IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004169
UI-2023-004170
First-tier Tribunal Nos:
HU/53275/2022
HU/53277/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

SWORNIM RAI
AGRIM TUMBAHANGPHE
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Aslam, instructed by Bond Adams LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 3 November 2023

DECISION AND REASONS

1. The Appellants and each of them are citizens of Nepal whose dates of birth respectively are recorded as 25th February 1988 and 25th January 2013. They are mother and son.

2. On 14th December 2021 the First Appellant made application for entry clearance for settlement to join her father as the adult dependant of a former Gurkha soldier. The Second Appellant also made application dependent upon his mother's claim.

3. On 28th April 2022 a decision was made to refuse the application and the Appellants and each of them appealed. The appeal was heard on 18th July 2023 by Judge of the First-tier Tribunal Beg who in a decision dated the same date dismissed the appeals and each of them.

4. Not content with that decision, by notice dated 3rd August 2023 the Appellants made application for permission to appeal to the Upper Tribunal.

5. There are two grounds. It is firstly contended that in her assessment Judge Beg failed properly to consider the evidence in assessing Article 8(1) of the European Convention on Human Rights, and secondly that she failed properly to have regard to the historic injustice affecting the class of persons to which the Appellants belong.

6. On 26th September 2023 Judge of the First-tier Tribunal Dainty granted permission and in so doing summarised the grounds as follows:

> "The grounds aver that the judge erred in relation to the article 8 assessment. It is firstly said that the judge failed to appreciate the real emotional support there would have been between the First Appellant and her parents after the marriage breakdown. Further the judge made an error in not counting the provision of accommodation as financial support and speculating that financial support could be provided via her husband or her own employment. It is then averred that had the judge accepted article 8 was engaged then the historical injustice as to Gurkhas would have outweighed the public interest the absence of other factors such as criminality or poor immigration conduct.
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> It is arguable that the judge made an error in leaving out of account the provision of accommodation by the Sponsors for the Appellant in assessing whether she was dependent on them or not. If the judge considered that this wasn't sufficient to amount to dependency she should have given reasons why not. It is also arguable that the judge misdirected herself by reference to Ahmed since Gurkhas are a recognised category of historic injustice and Ghising remains good law".

7. What is challenged in this case are findings of fact.

8. There are some guiding principles that assist when findings of fact are challenged. I refer first to the case of **HA (Iraq) [2022] UKSC 22** at paragraph 72:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding Tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently – see **AH (Sudan) -v- Secretary of State for the Home Department [2007] UKHL 49** per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the Tribunal, the court should be slow to infer that it has not been taken into account -

see **MA (Somalia) -v- Secretary of State for the Home Department [2010] UKSC 49** per Sir John Dyson.

(iii) When it comes to the reasons given by the Tribunal, the court should exercise judicial restraint and should not assume that the Tribunal misdirected itself just because not every step in its reasoning is fully set out - see **R (Jones) -v- First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19**".

9. Further, there is guidance in the case of **Riley -v- Sivier [2023] EWCA Civ 71**.

"The overarching point is that an appeal is a review and not a rerun of the trial. To win on appeal the Appellant has to show that there was some serious flaw in the judgment that calls for a change in the result or a retrial. When it comes to findings of fact there are five points to make:

(1) The court will treat the factual findings of a trial judge with a generous degree of deference. To uphold an appeal on the basis of criticisms of this kind the appeal court will need to be satisfied that there was a critical finding of fact that was either unsupported by the evidence before the judge or a finding that no reasonable judge could have reached.

(2) This approach applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

(3) The court will bear in mind that the trial judge has a whole 'sea of evidence' instead of 'island-hopping' as Appellants are prone to do when seeking to challenge findings at first instance.

(4) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into her consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that she has overlooked it.

(5) The same applies with even greater force to matters of argument. A judge is not bound to mention and address every single argument advanced".

10. In the case of **VW (Sri Lanka) [2013] EWCA Civ 522** McCombe LJ said:

"Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact".

11. In the case of **Volpi -v- Volpi EWCA Civ 464 [2022]** Lewison LJ said:

"The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial

judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached".

12. There was common ground in this case in that if the finding of Judge Beg at paragraph 37 was one that was open to her, namely that there was no family life, by which is meant protected family life, between the Appellants and the Sponsor, then the rest of the appeal falls apart because there is no proportionality assessment to be conducted.

13. I was grateful to Mr Melvin who enabled me to shorten the hearing more generally because he accepted as a general proposition that where family life is established in the ordinary Gurkha case the historical injustice will outweigh other factors. That was in my judgment a proper concession to make.

14. The question therefore for me in this appeal is whether it was open to the judge to find that there was no protected family life. Mr Aslam submitted that there was an absence of the detailed evidence of chronology in that the Appellant had been to Thailand and returned to a broken marriage. He noted that the judge had accepted that the adult Appellant was living with her child at her parents' home and yet notwithstanding those factors the judge failed to make findings with respect to the emotional dependence which was contended for.

15. It was accepted that living at the parents' home was part of a package of dependence. Mr Aslam, as is set out in the grounds, relied on the fact that in his submission the judge had made no finding on dependence with respect to the contention that living rent free in one's parents' home is dependency because it has a notional financial value.

16. The historical injustice in cases involving Gurkhas cannot be ignored but it is to be appreciated that in a human rights appeal, based upon Article 8 ,there first must be established a protected family life.

17. No issues, rightly, were raised with respect to private life and so I have put that to one side.

18. The decision is to be read as a whole. It would be tempting to look at this determination with respect to Article 8(1) by commencing at paragraph 37 in which the judge says:

"I find that there is no credible evidence that the appellants have family life with the sponsor that goes beyond normal emotional ties to a relationship of real committed and effective support".

19. It is to be noted that in the earlier paragraphs the judge notes such matters as the First Appellant's, depression at paragraph 34 and has regard to the skeleton argument that was submitted on behalf of the Appellants as to which see paragraph 32, but there were also credibility findings in this case which were not favourable to the Appellants, and I refer in particular to paragraph 35.

20. It is trite law to say that the judge does not have to deal with each and every point but standing back and looking at this case in the round I find that it was open to

the judge to find that there was no protected family life. That finding was neither perverse nor irrational and was evidence based.

21. There certainly are adverse credibility findings with respect to the financial relationship between the Sponsor and the Appellant and the judge was entitled to make adverse findings more generally.

22. Whilst a different judge might have made different findings that is not the matter with which I am concerned. The question is whether it was open to this judge to make the adverse finding that was made.

DECISION

23. In the circumstances these appeals and each of them are dismissed, and the decision of the First-tier Tribunal will stand.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 November 2023