



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004249
UI-2024-004253
UI-2024-004251

First-tier Tribunal No: HU/65179/2023
HU/65181/2023
HU/65180/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27th Of November 2024

Before

UPPER TRIBUNAL JUDGE LOUGHRAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EM KUMARI GURUNG
ALISHA GURUNG
JENISHA GURUNG
(NO ANONYMITY ORDER MADE)**

Respondents

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Mr West, Counsel instructed by Gurung & Co Solicitors

Heard at Field House on 18 November 2024

DECISION AND REASONS

Introduction

1. The Secretary of State for the Home Department ('SSHD') appeals with permission of First-tier Tribunal Judge Galloway against a decision of First-tier Tribunal Judge Abebrese ("the Judge") dated 14 June 2024.
2. Em Kumari Gurung was born on 3 August 1983. Alisha Gurung was born on 23 September 2006 and, Jenisha Gurung was born on 7 October 2008. Em Kumari

Gurung is the mother of Alisha and Jenisha Gurung. They are all citizens of Nepal. I shall refer to them as the Appellants as they were in the First tier Tribunal.

3. The Judge allowed the Appellants appeal against the refusal of their human rights claim.

Factual Background

4. The Appellants' human rights claim arose out of an application for entry clearance made on 30 September 2023 in which the Appellants sought to join the first Appellant's father, Sitaram Gurung ("the Sponsor"). The Sponsor is a former member of the Brigade of Gurkhas who served in the British Army between 1972 and 1988. The Sponsor was granted indefinite leave to remain on 28 October 2015 with his wife, the first Appellant's mother and another of their daughters. The Sponsor and his wife have five children, three of whom live in the UK.
5. The first Appellant married her husband in 2004 and they had the second and third Appellant. They divorced in 18 May 2023. It is the Appellants' case that the relationship broke down years before that and that the Appellants were supported by the Sponsor throughout and since the marriage and that the first Appellant's ex-husband lives in Japan and does not provide them with support.

The appeal before the First-tier Tribunal

6. The appeal came before the Judge on 4 June 2024. The Appellants were represented by Mr Gurung of Gurung Solicitors. The SSHD was not represented. The Judge records that the Sponsor was present and adopted his witness statement. The Judge includes a significant extract from the Sponsor's witness statement in the decision.
7. The Judge finds that he is of the view that "the Appellant has provided evidence to show that Article 8(1) is engaged on the facts." The Judge goes on to identify "that the real and substantial issue in this appeal relates to proportionality." The Judge concludes that the SSHD's decision is not proportionate because:
 11. The Sponsor in his witness statement and in his oral evidence stated that the first Appellant his daughter and the second and third Appellants rely on him financially and emotionally. The Sponsor states that he has always provided for the first Appellant and her family even whilst she was married. This has endured after her divorce and this he claims has enabled her to educate her family to reasonable standard.
 12. The first Appellant in her witness statement makes the point that in Nepal single divorced women are looked on favourably by society and this is one of the reasons why she and her family need to leave the country. It also stated by the first Appellant that she would also be able to provide mutual support to the Sponsor in this country. I found the Sponsor in particular to be a credible witness. I am of the view that this appeal should be allowed for the reasons stated above.
8. The Judge allowed the Appellants appeal.

The appeal to the Upper Tribunal

9. The SSHD sought permission to appeal to the Upper Tribunal. The grounds are somewhat difficult to follow but the following points are raised.
 - (i) Ground 1: The Judge made a material misdirection in law by failing to identify what evidence demonstrated that Article 8(1) was engaged and failed to identify aspects of family life other than financial support between the Sponsor and the Appellants.
 - (ii) Ground 2: The Judge failed to give adequate reasons on material matters because the Judge failed to take account of wider evidence such as maintenance, accommodation and the ability of the Appellant's to integrate into the UK. Accordingly, the Judge's proportionality assessment was inadequate and is not sustainable.
10. First tier Tribunal Judge Galloway granted permission to appeal on all grounds in a decision dated 10 September 2024.
11. The Appellants relied on a response to the SSHD's grounds pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Appellants submitted that there was no error of law within the Judge's determination and if there were any error it was not material to the outcome of the appeal.
12. I heard submissions from Ms Isherwood and Mr West at the hearing.
13. Ms Isherwood relied on and expanded the grounds. In respect of ground 1 Ms Isherwood submitted that this was not a standard adult child of a Gurkha case because it also involved the second and third Appellant, which the Judge did not address at all. Ms Isherwood submitted that the Judge failed to consider the first Appellant's divorce certificate, which she submitted demonstrated that the first Appellant's ex-husband shared custody and paid their expenses. Ms Isherwood submitted that it is clear from the reasons for refusal letter that the SSHD did not accept that Article 8 ECHR was engaged and the Judge failed to give reasons for his finding that it was. Ms Isherwood noted that there was no reference in the determination to the leading cases of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 or *Rai v ECO, Delhi* [2017] EWCA Civ 320. She submitted that there was no consideration of all the evidence in the round.
14. Mr West relied on his rule 24 response. Mr West submitted that the Judge properly directed himself in law. The Judge cited and accepted the Sponsor's evidence and there has been no challenge to the Judge's finding that the Sponsor was a credible witness. Mr West submitted that the SSHD's grounds were a disagreement with the Judge's findings. There was no reference to the divorce certificate in the SSHD's grounds. The SSHD had therefore not pleaded that the Judge failed to address the divorce certificate. In respect of ground 2 Mr West submitted that the issues highlighted in the grounds were not determinative in a case like this. Mr West submitted that the historical injustice applied equally to the second and third Appellant because they would have been born British had they not suffered the consequences of the historic injustice.

