Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05844/2015
HU/09086/2015
HU/09089/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 November 2017	**On 28 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

ENTRY CLEARANCE OFFICER (NEW DELHI)

Appellant

and

(1) S R
(2) M K R
(3) N R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Mr A Jafar, counsel
For the Appellant: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. For the sake of convenience, I refer to the parties as they were in the First-tier Tribunal, namely with the Entry Clearance Officer as the respondent.

2. The appellants are citizens of Nepal who appealed against the respondent's decisions to refuse them entry clearance as the adult dependents of a retired Gurkha soldier. The appeals against those decisions were allowed by Judge of the First-tier Tribunal M R Oliver ("the FTTJ") in a decision promulgated on 15 February 2017.

3. No anonymity direction was made in the First-tier Tribunal but given my findings as regards the appellants' and their parents' personal circumstances, they are entitled to anonymity in these proceedings.

4. Permission to appeal was granted by First-tier Tribunal Judge Cruthers in the First-tier Tribunal on 5 September 2017 in the following terms:

> "… In my assessment, the grounds are arguable. In particular, it seems to me arguable that:
>
> - as per the respondent's ground 2, the judge may not have had a sufficient evidential foundation for at least some of the findings that seem to have led him to allow these appeals.
>
> - As per the respondent's ground 1, it is arguable that the judge should have given (further) consideration to the "public interest criteria" set out in Part 5A of the Nationality, Immigration and Asylum Act 2002."

Hence the matter came before me.

Submissions

5. For the respondent, Ms Ahmad relied on the grounds of appeal. She submitted that, in conducting a proportionality assessment, the FTTJ had had no regard to the public interest considerations under s117B of the 2002 Act. Further, the finding that the delay could be explained by lengthy preparations was unreasoned and speculative. Findings about the quality of family life between the sponsor and adult children were also speculative. Inadequate reasons had been given for the finding that family life existed between the appellants, who were in their mid- to late-twenties, and the sponsor. It was not clear why the provision of funds and electronic communications were sufficient to demonstrate family life. Ms Ahmad relied on **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)** and **ECO, Sierra Leone v Kopoi [2017] EWCA Civ 1511.** She submitted the FTTJ had had a duty to address the conflicts in the evidence and to give reasons.

6. Mr Jafar, for the appellant, made lengthy submission. He relied on the guidance in **Jitendra Rai v ECO, New Delhi [2017] EWCA Civ 320.** He noted that **Kopoi** concerned adult cousins who were not dependent. Of more relevance was the guidance in **Rai** and **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC).** There were no conflicts in the evidence for resolution by the FTTJ. The decision on family life was a legal one. The FTTJ was not required to repeat all the evidence given it was not in dispute. This was an appeal allowed on human rights grounds. The FTTJ considered the public interest factors at [18], albeit s117B was not cited specifically. In any event, pursuant to **Rai** at [55]-[58] a failure to be alive to s117A and 117B did not amount to a material error of law. The respondent had not pointed to any public interest factors over and above the maintenance of immigration control, paragraph 41 of **Gurung** referred: the historic injustice required that the decision was in the appellants' favour. The sole issue for the FTTJ had been the existence of family life. He gave good reasons for finding as much. Evidence had been adduced to explain the delayed applications; the delay was not of the appellants' making. There was no material error of law. The appellants could not meet the criteria in the Rules but the issue was whether they met the policy criteria; they did. Thus the public interest factors were of little relevance.

7. In reply, Ms Ahmad observed that the immateriality of the error in **Rai** arose from the Court of Appeal's concluding that the decision had already been vitiated by error of law. These appellants were not assisted by **Rai.** It was accepted there were no inconsistencies in the evidence before the FTTJ; however, the respondent had not accepted the existence of family life. It was a matter of law. The evidence was insufficient for such a finding.

