



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01045/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2018

Decision & Reasons Promulgated
On 11 June 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

Appellant

and

MISS SULU DAMBERPAL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe
For the Respondent: Ms McCarthy

DECISION AND REASONS

1. For convenience I retain the designations of the parties as they were before the First-Tier Tribunal. Thus the appellant is Miss Damberpal and the ECO the respondent.
2. The appellant is a citizen of Nepal born in 1992. She appealed against a decision of the respondent made on 30 November 2015 to refuse her application for entry clearance for settlement as the adult dependent daughter of Hombir Damberpal (the sponsor).
3. The basis of the decision was that the appellant did not meet the requirements set out in Appendix FM regarding dependent relatives, nor the policy in respect of Foreign and Commonwealth HM Forces dependents over the age of 18 (IDI Ch 15, Sec 2A para 13.2 and Annex K, paragraph 9(8) as amended on 5 January 2015), or Article 8 ECHR.

4. The reasons for refusal, in summary, were that the appellant had grown up in Nepal; her parents migrated to the UK in 2013 by choice, content to leave the appellant, an adult, and without making obvious care arrangements for her. They evidently considered that she was able to care for herself. They could return to Nepal permanently or temporarily. She had been living in Nepal without her parents for two and a half years and was living and working independently. Checks had been made online which indicated that the appellant was employed as a data entry worker with a Kathmandu-based company. The respondent was not satisfied that she had given an accurate account of her circumstances in Nepal. The respondent concluded that the appellant was not wholly financially and/or emotionally dependent on the sponsor. There was no family life over and above that between an adult child and parents. Further, the reasons for refusing the application outweighed the consideration of historic injustice.
5. She appealed.

First tier hearing

6. Following a hearing at Taylor House on 29 June 2017 Judge of the First-Tier PS Aujla allowed the appeal.
7. He heard oral evidence from the appellant's parents and her sister. His findings are at paragraph [30] ff. It was conceded that the appeal could not succeed under the Rules or policy. He began by considering whether Article 8 family life existed between the appellant and her parents. He noted caselaw in particular *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 160 and the emphasis of deciding the issue on its own facts.
8. He found the evidence of the three witnesses to be credible.
9. In summary, the sponsor retired from the Gurkha Brigade in 1990 after 15 years of diligent service. His wife gave birth to four daughters, the appellant being the youngest. He had a work contract in Brunei between 1991 and 2000. Towards the end of his contract he was allowed to take his family with him to Brunei for three years. Following return to Nepal he resumed farming. In 2005 he took a job in Afghanistan. His two eldest daughters married and one moved to live in the UK, the other to Singapore. In 2010 his third daughter married. He and his wife came to the UK in 2013.
10. The appellant's position in her witness statement (at para [3]) was that she has no one living in Nepal. She was '*absolutely alone*'. She went to Kathmandu in 2005 for higher education. Later, she picked up an interest in flying and found out about courses in the Philippines. Her father paid for her to go there and between 2009 and 2011 she undertook various flying courses. Returning to Nepal she resumed her bachelor's degree in Kathmandu. She was living in rented accommodation which the sponsor paid for along with her other expenses. He also visited her for lengthy periods. He

left money from his pension for her when he visited. In 2015 she volunteered to do unpaid work for a company called Cloud Factory, a company involved in long-term relief work after the 2015 earthquake. She had tried to find employment in Nepal having completed her commercial pilot's course but had been unable to get work.

11. The judge's findings on family life are at [39]. He states:

"... (she) was living alone but was financially and emotionally dependent on her parents. She was 23 years old when she made the application. She was not in employment. She was still studying towards her bachelor's degree when she made the application. She had completed her pilot's licence but was unable to find employment. She was not working and had only undertaken voluntary work for Cloud Factory. She continued to be dependent on her parents financially and emotionally. Her other close relatives, three sisters, had got married and were living with their husbands away from the appellant. I have no reason to doubt the claim that there was extant family life between the appellant and her parents for the purposes of Article 8. I therefore find that Article 8 was engaged in the appellant's case."

12. The judge then went on to find that had it not been for the historic injustice the sponsor, who had given exemplary service, would have been entitled to come to the UK with his family many years ago and would have done so.

Error of law hearing

13. The respondent sought permission to appeal which was granted on 25 January 2018.
14. At the error of law hearing before me Ms Willocks-Briscoe sought to rely on the grounds. First, the judge failed to take the correct approach in assessing whether family life existed. She does not live alone, there is a sister and her grandmother nearby. She is living an independent life as a student and, more significantly, was abroad in the Philippines training for several years to become a pilot.
15. Second, the judge failed to give adequate weight to the Document Verification Report which noted that her own LinkedIn profile described her as working from 2012.
16. Ms Willocks-Briscoe added that it was speculation that the sponsor would have come to the UK on retirement had he been able to. Further, although the need for regard to section 117 of the Nationality, Immigration and Asylum Act 2002 Act is noted, no clear findings were made as to whether she can speak English, is able to maintain herself in the UK or successfully integrate into British society.
17. In reply, Ms McCarthy said the judge had carefully set out the appropriate caselaw and applied the correct test. It was clear that the appellant had throughout been financially dependent on her parents. She also relied on them for accommodation and her costs. She is unmarried and has always lived alone. She does not have a sister in Nepal. While she does have a grandmother she lives 350 kilometres away. She has attempted to get work but has been unable to do so. The respondent's reliance on the DVR report does not advance its case. That the appellant was merely a volunteer is

supported by a letter from the company which was before the judge. Nor is the fact that she spent time in the Philippines a matter which counts against her. Such did not breach family life, a life based in the emotional and financial support of her parents.

