Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/01307/2013
OA/01310/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 April 2014	**On 8 April 2014**
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Before

THE HONOURABLE MR JUSTICE JEREMY BAKER
SITTING AS A DEPUTY JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MOULDEN

Between
THE ENTRY CLEARANCE OFFICER

Appellant

and

MRS MANI SARA ALE
MASTER RAYAN ALE

Respondents

Representation:

For the Respondents: Mr H Shoeb of Counsel instructed by Howe & Co
For the Appellant: Mr G Saunders, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mani Sara Ale is 48 years of age having been born on 23 May 1965 and her son Rayan Ale is 19 years of age having been born on 25 April 1995. They are both citizens of Nepal. Mrs Ale is married to Shiram Ale who is the father of Rayan. Shiram Ale was a member of the Gurkha regiment of the British Army for a period of twelve years before his discharge in 1996. On

25 October 2006 he was granted a settlement visa. The visa was granted outside the Immigration Rules under a discretionary policy known as IDI Chapter 15, Section 2A, Annex A.

2. On 10 September 2012 Mani and Rayan Ale applied for entry clearance to the United Kingdom for the purposes of settlement as the spouse and dependant son respectively of Shiram Ale. Their applications were refused by the Entry Clearance Officer in a letter dated 19 November 2012. Those decisions were confirmed by the Entry Clearance Manager on 30 April 2013. Mani and Rayan Ale appealed against those decisions to the First-tier Tribunal.

3. Those grounds of appeal set out in full the relevant paragraphs of the Immigration Rules, and then appear to concede that neither of the Ales would have been able to succeed under them, as Shiram Ale had not been granted his visa under the Rules. The grounds properly refer to the discretionary policy and the relevant part of Annex A which is in these terms:

> "Discretion
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> Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same sex partners and dependant children under the age of 18".

Thereafter for reasons which are not altogether clear, reference is made to Article 8 and in particular the "historic injustice" described in *R (Limbu) v SSHD [2008] EWCA 2261 (Admin).*

4. In a decision promulgated on 19 November 2013, the First-tier Tribunal allowed their appeals. The Entry Clearance Officer appeals with permission against the decision of the First-tier Tribunal. We have to observe that the grounds of appeal lack clarity. It is noted that the First-tier Tribunal held that the applications were properly refused under the Immigration Rules and asserts that the appeals were allowed under ECHR. As such, it is submitted that the appeals should only have been allowed if the Ales were able to establish exceptional circumstances and that none existed in this case. In particular, there was no evidence that Shiram Ale intended to settle in the United Kingdom. The grounds conclude with the request that the appeal is granted so that a fresh decision can be taken in regards to the human rights decision.

6. There is no dispute in this case that as Shiram Ale was not granted his visa within the Immigration Rules, neither his wife nor son could have succeeded in obtaining entry to the UK under the Rules. This was appreciated by the First-tier Tribunal who thereafter proceeded to consider the matter under the Secretary of State's discretionary policy. The First-tier Tribunal examined the material which had been before the Entry Clearance Officer and concluded that the findings of both the Entry

Clearance Officer and the Entry Clearance Manager, that they were not satisfied that Shiram Ale intended to settle with his family in the United Kingdom, had no rational basis. We respectfully concur with that finding by the First-tier Tribunal.

7. The material before the Entry Clearance Officer and the Entry Clearance Manager comprised the witness statement of Mani Ale and the notes of a telephone interview with her. In the former of these documents she said in terms that it was her husband's intention to settle with them in the United Kingdom and confirmed this in her interview. The fact, as the First-tier Tribunal found, that Shiram Ale was currently working in Afghanistan was entirely understandable, as the family required his continuing financial support. Indeed we might add that even if he continues to work in Afghanistan, this would not be a bar to his settlement in the United Kingdom. Moreover, the fact that Mani Ale did not know why her husband had not settled earlier in the United Kingdom, did not bear upon the credibility of his present intention. It is correct to note that when the First-tier Tribunal was considering this issue it did have before it a witness statement from Shiram Ale, which had not been considered by the Entry Clearance Officer or the Entry Clearance Manager, and confirmed his intention to settle in the United Kingdom. However, although this no doubt provided some reassurance to the First-tier Tribunal, our interpretation of its decision is that it made its finding that the adverse conclusion reached by the Entry Clearance Officer and Entry Clearance Manager was irrational, on the basis of the evidence which had been considered by them. As we have already stated we are quite satisfied that the First-tier Tribunal was entitled to reach that conclusion.

8. The First-tier Tribunal then considered the terms of discretionary policy and noted that there was a clear presumption that the discretion should normally be exercised and settlement granted in accordance with the main applicant who in this case was Shiram Ale. It concluded that:

> "32. ……I do not consider that any valid reason for refusing the applications has been provided. I do not agree that it is not credible that the sponsor did not intend to come and settle in the United Kingdom with his family as that appears to be the only reason that discretion was exercised against the appellants. I find that there was no rational basis not to grant the applications under the policy. Discretion must be exercised lawfully and I do not consider that the refusal can be justified under the policy. It was an irrational exercise of discretion…… It appears to me that the decision was simply wrong. A proper exercise of discretion would have resulted in both appellants receiving the entry clearance they sought.
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> 33. I agree with the appellants that the refusal to grant settlement to both appellants was not in accordance with the law and I allow both appeals on that ground."

9. It is apparent that the First-tier Tribunal, having reached this conclusion, proceeded in the alternative to consider the position of the Ales under Article 8. We anticipate that it did so because this was a matter which had been raised on behalf of the Ales in their grounds of appeal and we make no further observation about the matter, save to note that the First-tier Tribunal considered that the decision to refuse settlement to the Ales was disproportionate under Article 8(2).

10. Having found that the First-tier Tribunal was entitled to conclude that there was no rational basis for doubting Shiram Ale's intention to settle in the United Kingdom, we are also of the opinion that having regard to the favourable terms in which the guidance upon the exercise of the discretion is expressed, that in the absence of any other adverse factors, of which there were none in this case, the First-tier Tribunal was also entitled to conclude that there would be no rational basis for the Entry Clearance Officer not to grant the Ales' applications. In those circumstances there can be no useful purpose served by remitting this matter for re-determination by the Entry Clearance Officer.

10. There is no error of law and accordingly the decision of the First-tier Tribunal is confirmed and this appeal by the Entry Clearance Officer is dismissed.

Signed Date

The Honourable Mr Justice Jeremy Baker
Sitting as a Deputy Judge of the Upper Tribunal