



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20445/2019
HU/00064/2021

THE IMMIGRATION ACTS

Heard at Field House
On 5th November 2021

Decision & Reasons Promulgated
On 19th November 2021

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

NARENDRA RAI
CHANDRA KALA RAI
(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondents: Mr R Jesurum of Counsel instructed by Everest Law

DECISION AND REASONS

Background

1. The Entry Clearance Officer raises a challenge to each of the decisions of the First-tier Tribunal in the linked appeals of Mr Narendra Rai and Ms Chandra Kala Rai.

2. Although before the Upper Tribunal the ECO is the appellant and the Rais are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to the Rais as the Appellants and the ECO as the Respondent.
3. The Appellants are brother and sister. The First Appellant, Mr Narendra Rai, was born on 29 June 1982. The Second Appellant was born on 31 August 1986. They are the children of Mr. Dhan Bahadur Rai (d.o.b. 29 November 1935) and Ms Bal Kumar Rai (d.o.b. 22 December 1952). The First Appellant has never married. The Second Appellant is a divorcee (divorced on 27 February 2020); she has a daughter born on 17 January 2008; details of her marriage and divorce are set out in the decision of the First-tier Tribunal.
4. The Appellants each made an application for entry clearance as the adult dependent child of a former Gurkha soldier – on 2 June 2019 and 24 November 2020 respectively.
5. Their father ('the Sponsor') joined the brigade of Gurkhas on his 18th birthday on 29 November 1953. He served for just over 15 years, being discharged with a record of exemplary military conduct and the rank of corporal on 30 November 1968.
6. The Sponsor and his wife (the Appellants' mother) secured 'settled status' entry clearance in January 2012, and entered the United Kingdom on 15 March 2012.
7. Both applications were refused under the Immigration Rules, and with reference to the Respondent's policy in respect of the adult dependent children of former Gurkha soldiers, and also with regard to Article 8 of the ECHR, for reasons set out in respective decision letters dated 23 August 2019 and 24 November 2020.
8. Both Appellants appealed to the IAC.
9. The appeals were linked and heard together by First-tier Tribunal Judge Mailer on 11 May 2021 and 26 May 2021. The Sponsor gave evidence in the appeal by way of a video connection.
10. In a joint Decision addressing both appeals, promulgated on 15 June 2021, Judge Mailer allowed both appeals on human rights grounds.
11. During the pendency of the appeals, on 27 January 2021, the Appellants' mother died. (Details of her ill health are set out in the Decision of the First-tier Tribunal.)

Consideration of 'Error of Law' challenge

12. The Respondent sought to challenge the decisions by way of a Notice of Appeal and Grounds of Appeal dated 21 June 2021. The grounds argued that the Judge had erred in assessing 'proportionality; the basis of the pleaded challenge was narrow. (See further below.)
13. Permission to appeal was granted on 15 July 2021.

14. For present purposes it is unnecessary to set out the full details of the background facts and supporting evidence in the Appellants' appeals. The joint Decision of the First-tier Tribunal contains a seemingly thorough rehearsal of the evidence and submissions, including the applicable law and case precedents. This is followed by careful analysis of the evidence and submissions, set within the framework of the applicable law, resulting in clearly stated, well-reasoned findings of primary fact.
15. The thoroughness of the reasoning and the sustainability of the findings of the First-tier Tribunal is reflected in the fact that the Respondent has not sought to challenge any of the primary findings of fact.
16. In both applications the Respondent did not accept it had been shown that family life existed between the Appellants and their parents within the meaning of Article 8.
17. This was identified as the only issue between the parties before the First-tier Tribunal:

"The parties are agreed that the issue in this appeal is whether family life exists between the adult appellants and their father for the purpose of Article 8(1) of the Human Rights Convention." (paragraph 123)

18. After a discussion of the applicable case law, including a consideration of the submissions made in that regard, the Judge refined 'the issue in this appeal' to this:

"The issue to be determined in this appeal, is accordingly whether the appellants enjoyed family life with their parents at the time of their departure to settle in the United Kingdom and which endured beyond it, notwithstanding their having left Nepal when they did. Their mother has recently passed away. Their father and sponsor asserts that his article 8 rights continue to be breached." (paragraph 132)

(We note the reference to the Sponsor's Article 8 rights: they are 'in play' every bit as much as the Appellants'.)

