



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/01213/2018  
HU/01217/2018  
HU/01221/2018

THE IMMIGRATION ACTS

Heard at: Field House  
On: 23 November 2018

Decision and Reasons Promulgated  
On: 6 December 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

MR KADERISEN PILLAY JAGAMBRUN  
MRS KISTNAMAH JAGAMBRUN  
MR PRADIAUM PILLAY JAGAMBRUN  
ANONYMITY DIRECTION NOT MADE

Respondents

Representation

For the Appellant: Ms Z Kiss, Senior Home Office Presenting Officer

For the Respondents: Mr D Bazini, counsel (instructed by Jein Solicitors)

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondents as the claimants.

2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Griffith, who in a decision promulgated on 27 July 2018, allowed the claimants' appeals on human rights grounds.
3. The claimants are citizen of Mauritius. The first two claimants are husband and wife, born on 10 June 1972 and 13 March 1973 respectively. The third claimant is their second son, born on 30 November 2000. Their elder son, Krishnen Pillay Jagambrun, born on 2 February 1996, has leave to remain in the UK until 6 April 2020.
4. The claimants' immigration history is set out by Judge Griffith. The first and second claimants entered the UK as visitors in May 2004. The first claimant was granted extensions until 30 September 2007 and his wife was granted leave as a student dependant.
5. In January 2014 an application based on private and family life was refused with no right of appeal. A further student application submitted by the first claimant was refused on 18 February 2008 with no right of appeal. On reconsideration that decision was maintained.
6. On 6 August 2014 the first and second claimants were granted discretionary leave to remain until 6 January 2017 in line with the leave granted to Kristhnen.
7. The third claimant, who had remained in Mauritius, applied for entry clearance to join his parents in June 2015. His application was refused and his subsequent appeal was dismissed by First-tier Tribunal Judge James on 1 December 2016. The third claimant subsequently entered the UK on 17 December 2016 and was granted temporary admission.
8. Judge James found that there was no dependency established between Kristhnen and his parents. Judge Griffiths noted that this was an appeal against the decision to refuse to grant entry clearance to the third claimant and the issues considered were different from those before her. She did not consider that she was bound by findings as to dependency [48].
9. She noted that the core of the current appeal concerned family life between the three claimants and Kristhnen and the consequences to all of them in the event of removal [49]. At the date of the hearing Kristhnen was 22 years old and had lived in the UK since 2004. He has leave to remain until April 2020. The first and second claimants were granted discretionary leave in 2014, as the secretary of state was satisfied that Kristhnen met the Immigration Rules under private life and was dependent on them. She 'understood' that the recent grant was made on the basis that he was able to show compliance with paragraph 276ADE(1)(v) of the

Immigration Rules, namely, that he was over 18 and had spent at least half of his life living continuously in the UK [49].

10. It was accepted that the claimants could not comply with the requirements of Appendix FM of the Rules. In respect of private life it was 'considered' that they did not meet the suitability requirements under the Rules as they had failed to reply to a request for information, nor could they show that there would be very significant obstacles to their integration into Mauritius [50].
11. Judge Griffith noted that the secretary of state sent an email to the claimant's representatives. The claimants were requested to provide evidence which showed that Kristhnen is still dependent on his parents and is still part of the family unit. The evidence should be as current as possible and cover as much time as possible [51]. The email asked that the documents be sent to a particular address within ten working days.
12. Judge Griffith noted that there was evidence that the claimant's representatives responded by email, attaching 'unparticularised' documents. She was satisfied on the balance of probabilities that the claimants' representatives replied in time to the requests for additional information of dependency and found that the secretary of state had not discharged the evidential burden on her to show that the claimants were unsuitable for the purpose of paragraph 276ADE(1)(i) - [51].
13. Even so, Judge Griffith was not satisfied that they met the requirements of paragraph 276ADE(1)(vi). There would not be very significant obstacles to their integration into Mauritius. The third claimant could not meet the relevant requirements of the Rules as he had only been in the UK for a very short period [51]. She noted the parents claimed that there was nothing to return to including no employment. In the result, she found that they could not satisfy the requirements of paragraph 276ADE in respect of private life [52].
14. She then considered their claims outside the Rules, noting that they needed to show that the consequences of refusal would result in unduly harsh consequences rendering the decision of the secretary of state disproportionate. She noted that the secretary of state accepted that in 2014, Kristhnen was dependent on his parents and that was one of the reasons they were granted discretionary leave from August 2014 until January 2017. The content of the emails seeking evidence of his continuing dependency on his parents "suggests a favourable outcome to the [claimants'] claim if sufficient evidence were provided" [53].

