



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002078
First-tier Tribunal No:
HU/58845/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 October 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

PANCHAMAYA PUN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, instructed by Arkas Law

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

Heard at Field House on 7 October 2024

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 13 April 1980. She appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her application for entry clearance to the UK.

2. The appellant applied on 19 May 2023 for entry clearance to the UK as the adult dependent child of her mother, the sponsor, who is the widow of a former Gurkha soldier. The appellant's father, Mr Narbahadur Pun, and her mother Mrs Budhi Sara Pun, were issued settlement visas to enter the UK on 9 March 2010 and they both arrived in the UK on 9 May 2011. The appellant's father passed away in the UK on 28 March 2020 and the appellant's mother remained living here, with frequent visits to Nepal.

3. The appellant's application was refused on 6 July 2023 on the grounds that she did not meet the eligibility requirements for adult dependent children of former Gurkhas as set out in the discretionary policy for Gurkhas discharged before 1 July 1997 and their family members, that she did not meet the requirements of paragraph EC-

DR.1.1. of Appendix FM of the immigration rules as a dependent relative, that there were no exceptional compassionate circumstances relating to her individual case to justify a grant of discretionary leave outside the immigration rules and that she had failed to demonstrate that she had an established family life with her mother over and above that between an adult child and parent such that Article 8 was engaged.

4. The appellant appealed against that decision. The appeal was listed before the First-tier Tribunal to be heard on 1 March 2024.

5. In a skeleton argument for the appeal hearing, dated 11 November 2023, it was argued on behalf of the appellant that she could meet most of the requirements of the immigration rules in Annex AF (GHK) 13.2 in relation to Gurkha cases, but that she otherwise succeeded on Article 8 grounds outside the rules. It was stated that the appellant was dependent upon her mother, that she was divorced and unemployed and that she had been withdrawing money from her late father's British Army pension since 2012 and had also been receiving money from her parents and then from her mother from the UK by way of money transfers since 2012. It was stated that the appellant was emotionally as well as financially dependent upon her mother and that there had been close contact between them through visits by the sponsor to Nepal and Viber audio and video calls. It was stated that the appellant was living alone in Nepal, that she had two married siblings living in Nepal who had their own family responsibilities and did not help her and that she had two brothers living in the UK who were British citizens and who had served/were serving in the British Army. It was claimed that the appellant was not independent but relied upon her mother and that she had an established family life with her mother.

6. For the appeal the appellant produced an appeal bundle which included her divorce certificate. She also produced a statement in which she explained that she had moved back home to her parents' house after one year of marriage, as she had problems with her husband, and she then lived separately from her husband for many years, with their divorce being finalised in 2021. She stated that she had never worked in Nepal and had given up her studies before completing her university degree and was fully dependent upon her mother.

7. The respondent produced a Respondent's Review for the hearing, dated 3 January 2024, in which the respondent referred to the appellant's divorce certificate dated 23 December 2021 and tenancy agreement and concluded that the appellant had formed an independent family unit outside the family home and had been leading an independent life and was no longer the responsibility of her parents. The respondent did not accept that the financial support provided to the appellant by her mother was sufficient in itself to show that Article 8(1) was engaged and noted a lack of evidence to support the appellant's claim that the sponsor was responsible for her accommodation in Nepal. The respondent considered that the photographs and limited communication logs provided did not support the existence of emotional ties beyond the norm, and did not establish a family life in terms of Article 8(1).

8. The appellant's appeal was heard by First-tier Tribunal Judge Scullion. The appellant was legally represented at the hearing and the sponsor attended to give oral evidence in support of the appeal. It was conceded that the appellant could not meet the requirements of the immigration rules and the appeal therefore focussed on Article 8.

9. Judge Scullion dismissed the appellant's appeal in a decision promulgated on 8 March 2024. He noted that there was no evidence showing the date of the appellant's marriage, but he found that it would have been at some point before 9 May 2010

given that the appellant's evidence was that she was married for a year before separating and returning to live with her parents and that her parents came to the UK on 9 May 2011. The judge found that the appellant's family life with her parents ended when she left the family home to live with her husband and, given that the divorce registration certificate was dated 17 April 2022, he found that the appellant was married for at least 12 years and that it was unlikely that her relationship with her husband ended before her parents left to settle in the UK. He found that the appellant got divorced almost 11 years after her parents had settled in the UK and just one year before she applied for leave to enter the UK and he therefore did not accept her claim to have rekindled her family life with her parents by moving back into the family home with her parents. The judge considered it relevant that it had taken the appellant 12 years to apply for leave to enter the UK to be with the sponsor, particularly when the updated rules had allowed for an application to be made two years prior to her parents making their application. The judge also considered the evidence of communication and transfers of money but found that that did not demonstrate emotional or financial dependence upon the sponsor. The judge concluded that there was no established family life between the appellant and the sponsor and that Article 8 was not engaged.

