



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00607/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2018

Decision & Reasons Promulgated
On 8 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

ANJU GURUNG
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Claimant: Mr T Jowett, Counsel instructed by NC Brothers & Co Solicitors

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal (Judge Anthony, sitting at Birmingham on 2 August 2017) allowing on human rights grounds the claimant's appeal against the decision of the Entry Clearance Officer to refuse her entry clearance as the adult dependant relative of the widow of a Gurkha Veteran. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The claimant is a national of Nepal, whose date of birth is 10 September 1988. On 12 April 2015 she applied to settle in the United Kingdom with her widowed mother. Her mother had arrived in the UK on 10 November 2006, and had become a permanent resident in the UK on 4 May 2010. Her father had served in the brigade of Ghurkas from 7 October 1964 to 30 October 1979. He had passed away on 1 October 2003.
3. On 7 October 2015, an Entry Clearance Officer (post-reference NEDE\3720151) gave his reasons for refusing the claimant's application for settlement. The mother had arrived in the United Kingdom as a visitor on 10 November 2006, and had settled in the UK on 4 May 2010 having been granted ILR as an ex-Ghurka widow. The claimant had lived apart from her mother since 2006, which was over 9 years ago. Her mother had migrated to the UK by choice, and there was no evidence of any care arrangements being put in place for the claimant before she migrated to the UK. This indicated that she was of the view that, as an adult, the claimant was able to care for herself.
4. She had three siblings in Nepal, and they had each other to rely on emotionally. She was in good health, she had been educated to high secondary standard (finishing in 2010) and she had spent the majority of her life in Nepal.
5. There were no obvious factors preventing her from working in Nepal, and there was no suggestion that her living conditions were anything but adequate. There was no obvious reason why her mother was unable to continue to support her financially if she was to remain in Nepal. Family life could continue as it may have done without interference by the refusal decision. Even if he was to accept that the refusal might be an interference with private life, he was not satisfied that she had established family life with her mother over and above that between an adult child and parents. This was further evidenced by her mother's decision to move to the UK without her.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Anthony. The Judge received oral evidence from the sponsor, who said that her daughter was financially and emotionally dependent on her. She depended on her for all her financial needs.
7. In her subsequent decision, the Judge set out her findings of fact from paragraph [10]. At paragraph [18], she said that she had considered whether there was any emotional dependency on the sponsor. She accepted the sponsor's evidence that the claimant depended on her for all major decisions in her life; and that in Nepalese culture, girls remained dependent upon their parents for all major decisions until they had got married. She found that the Entry Clearance Officer's decision approached the matter from the viewpoint of someone living in the West, and failed to take into account the cultural norms of Nepalese society. The Judge continued: "*Having found that the [claimant] has always lived with the sponsor until the sponsor relocated to the UK in 2006, I conclude that the [claimant] has a strong bond with the sponsor and that the relationship goes beyond the usual emotional ties. I have noted the documentary evidence of communication between the sponsor and the claimant. I have taken into account the frequency of the sponsor's visits to Nepal to see the claimant. Having heard all her evidence, I am satisfied that the*

claimant has always been emotionally dependent on the sponsor, having never lived apart from the sponsor until the sponsor left for the UK."

8. At paragraph [19], the Judge said that, for the above reasons, she agreed with the Entry Clearance Officer that the claimant enjoyed a family life with the sponsor. She found that the immigration decision would interfere with the claimant's right to family life with the sponsor and that the interference thus engaged Article 8(1).
9. On the issue of proportionality, it was in the public interest that persons who sought leave to enter were able to speak English and were financially independent. She found that the claimant would be maintained by the sponsor and therefore she was financially independent in the sense that she was reliant upon the sponsor financially.
10. At paragraph [24], the Judge reiterated her agreement with the Entry Clearance Officer that there was family life between the claimant and the sponsor.

The Application for Permission to Appeal

11. John McGirr of the Specialist Appeals Team settled an application for permission to appeal on behalf of the Entry Clearance Officer.
12. Ground 1 was that the Judge had misdirected herself at paragraph [3] in holding that the Entry Clearance Officer did not dispute in the refusal letter that Article 8(1) was engaged. In fact, the Entry Clearance Officer's refusal was based on the proposition that there was no extant family life at a level sufficient to engage Article 8(1).
13. Ground 2 was that the Judge had made a mistake as to material fact with regard to the siblings which the claimant had in Nepal. She concentrated on the presence of one brother in Nepal, and had not given consideration towards any support that was available to the claimant from her other sibling in Nepal.
14. Ground 3 was that the Judge had misdirected herself in reverting to the conditions of family life in place when the sponsor moved to the UK in 2006, rather than the date of the appeal hearing some 11 years later. Family life could not be seen to be preserved in amber indefinitely. The Judge did not address the issue of what constituted family life when the daughter had spent a decade since the sponsor's departure receiving higher education, living independently and living in a household with a relative about whom no findings were made.
15. Ground 4 was that the Judge's proportionality assessment under section 117B of the 2002 Act was flawed. Firstly, the finding that the claimant would be financially independent was self-contradictory, as the Judge simultaneously found that she was going to be financially dependent upon the sponsor. Furthermore, there was no assessment of whether the sponsor's income was sufficient to maintain the claimant.

