



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05645/2015

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 9 October 2017

Decision & Reasons Promulgated
On 15 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

YVONNE ELAINE HEWITT
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Puar, Counsel

For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica who was born on 13 September 1948. Her human right's claim was refused by the Respondent on 4 September 2015 and her appeal against this decision was dismissed by First-tier Tribunal Judge Coaster in a decision promulgated on 27 January 2017. Permission to appeal to the Upper Tribunal against that decision was granted by First-tier Tribunal Judge Nightingale in a decision dated 17 August 2017.
2. In granting permission, no arguable merit was found in the grounds relating to the First-tier Tribunal's treatment of EX.1 or the findings in relation to family life between the Appellant and her sisters. Permission was granted on the basis that it was arguable that the Judge erred regarding the relationship enjoyed by the Appellant with her elderly mother for whom she provided regular, including overnight, and personal care. It was arguable that the Judge erred by applying **Kugathas v SSHD [2003] EWCA Civ 31** too strictly without regard to the guidance given in **Ghising family life-adults-**

Gurkha policy) [2012] of 'real', 'committed' or 'effective' support. It was found arguable that having failed to find family life established with the Appellant's mother, the Judge's decision was arguably incomplete as this was not considered in the proportionality exercise.

3. On 18 September 2017 the Appellant sought to renew her permission application to the Upper Tribunal concerning her challenge to the finding that she did not have family life with her sister. That application was made late and time was not extended.
4. The grounds are therefore limited to the alleged error of law in respect of the First-tier Tribunal's findings regarding family life with the Appellant's mother, Mrs Lyn. The grounds assert that the Judge's findings at paragraph 60 did not accord with the evidence. It is also said that there were 'erroneous facts' in paragraph 8 onwards as the Appellant did not, as was recorded by the Judge, work unlawfully. Further, it is submitted that the Judge seemed to have concluded that there was no evidence of more than the normal emotional ties because the care of her mother was shared by her sister and half-siblings. It is argued that simply because care is shared with her siblings this does not mean that family life does not exist. The only reason that was advanced by the Judge was that care was shared. It is said that the evidence was that the Appellant was the main carer in that she was her mother's first born, there was significant guilt in the separation in the 60's and her mother would only permit the Appellant to carry out specific tasks and became significantly distressed when she was not around. The reference to the youngest sister doing most was a reference to physical work around the house and not to the care of the mother. It is also asserted that the Judge had ignored the evidence of the Appellant's sister who stated that their mother would not accept care from anyone outside of the family and that NHS care was not appropriate in a home setting.
5. I heard submissions from Mr Puar. He said that the original grant was silent as to the recording of errors of fact in significant aspects. The finding of fact that she worked illegally tainted the way in which the Judge determined the appeal. She accepted that the Appellant was a student nurse for a period and that was the oral evidence. She did part-time work for a short period to support her full time studies. According to paragraph 12 her student visa ended in 2003, she had met her partner in 2003 and the relationship developed in 2007. The second important aspect were the findings at paragraphs 58, 59 and 60. It was recorded that the Appellant told the Tribunal that she provided majority of the care. The evidence was that the younger sister provided the heavy work at the premises. The third issue was at paragraph 43 where it was said she had been a burden on UK tax payers. What happened was that she paid her health surcharge in respect of the application. The NHS wrote to her regarding NHS treatment. The demand came after the application for leave.
6. The Appellant's case was that she enjoyed family life with mother and leave was granted on the restrictive approach to family life. The Judge only cited the key parts of **Kugathas** rather considering whether there was real, committed and effective support and she did not have regard to paragraph 56 of **Ghising**. It was not clear whether **Ghising** was considered. The evidence was that she would stay on 3 to 4 nights and

the level of care was onerous and extreme. Her other siblings were working and there had been forced separation and the emotional bond was closer than before and the learned Judge accepted that substantial care was given. The care was shared and it was not a rational finding where there was a background and real and committed and effective care over a 14 year period. The threshold was not as high for engaging Article 8 as it had been previously been found. The level of emotion or connection could not be continued and hence it was relevant to proportionality. Had there been greater regard to **Ghising** and a test of real, committed and effective support over 14 years it would have made a material difference as the learned Judge would have to grasp with splitting the family.

