



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

Appeal Number: IA/49075/2014

THE IMMIGRATION ACTS

Heard at Field House

On 8th December 2015

**Decision and Reasons
Promulgated**

On 19th January 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

**Mrs Dudh Kumari Gurungseni
(no anonymity direction made)**

Respondent

Representation:

For the Appellant: Mr Staunton, Senior Home Office Presenting Officer

For the Respondent: Mr Howells, Counsel instructed by N.C Brothers & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nepal born on the 8th July 1947. On the 1st June 2015 First-tier Tribunal Judge M. Symes allowed her appeal against a decision to refuse to vary her leave to remain and to remove her from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State

now has permission to appeal against that decision¹.

Background

2. The Respondent came to the United Kingdom in February 2014 and was given leave to enter as a visitor. She had come to visit her daughter, British citizen Chanda Kumari Gurung, who is now treated as the 'sponsor' for the purpose of this appeal. On the 31st July 2014 an application was made for the Respondent to be granted further leave to remain 'outside of the Rules'. The basis of the application was set out in a covering letter dated 28th July 2014. The Respondent had been living in Nepal for a long time without any problems. Although she had separated from her husband when the Sponsor was about two years old she had brought her up alone; when the Sponsor had moved to the UK she had moved in with her niece. In 2005 the Respondent's husband contacted her to ask for a divorce. He claimed that this was to enable him to remarry but the Sponsor suspects it was to prevent her from making any claim on his Gurkha's pension. She did not oppose the divorce and as far as she is aware it went through without any difficulty. In 2012 the niece died and the Respondent was left alone. Since she arrived in the UK neighbours in Nepal contacted her to say that her ex-husband was looking for her. The Sponsor understands from what she has been told that he has discovered that the pension is still payable to the Respondent and he wants her to transfer any entitlement to him. "Serious and credible" threats have been made. It was against that background that the Sponsor, on the Respondent's behalf, asked for an unspecified period of leave outside of the Rules: "we need my mother to stay here with us at least until we know what is happening. Please can you allow my mother to remain in this country where we can look after and protect her".
3. The Secretary of State refused the application to vary leave in succinct terms. She was not satisfied that there were any particular compelling circumstances that justified a grant of leave. The Respondent had lived on her own in Nepal for a year before she arrived in the UK and she could always return there and make an application for entry clearance as an elderly dependent relative. If she wanted to make a claim for asylum, she should do so.
4. The appeal against this decision came before Judge Symes. He heard evidence from the Respondent and the Sponsor, which he found to be credible and generally plausible. Having swiftly established that the Respondent did not meet the requirements of the Rules he proceeded to consider Article 8. Judge Symes directed himself to the authorities on when leave should be granted 'outside of the Rules', in particular Nagre [2013] EWHC 720 (Admin), Aliyu and Anr [2014] EWHC 3919 (Admin), MM and Ors [2014] EWCA Civ 985,

¹ Permission granted on the 20th August 2015 by First-tier Tribunal Judge Simpson

and SS (Congo) [2015] EWCA Civ 387 wherein the Court of Appeal agreed that “compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules”. The determination then presents an analysis of the caselaw relating to the existence of family life between adult children and their parents, concluding it to be established that such relationships are capable of engaging Article 8, albeit not as a matter of course. Applying the facts as found to that legal framework the Tribunal concludes that there is here a family life for the purpose of Article 8:

“I accept that on the facts of this case, the lengthy relationship between mother and daughter is an especially strong one, unsurprisingly given the circumstances in which they lived together following their abandonment by the Appellant’s former husband, their ties having endured throughout the many years they have lived separately.

Clearly that family life will be the subject of serious interruption if the Appellant is returned to Nepal: she has lived in this country for some time and there is a serious obstacle to her returning to her normal life, given the threats issued against her by her former husband. The family unit will be disrupted by the separation resulting from the Appellant leaving the country. The Respondent’s decision is in accordance with the law and pursues a legitimate aim, i.e. the economic well being of the country in terms of immigration control, and so the relevant issue in the appeal is thus proportionality”.

