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

**Appeal Number: HU/01856/2016**
**HU/01857/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22nd November 2017** | **On 2nd January 2018** |

**Before**

**THE HONOURABLE LORD MATTHEWS**
**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**(1) CHHAM BAHADUR PUN**
**(2) RAM PRASAD PUN**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms N Nnamani, Counsel instructed by Howe and Co Solicitors
For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by Mr Chham Bahadur Pun and Mr Ram Prasad Pun against the decision of First-tier Tribunal Judge Chudleigh, promulgated on the 17th July 2017, to dismiss the appeals against refusal of their applications for entry clearance (hereafter, "the decision") as the son of Sasiram Pun (hereafter, "the sponsor").

2. The appellants are citizens of Nepal, who were respectively born on the 17th March 1981 and the 6th August 1986, and the sponsor is a person with settled status in the

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United Kingdom which was granted in recognition of his military service with the Brigade of Gurkas in the British Army.

3. The respondent's reasons for refusing their applications were that the appellants did not meet the requirements under Appendix FM of the Immigration Rules for entry clearance to the United Kingdom as adult dependent relatives, and the respondent was not satisfied that there was a sufficient degree of dependency between the appellants and their parents to constitute family life and thus to engage the potential operation of Article 8 of the Human Rights Convention.

4. The background to the appeals can be summarised as follows. The appellants have five other siblings. Two are married and living independent lives with their families in Baglung. Another (Bal Bhadur) has disabilities and lives with their parents in the United Kingdom. The other two (Lokendra and Denesh) live with the appellants in the family home in Baglung. The sponsor has had settled status since his arrival in the UK on the 9th July 2010. He has not visited Nepal since then, although his wife has done so on one occasion. The first appellant worked as a labourer in Malaysia between 2009 and 2013. He was unable to save any of his earnings due to the agency fees he had incurred in obtaining that employment. There is little work available in their village in Nepal. The appellants are however sometimes able to find work cutting grass and ploughing fields. They live too far away to be able to commute to work in the cities. The sponsor sends an average of £1,923.70 a year to the second appellant.

5. Judge Chudleigh was not satisfied that the appellants were wholly financially dependent upon the sponsor. She noted that she did not have any evidence from the second appellant and that the evidence of the first appellant was "sketchy" and had failed to mention his work in Malaysia. She concluded that the sums remitted by the sponsor to Nepal were intended to 'top up' the income of all four of his sons living in the family home. The total annual amount thus equated to around £500 for each adult child. The judge accepted that it was part of Nepalese culture for adult children to be considered as part of their parents' family unit until they were married. She also accepted that there were what she described as "occasional" telephone calls between the sponsor and the appellants. She was however unable to find that the appellants' current emotional ties to their parents in the UK were anything more than the ordinary love and affection that one expects between parents and adult children She was not therefore satisfied that the appellants had established 'family life' with the sponsor [paragraphs 33 to 37]. She also made it clear that had she found Article 8 to be engaged, then she would have found the appellants exclusion from the UK was disproportionate in furthering the legitimate objective of maintaining immigration controls. She would in those circumstances have therefore allowed the appeals [paragraphs 38 to 40].

6. Ms Nnamani submitted that the judge had materially erred in law by (a) failing to refer to the leading authorities in relation to the correct approach to Article 8 cases involving the 'historic injustice' suffered by former Ghurkha soldiers and their families, and (b) unfairly and inaccurately characterising the telephone contact between the sponsor and the appellants as "occasional". Ms Nnamani further

submitted that, upon her own findings, the judge was bound to conclude that family life existed between the appellants and their parents and that it was perverse to have concluded otherwise. Given that the judge had expressly stated that she would have allowed the appeals had she found family life to have been established, it followed that we should reverse her decision to dismiss the appeals.

7. We do not accept those submissions. We agree with Mr Avery that the key question is whether the judge applied the appropriate legal principles to the facts as found she found them to be, rather than whether she cited the case-law that enunciates those principles. The leading case concerning the approach to the 'historic wrong' in Ghurkha cases is arguably Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) in which the 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 in maintaining a firm immigration policy.* [Emphasis added]

As we have already observed, the judge faithfully applied this principle upon the premise (which she did not accept) that family life had been established. The decision in Ghishing did not however assist her in approaching the question of whether Article 8 was potentially engaged in the first place. In relation to that issue, the judge would have been guided by decisions such as Kugathas v The Secretary of State for the Home Department [2003] EWCA Civ 31 and Singh v The Secretary of State for the Home Department [2015] EWCA Civ 630, in which it was held that there needs to be something more than the love and affection between an adult and his parents or siblings in order to justify a finding of a family life for the purposes of Article 8. That is of course precisely the test that the judge applied at paragraph 36 of her decision

8. We also reject the submission that the judge came to a perverse conclusion. As Stanley-Burnton LJ said in Singh, the answer to the question of whether Article 8 is engaged, "all depends on the facts". It was in our view reasonably open for the judge to find that the payments made by the sponsor to the second appellant were intended simply to "top up" the income of the household of which the appellants (together with two of their siblings) were members, and we did not understand Ms Nnamani to be suggesting that we should go behind that finding. In our judgement, it was not perverse for the Tribunal to find, on the particular facts of this case, that regular financial contributions by a parent to an adult child, with whom he had not resided for many years, provided an insufficient basis for a finding of 'family life' and consequent engagement of the potential operation of Article 8. Similarly, whilst the judge's characterisation of the telephone contact between them as "occasional" may not have been entirely apposite, we do not consider this to have been material to the judge's overall assessment of the potential engagement of Article 8.

**Notice of Decision**

9. The appeal is dismissed.

No anonymity direction is made.

Judge Kelly
Deputy Judge of the Upper Tribunal