



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13174/2016

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 4 July 2018

Decision & Reasons Promulgated
On Thursday 12 July 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER -NEW DELHI

Appellant

And

MISS TARA DEVI PUN

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr D Balroop, Counsel instructed by Everest Law solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Entry Clearance Officer is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge L Nolan promulgated on 7 August 2017 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 14 April 2016 refusing the Appellant's human rights claim made as part of her application for entry clearance to come to the UK as the adult dependent relative of a discharged Gurkha soldier (her father). The Appellant's father has died since the date of the Respondent's decision but the Appellant continues her appeal on the basis that she wishes to join her widowed

mother who is also settled in the UK (as the wife of her Gurkha soldier husband). I refer to the Appellant's mother hereafter as "the Sponsor".

2. The Appellant is a national of Nepal. She was born on 2 November 1967 and is therefore now aged fifty years. Her parents came to the UK on 9 June 2010 following the Home Office policy in 2009 permitting them settlement. The Sponsor now lives with another of her daughters who is settled in the UK. When the Appellant's parents came to the UK, other adult dependents were not permitted to join parents under the policy. However, that policy was revised in 2015. The Appellant still fails to meet the policy though, because she was not aged under thirty years at the date of her application and the Respondent was not prepared to exercise discretion in her favour. The Respondent did not accept that the Appellant is financially and emotionally dependent on her parents in the UK. The Respondent also considered the Appellant's case under Article 8 ECHR and outwith the Immigration Rules but concluded that there were no exceptional circumstances justifying the grant of entry clearance.
3. The Judge allowed the appeal, finding that Article 8 ECHR was engaged by the family life between the Appellant and the Sponsor, that, but for the historic injustice of the Respondent's policy approach to Gurkha soldiers and their dependents, the Appellant would have been permitted to settle here with her parents long ago and that there were no other public interest considerations weighing in the balance against the Appellant.
4. The Respondent appeals the Decision on two grounds. First, the Respondent says that the Judge has failed to take account of all factors when looking at the public interest in refusing entry clearance, applying Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). That ground is said in the most recent grounds of appeal to be a rationality challenge to the finding that the Appellant's rights outweigh the public interest. Second, the Respondent submits that the Judge has failed to consider whether Article 8 ECHR is even engaged on the facts of this case.
5. Permission to appeal was refused by First-tier Tribunal Judge Grant-Hutchison on 29 January 2018. However, on renewal of the application to this Tribunal, permission was granted by Deputy Upper Tribunal Judge Appleyard on 15 March 2018 in the following terms (so far as relevant):

"...[2] The respondent's grounds of appeal are arguable. They assert that the judge has made a misdirection in law by making irrational findings in allowing this appeal on Article 8 grounds by finding that the "historic injustice" argument outweighed all other aspects of the case, erred in assessing dependency and in the application of Section 117B of the 2002 NIAA."
6. The matter comes before me to decide whether the Decision contains a material error of law. Both parties accepted that, if I found there to be an error of law in the Decision, given the basis of the challenge, the appeal could remain in this Tribunal

for re-hearing. I agreed with the representatives that if I found a material error of law, I would give directions for further evidence.

Decision and Reasons

Ground One

7. I can deal quite shortly with the first of the Respondent's grounds. That turns on the Appellant's means of support if she is permitted to come to the UK. It is common ground that, although the Sponsor lives with her other daughter, her income is derived from an occupational pension to which she is entitled by reason of her husband's service and a State Pension Credit. The Sponsor's evidence as recorded at [28] of the Decision is that she pays for all the Appellant's needs in Nepal, that the Appellant has never worked or earned her own income and that she is now wholly financially dependent on the Sponsor. The Judge accepted that evidence. When going on to consider the public interest at [29] of the Decision, the Judge records that the Sponsor is entitled to the benefits she receives in her own right and that the fact that she exists on such benefits is not a reason which outweighs the "powerful factors" in the Appellant's favour.
8. The Respondent suggests in his first ground that it is irrational for the Judge to expect the Appellant to arrive in the UK and to rely on public funds for her support. However, Mr Walker accepted that the Appellant would not be permitted recourse to public funds. Applying Section 117B, therefore, the Judge was entitled to find that the Appellant will be financially independent in the sense that she will not be a burden on the State. As the Judge observed, the Sponsor is entitled to the benefits she receives in her own right. Even assuming the Respondent is right to say that the Appellant would have no prospect of deriving an income for herself in the UK (as to which I have no information), the fact that the family decides to organise itself in such a way that the Sponsor will continue to pay for the Appellant's needs here rather than in Nepal is not something which should be weighed in the balance in favour of the public interest.
9. The Respondent mentions in his first set of grounds of appeal that the Judge has failed to consider the Appellant's ability to integrate which includes not simply the assessment of her financial circumstances but also her ability to speak English. Although I accept that there is no evidence either way about the Appellant's ability to speak English (and I note that the Sponsor gave evidence at the hearing through a Nepali interpreter which may indicate that she does not), this point is not repeated in the later grounds and Mr Walker made no submission to that effect.
10. For those reasons, the Respondent's ground one is without merit.

