Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11587/2015
HU/11588/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th April 2018	**On 04 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

BOM BAHADUR PUN
ROM BAHADUR PUN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondents: Ms N Nnamani of Counsel instructed by Howe & Co Solicitors

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer appealed against a decision of Judge N M Paul of the First-tier Tribunal (the FTT) promulgated on 9th May 2017.

2. The Respondents before the Upper Tribunal were the Appellants before the FTT. I will refer to them as the Claimants.

3. The Claimants are citizens of Nepal and are brothers born 8th September 1986 and 9th February 1990 respectively. On 17th September 2015 they applied for entry clearance in order to join their mother who is settled in the UK. Their mother is the widow of a former Gurkha soldier.

4. The applications were refused on 14th October 2015 and the Claimants appealed to the FTT. Their appeals were heard together on 26th April 2017. The FTT allowed the appeals on human rights grounds, finding that the decisions to refuse entry clearance breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

5. The Entry Clearance Officer applied for permission to appeal to the Upper Tribunal. Permission to appeal was granted by Judge Shimmin of the FTT in the following terms;

> 1. The Respondent seeks permission to appeal against the decision of First-tier Tribunal Judge N M Paul promulgated on 9th May 2017, allowing the Appellants' appeals against the Entry Clearance Officer's decision to refuse entry clearance.
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> 2. The grounds requesting permission to appeal to the Upper Tribunal argue that the judge erred in:
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> (1) making a material misdirection of law in relation to the Appellants' emotional dependency on their mother for the purposes of Article 8;
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> (2) giving weight to an immaterial and speculative assertion;
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> (3) failing to consider the requirements of section 117B.
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> 3. The Respondent disagrees with the findings of the judge but the judge heard the evidence and the findings are capable of being properly supported by the evidence and are open to the judge.
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> 4. With regard to ground (2) the mother, in her evidence, comments on the 'historical injustice' of Gurkha settlement policy but there is no indication in the decision as to any weight being placed on the finding in the reaching of the final decision.
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> 5. With regard to ground (3) it is arguable the judge erred in failing to consider the matters set out in section 117B and permission is granted on this ground alone.

Error of Law

6. On 13th February 2018 I heard submissions from both parties in relation to error of law. Mr Avery, on behalf of the Entry Clearance Officer, confirmed that there had

been no further application for permission to appeal, in relation to the grounds upon which permission was refused by Judge Shimmin. It was therefore accepted that the only ground upon which permission to appeal had been granted related to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

7. Mr Avery submitted that it was clear that the FTT had failed to consider section 117B, and in particular had failed to consider and make findings as to whether the Claimants could speak English, and whether they would be financially independent. It was submitted that these were important considerations which must be considered in relation to the public interest.

8. Ms Nnamani submitted that although there was no specific reference by the FTT to section 117B, the FTT had taken into account the witness statements made by the Claimants in which they contend that they can speak English. They had also studied English at school. The evidence indicated that they were financially dependent upon relatives in the UK. It was submitted by Ms Nnamani that the FTT had not erred in law, but in the alternative if an error of law was found, it was not material.

9. I found that the FTT had materially erred in law and set aside the decision. I preserved the findings which had not been successfully challenged. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 13th February 2018, promulgated on 20th February 2018. I set out below paragraphs 13-20 of that decision, which contain my conclusions and reasons for setting aside the FTT decision;

> 13. When considering the public interest in the context of proportionality, having found that Article 8 is engaged, it is mandatory to consider section 117B of the 2002 Act. In my view the FTT did not do so. There is no reference within the FTT decision to section 117B. I do not find that the decision indicates that the consideration set out in section 117B have been taken into account.
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> 14. So far as the Claimants are concerned, the relevant considerations in section 117B are that the maintenance of immigration controls is in the public interest, and it is in the public interest that a person seeking leave to enter the UK can speak English and is financially independent, as this assists integration.
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> 15. It is correct that the Appellants stated in their witness statements that they could speak English. There is however little documentary evidence to support this. The school certificates included in the Claimants' bundle are dated 2003 and 2006, and confirm that the Claimants studied English at school at that time. It is clear that a considerable time has elapsed since the Claimants attended school.
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> 16. There is also within the Claimant's bundle of documents, an undertaking of financial support from their brother-in-law in the UK, who offers support "to the extent of my ability". No satisfactory documentary evidence was included to prove the ability of the brother-in-law to provide financial support.

17. In any event, there is no reference by the FTT to the evidence referred to above. There is no indication that the FTT considered the evidence, analysed it, and made findings upon it.

18. In my view the error is material, because it is possible that the FTT may have reached a different conclusion if the considerations in section 117B had been taken into account. The decision is therefore unsafe and must be set aside.

19. When I indicated that I was reserving my decision on error of law, Ms Nnamani submitted that if a material error of law was found, it would be appropriate to give the Claimants a further opportunity to provide evidence in relation to their ability in English, and in relation to financial independence.

