IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/11238/2013
OA/11254/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 April 2015	**On 13 May 2015**

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE FINCH

Between

KIRAN LIMBU
SHREEJANA LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellants: Ms C M Fielden, Counsel, instructed by Sam, Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants, citizens of Nepal, against a decision of the First-tier Tribunal dismissing their appeal against the respondent's decision of 3 May 2013 refusing to grant them entry clearance as adult dependent relatives of their father, an ex-Ghurkha soldier, now settled in

the UK. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal.

Background

2. The appellants are brother and sister born on 4 October 1990 and 7 September 1987 respectively. Their father, who it was accepted gave exemplary service when in the Brigade of Ghurkhas, was issued with a settlement visa in New Delhi on 17 March 2008. He arrived in the UK on 9 March 2010 and was joined by his wife, the mother of the two appellants, on 14 August 2011.

3. The appellants subsequently applied for settlement but they were unable to meet the requirements of the Rules and were refused under paragraph EC-DR1.1(d) of Appendix FM. They also relied on the respondent's policy for dependants over the age of 18 of Foreign and Commonwealth and other HM Forces Members as set out in IDI Chapter 15, Section 28.13.2 but the respondent was not satisfied that there were any exceptional circumstances for either appellant. The application was then considered under article 8 but the respondent's view was that article 8 was not engaged. Both appellants were adults and it was not shown that there were more than the normal emotional ties with their parents. Even if the article was engaged, the refusal was proportionate in the exercise of immigration control. Following the service of the notice of appeal the applications were reviewed but the decision was maintained.

4. At the hearing before the First-tier Tribunal the appellants' father gave evidence, confirming that he had retired from the Ghurkhas in 1994 and had then lived in Malaysia and in his home village after his discharge, subsequently serving in Iraq in 2007 and 2008. He had no other family in Nepal apart from his two children. His wife's family lived in Nepal near the Himalayas. They had sold the family home in 2003. The appellants had been living independently since December 2012 but he paid everything for their upkeep. His daughter was working in a pharmacy and his son was studying IT.

The Findings of the First-tier Tribunal

5. The judge set out his findings in [34] – [40] of his decision. He commented that one appellant was aged 25 at the date of refusal and her brother 22. They were both adults, not just over the age of 18 but significantly so. They were both in good health and neither complained of any disability or mental condition. They lived together in accommodation in Nepal which both stated lacked hot water, but there was no other evidence of hardship in their living conditions. He found that the applications had been properly considered under the policy for dependants over the age of 18 which required exceptional circumstances to be demonstrated. The judge found that it was difficult to find any such exceptional circumstances in relation to the appellants. It was accepted that the sponsor had given exemplary service when in the Brigade of Ghurkhas but the real issue was whether

there existed in the narrative of the appellants' cases any circumstances which were considered exceptional to bring them within the relevant IDI.

6. He commented that the appellants had not been able to show anything beyond a normal relationship between themselves and their parents. It was accepted that the sponsor may have provided for the two appellants and sent money to enable them to handle their day-to-day living expenses but this was neither unexpected nor unusual for a student until such time as the children were able to obtain paid employment. He found that the appeals had been properly refused under the relevant provisions of Appendix FM and then went on to consider Article 8. He set out his findings as follows in [40]:

> "In reaching my conclusion that it would be proportionate to refuse entry I have borne in mind that there is no evidence to suggest that at the conclusion of their respective studies in Nepal either of the children will be unable to obtain employment. Life, it is accepted, it harder in Nepal than in UK but no evidence has been presented to suggest that securing jobs in their chosen fields – pharmacy and IT – is not possible. Even if there is family life it has continued since the parents came to the UK and it is quite reasonable to expect such family life to continue through modern means of communication. I bear in mind SG (Nepal) UKUT 00265 and note that in this case the parents chose to live in the UK instead of remaining with their family in Nepal. It is also the case that when the sponsor and his wife came to the UK they were aware that neither of the children automatically qualified for settlement. I find that the decision to refuse entry is proportionate to the legitimate end of pursuing a fair immigration policy."

