



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11137/2015

THE IMMIGRATION ACTS

Heard at Field House
On 2 March 2018

Decision & Reasons Promulgated
On 29 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MISS SAMJHANA THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Miles dismissing her application for entry clearance to the United Kingdom as an adult child of a former Gurkha soldier under Annex K of the Secretary of State's policy of 5 January 2015.
2. The respondent was not satisfied that the appellant was financially and emotionally dependent on the sponsor; that the appellant was genuinely related to the sponsor in the United Kingdom as claimed; that there were sufficiently compelling circumstances in the application to justify the grant of leave to the appellant outside

the policy document on an exceptional basis. The respondent was satisfied that the appellant had lived apart from the sponsor for more than two years as at the date of application. The date of application was 22 September 2015.

3. The appellant's father Mr Durga Bahadur Thapa gave oral evidence. In his witness statement which he adopted as his evidence-in-chief, he said that he joined the British Army in November 1974 and served until November 1998, a period of fifteen years, based in various countries including the United Kingdom. He then returned to Nepal and stayed with his family for a year before obtaining employment in the Brunei as a security guard. He returned to Nepal after ten years but had no opportunity to settle in the United Kingdom because there was no policy at that time to enable him to do so. However, had there been a policy he would have applied together with all his family and children including the appellant who would have been under 18 years.
4. When he was allowed to settle, he entered the UK in September 2010 having been granted indefinite leave to enter. He was joined by his wife in March 2011 and another daughter Sirimya in June 2011. The appellant is his only daughter still living in Nepal. She lives alone and is solely financially dependent on him and dependent emotionally on his family. He had paid for the education of all his children and had used his pension and savings in that regard. She currently resides in rented accommodation which is also paid for by the sponsor. His wife spends a lot of time in Nepal looking after the appellant and the separation has affected all the members of the family.
5. He said he has been visiting the appellant regularly since he came to the United Kingdom and he and his wife have made visits in 2012, 2013, 2014, 2016 and January 2017. He keeps in contact with the appellant by telephone three or four times per week using a service called Lyca Mobile. They also speak to each other using a free application on the computer. Recently they have communicated through email and video chats. He has supported his daughter financially by sending her a monthly remittance of between £100 and £125.
6. The sponsor stated that when the appellant was born he had been serving in Hong Kong. He registered her name with the army as Om Kumari Thapa. When the daughter was a bit older people started to call her Samjhana and she used that name when she was registered at school.
7. The appellant relied on the documentation that she had submitted in support of her appeal. They included a number of money transfer documents issued by Moneygram, Ria Financial Services Ltd and Western Union. All related to transfers made in 2015, apart from one in 2016 and one in 2017.
8. In light of the supporting documentary evidence, the judge was satisfied on the balance of probabilities that the appellant was named at birth Om Kumari Thapa by her father the sponsor but that she is now known as Samjhana Thapa.

9. The judge held that there was documentary evidence that the sponsor has provided financial support to the appellant since his arrival in the United Kingdom. However, that support only covered a period in 2015 when, as was pointed out by the respondent's representative, he entered the UK in 2011. Furthermore, there was no documentary evidence to confirm the sponsor's statement that his army pension is paid into a Nepalese bank account with the Standard Chartered Bank and that those funds are used for the appellant's financial support. The judge was not satisfied on the evidence that the appellant was sufficiently dependent on the sponsor.
10. In terms of emotional dependence, the judge accepted the sponsor's evidence on the matter and made a finding to that effect, although he observed that such a finding was simply that of emotional dependence rather than "wholly dependent" given the wording of the policy.
11. The judge held in terms of the period of time between the sponsor's entry to the United Kingdom and the making of this application, that the period was clearly in excess of the two years identified in Annex K(9)(8) of the respondent's policy document of January 2015. However, the judge said he was bound to observe that given the fact that the policy changed in favour of the sponsor being granted entry in 2009, and the policy for such a person such as the appellant only in January 2015, a gap of more than two years between the sponsor's settlement and the making of an application by a person in this situation the appellant would, in his judgment, be almost inevitable. Apart from that requirement, and the challenge to the application on the emotional and financial dependency issue on which he has set out his findings, there was no challenge by the respondent in relation to the other requirements of Annex K9 of the policy. However, the judge said it must follow, on the basis of his findings that he was not satisfied that the appellant has met the requirements of the respondent's policy document. Therefore, the appeal cannot succeed on that basis.
12. In the light of his findings, the judge said the only basis upon which this appeal could succeed would be on human rights grounds, specifically Article 8 ECHR when considered outside the Immigration Rules. He had regard to the threshold set out by the Court of Appeal in SS (Congo) [2015] EWCA Civ 387, namely "in our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, there is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focus consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in *Nagre* at paragraph [29], which has been tested and has survived scrutiny in this court: see e.g. *Haleemudeen* at [44], per Beatson LJ (paragraph 33).