Discussion

8. Ms Ahmad conceded in her reply to Mr Jafar's oral submissions that there had been no dispute between the parties as regards the evidence; the FTTJ was therefore justified in adopting the evidence of the parties for his findings of fact. That evidence was that the appellants' father, the sponsor, had settled in the UK in 2010; his wife had been granted similar status in that year but had remained in Nepal with the appellants, entering the UK the following year to join her husband. At [6] the FTTJ refers to various visits: between 2011 and 2016 the sponsor's wife had made "5 lengthy return visits to Nepal"; the sponsor had himself visited on one occasion for just over two months. All the appellants were unmarried, not leading independent lives and were totally dependent financially on the sponsor and his wife. At [7] the FTTJ refers to the evidence that the sponsor allowed his daughter, one of the appellants, to draw on his pension; she then paid the bills and gave money to her brothers. The sponsor spoke to his children on the telephone every day. All the witnesses "explained why their applications had not been made earlier" [8]. This is not evidence challenged by the respondent before the FTTJ.

9. The FTTJ has correctly cited the relevant authorities; he refers to the respondent's policy, Annex K to Chapter 15 Section 2A of the Immigration Directorate Instructions of 22 January 2015, and sets out the criteria to be met by the appellants at [16].

10. The FTTJ next considers at [17] whether family life exists between the appellant and sponsor. He notes the submission of the respondent that the parties had chosen to live apart, but finds against it on the grounds that the "parents either did not envisage that it would take so long and be so difficult to bring their children to join them or that they were making a judgment that it was better in their children's long-term interests to undergo some current hardship for the benefit when eventually they were able to come". This is speculative and based on conjecture.

11. However, the undisputed evidence of the appellants, their sponsor and their mother was sufficient for a finding that family life existed for the following reasons: the sponsor entered the UK in 2010; his wife was granted leave to enter at the same time but chose to remain in Nepal; she would have lost her leave to enter if she did not settle in the UK when she did; the witnesses explained the reason for the four year delay before the appellants applied for entry clearance: there was no provision in the Immigration Rules for the grant of leave to Gurkha children such as they were; the appellants applied within six months of the introduction of the respondent's policy. In the intervening period, between the departure of the appellants' mother from Nepal in August 2011 and their applications in June 2015, the appellants' parents visited Nepal on a regular basis and for prolonged periods of about two months at a time. These visits were approximately annually. The appellants have been financially dependent on their parents for the whole of their lives; they live in the family home in Nepal; they are not employed. None are married. The sponsor's evidence is that he telephoned the appellants from the UK each day. Thus, irrespective, of the fact the FTTJ's finding as to the existence of family life was based on speculation, it is a finding which is sustainable on the evidence before the FTTJ. His error is not therefore material.

12. While the FTTJ has not considered specifically whether the appellants fulfil the criteria in the respondent's policy, the evidence is such as to justify a conclusion that they do. The only questionable issue is whether the "applicant has … been separated from their father for more than 2 years at the date of application". In this case personal contact has been maintained throughout the family's separation with both parents (albeit not with the father solely). That separation has been explained by the witnesses as arising from the inability of the appellants to meet the criteria in the Rules until the inception of the respondent's policy.

13. The FTTJ's comments at [17] to the effect that "it can also be argued that the parents either did not envisage that it would take so long and be so difficult to bring their children to join them or that they were making a judgment that it was better in their children's long term interests to undergo some current hardship for the benefit when eventually they were able to come" is wholly speculative and based on conjecture. It is not grounded in the evidence. However, there is clear evidence as to the reason for the applications not being made until June 2015 and that evidence is not disputed. Thus there is no material error of law in the FTTJ's erroneous finding as regards the explanation for the delay.

14. The FTTJ refers at [18] to there being a gap of

> "just under 4 years before the children applied to join them. There must have been quite some preparation required when organising the reception of three rather than one. The three must have developed more than normal adult siblings ties with each other as three singles with a common purpose. The emotional ties between them and their parents are demonstrated by the frequency and length of the parental visits and must have been strengthened as a result of the recent earthquake."

15. Much of this is speculation, particularly the reference to "a common purpose" and the emotional ties being strengthened as a result of the recent earthquake. It is entirely unsupported by the evidence. However, the evidence before the FTTJ is sufficient for a finding of family life between the appellants and their sponsor and mother notwithstanding their living in different countries: that family life existed when the family were living together in the family home in Nepal and continued, notwithstanding the departure first of the sponsor and then, a year later, the appellants' mother. I refer to the evidence cited above which is not challenged. I do not accept that **Kopoi** is of relevance in this appeal: that case is not analogous to this.

16. While the FTTJ's assessment of the evidence is erroneous in that he draws on matters which are speculative, that assessment does not amount to a material error because the evidence is sufficient for a finding that family life exists between the appellants and the sponsor and his wife.