15. She referred to the decision in Ghising (Family Life - Adults - Gurkha Policy) [2012] UKUT 00160 at [57] where the Tribunal noted that it has been recognised that family life may continue between parents and child even after the child has attained his majority. She noted that 'other case law was referred to on the dependency between parents and their adult children involving more than normal emotional ties - Kugathas [2003] EWCA Civ 31 and that dependency is not limited to economic dependency [54].
16. She was satisfied on the evidence that Krishnén lives as part of the family unit. There is no evidence that since he came to the UK in 2004 he has lived anywhere other than with his family or has lived independently. It is not disputed that he has been working since 2015, earning in excess of £20,000. She considered that he should be capable of leading an independent life and it appears that despite now being an adult, earning a reasonable wage, nothing much has changed at home in that he continues to live rent free, makes no contribution to the household bills and receives money from time to time from his parents to help defray expenses. He should be capable at his age of leading an independent life but, as a matter of fact, he does not and has not. The evidence points to dependency of choice, supported by his parents who carry out a number of domestic tasks which he would be capable of doing such as cooking, washing his clothes (which his mother does for him) and the like.
17. Judge Griffith did not find however that a dependency of choice prevented her from finding that he enjoys family life with his parents and younger brother, and removing them would amount to an interference capable of engaging Article 8 [55].
18. Her consideration of proportionality involved balancing the wider public interest against the particular circumstances of the claimants. She noted that Krishnén now has a place at university. When he was 18 he had not been able to apply for student finance, owing to his immigration status and the law at the time. Until the law changed he could not qualify, as he was not settled. After the situation changed, following the decision in R. (on the application of Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57, all that was required is that he is ordinarily resident in England and has been ordinarily resident in the UK throughout the three year period preceding the first day of the academic year [56].
19. Judge Griffith noted that his parents stated that they would pay his fees if a loan was not approved. He has applied for a loan for those fees. Even if granted, he will continue to be dependent on his parents for some financial and emotional support. Many students rely on their parents

throughout their years at university and beyond. His parents therefore need to remain in employment at their current rate of remuneration to support him and their minor child [57].

20. She also considered that it would be detrimental to the third claimant for him to be separated from his older brother at this stage. They had 12 years apart, although she accepted that there was communication between them during that period. They are now reunited and enjoy each other's company. Separating them would be unduly harsh for them both and not necessary in the public interest [58].
21. She took into account, but did not add much weight to the position of the sister of the first claimant who is a British citizen. She is receiving treatment which she is entitled to. Although the first claimant plays an important role in her care, there is no evidence that if he were not available, nobody else would be able to help [59].
22. She had regard to the public interest considerations in s.117B. Although they had not been able to show compliance with the Immigration Rules, she was satisfied that there are compelling circumstances which go to the heart of their family life together with Krishnien, which in a proportionality balancing exercise was sufficient to tip the balance in their favour. Accordingly, the public interest did not require their removal and the secretary of state's decision was disproportionate [60].
23. On 9 October 2018, First-tier Tribunal Judge Ford granted the secretary of state permission to appeal. The arguable grounds included the contention that Judge Griffith erred in her findings as to dependency between the first and second claimants and their elder son, Krishnien. She failed to give adequate reasons for departing from a previous finding by the Tribunal that there was no dependency between Krishnien and his parents, and that she failed to adequately explain the compassionate circumstances which led to the finding that the decision was unduly harsh and therefore disproportionate.

### **Submissions**

24. Ms Kiss submitted on behalf of the secretary of state that the starting point in the appeal was the finding of First-tier Tribunal Judge James that Article 8 was not engaged in the third claimant's entry clearance appeal. On the basis of the evidence before him, he found that the parents made a difficult choice based on lack of money and on what the arrangements should be regarding their family once the father decided to study in the UK.

25. He found at [19] that they chose to split up the family and bring the mother and eldest child to the UK. As time went on they had a home together and earned sufficient sums to apply to bring their youngest child to the UK, but for whatever reason, they chose not to do so for more than 11 years. The trigger of the application was the grandmother's deterioration in health, and it was claimed that by the end of 2014 no other family member 'was willing or able to take care of the [third claimant]'.
26. Judge James found that in the absence of any medical or psychological report regarding his feelings of abandonment or suicidal ideation, and the absence of any documentary evidence of any contact with the third claimant by his parents since 2004 (by telephone, email or visits), and the absence of any evidence of financial support provided by the parents for the third claimant, he was not persuaded that '...there is any family life forged between the parents and the [third claimant], or with his older brother other than in name alone; due to the absence of easily accessible evidence which is not before me'. [29]
27. He found that there is no evidence of the UK son's need to financially rely on his parents. He is a healthy fit young man of 20 years who left school in June 2013 to earn his own living. He thus did not find that there is any dependency between the adult son present in the UK and his parents. He noted that it was claimed that he is residing with his parents (although no evidence of that was provided). This is not indicative of any dependency, without more [34].
28. He found on balance that it was in his best interests to remain living with his grandmother and extended family members in his own home.
29. Ms Kiss submitted that there should accordingly be good reasons given for going behind the previous findings, which Judge Griffith did not do. Simply to state that it was concerned with entry clearance was, she submitted, an incorrect approach. In the circumstances, she should have taken the decision of Judge James into account.
30. Moreover, Kristhnen earned £28,000 per year. This clearly is not a dependency of necessity. She referred to the cross examination of Kristhnen at [36]. He still claimed to be dependent on his parents as he had not saved and relied on them.
31. Ms Kiss referred to the Court of Appeal decision in Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511. Kugathas remains good law. There must be something more than normal emotional ties. Even if he ceases working he will still need a loan in order to support himself.

32. She submitted that Article 8 is a qualified right. People cannot choose where they wish to live. None of the claimants met the Rules. Reference to emotional ties would not in fact address the findings of Judge James. There had to be something more than that.
33. On behalf of the claimants, Mr Bazini submitted that there had been no material errors of law. The Judge took into account all relevant factors and applied Kugathas properly. She reached a decision open to her. The reliance on Deevaseelan is misplaced in the circumstances.
34. The Judge was dealing with a 'wholly different set of circumstances'. The third claimant applied for entry clearance to join his parents which was refused. Although Judge James found that they could join him in Mauritius and go back there, the third claimant, a minor, is now living with his mother, father and older brother. The grandparents are now deceased.
35. Judge Griffith heard evidence from the third claimant who described his circumstances in Mauritius. However, Judge James did not have the benefit of that evidence. Moreover, all have lived together now as a family unit.
36. He referred to the evidence adduced before Judge Griffith from [19] onwards. In particular the third claimant who was 17 years old at the date of hearing, stated that he sees his brother every day and the relationship is good and better than it was before. He is at school and has just sat seven GCSEs. After being separated for twelve years it would be hard for him if they were separated again, if he and his parents had to leave the UK. When he was living in Mauritius he was not close to other members of the family. He would speak regularly with his parents and brother, mainly on the telephone [31].
37. Mr Bazini referred to the evidence of Kristhnen, who stated that he could not go back to Mauritius. He has established a life here. He has lived here for half his life and has been educated here. He described his relationship with his brother as "fantastic". It would greatly affect his younger brother if they were parted. He himself would feel devastated given that they had only recently been reunited [35].
38. He submitted that the Judge's approach to the 'open and frank evidence' indicates that she considered that the parents were being over indulgent.
39. It was recognised that the secretary of state had sought to make the Immigration Rules Article 8 compliant. Paragraph 276ADE (1)(v) recognises the private life of a person who has lived here for more than half his life. It would be disproportionate for him to be required to leave. The contention that he can go and live with the rest of his family is accordingly wrong.

