Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14050/2019 (V)

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 11 March 2021	**On : 23 March 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

RITA KUMARI LIMBU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jaja, instructed by Howe & Co Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face

hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. The appellant is a citizen of Nepal, born on 17 September 1993. She applied for entry clearance on 3 April 2019, at the age of 25 years, to settle in the UK as the adult dependant child of her mother, the widow of an ex-Gurkha soldier who passed away on 9 April 1988. Her mother came to the UK on 8 March 2018.

3. The respondent refused the appellant's application for entry clearance on 9 July 2019 on the basis that she did not meet the requirements of the immigration rules, that the Home Office policy in Annex K, IDI Chapter 15, section 2A 13.2 did not include provision for adult children of ex-Gurkha widows and that Article 8 was not engaged on family or private life grounds. The respondent considered that there were no compassionate factors in the appellant's case which would warrant a grant of entry clearance outside the immigration rules.

4. The appellant appealed against that decision and her appeal was heard by First-tier Tribunal Judge Buttar on 9 October 2020 and dismissed in a decision promulgated on 20 October 2020. The judge heard from the appellant's mother, the sponsor, who stated that her daughter had studied in Nepal until the age of 18 and had been unable to find work after then. The sponsor said that she had not had enough money for both herself and her daughter to come to the UK and so she had only applied for herself. She confirmed that the appellant was living with her (the appellant's) sister Radhika. The appellant had other siblings in Nepal but only had a good relationship with Radhika. They lived in the family home which was very small and damaged and they could not afford to do any repair work. The sponsor said that she started sending money to the appellant once she began receiving money including pension credit and housing benefit, eight months after arriving here in March 2018. The money she sent was shared between the appellant and Radhika. Her other children in Nepal did not have regular employment but worked in farmlands as casual labourers. Prior to coming to the UK, she and the appellant had always lived together and she supported her financially and emotionally.

5. The judge noted the evidence that the appellant was the youngest child of the sponsor and had six other married siblings, five of whom were in Nepal. She noted that there was no evidence to support the sponsor's claims about the siblings and she considered the sponsor's evidence of the appellant's siblings to be inconsistent. The judge considered that there was nothing preventing the appellant from working in Nepal and she considered there to be no independent evidence to show that she was not working. She noted the lack of regular payslips documenting financial support from the sponsor to the appellant. The judge found that the sponsor did not provide real or effective or committed financial support to the appellant and that the appellant was not financially dependent upon the sponsor. She considered that the appellant was able to support herself by working in Nepal or with the support of her siblings. The judge did not accept that there was reliable evidence to show that the

appellant and sponsor lived together before the sponsor left Nepal in 2018 and found in any event that any ties between them before the sponsor left Nepal did not go beyond the emotional or financial ties existing between a mother and unemployed daughter living in the same household. The judge found that since the sponsor left Nepal the level of contact did not demonstrate family life beyond the normal ties of love and affection between an adult child and their parents. She concluded that family life did not currently exist between the appellant and the sponsor and found that Article 8(1) was not engaged. She accordingly dismissed the appeal without the need to consider proportionality under Article 8(2).

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had misdirected herself in law and reached contradictory conclusions, applying the wrong test for establishing whether family life existed and whether Article 8(1) was therefore engaged.

7. Permission was granted in the First-tier Tribunal on 11 December 2020 and the matter then came before me.

Hearing and submissions

8. Both parties made submissions before us.

9. Ms Jaja submitted that the judge had misdirected herself on the law and made contradictory findings. Ground 1 was that, whilst the judge referred at [18] to the test for family life as set out in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320, as "real, committed or effective support", she applied the wrong test at [40] by requiring the appellant to show that she was "wholly reliant on her mother". Ground 2 was that the judge elevated the test at [41] by requiring "real, effective *and* committed support". Ground 3 was the judge's contradictory findings at [43] and [44], where she set out the five stages in Razgar [2004] UKHL 27, found that the second step of interference with family life was met, but then found that family life was not engaged. Ground 4 was that the judge's finding at [20], that there *must* be a dependency between the sponsor and child, was inconsistent with the extract from Rai at [18] where it was said that an extant family life fell well short of what constituted dependency. Ground 5 was that the judge's finding at [17], that it would only be in rare cases that family life between a parent and child engaged Article 8 when they were in different countries, was contrary to the guidance in Rai. Ground 6 was that the judge had made a misdirection on the facts by considering that the appellant was living with her sister, whereas that was only a temporary address pending her move to the UK and that her permanent address was where she had lived all her life with her mother. Ms Jaja submitted that when these matters were all taken together cumulatively, the judge's decision was not sustainable and the case needed to be re-heard.