10. The appellant sought permission to appeal against Judge Scullion's decision on two grounds, both of which asserted that the judge's assessment of Article 8(1) was unlawful. Firstly, the grounds asserted that the judge had failed to consider or properly consider the evidence in assessing Article 8(1): that he had failed to give the appellant/ sponsor an opportunity to respond to the assertion that the appellant's relationship with her husband had continued, and he had failed to consider the evidence of regular withdrawals from the sponsor's bank account and money transfers for over 10 years since 2012. Secondly that the judge, in drawing an adverse inference from the sponsor failing to seek leave earlier for the appellant to join her in the UK, had misconstrued the time-line in relation to the adult children of ex-Gurkhas.

11. Permission was refused in the First-tier Tribunal but was subsequently granted in the Upper Tribunal on a renewed application, on the following basis:

"3. The grounds challenge the assessment of whether article 8 was engaged in the context of the findings made concerning the appellant's relationship with her former husband. The grounds contend that neither the presenting officer nor the FtTJ at the hearing questioned the sponsor in relation to the appellant's marriage and as a consequence there was no opportunity to respond to the assertion that the appellant's relationship with her husband had continued (see paragraph 7 - 9 of the grounds). The decision letter did not raise this as an issue and whilst the respondent's review (paragraph 17 - 22) did raise this issue alongside with other evidential issues, I can find no reference in the decision to any challenges to the evidence of the sponsor on this issue or how that issue was addressed at the hearing. The sponsor's witness statement did refer to her daughter's circumstances. In the light of those matters and on the basis of those grounds, I grant permission based on an arguable procedural unfairness. It will be for the appellant's representative to demonstrate the procedural unfairness by providing evidence in support.

4. The grounds also seek to challenge the findings made as to the financial circumstances, whilst that appears to be no more than a disagreement with the findings made, it does form part of the analysis of article 8 overall and whether the appellant had formed an independent life which the grounds at paragraph 7 - 9 challenge.

5. Permission is therefore granted on all grounds.."

12. The respondent produced a rule 24 response opposing the appellant's appeal and asserting that the Respondent's Review provided a clear indication of the Secretary of State's position.

Hearing and Submissions

13. The matter came before me for a hearing. Both parties made submissions.

14. With regard to the first ground, Mr Balroop relied upon the transcript of the hearing before Judge Scullion, which had been produced prior to the hearing, in submitting that unfairness had arisen from the judge finding that the appellant had continued to live with her husband after her parents had settled in the UK without giving the appellant or sponsor an opportunity to respond to such a suggestion. Mr Balroop submitted that the refusal letter had not addressed the appellant's marital status and that the Respondent's Review had taken the view that the appellant had returned to the family home after her divorce. He submitted that that was consistent with the evidence in the appellant's and sponsor's statements. He submitted further that the regular withdrawals from the sponsor's bank account over a 10 year period was consistent with the claim that the appellant had moved back home and resumed family life with her parents and was consistent with the sponsor's evidence that she and her husband had continued to support the appellant from the UK. Therefore the judge's conclusion, that the appellant's marriage had continued and that she had not returned to the family home, was unfair. With regard to the second ground, Mr Balroop submitted that the judge had erred by drawing an adverse conclusion from the appellant not having applied to come to the UK as part of the family unit when her parents did, in 2011, when she had not qualify under any of the policies due to her age.

15. Ms Isherwood submitted that the judge had made no error of law. The Respondent's Review had made it clear that there were issues arising out of the appellant's and sponsor's statements and the divorce certificate and it was therefore for the appellant, who bore the burden of proof, to address the matter. Yet the sponsor was only asked one question by her representative at the hearing on the matter. The judge was accordingly entitled to find that family life ended when the appellant left her parents' home and was entitled to reject the claim that family life was subsequently rekindled. The judge considered the evidence of financial remittances and of communications and his findings in that regard at [22] and [23] were not challenged.

16. Mr Balroop, in response, reiterated his submission that the judge and/or respondent ought to have put the contentious issues to the sponsor if they had concerns about the date of the divorce certificate, but did not do so. He relied upon the Supreme Court decision in TUI UK Ltd v Griffiths [2023] UKSC 48 on the need to cross-examine where matters are challenged.

Analysis

17. It is Mr Balroop's submission that it was unfair of the judge to find that the appellant's relationship with her husband had continued until after her parents had left Nepal and that she had not returned to the family home prior to her parents' departure for the UK, when that had never previously been suggested by the respondent and when it was not raised by either the respondent or the judge at the hearing. He submitted that the Respondent's Review had taken the view that the appellant had returned to the family home after her divorce, as consistent with the evidence in the appellant's and sponsor's statements.

