



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/04199/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 16 October 2017

Decision and Reasons Promulgated
On: 9 November 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MISS BISHNU SEN
ANONYMITY DIRECTION NOT MADE

Respondent

Representation

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms A Jaja, counsel (instructed by Howe & Co Solicitors)

DECISION AND REASONS

1. I shall refer to the appellant as “the ECO” and to the respondent as “the claimant.”
2. The claimant is a national of Nepal born on 28 August 1976.
3. The ECO appeals with permission against the decision of First-tier Tribunal Judge Fox who allowed the claimant's appeal against the ECO's refusal of her application

for entry clearance as the dependent relative of Mrs Lacchimi Sen, her sponsor, a widow of a former Gurkha soldier discharged from service prior to 1 July 1997. The decision was promulgated on 11 July 2017.

4. Judge Fox found that the claimant could not satisfy the terms of any applicable policy [25]. However, the claimant had satisfied the burden upon her in accordance with Article 8 of the Human Rights Convention. He considered the five stage test set out in Razgar. He noted that the claimant's bundle comprised 236 pages as well as over 310 pages relating to relevant authorities.
5. The sponsor was the claimant's mother. The Judge incorrectly referred to her at [14] as having adopted "his" witness statement.
6. In her statement she provided details of her continued ties with the claimant. In fact she had spoken to the claimant on the morning of the hearing. She contended that the claimant is alone and is experiencing difficulties.
7. The sponsor was born on 18 June 1947. She was granted ILE in August 2014 under the Gurkha policy as she was a spouse of a British Gurkha veteran. She entered the UK on 25 September 2014.
8. She had consulted with friends concerning the claimant's application. They advised her to settle in the UK before the claimant made an application. She then travelled to the UK with friends in September 2014. On account of expense and the documentation procedures she had to wait for some time to save money to make the application.
9. When her husband was discharged from the army there was no settlement policy in place for British Gurkhas and their families. That was only given to Gurkha veterans more recently. They had never had the opportunity to apply for settlement together as a family immediately upon his discharge. They would have applied for settlement together had she had the opportunity to do so upon her husband's discharge.
10. She has two children, including the claimant. She also has a son who is married and lives with his family in Motipur, Butwal.
11. Her husband was originally married to his first wife who died in June 2001. He had seven children from that marriage. They are all married and live independently with their families.
12. She contended that the claimant remains wholly dependent on her and will continue to be so for the foreseeable future.
13. Her late husband enlisted in the Gurkhas on 1 December 1943 and was discharged on 22 April 1963 on termination of engagement. He was a sergeant.
14. The claimant relies on her for financial support, accommodation and all other matters throughout her life. She lives in the family home which she owns.

15. The claimant is unmarried and unemployed. She lives in the family home on her own. Her son has already claimed his share on the property and lives with his family independently.
16. She misses her daughter. The claimant does not have educational qualifications. She only had one primary school up to Class 8. The children studied up to Class 8 and then stopped as they could not afford their education in the city. Her daughter is studying an English course and bought many English books to improve her English.
17. She lives in a village where there is no proper road transport.
18. She receives a widow's pension of about £150 a month. She withdraws some money when she goes to Nepal and gives it to the claimant. She has been saving that money.
19. She stated that she is getting old and suffers from health problems. She cannot speak English. It is difficult for her to follow up hospital appointments. She does not wish to go back to Nepal and die like her husband.
20. Her daughter has no income or resources of her own. She sends her about £50-£100 a month for her daily requirements. She is living in very poor conditions. She contacts her daughter regularly. They used to talk on the telephone every day. That was expensive. Recently, she has installed Viber and needs her friend's assistance to call her daughter. This is comparatively cheap. She now speaks to her for hours and more often.
21. She requested her son to look after the claimant but the daughter in law did not want to take on the burden of an unmarried woman. This is the duty of the unmarried woman's parents.
22. She will find suitable accommodation in the UK. Her friend will help her accommodate the claimant.
23. It was difficult for her to leave her daughter behind. She came to the UK for her health and a bright future. There was also a statement from the claimant dated 15 June 2017.
24. She was subjected to very few questions during her cross examination [15-18].
25. In his findings, the Judge reminded himself that the starting point is that the entry clearance officer is entitled to control the entry of foreign nationals into the UK. He noted that the sponsor sought to understate the claimant's ties to Nepal to bolster the appeal. By her own evidence the claimant has no social contact with any other individual in any meaningful way.
26. He did not accept that the claimant lives in complete social isolation as claimed [27]. It was reasonable to expect that the claimant has access to social interaction via food markets and neighbours at a minimum. She has a telephone provided by her mother. The sponsor was reluctant to divulge extended family ties in Nepal.

