Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10007/2019
HU/10010/2019, HU/10012/2019
HU/10013/2019, HU/10016/2019
(P)

THE IMMIGRATION ACTS

Decided without a hearing

Decision & Reasons Promulgated
On 21st September 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SABINA LIMBU
KHUBINA LIMBU
LABINA LIMBU
AMINA LIMBU
DIPRAJ LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

The re-making of the decision in these appeals has been made without a hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in these five linked appeals. The appellants are all citizens of Nepal and are siblings. They are the children of a deceased ex-Gurkha soldier and his widow (the sponsor). All five appellants made applications for entry clearance (deemed to constitute human rights claims) in order to join the sponsor in the United Kingdom. The human rights claims were refused and appeals to the First-tier Tribunal dismissed.

2. By a decision promulgated on 30 July 2021, I found that the First-tier Tribunal had materially erred in law, that its decision should be set aside, and that the appeals should be retained in the Upper Tribunal for a re-making decision to be issued in due course. In so doing, I expressly preserved a number of findings of fact:

    (a) the appellant's had lived with the sponsor before she left Nepal in 2018;
    (b) all the appellants were unmarried and unemployed;
    (c) they were financially dependent on their late father's pension (which the sponsor had dedicated for this purpose) and on a less regular basis, funds sent over by the sponsor herself;
    (d) they continued to live in the family home;
    (e) they had all been educated;
    (f) the only change in the appellant's circumstances since 2018 was the departure of the sponsor in that year;
    (g) it had been a "choice" on the sponsor's part to come and settle in this country.

3. I also issued directions to the parties. In particular, I required the respondent to consider whether a resumed hearing would be necessary, or whether these proceedings could be resolved on the basis of written submissions only.

4. By a response dated 9 August 2021 from Ms Isherwood, Senior Presenting Officer (to whom I am very grateful for her conscientious adherence to the timeframe set out in my directions), the respondent confirmed that in light of the preserved findings of fact and the evidence as a whole, the appeals were no longer resisted.

5. In light of this development, my re-making decision can be stated in brief terms. Before doing so, I confirm that I have carefully considered whether it is fair to proceed without a hearing, notwithstanding the respondent's stated position. It is clear to me that a resumed hearing is not required. The appeals stand unopposed and there is nothing more that the appellant's could seek to offer by way of oral (or indeed written) submissions.

Remake decision

6. Having regard to the preserved findings of fact, the evidence as a whole, and relevant case-law including Rai [2017] EWCA Civ 320, Gurung [2013] 1 WLR 2546,

and Ghising (family life – adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC), I find that there is continuing family life between all of the appellants and the sponsor.

7. I find that the respondent's refusal of the appellants' human rights claims constituted an interference with that family life. There is no dispute that the decisions were in accordance with the law and pursued a legitimate aim.

8. Turning to proportionality, I conclude that the historic injustice (as that term is properly understood: see Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC)) is a very significant factor in the appellants' favour. On the facts of these cases, there are no countervailing matters in the respondent's favour such as to outweigh that very significant factor.

9. Given the foregoing and the respondent's considered position at this stage, I conclude that the refusals of the appellants' human rights claims were disproportionate and therefore unlawful under section 6 of the Human Rights Act 1998.

10. It follows that all of these appeals must be allowed.

Anonymity

11. The First-tier Tribunal did not make a direction and there is no reason for me to do so. No anonymity direction is made.

Notice of Decision

12. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

13. I re-make the decision by allowing all of the appeals on Article 8 grounds.

Signed: *H Norton-Taylor* Date: 16 August 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make full fee awards in each of these appeals. The total amount awarded is therefore £700.00.

