



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-002114
UI-2023-002116

First-tier Tribunal No:
HU/53031/2022
HU/53032/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

BIMAL RAJ SHAHI
DIPENDRA SHAHI
(NO ANONYMITY ORDERS MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R. Jesurum, Counsel instructed by Everest Law Solicitors

For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 4 October 2023

DECISION AND REASONS

Introduction

1. The Appellants appeal against the decision of First-tier Tribunal Judge Chana (hereafter “the Judge”) promulgated on 12 April 2023 which dismissed the Appellants’ appeal against the Respondent’s refusal of the applications for entry clearance dated 29 April 2022.

2. Permission to appeal was initially refused by Judge Parkes on 23 May 2023, but was later granted on renewal of the application directly to the Upper Tribunal by Upper Tribunal Judge Kamara on 4 July 2023.

The relevant background

3. The Appellants applied for entry clearance on 8 December 2021 and 9 December 2021 on the basis of their position as adult dependent sons of a widow of an ex-Gurkha soldier.
4. The Appellants' late father served in the British Army for 16 years before his discharge on 25 November 1975. Unfortunately, the Appellants' father passed away on 13 September 2010 and it was not until 5 October 2018 that the Appellants' mother (their Sponsor) was granted Indefinite Leave to Enter the UK on the basis of her deceased husband's Gurkha status.
5. In the Judge's decision, she concluded that the Appellants had failed to establish that they enjoy an Article 8(1) ECHR family life with their Sponsor.

Findings and reasons

6. In preliminary discussion Ms Everett indicated that she was conceding the appeal effectively for the reasons laid out by Mr Jesurum in the Grounds of Appeal in respect of the Judge's conclusion that the Appellants do not enjoy an Article 8(1) ECHR family life with their Sponsor.
7. I am grateful to Ms Everett for her very fair approach in this case and I entirely agree with her concessions.
8. On the basis of the Respondent's view in this case, it is unnecessary for me to lay out in detail the full nature of the material errors in this judgment but nonetheless I should make plain that I accept the following submissions.
9. Despite being directed, in detail, to the legal developments in respect of the understanding of the concept of family life between a parent and adult children within the Appellant's extremely lengthy skeleton argument for the First-tier appeal, the Judge nonetheless simply summarised the legal position as requiring the Appellants show dependency over and above those of normal emotional ties (para. 20).
10. Despite referring herself to the Court of Appeal's decision in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 at para. 7, it is evident from para. 20 onwards that the Judge did not apply the Court's later clarification of the legal test:

"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents ... the irreducible minimum of what family

life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors ... include identifying who are the near relatives of the Appellant, the nature of the links between them and the Appellant, the age of the Appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the Appellant were dependent on his family or vice versa", but it was "not ... essential that the members of the family should be in the same country". In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

11. On this basis alone I find that the Judge's assessment of the evidence in respect of the claimed family life between the Appellants and their Sponsor is affected by a material error of law.
12. For completeness, I also accept the Appellant's argument that the Judge did not make a clear finding on the reciprocal nature of the support between the Appellants and the Sponsor, including when considering the fact that both Appellants had worked outside of Nepal, albeit some years ago (see paragraph 10).
13. I also find that the Judge gave materially insufficient consideration to the nature of the visits made by the Sponsor to the Appellants in Nepal since she gained Indefinite Leave to Enter the UK in 2018 at para. 26. The Judge has simply failed to engage with the evidence in the Sponsor's witness statement as to the profound difficulties she had in living in the UK without her two sons which caused her to return to Nepal in January 2020 (as one example of a visit) and not return to the UK until 7 January 2022. The evidence also shows that the Sponsor returned to Nepal in January 2022 and was still there as at December 2022.
14. I also conclude that the Judge's finding for instance at para. 23, that as the Appellants are not working in Nepal and live in the family home this means that they are independent adults is insufficiently reasoned and appears to treat the fact that the Appellants had worked overseas some years before as being determinative of the finding that there was no family life at the date of the hearing.
15. For completeness, and perhaps indicative of the significant errors in this judgment, I find that the purported conclusion in the alternative at para. 31, namely that the decisions to refuse entry are proportionate "*even taking into account the policy*" is wholly inadequate. There is simply no engagement at all with the Appellants' arguments about historic injustice and/or the authorities which were cited by the Appellants in the skeleton

argument. It was not enough for the Judge to roughly summarise these submissions at the beginning of the judgment; the Judge was required to apply those legal principles when making her findings and she did not do so.

Notice of Decision

16. The Appellants' appeals are allowed, and the decision of the Judge is set aside in its entirety.

DIRECTIONS

(1) In light of the need for a full fact-finding, I direct (in accordance with the observations of the two representatives) that the matter should be remitted to the First-tier Tribunal for rehearing other than by Judge Chana.

(2) The First-tier Tribunal is to note that the sponsor as well as her son in the UK will give oral evidence and that a Nepalese interpreter is required.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 October 2023