Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: **HU/08631/2019**
HU/08634/2019
& HU/08640/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 5 October 2020

Decision & Reasons Promulgated
On 15 October 2020

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

PREM KUMARI BEGHA
PREM BAHADUR BEGHA
JYOTI PRAKASH BEGHA

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to directions issued by Upper Tribunal Judge Kopieczek on 3 August 2020.

2. The appellants, mother, father and son, are nationals of Nepal. They have been granted permission to appeal against the decision of First-tier Tribunal Judge Swinnerton, promulgated on 4 February 2020, dismissing their appeals against the respondent's decision to refuse to grant entry clearance to settle in the UK.

3. The second appellant is an ex-Gurkha soldier who served in the British Gurkha Regiment for 15 years, from 1984 until his discharge, with exemplary

conduct, in 1999. He applied, in August 2018, for entry clearance to settle in the UK under the ex-Gurkha discretionary policy, together with his wife and son who applied as his dependants under the policy.

4. The second appellant's application was refused on 2 April 2019 on the grounds that he did not qualify for entry clearance outside the immigration rules under the ex-Gurkha discretionary policy because he did not apply to settle in the UK within the relevant time period. He did not qualify under Appendix Armed Forces paragraph 11(b)(i) as he had not made his application for entry clearance within 2 years of his discharge. The respondent considered that the decision to refuse the appellant's application did not breach Article 8. The first and third appellants' applications were refused in line with that decision.

5. The appellants' appeal against the decisions came before Judge Swinnerton on 28 January 2020. The judge found that the second appellant could not meet the requirements of the immigration rules as he was not applying within 2 years of being discharged from the Army. The judge went on to consider the Home Office policy guidance entitled 'HM Forces: applications on discharge' (the HM Forces policy), which addressed circumstances where the only reason for refusal was because the applicant had been discharged more than 2 years ago. The judge rejected the appellant's explanation for having only applied in 2018, namely that there had been a failure of communication by the Ministry of Defence in informing him of an opportunity for settlement. The judge noted that, whilst the appellant was deployed in the UK for a total of more than 4 years, the last occasion ended almost 23 years ago, and he concluded in the circumstances that the respondent's decision was not disproportionate. The judge dismissed the appeals.

6. The appellants sought permission to appeal the judge's decision on the grounds that the judge had failed to consider that historic injustice had been established. It was asserted in the grounds that the judge had failed to consider that the second appellant relied on the discretionary policy which permitted the respondent to disregard the 2-year time period to make an application after discharge. The fact that the second appellant met the discretionary criteria of Chapter 15, section 2A of the IDI was a determinative factor in the human rights appeal. The judge had not considered the respondent's failure to apply discretion under Chapter 29.4 of the DSP Entry Clearance Volume 1 General Instructions entitled "Settlement entry for former members of HM Forces and their dependants" to disregard the requirement for the application to be made no more than 2 years after discharge from the British Army. The judge had erred in law by concluding that family life did not exist in this case.

7. Permission was granted by the First-tier Tribunal on 17 June 2020 on all grounds.

8. The case was then reviewed by the Upper Tribunal due to the circumstances relating to Covid 19. In a Note and Directions sent out on 3 August 2020, Upper Tribunal Judge Kopieczek indicated that he had reached

the provisional view that the question of whether the First-tier Tribunal's decision involved the making of error of law and, if so, whether the decision should be set aside, could be made without a hearing. Submissions were invited from the parties.

9. Written submissions have been received from the appellant, in which no objection was made to the matter being dealt with on the papers under rule 34. It was conceded on behalf of the appellants that they were wrongly advised to pursue a human rights appeal and that their grounds of appeal were misconceived as this was a pure entry clearance case which ought to have been challenged by way of judicial review. However, the Tribunal was invited to set the judge's decision aside on the basis that he had misconstrued the HM Forces policy and had failed to treat the case as a historic injustice case. It was also asserted that the judge had erred in his adverse credibility findings by failing to refer to the appellant's explanation for the delay in making his application. It was accepted that the decision on the re-making would be to dismiss the human rights appeals.

10. I am not persuaded by the assertion in the grounds that the judge misconstrued the HM Forces policy. The judge gave consideration to the policy and to the discretion to be exercised in cases where the only reason for refusal was because the applicant was discharged from the British Army more than 2 years ago. The grounds rely, in section C, on page 11 of the policy in that regard and assert that the reason for the delay in making an application outside the 2 year time limit was not a relevant factor. However, that section of the policy refers to applications for settlement *after* entry, whereas the relevant section would have been at page 9, relating to applications for indefinite leave to enter, which requires compliance with the general eligibility requirements at page 7.

11. As for the reliance in the grounds on Chapter 29.4 of the DSP Instructions, that requires "*strong reasons why settlement in the UK is appropriate*". In that respect, the grounds at [9] assert that the judge erred by not taking account of the respondent's failure to exercise discretion in the appellant's favour owing to his stay in the UK for more than 3 years prior to discharge from the Army. However, the relevant factor within the policy was 3 years of living in the UK *after* discharge and plainly that did not apply to the appellant who, according to his own evidence, returned to Nepal after he was discharged from the Army. The relevant factors referred to in the DSP Instructions were considered by the judge at [25] and it does not seem to me that there was anything within those Instructions which assisted or benefitted the appellant, as the judge clearly found.

12. As for the question of "historic injustice", that was clearly the matter which the judge was considering at [24] when having regard to the lengthy delay by the appellant in making his application and his reasons for the delay. Contrary to the assertion in the grounds, the judge gave full consideration to the appellant's explanation for the delay and provided cogent reasons for rejecting that explanation. The judge was perfectly entitled, in my view, to draw the

adverse conclusions that he did in that regard and, as such, the question of "historic injustice" was accorded appropriate weight in the judge's decision. The grounds challenging the judge's adverse findings in that regard are simply a disagreement.

13. In the circumstances it seems to me that the judge was entitled to make the findings that he did and to conclude that the appellant could not succeed within the terms of the policy and could not make out a case outside the immigration rules.

14. In any event, as the submission on the error of law rightly acknowledge at [4], the appellants could not succeed in their appeals in any event. The only grounds available to them were human rights grounds, yet it is clear that Article 8 could not be engaged and that the respondent's decision could not have given rise to any interference with the appellants' protected rights.

15. For all these reasons I do not find that the judge erred in law and I do not agree to set aside his decision.

DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 5 October 2020