



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/01733/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 9 October 2017

Promulgated

On 19 October 2017

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ANJANA PARIYAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Lemer, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of a national of Nepal against a decision of the Entry Clearance Officer, now represented by the Secretary of State, refusing her entry clearance to the United Kingdom on human rights grounds.
2. The Upper Tribunal gave permission to appeal for the following reasons:
“Despite the FTJ’s otherwise careful assessment of the relationship between the Appellant and her parents, it is arguable that the FTJ may have erred in law by attaching weight to the Respondent’s view, expressed in a policy outside the Immigration Rules, that a separation of more than two years between an adult

child and her parents were generally sufficient to negate emotional dependency, and that the FTJ may have erred in law by failing to adequately consider the explanation given by the appellant's parents migrating without her (**Rai v Entry Clearance Officer, New Delhi [2017] ECWCA Civ 320**)."

3. It is right to emphasise that although the decision of the Court of Appeal in **Rai** is very pertinent, judgment was not given until 28 April 2017 which was a few days after the decision complained of was promulgated by the First-tier Tribunal. It follows that although the decision in **Rai** declares the law and binds the First-tier Tribunal, and the Judge erred if the decision is not consistent with it, the Judge is not to be criticised for failing to consider a case that is both relevant and similar on its facts because it had not been decided when the First-tier Tribunal heard the case and made its decision.
4. The First-tier Tribunal began by setting out the pertinent facts. The Appellant was born in August 1988 and so is almost 30 years old. She applied for entry clearance as the adult dependent relative of her father who is a former soldier who served the United Kingdom in the Brigade of Gurkhas.
5. The appellant's father was given entry clearance in June 2009 and settled in the United Kingdom in June 2011. The appellant's mother settled in the United Kingdom on the same day. She had had indefinite leave to enter on 8 August 2010.
6. The respondent was satisfied that an application for settlement would have been made before 2009 if that had been an option available to the appellant's father when he was discharged from the Brigade of Gurkhas.
7. However the respondent applied published guidelines and decided that the appellant was not able to show a meaningful family life with her parents in the United Kingdom because they had lived apart for more than two years at the date of application. It was the respondent's case, which the judge accepted, that the appellant's parents had left her in Nepal when they removed to the United Kingdom. She had not been left, for example, to pursue her education in a boarding school in Nepal, but the family unit had been broken up.
8. It was the appellant's case that she had remained emotionally and financially dependent on her parents although she shared a home with her brother.
9. The judge received evidence from the appellant's father and mother and read evidence and made findings. Mr Lemer has assisted me by setting out the findings that he said were made by the First-tier Tribunal Judge and which he found particularly helpful. I adopt Mr Lemer's summary although I make it clear that I agree with him that the matters set out there were established to the satisfaction of the First-tier Tribunal. I would expect Mr Lemer to get it right but the responsibility is mine and I have checked. The First-tier Tribunal made the following findings:"
 - (a) The appellant is unmarried and unemployed.
 - (b) The family belong to the oppressed Dalit Community, excluded from full participation in social occasions, and subject to discrimination.
 - (c) Financial reasons prevented the sponsor applying for the appellant to join the family at an earlier stage.
 - (d) The appellant is financially dependent upon her parents.
 - (e) There is regular contact between the appellant and her parents by phone and other modern means of communication.

(f) It is traditional for Nepalese unmarried daughters to live with their parents.”

10. The “regular contact” set out above includes two visits by the appellant’s mother to Nepal to visit her children.
11. I am quite satisfied the First-tier Tribunal erred in law. The judge said at paragraph 65:

“I bear in mind that Annex K was introduced after the cases referred to above. It could be taken that the view of the Secretary of State is that a separation of more than two years between an adult child and parents is generally sufficient to negate any such emotional dependency. I must give weight to this.”
12. It is not entirely clear what the judge meant by saying that he was bound to “give weight” to the policy. If it was his view that he had to accept that the policy was a correct statement of the law and that there was unlikely to be emotional dependency after more than two years’ separation he was wrong. Whereas the High Courts have approved parliament identifying weighty factors in an Article 8 balancing exercise I know of no authority that requires a judge to accept that a minimum degree of contact is necessary before private and family life of a kind that might come within the protection of the Convention is established. It may be the case that the Secretary of State can commit herself to an irreducible minimum so that a judge would have to accept that private and family life of a kind that engaged the protection of Article 8 existed in circumstances where the Secretary of State’s policies accepted that it existed but converse does not apply. This is not to discourage the Secretary of State from making policies but to recognise their scope and limitations.
13. Mr Bramble did not argue against this view. Rather it was his case that in fact the judge had conducted a proper balancing exercise taking into account all relevant factors and the mis-statement of the law was not in fact a misdirection.
14. The problem with that submission is that it is irreconcilable with paragraph 66 of the judge’s decision. There the judge reminded himself of the chronology, of the fact that the appellant had been living with her brother and of the fact that her mother particularly had made visits to Nepal and had kept in touch and that it was traditional for an unmarried daughter to live with her parents but found the fact that the parents were willing to leave her in Nepal and that they had been apart for “getting on for six years”, together with the fact that she was not asked to seek entry clearance until after her brother led him to conclude that “the requisite degree of emotional dependency exists, after such a passage of time, between the appellant and her parents.”
15. In short it is clear that the judge’s finding was heavily influenced by the period of absence taken with the fact that the Secretary of State considered this to be significant. What the judge did not do, just as the judge who was criticised in **Rai** did not do, was look at the reasons for the appellant’s parents leaving her and seeing how those reasons illuminated the question of whether or to what extent private and family life was diminished by reason of the separation.
16. It must be remembered that the instant case was prepared before the judgment was given in **Rai** and so the witness statements could not have been prepared with the judgment in mind. This means they may not be quite as helpful on the point as they could be but it also means that what is there