Ground Two

11. This was the main focus of the oral submissions before me. The Respondent's challenge is to the finding by the Judge that Article 8 is engaged at all. As such, as

I pointed out to Mr Balroop, the Judge's findings in relation to historic injustice are not relevant; those arise only in the context of the balance to be struck when assessing proportionality. The Respondent does not challenge the proportionality assessment save as outlined in ground one. In particular, at [2] of the most recent grounds, the Respondent expressly accepts that the "historical injustice" argument is an important factor in the proportionality assessment.

12. The issue in ground two is whether the Judge was entitled to find that the Appellant has family life with the Sponsor notwithstanding that they do not live together. Since both the Appellant and Sponsor are adults, that issue also turns on whether the Judge was entitled to find that the Appellant is emotionally and financially dependent on the Sponsor and whether the Appellant's evidence justifies that conclusion.
13. I leave out of account at this stage the further evidence submitted by the Appellant prior to the hearing before me. Mr Balroop accepted that this only becomes relevant in the event that I find an error of law and need to determine the matter afresh. In any event, that evidence goes to the Sponsor's need for care rather than the Appellant's dependency on the Sponsor (although I accept that this evidence might be relevant in terms of the interdependency between the Appellant and the Sponsor which goes to the issue whether there is family life).

14. I begin with the Judge's finding that Article 8 ECHR is engaged at [28] of the Decision:

"I accept that the sponsor and the appellant have been living apart since Mr and Mrs Pun came to the UK in 2010, and that it was Mr and Mrs Pun's choice to move together to the UK and leave the appellant behind alone. Mr Pun was taking advantage of a relatively new change in policy which allowed him, as an ex-Gurkha to settle in the UK, but which did not also allow the adult appellant to accompany her parents. In her evidence Mrs Pun says that this was a very difficult choice for the family to make and I accept this. It is not in dispute that until Mr and Mrs Pun left Nepal in 2010, that they and the appellant lived together as a family unit, and I so find. The evidence before me is that when Mr and Mrs Pun came to the UK, the appellant was supported financially by her father, and after his death by her mother who is in receipt of her husband's pension and State Pension Credit in her own right. Mrs Pun's evidence was that she pays for everything the appellant needs, that the appellant has never worked or earned her own income, and that the appellant was now wholly financially dependent upon her mother. I accept this as a true and credible account of the financial relationship between the appellant and the sponsor. I find that the appellant is wholly financially dependent upon her mother. I accept that both appellant and sponsor had and have a close emotional relationship, and that closeness has endured even while appellant has been living apart from the her [sic] parents. I accept that the appellant has never married and has remained in the family home for her entire life, and that she is now past the age when she could ever reasonably expect to marry and found a family of her own. I find that the appellant has not at any point established her own independent family life, but instead she remains financially and emotionally dependent upon her mother, that she remained part of her parents' household after they left Nepal, that family life existed at the point Mr and Mrs Pun left and that family life continued afterwards, and that her parents (and most latterly her mother) have accepted and retained responsibility for

the appellant. I accept that there is a family life between the appellant and the sponsor which has a dependency which goes beyond the normal parent and adult child relationship albeit that family life is conducted mainly at present over distance. I accept that this decision interferes with that family life in that the sponsor and the appellant are being prevented from living together once more."

15. Essentially, the Respondent's ground in this regard is that no adequate reasons are given and the Judge does not reference the evidence on which she bases her findings.
16. There are two legal issues which arise for consideration in relation to the Judge's finding that Article 8 is engaged. The first is whether Article 8 family life is established on the evidence. That in turn depends on whether the evidence shows that there exist more than the usual emotional ties based on the family relationship, because, as I have already noted, the Appellant and Sponsor are adult relatives.
17. Before the First-tier Tribunal, the Appellant relied on the case of Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 which was also a Gurkha case. Mr Balroop drew my attention to what the Court of Appeal said in that case at [39] as follows:

