved my determination.

## **15. Conclusions**

- 16.** Essentially the complaint with Judge Gibbs' determination is that she re-evaluated the situation as it was in 2009 and did not use Judge Wilson's findings as her starting point. It is helpful to consider what those findings were before assessing whether Judge Gibbs departed from them or sought to re-evaluate them. I summarise them below using the paragraph numbering of Judge Wilson's determination.
- As at the date of ECO's decision in 2009, the appellants were studying and living in rented accommodation some considerable distance away from the family home which they occasionally visited. They were financially supported by their father (at 12).
  - They were living together and had not formed a separated household (at 14).
  - The issue of family life between the appellants and their parents was not straightforward. They were adults and had lived apart from their parents for a number of years but there were strong emotional ties between them and there was economic dependency. There was sufficient family life still enjoyed as to constitute that within the meaning of article 8 (at 19).
  - Family life was not of the nature that would be expected with young children (at 20).
  - The evidence suggested that they would be a burden on the state if admitted (at 23).
  - Adequate accommodation was available (at 24).
  - There were exceptional circumstances to the extent that the UK owed a debt to Gurkha veterans (at 25).
  - However, the appellants should not be allowed to enter the UK because their parents decided to leave them and come to the UK

with the result that they now lived in different countries. The parents could return to Nepal to live with them or visit and the appellants could travel here to visit them (at 26).

- The appellant had (four) other siblings and other relatives in Nepal, there was a family house and their pattern of life had not altered with the departure of their parents (at 27).
- They were unmarried but were persons of maturity (at 27).

**17.** Judge Gibbs commences her findings at paragraph 13. She accepts that there is genuine love and affection between the parties, that the appellants spend their father's pension on their living expenses and that they receive additional funds from him in the UK (at 13). So far, she concurs with Judge Wilson's findings. She then proceeds to place weight on the fact that when the appellant's parents left Nepal, the appellants had already been living away from the family home and she finds that the decision to emigrate is evidence that family life "*did not involve levels of dependency that go beyond the usual*" (at 14). Whilst this would appear to be a divergence from Judge Wilson's acceptance of emotional and economic dependency, Judge Gibbs clearly acknowledges that in the next paragraph (at 15). Those findings demonstrate a contradiction in that whilst Judge Gibbs purports to acknowledge Judge Wilson's finding of family life, she also makes her own finding on the same evidence which directly conflicts with it.

**18.** I accept that Judge Gibbs is entitled to assess the situation since 2009/2010 and to make findings on that and it may well be that she is right to say that the many years that have since passed have altered the situation between the appellants and their parents so that family life no longer exists, however I have to agree with Mr Jaisri that there are problems with the judge's reasoning and that these have infected her assessment.

**19.** First, as mentioned above, the judge has sought to substitute her own finding on family life for that of Judge Wilson's, using the same facts. Whilst she is entitled to depart from the findings of an earlier judge's determination, she is required to provide good reasons for so doing and I have seen none. She should therefore have taken the family life finding as her starting point and then proceeded to set out why she did not accept that there was ongoing family life.

**20.** Second, her reliance on the decision of the appellants' parents to leave Nepal for the UK as a basis for finding there was no dependency beyond the norm is contrary to the guidance of the Court of Appeal in Raj (*op cit*). I acknowledge that in the case of Raj the flaw in the decision of the Upper Tribunal was that it placed significant weight on that single factor whereas Judge Gibbs also took account of the separate residential arrangements and the long period of separation,

however I cannot be satisfied that the same conclusion would have been reached had the issue of the parents' departure not features in her assessment. The issue for the judge to consider was whether the appellants had demonstrated that the family life they enjoyed with their parents, which had been found to exist at the time of their departure, had continued, notwithstanding that they were no longer in Nepal.

- 21.** Third, Judge Gibbs' conclusions on family life appear only to address the circumstances of the second appellant (at 15). There is no assessment of the circumstances of the first appellant whose position remained unchanged in the years following Judge Wilson's determination.
- 22.** For these reasons, I find that the judge made material errors of law and her decision cannot stand. There was some discussion between the parties as to the appropriate form of disposal and it was agreed that the best course of action would be a fresh hearing at which the decision would be re-made. The matter shall therefore be transferred to the First-tier Tribunal for that to be done.
- 23. Decision**
- 24.** The First-tier Tribunal made errors of law such that the decision is set aside. It shall be remade by another judge of that Tribunal at a date to be arranged.
- 25. Anonymity**
- 26.** No request for an anonymity order was made and I see no reason to make one.

Signed



Upper Tribunal Judge

Date: 17 August 2017