18. However it seems to me quite clear from the Respondent's Review that the respondent had concerns about the appellant's account of resuming her family life

with her parents after separating from her husband and that those concerns arose from the divorce certificate and in particular the date of the divorce. At [18] of the Respondent's Review the respondent expressed concerns about the accounts given in the appellant's and sponsor's statements about the timing of the divorce and required further evidence to clarify the matter and corroborate the accounts in the statements. At [19] the respondent specifically referred to the date of the divorce as stated in the divorce certificate, considering that there had been minimal time for the appellant to re-establish family life with her parents, thus plainly raising the suggestion that the relationship had not ended when the appellant had claimed. At [20] the Respondent's Review referred to the appellant returning to the family home following her divorce. However, rather than that being an acceptance of the appellant's account, as Mr Balroop appears to suggest, it is clear that the respondent was in fact making reference to the sponsor's evidence in her statement and went on to suggest that the account was at odds with the evidence of the appellant renting a single property room and living alone.

19. In such circumstances I do not see how it can possibly be suggested that the respondent had not raised any challenge to the appellant's account of her relationship, separation and divorce and how that impacted upon her family life with her parents. The respondent was plainly of the view that the appellant had, as a result of her marriage, formed an independent family unit away from the family home and was no longer the responsibility of her parents. It cannot now be claimed by the appellant that she was not aware of the case against her and that she had been deprived of an opportunity to address that case. As the respondent stated in the rule 24 response, it was open to the appellant's representatives to obtain additional evidence from the appellant or sponsor by way of further witness statements to address the respondent's concerns and to seek clarity during the live evidence. However, as Ms Isherwood pointed out, the transcript of the hearing before Judge Scullion shows that there were only limited questions put to the sponsor, none of which addressed the respondent's concerns arising from the date of the divorce. In so far as it is suggested that it was the respondent's responsibility to address all the issues of concern in cross-examination, I do not agree, when the issues had already been clearly set out in the Respondent's Review. As Ms Isherwood submitted, the burden of proof was upon the appellant to make out her case and she bore the burden of providing a proper response to the respondent's concerns. Accordingly I would agree with Ms Isherwood that it was entirely open to the judge, having had the benefit of hearing from the sponsor and considering all the evidence, to make findings on that evidence and to conclude that the appellant's relationship and marriage ended some considerable time after she was claiming and that there was no family life between the appellant and her parents at the time they left for the UK.

20. As for Mr Balroop's submission that the evidence of continued financial support from the appellant's parents and subsequently from her mother dating back to 2012 corroborated the appellant's account of having separated from her husband and returned to the family home, that was a matter considered by the judge. At [23] the judge gave reasons for finding that the withdrawals and money transfers were not in themselves sufficient to evidence financial dependency on the sponsor, in the same way that, at [22], he found that frequent contact between the appellant and the sponsor was to be expected in the case of an adult and an elderly parent. At [24] the judge made it clear that he was taking all the evidence in the round when assessing the nature of the appellant's relationship with her parents and whether it amounted to family life for the purposes of Article 8. There were clear concerns about the appellant's evidence in regard to her marriage, as already discussed, and in the circumstances the judge was fully and properly entitled to conclude that the evidence of financial support did not assist the appellant in demonstrating a subsisting family life with her parents. I fail to see how there was anything contrary to the guidance in

Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 in the judge's conclusions in that, or any other, respect and I reject the assertion that the judge's assessment was unlawful.

21.As for the second ground, which asserted that the judge had misconstrued the time-line in relation to the adult children of ex-Gurkhas, it may well be that the judge failed to comprehend or acknowledge that the appellant did not fall within the relevant policy at the time stated. However I do not consider that anything material arises from that, given the judge's findings overall about the appellant's relationship, marriage and divorce. In any event it seems to me that the judge was entitled to take account of the substantial length of time between the appellant's parents leaving Nepal and her application for entry clearance, as well as the timing of her application, when considering her marital situation and the overall assessment of whether family life continued to exist.

22.For all of these reasons I do not find the grounds to be made out. I reject the assertion that the judge's consideration and conclusions involved procedural unfairness and I likewise reject the assertion that his Article 8 assessment was not a lawful one. It cannot be said that the judge was not entitled to conclude as he did on the evidence available to him or that he made any material errors of law in reaching his decision. He assessed the evidence against the relevant legal principles and reached a conclusion which was fully and properly open to him on the basis of the evidence. Accordingly, I uphold his decision.

Notice of Decision

23.The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 8 October
2024