



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/14586/2016**

Appeal Numbers:

HU/14591/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated
On 5 February 2018**

On 18 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**PHAL BAHADUR GURUNG
TIRTHA KUMARI GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellants: Mr. A. Gurung

For the Respondent: Mr. C. Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge T. Jones, promulgated on 7 March 2017, in which he dismissed the Appellants' appeals against the Respondent's decisions to refuse leave to enter as the adult dependent relatives of a former Gurkha.
2. Permission to appeal was granted as follows:

“In a decision promulgated on 7 March 2017 F-tT Judge T Jones dismissed their appeals on the papers under the policy in Annex K which came into effect from 5 January 2015. He also dismissed their Article 8 appeals. He accepted that they are in receipt of funds from their parents and remain in the family home. He accepted that there is family life at [15]. He did not accept that they met the “Immigration Rules”. They could have settled with their parents back in 2011 when they came to the UK. He found with regard to Article 8 that they were in a position to settle with their parents in 2011.

The grounds assert that they could not make applications as dependent adult children under the rules or policy prior to 2015. The “rules” applicable before then did not cover their situation.

It is arguable that the judge did not take into account that they might not have been able to make a successful application in 2011. The grounds are arguable.”

3. The Sponsor, Mr. Rudra Bahadur Gurung, attended the hearing. The Appellants were represented by Mr. Asbadahur Gurung, who explained that he was a relative of the Sponsor, and that the Sponsor could not speak English. I heard brief submissions from Mr. Avery and Mr. A. Gurung following which I announced that the decision involved the making of a material error of law. I set aside the decision to be remade.

Error of law

4. As accepted by Mr. Avery, there is a conflict in the decision, given that at [15], the Judge accepts that there is family life, at [18] appears to suggest that it is not a relationship which is protected, and then at [19] again finds that there is family life. Mr. Avery further accepted that the Appellants would not have been able to make an application to settle with their parents in 2011 as they were over 18 at the time. It was only in 2015 that the provisions were made for the adult dependent relatives of former Gurkhas to settle with their parents.

5. I find that the Judge finds at [15] that there is family life between the Appellants and their parents:

“I have found that the Appellants are in receipt of funds from their parents and remain in the family home. I accept the claim is such that in these circumstances, taking account of the relationship between the Sponsor and his albeit adult children, there is family life.”

6. The Judge makes his conclusions at [19], and states:

“Accordingly, and in line with the conclusions reached on review of the grounds of appeal, by the Entry Clearance Officer Manager (ECO (M)), I find, for reasons I have already given there is no historical injustice, no

prior history of the Appellants or Sponsor having made prior applications that were unjustly refused to their detriment in planning their lives. The Appellants were in a position to settle along with their parents in 2011, and reasons as to why this was not done then, of (sic) within two years afterwards, have not been put before me. The Appellants and parents knew of the construction of the rules, and had made reference to them fully. They applied for settlement and left for the United Kingdom when both Appellants were adults. They maintain their present family life by periodic visits for nearly, if not three months, almost annually. On the available information I find the parents have a viable option of returning to Nepal if they choose to in line with the ECO (M)'s representations. In line with the Respondent's representations as to proportionality, it is for these reasons, that I find the balance therein falls in favour of the Respondent and not the Appellant's (sic) and I dismiss the appeal."

7. As accepted by Mr. Avery, the Appellants were not in a position to settle along with their parents in 2011, as there was no route available to them given that they were over 18 years old. I find that the Judge has erred in finding that the Appellants were in a position to settle in 2011, and that this finding has affected his consideration of Article 8. He has stated that there was no historical injustice due to the fact that the Appellants had not made any applications which were unjustly refused, but this is because the Appellants were not able to make applications when their parents came to settle in 2011 as they were over 18 years old.
8. I am mindful of the cases which deal with the position of adult dependent relatives of Gurkhas, namely Gurung [2013] EWCA Civ 8, and Ghising and others [2013] UKUT 00567 (IAC) and Rai [2017] EWCA Civ 320. The Respondent has referred to the first two cases in the decision. Contrary to the Judge's finding, there is an acceptance that there has been historical injustice - "I am satisfied that the reasons for your refusal outweigh the consideration of historical injustice". This is a clear indication that the Respondent considers the issue of the historical injustice to be relevant to the Appellants' case, but that the reasons for refusal outweigh it.
9. The Judge has found that there is family life, but has failed to carry out a full assessment of the Appellants' position under Article 8 in accordance with the caselaw. It appears that this is largely due to his finding that there was no historical injustice based on his erroneous finding that the Appellants could have applied for settlement in 2011. I find that this is a material error of law. Accordingly I set the decision aside.

Remaking

10. I stated at the hearing that I would remake the decision, and that I would preserve the finding made in the First-tier Tribunal that there was family life between the Appellants and Sponsor. Mr. Avery agreed with this. I have also considered the Appellants' evidence, particularly that provided with the appeals.

11. I find that the Appellants cannot meet the requirements of the immigration rules, nor can they meet the requirements of the policy set out at Annex K.
12. I have considered the Appellants' appeals under Article 8 outside the immigration rules in accordance with the case of Razgar [2004] UKHL 27. I find that there is family life between the Appellants and Sponsor sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life.
13. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being regular immigration decisions taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
14. In carrying out the proportionality exercise, I have taken into account the case of Ghising. Headnote (4) states:

"Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy."
15. I have taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant, mindful of [55] to [57] of Rai where the effect of section 117B on such appeals is considered. While section 117B(1) provides that the maintenance of effective immigration controls is in the public interest, taking into account headnote (4) of Ghising, given the historic wrong, there needs to be more than this in such Gurkha settlement cases. There are no additional considerations in the Appellants' cases such as criminality or bad immigration history. In relation to sections 117B(2) and 117B(3), the weight to be given to the English-language skills and financial independence of the Appellants does not outweigh the weight to be given to the effect of the historic injustice. Sections 117B(4) to (6) are not relevant.
16. I have taken into account the fact that when the Appellants' parents applied for settlement in 2011 it was not possible for the Appellants to apply with them as dependents of the Sponsor as they were over 18 years

old. I find that, had they been able to apply for settlement at the time, they would have done so. The policy was amended in 2015 to allow adult dependent relatives to apply for settlement.

17. Further, I find that at the time that the Sponsor was discharged from the British army the Appellants were under 18 years old, and would have been able to settle with him, had he had the opportunity to settle at the time.
18. Taking into account all of the above I find that, were it not for the historic injustice, the Sponsor would have settled in the United Kingdom when he completed his service in the British army. The Appellants would have settled with him. I further find that they would have applied in 2011 to settle with him, had they been able to. I find that the balance comes down in favour of the Appellants, and that limited weight is to be given to the Respondent's aim of maintaining immigration control. Taking into account the case of Ghising, I find that the Appellants have shown on the balance of probabilities that the decisions are a breach of their rights, and those of the Sponsor and their mother, to a family life under Article 8.

Decision

19. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
20. I remake the decision allowing the Appellants' appeals on human rights grounds, Article 8 ECHR.
21. No anonymity direction is made.

Signed

Date 2 February 2018

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeals, I have considered whether to make a fee award. Further evidence was provided for the appeals. In the circumstances I make no fee award.

Signed

Date 2 February 2018

Deputy Upper Tribunal Judge Chamberlain