17. With the exception of one criteria in the respondent's policy (that relating to separation of the appellants from their father for a period of more than two years), the appellants fulfil those criteria (as set out at [p16] of the FTTJ's decision). The respondent noted in the refusal notices that the appellants had been separated from family for more than three years but, as the sponsor says in his witness statement, "after arriving in the UK on 07/08/2011, my wife went back to Nepal visit them [sic] on 17/12/2012 and came back to the UK on 2/02/2013. She went second time to Nepal on 08/12/2014 and return back to the UK on 21/01/2015. … She went to Nepal again on 09/07/2015 and came back to UK on 05/09/2015". In addition, the sponsor himself visited his children in Nepal on 8 July 2014, returning to the UK on 16 September 2014. Thus, while there was a gap of over two years between the sponsor's visits to Nepal, there have been annual visits by either the sponsor or his wife since the sponsor's

settlement in the UK. It is also relevant that the sponsor and his wife have staggered their visits to Nepal. This suggests an endeavour to minimise the time the appellants spend apart from their parents. Overall, the evidence is consistent with a very close relationship between the parents and adult children.

18. I was referred to the respondent's submission before the FTTJ that the appellants' parents had chosen to leave their children in Nepal. Paragraphs 38 and 39 of **Rai** make it clear that concentrating on the parents' decision to leave Nepal and settle in the UK, without focusing on the practical and financial realities entailed in that decision, was "a mistaken approach". In the present case, it is clear from the evidence that the appellants lived in the family home at the date of their mother's departure and that they were dependent on their parents at that time. This state of affairs has continued, notwithstanding the settlement of both parents in the UK. The evidence suggests that the close relationship between the appellants and their parents has endured beyond the departures of their parents from Nepal to settle in the UK.

19. In the circumstances, and given the low threshold for engagement (**AG (Eritrea v SSHD [2007] EWCA Civ 801),** the FTTJ was entitled to find that Article 8 was engaged, albeit his reasoning was inadequate.

20. Insofar as the proportionality assessment is concerned, the sponsor explains why he had been unable to make a settlement application earlier and why no earlier applications were made by the appellants.

21. The FTTJ had summarised at [15] the guidance in **Ghising & Ors** to the effect that "where family or private life is shown to exist and, but for the historic wrong, the appellant would have settled in the UK long ago, it would, ordinarily, be for the respondent to show that there were matters over and above the public interest in maintaining a firm immigration policy, such as a bad immigration history or criminal behaviour, which could shift the balance against the appellant". In the present cases, there was no suggestion that the ECO relied on any other facet of the public interest in the appeal before the FTTJ (such as a poor immigration history or criminal record).

22. In **AP (India) v SSHD [2015] EWCA Civ 89** it was held that, when considering whether the historic injustice was the cause of an appellant's inability to gain entry sooner, "the courts should not in this context be unduly rigorous in the application of the causation test, given that its significance is to redress this historic injustice". The evidence before the FTTJ was sufficient to demonstrate that, but for the historic injustice, the appellant's father would have applied to settle in the UK. By analogy, as was said by the Court of Appeal in **AP (India)**, if the sponsor in that case had given express evidence to the effect that he would have come to the UK earlier if he had been entitled to do so then it would have been enough to demonstrate that the causal link had been established. That is the case here: the sponsor states as much in his witness statement. The FTTJ did not do so, but would have been entitled to rely on the sponsor's evidence to find there was a historic injustice and that this rendered disproportionate the degree of interference with the appellants' protected rights.

23. As regards the proportionality assessment, again the FTTJ's findings were poorly reasoned, being based in part on speculation and conjecture. Whilst the FTTJ failed to refer specifically to s117A or s117B of the 2002 Act, he referred to the relevant public interest factors at [18]. He also had in mind the criteria in the respondent's policy at [16]. Thus the relevant public interest factors were addressed albeit there was no specific reference to the 2002 Act (**Dube (ss117A-117D) [2015] UKUT 00090 (IAC).**

24. For these reasons, there is no material error of law in the FTTJ's decision and reasons.

Decision

25. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

26. I do not set aside the decision.

A M Black
Deputy Upper Tribunal Judge Dated: 24 November 2017

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black
Deputy Upper Tribunal Judge Dated: 24 November 2017