Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/06889/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On Tuesday 17 September 2020	**On Tuesday, 22 September 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

TARA KUMARI RAI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: No submissions received

For the respondent: Ms S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by Upper Tribunal Judge Pickup on 23 June 2020 against the determination of First-tier Tribunal Judge Mailer, promulgated on 23 January 2020 following a hearing at Hatton Cross on 16 December 2019.

2. The appellant is a Nepali national (not Sri Lankan as stated in the grant of permission) born on 13 November 1982. She appeals the decision of the respondent of 22 February 2019 to refuse to grant her entry clearance to enable her to join her father, the sponsor, a former Gurkha soldier. He was granted settlement on 2 May 2011.

3. The respondent was not satisfied that the appellant was dependent on her father at the time of his application to settle in the UK. On his visa application form he had declared a number of dependent children but her name had not been included on the list. Additionally, the kindred roll submitted with the application did not include her name. No details of her financial commitments in Nepal had been provided and there was limited evidence of financial support from her father or contact beyond that which would be expected between an adult child and parent. The respondent noted that the sponsor had been in the UK since January 2012 and that they had not lived together since then. The respondent was not satisfied that the appellant had demonstrated that she had not formed an independent family unit. The application was also considered and refused under appendix FM of the immigration rules.

4. The appeal came before Judge Mailer who heard oral evidence from the sponsor and his wife and considered the documentary evidence and the submissions. He found that the application for entry had been made when the appellant was 36 years old, some seven years after her parents entered the UK in 2012. He noted that there was no evidence of any money transfers before 2018 and was not satisfied that there was dependency between the parties. He noted that the appellant had left the family home and moved with her sister to Kathmandu to obtain employment. He had regard to the evidence of contact between the appellant and her parents and to the visits they made. He had regard to the relevant case law but found that it had not been shown that the appellant's family life with her parents had endured after they left Nepal in 2012. Accordingly, he dismissed the appeal.

5. The appellant sought permission to appeal to the First-tier Tribunal. There were seven grounds but it has to be said that they were unfocused and repetitive.

6. The first argued that the judge made a material misdirection in law as to the relevant test and standard to be applied. It was submitted that he failed to undertake a proportionality assessment under article 8 (2). It was submitted that he failed to make any reference to support when assessing the issue of family life and that his analysis suggested that he was focusing on a different, higher standard of dependency which was not required.

7. The second ground argued that the judge erred in failing to ask the right question, focusing on irrelevant matters and failing to consider material evidence. It was submitted that he failed to give an adequate explanation for not accepting the sponsor's evidence that close ties were maintained with his children after his departure, that he had travelled to Nepal and that he had opened a bank account for the use of his children. It was also submitted that the judge did not consider why an earlier application had not been made and failed to consider the difference in labour conditions between the UK and Nepal. It was submitted that the appellant's evidence was credible, that the judge focused on financial dependence and applied the wrong test. It was submitted that the judge failed to engage with the appellant's grounds and submissions.

8. The third ground argued that the decision was based on incorrect factual basis which infected the article 8 assessment. It was maintained that the evidence before the judge was that the appellant's father had been withdrawing his pension while he was in Nepal for the use of the appellant. It was argued that the judge did not direct himself in accordance with relevant case law.

9. Ground 4 maintained that the judge failed to note that the threshold in relation to the engagement of article 8 was a low one. It was submitted that the judge should have allowed the appeal on the basis of the historic injustice. The skeleton argument had not been considered.

10. Ground 5 argued that the judge failed to properly assess all the relevant evidence and that his reasoning was inadequate.

11. The sixth ground argued that the judge failed to apply the law and case law correctly.

12. In conclusion it was submitted that the outcome might have been different had the errors not been made. It was submitted that the judge did not apply anxious scrutiny to the case.

13. Permission to appeal was refused by First-tier Tribunal Judge Loke. The appellant renewed her application to the Upper Tribunal. Similarly lengthy and unfocused grounds were put forward.

