



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12528/2015
HU/12530/2015

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 6 April 2018

Decision & Reasons Promulgated
On 18 May 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MR TIRTHA RAJ SUNUWAR
MR KAUSHAL SUNUWAR
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant (Entry Clearance Officer): Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondents: (Mr Sunuwar & Mr Sunuwar): Mr H Dien, Counsel, instructed by NC Brothers & Co Solicitors

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer against a decision of First-tier Tribunal Judge Hall, who had allowed the appeal of Mr Tirtha Sunuwar and Mr Kaushal Sunuwar. For ease of reference I shall throughout this decision refer to the Entry Clearance Officer who was the original respondent as “the Entry Clearance Officer” and to Messrs Sunuwar and Sunuwar, who were the original appellants, as “the claimants”.
2. The claimants are two young Nepalese citizens, born respectively in 1987 and 1981. They are brothers and are the children of the sponsor, who had served in the Brigade of Gurkhas of the British army between 1978 and 1992.
3. The sponsor and his wife who is the mother of the claimants were granted settlement visas on 2 December 2010 and at that time they had been unable to apply for settlement visas for the two claimants because the claimants were then over 18 years of age. They have subsequently been joined by their daughter (the sister of the claimants) who was granted settlement following an appeal apparently based upon her disability as she is deaf.
4. In or around 2015, following the clarification of the law in various decisions the claimants applied for entry clearance as the dependent adult sons of their father, a former Gurkha soldier settled in the United Kingdom. Their applications were refused and the claimants appealed against these decisions. Their appeals were heard at Sheldon Court, Birmingham before First-tier Tribunal Judge Hall, on 11 May 2017 and in a decision and reasons promulgated on 23 May 2017 their appeals were allowed. It is against this decision, as already noted, that the Entry Clearance Officer now appeals.
5. I do not propose in the course of this decision to set out the circumstances in any detail because it is agreed that there is in effect only one issue in this case which I will refer to shortly. It is accepted by both parties that the law can be briefly summarised as follows following the guidance given by the Upper Tribunal in *Ghising* [2012] UKUT 00160 (IAC) and subsequently affirmed by the Court of Appeal in *Rai* [2017] EWCA Civ 320. The position is that where but for what is now referred to as the “historic injustice” a Gurkha veteran would have applied for entry clearance on behalf of his children at a time when they were still minors, and subsequently applied in circumstances where those children have continued family life with their father since then there would be no proper reason for refusing them entry clearance. A decision to do so in these circumstances would not be proportionate. What is essential however is that it is established by particular applicants (adult children) that there has remained family life between that applicant and his/her Gurkha veteran father.
6. In this case it has been accepted throughout that but for the “historic injustice” the claimants’ father would have applied for entry clearance to enter the UK together with the claimants and that at that time, as minor children, the claimants would have been entitled to enter this country. Accordingly it is accepted that the only issue which would have to be established by the claimants in order to be entitled to entry clearance was that they still had a family life such as to engage Article 8, with their father. This was the only issue effectively which had to be determined by Judge Hall.

7. In his decision Judge Hall found that the claimants were both financially and emotionally dependent on their parents and accordingly that Article 8(1) was engaged. Judge Hall had regard in particular to the decision in *Rai* because, as he said, this “reviewed previous case law on family life between parents and adult children”.
8. As already noted Judge Hall found that the claimants were not only financially dependent on their parents but also emotionally dependent on them. It is accepted on behalf of the respondent that there was financial dependence but it is not accepted that there was emotional dependence and it is submitted that the judge has not given adequate reasons for his conclusion that there was.
9. The Entry Clearance Officer’s submissions are set out in the grounds and were developed succinctly by Ms Fijiwala in oral argument. It is not necessary for the purposes of this decision to rehearse her arguments in any great detail; however, I have had regard to everything which was said to me during the course of the hearing as well as to all the documents in the file, whether or not they are specifically referred to below.
10. The essential submission that is that made on behalf of the Entry Clearance Officer is that Judge Hall failed to have proper regard to the guidance given by the Court of Appeal in *Kugathas* [2003] EWCA Civ 31 with regard to what needed to be established before the Tribunal could conclude that the claimants were emotionally dependent on their parents. In the grounds it is submitted that “the Tribunal has not explained the basis for this finding”. It is also said that “on the face of it there was no evidence to show dependence beyond the normal emotional ties”.
11. Permission to appeal was granted by First-tier Tribunal Farrelly who stated as follows, when setting out her reasons for granting permission:
“...
 5. In order for family life to exist there must be something more than the normal ties of love and affection expected between parents and adult children. The judge refers to financial support and visits by the sponsor. There is also reference to regular contact. However, I find it arguable that the judge failed to explain in the circumstances what it was that goes beyond the norm to show a state of dependency.”