Grounds and Submissions

7. In the grounds of appeal it is argued that the judge did not deal adequately with the family life existing between the appellants and the members of the family residing in the UK. The judge had failed, so it is argued, to engage with the evidence of continued family life and erred in his conclusion that the appellants had been living an independent life. The judge's assessment failed to consider the family as a whole or make a lawful article 8(1) assessment. Secondly, it is argued that the judge erred by failing to refer to Gurung [2013] EWCA Civ 8 and failed to take into account the up-to-date approach concerning the historical wrong set out in that appeal. Thirdly, it is argued that the judge appeared to conflate the assessment of article 8(1) and the proportionality exercise involved pursuant to the historical wrong by distinguishing the facts of the case that fell for consideration under article 8(1) and those elements under article 8(2), notwithstanding the fact that SG (Nepal) referred to polygamous marriages.

8. Ms Fielden crystallised her submissions into an argument that the judge had failed to take proper account of the emotional dependency between the appellants and their parents which, she argued, should have been more fully explored. She accepted that an article 8 assessment was very fact sensitive and needed to be applied to the individual circumstances of each appellant. The fact that they could keep in contact depended on

the extent and quality of the communication and that was not in itself determinative. She submitted that the judge appeared to have been considering the policy in force in 2009 rather than the later policy in 2010. She did not wish to make any further submissions under ground 3, accepting that it was not entirely clear what that ground was aimed at.

9. Ms Isherwood submitted that there was no material error of law and that the grounds were in substance a disagreement with the judge's findings of fact. The judge had carried out the individual assessment of the facts as required and there is no reason to believe that she had not properly taken into account the historic injustice referred to in Gurung. Although the judge referred to some specific matters set out in the 2009 policy, she was clearly aware that the relevant policy was that of 2010: see [25].

Assessment of the Issues

10. The issue in this appeal is whether the judge erred in law in his assessment of article 8. It was common ground that the appellants could not meet the requirements of the Rules in Appendix FM, nor could they demonstrate exceptional circumstances to bring them within the respondent's policy. In these circumstances the judge went on to consider the position under Article 8. We are not satisfied that the judge failed to deal adequately with the issue of family life. The judge, having summarised the details of the application and the reasons for refusal set out in the original decision and in the Entry Clearance Manager's review, was clearly aware of the family circumstances and in particular those in which their father and mother came to live in the UK while the appellants remained in Nepal. The judge took into account their ages at the date of decision and the fact that their father was paying everything for their upkeep. He was entitled to reach the conclusion that the appellants had failed to show anything behind the normal relationship between adult children and their parents. The judge's findings about the appellants living independently must be read in the context of the evidence as a whole and does not indicate any misdirection or misunderstanding of the family position. It is therefore not the case as the grounds allege that the judge failed to consider the family as a whole or make a lawful article 8(1) assessment.

11. The judge went on to consider in the alternative article 8(2). He commented in [40] that even if there was family life it had continued since the parents had come to the UK and went on to find that the refusal of entry clearance was proportionate to the legitimate end of pursuing a fair immigration policy.

12. The second ground argues that the judge failed in his assessment to refer to Gurung, referring only to SG (Nepal) which had dealt with polygamous marriages. The substance of this ground is that there had been a failure to consider the historical wrong assessment as set out in Gurung. However, there is no reason to believe the judge was not aware of and did not take this factor into account. He had recorded in [26] the comments of the

Entry Clearance Manager on that issue and there is no reason to believe that he did not have it in mind in his assessment. Finally, the grounds argue that there was a conflation of the assessment of Article 8(1) and Article 8(2) but there is no substance in this ground. There is a reference to SG (Nepal) relating to polygamous marriages but the point the judge made in respect of that case was that the parents in the present case had chosen to live in the UK instead of remaining with their family in Nepal. That matter was by no means determinative but was a factor which could properly be taken into account.

13. In summary, we are satisfied that the judge took all relevant matters into account and reached a decision properly open to him on the evidence. When refusing permission to appeal in the First-tier Tribunal Judge De Haney said that a full and proper reading of the determination showed that the judge had properly set out the law, his findings of fact and reasoning and that in essence the grounds were simply a disagreement with the findings of the judge and a further attempt to re-argue the appeal. We agree with that comment. For the reasons we have given we are not satisfied that the judge erred in law in any way capable of affecting the outcome of the appeal.

Decision

14. The First-tier Tribunal did not err in law and this appeal is accordingly dismissed.

Signed Date: 07 May 2015

Upper Tribunal Judge Latter