



Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/11281/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 May 2018

Decision and Reasons Promulgated
On: 17 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS LAL SUBA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms A O'Callaghan, counsel (instructed by N. C. Brothers & Co)
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal, born on 17 September 1943. She appeals with permission against the decision of First-tier Tribunal Judge A Kelly, promulgated on 13 October 2017. He dismissed her appeal against the respondent's refusal to grant her leave to remain in the UK under Article 8 outside the Immigration Rules. She wished to remain in the UK with her brother and other relatives rather than return to Nepal from where she left in 2015. She claimed she would have nobody to care for her there.
2. In granting permission to appeal, Judge P J Hollingworth stated inter alia, that in applying s117 Judge Kelly '...has not stated... the position in relation to finance in a way which is readily understandable in relation to the proportionality exercise in weighing all the factors'. At [25] the Judge applied s.117B of the 2002 Act and found that the appellant did not speak English and that she was not financially independent.

3. Judge Hollingworth found it to be arguable that in carrying out the proportionality exercise, the Judge had attached insufficient weight to the matters set out in ground (ii) of the permission application. This included the contention that the Judge failed to take into account that her sponsor is a former Gurkha who served in the British Army. It is asserted that the case was analogous to other adult dependent Gurkha cases and therefore involved consideration of the issues raised in Gurung v SSHD [2013] EWCA Civ 8. In particular, the issues associated with such cases are such that they are capable of “tipping the balance” in favour of the appellant in respect of proportionality under Article 8.
4. Ms O’Callaghan, who did not represent the appellant at the hearing, adopted the grounds of appeal. She submitted that it was not clear from paragraph [25] of the determination whether the Judge found whether the appellant was financially independent or to the contrary.
5. It is contended that the appellant was plainly financially independent and that her brother with whom it was found she had family life, owned his own six bedroom property in which the appellant had lived and was in receipt of an annual income of £32,970. Accordingly the appellant satisfied the financial requirements which she would have to comply with had she entered under the Rules.
6. Even if this is not an error of fact it is “perverse” because the first sentence of [25] seems to be inconsistent with the remainder of “the same.” It is submitted that as a family member of the sponsor she would be applying under Appendix FM as an adult dependent relative and would necessarily be entitled to rely on support from her brother - Rhuppiah v SSHD [2016] EWCA Civ 803.
7. In addition, Ms O’Callaghan submitted that the Judge did not set out in the proportionality assessment, the historical injustice which applied. Nor did he set out why the devastation and misery created by the Nepalese earthquake should not be a factor weighing in her favour.
8. On behalf of the respondent, Mr Kotas submitted that there are two limited grounds. He submitted that with regard to the first ground, that it is clear that the Judge found that she was dependent on the sponsor and was not financially independent. The Judge had regard to the evidence at [5] where he noted that the appellant had lived on her own in the property owned by her brother, the sponsor, in a small village. The appellant had stated that she is illiterate. The appellant stated that her brother has supported her financially whilst she was living in Nepal. He would send money. She also received income from some land that her brother owned [7]. The appellant also received a pension when she was living in Nepal.
9. Further, Mr Kotas noted that at [24], when undertaking the Article 8 proportionality assessment, the Judge had regard to the public interest factors in s.117B. He found that the appellant did not meet the requirements under the private life provisions of the Immigration Rules. Nor did she satisfy the rules relating to adult dependent relatives contained in Appendix FM. The inability to meet the Rules counts heavily against her. There has been no challenge to these findings.

10. With regard to s.117B(2) and (3) these are in any event neutral factors. The appellant can obtain no positive right to a grant of leave to remain under those sub-sections regardless of the degree of her fluency in English or the strength of her financial resources – AM (anonymity direction) v SSHD [2015] UKUT 0060.
11. Mr Kotas also referred to the decision in Rhuppiah, supra. At [63] Sales LJ, with whom the other Judges agreed, considered the meaning of the phrase “financially independent” in section 117B(3). This is an ordinary English phrase, and the First-tier Tribunal gave its natural meaning, as indicating someone who is financially independent of others. This is the correct interpretation. He found that the FTT was also entitled on the evidence to find that the applicant was not financially independent in this sense, and that this was a factor which counted against her in the Article 8 balancing exercise.
12. Mr Kotas submitted that it is clear that the appellant is financially dependent on her brother. There has been no material error of law. It is clear from the context of [25] that there has been a typographical error and that the Judge intended to find that the appellant was not financially independent. Even if she were, this amounts only to a neutral factor. It does not mean if she is in a position to show that she was independent, that the proportionality balance will be tipped in her favour.
13. Mr Kotas submitted that there is no merit in the contention in ground 2 that the sponsor is a former Gurkha in the British army and that accordingly the case was analogous to other adult dependant Gurkha cases: The “historic injustice” point is a concession which applies to an applicant who shows that but for the injustice, the sponsor, namely her husband, would have settled in the UK. He submitted that this applies in the main to widows and adult children who were prevented from coming to the UK as a result of the historic injustice.
14. There is nothing to show any historic injustice. He referred to the witness statement produced by the appellant. She married her late husband in 1971. He died during the “Ingo Gak conflict” in 1972. She lived with her parents and did not get married. She did not have children from that “wedlock.”
15. There is thus no relevant historical injustice in this case. Her brother is in the UK. He retired from the British Army and currently works for the Ministry of Defence. The appellant has visited him the UK in 2014 and returned to Nepal. In his witness statement he contended that there was no intention for her to stay in the UK during her visit in May 2015. It was due to the uninhabitable condition of the house which prompted the application of further leave to remain. It had also been submitted on her behalf that she suffers from a number of medical conditions including osteoarthritis, a skin condition and haemorrhoids, and she is on medication.
16. Mr Kotas submitted that there is no merit to the second ground either.