"The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "...not compulsory but ...voluntarily undertaken ..." (paragraph 20), "...having made the choice to come to the [United Kingdom]" (paragraph 21), "...the willingness of the parents to leave..." (paragraph 23), and "...their voluntary leaving of Nepal and leaving the Appellant..." (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."
18. Whilst the Judge is right to note, as she does at [12] of the Decision that this case is factually similar to the facts of Rai, she did not accept the Court of Appeal's judgment in that case as conclusive. She was right not to do so. Such cases turn on the facts.
19. The Judge also recognised at the same paragraph the importance of whether the Appellant is emotionally and financially dependent on the Sponsor. That emerges from the case of Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. Mr Balroop submitted, by reference to the case of S v UK which is one of the authorities considered in Kugathas, that the Appellant need only establish financial dependency and that this would be sufficient for her to succeed in showing the necessary ties in order to also establish that family life continues to exist. I do not accept this submission. The case of S v UK itself states that "[r]elationships between adults...would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties." Similarly, at [25] of Kugathas,

Arden LJ points to the need for “something more...than normal emotional ties”. The fact that Arden LJ went on to say that such ties “might exist if the appellant were dependent on his family or vice versa” does not indicate that only financial dependency is sufficient. There is no mention there of the dependency being “financial”; that is to read words into that citation. In addition, what is there said has to be read in the context of what precedes it where the evidence sought is that of more than “emotional ties”.

20. I turn then to the evidence on which the Appellant relies as establishing the requisite dependency. In terms of supporting evidence, there are some transfers in the bundle ([AB/238-246]). Those show payments in May 2016 of about £1000 and some separate amounts in March 2015, August 2016 and April 2017. They do not show a sequence of payments over a long period and, more importantly, do not show that the Appellant is dependent on such payments.

21. There is however more persuasive evidence contained in the witness statements of the Appellant and the Sponsor as follows:

Appellant’s statement dated 25 June 2017

“...[3] Although my parents went to the UK, they returned to Nepal each year and spent 3 months with me. That is the longest they could remain outside the UK otherwise their pension would have stopped. My parents never wanted to leave me in Nepal. They had no option as our circumstances in Nepal were dire. In Nepal we had no life. All the day was spent in doing the chores. There was very little income from my father’s pension which was spent on repaying the loans we took to shelter us.

[4] When my parents left for the UK, I was the only unmarried dependent living in the house. There was no policy of settlement for adult dependent Gurkhas at that time so we did not apply. I have applied for settlement now because of the new policy allowing over 18 children of Ex Gurkhas to settle in the UK. It is unfair to consider age as a factor of dependency as in Nepal and especially in dilapidated areas where we lived, families live together and support each other. The head of the family remains the sole bread earner for everyone. Children remain dependent on the head of the family until the females get married and leave the house. I have never been married. Our personal and family circumstances did not provide me with the opportunity for marriage. I have now passed my age for marriage. My only family is my mother and I will live with her for the rest of our lives.

[5] I confirm that I am single and I have always been dependent of my father. He had been the one who has arranged for all my needs. Now my mother sends me the money to pay for the rent and other expenses in Nepal.

[6] There is nothing for me in Nepal without my parents. I miss them very much. I talk to my mother almost every day. It brings me to tears sometimes knowing that my father is dead and my mother is getting old and needs me. It is unfair to keep me apart.

[7] I want to be independent but I need my family next to me for confidence and encouragement.

[8] I am not doing anything in Nepal. My day is spent doing household chores.

[9] I do not have anyone in Nepal to provide me with emotional or financial support. I have never received any help from my siblings other than for becoming a medium between me and my mother. It is unfair to suggest that I can live on my own

in Nepal. I have no employment or family in Nepal to support me financially or emotionally.

[10] Also, I will not find work in Nepal. I do not have the education or the skills to work in Nepal. I will still be alone.
..."

Sponsor's witness statement dated 25 June 2017

"...[5] Tara is the only one dependant on me. I really want Tara to come to the UK as it was my late husband's and mine intention to live together as a family.

[6] Prior to me departing to the UK, I was living with Tara in our family small home in Kathmandu. We are very close emotionally because she was always living with me and never left home to live by herself. Tara remains unmarried and still emotionally and financially dependant on me. She has never lived alone in Nepal until now and I am worried about her being all [sic] in Nepal.

[7] Tara and I are very close emotionally, especially since the death of her father. She seems rather anxious and depressed. I am worried that Tara being alone in Nepal without anyone looking after her. I have always been involved in her upbringing although I am in the UK I maintain close contact with her by phone. I am in contact with her via Viber 1-2 times a week. Tara keeps me involved in all aspects of her life.