15. Mr Isherwood provided a short response. She said that there is a clear lack of findings in the determination and that the Judge has failed to address the Sponsor's relationship with the second and third Appellant.
16. I reserved my decision which I now give.

Discussion

17. I am not persuaded that the Judge materially erred in law.
18. In the grounds the SSHD complains that the Judge made a material misdirection in law. However, the SSHD does not identify how the Judge misdirected himself in law. Before me, Ms Isherwood raised that the Judge did not refer to *Kugathas* or *Rai*. I accept that the Judge did not refer specifically to these cases. However, that does not in itself indicate an error. The First tier Tribunal is an expert tribunal. The Court of Appeal noted in *Rai* at [16] that the legal issues relevant to considering whether Article 8(1) is engaged in cases like this "are not controversial." The Judge was required to apply the test in *Kugathas* and determine whether there was real or effective or committed support between the Appellants and the Sponsor. The SSHD has not identified any language of the decision that demonstrates that the Judge failed to do this. I am satisfied that the Judge was aware of and applied the appropriate legal tests to the fact of the Appellants case.
19. I am not persuaded that the Judge failed to identify what evidence demonstrated Article 8(1) was engaged or that the Judge did not address the Sponsor's relationship with the second and third Appellants. The Judge found the Sponsor "to be a credible witness" and records the Sponsor's evidence that the Appellants rely on him financially and emotionally. This is clearly evidence of real committed or effective dependency between the Sponsor and all the Appellants. It is difficult to know what other evidence the Judge could or should have identified to demonstrate his finding that Article 8(1) was engaged.
20. I note Ms Isherwood's submission that the Judge has not addressed the divorce certificate. However, this was not raised in the SSHD's grounds and permission was not granted on that ground. In any event, I am satisfied that the Judge did not err in this regard. The Judge records that he "considered both the documentary and oral evidence." I have considered the SSHD's decision refusing the Appellants' human rights claims. The Respondent refers to the divorce certificate, but only to satisfy herself that the first Appellant is divorced. The Respondent does not argue that it demonstrated that the first Appellant's ex-husband shared custody with the second and third Appellants and paid their expenses. The SSHD did not provide a review and was not represented at the First tier Tribunal. Accordingly, I am satisfied that the first time the SSHD sought to make this argument was before me. The Judge was not required to address every piece of evidence or issues that the SSHD had not raised.
21. I am satisfied the Judge gave adequate reasons why having found Article 8(1) was engaged the decision to refuse the Appellants' human rights claim was disproportionate. The Judge cites an extract of the Sponsor's evidence which clearly addresses the historic injustice. The Sponsor states that had he been allowed to settle in the UK at the time he was discharged the first Appellant would have settled in the UK with him as she was 4 years and 8 months old and

that with his military background he would have been able to find work. As it was, on his return to Nepal he could not find employment and his pension was not enough to feed his family. He also notes that if he had received a fair pension his children would have received better education.

22. In addition, to the Sponsor's evidence, the Judge also considers the first Appellant's evidence that in Nepal single divorced women are not looked on favourably by society and that she would be able to provide mutual support to the Sponsor in the UK.
23. I accept that the Judge did not explicitly address the public interest considerations applicable in all cases and as outlined in section 117A and 117B of the Nationality, Immigration and Asylum Act 2002. However, as was the case in *Rai* in view of the "historic injustice" in this case I am not persuaded any consideration of the provisions in section 117A and 117B could have materially impacted the outcome of appeal.
24. For all these reasons I do not find the SSHD's grounds to be made out and I conclude that the Judge's decision should stand. I accordingly uphold the Judge's decision.

Notice of Decision

25. The SSHD's appeal is dismissed. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
26. The decision allowing the Appellants appeal stands.

G.Loughran

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26.11.2024