



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01070/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 September 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SUSIL THAPA
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER -

Respondent

Representation:

For the Appellant: Mr D Shrestha of Counsel

For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nepal born on 20 June 1989. He appeals against the decision of Judge of the First-tier Tribunal Lawrence sitting at Hatton Cross on 2 November 2017 in which the Judge dismissed the Appellant's appeal against the decision of the Respondent dated 21 December 2016. That decision was to refuse the Appellant's application for leave to enter the United Kingdom as an adult dependent

relative of his mother Mrs Balumayaalisdal Maya Thapa ("the Sponsor"). The Sponsor is the widow of a former Gurkha soldier Mr Mandarbahadur Thapa, the Appellant's father who passed away on 12 October 1995.

The Explanation for Refusal

2. The Appellant told the Respondent that he was unemployed and that the Sponsor supported him. The Respondent refused the application on the basis that the Appellant had disclosed no disability or provided any evidence that he was unable to care for himself on a daily basis. The application was thus refused under section EC-DR 1.1 of Appendix FM of the Immigration Rules which applies to adult dependent relative applications such as this made out of country.
3. The Respondent also refused the application under Annex K of the immigration directorate instructions Chapter 15 section 2A. These did not assist the Appellant because the Sponsor had not been granted settlement under the 2009 discretionary arrangements and Annex K did not make provision for adult children of an ex-Gurkha widow. The Respondent did not consider there were any exceptional compassionate circumstances which would lead to a grant of entry clearance. The Appellant had grown up in Nepal and the Sponsor had chosen to apply for a settlement visa when the Appellant was already an adult in the full knowledge that the Appellant would not automatically qualify for settlement.
4. There was no bar to the Sponsor returning to Nepal if she so chose where family life could be continued. The family life between the Sponsor and the Appellant was not over and above the normal emotional ties between an adult child and his parent. The historical injustice was not such as to have prevented the Appellant leading a normal life and did not outweigh the proportionality assessment under Article 8.

The Decision at First Instance

5. The Judge heard oral evidence from the Sponsor. It was submitted on the Appellant's behalf that the Appellant's late father ought to have been given the opportunity to settle many years ago and that denial was an historic injustice. The Judge found that the 2009 discretionary arrangements did not benefit the Appellant in this case and analysed the appeal outside the Immigration Rules under the provisions of Article 8 (right to respect for private and family life). He noted that the Appellant's argument that there was no employment available to him in Nepal was directly contradicted by background information produced by the Presenting Officer. That the Appellant was unemployed in Nepal did not of itself mean that Article 8 would be engaged.
6. After directing himself in relation to certain decided authorities the Judge noted that the first question to be answered was whether there was family life between the Appellant and the Sponsor given that they were both adults and the Appellant had been living in Nepal without the Sponsor for a number of years. For there to be more than normal emotional ties there would have to be a dependency which had to be

read down as meaning real, committed or effective support in a personal sense. According to the authorities family life was not suddenly cut off when the child attained majority particularly where the Appellant had lived continuously with his or her parents. The Judge emphasised that that last consideration did not apply here as the Appellant and Sponsor had lived apart (for the last four years it appears).

7. The Judge concluded at [12] that the Appellant had demonstrated his independence from the Sponsor by him living in Nepal and she in the United Kingdom. She had claimed to send the Appellant money but that alone could not create dependency. The Sponsor could relocate to Nepal to enjoy family life with him there as she was born and brought up there. She had not demonstrated that she had lost any ties to Nepal nor would she experience very significant obstacles in re-integrating there. At [13] the Judge concluded "I do not find there is family life between the Appellant and his mother over and above what is set out in the relevant case law".
8. There were no compelling circumstances to take the case outside the Rules and the historic injustice point did not bring this appeal within Article 8. The Sponsor had benefited from the historic injustice point by being granted settlement in the United Kingdom but by that time the Appellant had already established his own independent life. Mere financial dependency was not dependency which created a right under Article 8. He dismissed the appeal.

