



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

**Appeal Number: HU/10981/2016**

**HU/10986/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 May 2018**

**Decision & Reasons Promulgated  
On 23 May 2018**

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**BIJAYA RAI**

**BABIN RAI**

**Appellants**

**-and-**

**ENTRY CLEARANCE OFFICER, NEW DELHI**

**Respondent**

**Representation:**

For the Appellant:

Mr. A. Jaffar, direct access counsel

For the Respondent:

Mr. L. Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The 1<sup>st</sup> Appellant, who was born on 13 August 1985, and the 2<sup>nd</sup> Appellant, who was born on 27 June 1986, are nationals of Nepal. On 15 March 2016, they applied for entry clearance to

join their parents for the purposes of settlement in the United Kingdom. Their applications were refused on 23 March 2016.

2. They appealed and First-tier Tribunal Judge Sweet allowed their appeals in a decision promulgated on 17 July 2017. First-tier Tribunal Judge Doyle granted the Respondent permission to appeal on 10 January 2018.

### **ERROR OF LAW HEARING**

3. At the error of law hearing on 14 March 2018, I set aside First-tier Tribunal Judge Sweet's decision for lack of adequate reasoning and set the appeal down for a re-hearing in the Upper Tribunal and for both parties to make further oral submissions. Both counsel for the Appellants and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

### **DECISION ON SUBSTANTIVE APPEAL KEPT IN THE UPPER TRIBUNAL**

4. The Appellants' parents have been present and settled in the United Kingdom since 12 June 2013. The Appellants' father served in the Brigade of Gurkhas and retired on 7 May 1970.
5. The Appellants applied for leave to enter under section E-ECDR of Appendix FM of the Immigration Rules but were not able to meet all the necessary entry requirements.
6. However, the Respondent has also published relevant policy, which is entitled *Annexe K – Adult Children of Former Gurkhas* to BG 03.01.01, dated 22 January 2015. This provides that adult children of former Gurkhas may be granted settlement in the United Kingdom in certain circumstances. Counsel for the Appellants took me to paragraph 9 of this policy which lists ten conditions that need to be met in order for settlement to be granted under this Policy.
7. It was not disputed that the Appellant's father had been granted settlement under the relevant discretionary arrangements or that the Appellants were related as claimed and were still in Nepal. Therefore, they met the first three conditions.

8. The fourth condition is that an applicant is 18 years of age or over and 30 years of age or under on the date of the application. There has been some confusion over whether the Appellants were able to meet this requirement but by my calculation they were just able to qualify at the date of their applications, as they were 30 and 29 at that time.
9. It was also not disputed that the Appellants had been born after their father was discharged from the Gurkha regiment for the purposes of the sixth condition or that the Appellants did not fall to be refused on grounds of suitability for the purposes of the tenth condition.
10. In relation to the seventh condition which stated that the Respondent is satisfied that an application for settlement would have been made by the Appellant's father before 2009 if the option to do so had been available. This was not directly addressed by the Entry Clearance Officer in his decision. It was the Appellants' evidence in her supplementary statement, dated 5 July 2017, that her husband had often said that if he had had the chance to settle in the United Kingdom when he was discharged, which was in 1970, he would have taken up this chance. This evidence was not disputed by the Respondent.
11. The eighth condition is that they had not been living apart from the former Gurkha for more than two years on the date of the application. The Appellants accept that they have been living apart from their father since 12 June 2013. Therefore, they had been living apart from him for more than two years at the time of their applications.
12. There is a "saving clause" in condition eight, which applies where an applicant has been living apart by reason of education or something similar (such that the family unit was maintained; albeit that the applicant lived away). The Appellants did not leave the family home to attend college but have remained there. As the Home Office Presenting Officer submitted their father left them in Nepal when he was granted entry clearance to come to the United Kingdom. As explained below, he had little choice in the matter once he and his wife and other son had been granted entry clearance but the Appellants had been refused entry clearance, as entry had to be made within a specified time. It is arguable that this brought the Appellants within the "by reason of...something similar" definition in the policy.
13. For the purposes of condition five, the Appellants also had to show that they were financially and emotionally dependent upon their father and mother. In relation to financial dependency,

the Respondent did not dispute that the Appellants continue to live in the family home in Nepal. In addition, the Respondent did not challenge the authenticity of the money transfer receipts showing money being sent to the Appellants by their parents on a regular basis. There were also statements which indicated that the Appellant's father's pension was being paid in Nepal and had been used to pay for the 1<sup>st</sup> Appellant's education. In addition, in her first witness statement, the Appellants' mother stated that the 1<sup>st</sup> Appellant was authorised to withdraw from the Brigade of Gurkha pension office in Nepal. This evidence was not challenged by the Home Office Presenting Officer. He submitted that the degree of financial dependence was unclear but he did not refer to any evidence to suggest that the Appellants had any other source of income. He also accepted that neither of the Appellants were in employment. I have also noted that the evidence suggested that the Appellants were not able to obtain employment in the village where they lived and, therefore, their dependency was one of necessity, which was similar to the situation in which the Appellant in *Jitendra Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 found himself.