Signed: *H Norton-Taylor* Date: 16 August 2021

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10007/2019
HU/10010/2019
HU/10012/2019
HU/10013/2019
HU/10016/2019
(V)

THE IMMIGRATION ACTS

Heard remotely from Field House
On 22 July 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SABINA LIMBU
KHUBINA LIMBU
LABINA LIMBU
AMINA LIMBU
DIPRAJ LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr S Ahmed, instructed by Gurkhas Coop
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are all citizens of Nepal and the children of an ex-Gurkha soldier and his widow (the sponsor). Collectively, they appeal against the decision of First-tier Tribunal Judge Moore ("the judge"), promulgated on 23 March 2020. By that decision, the judge dismissed the appellants' appeal against the respondent's decisions, all dated 28 October 2018, refusing their human rights claims made by way of applications for entry clearance to join the sponsor in the United Kingdom.

2. The appeals to the First-tier Tribunal were based on Article 8 ECHR. It was said that there was family life between the appellants and the sponsor before the latter came to settle in the United Kingdom in 2018. It was also asserted that the historic injustice perpetrated against former Gurkha soldiers and their families represented a decisive factor in the proportionality exercise.

The decision of the First-tier Tribunal

3. The judge accepted the evidence provided orally by the sponsor and contained in a large number of documents. With reference to with reference to [16]-[25], the judge made the following core findings of primary fact:

    (a) the appellant's had lived with the sponsor before she left Nepal in 2018;
    (b) all the appellants were unmarried and unemployed;
    (c) they were financially dependent on their late father's pension (which the sponsor had dedicated for this purpose) and on a less regular basis, funds sent over by the sponsor herself;
    (d) they continued to live in the family home;
    (e) they had all been educated;
    (f) the only change in the appellant's circumstances since 2018 was the departure of the sponsor in that year;
    (g) it had been a "choice" on the sponsor's part to come and settle in this country.

4. The judge also implied that he accepted that there was a causal connection between the historic injustice and the fact that the family unit had not tried to settle in the United Kingdom earlier.

5. Notwithstanding his findings, the judge went on to conclude that there was no family life between the appellants and the sponsor. He then concluded, in the alternative, that the respondent's decisions were proportionate.

The grounds of appeal and grant of permission

6. The grounds of appeal are fairly lengthy but can be condensed to two central assertions: first, that the judge had failed to give adequate reasons for his finding on family life; second, that the judge had failed to have regard to the guidance on the importance of historic injustice, as set out in a number of authorities. In granting permission, First-tier Tribunal Judge Landes found these two points in particular to be arguable.

The hearing

7. Mr Ahmed relied on the grounds and expanded on them in a concise manner, referring to a number of well-known cases involving Gurkhas (Rai [2017] EWCA Civ 320, Gurung [2013] 1 WLR 2546, and Ghising -adults-Gurkha policy) [2012] UKUT 00160 (IAC)).

8. Ms Isherwood submitted that the judge had directed himself properly and had undertaken a fact-sensitive assessment of the evidence. She submitted that the judge had not committed any errors of law which were material to the outcome. She noted that the judge had not made any specific findings on the existence of emotional dependency and had made a reference to money being "borrowed" by the appellants, with no explanation for this provided.

Conclusions on error of law

9. As I announced to the parties at the hearing, I conclude that the judge did err in law and that his decision should be set aside.

10. The findings of primary fact clearly pointed in the direction of the existence of family life between the appellants and the sponsor. It is implicit that there was family life prior to the sponsor's departure in 2018. The judge found that there had been no material change in the appellants' circumstances save for that event. They were financially dependent on the sponsor, lived in the same family home, and had not established independent lives of their own. In light of this factual matrix and the guidance from relevant authorities, it required clear reasons from the judge to support a conclusion that there was in fact no family life. That the judge correctly directed himself to relevant authorities does not equate with the provision of adequate reasons.

11. I am bound to say that I cannot detect any such reasons. The fact that the sponsor "chose" to settle in the United Kingdom was not an adequate basis to reject the existence of family life. As made clear at paragraph 39 of Rai, focusing on the issue of "choice" is to avoid the core question of fact, namely whether the family life which had existed previously, continued. The judge also failed to engage with the uncontentious fact that the appellants had applied to come to United Kingdom at the

same time as the sponsor, thus indicating a desire to maintain the pre-existing family life (see paragraph 42 of Rai). In respect of the "borrowed" money point highlighted by Ms Isherwood and referring to [14] of the judge's decision, this was not of concern to him, as he made no reference to it when setting out his findings and conclusions. Finally, it is true that the judge has not expressly referred to emotional dependency. However, at [15] the judge made reference to the submissions put forward on the appellants' behalf as regards cultural norms, as these informed both emotional and financial dependency in situations where adult siblings had not yet formed their own independent lives. There is nothing in the judge's decision to indicate that he did not accept the thrust of this submission. At best, there is a lacuna in the judge's assessment which could only favour the appellants' current challenge.

