Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09927/2015
HU/09945/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 November 2017	**On 11 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RITESH RAI
RUKESH RAI
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondents: Mr Lee, instructed by Kent Immigration and Visa Advice

DECISION AND REASONS

1. The respondents (hereinafter "the claimants") are nationals of Nepal who applied for entry clearance to settle in the UK as dependent sons of their father, a former Gurkha soldier who is present and settled in the UK. The applications were refused by the Secretary of State. The claimants appealed to the First-tier Tribunal where their appeal was heard by Judge Amin. By a decision promulgated on 9 February 2017, the judge

allowed the appeal. This decision of the First-tier Tribunal is now being appealed by the Secretary of State.

Background

2. The first claimant was born on 22 July 1987. The second claimant was born on 29 August 1989. They reside together in Nepal.

3. The claimants' father ("the Sponsor") is a former Gurkha soldier who joined the army in 1979 and was discharged in 1993. He was granted indefinite leave to enter the UK in 2009. He applied to bring the claimants with him but this application was refused.

4. The Sponsor claims that if he had been allowed to settle in the UK on discharge from the army he would have done so with his sons (who were young children at the time).

5. The Sponsor entered the UK in February 2011 whereupon a further application was made in order to enable the claimants to join him in the UK. This was refused in May 2012 and the appeal of that the decision was dismissed by the First-tier Tribunal (Judge Martins) in April 2013 (hereinafter "the 2013 decision").

6. The Sponsor and the mother of the claimants are divorced. The claimants claim that they do not have regular contact with their mother and that she does not provide them with any support. They claim to be unemployed and that the circumstances in Nepal are such that they are unable to find work. They also claim that their family in Nepal is extremely poor and unable to provide them with any support. The Sponsor provides the claimants with £400-£500 a month and they claim to be totally financially dependent on him.

7. The Sponsor works as a taxi driver in the UK, earning between £2,000 and £3,000 a month. He last visited Nepal in 2013. His reason for not visiting since is that he has been saving money to enable him to sponsor the claimants. The Sponsor and the claimants claim that they speak several times a week.

Decision of the First-tier Tribunal

8. The judge considered whether Article 8(1) ECHR was engaged. Citing the Upper Tribunal decision in Dasgupta [2016] UKUT 00028, the judge noted that the question of whether family life exists is intensely fact sensitive. She found the claimants are financially dependent on the Sponsor, had lived with the Sponsor until he departed to the UK, are dependent on the Sponsor for their accommodation in Nepal, are emotionally close to the Sponsor, and do not receive similar support from other family, in particular their mother. The judge concluded that Article 8 was engaged in these particular circumstances.

9. The judge recognised that in 2013 the First-tier Tribunal reached a different conclusion as to whether article 8 was engaged. The judge noted at paragraph 15 that when the appeal was considered in 2013 the claimants still interacted with their mother. At paragraph 29 the judge explained that she was departing from the 2013 decision because since then the claimants had lost all contact with their mother. The judge also stated that there have been developments in the case law.

10. The judge found that but for the historic injustice that prevented the Sponsor settling in the UK following his discharge from the army in 1993, the claimants, who at that time were minors, would have settled in the UK with their father. The judge noted the finding in Ghising [2013] UKUT 567 that "the weight to be given to the historic injustice will normally require a decision in the appellant's favour".

11. At paragraph 22 the judge stated:

> "*Nothing in Section 117B of the Nationality, Immigration and Asylum Act 2002 which states, inter alia, that the Tribunal must have regard to whether the appellant speaks English and whether she is financially independent add anything in this context.*"

Grounds of Appeal and Submissions

12. The Secretary of State has made two arguments in the grounds of appeal.

13. The first argument is that the judge failed to take into consideration that the claimants are not financially independent which she was required to do under Section 117B(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

14. The second argument in the grounds is that the judge failed to adequately justify the finding that there is family life between the claimants and the Sponsor, given the different conclusion reached in the 2013 decision and that she had "merely" found the claimants to be receiving financial assistance from the Sponsor and to have lost contact with their mother.