14. Taking this evidence into account in its entirety and applying a balance of probabilities, I find that the Appellants are financially dependent upon their parents.
15. In relation to emotional dependency, counsel for the Appellants relied on the content of the witness statements which indicated that the Appellants talked to one or more of their parents by telephone most days. The 1<sup>st</sup> Appellant also explained that in their culture, families tended to live in extended family units and that she had never established her own independent family unit. She also stated that there was no one else she could turn to for support. The 2<sup>nd</sup> Appellant said in his statement that he missed his mother and father very much and was totally emotionally dependent upon them. The Appellants were also concerned about the frailty of their father's health and depended on their mother for advice on a regular basis. This evidence was not challenged by the Home Office Presenting Officer and the Respondent has always accepted that the Appellants are unmarried and have yet to leave the family home in Nepal. As a consequence, the Appellants are entitled to entry under the Respondent's published policy.
16. In the alternative I have looked at the Appellants' entitlement to leave on the basis of their Article 8 rights outside the published policy and began by considering whether they still enjoyed a family life with their parents for the purposes of Article 8.1 of the European

Convention on Human Rights. The Home Office Presenting Officer sought to rely on paragraph 35 of Lord Justice Rix's judgment in *AAO v Entry Clearance Officer* [2011] EWCA Civ 840, where he held that "it is established that family life will not normally exist between [parents and adult children] within the meaning of article 8 at all in the absence of further elements or dependency which go beyond normal emotional ties".

17. In contrast, counsel for the Appellants relied on paragraph 17 of *Jitendra Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 where Lord Justice Lindblom held at paragraph 17 that:

"In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 Sedley LJ said (in paragraph 17 of this judgment) that "if dependency is read down as meaning "support" in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support" then it represents...the irreducible minimum of what family life means".

18. Lord Justice Lindblom also found later in the same paragraph that it was "not ...essential that the members of the family should be in the same country". He also noted in paragraph 18 that:

"in *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgment in *Kuguthas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence".

19. I prefer this exposition of the law on dependency in that it has given more detailed consideration to the law of the Strasbourg Court and also was located in a very similar case involving the family of an ex-Gurkha soldier. As a consequence, I find that the Appellants do enjoy a family life with their parents for the purposes of Article 8.1 of the ECHR, relying on them for accommodation and financial and emotional support and being unmarried. They are also both still being supported in education by their parents in preparation for future careers, as was clear from the oral evidence given by their mother before the First-tier Tribunal.

20. I also do not accept the submission made by the Home Office Presenting Officer that the Appellants' parents had intentionally separated from them when they decided to move to the United Kingdom. As was explained in paragraph 23 of *Jitendra Rai*, the Appellants' parents could not delay their own entry into the United Kingdom once they and their younger son had been granted entry clearance, as such clearance would lapse after two years pursuant to article 13(4)(a) of the Immigration (Leave to Enter and Remain) Order 2000.
21. The Court of Appeal in *Jitendra Rai* also found that the fact that parents had chosen to move to the United Kingdom did not negate the possibility of continuing family life. In paragraph 18 Lord Justice Lindholm noted that it was important not to interpret the case of *Kugathas* too restrictively. As Lord Dyson held at paragraph 45 of *R (on the application of Gurung and others) v Secretary of State for the Home Department* [2013] 1 WLR 2546 "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case".
22. In relation to considering whether refusing them entry clearance amounted to a proportionate breach of Article 8 of the ECHR for the purposes of Article 8.2, the Home Office Presenting Officer submitted that the Entry Clearance Officer was responsible for controlling immigration into the United Kingdom and, therefore, the proportionality assessment should not fall in the Appellants' favour. He did not dispute that, but for the delay in granting the Appellants' father a right to enter, the Appellants would have qualified for settlement as his minor children or would have been born here and that this had been classified as an historic injustice.
23. I have noted that in head note (4) of *Ghising and others (Ghurkhas/BOCs: historic wrong: weight)* [2013] UKUT 567 (IAC), the Upper Tribunal concluded that:

"...where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/entry clearance officer consist solely of the public interest of maintaining a firm immigration control".

24. I have also noted that there was no suggestion of any criminal offences or poor immigration history which may have counted against the Appellants in the proportionality balance. As a consequence, I find that refusing them entry clearance amounted to a disproportionate breach of Article 8 of the European Convention on Human Rights.

## DECISION

(1) The Appellants' appeals are allowed.

*Nadine Finch*

Signed

Date 18 May 2018

Upper Tribunal Judge Finch