The Reasons for the Grant of Permission to Appeal

16. On 27 February 2018, Judge Hodgkinson granted permission to appeal on all grounds raised. It was clear, from the reading of the notice of refusal, that the Entry Clearance Officer did not accept that there existed a family life between the claimant and her

sponsor-mother, contrary to what the Judge had said at paragraphs [3] and [14] of her decision.

17. The Judge had proceeded to explain why, in any event, she was satisfied that Article 8(1) was engaged; nonetheless, she appeared to focus upon the absence of financial support from the claimant's siblings in Nepal and did not appear to have factored in the question of whether they provided emotional support to the claimant. She did not appear to have taken into account the indication that there was more than one sibling in Nepal and did not appear adequately to consider the fact that the claimant and the sponsor had lived apart for more than 10 years. This was arguably a material factor to be considered when assessing the question of family life, and also in terms of proportionality.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine an error of law was made out, Ms Fijiwala developed the arguments advanced in the grounds of appeal. In reply, Mr Jowett referred me to his skeleton argument in which he made detailed submissions as to why the appeal should be dismissed. He submitted that there had been no material mistakes of fact by the Judge. Her mistaken understanding that family life was conceded by the Entry Clearance Officer was immaterial, as the Judge had analysed the evidence and had come to an independent conclusion on family life which was reasonably open to her on the evidence.

Discussion

19. Justice must not only be done, but must be seen to be done. The Judge clearly misdirected herself on one of the two principal and controversial issues in the appeal, which was whether there was family life between the claimant and the sponsor so as to engender, at least arguably, a positive obligation on behalf of the Entry Clearance Officer to accord the claimant Article 8 relief on historic wrong grounds.
20. Although the Judge conducted her own analysis of the evidence, this was within the framework of an incorrect starting point that the Entry Clearance Officer conceded the controversial issue under discussion. Accordingly, even if I was persuaded (which I am not) that the Judge's independent analysis was sound, I find that the procedural error by the Judge is so fundamental that the Entry Clearance Officer was deprived of a fair hearing in the First-tier Tribunal.
21. I consider that the Judge did not give adequate reasons for finding that the claimant continued to enjoy family life with her mother as at the date of the appeal hearing. In **Rai -v- ECO (New Delhi) [2017] EWCA Civ 320**, Lindblom LJ at paragraph [42] reiterated that the critical question under Article 8(1) was whether the appellant's family life with his parents had subsisted at the time they chose to leave Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision*".
22. As is pleaded in the grounds of appeal, one theme in the Judge's line of reasoning in paragraph [18] appears to be that, because family life between the sponsor and the claimant existed in 2006, it can be inferred that family life still subsists now after a very

lengthy period of separation. This does not follow, as a matter of common sense. On the contrary, common sense dictates that the longer the period of separation, the less likely it is that family life still exists between an adult child and her parent. As Sedley LJ said in **Patel & Others -v- ECO (Mumbai) [2010] EWCA Civ 17** at paragraph [14]: *“You can set out to compensate for historical wrong, but you cannot reverse the passage of time.”*

23. Given the lengthy period of separation, there needed to be a careful evaluation of the evidence concerning the claimant’s alleged ongoing emotional dependency on her mother from 2006 to the date of the appeal hearing.
24. The mere fact that the sponsor had from time to time made return visits to Nepal since being granted ILR in 2010, did not in itself evidence a continuation of family life between the sponsor and the appellant (or between the sponsor and her other offspring in Nepal), for the reasons given in **Kugathas**, and also in more recent authority. In **Kopoi [2017] EWCA Civ 1511**, Sales LJ said at paragraph [30] as follows:

A three week visit would not involve a significant contribution to family life in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind would not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a “family life” which does not currently exist.

25. The extent and content of written communications between the claimant and her mother were relevant. However, as submitted by Ms Fijiwala, the Judge did not engage with the fact that the disclosed communications were recent, and did not cover most of the period of separation.
26. The fact that the claimant, who was unmarried, still deferred to her mother on major decisions in her life did not in itself establish continuing emotional dependency.
27. The other controversial issue in the appeal was proportionality. The Judge misdirected herself in holding that the claimant was financially independent.

Conclusion

28. An error of law is made out under Grounds 1, 2 and 3. Given the nature of the error of law which has been established under Ground 1, this is not an appropriate case for retention by the Upper Tribunal. Since the Entry Clearance Officer has been deprived of a fair hearing in the First-tier Tribunal, and in view of the extent of the fact-finding which is going to be required for the purposes of re-making the decision (looking afresh at the issue of subsisting family life and the evidence bearing on proportionality), this is an appropriate case for remittal to the First-tier Tribunal for a *de novo* hearing, with none of the findings of fact made by the previous Tribunal being preserved.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside in its entirety.

Directions

This appeal is remitted to the First-tier Tribunal in Birmingham for a fresh hearing to remake the decision, with none of the findings of fact made by the previous Tribunal being preserved.

I make no anonymity direction.

Signed

Date 4 June 2018

Judge Monson
Deputy Upper Tribunal Judge