12. The absence of adequate reasons in light of the findings of primary fact is an error of law. It is a material error of law because of the judge's approach to his alternative conclusion that the respondent's decisions were proportionate.

13. The overall effect of the guidance set out in a number of well-known authorities is that the historic injustice perpetrated against former Gurkha soldiers and their families is a very significant, if not decisive, factor in the balancing exercise (see, for example, Gurung, Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC), and Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC)).

14. Weight is of course usually a matter solely for the first instance tribunal to attribute. However, in Gurkha cases, the historic injustice has, exceptionally, being accorded particularly significant weight in general terms. This should be the starting point of the judge in any given case. Here, and with particular reference to what is said at [26], the judge has in effect relied on his findings of primary fact (which, in the alternative scenario, went to show the existence of family life) as the basis for concluding that the respondent's decisions were proportionate. In other words, the very fact of showing family life ultimately defeated the Article 8 claim. In my judgment, this is an error in approach: the judge did not actually apply the guidance set out in the authorities. Further, or alternatively, the judge failed to provide adequate reasons as to how he reached his conclusion on the balancing exercise. Either way, he erred in law.

Disposal

15. There is no question of these appeals being remitted to the First-tier Tribunal.

16. There is no reason to disturb the judge's findings of primary fact and I expressly preserve these in respect of the re-making of the decisions in these appeals. For the avoidance of any doubt, those findings are set out in paragraph 3 of my error of law decision and at [16]-[25] of the judge's decision.

17. I discussed what should happen next with representatives at the hearing. The following course of action was agreed:

    (a) the error of law decision will be sent out to the parties;
    (b) the appellant's shall ensure that the two bundles filed previously (that which was before the First-tier Tribunal and the updated bundle received by the Upper Tribunal on 20 July 2021) are served on Ms Isherwood;
    (c) having considered the evidence in light of my error of law decision, Ms Isherwood will then inform the Upper Tribunal whether the respondent seeks a resumed hearing or whether the decisions in these appeals can fairly be re-made on the basis of written submissions only;
    (d) the appellant's of than have an opportunity to respond;
    (e) the Upper Tribunal will then decide on the appropriate course of action in respect of the re-making of the decisions in these appeals.

Anonymity

18. The First-tier Tribunal did not make an anonymity direction and there is no reason for me to do so.

Notice of Decision

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

20. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

21. The decisions in these appeals will be re-made by the Upper Tribunal in due course.

Directions to the parties

1. **No later than 3 days after** this error of law decision is sent out, the appellants shall serve on the respondent (specifically, Ms Isherwood) the two bundles of evidence referred to earlier;

2. **No later than 14 days after** this error of law decision is sent out, the respondent shall confirm with the Upper Tribunal (copying in the appellants) whether: (i) she seeks a resumed hearing; or (ii) whether the re-making of the decisions in these appeals can take place on the basis of written submissions only;

3. If the respondent is to rely on written submissions only, these should if possible be filed and served **at the same time** as the confirmation provided under Direction 2;

4. If Direction 3 cannot be complied with, the respondent shall file and serve the written submissions **no later than 21 days after** this error of law decision is sent out;

5. If the respondent seeks to rely on written submissions only, the appellant's shall file and serve written submissions **no later than 7 days after** receiving the respondent's written submissions;

6. If a resumed hearing is required, the Upper Tribunal shall issue further directions in due course;

7. With liberty to apply.

Signed: *H Norton-Taylor* Date: 22 July 2021

Upper Tribunal Judge Norton-Taylor