The Onward Appeal

9. The Appellant appealed against that decision arguing that separation by itself did not indicate there was no dependence. The reason for the separation ought to have weighed in the Article 8 proportionality exercise. The 2009 discretionary arrangements were updated in 2015 allowing those under the age of 31 (as the Appellant is) to qualify for settlement. The grounds cited the Court of Appeal decision of **Rai [2017] EWCA Civ 320** that that what was in issue was whether there was a family life between the Appellant and Sponsor. In **Rai** the Appellant had demonstrated that he had a family life with his parents which existed at the time of their departure to settle in the United Kingdom and had endured beyond it notwithstanding the parents left Nepal when they did.
10. There was no finding by the Judge in the instant case whether there was a family life between the Appellant and the Sponsor at the time she left Nepal. The Appellant continued to be dependent on his mother financially and emotionally. There was regular contact between the Appellant and the Sponsor. The Sponsor had raised the Appellant single-handedly from the age of 6 when the Appellant's father died. When considering applications under annex K the guidance was that decision-makers must take account of Article 8 case law in Gurkha cases. The Judge was wrong to conclude that the Appellant's case was not sufficiently compelling to consider outside the Immigration Rules under Article 8. The Appellant's father had not been allowed to settle in the United Kingdom at the end of his military service. But for that injustice the Appellant would have been able to accompany his father as a dependent child

under the age of eighteen. Citing the case of **Ghising [2013] UKUT 567** the grounds noted that the historic injustice issue would carry significant weight on the Appellant's side of the balance and was likely to outweigh matters relied upon by the Respondent where they consisted solely of the public interest.

11. The application for permission to appeal came on the papers before Upper Tribunal Judgement McWilliam on 7 June 2018. In a very brief decision she granted permission stating "it is arguable that the Judge's decision in respect of family life is inadequately reasoned". There was no reply from the Respondent to the grant.

The Hearing Before Me

12. In consequence of the grant of permission to appeal the matter came before me to decide whether there was a material error of law such that the decision fell to be set aside and the appeal reheard. If there was not, then the decision of the First-tier would stand.
13. Counsel for the Appellant relied upon his skeleton argument which made a number of generic submissions on family life and the historic injustice. He submitted that there was a clear error of law in the determination in that there had been no consideration of family life. The Judge had made no findings on any issue. This was not an ordinary Article 8 case this was a Gurkha case. There had been no consideration given to the historic injustice. The Sponsor had no family in the United Kingdom and had raised the Appellant herself. There was an emotional dependency. If there had been a policy to which the Appellant was entitled he would have applied earlier. She left money for the Appellant when she visited him each year in Nepal. The question was whether there was a family life when the Sponsor came to the United Kingdom and whether that family life continued. The case should be remitted back to the First-tier to be reconsidered with no findings preserved.
14. In response the Presenting Officer argued that in [9] to [13] of the determination the Judge properly considered whether family life was present between the Appellant and the Sponsor. The Judge was aware he could find there was family life between an adult child in Nepal and one parent in United Kingdom. His reasons for not so finding were brief but adequate. He noted the background information supplied by the Respondent that employment was available in Nepal. The Appellant was independent as the Judge had found. The remittances did not of themselves create a dependency. Even if the Judge's remarks about the Sponsor relocating to Nepal were irrelevant, the Judge had given adequate reasons for rejecting the claim to family life. There was no material error of law in the decision.
15. In response, counsel argued that the Appellant was unemployed and had never been able to find a job even if jobs were available. The Judge had made no finding of whether the Appellant could find a job, the Appellant was not well educated and came from a remote village in Nepal. There had been no challenges to the Appellant's evidence apart from the one point that work was available in Nepal.