Assessment

17. First-tier Tribunal Judge Kelly set out the evidence in detail, noting that her sponsor has been in the UK since 1999 [12]. He had regard to the appellant’s contentions that she qualified for leave to remain under paragraph 276ADE(vi), alternatively that her appeal should succeed under Article 8 outside the Rules as a removal to Nepal would amount to a

disproportionate interference with the family life she enjoys with her brother and other relatives in the UK [15].

18. He stated at [17] that the appellant could return to Nepal and resume the life that she was leading prior to coming to the UK. She could continue to be financially supported by her brothers in the UK and through the income generated by their land in Nepal.
19. He considered whether there would be “very significant obstacles” to her integration into Nepal. He set out the relevant factors at [17–18]. The appellant has lived in Nepal for the first 71 years of her life. She has lived alone since her father died in 1997. Her husband died in 1992. She is now 74 years old. He accepted that the appellant has some health problems. None of these are severe in nature or substantially greater than those experienced by people of her age. None of the conditions requires a high level of specialist care or medication. In any event her brothers could pay for somebody in Nepal to provide her with any care that she needs. He had regard to her health problems at [19].
20. He found that she would continue to have friends and extended family members in and around her village who could offer her emotional and practical support on her return [19].
21. He also had regard to the contention that she would have no suitable accommodation in Nepal. The property was described as being in a poor state of repair and with a leaky roof. He found that the sponsor failed to offer any satisfactory explanation as to why he could not arrange to have it repaired. He has made no effort to source a suitable tradesperson in Nepal. Even if it genuinely proved to be impossible it would be open to the sponsor to identify suitable alternative accommodation for the appellant. The appellant’s reference to a snake and rat infestation inside the property is also something that could be dealt with [18].
22. He found on the evidence that she did not meet the condition in paragraph 276ADE(1)(vi) [20].
23. Judge Kelly also considered her appeal outside the Rules. He directed himself in accordance with the relevant authorities. He found that the relationship between the appellant and the sponsor is far closer than is often the case between an adult brother and sister. He accepted that she has bonded with her young grandson and other relatives here. He accordingly found that family life does exist between the appellant and her siblings in the UK – [22].
24. In the proportionality assessment, he considered the public interest factors in s.117B of the 2002 Act. He noted that the appellant did not meet the requirements under the private life provisions of the Immigration Rules. Nor did she satisfy the Rules relating to adult dependant relatives set out in Appendix FM. The ability to meet the Rules counts against her [24]. There has been no challenge to that finding.
25. I have had regard to the assertion that there is some ambiguity and lack of clarity regarding [25]. I find that it is clear from the context of the Judge’s findings as a whole that he intended to find that the appellant is not financially independent.
26. He noted that although s.117B(4) and (5) do not apply to family life, it provides that little weight should be attached to a private life established in the UK at the time when the person is in the UK unlawfully or their immigration status is precarious.

27. He found that the appellant's status has never been anything other than precarious. She came as a visitor and could have had no legitimate expectation that she would be permitted to remain here on a permanent basis [26].
28. He went on to consider whether there were any other features in her case which might weigh in her favour and which would tip the balance against the respondent's legitimate interest in maintaining effective immigration control. He found that there were not.
29. He had regard to the assertions regarding the devastation and misery caused by the earthquake of 2015, which was said to be a factor weighing in her favour. However, he was not persuaded that this was so. The circumstances are likely to be vastly more favourable than many Nepalese people of her age on account of the financial support that she is able to receive from relatives living in the UK.
30. The contentions regarding historic injustice are not relevant to the circumstances in this appeal, for the reasons already referred to.
31. Nor is she solely dependent upon a state pension or other state funding. In the circumstances he found that the decision was proportionate [27-28].
32. First-tier Tribunal Judge Kelly has undertaken a detailed assessment of the evidence and has given sustainable reasons for his findings. There is no basis for the assertion in the grounds that the decision is in any way perverse.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity order not made.

Signed

Date 12 May 2018

Deputy Upper Tribunal Judge Mailer