5. In addressing proportionality the determination first sets out the relevant section of Part V of the Nationality, Immigration and Asylum Act 2002, section 117B. Each sub-section is considered. The determination then concludes:

“Considering the evidence as a whole, it seems to me that it would be disproportionate to expect the Appellant to return to Nepal before her family are able to assure her return in safety and dignity. As the European Court said in *Pretty v United Kingdom* (2002) 35 EHRR 1, para 65, “the very essence of the Convention is respect for human dignity and human freedom”. In coming to this conclusion I take account of the fact that the visitor route (even allowing for Home Office policy on carers) should not be seen as a gateway to extended residence in this country and to the very high threshold set in settlement applications for adult dependent relatives, who cannot make an application from within the United Kingdom. I consider the circumstances identified above outweigh the public interest in maintaining those policy positions in the particular facts of this case. There are unusual and compelling circumstances.

I find that as things stand the Appellant’s return to Nigeria (*sic*) would represent a disproportionate interference with the family’s Article 8 rights. The consequences of my decision are a matter for the Respondent when she considers what grant of leave to remain might be appropriate. The family should not, given my findings, necessarily expect that there would be a further grant of leave to

remain: they must now put their affairs in order with appropriate speed”.

6. The appeal was thereby allowed.

The Appeal

7. The grounds of appeal are somewhat repetitive but in essence the Secretary of State submits the decision of Judge Symes to be legally flawed in the following respects:

- i) Although dressed in the language of Article 8 this was in essence a “veiled Article 3 claim” and the evidence did not establish a real risk, or flagrant denial of rights, such that Article 3 was engaged;
- ii) It is difficult to see how Article 8 was engaged, given the limited scope of the case: the application sought only a limited period of leave and the Tribunal failed to grapple with how the decision might be disproportionate in those circumstances

8. In response Mr Howells emphasised that in putting the case (he had been counsel before the First-tier Tribunal) he had not relied at all on Article 3. The case was squarely put on Article 8 grounds and this is reflected throughout the determination. The Article was engaged because of the strong bonds the Respondent shares with her daughter, and the First-tier Tribunal understood and accepted that to be the case. As to the temporary nature of the leave sought there was no legal basis for suggesting that this could bar recourse to the ECHR: the point was simply that *at this time* the separation of mother and daughter was disproportionate, given the Respondent’s age, vulnerabilities and the understandable concern about expecting her to deal with her former husband alone.

My Findings

9. It is difficult to understand why the Secretary of State for the Home Department takes the view that Judge Symes has applied Article 3 “by the backdoor”. At paragraph 15 the case for the Respondent (then appellant) is recorded as being on “grounds of her private and family life”. The legal framework set out at paragraphs 18-22 is entirely directed at Article 8. The s117B analysis and the concluding paragraphs I have set out above further reflect that. The conclusion that it would be disproportionate not to grant a period of limited leave turned not on whether there was a real risk of serious harm in Nepal, but on the particular circumstances of the case, those being that here is an elderly lady who enjoys a close dependency on her daughter and would be returning to Nepal alone. The passage cited from *Pretty* could be relevant to an Article 3 analysis but not exclusively so: that the “essence of the Convention is respect for human dignity and freedom” was equally pertinent to Article 8. The potential risk of violence, threatening behaviour and/or legal

proceedings in Nepal was in that way relevant, but it remained one facet of the Article 8 case.

10. As to the temporary nature of the leave sought that was clearly in the forefront of the Tribunal's reasoning: see paragraphs 7, 13, 23 and 26. The basis of the case was that the Sponsor requested some time to make appropriate arrangements for her mother in Nepal: that this was not an application for settlement is central to the analysis on proportionality. No legal authority is cited to support the suggestion in the grounds that the temporary nature of the leave sought brought this claim outwith the scope of the Convention.
11. This was an unusual case. The First-tier Tribunal found that on the facts there was a family life between these two adults and that there would be an interference with it should the Respondent be refused further leave and removed. Given the temporary nature of the leave sought, the family history and the close relationship between mother and daughter the Tribunal found that the decision was disproportionate. It gave reasons for doing so, having regard to all the material factors including s17B(1)-(5) and the weight to be given to the public interest. In reaching its conclusions the First-tier Tribunal did not err in law.

Decisions

12. The determination of the First-tier Tribunal contains no error of law and it is upheld.
13. I was not asked to make any direction for anonymity, and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
26th December 2015