Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/22256/2018
HU/23688/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2019	**On 15 January 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR THARMAN GARBUJA
MR SUNEL GARBUJA
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 11 July 2019 of First-tier Tribunal Judge Andonian which refused the Article 8 ECHR appeals brought

by the appellants against the refusal of entry clearance as the adult dependants of the widow of a Gurkha soldier.

2. The background to this matter is that the appellants' father was a driver in the British Army, serving from 7 October 1964 until 11 October 1969. When the appellants' father was discharged from the army on 11 October 1969, the discretionary arrangements for Gurkhas to come to the UK had not come into effect and there was no provision for the father to come to the UK.

3. After his discharge from the army the appellants' father married their mother and the five children of the family, including the two appellants were born. Very sadly, shortly after the introduction of the policy allowing him to come to the UK, the appellants' father died in November 2010. The family were left in very difficult circumstances in a remote and rugged area of Nepal with very limited infrastructure. The appellants' mother did not apply immediately to come to the UK, as was her right in law at that time, as she was concerned about leaving her children. Further, she only had sufficient funds to apply for herself and possibly one child to come to the UK. On advice, she applied for settlement with a minor child and was granted indefinite leave to enter the UK on 10 February 2015, arriving in the UK on 10 March 2015. The appellants' case was that after their mother came to the UK they remained dependent on her, in terms of finance and other support including constant contact being maintained, visits, telephone calls and so on.

4. The application for entry clearance was made on 9 July 2018 and refused on 28 September 2018. An ECM review dated 6 March 2019 maintained the refusal of entry clearance. The appellants proceeded with an appeal to the Upper Tribunal

5. In the First-tier Tribunal decision issued on 11 July 2019 refusing the Article 8 ECHR appeals the judge sets out the background to the matter in paragraphs 1 and 2. He then proceeds to set out key aspects of the development in the law concerning cases of former Gurkha soldiers and their families across paragraphs 4 to 17. In paragraphs 18 to 29 the judge sets out the oral evidence of the appellants' mother and their younger brother who lives with her in the UK. He records the submissions of the parties in paragraphs 30 to 33. In paragraphs 34 to 42 the judge sets out further case law and legal matters and the reasons for refusal relied upon by the respondent. In paragraphs 44 the judge stated as follows:

> "*Matters that were stacked up against the appellant by the respondent outweighed the appellants argument of historical injustice*
>
> 44. I was satisfied that the reason for the refusal outweighed the consideration of historic injustice. The first and second appellants had grown up in Nepal, the first was 35 of the time of application, and his brother was 23; they had lived apart from their mother for about 4 years, when they had applied for entry clearance to join their mother in the UK, who chosen (sic) to apply for a settlement visa which was her

> right when the appellants were already adults in the full knowledge that her adult children do not automatically qualify for settlement. The respondent was not satisfied that the appellants had established family life with their mother and had emotional ties over and above the normal ties between adult children and parent and therefore I do not believe that article 8 was engaged in the first place."

6. The grounds of appeal maintained that in paragraph 44 of the decision the First-tier Tribunal failed to make a clear finding on whether family life existed between the appellants and their mother, failed to apply the correct test required for a finding on family life between adult children involved in Gurkha cases as set out in case law, erred in law in stating that the reason that family life was not established was because the respondent said so in the refusal letter and, in any event, referred to irrelevant or impermissible factors when considering the situation of the appellants and their family life with their mother.