40. Moreover, he submitted that the secretary of state herself did not regard herself as being bound by the decision of Judge James. She had in fact written to the claimants asking for updating evidence. The only reason that that would have been done would be to consider extending the leave to remain even though Kristhnen was over 18.
41. Judge Griffith found that the claimants did not satisfy the Immigration Rules under paragraph 276ADE in respect of private life. She set out the basis for this finding at [52]. She also had regard to the fact that Kristhnen should be capable of leading an independent life. She has properly directed herself at [55]. She found that he has lived with his family since he came to the UK in 2004. He has not lived independently. As a matter of fact, he has chosen to live with his parents.
42. Judge Griffith had regard to the fact that many students have to work but mainly rely on their parents throughout their years at university and beyond. Kristhnen wishes to live with them and go to university which, up until recently, he had been denied. He will thus continue to be dependent on his parents for some financial and emotional support. She did not consider that it is not a complete answer to say that he could get a job [57].
43. Mr Bazini referred to the decision of Judge James at [34]. He did not find that there is any dependency between the adult son present in the UK and his parents. Judge James noted that it is claimed that the UK son is residing with his parents although no evidence of this was provided. Nevertheless, that is not indicative of any dependency, without more [34]. Accordingly Judge James did not make any finding.
44. He submitted that Judge Griffiths did not therefore go behind that finding. She had regard to authorities relating to family life including Ghising, supra at [56–62]. At [57] Mrs Justice Lang noted that it has been recognised that family life may continue between parent and child even after the child has attained his majority. She reviewed the authorities of the ECtHR and those in the UK. The Tribunal referred to AA v UK, where it was noted that the European Court found that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy life with them [61].
45. Mr Bazini referred to the decision in MI (Paragraph 298(iii): “Independent Life” ) Pakistan [2007] UKAIT 0052. The Tribunal held that the mere fact that a person has chosen the lifestyle he has does not mean that he is to be regarded as leading an independent life.



46. He submitted that these were all matters which make the decision of Judge Griffith sustainable in the circumstances. There were more than the normal emotional ties. There were financial ties. There was also the relationship between the brothers who have now become reunited. The younger brother is a minor and does not fall within Kugathas. The fact that the brothers had been separated for many years through no fault of their own and have been reunited, is in itself a compelling circumstance.

### **Assessment**

47. First-tier Tribunal Judge Griffith has undertaken a detailed assessment of the claimants' evidence before her.
48. It is evident that she was well aware of the earlier decision of First-tier Tribunal Judge James. She noted that he was concerned with an entry clearance application. She had regard to the evidence that arose since then, including the fact that the third claimant was now in the UK and had reunited with his parents and his brother, Kristhnen.
49. I have also had regard to the secretary of state's email sent to the claimants' representatives. In order to move forward with "your client's application" they were requested to provide evidence which proves that Kristhnen is still dependent on his parents and is still part of the family unit. That evidence should be as current as possible and cover as much time as possible. Judge Griffith found on the balance of probabilities that the representatives had replied in time to the request for additional information of dependency. She noted that the content of the email seeking evidence of his continuing dependency on his parents suggests a favourable outcome if sufficient evidence were provided [53].
50. As already noted, Judge Griffith was not satisfied that the secretary of state had discharged the evidential burden showing that the claimants were unsuitable for the purposes of paragraph 276ADE(1). She was nevertheless not satisfied that they had provided sufficient evidence to show that they met the requirements of paragraph 276ADE(1)(vi).
51. When she considered the claim outside the Rules she undertook a detailed evaluation as to whether the consequences of refusal would result in unduly harsh consequences and render the decision of the secretary of state disproportionate in the circumstances.
52. She has properly directed herself in accordance with the relevant authorities including Kugathas and Ghising [54]. She noted that whilst Kristhnen should be capable at his age of leading an independent life, as

a matter of fact he did not. On the evidence she found that he has lived as part of the family unit. There is no evidence that since he came to the UK in 2004 he has lived anywhere other than with his family. He has not lived independently. Notwithstanding his earnings from employment nothing much had changed and he continues to live rent free, makes no contribution to household bills and receives money from time to time from his parents to defray expenses.

53. In considering whether removing them would amount to an interference capable of engaging Article 8, she found that a dependency of choice did not militate against a finding that he enjoys family life with his parents and younger brother.
54. He had been unable on account of his immigration status to apply for student finance. Before the decision in Tigere he could not qualify for a place at university as he was not settled. The situation then changed and he fulfils the requirements. She found that even if granted a loan, he would continue to be dependent on his parents for some financial support and emotional support.
55. In the circumstances she considered it to be detrimental to the third claimant to be separated from his older brother, having regard to the fact that they had been apart for twelve years, albeit that they had been communicating during that period. She found that they were now reunited and enjoyed each other's company. Separating them would be unduly harsh for both of them. That was not necessary in the public interest [58].
56. Although it is conceivable that another Judge might have come to a different conclusion, the reasons given by Judge Griffiths for concluding that there are compelling circumstances which tips the balance in their favour are neither irrational nor perverse.

### **Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall accordingly stand.

Anonymity direction not made.

Signed

Date 1 December 2018

Deputy Upper Tribunal Judge C R Mailer

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