14. It was argued by way of ground 1 that there was a failure to apply the correct test for family life between adults. It was maintained that the judge set out no self direction and that it had not been shown that the correct test had been applied. Lengthy extracts from various judgments were cited and it was argued that the judge placed too high a threshold on the support required to engage article 8(1). It was further argued that the judge failed to have regard to binding case law, conflated the issues of family life and proportionality, erred in his assessment of whether article 8 was engaged and had regard to irrelevant matters and failed to have regard to established principles. It was submitted that the judge did not make any reference to support when applying the law and that his finding at paragraph 68 suggested that a higher standard was applied when the matter of support was considered. It was argued that the judge did not correctly direct himself to what support meant.

15. Ground 2 argued that the judge failed to consider material evidence. This is essentially a repetition of paragraph 7 above and I do not therefore need to repeat it here. Additionally it was argued, again, that the wrong test on financial dependency was applied, a higher threshold used and that the presence of other family members in Nepal was not determinative of whether the appellant enjoyed real, effective or committed support from her parents.

16. The third ground argued that there was a failure to perform a proportionality assessment. It was argued that the judge should have applied the case law on Gurkha cases addressing the Military Covenant and the historic injustice.

17. In conclusion it was argued that if article 8 was engaged, then the fact of historic injustice would normally require a decision in the appellant's favour. The live question for the Tribunal was thus said to be whether article 8 was engaged.

Covid-19 crisis

18. The usual procedure after the grant of permission would have been for the appeal to have been listed for hearing after the grant of permission, but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen. Instead, directions were sent to the parties accompanying the grant of permission on 26 June 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

19. The Tribunal has received written submissions from the respondent but the appellant has not responded. I am satisfied that the grant of

permission and the directions were properly served on both the appellant and her UK representatives by post. Additionally, Mr Whitwell served a copy of his submissions on the appellant's representatives by email on 18 August 2020. I now proceed to consider the matter.

20. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly"*. To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

21. I have had regard to the submissions and the evidence before deciding how to proceed. The appellant has had two opportunities to respond to the Tribunal but has failed to do so. There is no indication that the correspondence sent by the Tribunal has been undelivered. I consider that the issues to be decided are uncomplicated and straightforward. There are detailed arguments for the appellant in the grounds. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. There is provision in the rules for the Tribunal to determine an appeal on the papers and in this case I cannot see any basis on which the appellant would be disadvantaged by the lack of an oral hearing. I have regard to the importance of the matter to her and consider that a speedy determination of this matter is in her best interests. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

22. The respondent's submissions are dated 10 August 2020 and were sent to the Tribunal and to the appellant's representatives on 18 August.

23. The respondent opposes the appellant's appeal and submits that the judge directed himself appropriately. It is submitted that the judge was referred to the noted jurisprudence on the error of law (at 51)

with reference to Gurung [20130 EWCA Civ 8 with regard to the historic injustice, to Rai [2017] EWCA Civ 320 (at 17), Patel [2010] EWCA Civ 17 and Singh [2015] EWCA Civ 630 (at 24). It is submitted that the judge confirms that he has considered all the evidence placed before him (at 53) and that he expressly referred to Singh (at 78). It is submitted that the judge did not limit himself solely to the issue of finances when considering the question of support and that he noted the most recent evidence of contact between the appellant and sponsor and the family visits (at 77). It is pointed out that the grounds do not maintain that it was perverse for the judge to find there was no continuing family life between the appellant and the sponsor.

