Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/06522/2015**

HU/06525/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2017	**On 08 November 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEBINDRA LIMBU (FIRST APPELLANT)
RAJENDRA KUMAR LIMBU (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondents: Mr M Puar, instructed by N C Brothers & Co Solicitors

DECISION AND REASONS

1. The Secretary of State (to whom I shall refer hereafter as "the respondent" as she was before the First-tier Judge) appeals with permission to the Upper Tribunal against the decision of a First-tier Judge who allowed the appeals of the respondents (hereafter referred to as "the appellants") against the Secretary of State's decision of 1 September 2015 refusing

them entry clearance with a view to settlement with their father and sponsor Mr Surendra Kumar Limbu.

2. The sponsor and his wife, the appellants' mother, were granted indefinite leave to remain in the United Kingdom in 2010. Prior to that the sponsor had served with and was discharged from the British Army owing to redundancy on 29 September 1988. The appellants were born respectively in September 1986 and December 1988. They were both therefore over the age of 18 at the time when their parents were granted indefinite leave to remain. The appellants' parents initially tried to settle in the United Kingdom in 2012 but they went back to Nepal, the sponsor returning in 2014 and has remained in the United Kingdom ever since. The appellants made applications to come to the United Kingdom in 2015 but these were refused by the respondent. Their mother did not want to leave them on their own in Nepal so she remained there with them as long as she could without prejudicing her own settlement. She subsequently joined the sponsor in the United Kingdom in December 2016. It seems that the appellants are not working but have now finished the studies that they were engaged in, in 2012 and their parents initially settled in the United Kingdom. They had been unable to find work in Nepal. Neither is married nor in a relationship. They are supported financially in Nepal by the sponsor who remits funds to them on a regular basis.

3. The judge found the sponsor to be a credible witness. The claim was based not on meeting the requirements of the policy in respect of families of former Ghurkha soldiers, but rather that as a result of the historic injustice caused to them they had been deprived of the opportunity to settle with the sponsor and that as a consequence Article 8 of the European Convention on Human Rights was engaged.

4. The judge was satisfied that there was family life between the appellants, their mother and the sponsor. He noted that the reality was that the appellants had always lived at home with their mother, save for the brief period of one month when she came to the United Kingdom in 2012, and the evidence showed that she had found it very difficult to leave the appellants in Nepal, which the judge considered to show the strength of the emotional bond that existed between them. The judge found the family situation to be entirely plausible. He reminded himself of the immigration history I have set out above. The judge considered it to be understandable that the appellants were unable to join the sponsor earlier as they were in full-time study and they had looked for work but had been unsuccessful. There was no evidence before him to suggest that the appellants had formed an independent family unit. He found therefore that they had remained part of their parents' family. The judge had noted and taken into account among others the authorities of Gurung [2013] EWCA Civ 8 and Ghising [2013] UKUT 00567 (IAC).

5. As regards the proportionality of the decision, the judge noted that the evidence showed that the sponsor and the appellants' mother had taken active steps to pursue their settlement arrangements in the United

Kingdom following their grant of leave by the respondent and there was no reason to believe that if the same rights had been afforded to the appellants in the past they would not also have chosen to exercise them and settle in the United Kingdom. The judge concluded that accordingly the interference was disproportionate, Article 8 was engaged and leave should be granted to enable the appellants to settle with the sponsor in the United Kingdom.

6. The Secretary of State sought and was granted permission to appeal against this decision, first on the basis that the guidance in Kugathas [2003] EWCA Civ 31 had not been followed, where it was noted that there was no presumption of family life and that family life was not established between an adult child and his surviving parent or other siblings unless something more existed than normal emotional ties. Such ties might exist if the appellant was dependent on his family or vice versa. It was argued that the judge had failed to consider whether more than the usual family ties between older members of the same family existed in the instant case.

7. It was also argued that the judge had failed to make any findings under section 117B of the 2002 Act and that there had been no consideration of the public interest aspects, nor any assessment as to whether the sponsor's income was sufficient to keep him, his wife and the two appellants in the United Kingdom.

8. In his submissions Mr Tarlow relied on and developed the points made in the grounds. He argued that nothing brought the appellants into more than the normal relationship between parents and adult children and the judge had failed to mention Kugathas or consider whether there were more than the normal family ties. There was also the failure to refer to section 117B and that was also a material error of law.

