



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

Appeal Number: IA/00147/2014

THE IMMIGRATION ACTS

**Heard at: Field House
On: 20th March 2015**

**Determination Promulgated
On: 28th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

**Ms Asha Lumbu Kerung
(no anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Jesuram, Counsel instructed by Howe & Co Solicitors

For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal date of birth 25th December 1982. She appeals against the decision of the First-tier Tribunal (Judge Fox) to dismiss her appeal against a decision to refuse to vary her leave to enter and to remove her from the UK pursuant to s47 of the Immigration Asylum and Nationality Act 2006.
2. The basis of the Appellant's application to remain the UK was that the Secretary of State should have exercised her discretion in her

favour and granted her leave to remain in line with the published policy on dependent family members of Gurkhas; alternatively the case was put on Article 8 grounds.

3. The Respondent considered whether the Appellant met the requirements of paragraph 317 of the Rules and found that she did not. Consideration was then given to the policy expressed in the Immigration Directorates' Instructions to the effect that dependents over the age of 18 would normally need to meet the relevant criteria for settlement under the Rules (ie paragraph 317) but "in exceptional circumstances" the Secretary of State may exercise her discretion in their favour. The letter notes that this policy was directed at the children of Gurkhas who had reached majority and therefore no longer qualified for leave as children; return would leave them as "stranded siblings". The Appellant is thirty years old and has siblings in Nepal. As for Article 8, the Respondent did not accept that the Appellant's father was dependent upon her for care, as claimed. If she was financially dependent upon him for her studies, as claimed, this did not constitute exceptional circumstances.
4. The First-tier Tribunal heard evidence from the Appellant, her mother and father. Having done so it was not accepted that there was a dependency as claimed. In particular the Tribunal considered the evidence of the Appellant to be inconsistent with that given by her mother about the level of care required by her father. It was not accepted that there was a "family life" for the purpose of Article 8, nor that the Rules were met, nor that there were any "exceptional circumstances" for the Secretary of State to consider in line with her policy. At paragraph 54 there is a finding that the Appellant perpetrated deception when she entered as a student.
5. Permission was sought to appeal to the Upper Tribunal. This was refused by First-tier Tribunal Judge Page on the 24th June 2014 and upon renewal by Upper Tribunal Judge Kebede on the 1st August 2014. The Appellant successfully sought judicial review of the decision, with Mr Justice Popplewell granting permission on the 18th November 2014, and the decision to refuse permission being quashed on the 15th December 2014 by Master Gidden. On the 21st January 2015 Judge Ockelton, Vice President of the Upper Tribunal, formally granted permission.

Error of Law

6. I find, for the reasons that follow, that the decision of the First-tier Tribunal contains an error of law such that it must be set aside in its entirety.
7. The Appellant came to the UK as a Tier 4 (General) Student

Migrant in 2011. She subsequently made this application for leave to remain on the grounds set out above. As a matter of law, she was perfectly entitled to do this, and I am happy to accept Mr Jesuram's explanation that she only made her application when developments in the law gave rise to some hope that she would be entitled to remain here with her parents. The Respondent never took any issue with that chronology. It was never suggested that the Appellant had somehow acted inappropriately in entering the country as a student, and indeed it was the accepted facts (as found at paragraph 50) that the Appellant had completed her post-graduate diploma in Health and Social Care whilst here. There was no suggestion in cross-examination that the Appellant had entered the UK illegally (ie by lying about her intentions). There was therefore no evidential basis for the finding, at paragraph 54, that "the Appellant deceived the Respondent when she represented herself as a temporary migrant upon entry to the UK".

8. Mr Jesuram rightly identifies this as a matter of procedural unfairness. The Appellant was not at hearing asked about her intentions upon entry. As a matter of fairness she was entitled to be given an opportunity to address an allegation of deception. In his very erudite grounds and submissions Ms Jesuram points out that where such procedural unfairness is established it matters not whether the outcome of the appeal will be the same in the end, or would have been the same but for that unfairness. That is no doubt arguable so. In this case however there is a clear indication that the finding of deception played a central role not just in the Judge's evaluation of the Appellant's evidence, but of the substantive decision on proportionality: see for instance the comment at 54 "it is reasonable to expect that a prospective migrant who seeks to rely upon the respondent's discretion must do so with clean hands". I am not satisfied that the flawed finding can be extricated from the decision as a whole.
9. The parties agreed that where a matter is set aside for procedural unfairness, and where extensive findings of fact are required, it is appropriate to remit the matter to the First-tier Tribunal for re-making. I agree that in this case that is the most appropriate course.

Decisions

10. The decision of the First-tier Tribunal contains an error of law and it is set aside.
11. The decision in the appeal is to be re-made in the First-tier Tribunal.
12. I make no direction for anonymity because neither party has

requested one and on the facts I do not consider such an order to be necessary.

Deputy Upper Tribunal Judge Bruce
20th March 2015