Consideration

15. The issue raised by the second ground of appeal – whether family life exists between adult children and a parent – is one that has been subject to considerable analysis by the Court of Appeal. See for example Singh v Secretary of State [2015] EWCA Civ 630 and Rai v Entry Clearance Officer [2017] EWCA Civ 320. The recent case law makes clear that there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 and the assessment of whether there is family life is fact specific and will depend on consideration of all the relevant facts in the particular case.

16. In the present case, the judge has undertaken a fact specific evaluation of the circumstances of the claimants and the Sponsor. Her unchallenged findings were that the claimants are financially dependent on the Sponsor who pays for their accommodation and that they have no contact with their mother. She also found that but for the historic injustice affecting Gurkhas the sponsor would have been able to bring, and would have brought, the claimants to the UK when they were children. That this is relevant to an assessment under Article 8(1) was made clear in Rai (see paragraphs 41-42). Given this factual matrix, it was in my view unsurprising the judge would conclude family life existed within the meaning of Article 8(1).

17. Before me, Ms Isherwood argued that the judge ought to have followed the 2013 decision where family life under Article 8 had been found to not be engaged as there had been no change in circumstances in the intervening period. Mr Lee contended that matters had in fact moved on, both in terms of the factual circumstances and the case law pertaining to the issue of whether Article 8 is engaged. He noted that the 2013 decision was promulgated before Ghissing (Gurkhas/BOCs; historic wrong; weight) [2013] UKUT 00567 and Rai.

18. Applying the Devaseelan guidelines on procedure in second appeals (Devaseelan v SSHD [2002] UKAIT 702), the correct approach was for the judge to treat the 2013 decision as a starting point - and an authoritative assessment of the claimant's status when it was made - which could then be built upon by consideration of the facts arising subsequently. In my view, this is exactly the approach taken by the judge. She has treated the 2013 decision as her starting point and has noted that since that time there has been a change in the factual circumstances, which is that the claimants have now lost contact with their mother completely. This is a material change in the claimants' circumstances and I am satisfied that the judge was entitled to depart from the 2013 decision because of it. I therefore find that the Secretary of State is unable to succeed under the second ground of appeal.

19. I now turn to the first ground of appeal, which argues that the judge failed to properly consider Section 117B of the 2002 Act.

20. In the assessment of proportionality under Article 8 ECHR in a case not involving deportation a court or tribunal must have regard to the factors set out in Section 117B of the 2002 Act. Accordingly, the judge did not have an option as to whether or not to consider whether the claimants speak English, were financially independent or satisfied any of the other factors in Section 117B.

21. The judge considered Section 117B at paragraph 22. In this paragraph, it is unclear whether the judge was saying that she was not taking Section 117B into account (which would be an error of law) or that she has taken the Section into account but that it did not change her conclusion about the public interest (which would not be an error of law). However, even if the judge has made an error of law, the error is not material.

22. This is a case where the judge has made an unchallenged finding that but for the Sponsor's inability to settle in the UK at the date of discharge (when the claimants were young children), the claimants would have settled in the UK many years ago. In such circumstances, the "historic injustice" will carry significant weight in the balancing exercise under Article 8 (2) and it will ordinarily outweigh the public interest in firm immigration control. As explained in Ghissing:

> *"....there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the "public interest in maintaining of a firm immigration policy", which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a "trump card", in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour.*

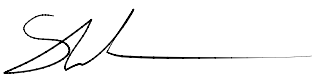
23. Whilst the fact that the claimants are not financially independent is a factor that must be taken into account in the proportionality assessment under Article 8(2), it would be inconsistent with Ghissing to find that this factor, of itself, could outweigh the "powerful factors bearing on the [claimants'] side". There is nothing in the factual matrix to suggest the claimants have a poor immigration history, have engaged in criminal behaviour, or have done something analogous. Having found Article 8(1) was engaged, it is difficult to see how on the facts of this case the judge could have reached a conclusion other than in the claimants' favour.

Decision

A. The appeal is dismissed.

B. The judge has not made a material error of law and the decision of the First-tier Tribunal stands.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 9 December 2017