Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/05112/2016**

HU/05115/2016

HU/05116/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd April 2018	**On 1st May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR JHAK BAHADUR PUN (FIRST APPELLANT)
MISS NETRA KUMARI PUN (SECOND APPELLANT)
MISS DHAN KUMARI PUN (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss A Jaja, Counsel, Howe & Co Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nepal. They all make application as the dependent children of Durgabahadur Pun, a former Ghurkha soldier. Their applications were refused on various dates between 2015 and 2016. The Appellants lodged Grounds of Appeal and the appeals came before Judge of the First-tier Tribunal Fox sitting at Hatton Cross on 27th June 2017. Judge Fox noted that in the Notices of Refusal that the Entry Clearance

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Officer had concluded that the Appellants are healthy adults, that they are not financially or emotionally dependent upon the Sponsor for the purpose of the revised policy as they have been separated for more than two years and the Entry Clearance Officer concluded that no other exceptional circumstances existed. Having heard the appeal, the Appellants' appeals were allowed on human rights grounds.

2. On 23rd August 2017 the Secretary of State lodged Grounds of Appeal to the First-tier Tribunal. On 7th February 2018 First-tier Tribunal Judge Grant-Hutchison granted permission to appeal. Judge Grant-Hutchison considered that it was arguable that the judge had erred in law (a) by failing to give adequate reasons why apart from financial and emotional dependency there was sufficient to demonstrate emotional dependency to the *Kugathas* standard when all three appellants live in the same location and no consideration has been given that as healthy adults, they cannot support each other and why their emotional bonds with their Sponsor constitutes anything beyond the norm. Judge Grant-Hutchison also noted that it was contended by the Secretary of State that the First-tier Tribunal Judge had failed to consider Section 117B adequately, and that whilst accepting that the historic injustice ought to trump the Respondent's interest in maintaining firm immigration policy, Annex K had been introduced specifically to address the "historic injustice" and yet the Appellants do still not meet the requirements having lived apart from their Sponsor at the time of application for over six years, more than the two years required by Annex D and that although the Sponsor asserted that he would have settled in the UK upon his retirement, had he been given the opportunity to do so, it may be that the argument was no more than pure speculation as to what someone would have done in hindsight, which arguably could not be given any weight in an overall proportionality assessment.

3. The Appellants replied to the Secretary of State's Grounds of Appeal by Rule 24 response. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the sake of continuity throughout the appeal process, the Entry Clearance Officer is referred to herein as the Respondent, albeit that I note that that this is an appeal by the Entry Clearance Officer. The Appellants are represented by their instructed Counsel Ms Jaja. Ms Jaja is familiar with this matter, having appeared before the First-tier Tribunal and is the author of the Rule 24 response. The Secretary of State appears by her Home Office Presenting Officer Mr Wilding.

Submission/Discussion

4. Mr Wilding takes me to, and relies upon, his Grounds of Appeal save that he amends this by indicating that the Secretary of State no longer seeks to rely on the ground pursuant to Section 117B of the 2002 Act. His main submission is that the judge has failed to properly reason that Article 8(1) has been engaged. He takes me in particular to paragraphs 30 to 35 of

the judge's decision, these being the first part relating to the judge's findings. He submits that being generous (his words) it could be possibly construed therein that the judge has gone on to consider the concept of proportionality. He notes that reference is made to the factual history therein, but he wonders whether that shows whether family life exists and submits that there are only normal emotional ties and that the judge has not engaged in the *Kugathas* test and therefore the findings at paragraph 36 thereafter reflect an error of law as to whether Article 8 has been engaged. He accepts the response that is set out in the Rule 24 and notes that the judge has referred to the authorities and that *Kugathas* has been raised at paragraph 28. He submits that this is even more damning of the decision and whilst noting that at paragraph 35 the threshold for Article 8 is low, that does not assist the Appellant and that there is nothing on the findings of the evidence at paragraph 36 onwards to say that the findings therein were immaterial and that there has been no engagement with the evidence. The Secretary of State's position is that the decision is lacking in construction as there are no findings and that the decision should be remitted back to the First-tier Tribunal for a complete rehearing.

5. In response Ms Jaja refers to the Rule 24 response and to the authorities. She submits that the judge has taken into account the relevant case law and that the approach was perfectly correct. She reminds me that the judge has noted at paragraph 24 that the second and third Appellants are not in education and are financially dependent upon the Sponsor. She points out this has not been challenged and in fact it is repeated at paragraph 3 of the Grounds of Appeal. Consequently, she submits the only real issue in this matter is one of proportionality.