19. In considering this single issue, much of the focus was on apparent discrepancies in addresses and a consideration of who was living where, when, and with whom – with there being particular scrutiny of the circumstances of the Second Appellant in light of the fact that she had been married and subsequently separated and divorced.
20. Key findings of fact of the First-tier Tribunal – none of which is disputed before us – include:

(i) The Sponsor was "essentially credible" (paragraph 133).

(ii) "...as at the date of [the Second Appellant's] application... the "ordinary state of affairs" was that [she] was cohabiting with her brother at their father's house" (paragraph 150).

(iii) "...the sponsor has provided the appellants with financial support including access to his pension and later by reimbursing his eldest daughter for the monies she had

provided to the appellants. There are also remittances produced recording remittances to his children.” (paragraph 153)

(iv) “It is not disputed that the appellants’ parents visited Nepal to be with [the Appellants] on a regular basis until 2017” (paragraph 158)

(v) “...the sponsor needs constant emotional and physical support” (paragraph 157).

(vi) “...the appellants are in daily telephone contact with their father. He has become housebound and has been hospitalised on five occasions, which he believes arises from a heart condition. He referred to the importance to all of them of such ongoing contact... That is particularly so since the death of his wife - the appellants’ mother” (paragraph 159).

(vii) “Had the option been available to him, the sponsor would have settled in the UK at a time when the dependent children, who are now adults, would have been able to accompany their father and mother as dependent children.” (paragraph 167)

21. The Judge set out concluding findings at paragraphs 161-164:

“161. Having regard to the evidence as a whole, I am satisfied that family life was reconstituted between [the Second Appellant] and her parents following her separation and divorce from her husband. There was also family life between [the First Appellant] and his parents. [The Second Appellant] ordinary lived in the same house as [the First Appellant], and have been temporarily separated following the lockdown.

162. Both [Appellants] have been supported by their father, which is real, effective and committed. They are dependent on him.

163. The emotional ties between these appellants and their father provides ongoing mutual support. They receive financial support through their father. Since their father's bereavement, there has been an intensification of the emotional bond. Moreover, the sponsor suffers from various medical conditions, including depression. He continues to be in daily telephone contact with them.

164. In summary, I am satisfied that family life exists between them.”

22. Having reached the conclusion that family life existed, the Judge had in substance concluded in the Appellants’ favour on the only issue that was in dispute between the parties.

23. The Judge went on in a few succinct – but entirely adequate - paragraphs to consider the implication of that core conclusion with reference to Article 8 and ‘proportionality’: see paragraphs 165-168.

24. The Judge reminded himself of the decision in **Ghising and others (Ghurkhas / BOCs: historic wrong; weight)** [2013] UKUT 000567 (IAC), and also made reference to the case of **Patel v ECO (Mumbai)** [2010] EWCA Civ 17. (The Respondent acknowledged

in each of the decision letters herein that **Ghising** was relevant.) Judge Mailer summarised the import of **Ghising** in these terms:

“...the Upper Tribunal held that 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 would ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant’s favour, where the matters relied on by the Secretary of State / entry clearance officer consists solely of the public interest in maintaining a firm immigration policy” (paragraph 165).

25. No criticism of that summary has been made in the Grounds of Appeal or by Mr Tufan before us.

26. Judge Mailer then immediately identified ‘the matters relied upon’ by the Respondent in the instant case:

“In the appellants’ case the ECO does not seek to rely on anything apart from maintaining a firm immigration control.” (paragraph 166)

27. This logically, sustainably, and in light of the analysis seemingly inevitably, lead to this conclusion on the appeals:

“In the light of the historic injustice, I find in the circumstances that the respondent’s decision constitutes a disproportionate interference with their right to respect for family life under Article 8(1) of the Human Rights Convention.” (paragraph 168)

28. The Respondent’s challenge is set out in the Grounds of Appeal in these terms:

“1. The appeal was allowed on the grounds of historic injustice. However, it is submitted that the Tribunal erred by making an incomplete evaluation in the proportionality assessment. Although historic injustice is, indeed, a weighty matter, it is not the only one. It is respectfully submitted that the Tribunal should also have considered other factors, in particular maintenance and accommodation, in the proportionality assessment. The Tribunal has given no consideration to where the appellants will live in the UK, whether there is adequate accommodation for them and how they will afford to live in the UK. The sponsor’s evidence was that he relies on income related Social Security benefits. That being the case the presence of adult family members in his household (if there is sufficient space) will lead to a decrease in his benefits entitlement and will restrict his ability to provide financial support. In addition, the appellants have no entitlement to benefits in their own right. It is respectfully submitted this failure is fatal to the proportionality assessment.

2. The Tribunal does not have an overall regard to the public interest. However, it is submitted that the narrow definition it applies is not sufficient. The Tribunal’s assessment is based on historic injustice being determinative. However, it is submitted that there should be other factors considered. These have simply not being considered.”

29. The difficulty, it seems to us, is that the Grounds raise a matter that quite simply did not feature at any point hitherto.

30. The First-tier Tribunal Judge observed that the representatives acknowledged that there was but one issue - which was that of whether or not Article 8 was engaged. The Judge also identified that beyond the imperative of maintaining effective immigration control, the Respondent did not rely on any specific further matters that might justify taking an approach contrary to that which might “ordinarily” follow where, but for the historic wrong an appellant would have been settled in the UK long ago (as *per Ghising*). A perusal of the decision letters confirms that nothing was raised in this regard. Nor was anything introduced in the course of the pre-hearing procedures.
31. The Respondent’s position up to, and at, the hearing before the First-tier Tribunal – not to raise any issue in respect of maintenance and accommodation – is essentially consistent with the Respondent’s policy on adult dependent children of former Gurkhas, which does not impose any maintenance and accommodation eligibility requirements.
32. Although noting that the domestic and financial circumstances of the Sponsor featured in the evidence before the First-tier Tribunal, Mr Tufan acknowledged that this had not lead to the formulation by the Respondent of a ‘public interest’ point to be weighed against the ‘historic injustice’. In such circumstances he accepted that he could not realistically argue that Judge Mailer had fallen into error by not engaging with an issue not raised.
33. We agree and express some disquiet that a challenge was raised on this unfounded basis at all. The delay in reaching finality in these proceedings has aggravated rather than alleviated the historic injustice in this case, and does so at a time when the Sponsor is significantly ill, and in a context where the Appellants’ mother died during the pendency of the appeals.
34. Our concerns in this regard also extend to the grant of permission to appeal – which additionally unnecessarily referred to the Second Appellant’s marital history as “*reduc[ing] the weight attached to Article 8*”. Mr Tufan acknowledged that there was nothing about the circumstances of the Second Appellant pleaded in the Grounds of Appeal, and he did not seek to raise any point himself.
35. For the reasons given we reject the Respondent’s challenge: we can identify no error of law in the Decisions of the First-tier Tribunal in respect of either of the Appellants; the decisions allowing each of the Appellants’ appeals stand.

Notice of Decision

36. The decisions of the First-tier Tribunal contained no material error of law and accordingly stand.
37. Mr Narendra Rai’s appeal remains allowed.

38. Ms Chandra Kala Rai's appeal remains allowed.
39. No anonymity directions are sought or made.

Signed:

Date: 9 November 2021

Deputy Upper Tribunal Judge I A Lewis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email