



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number HU/16386/2016
HU/16387/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25th June 2018

Decision and Reasons Promulgated
On 30th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

**B R
S R**

(ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford (Counsel, instructed by Everest Solicitors)
For the Respondent: Ms A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants are sisters and the daughters of the Sponsor, a former Ghurka soldier who has now settled in the UK. They applied to join their parents in the UK but the applications were refused for the reasons given in the Refusal Notices of the 27th of January 2016. Their appeals were heard by First-tier Tribunal Judge Callow at Taylor House on the 31st of July 2017, the appeals were allowed for the reasons given in the decision promulgated on the 21st of August 2017.
2. The Secretary of State sought permission to appeal to the Upper Tribunal in grounds of application of the 15th of September 2017. Permission to appeal was granted by the First-tier Tribunal on the 28th of February 2018 leading to the hearing of this appeal at Field House.
3. The Judge found in paragraph 24 that there was family life between the Appellants and their parents based on the levels of financial and emotional support and that the Appellants had not established families or independent lives of their own and but for their parents' support the Appellants would be destitute. The level of contact demonstrated that emotional dependency

existed and the support was both real and effective. The Judge went on to consider the provisions of sections 117A and 117b of the 2002 Act and the effect of the historic injustice, putting the Appellants in the position they would have been but for the wrong the appeal was allowed.

4. In the Secretary of State's grounds of application it was observed that it was accepted at the hearing that the Appellants did not meet the Immigration Rules or the policies that apply to adult dependent children of Ghurkas. It was argued that the Judge had not considered all the circumstances that applied in the case. The ECO had noted that there was no obvious reason why the Appellants could not support themselves and referred to the circumstances in which the Sponsor and his wife had left the Appellants when they came to the UK. Relying on a citation from the case of Rai [2017] EWCA Civ 320 it was submitted that the case turned on whether there was family life at the relevant time and that the Judge had failed to make complete findings amounting to a material misdirection in law. In granting permission the First-tier Tribunal Judge observed that the article 8 case law arguably weak on any view.
5. At the hearing for the Secretary of State it was argued that the Judge had not made coherent findings about why there was family life. Referring to paragraphs 24 and 25 the absence of evidence did not equal positive evidence and the older a child is more is required to show dependency. There were generalise assumptions about life in Nepal. The fact that families may organise their lives to live together did not mean that required protection. The Judge had erred in sympathy and had put the historic injustice before considering family life.
6. For the Appellant's it was submitted that what was required was an assessment whether article 8(1) was engaged. The Secretary of State was arguing that the Judge found article 8(1) was engaged because of the historic injustice and had not referred to any part of the decision where the Judge found article 8 was engaged. It was engaged because of the existence of committed support. In paragraph 30 the Judge had considered the position from the date of migration to now. There was no requirement for dependency to be necessary. Turning to the historic injustice applying the formula from paragraph 60 of Ghishing 2 continued exclusion would be disproportionate. The observation in the grant could only have been made in ignorance of the case law on adult dependent Ghurkas.
7. In reply it was accepted that a finding that family life endured would go in the Appellants' favour. That did not detract from the brief findings on family life that the Judge made. The fact that the Appellants would be destitute without support was not a finding that family life endured.
8. The Immigration Rules and policies remain relevant to the assessment of the proportionality of removal under article 8. However in Ghurka cases this is in the context of the historic injustice and the decision in Rai [2017] EWCA Civ 320 and the emphasis of the importance of the finding of family life. If the finding of family life was justified then ordinarily the historic injustice would cause the balance to fall in the Appellant's favour.
9. It is not correct for the Home Office to argue that in this case the Judge found that family life existed predicated on the historic injustice. The Judge considered the issue discretely and then placed that in the context of the extant case law including Rai (above) and the other cases cited. The Judge gave reasons for finding that family life existed, and the circumstances of the Appellants in this case were not significantly different from those in Rai, once that was established within the decision the Judge was entitled to find that the proportionality decision fell to be decided in the Appellants' favour.

10. In the circumstances the Judge did not err either in the approach taken to the existence of family life between the Appellants and their parents or the assessment under article 8 with regard to the proportionality of the decision. The decision of Judge Callow stands as the disposal of the Appellants' appeals. Judge Callow made fee orders which I also uphold.

CONCLUSIONS

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

I do not set aside the decision.

Signed:



Deputy Judge of the Upper Tribunal (IAC)

Dated: 20th July 2018

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I continue that order.

Fee Award

The First-tier Tribunal's fee award of £140 stands.

Signed:



Deputy Judge of the Upper Tribunal (IAC)

Dated: 20th July 2018