24. It is submitted that ground 2 is essentially a reason's challenge. It is pointed out that most of the factors cited by the appellant in the grounds of appeal appear in the judge's decision. Thus, the visits are referred to (at 61), the remittances (at 64 - 65) and the phone contact (at 77). It is pointed out that the grounds do not engage with the many reasons the judge gave for not accepting that family life continued between the appellant and the sponsor. These were that the appellant was 36 at the time of the application, that a number of years had elapsed between the sponsor entering the UK and the application for entry clearance being made, that the appellant had enough of an independent life to leave the family home and to relocate away from the siblings who remained at home, that she was sufficiently independent to undertake a beautician's course and enterprising enough to assist her sister in starting a beauty parlour business and thereafter seeking salaried employment when the business was not viable. It is pointed out that the evidence was found to be vague and inconsistent in places, that there was limited documentary evidence of contact and financial support prior to 2017 (at 66 and 77) and most importantly that the appellant had not even been named on the sponsor's visa application form as a dependant or on the original kindred roll (at 2).

25. It is submitted for the respondent that the findings were open to the judge to make and that more than adequate reasons had been provided to underpin the conclusion that family life between the appellant and sponsor had not endured following his departure from Nepal. It is pointed out that the appellant's disagreement and claim that a different Tribunal might have reached a different conclusion did not mean that the judge had erred in law.

26. With respect to ground 3, it is submitted that this either stood or fell with the first and second grounds. It is accepted that proportionality was not considered but it is submitted that this was not surprising given that the issue was agreed to be whether there was family life between the appellant and the sponsor. It is submitted that if the

judge's finding on family life was upheld then any absence of consideration of proportionality pursuant to Razgar was immaterial.

Discussion and Conclusions

27. I have considered all the evidence, the grounds for permission, the First-tier Tribunal's determination and the submissions made.

28. Despite the length of the appellant's grounds, the argument is essentially two fold: that the assessment of family life was not properly undertaken and that there was no proportionality assessment.

29. The judge identified the agreed issue at the start of the determination (at 7) as being whether family life existed between the appellant and sponsor. It is acknowledged in the appellant's grounds to the Upper Tribunal that that was the live issue before the Tribunal. It follows that if no family life was found, there being no private life claim put forward, then the judge had not need to undertake a proportionality assessment.

30. The judge properly considered all the evidence and confirmed this at paragraphs 8 and 54. The case law relied on was noted (at 51). It is well established that judges are not required to set out every piece of evidence or to refer to every argument made. It is enough that the reasoning is such that the losing party understands why he has lost. The judge also properly self directed at 55-57 and considered case law at 78.

31. The appellant's case is set out in full (at 9-46). The matters raised repeatedly in both sets of grounds are all present in the determination. The sponsor's evidence of contact, of Viber calls on a regular basis, his five visits and the two visits made by his wife, the fact that his army pension (described as meagre in his evidence at 14) was paid into a local bank and that he withdrew money for his children, the delay in the making of the visa application, the reason for the lack of evidence prior to 2017 and 2018 and the appellant's unemployment are all matters which are recorded in the determination.

32. I can see nothing in the determination to suggest that relevant matters were disregarded or that a higher threshold was applied. The judge properly considered the issue of family life. He took account of the evidence but concluded that the claimed support was not committed or effective. That was a conclusion open to him notwithstanding the contact between the appellant and the sponsor. Given the absence of the appellant as a dependant on the kindred roll and on the sponsor's visa application (for which no explanation has been provided), the fact that the appellant had relocated away

from the family home and had set up a business with her sister and the absence of evidence prior to 2018 when the entry clearance was made, there is nothing irrational or unreasonable in the judge's conclusion on family life. Visits and calls are what one would expect between parents and adult children. They do not establish a family life for article 8 purposes.

33. For all the above reasons, the judge was entitled to conclude that there was no family life between the appellant and the sponsor. Given that finding, there was no need to undertake a proportionality assessment and consider the issue of the historic injustice.

Decision

34. The decision of the First-tier Tribunal does not contain an error of law and it is upheld. The appeal is dismissed.

Anonymity

35. No request for an anonymity order has been made at any stage of the proceedings and I see no reason to make one.

Signed

R. Kekić
Upper Tribunal Judge

Date: 17 September 2020