9. In his submissions Mr Puar argued that with regard to the section 117B point, that was addressed by what was said by the Court of Appeal in Rai [2017] EWCA Civ 320, at paragraphs 55 to 57. Though the judge had not referred expressly to Kugathas he had referred to Gurung and Ghising which dealt with the same issue, including proportionality and historic injustice. The judge set the facts out carefully including a finding that the sponsor was credible and there was financial and emotional dependency. If the Tribunal did not accept that a reference had been made to Kugathas then nevertheless there were clear findings of fact so the judge would have come to the same conclusion. It was relevant to also note paragraph 61 in Ghising and the reference there to the decision in AA (application number 8,000/08) on the situation of a person seeking to rely on family life, was married and that of a person who was still single.

10. By way of reply Mr Tarlow argued that he would expect there to be family life between adult children and their parents, but it was necessary to show something more than the normal family links and there was a lack of clear findings on that.

11. I reserved my decision.

12. The first point is what may be described as the Kugathas point, that is to say the question whether the judge erred in law in finding that there was family life between the appellants and the sponsor such that their relationship was entitled to protection under Article 8 of the European Convention on Human Rights. Kugathas was most recently described in Kopoi [2017] EWCA Civ 1511 as the leading domestic authority on the ambit of "family life" for the purposes of Article 8. It was said though that it was not an absolute requirement of dependency in an economic sense for family life to exist, but that it is necessary for there to be real, committed or effective support between family members in order to show that family life exists. It was also said that neither blood ties nor the concern and affection that ordinarily go with them are by themselves altogether sufficient. The judge noted that the reality was that the appellants had always lived at home with their mother, except for the brief period of one month when she came to the United Kingdom with the sponsor in 2012. The judge commented that the evidence showed that their mother had found it very difficult to leave the appellants in Nepal which showed the strength of the emotional bond existing between them. He also referred to the fact that there was no evidence before him to suggest that the appellants had formed an independent family unit and he found therefore that they had remained part of their parents' family. Though he did not refer specifically to Kugathas, he did refer to Gurung and Ghising. In the latter in particular there is detailed reference to Kugathas. The question is whether the judge identified, as it was put in Kugathas at paragraph 14: "evidence of further elements of dependency, involving more than the normal emotional ties".

13. The point is a marginal one. I consider that it is not a decision that every judge would have come to by any means, but I am satisfied that on balance the judge had the appropriate test in mind when he found that there was protected family life in this case between these appellants and their parents. In referring to the length of the emotional bond and the difficulties that the appellants' mother had found in leaving them in Nepal, the judge clearly had in mind the statements of the appellants. The first appellant said at paragraph 7 of his statement that their mother could not get used to being without them and came back to Nepal to look after them. The second appellant endorsed that statement referring to the financial and emotional dependence they had on their parents, and the fact that they were not independent from their parents. In my view there was enough, on balance, to justify the judge's conclusion that there is family life between the appellants and their parents and the necessary element of emotional dependency beyond the simple fact of the relationship was found.

14. The second point is the failure to refer to section 117B of the 2002 Act. In this regard, as noted above, Mr Puar referred to paragraphs 55 to 57 of Rai. This was also a case involving the appeal of an adult son of a former

Ghurkha soldier arguing that his Article 8 rights had been breached when he was refused leave to enter the United Kingdom. The Court of Appeal noted the argument made on behalf of the appellant that in view of the "historic injustice" underlying the appellant's case, considerations arising under section 117A and section 117B would have made no difference to the outcome and certainly no difference adverse to the appellant. On behalf of the respondent it was submitted that if the decision was otherwise lawfully made the considerations arising under sections 117A and B could not have made a difference in his favour. The court agreed with these submissions.

15. Though I do not think this goes quite as far as Mr Puar suggested in never being able to assist the Secretary of State if historic injustice applies, I consider that what was said in particular at paragraphs 56 and 57 in Rai is such as to support Mr Puar's argument sufficiently. In my view there is no error of law in the decision in the failure to refer to section 117A or B of the Nationality, Immigration and Asylum Act 2002, bearing in mind the historic injustice substratum to the appellants' case. Nor as noted above do I find any error of law in the failure to refer to Kugathas but conclude that the findings on family life were also open to the judge.

16. Bringing these matters together, I consider that it has not been shown that the judge erred in law in coming to the conclusions that he did in this case, and accordingly his decision allowing these appeals under Article 8 is upheld.

17. No anonymity direction is made.

Signed Date 07 November 2017

Upper Tribunal Judge Allen