18. Ms McCarthy added that the appellant's parents came as early as they could. Her father could not break his contract of work in Afghanistan. It was clear from the evidence that he would have come to the UK on retirement from the British Army had he been permitted to do so.

Consideration

19. In considering this matter the first issue is whether at the date of hearing the appellant had established that as an adult she has family life with her parents.
20. As indicated the judge (at [32]) made reference to relevant case law including *Ghising*. In that case reference was made to *Kugathas v SSHD* [2003] EWCA Civ 31 where (at [14] Sedley LJ cited with approval the Commission's observation in *S v UK* [1984] 40 DR 196:

"Generally the protection of family life under Article 8 involved cohabiting dependents, such as parents and their dependant, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than normal emotional ties."

21. The Tribunal in *Ghising* went on (at [54]) to note that "Sedley LJ accepted the submission 'dependency' was not limited to economic dependency; at [17]. He added:

"But if dependency is read down as meaning 'support' in the personal sense, and if one adds, echoing the Strasbourg jurisprudence 'real' or 'committed' or 'effective' to the word 'support' then it represents in my view the irreducible minimum of what family life implies."

22. It is clear that the judge directed himself as to the appropriate test. There is no legal or factual presumption as to the existence or absence of family life. It all depends on the facts. There is no test of exceptionality.
23. In seeking to apply the caselaw to the appellant's case it was noted by the judge that she is a young unmarried woman who is financially dependent on her parents. She is not in paid work. That she is not in paid work was challenged by Ms Willocks-Briscoe on the basis of checks by the ECO which revealed that on her own LinkedIn profile it was stated that she was a "Data Entry Worker" at Cloud Factory in the period "December 2012 - the present." Her profile also mentions "Education, Sankher Dev Campus, 2012-2016." Also, "Volunteer Experience & Causes, Causes Sulu cares about: Animal Welfare."

24. On the face of it “worker” might suggest paid employment. However, the judge noted and accepted the evidence of the three witnesses that this was unpaid and “*in the nature of charitable voluntary work*” [37]. He also found that he could rely on the contents of a letter from the Senior Manager of Workforce at Cloud Factory (p51 of the appellant’s bundle), which states that her role was as a volunteer at the company; the company being involved in long term relief work after the 2015 earthquake. The judge found that the appellant additionally was “*involved in community service projects. She also volunteered in orphanages. That clearly indicated that the appellant was engaged in useful community and charitable projects as a volunteer. That was far different from what can be termed as employment.*”
25. I find that the judge’s conclusion that the appellant was not, and had never been in paid work, despite her efforts to get such particularly after her return from the Philippines, and that she was wholly financially dependent on her parents for her accommodation, education and living costs was one that was open to him on the evidence.
26. As for her claim to be emotionally dependent involving more than normal emotional ties, the judge noted the unchallenged evidence that she is a single woman not many years into her majority. She has not established a family life of her own. The attainment of majority does not end family life. It is clear that she is emotionally close to her parents, speaking to them regularly. Her parents visited for four months in 2013/14 and again in early 2015. Such amounts to more than, as the grounds claim, keeping in touch and occasional visits. All her sisters are married and live their own lives. The grandmother referred to in the grounds lives a long way away. These findings were open to the judge on the evidence.
27. It is of course the case that the appellant spent several years in the Philippines learning to fly. At that time, 2009 to 2011, her parents were still in Nepal. She was financially dependent on her father during that time. Nonetheless such would suggest an independence of spirit. It may be that during that period there was a diminished level of family life. However, having returned to take up study her parents later left for the UK. She remains financially dependent on her father. Whatever were her personal circumstances during her time in the Philippines, I do not consider that such takes away from the judge’s finding that since her return and although she is a student in Kathmandu, she is in essence, alone, a young woman reliant on her parents emotionally as well as financially and that she is not leading an independent life. She has resumed her family life. Dependence for the purposes of studies is not to be discounted (*per Pun and Others (Gurkhas-policy-article 8) Nepal [2011] UKUT 377* (at [24])). I note also the cultural factors in Nepal under which unmarried children remain part of their parents’ household.
28. It may be that a different tribunal might have reached a different conclusion on the facts as to the existence of family life but I do not consider that the judge who, as indicated, directed himself to the correct tests to be applied, was not entitled for the reasons he gave to reach his conclusion on that matter.

29. Having advanced to proportionality, as the grounds indicate, despite having noted section 117 of the 2002 Act the judge did not consider it. The appellant may well, with the flight training, speak English, but she is not financially independent. Such weighs against the appellant. However, I do not find such to be a material error. The judge noted *Ghising and others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 567:*

"[In Gurung and others [2013] EWCA Civ 8] The Court held that, as in the case of British Overseas Citizens, the historic wrong suffered by Ghurkha ex servicemen should be given substantial weight."

(headnote (3))

"Where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant's favour, where the matters relied on by the SSHD/ECO consist solely of the public interest and maintaining a firm immigration policy."

(headnote (4))

30. I do not see that the grounds are correct in stating that it was "*pure speculation*" that the sponsor would have come to the UK on retirement but for the historic injustice. He states such in his witness statement (para 4). He was found to be credible.
31. The judge's conclusion that the respondent's decision was a disproportionate breach of the right to respect for family life was one that was open to him for the reasons he gave.

Summary of Decision

The decision of the First-tier Tribunal shows no material error of law and that decision allowing the appeal on human rights grounds shall stand.

No anonymity order made.

Signed

Date 8 June 2018

Upper Tribunal Judge Conway