27. However, the Judge stated that this could not detract from the purpose of the discretionary policy intended to address the historic injustice associated with ex-Gurkha soldiers' exclusion from the UK.
28. He accepted the documentary evidence demonstrating the claimant's relationship with her mother. There is no suggestion that the claimant's late inclusion on the kindred role cannot be relied on to show the claimant's family ties [30].
29. The discretionary policy has now evolved to include adult children to a maximum age of 30 years. This demonstrates the acknowledgement that family life can continue between adult family members beyond normal emotional ties. He recognised the state's entitlement to determine those who qualified for entry clearance. The practice however, of restricting family members who qualify for leave to enter the UK can, in certain circumstances, perpetuate continued interference with family life that those policies are intended to address - [32].
30. Article 8 is intended to address exceptional circumstances. He found that the "respondent's policies addressed the exceptional circumstances in part and it is reasonable to conclude that the policies are designed to acknowledge the interference with family life and private life historically suffered by ex Gurkha soldiers and their family members." But for the historic reluctance to acknowledge the rights of residence for such soldiers and their family members, it is reasonable to conclude that the sponsor would have settled in the UK at an earlier date. Accordingly the claimant would also have benefited from this historic entitlement [34-35].
31. But for the delay in acknowledging that right, it is most likely that the claimant would have exercised her right of residence while her father was alive. The delay caused the sponsor and the claimant to be separated. The mother had to choose between the socio economic advantages of life in the UK and family life with the claimant [36].
32. Notwithstanding embellishments to her evidence, he found that she had not formed an independent life in Nepal. She is single, lives alone and remains dependent in financial and emotional terms upon the sponsor. The claimant's siblings have established independent lives and only the claimant seeks to join the sponsor in the UK for this reason - [37].
33. The claimant would qualify under the relevant policies but for her age. Her application for entry clearance was submitted within the two years' threshold as stated within the policies. He found that the claimant's particular circumstances amounted to exceptional circumstances for the purpose of article 8. He applied the decision in Rai v ECO [2017] EWCA Civ 320.
34. He considered s.117B of the 2002 Act. The claimant is financially dependent on the sponsor who in turn relies on public funds. To bar the claimant in these circumstances would defeat the purpose of the relevant policies and the exceptions. But for the historic injustice, the claimant would not be uneducated. The language certificate described the claimant as intelligent. The document demonstrated her

willingness to engage with UK society and the socio economic advantages which flow from UK residency. [39-41].