7. Mr Richards asked me to find that the determination disclosed no material error and **Kugathas** was correctly cited and applied. These circumstances could be distinguished from **Ghising** which was saying that family life did not cease at midnight of the 18th birthday. Taking account of the particular circumstances in overage dependents in Gurkha families even in those circumstances regard was still to be had of continuing dependence. The Judge correctly directed herself and conducted an examination of the circumstances of the particular case whether the family life extended to this relationship. In a series of detailed findings beginning with the self-direction at paragraph 55 and going through to 62 the Judge examined the facts of this case and came to a well-reasoned conclusion that whilst there was deep affection between the Appellant and her mother and personal regret at separation that did not amount to more than the usual emotional ties even taking account of the personal care and she was entirely justified in finding that there was not family life. That was a finding entirely open to her on the law and on the facts of the case and she gave full reasons and it could not be said that there was a material error leading to that finding. In all of the circumstances the determination ought to stand and he invited me to dismiss the appeal.

Discussion

8. Permission was granted in respect of the First-tier Tribunal's finding as to whether family life existed for the purposes of Article 8 ECHR. It is said at paragraph 5 of the grounds and in submissions that the Judge's findings were coloured by an erroneous finding that the Appellant worked illegally in paragraph 12 of the decision. Firstly, at this point the Judge was recording the proceedings and evidence and not making findings, and secondly there is no basis for concluding that this had any impact on her findings with regard to family life between the Appellant and her mother. The finding referred to by Mr Puar at paragraph 43 of the decision that the Appellant was a burden on UK tax payers was not challenged in the grounds of appeal.
9. The grounds assert at paragraph 4 that the Judge's findings at paragraph 60 did not accord with the evidence. The grounds state 'this wasn't the evidence' but do not go on to state what the evidence was and where it was to be found. The Judge kept a careful, typed record of the evidence which accords with the facts as she found them to be. In the absence of any indication in paragraph 5 of what evidence the Judge should have and failed to take into account I do not find that this allegation is made out.

10. I find no error in the Judge's self-direction at paragraphs 56 and 57 of the decision. She cited **Kugathas v SSHD [2003] EWCA Civ 31** and **S v UK (1984) 40 DR 196** and properly formulated the applicable test. The Judge is criticised for not citing and relying on the case of **Ghising (family life-adults-Gurkha policy) [2012] UKUT 00160** and in particular failing to have regard to the finding of the Upper Tribunal at paragraph 56 that the judgment in **Kugathas** had been interpreted too restrictively in the past. However, the issue in that case related to young adults and the relationship between parent and child after the child has attained his majority. This was not a relevant issue in this appeal.
11. It is clear from the decision of the Court of Appeal in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630** and the decision of the European Court of Human Rights in **GHB v United Kingdom [Application number 42455/98]** that the question of whether there exists family life between, or among, those under scrutiny will invariably be an intensely fact sensitive one.
12. Further, as the Upper Tribunal recently recalled the relevant principles in the case of **Dasgupta (error of law - proportionality - correct approach) [2016] UKUT 00028** this is an error of law appeal and not a challenge on the merits. Accordingly I apply the **Edwards v Bairstow [1956] AC 14** prism. There, in an error of law appeal, the House of Lords applied the standard of "*the true and only reasonable conclusion*" open to the Commissioners [at p10] and, notably, in doing so, employed then language of "*perversity*" [at p 6]. They defined the latter as a case in which -
- " the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal."*
13. [per Lord Radcliffe at p 10]
14. In the language of Viscount Simonds [at p 6]:
- " For it is universally conceded that, although it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."*
15. Having correctly addressed the relevant law, the Judge accepted that the Appellant made a significant contribution to the care of her mother but shared these duties with her other sisters. She found that the Appellant visited her mother three times a week and on four days her mother was cared for by other family members. It was stated by the Appellant's sister, Mrs Shaw, that the youngest sister did the most. These findings accorded with the evidence before her and as recorded by her and were open to her on the facts of the case. The finding that on these facts there was not an emotional dependency which went beyond normal emotional ties was entirely open to her. It was perfectly proper to take into account that care was shared amongst a number of

siblings in coming to this conclusion. I find that there was no error of law in the decision.

Conclusions:

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

I do not set aside the decision and the appeal is dismissed.

Anonymity

No anonymity direction is made.

Signed

Date

A handwritten signature in black ink, appearing to be 'L J Murray', written in a cursive style.

Deputy Upper Tribunal Judge L J Murray