10. Mr Kandola submitted that the judge's decision was sustainable. The judge had properly directed herself on the law, she had set out her analysis of the evidence from [30] and had made adverse credibility

findings against the sponsor at [32]. Contrary to the submissions for the appellant, the judge had not misdirected herself on the facts, but had found inconsistencies in the evidence of where the appellant was living before the sponsor left Nepal and had found there to be no family life at that time. The judge found that there was little evidence of family life since the sponsor had left Nepal and had properly entered into a fact sensitive analysis in line with the guidance in Rai. The judge had applied the right test. Whilst there was a contradiction at [44] it could not be said that that undermined the preceding properly reasoned paragraphs and it was clear that the judge found that family life had not been established for the purposes of Article 8(1).

11. In response, Ms Jaja submitted that, contrary to Mr Kandola's submission, the judge clearly found, at the end of [36], that family life *did* exist before the sponsor left Nepal. The judge had applied the wrong test and her decision was riddled with inconsistencies and misdirections.

Consideration and findings

12. I have to agree with Ms Jaja that the judge's findings and conclusions are unclear and confusing and appear to be contradictory. Having read the decision several times, it is not at all clear to me what the judge's conclusion was in regard to the existence of family life prior to the sponsor leaving Nepal. At [35] the judge found that there was an absence of reliable evidence of the appellant and sponsor having lived in the same house prior to the sponsor's departure and went on to find that even if they did live in the same house, the ties between them did not go beyond the usual ties existing between a mother and an unemployed daughter living in the same house. The sole basis for the latter finding appears to be that the judge did not believe the sponsor's evidence that the appellant could not find employment in Nepal, which seems to be a rather unsafe basis for making such a finding. That is particularly so when she went on to make a finding at [36] that the family situation was that "*the mother potentially may have financially supported an unemployed adult daughter living in the family home*". The judge's final sentence in [36], that "*that is the basis upon which I find that family life existed between the appellant and sponsor before the sponsor left Nepal*" was relied upon by Ms Jaja as a finding by the judge that family life existed prior to the sponsor's departure, but it seems to me that that sentence is as ambiguous and unclear as her preceding findings.

13. The ambiguity in the judge's findings on the existence of family life between the appellant and the sponsor prior to the sponsor leaving Nepal is clearly a material consideration in the challenge to her decision on family life existing subsequent to the sponsor coming to the UK and thereafter. Further, there is merit in Ms Jaja's challenge to the judge's application of the relevant test in assessing whether Article 8(1) was engaged, which again appears to have been predicated on the rejection of the sponsor's account of her daughter being unable to find employment and an absence of evidence to show that the appellant was "wholly reliant on her mother" (at [40]), neither of which involve the correct application of the test in Rai.

14. Whilst I do not consider the evident contradiction in the judge's findings at [43] to [44] to be particularly material, if taken alone, I do find that it is just a further example of unclear and ambiguous findings when considering the decision as a whole. I agree with Ms Jaja that, when all of these concerns are taken cumulatively, the judge's findings and conclusions are simply not sustainable and the decision cannot stand.

15. Accordingly, I set aside the judge's decision. It seems to me that the appropriate course is for the case to be remitted to the First-tier Tribunal to be heard *de novo*, with no findings preserved.

16. The appellant is advised to take this further opportunity to obtain and produce the evidence which was lacking before Judge Buttar, both in regard to her living circumstances prior to the sponsor's departure from the UK and to the nature and extent of the support provided by the sponsor since she came to the UK.

DECISION

17. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Buttar.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 12 March 2021