[8] Tara has always been dependant on my husband and I. She does not have any property of her own. She remains in the same home where we lived as a family. My husband has paid for her education and I still provide for her daily living expenses. She lives in our small house. I send her money through money Transfer Company. She is my daughter and my responsibility.

[9] Tara is not well educated. She has studied only in a village school only up to year 6. Therefore, she is unemployed. She is unable to find a job with low level education, experience and skills. Nepal has high unemployment rate and an underdeveloped economy. I have continued to support my daughter. She is an integral part of my family.

[10] I have visited Tara many times since coming to the UI. I have my daughter together with my husband on June 2012, January 2014, December 2014 and January 2016. On June 2016 I went with my daughter Tulka to Nepal for my husband's funeral. This visit to Nepal was not of joy but of sadness. Tara was especially upset because she felt anxious that the death of her father meant that she would not be able to join me in the UK.

[11] I am 77 years old now. I have several medical issues. I am unable to perform ordinary tasks such as carrying things, cooking, washing etc and require permanent care. Tara always cared for me on a daily basis as we were not able to afford a nurse who could look after me 24 hours a day in Nepal. Although I am currently living with my daughter Tulka in England, she is unable to look after me long term. She has other commitments such as looking after her own family and her job commitment.

..."

22. Whilst I accept that the Judge did not set out this evidence in full either expressly or by reference in her reasons, she clearly had it in mind as there is reference to some of the substance of it at [28] of the Decision and the Judge accepts the evidence as true. As I have already pointed out at [18] above, whether a case meets the necessary thresholds for showing the requisite dependency and that family life remains in existence is a matter of fact on the evidence in each case. This evidence is in my estimation sufficient to prove both aspects.

23. The Judge's reasons for finding family life as set out at [28] of the Decision, can be summarised as follows:
- (1) The Appellant is and has always been wholly dependent on her parents financially;
 - (2) The Appellant has not formed her own independent family life – she is unmarried and that is now unlikely to change due to her age;
 - (3) The Appellant remained part of her parents' household even after they left Nepal as a result of that dependency.
24. Those conclusions are made out on the evidence. It is clear that the Appellant has built up no independent life of her own since her parents came to the UK. She has no job or education allowing her to obtain one, she lives alone and is both financially and emotionally dependent on her parents. Similarly, it is clear from what is said by both the Appellant and the Sponsor that the cultural expectation is that the Appellant, as the Sponsor's only adult child with no family of her own, will provide care for her ageing mother who suffers from various illnesses. The Appellant says in her statement that her "only family is [her] mother" and that she will "live with her for the rest of our lives". She says that there is "nothing for [her] in Nepal without [her] parents" and that she is "not doing anything in Nepal". The Sponsor says that "Tara is the only one dependant on me", that "Tara has always been dependant on my husband and I" and that the Appellant is "[her] responsibility".
25. That family life continued to subsist even after the Appellant's parents left Nepal does not depend simply on regular telephone contact and/or visits and transfer of funds – such might be expected in any family relationship and does not necessarily constitute family life. However, it is also worthy of note that the Appellant's parents continued to visit the Appellant in Nepal for long periods of time at regular intervals, that telephone contact has continued almost daily notwithstanding the long period that the Sponsor has been in the UK and that the Sponsor continues to support the Appellant financially, again in spite of the length of time that she and the Appellant have been separated.
26. I am mindful of the fact that the Judge did not set out the evidence on which her findings were based and that some of what I say above amounts to an expansion of the reasons given. I also make clear that, whilst the Judge was entitled to the conclusion to which she came, another Judge on the same evidence might have reached the opposite conclusion. However, I am satisfied on the basis of the evidence before the Judge and for the reasons which she gave, that she was entitled to reach the conclusion she did that Article 8 family life continues to exist between the Appellant and the Sponsor. There is no error of law in her assessment.
27. Since there is no challenge in relation to the Article 8 assessment thereafter, except as regards the Appellant's financial dependency on the Sponsor, with which I have already dealt under the heading of ground one, it follows that the Judge was entitled to reach the conclusion she did that the refusal of entry clearance is a

disproportionate interference with the family life of the Appellant. Accordingly, the Appellant's appeal succeeds.

28. The Respondent's grounds do not disclose an error of law in the Decision. I uphold the Decision with the consequence that the Appellant's appeal remains allowed.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge L Nolan promulgated on 7 August 2017 with the consequence that the Appellant's appeal stands allowed

Signed

Dated: 10 July 2018

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith