



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004117
UI-2023-004118
UI-2023-004119

First Tier Number: HU/52168/2023
HU/52170/2023
HU/52171/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of May 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sayangma Rai
Aashan Kumar Rai
Nirmala Rai

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr West, Counsel instructed by Everest Law
For the Respondent: Mr Thompson, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 10 May 2024

DECISION AND REASONS

1. The Appellants are nationals of Nepal. They are siblings, born respectively on the 11th December 1993, the 8th April 2002 and the 12th January 2000. They appeal with permission against the decision of the First-tier Tribunal (Judge Rakhim and Judge Curtis) to dismiss their appeals on human rights grounds.

Background

2. The Appellants' father Mr Ishwar Man Rai was a soldier in the Brigade of Gurkhas; he enlisted in 1953 and served for five and half years before being honourably discharged on in 1959. Mr Rai died in Nepal in 2010, some ten months after the first concession relating to the admission of former Gurkhas had been announced by the then Secretary of State.
3. After the death of Mr Rai the Appellants' mother Mrs Rita Devi continued to live in Nepal with the Appellants until, in 2022, she was granted indefinite leave to enter the United Kingdom.
4. On the 22nd August 2022 the Appellants, by then all adults, each made an application to join Mrs Devi in UK. The basis of those application was that they continue to share a 'family life' with their mother for the purpose of Article 8; that any decision to refuse entry clearance would amount to a lack of respect for, or interference with, that family life, and that any refusal would be disproportionate.
5. The application for entry clearance was refused and the Appellants appealed.

Decision of the First-tier Tribunal

6. When the appeal came before the First-tier Tribunal it heard oral evidence from Mrs Devi. It also had regard to the documentary evidence, and in what is in large part a thoughtful, well structured and cogent decision it made the following findings of fact:
 - These young adults had always lived with their mother
 - There was a shared emotional dependency
 - They are financially dependent upon her
 - None of the Appellants have established independent lives
7. These findings lead the Tribunal to conclude, contrary to the view taken by the ECO, that there exists between Mrs Devi and her adult children an Article 8 family life. The Tribunal proceeded from there to find that the decision to refuse entry clearance amounted to an interference with that family life so that Article 8 was engaged. It then turned to consider proportionality.
8. The Tribunal referred itself to several authorities dealing with the position of Gurkhas and their families. In this distillation of the applicable caselaw the Tribunal noted that the crux of these cases is the historic injustice perpetrated against these veterans, who were for many years denied the opportunity to settle in the United Kingdom, despite their service and sacrifice for the Crown. The weight of that historic injustice is such that in cases where the only remaining issue is proportionality, the balance will normally be struck by the granting of entry clearance. That is because 'but for' the historic injustice, the Gurkha would have settled in the UK long ago, and his wife and children would have either been born or naturalised as British citizens.
9. The Tribunal did not however consider that there had been any injustice in this case. It focused on the period immediately preceding the death of Mr Rai, and the

fact that for those last months of his life he could have made an application under the first iteration of this policy. The Tribunal could not be satisfied, on the evidence before it, that Mr Rai ever intended that he or his family members leave Nepal to live in the UK. In those circumstances, it concluded, there can be no injustice to this family and accordingly found itself “unable to attach any weight” to the historic injustice faced by Gurkhas more generally. The appeal was dismissed.

Grounds of Appeal: Discussion and Findings

10. There are several grounds of appeal advanced but for reasons I set out here, I really only need to be concerned with one.
11. Mr West submits that the main issue in this case was whether there was a family life between the Appellants and their mother. That matter was settled in their favour by the careful findings of the Tribunal. The Tribunal’s search for evidence that Mr Rai had wanted to move to the UK was not driven by the Respondent: this point had never been made before. Had the Appellants been on notice that they were being put to proof about their father’s intentions, they would have sought witness statements on the matter, for instance from friends and other members of the regiment. In fact no one had thought this necessary for the simple reason that the ECO had already accepted that there was a historic injustice perpetrated against this family: this much was conceded when Mrs Devi was given her visa. Of this latter point, the Tribunal says this:

66. Mr West submitted that the Respondent had accepted the historical injustice in allowing the Sponsor’s settlement application, but we were not provided with a copy of any such decision letter. The policy in question confirms that widows of former Gurkhas (such as the Sponsor) fell within the ambit of the discretionary arrangements and should ordinarily qualify for entry. That, though, is not the same thing as the Respondent accepting that all widows of Gurkhas who applied under the policy had been the victim of an historical injustice. In the absence of the decision letter expressly accepting that the Sponsor, or her husband, had actually been the victims of an historical injustice, we are unable to accept Mr West’s proposition.
12. Having reviewed this passage, the decision as a whole and the grounds, Mr Thompson before me conceded on behalf of the Respondent that the Tribunal was here, as a matter of fact, wrong. The ECO did grant Mrs Devi her visa because the ECO accepted that she, as the widow of a Gurkha, had been the victim of the very injustice identified in the authorities recited by the First-tier Tribunal and summarised at my paragraph 8 above. It was not the position of the ECO that there was no injustice. The ECOs case had been that there was here no family life, and that matter having been decided in the Appellants favour, it followed that the appeals must be allowed by consent.

Notice of Decision

13. The decision of the First-tier Tribunal is set aside.
14. The appeals are allowed.
15. There is no order for anonymity.

Upper Tribunal Judge Bruce
10th May 2024