



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

Appeal Numbers: HU/01058/19 (P)
HU/01060/19 (P)

THE IMMIGRATION ACTS

Heard at Manchester CJC (Skype)

On the: 15th September 2020

**Decision & Reasons
Promulgated**

On the: 27th January 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Miss Sobha Thapa
Mr Narendra Thapa
(no order for anonymity)**

Appellant

and

Entry Clearance Officer

Respondent

For the Appellants: Mr Moll of Counsel instructed by Everest Law Solicitors
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

The Appellants are respectively a sister (born on the 19th March 1977) and her brother (11th August 1978). They are both nationals of Nepal who seek entry clearance to the United Kingdom on human rights grounds; specifically they wish to join their father Mr Radhe Shyam Thapa, a former Gurkha now settled in the United Kingdom. The applications for entry clearance were refused in a decision dated the 11th December 2018.

The Appellants' linked appeals against that decision came before the First-tier Tribunal (Judge Sweet) on the 19th September 2019. By his decision promulgated on the 25th September 2019 Judge Sweet dismissed both appeals on human rights grounds. He concluded that neither Appellant could meet the requirements of Annex K of the Immigration Rules. Insofar as the Appellants relied on Article 8 'outside of the rules' Judge Sweet did not consider that a family life existed nor accordingly that the decision to refuse entry clearance was disproportionate.

The Appellants appealed to the Upper Tribunal. Permission was granted by the First-tier Tribunal (Judge O'Brien) on the 31st January 2020.

The matter was listed for hearing at on the 15th April 2020. That hearing was, with notice, adjourned as a result of measures taken by the government to control the spread of Covid-19. On the 24th March 2020 the Vice President of the Tribunal Mr CMG Ockelton made Directions. He indicated his provisional view that at least in respect of the following two matters, this appeal could proceed on the papers: did the decision of First-tier Tribunal Judge Sweet contain an error of law, and if it did, should it be set aside? Judge Ockelton invited the submissions of the parties on that matter.

On the 20th April 2020 the Appellants, or rather their representatives in the United Kingdom (Everest Law), responded on their behalf. They indicated that they had no objection to the 'error of law' hearing proceeding on the papers, and made written submissions which they asked to be taken into account. On the 27th April 2020 the Respondent, or rather his representative in the United Kingdom (the Secretary of State, on this occasion by way of letter from Senior Presenting Officer Rhona Pettersen) made his own submissions.

By my decision of the 29th June 2020 (promulgated on the 7th July 2020) I addressed the two questions identified by Judge Ockelton in his Directions. I found error of law and set the decision of the First-tier Tribunal aside.

The error, in brief summary, was in the First-tier Tribunal' approach to whether a 'family life' exists in this case for the purpose of Article 3 ECHR. In his very brief decision Judge Sweet held that in the absence of "beyond normal family ties" between these adult children and their sponsor father, the Convention obligations of the United Kingdom could not be engaged. In doing so Judge Sweet failed to have regard to the binding authority of Jitendra Rai v Entry Clearance Officer [2017] EWCA Civ 320 wherein the Court of Appeal reviewed the existing jurisprudence relevant to these Gurkha entry clearance appeals. The material conclusions of the court were that Kugathas v SSHD [2003] EWCA Civ 31 has been too restrictively read, and that in examining whether family life is engaged there is no requirement of exceptionality: it all depends on the facts.

The facts here were not in dispute. The Appellants had continued to live in the family home where they had at all material times lived with their sponsor father until he eventually came to the United Kingdom to take advantage of a right of settlement which he should always have had. He had in fact delayed in

taking up that settlement right because he did not want to be separated from his children. They continued to be financially supported by him and he had maintained his close emotional bond with them by frequent visits (at the date of the decision he had returned to Nepal four times) and daily contact via telephone and the internet. Neither Appellant has married or founded a family of their own. On the basis of the guidance in Raj, these findings were sufficient to demonstrate that a 'family life' continued to exist notwithstanding that these Appellants are both now adults.

As Mr McVeety acknowledges, that being the finding, it follows that the appeals must be allowed, because the weight of the historic injustice meted out to Nepalese members of the Gurkha regiments is such that any public interest in denying these family members entry is outweighed. The Appellants' father served his regiment between 1964 and 2003. Had he been permitted to settle sooner he would have done. Had he been able to settle sooner it is common ground that his children would have qualified for leave under Appendix K of the Rules. The appeals are therefore allowed.

Decision

The decision of the First-tier Tribunal is set aside for error of law.

The decisions in the appeals are remade as follows: the appeals are allowed on human rights grounds.

There is no anonymity order.

Upper Tribunal Judge Bruce
15th September 2020