



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02207/2014
OA/02209/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18th November 2015

Decision & Reasons Promulgated
On 4th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MISS JAMEENA LIMBU (FIRST APPELLANT)
MISS NABEETA LIMBU (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Rai - Counsel

For the Respondent: Ms Willock-Briscoe - Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Hamilton issued on 21st May 2015 allowing under the Immigration Rules and on human rights grounds the Appellants' appeal against the decision of the Respondent made on 20th January 2014 to refuse leave to remain in the United Kingdom as adult dependent relatives of their father, an ex-Gurkha settled in the UK.

2. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 9th September 2015. He said:
 - “5. I am satisfied that Ground 1 is arguable as it has not been explained how the change in the Second Appellant’s primary carer to the First Appellant from their mother impacts on the presence of family life said to exist between the adult Appellants and their parents here.
 6. I am satisfied that Ground 2 is arguable regarding the Appellants’ father’s lack of credibility regarding his ability (or as found inability) to maintain or accommodate them without recourse to public funds. In the absence of family life (as found as flowing from Ground 1) it is arguable that the private life financial burden consideration in Section 117B of the Nationality, Immigration and Asylum Act 2002 has been stated but not applied.”
3. In the grounds seeking permission it is submitted that the Judge had erred in finding that there was nothing before him to enable him to go behind a finding in a previous determination issued in March 2012 that both Appellants had established a family life with their parents despite being adults. He found that there had been no significant changes since then. It is submitted that this finding ignores key evidence in that when the case was previously heard in March 2012 the Appellants’ mother was the Second Appellant’s primary carer. The Second Appellant is permanently disabled and that was a material factor in considering whether or not there was family life at that time. There has been a material change because the First Appellant is now looking after the Second Appellant in the absence of their mother. The second ground seeking permission is that the Judge had said that there was no reliable or credible evidence of the Sponsor’s ability to adequately maintain the Second Appellant who is permanently disabled and there was also an issue about accommodation for her. The Tribunal in 2012 had made findings that the Sponsor was not credible about his earnings and Judge Hamilton found that he was “inconsistent and evasive” in his evidence of care arrangements for the Second Appellant. It is submitted that this appears to show a clear pattern since 2012 of the Sponsor “tailoring and/or withholding evidence in order to strengthen the Appellants’ case”. Judge Hamilton erred in failing to give sufficient evidence to the issues arising from the evidence about maintenance and accommodation.
4. Briefly the history of this case is that in or around July 2009 the Appellants’ father applied for indefinite leave to enter the UK as a former Gurkha. His wife and the Appellants’ younger sister applied as his dependents. On 20th March 2010 their applications were granted. The Appellants had been unable to apply at that time because of financial constraints. The Sponsor moved to the UK in February 2011 and was joined in the UK by his youngest daughter. His wife remained in Nepal with the Appellants. In July 2011 the Appellants applied for entry clearance and this was refused on 6th July 2011. The Appellants appealed and Designated Judge Manuell and Immigration Judge Fox heard the appeals on 24th February 2012. In a determination promulgated on 23rd March 2012 the appeals were dismissed. At that time the Appellants’ mother was in Nepal caring for the Second Appellant. The First

Appellant was in full-time education and although she may have provided some assistance to her mother it was her mother who was the primary carer. There was an issue over the Sponsor's ability to maintain and accommodate the Appellants and there was insufficient evidence of this. It was accepted that the Second Appellant had an established family life with her parents that went beyond the normal emotional ties one would expect to exist between parents and adult child and she also had an established family life with her parents. It was accepted that the Second Appellant would find it "very difficult to function because of illness or disability without the help and support of at least one of her parents ideally her mother who is her primary carer." It was the fact that there was no satisfactory evidence that the Sponsor could maintain and accommodate the Second Appellant and the likely burden on the public purse if she came to the UK would be significant that was the main reason for the appeal being dismissed as the Panel found that this outweighed any "historic injustice" argument arising from the fact that her father was in the UK as a Gurkha.

5. Judge Hamilton considered the appeal at length. He relied heavily on the decision issued in 2012. He relied on current case law applicable to applications by Gurkhas and their families. He dismissed the appeal under the Immigration Rules but allowed it on Article 8 grounds. In doing this he took into account that the First Appellant had established some element of an independent life in Nepal being young, educated and healthy. She could continue to be supported financially by her parents if they are living in the UK. In respect of the Second Appellant he took into account the likelihood that if she comes to the UK her disability means that she will be a significant burden on the public purse. He also took into account that medical care and adequate physical care is likely to be available for her in Nepal. He went on to say:

"However in respect of both Appellants I do not find that these factors can be given the sort of weight contemplated in **Gurung** so as to enable them to 'outweigh the powerful factors bearing on the Appellants' side'. I also have some concern as to whether treating the Second Appellant differently because of her disability may not be consistent with the Equality Act. I therefore find that in respect of both Appellants the refusal decision was a disproportionate interference with the Appellants' family life and therefore not in accordance with the law."

In considering the issue of family life the Judge Hamilton took into account that at the time of the appeal hearing in March 2012 the First Appellant was in full-time education and was living in the family home, financially supported by her parents. The Tribunal found that despite the fact that she had established an independent life she was still sufficiently dependent on her parents to have established a family life with them. Her circumstances at the time of the refusal decision in January 2013 were almost identical. The reasons for the Second Appellant's dependency on her parents he found to be obvious. He found therefore that both Appellants have an established family life with their parents in particular their mother who was in Nepal looking after the Second Appellant at the time of the refusal.

6. Mr Rai said that the Appellants' mother had returned to Nepal for ten months to look after her daughter. She spends a lot of time with her because it is difficult for the First Appellant to manage. Mr Rai submitted that there have been changes to the situation but these are not material. The Appellants' mother is still going to Nepal to look after her daughter.
7. I have had some difficulty with this case but it seems to me that the Judge was entitled to rely on the previous determination and to find that there was no material change in the situation of the Appellants since that decision was made including a finding that there was a family life that went beyond normal ties between the Appellants and their parents. It seems to me that the Judge looked at the evidence in the round which is what was required of him. When one looks at the situation in reality the First Appellant was left to look after her sister because her mother could not be there all the time but it is clear from the information and the evidence before me that the mother has spent a vast amount of the time since she got entry clearance to come to the UK in Nepal looking after her daughter herself. The refusal of entry clearance to the Second Appellant has impacted considerably on the family life of the whole family since the mother spends so much time away. The burden on the First Appellant without the mother's help is very great, especially for a young single woman. It seems to me that it is the failure of the Secretary of State to consider this that renders his decision arguably disproportionate. It may well be that had I dealt with this case I would not have reached the same decision as the Judge but his decision cannot be said to be perverse. He refused the appeal under the Immigration Rules and would have refused it under the Home Office policy for applications for entry clearance for Gurkhas' dependents but he maintained the previous finding that there was a family life and found that interference with that would in all the circumstances be proportionate. He did consider the financial issues and his conclusion was open to him on the entirety of the evidence before him.

Notice of Decision

I find that there is no material error of law in the determination of the First-tier Tribunal and I uphold that decision.

The appeal of the Secretary of State is dismissed.

Signed

N A Baird
Deputy Judge of the Upper Tribunal

Date: 15th December 2015