35. Accordingly the claimant's absence from the UK constituted a disproportionate interference with any legitimate aim pursued.
36. On 18 August 2017 First-tier Tribunal Judge Saffer granted the ECO permission to appeal. It was arguable that the Judge materially erred regarding the existence of ties beyond those normally existing between adults, the impact any such ties had on proportionality and the application of s.117 of the 2002 Act.
37. Mr Clarke submitted that the Judge had regard to financial remittances. The Judge did not appear to have had regard to any evidence of regular communication between them although satisfied that they speak on the phone on a regular basis [17]. The sponsor has visited the claimant only once.
38. The limited evidence did not demonstrate emotional dependence to the Kugathas standard. He noted that in paragraph 2 of the grounds the ECO does not dispute that a family life exists between the claimant and her sponsor; simply that the evidence does not show elements of dependency beyond the normal emotional ties between adults. It is normal for adult children to keep in touch with their parents. There has to be something more, however.
39. Mr Clarke referred to the decision of the Court of Appeal in PT (Sri Lanka) v Entry Clearance Officer [2016] EWCA Civ 612. The Court considered whether the appellant's Article 8 rights had been engaged in that case. Mr Clarke submitted that there must be a fact sensitive assessment made. The Court referred at [23] to the question as to whether Kugathas establishes a rebuttable presumption against any relationship between an adult child and his parents being sufficient to engage Article 8. However, in Ghising v SSHD [2012] UKUT 00160 the Upper Tribunal was critical of that reading. The judgment in Kugathas has been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts. The Court of Appeal set out the Tribunal's full account of the Strasbourg case law at [60-61].
40. At [62] the Upper Tribunal concluded in Ghising that the different outcomes in cases with superficially similar features emphasised that the issue under Article 8 (1) is highly fact sensitive. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts to decide whether or not family life exists within the meaning of Article 8(1).
41. The approach of the Upper Tribunal in Ghising was approved by the Court of Appeal in R (Gurung) v SSHD [2013] EWCA Civ 8.
42. The Court of Appeal concluded that the position thus is that Sedley LJ's statement of the applicable principles in Kugathas has not been in any sense disapproved since it requires a fact sensitive approach, but that it requires to be understood in the light of the subsequent case law helpfully summarised in Ghising.

43. Mr Clarke submitted that the Judge was oblivious to the need for a fact sensitive assessment. There was no clear family life finding. Even if it is construed as such, it is not sufficient to constitute an infringement under Article 8.
44. Accordingly, the decision is unsafe because without a proper finding relating to family life, you do not get to consider historic injustice. Moreover, the reference to "historical injustice" by the Judge from [35] onwards amounted to pure speculation as to what someone would have done in hindsight. This should not have been given any weight in the overall proportionality assessment.
45. Nor did the Judge make any findings concerning the claimant's ability to speak English, noting that she is uneducated and has not made efforts to seek employment in Nepal. Although she may be willing to engage with the socio economic advantages flowing from UK residency, this shows that she is motivated by reasons of economic migrancy.
46. In reply, Ms Jaja referred to the ECO's grounds. She submitted that it is evident from the grounds themselves that "the ECO does not dispute that a family life exists between the claimant and her sponsor." The contention is that the evidence does not show elements of dependency beyond the normal emotional ties between adults.
47. Accordingly, it is not disputed that family life does exist between the claimant and her mother. She submitted that there is no reason to go behind that concession. That is the starting point in the appeal.
48. The complaint is that the Judge has not expressly stated what his findings are. She submitted that this amounts to a complaint made about form as opposed to substance. The Judge at [9] considered the application of Article 8 outside the Rules. He directed himself correctly as well as noting the need to consider s.117B of the 2002 Act. He took into account relevant decisions at [11] including Rai, supra. The question is whether the 'principles' from the authorities were properly applied to the evidence in this case. The substance shows that the Judge has taken into account and applied the recent case law relating to Gurkhas and dependants. There is, she submitted, no reason for the determination not to be upheld.
49. She referred to paragraph [17] in Rai. The Court of Appeal found that the legal principles relevant to the issue were not controversial. The nature of the links between the claimant and near relatives constitute relevant factors. This includes the age of the claimant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
50. Accordingly, Arden LJ stated in Kugathas that a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties. Such ties might exist if the appellant were dependent on his family or vice versa. It was not essential that members of the family should be in the same country.

