



IAC-AH-KRL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/06396/2014
OA/06397/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower at Birmingham

Decision & Reasons

On 28th April 2016

**Promulgated
On 11th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**BHAVIK RAM KARAVADRA
HITESH RAMBHAJI KARAVADRA
(ANONYMITY ORDERS NOT MADE)**

Appellants

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
ON BEHALF OF ECO MUMBAI**

Respondent

Representation:

For the Appellants: Mr Z H Jafferji of Counsel

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of India whose mother, resident in the United Kingdom, is a British Citizen. She was previously a British Overseas Citizen, having been born in Uganda. The Appellants, together with their younger brother, applied for entry clearance to come to the United Kingdom to join their mother. At the time of application the two current Appellants were marginally over the age of 18 years but the younger brother was under 18. The applications of the two current Appellants were refused although that of their younger brother, now sadly deceased, was granted. The refusal decisions stated that the Appellants did not meet the requirements of the Immigration Rules.
2. The Appellants' appeals against those refusal decisions were heard before First-tier Tribunal Judge Obhi on 7th January 2015. At that hearing it was accepted that the Appellants could not meet the requirements of the Immigration Rules and they relied upon Article 8, ECHR. In her decision, promulgated on 14th January 2015, the judge found the Appellants' parents, who had both given evidence, to have been credible witnesses. She accepted that there was family life between the Appellants and their parents. She noted (at paragraph 21 of her decision) that

“The Appellants were born in and have resided in India throughout their lives. I am not persuaded therefore that the fact of their mother being a former east African Asian and the withdrawal of the SV (special voucher) scheme and the ‘historical wrongs’ referred to are an additional factor to weigh into the balance when considering Article 8 outside of the Immigration Rules. I am not satisfied that there are any circumstances in this particular case which take it out of the ordinary or make the case exceptional such that it should be considered outside of the Immigration Rules.”

3. She continued in the following paragraph (22)

“However even if I were to do so, as I have stated earlier, whilst I accept that there is a family life between the Appellants and their parents the decision of the ECO has not interfered with that family life. The Appellants' parents chose to come to the UK in search of a better life and whilst the Appellants' mother had the option of coming to the UK she was not forced or coerced into doing so. In making her decision to do so she will have had to take into account the circumstances of the whole of her family, including her children and in the context of that consideration chose nevertheless to do so. There is no obstacle to her returning to India to be with her sons if she chooses to do so. I am not therefore satisfied that there is an interference caused by the decision of the ECO and for these reasons the appeals must fail.”

4. The Appellants applied for permission to appeal those adverse decisions relying on the judgment of the Court of Appeal in **Patel, Modha** and

Odedra v ECO (Mumbai) [2010] EWCA Civ 17. That judgment indicated that the historical background was a matter of significance weighing in the Appellant's favour and it was contended that the judge had erred in failing to take it into account as an additional factor in the proportionality balance. The grounds referred also to the judgment of the Court of Appeal in **ECO v NH (India) [2007] EWCA Civ 1330** which also identified the "historical injustice" and in which Lord Justice Pill expressly rejected the concept of a Sponsor (who had been a British Overseas Citizen) being required to leave the United Kingdom and return to India to reunite with the family left behind. Permission was granted on these grounds on 1st April 2015.

5. At the commencement of the hearing before me Mr Mills said it did appear that the judge at first instance had not considered the impact of the historical wrong as described in **Patel, Modha and Odedra** and in parallel terms, regarding the children of former Ghurkha soldiers, in **Ghising and Others (Ghurkhas (BOCs): historic wrong; weight) [2013] UKUT 00567 (IAC)**. The fact that the Sponsor was a former British Overseas Citizen brought into play the historic wrong which was to be afforded significant weight. He said it appeared that the Appellants' arguments were correct. Once Article 8 was engaged (and there had been no challenge to the judge's finding that family life existed) such a claim was not easy to resist. He accepted that the judge had erred in failing to take those points into account and accepted that her decision to dismiss the appeal should be set aside.
6. I agreed with that view. The cases referred to did indicate the weight to be afforded to the "historic wrong". To be fair to the judge she does not appear to have been referred to those cases in the course of the hearing. Nonetheless they were binding upon her. Whilst it might be argued that there had been no active interference with family life as this is an entry clearance case, that might be expressed differently in that there had been a lack of respect for family life. Such a lack of respect would come equally within the ambit of Article 8.
7. I was in a position to remake the decision. Mr Mills, to whom I am grateful for his practical approach, noted that the Appellants were only in their early twenties. There had been a finding of family life. The ECO had raised no issue of them having any adverse history which might weigh against the grant of entry clearance. Having regard to the weight to be afforded to the historic wrong he accepted that the appeal should be allowed.
8. Mr Jafferji naturally agreed with those comments and mentioned the very sad circumstance that the one child who had been granted entry clearance had unhappily died before being able to come to the United Kingdom. He requested that the appeals be allowed and that entry clearance be granted as soon as possible.

9. I allow the appeals accordingly and trust that once this decision is communicated to the ECO in Mumbai entry clearance for these two Appellants will be issued without delay.

Notice of Decisions

10. The making of the decisions in these two appeals by the First-tier Tribunal involved the making of material error on a point of law. Those decisions are set aside.
11. I have remade the decisions and for the reasons set out above these appeals are allowed under Article 8, ECHR.
12. There was no request for the making of an anonymity order and none is made.

For the reasons given below I make no fee award.

Signed

Dated 6 May 2016

Deputy Upper Tribunal Judge French

TO THE RESPONDENT
FEE AWARD

As the Appellants have now succeeded in their appeals I have considered whether to make a fee award but have decided not to do so. In reaching my decision I note that in their applications the Appellants had not placed specific reliance upon their mother's former status as a British overseas citizen, a critical factor, nor was the relevant case law put before the judge at first instance.

Signed

Dated 6 May 2016

Deputy Upper Tribunal Judge French