cannot be said to be there to satisfy **Rai**. The appellant's father offers an explanation. He said that he applied for settlement with his son in 2007 at that time there "were hundreds of Gurkhas" applying for indefinite leave to enter and he was advised (it is immaterial if this was good advice) by a friend that he had to obtain his own visa in order to support his family. He explained that he saved money and made an application for indefinite leave to remain for his wife and then his son and that arranging the funds for his son's application used up all his resources. Again he had said his friends had advised him that he and his wife had to be settled in the United Kingdom in order to apply for their children to join. He said it had taken him almost a year to save the money for the air fare and a deadline was looming.

17. He had said at paragraph 6:

"I wanted to apply for all my dependent children at the same time but I was unable to do so due to my financial circumstances."

18. He then said it took him over three years to save the money for just one application fee. He had applied for leave for his sons N and S and did not want to let down his daughter. Unremarkably this position is echoed but encouragingly not repeated word for word in the statement of his wife. The appellant said in her statement:

"When our father and mother left Nepal to settle in the UK, they consoled us that they will make our application as soon as possible. It was not an easy decision for our parents to leave us on our own in Nepal."

19. The appellant did not give evidence. Her parents' evidence was believed. I have decided to believe what they say in their statements namely that it was always their intention for the whole family unit to remove to the United Kingdom assuming that could be lawfully achieved but they had to go in stages to make the necessary financial arrangements. This claim is not only clearly set out in the papers but is consistent with the rest of the evidence and indicates a wholly responsible attitude to meeting the requirements of immigration control. It does not suggest any abandonment of the family unit.

20. I must ask myself very carefully if the relationship that is established is family life within the meaning of Article 8. It is clear that family life does not ordinarily end on a person's eighteenth birthday and it is right that decision-makers adopt a fact sensitive all encompassing approach to Article 8 rather than trying to narrow it down into too many restricted requirements. The plain fact is this appellant comes from a culture where there is a strong expectation that a family unit will remain together until the children leave to marry and that is especially the case for daughters. It is plainly the case that within this family unit there has remained a substantial financial dependency but also an emotional dependency. The appellant has not established herself in any other family unit. I am satisfied that the relationship she enjoys with her parents can only be described sensibly as private and family life of a kind that the United Kingdom is required to promote.

21. I then have to ask myself, having reminded myself of the five tests in R on the application of Razgar v SSHD [2004] UKHL 27 and the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002, if the decision to refuse her entry clearance is proportionate. Proportionality is possibly even more flexible than the initial test of engagement. Certainly an interference

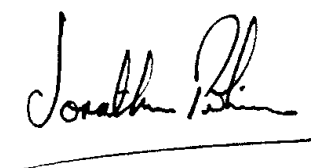
that would be proportionate in the case of, for example, a young man of 19 who still lives in the family home in the United Kingdom but who is preparing to leave shortly to take work would be quite disproportionate in the case of, for example, a 2-year-old child living in a nuclear family in the United Kingdom. The Immigration Rules generally identify the necessary requirements of entry to the United Kingdom and British law is not required to accept that different social traditions determine the outcome of an Article 8 balancing exercise.

22. However people such as the appellant are in a special position. Her father served in the armed forces and it is recognised that Gurkhas are the victims of an historic wrong. Her father would have come to the United Kingdom with his children at the end of his military service if that had been possible. I find this a relevant factor on an Article 8 balancing exercise that needs to be borne in mind. This is not a criminal case and the public interest must surely lie in encouraging and respecting those who have served the Crown and looking favourably on their desires to promote unity within their own family.
23. This is by no means straightforward but I am quite satisfied that the prolonged separation in this case was not because the private and family life has been broken up or there was any intention to abandon the family unit. I am satisfied that, to use a convenient phrase, Article 8 is engaged. I am also satisfied, given the particular facts of this case including the historic wrong done to Gurkhas and that this is an appeal that ought to have been allowed.
24. That may well have been the decision that the First-tier Tribunal would have reached if the decision in **Rai** had been available but that is not the point.

Notice of Decision

25. I am satisfied that the First-tier Tribunal erred in law. I set aside its decision and I substitute the decision allowing the appeal.

Signed

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', is written over a horizontal line.

Jonathan Perkins, Upper Tribunal Judge

Dated: 19 October 2017