



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

Appeal Number: OA/02513/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17th November 2017**

**Decision & Reasons
Promulgated
On 18th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR ANIL RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Asanovic (Counsel)

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 14th May 1991. The Appellant applied for entry clearance as the dependent relative of Bindu Kumari Rai, the widow of an ex-Gurkha soldier. The Appellant's application was dated on 15th August 2014 and the application was considered by the Entry Clearance Officer as an adult dependent relative under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules and the Home Office Secretary's policy as outlined in IDI chapter 15 section 2A - 13.2 as amended on 12/03/2010.

2. That application was refused by the Entry Clearance Officer on 2nd January 2015. Grounds of Appeal were lodged seeking to argue the Entry Clearance Officer had failed to consider the Appellant's human rights and the historical injustice suffered by Gurkhas. The decision was maintained by the Entry Clearance Manager.
3. The Appellant appealed and the appeal came before First-tier Tribunal Judge Obhi sitting at Taylor House on 14th February 2017. In a decision and reasons promulgated on 15th February 2017 the Appellant's appeal was allowed on human rights grounds.
4. On 14th March 2017 the Secretary of State lodged Grounds of Appeal in the Upper Tribunal. Those grounds were considered by Judge of the First-tier Tribunal Landes on 14th September 2017. Judge Landes granted permission to appeal. The judge noted that the First-tier Tribunal Judge allowed the appeal of the Appellant, a national of Nepal, who is the adult dependent son of the widow of a former member of the Brigade of Gurkhas. Judge Landes commented that if the judge's conclusions under Article 8 more generally could not be challenged then any error in respect of Appendix K of the Immigration Rules would be immaterial. She found that the judge did find that there was family life between the Appellant and his mother and sister and that it was clearly implicit (as shown in paragraph 23 of the First-tier Tribunal Judge's decision) that Article 8 was engaged and she considered the reasons to be adequate - emotional dependence and financial dependence - noting in particular that the Appellant's mother is a widow.
5. Judge Landes did consider that it was arguable however that the judge had failed to give reasons for considering the Appellant's case was "not directly affected by Sections 117A-C". On that basis permission to appeal was given to the Secretary of State. On 17th October 2017 solicitors on behalf of the Appellant lodged a Rule 24 response.
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. This is an appeal by the Secretary of State. However for the purpose of continuity throughout the appeal process Mr Rai is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by his instructed Counsel Ms Asanovic. Ms Asanovic is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Duffy.

Submissions/Discussions

7. Mr Duffy does no more than seek to rely on the Grounds of Appeal. He acknowledges that what has been said by Judge Landes in the grant of permission is a valid point but he does wonder even though he represents the Secretary of State in this matter who has been granted permission to appeal as to whether the point made by the judge in granting permission

actually takes the appeal anywhere bearing in mind that if there is family life the historic injustice arguments come into play and consequently reliance upon paragraph 117 may not apply. In such circumstances he does no more than rely on the Grounds of Appeal.

8. Ms Asanovic seeks to rely on the Rule 24 response. She takes me to paragraphs 55 to 58 of *Rai v Entry Clearance Officer New Delhi [2017] ECWA Civ 320*. Relying on the fact that the key basis of Section 117A and B is that it is a codifying position and consequently the Appellant succeeds under Article 8 as a point of principle there would be no materiality to any error under Section 117. She submits this is also borne out by the decision of the Court of Appeal in *Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803*.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. The thrust of the grant of permission is Judge Landes considered if it was simply that the First-tier Tribunal Judge had not considered the factors in Section 117A to C then it was arguable that if she had considered them she may have come to a different conclusion. That has to be looked against the fact that on the assumption that the Appellant succeeds under Article 8 which has been allowed as a point of principle then there would appear to be no materiality to any error that may have occurred under Section 117. *Rhuppiah* is helpful. Paragraph 49 Sales LJ states:

“Where Parliament has itself declared that something is in the public interest - see sections 117B(1), (2) and (3) and section 117C(1) - that is definitive as to that aspect of the public interest. But it should be noted that having regard to such considerations does not mandate any particular outcome in an Article 8 balancing exercise: a court or tribunal has to take these considerations into account and give them considerable weight, as is appropriate for a definitive statement by Parliament about a particular aspect of the public interest, but they are in principle capable of being outweighed by other relevant considerations which may make it disproportionate under Article 8 for an individual to be removed from the UK.”

12. That finding confirms the codifying effect of Section 117. Consequently even if there were to have been an error then in any event it would not have been material to the decision reached by the judge. In such circumstances the Secretary of State’s appeal cannot succeed as I find there is no material error of law in the decision of the First-tier Tribunal Judge and for all the above reasons the appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date: 12th December 2017

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No application is made for a fee award and none is made

Signed

Date: 12th December 2015

Deputy Upper Tribunal Judge D N Harris