20. I have decided that it would be appropriate to give the Claimants that opportunity. The decision needs to be remade. It is not appropriate to remit this appeal back to the FTT. There will therefore be a further hearing before the Upper Tribunal. The finding by the FTT that Article 8(1) is engaged is preserved. The purpose of the next hearing is for the Upper Tribunal to consider the considerations contained in section 117B of the 2002 Act.

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10. Further evidence had been submitted by the Claimants in the form of a supplementary bundle containing 49 pages.

11. At the commencement of the hearing Mr Kotas produced the decision of the Court of Appeal in Rai [2017] EWCA Civ 320 drawing my attention to paragraphs 56 and 57 in which reference was made to section 117B of the 2002 Act. Mr Kotas advised that in view of paragraphs 56 and 57 of Rai, he did not intend to make any submissions that the appeals of the Claimants should be dismissed.

12. Ms Nnamani indicated that she relied upon the contents of the supplementary bundle which included witness statements from the mother of the Claimants, and Padam Kaucha the brother-in-law of the Claimants, and which also included pay slips and bank statements, and evidence that the Claimants had passed an English language speaking and listening test.

13. I indicated that a written decision would be issued.

My Conclusions and Reasons

14. The position before the Upper Tribunal was that the FTT had found that Article 8 was engaged on the basis of family life between the Claimants and their mother. There had been no successful challenge to that finding. The error of law was that the FTT had failed to give any consideration to section 117B of the 2002 Act.

15. Mr Kotas referred to paragraphs 56-57 of Rai, and it is appropriate to set out paragraphs 55-57 of that decision in which reference is made to sections 117A and 117B of the 2002 Act;

> 55. With effect from 28th July 2014, section 117A of the Nationality, Immigration and Asylum Act 2002 requires that where a court or Tribunal is considering the public interest, and whether an interference with Article 8 rights is justified, it must have regard, in cases not involving deportation, to the matters set out in section 117B, including that the maintenance of effective immigration control is in the public interest (section 117B(1)), that it is in the public interest that those seeking entry into the United Kingdom speak English (section 117B(2)), and that it is in the public interest that those seeking entry be financially independent (section 117B(3)).
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> 56. Mr Jesurum pointed out that the Upper Tribunal Judge did not consider the matters arising under those provisions of the 2002 Act. He submitted, however, that in view of the 'historic injustice' underlying the Appellants' case, such considerations would have made no difference to the outcome, and certainly no difference adverse to him. Ms Patry submitted that if the Upper Tribunal's decision was otherwise lawfully made, the considerations arising under section 117A and B could not have made a difference in his favour.
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> 57. The submissions made on either side seem right. Certainly, if the Upper Tribunal Judge's determination is in any event defective as a matter of law, which in my view it is, I cannot see how the provisions in section 117A and B of the 2002 Act can affect the outcome of this appeal.

16. I have taken into account the evidence contained in the Claimants' supplementary bundle. It is evident that both undertook an IELTS B1 speaking and listening test and passed this test. The certificates are dated 12th April 2018. The test results indicate a satisfactory ability to speak and listen in English, though such an ability is a neutral factor in the balancing exercise.

17. The Claimants' brother-in-law repeats in his supplementary witness statement dated 16th April 2018 his offer of financial support. He is in employment and has evidenced this by pay slips and bank statements. He and his wife have savings of approximately £17,000. The brother-in-law is a former Gurkha soldier. I accept his evidence that he and the Claimants' mother will ensure financial support for the Claimants upon their arrival in the UK until they can find employment.

18. I have considered the need to maintain effective immigration control and the fact that the Claimants will not have an income of their own when they arrive in the UK. I have also placed weight upon the comments of Lindblom LJ at paragraphs 56-57 of Rai and the fact that Mr Kotas did not make submissions urging that the Claimant's appeals should be dismissed.

19. Taking all the circumstances into account including the finding by the FTT that Article 8 is engaged, I conclude the decision to refuse entry clearance is disproportionate and therefore breaches Article 8.

20. The appeal to the Upper Tribunal was brought by the Entry Clearance Officer who is the Appellant before the Upper Tribunal, and I therefore conclude that the Entry Clearance Officer's appeal should be dismissed, which means that the appeals of the Claimants are allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it was set aside. I substitute a fresh decision as follows.

The appeal of the Entry Clearance Officer is dismissed. The appeals of the Claimants are allowed.

There has been no request for anonymity and I see no need to make an anonymity direction.

No anonymity direction is made.

Signed Date 26th April 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I have allowed the appeals of the Claimants but make no fee award. The appeals have been allowed because of evidence presented to the Tribunal which was not before the initial decision maker.

Signed Date 26th April 2018

Deputy Upper Tribunal Judge M A Hall