



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

Appeal Number: HU/20895/2018

THE IMMIGRATION ACTS

**Heard at Field House
On Tuesday, 27 July 2021**

**Decision & Reasons
Promulgated
On Friday 13, August 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

**BINA RAI
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr E Wilford, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

This is an appeal against the decision dated 15 October 2019 of First-tier Tribunal Judge Rowlands which refused the appellant's appeal brought on Article 8 ECHR grounds.

The appellant is a citizen of Nepal born on 31 March 1987. A great deal of her history is undisputed. She is the daughter of a Gurkha soldier, Kumarsing Rai. The appellant's father served in the Gurkha Brigade of British Army from 1962 until 1972. Sadly, in 2000 the appellant's father died.

Under the policy introduced in 2009 providing for a correction of the historic injustice to those who served in the army as Gurkhas, the appellant's mother came to the UK in 2015.

On 20 July 2017 the appellant applied for entry clearance to join her mother in the UK. The application was refused on 29 August 2018. An Entry Clearance Manager's Review on 18 February 2019 maintained the refusal. On 10 October 2018 the appellant gave notice of an appeal.

As above, in a decision dated 15 October 2019, First-tier Tribunal Judge Rowlands refused the appeal. The First-tier Tribunal found that the appellant did not have a family life with her mother. The reasons for this conclusion were set out in paragraphs 17 to 19:

- "17. I have considered all of the evidence in the case including that to which I do not specifically refer and reach the following conclusion. There seems to be little dispute over the facts of this case. The Appellant is a 32-year old, unmarried, unemployed female who lives with her sister and brother in the family home in Nepal. She has no income, they all live rent-free and survive on their mother's widow's pension from the British Army following the death of their father, a former Gurkha. I am told that none of the children are employed. This appeal relates to the eldest only.
18. Their circumstances are not good in a material sense. They live in a small property which seems very isolated. This is what they have been used to all their lives. Their mother occupies one room in a property in the United Kingdom and works part-time as a cleaner. She is 64 years of age and has little spare income, she is not a well woman and sends such money as she can back to her adult children. They live in the countryside and have a cow and some chickens and land to tend. I am not sure in most senses who is the better off but the question is does she have family life with her mother such as would engage Article 8.
19. I am told that they communicate as much as they can by phone or internet although I have been provided with some evidence of this all of it is in Nepalese and I can't read it. It seems to me quite common that parents and children would communicate in such a way. I am told that the Appellant gets upset when they speak which is perhaps to be expected because of the separation from her mother. I believe her family life must of course be mainly with her siblings, after all they live together on a daily basis. Their mother is far away. The Appellant must get her emotional support from her siblings and I do not believe that they have proved that her family life with her mother is more than that which would be expected of adult children separated from their mother by choice or otherwise. I am not satisfied that her family life is such that it would engage Article 8. For these reasons I do not consider that I need to consider the historical injustice."

The appellant brings two main grounds of appeal against the decision of the First-tier Tribunal. Firstly, she argues that the First-tier Judge applied an incorrect test when assessing whether family life existed between her and her mother. Secondly, the appellant maintains that the First-tier Tribunal failed to

take into account material evidence in that assessment and took into account immaterial factors.

The appellant maintains that the First-tier Tribunal Judge did not set out the correct self-direction in law as to how to assess family life concerning an adult child and a parent in the context of a Gurkha family as set down by the Court of Appeal in Rai v ECO Delhi [2017] EWCA Civ 320. The key ratio in Rai had been brought to the attention of the First-tier Tribunal in the skeleton argument dated 9 June 2019 which indicated in paragraph 2 that the question that the judge had to answer was:

- “1) Is there support between the Appellant and the sponsor which is real, or effective or committed (Rai v ECO Delhi [2017] EWCA Civ 320 at paragraph 36 per Lindblom LJ).”

It was my conclusion that there was merit in this aspect of the appellant’s challenge. As the judge indicates in paragraph 17 of the decision, there was “little dispute over the facts of this case”. The facts were therefore that the appellant was a 32 year old unmarried unemployed woman living with her sister and brother, having done so all of her life in the family home in Nepal. The home was owned by her mother. She had no income at all other than what her mother was able to provide from her own income. The appellant’s mother’s evidence at paragraphs 7, 8 and 9 indicated that having learned of the settlement rights for widows of Gurkha nationals, she took the decision to come to the UK alone “after much deliberation” and hoped that her children could come shortly afterwards. In paragraph 12 the sponsor’s evidence was that it was “never my intention to leave any of the children behind” and that the separation occurred only because she did not have sufficient funds to apply for the children to join her sooner. The sponsor’s evidence, consistent with that of the applicant, was also that she had “been constantly in contact with the children and helping them with money from the UK”.

In my view, these parts of the evidence, at least, were capable of meeting the test in Rai as to there being family life because of “dependence” consisting of “real”, “effective” or “committed” support but the First-tier Tribunal did not take them into account when finding that there was no family life. The assessment that was required, was not merely to look for more than usual emotional ties, as suggested for the Secretary of State before me. The assessment also proceeded on the basis that if the appellant had a family life with her siblings then this displaced or reduced the likelihood of family life with her mother. It was not clear to me that this approach was supported by authority or, in the context of the Gurkha families affected by the historical injustice, was appropriate.

Further, I also accepted that the decision on family life did not take into account potentially material aspects of the evidence, for example whether the straitened circumstances in which the appellant lived and complete dependence on her mother for material support might impact on continuing family life with her mother, the mother’s dilemma in applying for entry clearance for herself without her children being able to do so at the same time

and the appellant's distress when speaking to her mother which the judge accepted was likely to be because they were separated.

It was therefore my conclusion that both of the appellant's grounds of appeal had merit and that the decision of the First-tier Tribunal had to be set aside.

The parties made submissions on the appropriate disposal in the event of an error of law being found. The respondent considered that the matter had to be remitted to the First-tier Tribunal. The appellant maintained that the materials were sufficient for a decision to be remade in the Upper Tribunal and in the event that this was not considered to be the case, the matter should be remitted to the First-tier Tribunal.

It was my conclusion that where the assessment of family life here has to be a careful and holistic one given the particular circumstances of this separated Gurkha family, this had to be done *de novo* in the First-tier Tribunal. It is also the case that there has been no assessment of proportionality at all where the First-tier Tribunal did not find there to be a family life. In those circumstances, it is appropriate for the matter to be remitted to the First-tier Tribunal *de novo* in line with paragraph 7 of Part 3 of the Senior President's Practice Statement dated 25 September 2012.

The attention of the First-tier Tribunal is drawn to the extant appeal of the appellant's sister in appeal HU/12475/2019 and to the indication made before me that appellant will be making an application for the appeals to be joined and heard together.

Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade *de novo* in the First-tier Tribunal.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 2 August 2021