



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

Appeal Numbers: OA/00321/2014
OA/00325/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 March 2015**

**Decision & Reasons Promulgated
On 21 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

**RAJU TAMANG - FIRST APPELLANT
TARA TAMANG - SECOND APPELLANT
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICE - NEW DELHI

Respondent

Representation:

For the Appellants: Mr E Wilford, Counsel

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nepal, born respectively on 30 November 1988 and 14 December 1986. Their father was born on 25 February 1962 and is also a national of Nepal who served in the British Army in the Gurkha Brigade between 11 February 1983 and 27 November 1994 and also served in the Gurkha Reserve Unit in Brunei between 7 September 2005 and 31 December 2009. He was granted a settlement visa on 25 October 2010. The appellants' mother and their younger sister were

issued with settlement visas on 20 October 2010. Their sponsor then travelled to the United Kingdom on 17 April 2011 and the appellants' mother and sister likewise travelled on 9 September 2012. They all returned to Nepal in October 2012.

2. On 23 September 2013 the appellants applied for leave to enter the United Kingdom as their father's adult dependants. Their applications were refused on 4 December 2013 and they subsequently appealed to the First-tier Tribunal. Following a hearing at Taylor House, and in a decision promulgated on 8 December 2014 Judge of the First-tier Tribunal Finch dismissed their appeals on Article 8 grounds following an acceptance by both appellants that they were not entitled to entry clearance under Section EC-DR because they did not require long term personal care to perform everyday tasks as a result of their ages, illness or disability.
3. On 2 February 2015 Judge of the First-tier Tribunal Mark Davies granted the appellants permission to appeal. His reasons for so doing were:-
 - “1. The appellants seeks (sic) permission to appeal against a decision of the First-tier Tribunal (the judge) promulgated on 8th December 2014 who dismissed the appellants' appeal against the decision to refuse them entry clearance as adult dependants on Article 8 grounds.
 2. The grounds and the determination do disclose an arguable error of law. The judge appears to have given no consideration to prospective breaches of fundamental rights and that is a matter that is relevant to the issue of proportionality.”
4. Thus the appeal came before me today.
5. Mr Wilford referred me to paragraph 14 of the judge's decision where she finds that family life does exist between the appellants and their father for the purposes of Article 8(1) of the European Convention on Human Rights (ECHR) and that the appellant are emotionally, financially and culturally dependent upon their parents. He also referred me to the following paragraph wherein is an analysis of the appellants' family's arrivals and departures from Nepal. Paragraph 15 of the judge's decision states:-
 - “15. However, in his witness statement the sponsor admitted that he had returned to Nepal with his wife and younger daughter in October 2012 and had remained there until 2 April 2014. He also admitted that the appellants' mother and younger sister had remained with them in Nepal until September 2014. Therefore, at the time of the decision (and until shortly before the appeal hearing) the appellants were not separated from the sponsor and/or their mother and no breach of their family life had occurred. The appellants' Counsel argued that the fact that the sponsor was in Nepal was irrelevant as he had been granted settlement in the United Kingdom. However, for the purposes of Article 8 I had to consider whether there was a breach of Article 8 at the date of the decisions and the facts suggested that at the time there was no such breach. It is also the case that at the date of the decision the appellants' mother and sister had in fact only been present in the

United Kingdom between 9 September 2012 and some time in October 2012 and the sponsor had only been there between 17 April 2011 and October 2012 and then returned to Nepal. It was said that this was for a funeral but in fact he remained there until 2 April 2014 and said in his witness statement that he had previously had difficulty in obtaining employment in the United Kingdom. Therefore, in my view at the date of the decisions the whole family were living in Nepal and exercising their right to family life there. Therefore, the refusal of entry clearance did not amount to a breach of Article 8(1)."

6. He argued that the judge erred in concluding that the instant decision did not amount to a breach and drew my attention to Section 8 of the Human Rights Act 1998 contending that it envisages consideration of the lawfulness or otherwise of future breaches. Likewise he argued that the test in **Razgar [2004] UKHL 27** is formulated in the future tense:

"Will the proposed removal be an interference by a public authority ..."

7. He also reminded me of the case of **Quila and Another R (in the application of) v SSHD [2012] 1 ALL ER 1011** which provides clear authority that there is no difference between positive and negative obligations. Thus the fact that the **Razgar** test refers, at stage 2, to "removal" rather than exclusion is immaterial.
8. Additionally, and alternatively, he submitted that even taking the facts as they were at the date of decision it was clear that the decision amounted to a disproportionate interference with the family life between the appellants and their family in the United Kingdom. He therefore urged me to allow this appeal and substitute a decision allowing the appellants' appeals.
9. Mr Walker contended that there were clear findings in relation to the facts of the case which were not in dispute. At the time of the decision the appellants have been with their family for a substantial period of time. The appellants' parents were back with them in Nepal and in concluding that there was no breach the judge quite simply had not erred.
10. Judge Finch has made clear findings of fact and taken into account all relevant case law. Indeed Mr Wilford accepted that beyond the issues of the claimed breach and proportionality the decision cannot be impugned.
11. I do not accept any of Mr Wilford's submissions. Judge Finch has given clear and detailed reasons for coming to her conclusions that at the date of the decision the whole of the family were living in Nepal and exercising their right to family life there. She was entitled to conclude that as a consequence the refusal of entry clearance did not amount to a breach of Article 8(1). All her findings were open to be made on the available evidence and I am not persuaded that on the factual matrix found it was incumbent upon Judge Finch to look to the future as submitted by Mr Wilford. Her task in what is an entry clearance case was to consider whether the respondent's decision engaged the appellants' right to

respect for their family life under Article 8. Clearly she was aware that the right to respect for the family life of one member necessarily encompasses the right to respect for the family life of others with whom that family life is enjoyed. From the factual matrix here it was inevitable that she would come to the conclusion that she did given the facts at the date of decision and if those have now changed, and I understand that the appellants' parents may now be back in the United Kingdom, then the appellants' remedy is to make a fresh application.

12. No anonymity order has previously been made in these proceedings and no such application was made before me today. There is no need for such an order.

Notice of Decision

13. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

14. I do not set aside the decision.

Signed

Date 15 April 2015.

Deputy Upper Tribunal Judge Appleyard.