6. She contends that when putting all of this "into the mix" (her words) that if there is no dispute as to family life then there would be no need to rehearse what is conceded. She takes me to paragraph 31 and the fact that the judge has accepted the evidence and noted that the Sponsor has provided credible evidence of his immigration history and the reasons for its timing. She refers me to the most recent decision, namely the Court of Appeal decision in *Rai v the Entry Clearance Officer New Delhi [2017] EWCA Civ 320* and to the reference to the analysis therein of *Kugathas v the Secretary of State for the Home Department [2003] EWCA Civ 31*. She submits that at paragraph 31 of the decision the judge has followed these guiding principles and has concluded at paragraph 42 that the Appellants have not formed independent lives.

7. Mr Wilding responds by commenting that *Kugathas* is not a proportionality exercise and that the issue that needs to be addressed relates to the five-stage test set out in *Razgar*. He indicates that should the Tribunal accept that proportionality has been reached, then the appeal will be allowed and hence the challenge that Article 8 is not engaged. He submits this is the point the Entry Clearance Officer was making in his refusal e.g. he does not accept that there is emotional dependency. He submits that the historical wrong is not relevant to the engagement of paragraph 8(1) but it

is for proportionality and refers me to paragraph 14 of *Patel and others [2010] EWCA Civ 17*.

8. Ms Jaja submits that despite such submissions the Secretary of State is still stuck with the concession made before the judge and points out that the Grounds of Appeal refers to family life and not a family unit, which she submits is something completely different. She submits that fairness and due process mean that she is entitled to take advantage of the concession and that the concession was made of financial dependency and therefore that is sufficient to engage Article 8. Thereinafter she goes into an analysis of the authorities, all of which I have given due consideration to.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. I start by reminding myself that the issue before me is whether or not the First-tier Tribunal Judge has materially erred in law. I am not rehearing this matter (at least not at this stage) nor being asked to draw my own conclusions. The starting point is the judge's findings, which begin at paragraph 30. This is a judge who has done a very thorough analysis of the case and the manner in which the decision is set out is well-constructed. Firstly, the judge has dealt with the basis upon which the Secretary of State refused the appeal and has then gone on in considerable detail at paragraphs 6 to 11 to set out the authorities with regard to the burden and standard of proof. He has then dealt with the

issues of the evidence and the submissions and then made findings from paragraph 30 onwards. The judge had made clear in his determination that he was guided in reaching his decision by the authorities including those cases recited in the authorities, starting with *Gurung* and going through to *Rai*. As Ms Jaja reminds me those cases make it clear that where the adult children of ex-Ghurkhas are concerned, there are factors which the court is entitled to take in account in determining whether refusal of entry clearance breaches Article 8. She has submitted that the First-tier Tribunal Judge has provided sufficient reasoning in relation to emotional dependency but that even if he did not, any failure to do so would not be material.

12. I remind myself that the Secretary of State has made a concession with regard to financial dependency. I agree with Ms Jaja's submission that *Rai* refers to a "long delayed right" and by way of the findings of the judge at paragraph 32, the judge has accepted the view expressed in *Rai* at paragraph 18 that the judgment in *Kugathas* has been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg case and that some of the court's decisions indicate that family life between adult children and parents will readily be found without evidence of exceptional dependence.

13. Thereafter the judge has, I am satisfied, gone on to look at the appropriate stages within *Razgar* and at paragraph 38 has reminded himself that an entitlement to entry clearance is not within the Tribunal's gift and that Article 8 must not be employed to grant an entitlement to residence where none is intended. Thereafter he has gone on to consider the position regarding exceptional circumstances and the policies and has made findings that he was perfectly entitled to.

14. I am consequently satisfied that this is a solid decision where the judge has quite properly addressed the issue of both emotional and financial dependency to the *Kugathas* standard and has properly applied the law. It has only been necessary to recite the above herein to show that the judge has taken such steps. To that extent, the submissions of the Secretary of State amount to nothing more than disagreement.

15. This is a judge who has carried out the appropriate exercise properly and thoroughly and made findings which he was entitled to. In such circumstances, for all the above reasons, the appeal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 30 April 2018

Deputy Upper Tribunal Judge D N Harris