7. At the hearing Mr Jesurum took me to the case law concerning the proper approach to an assessment of family life between adult children of ex-Gurkha soldiers. In particular, he took me to the case of **Jitendra Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**. Mr Whitwell for the respondent did not dispute that the proper approach to an assessment of Article 8 family life in the circumstances of this appeal is set out in paragraph 36 of that decision as follows:

> "As Ms Patry submitted, it was clearly open to the Upper Tribunal judge to have regard to the appellant's dependence, both financial and emotional, on his parents. This was, plainly, a relevant and necessary consideration in his assessment (see the judgment of the court in *Gurung*, at paragraph 50). If, however, the concept to which the decision-maker will generally need to pay attention is "support" – which means, as Sedley L.J. put it in *Kugathas*, "support" which is "real" or "committed" or "effective" – there was, it seems to me, ample and undisputed evidence on which the Upper Tribunal judge could have based a finding that such "support" was present in the appellant's case. He found, however, that the appellant had a "reliance upon his parents for income that does not place him in any particular unusual category either within this country or internationally" (paragraph 23 of the determination), and no "indication on balance of a dependency beyond the normal family ties and the financial dependency" (paragraph 26). These findings, Mr Jesurum submitted, suggest that he was looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Mr Jesurum submitted that this approach was too exacting, and inappropriate. It seems to reflect the earlier reference, in paragraph 18 of the determination, to the requirement for "some compelling or exceptional circumstances inherent within [an applicant's] own case". In any event, Mr Jesurum submitted, it elevated the threshold of "support" that is "real" or "committed" or "effective" too high. It cannot be reconciled with the jurisprudence – including the Court of Appeal's decision in *Kugathas* – as reviewed by the Upper Tribunal in *Ghising (family life – adults – Gurkha policy)* (in paragraphs 50 to 62 of its determination), with the endorsement of this

court in *Gurung* (in paragraph 46 of the judgment of the court). It represents, Mr Jesurum contended, a misdirection which vitiates the Upper Tribunal judge's decision."

8. Reading this paragraph and returning to the findings of the First-tier Tribunal in paragraph 44 of the decision, I was satisfied that an error of law was shown. As conceded by Mr Whitwell, the heading and consideration in paragraph 44 of the decision is confused, referring to and appearing, certainly in part, to be a proportionality assessment being made under Article 8(2) rather than an Article 8(1) family life assessment. It is therefore not clear that an proper assessment of the existence of family life under Article 8 (1) took place. Also, even reading paragraph 44 of the decision as fairly as possible, the judge does not follow the approach set out in paragraph 36 of **Rai** where the financial dependence of the appellants on their mother was a factor that had to be considered carefully as to whether it could assist in amounting to a "real" level of support or dependence that could amount to a family life. Further, the first and last sentences of paragraph 44 leave me in significant doubt as to whether an independent judicial assessment of the relevant factors in the evidence concerning family life was undertaken by the judge where he does not analyse the respondent's position in any way and appears to accept it without question. Further, the judge also took an incorrect approach in paragraph 44 in placing weight on the appellants' mother choosing to come to the UK knowing that her adult children did not automatically qualify for settlement. This is the specific error found by the Court of Appeal in **Rai**; see paragraphs 39 and 40 of that decision.

9. For these reasons, therefore, I found that paragraph 44 of the decision of the First-tier Tribunal disclosed an error of law where it did not make a clear finding on whether family life existed for the purposes of Article 8 outside the Immigration Rules and, even it was taken to be such did not conduct that assessment lawfully.

10. That might not amount to a material error where paragraphs 45 to 48 of the decision set out a proportionality assessment in the event that Article 8 ECHR was engaged. The difficulty there is that Mr Whitwell conceded for the respondent that that the second ground of appeal challenging the proportionality assessment had merit and accepted that paragraphs 45-48 of the decision showed material error on a point of law.

11. For these reasons, therefore, I found that the errors in the decision meant that the entire Article 8 assessment in paragraphs 44 to 49 of the decision had to be set aside to be remade. Where there are no extant findings of fact, the parties were in agreement that the matter should be returned to the First-tier Tribunal for primary findings of fact to be made in line with the relevant authorities and guidance.

Notice of Decision

12. The decision of the First-tier Tribunal discloses an error of law and is set aside to be remade de novo.

13. Where there are no extant findings and the appeal must be remade entirely, the remaking will take place in the First-tier Tribunal.

Signed:  Date: 13 January 2020
Upper Tribunal Judge Pitt