IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-004746
UI-2024-004748

FtT Nos: HU/61647/2024;
LH/04828/2024
HU/61648/2023; LH/04829/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 January 2025

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE OBI

Between

Kaushal Jung Ghale (First Appellant)
Srijana Ghale (Second Appellant)
(NO ANONYMITY ORDER MADE)

Appellants

and

Entry Clearance Officer

Respondent

Representation:
For the appellants: Mr M Kashif, Solicitor at Bond Adams LLP
For the respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 16 December 2024

EXTEMPORE DECISION AND REASONS

Introduction

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge French ("the judge"), promulgated on 14 August 2024. By that decision the judge dismissed the appellants' appeals against the respondent's decision to refuse their human rights claims. Those claims were made via applications for entry clearance to join their mother ("the sponsor") in the United Kingdom.

2. The appellants are Nepalese citizens and are brother and sister. They are the adult children of a former soldier who served in the Brigade of Ghurkhas and who had disappeared in 1994 and was subsequently declared deceased. The sponsor had applied for settlement in this country as the widow of a former member of the Brigade and had arrived here in July 2021. She has resided in this country ever since.

3. In summary, the respondent refused the human rights claims on the following bases: first that the appellants could not meet the provisions of the relevant Immigration Rules; second, that there was an absence of evidence in relation to a number of issues; and third, that there were no exceptional circumstances that justified the granting of entry clearance outside the Immigration Rules and in compliance with Article 8 ECHR.

4. In a concise decision, the judge set out the history of the case and the parties' respective positions. At [15] he set out a number of findings of primary fact. It is right to say that the judge was not impressed by a number of aspects of the evidence before him and there were a number of what were described as "major inconsistencies" in the case. These included, but were not limited to, the following:

    (a) A discrepancy in the evidence as to whether the first appellant was married;

    (b) The absence of evidence relating to whether the sponsor had met with the appellants during a visit to Nepal in 2023;

(c) The first appellant's trips to Qatar over the course of time, with the implication being that he may have continued employment in the Middle East for longer than had been claimed; and

(d) The absence of evidence relating to claimed regular contact between the sponsor and the appellants.

5. The findings of fact were followed by a section entitled "Conclusion". For the purposes of our decision, we highlight only the most relevant of the passages set out here. At [16(iv)] the judge stated that he had to decide whether the appellants "really are financially and emotionally dependent on the sponsor". The reference to financial and emotional dependency is reiterated at [16(vi)] and then again at [16(vii)], with a final conclusion at [16(x)] confirming that the judge was not satisfied that the appellants were financially or emotionally dependent on the sponsor.

6. Beyond that, the judge concluded there was little evidence to support the claimed daily contact and that the sponsor had "chosen" to come to the United Kingdom, leaving behind the appellants despite a claim that she had been in poor health at the point of her departure. In light of the forgoing the judge dismissed the appeal.

7. In summary, the grounds of appeal assert that the judge had failed to apply the correct legal test in relation to the existence of family life under Article 8(1), with particular reference to the well-known judgment of the Court of Appeal in Rai v ECO [2017] EWCA Civ 320: the appropriate test being whether there was "real, effective, or committed support" provided by the relevant sponsor to an adult child of a former Ghurkha soldier. The grounds also assert that certain matters were conflated by the judge in relation to the consideration of Article 8(1) and proportionality under Article 8(2). It is said that the judge failed to take any or any adequate account of the fact that the appellants had been residing in a property owned by the sponsor, a consideration which was relevant to the existence of family life. Finally, it is submitted that the judge erred in failing to separately consider with adequate care the second appellant's circumstances, which differed in material respects from those of the first.

8. Permission was subsequently granted on all grounds.

9. At the hearing before us we received helpful and concise submissions from the representatives, for which we are grateful.

10. During the course of her submissions, Ms Lecointe, in our view fairly and appropriately, conceded that the judge had misdirected himself in law in respect of the appropriate test of family life in cases such as the present.

11. We conclude that the judge failed to direct himself to and apply the "real, committed, or effective support" test set out in Rai. Instead, he focused on financial and/or emotional dependency, which was not the correct approach. There is no reference to the correct test in the judge's decision, or any reference to the judgment in Rai. That of itself does not disclose an error of law. However, the repeated references to financial and/or emotional dependency is a strong indicator in our view that he did not have in mind, or at least apply, the appropriate legal test (i.e. support rather than dependency).

12. This, combined with Ms Lecointe's concession, leads us to conclude that the judge did indeed materially err in law and, given the relatively low threshold in relation to materiality (whether the error *might* have made a difference to the ultimate outcome, not *would* have done so), this is sufficient for the judge's decision to be set aside.

13. There are additional errors which were set out here in brief terms. On a fair reading of the judge's decision, he took into account the sponsor's apparent choice of leaving Nepal and coming to settle in the United Kingdom.

14. One sees from the judgment in Rai at [38]-[40] that the question of "choice" in the context of Ghurkha cases is not a relevant consideration in the assessment of whether family life exists. It appears to us as though the judge has taken this matter into account at the Article 8(1) stage, which he ought not to have. Even if it was relevant, cogent reasons were required for that in light of Rai. There are no such reasons.

15. Further, we are satisfied that the judge failed to take account of the apparently undisputed fact that the appellants had been residing in the family home in Nepal and that this was a relevant consideration to the existence of family life. We see no mention of this factor at [60] in the judge's decision. Whilst Ms Lecointe did not concede that this was an error, she did accept that it should have been considered.

16. We bear in mind Ms Lecointe's submission about the first appellant and his marital status. It is right that the judge had concerns about this aspect of the evidence as recorded at [15(iii)]. However, on our reading of that particular paragraph, the judge was not regarding that finding as decisive of the existence of family life. He stated that if indeed the first appellant was married, it would "reduce" the strength of the argument that there was family life. The judge did not state that it would extinguish the possibility of such life existing.

17. With all of the above in mind, we set aside the judge's decision on these additional bases.

18. We have in mind the Practice Direction and relevant authorities on whether to remit these appeals or retain them in the Upper Tribunal. We have decided to remit the appeals to the First-tier Tribunal because the existence or otherwise of family life is a factual matter and there is a significant degree of fact-finding to be made. In our view it is appropriate that this is done in the First-tier Tribunal.

19. We have considered whether certain findings of primary fact can be preserved. It is a difficult balance to strike. Having regard to that balance, we conclude that these appeals should be reconsidered afresh and without any preserved findings. The Appellants may count themselves as somewhat fortunate in this regard, but there is a danger of an artificial exercise on remittal if we were to try and preserve certain findings of fact, whilst setting aside others.

20. For reasons which were unclear, the judge made an anonymity direction in this case. There was no basis for that to be done and we have no hesitation in discharging that direction now.

Notice of Decision

The First-tier Tribunal erred in law and its decision is set aside.

The appeals are remitted to the First-tier Tribunal for rehearing without any preserved findings of fact.

Directions to the First-tier Tribunal

(1) These appeals are to remain linked;

(2) The appeals are remitted to the Birmingham hearing centre;

(3) The remitted appeals shall not be heard by First-tier Tribunal Judge French.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 18 December 2024