51. In Patel and Others v ECO, Mumbai [2010] EWCA Civ 17, Sedley LJ stated at [14] that what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children may still have a family life with parents who are now settled here not by leave or by force of circumstance, but by long delayed right.
52. Ms Jaja noted that the Judge accepted that the evidence of the sponsor was in certain respects “understated”. According to the sponsor's evidence the claimant had no social contact with any other individual in any meaningful way. The Judge did not accept that she lives in complete social isolation as claimed [27]. Accordingly the Judge did exercise a critical assessment.
53. The Judge stated that the crucial point is not the claimant's age. However, it was not until 2015 that adult dependent children could apply under the policy.
54. Accordingly this was the government's delay in acknowledging the right of residence for ex-Gurkha soldiers and their family members. The delay caused the sponsor and the claimant to be separated.
55. She submitted that the Judge did apply the legal principles as set out in Rai at [17-18]. The Judge has stated the reason why her mother had settled here. This was as a result of a long delayed right.
56. With regard to the alleged speculation as to whether her father would have settled in the UK at an early stage, the sponsor clearly stated in the witness statement that they would have applied for settlement together had she had the opportunity to do so upon her husband's discharge.
57. Moreover, the claimant stated in her witness statement that she continued studies in English and completed an English course. She has been reading books to improve her English.
58. The financial considerations were addressed by the mother in her witness statement at [39]. Her friend will help accommodate the claimant. She will assist the claimant in finding a job. She will not be a burden on public funds. The claimant also stated that she declared in her appendix form when applying for settlement that she would find appropriate work in the UK.
59. In response, Mr Clarke submitted that the Judge has not given reasons for the conclusions reached. There is an absence of findings, particularly in relation to proportionality.

Assessment

60. It is asserted that the Judge did not indicate the basis upon which he found the claimant to be emotionally and financially dependent on her mother in the UK. It is asserted that the dependency is based on financial remittances. The Judge apparently did not have regard to the evidence of regular communication between them

including phone cards or text messages. He was satisfied that they speak to each other on a regular basis by telephone.

61. However, there was substantial evidence produced of regular communication between them by way of Viber call logs and screen shots between the claimant and her mother in the UK. There were also copies of previous telephone call details and calling cards from pages 109-151. There were also copies of money remittance receipts between the sponsor and the claimant produced at page 87-108.
62. The ECO moreover stated in the grounds of appeal that it is not disputed that the family life exists between the claimant and her sponsor.
63. The Judge was not uncritical of the sponsor's evidence regarding the assertion that the claimant has no social contact with any other individual in any meaningful way. He did not accept that she lives in complete social isolation as claimed. However, that did not detract from the purpose of the discretionary policy intending to address the historic injustice associated with ex Gurkha soldiers' exclusion from the UK [27-29].
64. Judge Fox found that the relevant policy acknowledges that family life can continue between adult family members beyond normal emotional ties [31]. He found that the claimant is single, lives alone and remains dependent in financial and emotional terms upon the sponsor [37]. He had had regard to the evidence produced in support. He has had regard to the witness statements produced as well as the sponsor's evidence.
65. During submissions it was contended on behalf of the entry clearance officer that any interference with Article 8 is proportionate. Family life can continue by visits from the sponsor [21].
66. The Judge had regard to the evidence that the claimant has not formed an independent life in Nepal [37]. She is unmarried and dependent upon her mother financially and emotionally. They cohabited until 2014. They separated only for the sponsor to exercise belated rights of residence in the UK.
67. The Judge has properly directed himself in accordance with the relevant authorities at [8 to 11] which included Rai v ECO, supra. It is evident that the Judge found as a matter of substance that family life can continue between adult family members beyond normal emotional ties, as he noted at [31]. He found that the claimant had satisfied the burden upon her in accordance with Article 8. He found in the circumstances that family life did exist between these adult relatives.
68. Judge Fox also considered as part of the proportionality assessment the historic injustice in delaying the acknowledgement of rights of residence for ex Gurkha soldiers and their family members. The sponsor did state that but for that injustice they would have settled in the UK as a family at a much earlier date. There was accordingly a proper basis for the finding that the claimant would also have benefited from this historic entitlement. [35]

69. Having applied the decision in Rai, supra, he found that the claimant's particular circumstances amount to exceptional circumstances for the purpose of Article 8 [39]. He has considered s.117B of the 2002 Act as part of his decision.
70. There have been no material errors of law.

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 direction not made.

Signed

Date 6 November 2017

Deputy Upper Tribunal Judge C R Mailer