



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/03744/2020
HU/03759/2020
HU/03751/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 10 March 2022**

**Decision & Reasons Promulgated
On 1 April 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**MISS TARA DEVI RAI
MR SUMAN RAI
MISS ROSY RAI
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondents: Mr D Bhattarai, Solicitor from Gordon and Thompson
Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Entry Clearance Officer is once again “the Respondent” and the Rai siblings are “the Appellants”.
2. This appeal is brought by the Respondent against the decision of First-tier Tribunal (Judge Lingam - “the judge”), promulgated on 17 November 2021. By this decision, the judge allowed the Appellants’ appeals against the Respondent’s refusal of their human rights claims made in the context of applications for entry clearance.
3. The Appellants are all citizens of Nepal and are the adult children of the widow of a former Gurkha soldier who served the United Kingdom over a significant period of time and in an exemplary fashion.
4. The Appellants’ mother (“the Sponsor”) came to the United Kingdom to settle, as she was eventually entitled to do. At this time there was no policy in place for the Appellants to have accompanied her. There was a delay in making the applications for entry clearance on the basis of insufficient funds over a period of time. Notwithstanding this difficulty, applications were made in due course. These were deemed to constitute human rights claims and were refused by the Respondent on 6 January 2020 on the basis that the Appellants did not fall within the remit of the Rules or policy guidance relating to the family members and/or the children of former Gurkha soldiers.

The decision of the First-tier Tribunal

5. The judge found that there was family life as between the Appellants and the Sponsor and that in light of the historic injustice perpetrated against Gurkha soldiers and their family members over the course of time, the Respondent’s decisions were disproportionate and therefore unlawful under section 6 of the Human Rights Act 1998.

The grounds of appeal

6. Unhappy with this outcome, the Respondent sought permission to appeal on narrow grounds. The judge’s finding in respect of family life and Article 8(1) was not challenged. Instead, the grounds focussed on certain facets of the public interest, specifically maintenance and accommodation in the United Kingdom. It was said that the judge simply failed to grapple with these particular issues.

7. Permission to appeal was granted in brief terms and with no reasons given, a practice which is often both unhelpful and leads in some cases to a grant which should simply not have been made.

The hearing

8. At the hearing Mr Walker adopted what I consider to be a fair and realistic approach on his part, accepting that there were “some difficulties” in respect of the grounds and the nature of the challenge put forward. He accepted, in my view quite rightly, that the judge had considered all of the evidence before her and had directed herself properly to relevant case law. There was no suggestion that any of the Appellants had been involved in any misconduct. Mr Walker acknowledged the significance of the historic injustice issue.
9. Without intending any disrespect to Mr Bhattarai, in the circumstances of these particular cases I did not call on him for oral submissions.

Conclusions on error of law

10. I conclude that there are no material errors of law in the judge’s decision.
11. Her findings as to the existence of family life had not been challenged, but in any event, they were clearly open to her on the evidence and in light of the approach set out in the relevant authorities.
12. The Appellants’ cases really turned on the issue of proportionality and historic injustice. This issue has been dealt with over the course of years by the higher courts, but a useful summary is set out in the case of Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC), particularly in the citations of case law set out at paragraph 37 and in light of the Tribunal’s observations at paragraphs 38 and 41.
13. What this all goes to show is that absent significant countervailing factors, an example of which might be criminality or other significant misconduct on the part of an individual, the historic injustice is likely to be decisive in many, if not most, cases involving the children of former Gurkha soldiers. As the President put it at paragraph 41 of Patel, “the effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided there is nothing materially adverse in their immigration history.”
14. In the present cases there simply was nothing materially adverse in the Appellants’ history and in that sense the judge did not fail to have regard to a relevant matter. The issues of maintenance and accommodation in the United Kingdom are effectively part and parcel of the public interest in maintaining effective immigration control, this itself being a sub-category

of the need to maintain the economic wellbeing of the United Kingdom under Article 8(2) ECHR. Thus, issues of maintenance and accommodation are to all intents and purposes factored into the assessment of the importance of the historic injustice by the courts and Tribunal over the course of time.

15. It is of note that what was said in Patel was very much in the context of considering Part 5A of the 2002 Act and it would certainly take some persuading for me to conclude that the President's observation quoted at paragraph 13, above, was made in ignorance of all the facets of the public interest.
16. The judge took full account of the historic injustice and, seen in its proper context, this issue played, as she concluded, such a significant part in the overall proportionality exercise that the Appellants' appeals fell to be allowed. This conclusion was, in my view, clearly open to her.
17. The Respondent's appeal to the Upper Tribunal must therefore be dismissed as no errors of law have been identified.

Notice of Decision

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

The appeal to the Upper Tribunal is therefore dismissed.

No anonymity direction is made.

Signed H Norton-Taylor

Date: 17 March 2022

Upper Tribunal Judge Norton-Taylor