Discussion

12. In my judgment in a very careful and thorough determination Judge Hall has indeed given adequate reasons for the findings which he made. He had in mind all the relevant authorities, including not just *Ghising* and *Rai*, but also the guidance given by the Court of Appeal in *Kugathas*. Detailed reference is given to the guidance in *Kugathas* at paragraph 39 and 40. At paragraph 39 the judge cites Sedley LJ as saying that “‘real’ or ‘committed’ or ‘effective’ support represented the ‘irreducible minimum of what family life implies’.” Then at paragraph 40 Judge Hall refers to paragraph 25 of *Kugathas*, where Arden LJ “confirmed that family life is not established between an adult child and his surviving parents or other siblings unless something more exists

than normal emotional ties". He goes on to say that "such ties might exist if the appellant were dependent on his family or vice versa". He also had in mind that although it was "not essential that members of the family should be in the same country... it would probably be exceptional if family life was established that engaged Article 8 between members of a family in different countries".

13. In other words, Judge Hall was very conscious of the reality which is that a finding that family life exists between adult children and their parents is very much the exception and that it is necessary also to establish that there is something beyond normal emotional ties.
14. Judge Hall gives his reasons for so finding at paragraph 50, where he finds "on the evidence presented... the family life which existed when the parents left Nepal has carried on despite the physical separation". At paragraph 47 he had noted that the claimants were financially supported by the sponsor (which as noted above is not disputed). At paragraph 48 reference is made to visits by the sponsor and his wife to their children, the claimants and the judge accepted as he was entitled to that the purpose of these visits was to spend time with his children. He also at paragraph 49 referred to the regular contact between the sponsor and his wife on the one hand and the claimants on the other which was provided by evidence of Viber calls and chat logs. With reference to these, Ms Fijiwala submitted that he should not have relied upon this evidence because the text messages within were not translated. In my judgment the judge was perfectly entitled to rely on these records because what they do show is just how frequent the contact was between the parents and their children. When one looks at this log one sees that day after day there are several communications between them. For example, at random, because it is only one example of many, on 28 April 2017 just on one of the logs, there appears no fewer than eighteen different communications including reverse miscalls, calls that were effective, mail messages and photo messages. This pattern is repeated day by day. Different judges will no doubt have different views as to what "normal emotional ties" actually are. It may be that in some families the "normal" situation is that once a child is an adult he or she leaves home and has some but not necessarily hugely frequent communication with their parents. That however is plainly not the case here and it was entirely open to the judge to find that where there is financial dependency, visits, and over a period of months literally hundreds of different communications between the parents and the children, this goes beyond what is considered in this country to be "normal". It may be that not every judge would reach the same conclusion as Judge Hall although were I to have to make this decision I might very well have done so. However it certainly cannot in my judgment be successfully argued that this finding was not open to Judge Hall on the evidence which he considered.
15. As this is the only issue between the parties it follows that there was no arguable error of law in Judge Hall's decision capable of having any material impact on his decision and this appeal by the Entry Clearance Officer must accordingly be dismissed and I so find.

Notice of Decision

The appeal of the Entry Clearance Officer against the decision of First-tier Tribunal Judge Hall is dismissed, the consequence being that Judge Hall's decision, allowing the claimants' appeal is affirmed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 30 April 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 30 April 2018