Findings

16. The issue in this case was whether the Appellant could succeed outside the Immigration Rules under the provisions of Article 8. He could not bring himself within the provisions in the rules relating to adult dependent relatives because he is in good health and does not require assistance for day-to-day activities. The Appellant's alternative argument was that he should succeed under annex K because that had been updated in 2015 by extending an ability to apply to settle to adult dependent children of Gurkhas up to age 30. The Appellant had applied in December 2016 to join his mother under annex K. If he had been allowed to settle under the 2009 policy, he would have been able to settle with the Sponsor but the separation was in part caused as a result of the 2009 policy wrongly precluding him from entering the United Kingdom because of his age.
17. The Judge was aware of that argument, writing at [7] that since the Appellant's father had passed away some fourteen years before the discretionary arrangements were brought in in 2009 the Appellant could not benefit from the 2009 discretionary arrangements. In any event as the Respondent pointed out in the refusal decision, the 2009 policy permitted children under the age of 18 to apply and since the Appellant was over 18 when he applied the policy could not apply to him. The argument made by the Appellant in essence is that the restriction contained in the 2009 arrangements was unlawful but in the absence of authority that they have been struck down (as opposed to amended by the Respondent in 2015), I do not consider there is any merit in that argument. The position remains as the Judge pointed out that the Appellant could not bring himself within the 2009 discretionary arrangements.
18. The case could thus only be considered outside the Rules under Article 8. In the case of **Rai** the Court of Appeal had emphasised that the correct approach was not to say that there was no valid claim because of the decision of the Sponsor to travel to the United Kingdom leaving the Appellant behind but rather to look at whether there was family life in this case deserving of protection. The Judge was aware that that was the appropriate test hence his reference in the determination to the various authorities that family life might continue after an Appellant had achieved majority. If there was family life deserving of protection, then the decision for the Judge would be whether the Respondent's decision to refuse entry clearance was proportionate to the legitimate aim pursued.
19. On the other hand, if there was no family life between the Appellant and the Sponsor which deserved protection then the case would not reach as far as the proportionality exercise. As the Respondent conceded in defending the decision of the First-tier Tribunal, the reasoning was brief but given that the Judge felt the case fell at an early stage of the **Razgar** questions that brevity is not altogether surprising. What the Judge was concerned about was whether the evidence before him indicated that there was a family life between the Appellant and the Sponsor. The issue as to historic injustice particularly that it would tip the balance in favour of the Appellant would only properly arise at the proportionality exercise stage. If the Judge was wrong to say

that the case did not get past a finding that there was no family life deserving of protection, then there might well be a strong argument that there was a material error of law and the case needed to be reheard.

20. If, however, the Judge was correct in his finding then the case did not reach the proportionality stage then the historic injustice argument was not relevant. In **Rai** the Court of Appeal emphasised that the assessment of family life was a two-stage process, was there family life at the time of separation and was there family life now? What the Judge in effect did at [9] was to run both of those questions into one question: whether there was family life between the Appellant and the Sponsor. That turned on whether the financial support claimed by the Sponsor was real, committed or effective. That in turn depended on whether the Appellant relied on what it was claimed was being sent to him which raised the issue of whether he could work if he chose and did not need what was being sent.
21. The evidence of whether the Appellant could find work was disputed, the Appellant's argument was that he could not find work, the Judge by contrast was evidently impressed by the Respondent's evidence that work was available in Nepal. Given the Appellant's good health it was not surprising that the Judge rejected the Appellant's evidence of an inability to work noting at [12] that the Appellant had demonstrated his independence from the Sponsor by living in Nepal and she in the United Kingdom. Since that arrangement had gone on for four years, unless the Sponsor was providing the Appellant with so much money that he did not need to work (which did not seem to be the case), it was difficult to see how otherwise the Appellant could have fended for himself for so long. The Judge did not entirely accept that the Sponsor was sending money to the Appellant noting at [12] that she "claimed" to send the Appellant money. Either way, whether the claim was correct or not the Judge did not consider that financial provision alone created dependency.
22. Although the Appellant argues that his dependency upon the Sponsor went beyond financial dependency and extended to emotional dependency, it is difficult to see how that argument can succeed on the basis of the evidence that was before the Judge. The parties had lived apart for quite some time and the Appellant had made an independent life for himself. He and the Sponsor maintain contact through annual visits by the Sponsor to the Appellant. It is difficult to see in this case how there was more than normal emotional ties between the Appellant and the Sponsor. That the case involved a Gurkha widow and her adult son did not of itself take matters significantly further. Since the Judge did not accept that there was a dependency in the case and found both that there were no compelling circumstances and that the historic injustice point did not apply, it is difficult to see how the Judge could have come to an alternative view other than the one he did which was to dismiss the appeal. I do not consider there was any material error of law in the decision in this case and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5 September 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed this 5 September 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge