



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03359/2015
HU/03361/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER

and

BINDU MALL
DIPENDRA MALL

Appellant

Respondents

Representation:

For the Appellant: Mr M. Diwnyecz, Senior Home Office Presenting Officer

For the Respondents: Mr R. Layne, Counsel

DECISION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer (“the ECO”). However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. The appellants are citizens of Nepal, born on 17 August 1985 and 16 March 1989, respectively. They applied on 17 June 2015 for entry clearance for the purposes of settlement as the adult dependant relatives of an ex-Gurkha soldier, their father Res

Bahadur Mall (“the sponsor”). Their applications were refused in decisions dated 6 July 2015.

3. The appellants appealed and their appeals came before First-tier Tribunal Judge Talbot (“the FtJ”) at a hearing on 3 April 2017 whereby he allowed the appeals on Article 8 grounds outside the Immigration Rules. I summarise the grounds upon which permission to appeal against his decision was granted, as well as the submissions of the parties.

The grounds and submissions

4. The respondent contends in the grounds that the appellants’ family ties with the sponsor do not demonstrate emotional dependency over and above normal emotional ties. The evidence before the FtJ in that respect was lacking. Reference is made in the grounds to Appendix FM and Annex K of the Rules, as well as the Immigration Directorate Instructions (“IDI’s”), none of which the appellants meet, it is said.
5. There was voluntary separation by the sponsor from the appellants and no care arrangements were made for them, indicating that they were able to care for themselves. There was no evidence of visits by the sponsor or other contact, suggesting that the appellants have formed independent lives despite not being married. There was no reason as to why the current parental support that they are receiving could not continue. They could live in Nepal and support each other.
6. Although the FtJ found that there was financial dependency despite the appellants being educated to postgraduate level, that financial dependency seemed to be a matter of choice. The appellants have not shown why they could not work, or that they had any intention of working. No health issues are apparent. There is nothing to suggest that their living conditions in Nepal are anything other than adequate.
7. It is further argued that the FtJ failed to consider “the public interest and proportionality tests” under s.117A of the Nationality, Immigration and Asylum Act 2002 in terms of whether the appellants would be able to integrate or be a financial burden on the state. There was insufficient evidence that the sponsor could provide adequate support for them.
8. As regards the historic injustice, the FtJ attached significant weight to that issue but that was but one factor to be taken into account in the proportionality assessment.
9. In submissions, Mr Diwnyez relied on the respondent’s detailed grounds of appeal. Mr Layne in his submissions referred to the FtJ’s decision, in particular at [18] and [19] where the FtJ referred to relevant authority in terms of the effect of the historic injustice on the proportionality assessment. It was submitted that the FtJ was correct to conclude that if the only issue in the assessment of the public interest was the demands of immigration policy, the balance would be tilted in favour of the appellants. In addition, there was nothing adverse to the appellants in terms of their immigration history or any criminality. It was submitted that the FtJ was correct to allow the appeals.

The FtJ's decision

10. The FtJ set out the respondent's decision in detail. At [7] he said that the respondent's reasons must be read in the light of the Entry Clearance Manager's ("the ECM") review, which he reproduced verbatim. That review included the ECM stating that "I am indeed satisfied that Article 8(1) is engaged".
11. After summarising the parties' submissions the FtJ made a number of findings. He noted that it was indicated on behalf of the appellants that the basis for the appeal was in terms of Article 8 outside the Rules. After referring to relevant authority in relation to Article 8 he said that "an absolutely key issue" is the 'historic injustice' as highlighted by the Court of Appeal in *Gurung v Secretary of State for the Home Department* [2013] EWCA Civ 8 and as recognised in the IDI's. He found that as adult dependants of a former Gurkha settled in the UK who, but for historic injustice would have settled in the UK long ago as a minor child of the former Gurkha, does constitute 'compelling circumstances' warranting consideration outside the Article 8 Rules.
12. He summarised the findings made in a previous appeal to the First-tier Tribunal by these appellants, which included a finding that there was insufficient emotional dependency between the appellants and their parents. At [15] however, he referred to the fact that the respondent had now conceded in the ECM's review that Article 8(1) was engaged "clearly on the basis that 'family life' exists between the Appellants and their parents". In the circumstances he said that he did not adopt the findings made by the First-tier Tribunal at the previous appeal.
13. At [16] the FtJ noted that there was no significant dispute between the parties as to the historical and factual background to the appeal, set out in some length in the witness statements of the appellants and the sponsor. He then summarised that background. He said that neither of the appellants have been able to secure employment in Nepal and they remain financially dependent on their father.
14. He went on to state that the dispute between the parties has been on the issue of emotional dependency "but, in accepting that Article 8 is engaged, the Respondent has now implicitly accepted that there is emotional dependency between the Appellants and their sponsor".
15. He thus concluded that the decision to refuse entry clearance prevents them from joining their parents in the UK and that that "constituted an interference with their family life of sufficient gravity as to engage the Convention".
16. After quoting from *Gurung and Ghising and others (Ghurkhas/BOCs: historic wrong; weight)* [2013] UKUT 00567 (IAC), he concluded that but for the historic injustice the sponsor would have settled in the UK at a time when his children would have been entitled to accompany him as minor dependants. He found that there were "no adverse matters in this case such as a bad immigration history or criminal behaviour which would tilt the public interest balance in favour of the Secretary of State". He thus concluded that the historic injustice outweighed the legitimate aim in the maintenance of immigration control.

Assessment and Conclusions

17. With respect to the author of the respondent's grounds, they fail to recognise that the FtJ's decision was made in the light of what was said in the ECM review (see [10] above). Once it was accepted by the respondent that there was family life between the appellants and the sponsor, the outcome of the appeal, on the facts of this case, was not in doubt.
18. Now the grounds could, perhaps, have taken issue with the FtJ's interpretation of what was said in the ECM's review, although it is difficult to see how; but the grounds do not do that. Furthermore, the grounds do not take issue with the FtJ's interpretation or application of the authorities, in particular *Ghising*.
19. It is only necessary for me to repeat the guidance given by the Upper Tribunal in *Ghising* whereby what it said at [59] and [60], was distilled as follows:

"(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.

(4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

20. The FtJ's decision was made in line with relevant authority and the grounds do not establish any error of law in his decision. Accordingly, his decision to allow the appeal of each appellant must stand.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal of each appellant stands.