



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

Appeal Numbers: HU / 21579 / 2018\_P  
HU / 21581 / 2018\_P  
HU / 21582 / 2018\_P

**THE IMMIGRATION ACTS**

**Decision Under Rule 34 Without a Hearing  
On 29<sup>th</sup> September 2020**

**Decision & Reasons Promulgated  
On 1<sup>st</sup> October 2020**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

- (1) Rishiraj Rai
- (2) Binam Rai
- (3) Dilan Rai

**(ANONYMITY ORDER NOT MADE)**

Appellants

And

The Secretary of State for the Home Department

Respondent

This is a decision on the papers without a hearing. The Upper Tribunal did not receive any written submissions from the appellants. The Upper Tribunal received written submissions from the respondent but these did not address the question whether a decision could appropriately be made on the papers. The documents described at para 7 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at para 8 below. The order made is set out at para 15 below. (*Administrative Instruction No. 2 from the Senior President of Tribunals*).

**Representation (by written submissions):**

For the appellants: (No submissions received)

For the respondent: Mr A Tan, Senior Presenting Officer.

## DECISION

1. The appellants are siblings born (respectively) on 29 August 1987, 13 September 1990 and 27 May 1997. They are nationals of Nepal. They appeal against a decision of Judge of the First-tier Tribunal Chudleigh (hereafter the "Judge") who dismissed their appeals on human rights grounds (Article 8) against decisions of the respondent of 21 August 2018 to refuse their applications of 25 August 2017 for entry clearance certificates in order to settle in the United Kingdom as the adult dependent children of Mr Hari Chandra Rai (hereafter the "sponsor") who was settled in the United Kingdom with his wife, and their mother Mrs Mantala Rai.
2. The sponsor had served in the Brigade of Gurkhas of the British Army from 26 January 1978 until 29 September 1988, when he was discharged. The sponsor and Mrs Rai left Nepal on 25 September 2018 to settle in the United Kingdom. They returned to Nepal on 22 November 2018 and stayed until 26 December 2018 when they returned to the United Kingdom.
3. The Judge was not satisfied that the appellants enjoyed family life with their parents. She was not satisfied that they were dependent on the sponsor for financial or emotional support. She concluded that the appellants and their parents had tried to construct a case for entry clearance and were endeavouring to demonstrate financial and emotional support where it did not exist (para 57).
4. In granting permission to appeal, Upper Tribunal Judge Kamara made some detailed observations.
5. On 1 July 2020, the Upper Tribunal sent to the parties a "*Note & Directions*" dated 26 June 2020 by Upper Tribunal Judge Owens in which Judge Owens stated that she had taken the provisional view that it would be appropriate in the instant case to decide the following questions without a hearing:
  - (a) whether the decision of the Judge involved the making of an error of law; and
  - (b) if so, whether it should be set aside.
6. Judge Owens then gave directions which set a timescale for the appellants to make written submissions on questions (a) and (b), for the respondent to lodge submissions in reply and for the appellants to lodge further submissions in response. She also gave directions which provided for any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and/or (b) to submit reasons for that view within a certain timescale.
7. In response to the "*Note and Directions*" of Judge Owens, the Upper Tribunal has received from the respondent a document entitled: "*Re Secretary of State's response to the grounds of appeal under Rule 24*" dated 17 July 2020 from Mr Tan, sent to the Upper Tribunal by email dated 17 July 2020 timed at 09:57 hours. The Upper Tribunal has not received any written submissions from the appellants.

8. Mr Tan accepted in his Rule 24 Reply that the Judge had materially erred in law in reaching her finding that the appellants did not enjoy family life with their parents and that her decision should be set aside. Having considered the grounds, the grant of permission by Judge Kamara and the respondent's Rule 24 Reply, I agreed that the Judge had materially erred in law and that her decision should be set aside. My reasons are given below. In these circumstances, I concluded that the appellants would not suffer any prejudice by my proceeding to decide questions (a) and (b) without a hearing and without giving them a further opportunity to make submissions in response to the directions issued by Judge Owens.

### Assessment

9. I am satisfied that the Judge erred in law in reaching her finding that the appellants did not enjoy family life with the sponsor and his wife, for the following reasons:
- (i) The Judge failed to take into account relevant evidence, i.e. that the entire family had applied for entry clearance simultaneously in order to travel to the United Kingdom together; that the appellants lived with their parents until their departure for the United Kingdom; and their continued residence in the family home subsequently.
  - (ii) The Judge fell into speculation in stating that it was likely that the appellants were working because the sponsor and their elder sibling had left Nepal in order to work.
  - (iii) The Judge erred by failing to apply the guidance in Rai [2017] EWCA Civ 320 which stated, inter alia, that it was necessary to assess whether family life was being enjoyed prior to the departure of the sponsor-parent(s) and, if so, whether the enjoyment of such family life had endured.
10. The Judge's finding, that the appellants did not enjoy family life with the sponsor, was plainly material to her assessment of proportionality.
11. I am therefore satisfied that the Judge's decision on the appeal of each of the appellants did involve the making of an error of law such that her decision to dismiss their appeals stands to be set aside. I therefore set aside her decision to dismiss the appeals.
12. However, the Judge's summary of the oral evidence that was given before her, at paras 11-23, shall stand as a record of the oral evidence that was given before her.
13. The next question is whether the decisions on the appeals should be re-made in the Upper Tribunal or whether the appeals should be remitted to the Upper Tribunal.
14. It has not been possible to preserve any of the Judge's findings. Furthermore, although there will be only one hearing, the individual circumstances of the three appellants may have to be considered separately. For example, it will be necessary to consider whether or not the second and third appellants meet the terms of the respondent's policy on adult children of former Gurkhas, as argued in the grounds and which the Judge did not consider. In all of these circumstances, I have concluded

that the only fair course of action is for the appeals to be remitted to the First-tier Tribunal.

### **Notice of Decision**

15. The decisions of the First-tier Tribunal to dismiss the appeals of the appellants involved the making of errors on points of law such that the decisions fell to be set aside. The decisions are set aside. The appeals are remitted to the First-tier Tribunal for the decisions on the appeals to be re-made by a Judge of the First-tier Tribunal other than Judge Chudleigh.

Signed  
Upper Tribunal Judge Gill

Date: 29 September 2020

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email