

C2/2016/0751

Neutral Citation Number: [2017] EWCA Civ 2697
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 05 April 2017

Before:

LORD JUSTICE BEATSON

THE QUEEN ON THE APPLICATION OF GURUNG

Applicant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

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Mr Lee appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

Judgment

LORD JUSTICE BEATSON:

1. This is a renewed application by Mrs Gurung for permission to appeal against the decision of Upper Tribunal Judge Canavan on 28 January 2016. Judge Canavan dismissed Mrs Gurung's application for judicial review challenging the decision of the Secretary of State dated 1 September 2014 refusing her permission to appeal, as did Laws LJ in an order dated 17 August 2016 after he considered the application on the papers.
2. Because the factual background is set out clearly and fully in the Upper Tribunal's decision, it is not necessary to repeat it here. In summary, the applicant has been in this country since 31 December 2005. She had obtained leave to enter as a spouse of a person present and settled here. She admits that she used deception in her application dated 12 December 2004 because her husband, whose claim for asylum had been refused on 8 October 2004, did not in fact have leave to remain at that time.
3. Thereafter in March 2009 Mr Gurung applied for leave to remain on human rights grounds with the applicant as a defendant. That application was refused and there was no appeal against it. In March 2010 Mr Gurung was told that his case was being considered under the Legacy Programme and was asked for further information about his circumstances. He explained his circumstances and again listed the applicant as his dependent. He was granted indefinite leave to remain under the Legacy Programme in a decision dated 9 December 2010, but that decision did not mention the applicant.

4. Mr Gurung's previous solicitors wrote to the Secretary of State stating that the applicant was still waiting for her status to be regularised in line with her husband's.

In a letter dated 8 December 2011 Mr Ian Hird of the Asylum Casework Directorate it was stated of the Legacy Programme that:

“Whilst it is acknowledged when resolving claims, we would normally give the same leave to remain to dependents as a main applicant, our computer records indicate that your client did not have any dependents on his claim at the time he was granted ILR, so we would not have been in a position to grant leave in line to his wife at the same time as your client.”

5. The letter requested further information in order for the Secretary of State to look further into the matter. That was provided but no further response was received. In 2013 the applicant made a number of applications for leave as the spouse of a person present and settled in the United Kingdom. Those applications were all refused with no right of appeal. Judicial review proceedings were filed on 3 January 2014 and permission was granted because it was stated that it was plain that the applicant was here as her husband's dependent on the legacy form. It was plain on the legacy form that the applicant was here as her husband's dependent and that should have been considered.
6. The proceedings were settled by consent after the Secretary of State agreed to reconsider the application. That reconsideration led to the decision dated 1 September 2014 in which the Secretary of State again refused the application. The decision letter referred to the applicant's admission that she obtained entry clearance by deception. It stated that for that reason the Secretary of State considered that her presence in the United Kingdom was undesirable. It also stated that she failed to fulfil

the requirements of appendix FM of the Immigration Rules and that she would in any event have failed to meet the requirements at paragraph EX.

7. The letter stated that while it was acknowledged that the appellant's partner was a British citizen, this did not mean the couple were unable to live together in Nepal and there were no insurmountable obstacles to them continuing their relationship there. It also stated that the applicant's husband was granted settlement in 2010 on the basis of his long residence in the UK, and that did not represent an insurmountable obstacle to him relocating to Nepal.
8. The Upper Tribunal found that under the Legacy Programme there never was any policy to grant dependents any form of leave in line with the main applicants. The judge stated that the letter from Mr Hird was somewhat ambiguous if read by a lay person with no knowledge of the normal procedures for adding a dependent to an asylum claim or the Legacy Programme (see paragraph 28). But when read in the light of the normal procedure for registering dependents in an asylum claim and the operational nature of the Legacy Programme, the letter had raised no legitimate expectation that the applicant would be granted leave to remain in line with her husband. The legacy claim was based on Mr Gurung's original asylum claim, and since the applicants did not arrive in this country until over four years after that asylum claim was refused she could not have been added to that.
9. It was submitted in writing by Mr Akinbola and advanced this morning by Mr Lee of counsel that the Upper Tribunal judge fell into two errors in her decision. First, the Legacy Programme applied not only to those whose asylum cases had not been concluded before March 2007 but also to those whose asylum applications had been

refused but there was no indication that the applicant had left the United Kingdom (see R (Geraldo) v SSHD [2013] EWHC 2763 (Admin) at paragraph 44). The second error was that it is submitted that the Secretary of State had erred in stating that Mr Gurung's leave was granted under his initial application for asylum dated 16 September 2000 because the grant of ILR in 2010 under the Legacy Programme was part of a separate process and not a reconsideration of the asylum application. The guidance issued by the Case Resolution Directorate showed that the cases within the Legacy Programme were not limited to those for whom a decision had not been reached. Since leave under the Legacy Programme was, it is submitted, not dependent on facts in place at the date of the original asylum application, the judge's conclusion that there was no policy to grant leave to remain in line with the main applicant to those who were that person's dependents at the time of the grant of leave was wrong.

10. Notwithstanding the careful and well-structured judgment of the Upper Tribunal judge, I have concluded that these grounds have a real prospect of success and satisfy the requirements of CPR part 52.6. Accordingly, I grant permission. I direct that this case be heard by a constitution of three judges, one of whom may be a puisne judge, with a time estimate of half a day.

Order: Application granted