13. The judge said that this guidance must apply in this case, even though this is a case which fails under a policy rather than the Immigration Rules themselves. Given his adverse finding on the financial dependence issue in this case, which is also significant in any assessment of whether family life exists for the purposes of Article 8 ECHR in this case given the age of the appellant, the judge was not satisfied that there are any sufficiently compelling circumstances to justify consideration of this appeal under Article 8 outside the Rules. Indeed, in his judgment it would be very difficult for the appellant to establish that family life for the purposes of the article has been proved in this case because, the basis of his findings, the only arguable basis would be on emotional dependency and in that regard the judge said he was not satisfied that there is any evidence to suggest that the dependency in this case is anything other than normal ties of love and affection in their relationship between a parent and adult child in any event.
14. Permission was granted by First-tier Tribunal Judge Holmes who said that no conclusion was reached by the judge upon whether the appellant and the sponsor enjoyed family life together at any relevant date. The judge appears to have accepted emotional dependence continued, but arguably to have confused the test for financial dependency with that for family life between an adult child and their parents and sibling. There was no reference to any of the relevant jurisprudence, and arguably the decision does not disclose any engagement with the principles set out therein **Rai [2017] EWCA Civ 320** which Judge Holmes said was available at the date of the hearing.
15. At the hearing before me Mr Balroop submitted the Court of Appeal's decision in **Rai [2017] EWCA Civ 320** and the Upper Tribunal's decision in **Pun and Others (Gurkhas - policy - Article 8) Nepal [2011] UKUT 00377 (IAC)**.
16. Mr Balroop submitted that the key issue in this case is family life. This is because of the historical injustice family life will always outweigh the public interest unless there is criminal history or poor immigration. Mr Rai submitted that there are no Immigration Rules for an adult dependent child of a Gurkha. Annex K is the policy that is applied by the Secretary of State and then Article 8 outside the Immigration Rules according to **Gurung [2013] EWCA Civ 8**.
17. Mr Balroop identified the three key issues upon which the respondent refused the appellant's application. The respondent also considered that Article 8(1) was not engaged because the appellant and her parents had been living apart for five years which meant that she was living an independent life.
18. Mr Balroop said that at paragraph 19 the judge seemed to suggest that the requirement under the policy (K8) that the applicant has not been living apart from the former Gurkha for more than two years on the date of application seems non-sensical because in a case such as this where the sponsor was granted entry in 2009 and the policy of a person such as the applicant only making an application in 2015 meant that the gap of more than two years was inevitable. In the circumstances Mr Balroop submitted that the appellant can only rely on Article 8.

19. Mr Balroop relied on paragraph 17 of **Rai** where he said the Court of Appeal seemed to be watering down **Kugathas** in their definition of dependency. The Court of Appeal held as follows:

17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley LJ said (in paragraph 17 of his judgment) that

“If dependency is read down as meaning ‘support’, in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, ‘real’ or ‘committed’ or ‘effective’ to the word ‘support’, then it represents ... the irreducible minimum of what family life implies.”

Arden LJ said (in paragraph 24 of her judgment) that

“Relevant factors ... include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, 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.”

She acknowledged (at paragraph 25) that

“There is no presumption of family life.”

Thus

“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.”

She added that:

“[Such] ties might exist if the appellant were dependent on his family or vice versa, but it was ‘not’ ... essential that the members of the family should be in the same country”.

In *Patel and Others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley LJ said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) 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.”

20. Mr Balroop also relied on paragraph 39 where the Court of Appeal held 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. Each time he

did so, he stressed the fact that this was a decision they had freely made ... but that, in my view, was not to confront the real issue and 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."

21. Mr Balroop relied on the facts of this case. He said that the sponsor came to the UK in 2010 and the appellant's mother in 2011. The whole family were living together at the time the parents came to the United Kingdom. Both parents have visited the appellant regularly. They came to the UK with one daughter and the appellant has remained in Nepal on her own. Mr Balroop submitted that family life has continued even though the appellant lives in Nepal and her parents and their other daughter live in the United Kingdom. Mr Balroop said that the judge accepted that there was emotional dependency between them because of the constant visits and contact between them. He submitted that this was real and effective emotional dependency between the sponsor and the appellant.
22. Mr Balroop submitted that his only concern was with the judge's finding financial dependence. Mr Balroop relied on paragraph 24 of **Pun** where the Upper Tribunal held

"We certainly accept that a contrived dependency will carry little, if any, weight within Article 8 either when deciding whether family life exists or when assessing proportionality, that if financial dependency is of choice to the extent that an applicant is dependent so that he or she can pursue further studies this should not without more mean that such a dependency cannot properly be taken into account."

23. Mr Balroop submitted that the appellant has been studying since 2011 and has been relying on her family in particular her father for financial support. That is the context within which the judge should have considered this issue. Mr Balroop submitted that Article 8 has to be looked at in the round. Emotional dependency was accepted by the judge and there should have been a finding by the judge that the appellant is financially supported by the sponsor. There is also the fact that there was family life between the appellant and her parents before they came to the United Kingdom and has continued when they came to the United Kingdom without the appellant.
24. Mr Tarlow submitted that Article 8 is the basis of this challenge. At paragraphs 20 and 21 the judge made an assessment of the appellant's case that was open to him. The judge found that there were no compelling reasons to enter into the Article 8 arena. The dependency in this case is not more than the normal emotional ties between an adult and a dependent child.

Findings

25. It was accepted by both parties in the light of the findings made by the judge in relation to the policy that the basis of the appellant's challenge could only be under Article 8 of the ECHR.
26. I find that the judge only devoted paragraphs 20 and 21 to the article 8 claim. I find that at paragraph 20 the judge did not make any assessment of the appellant's case. The judge merely quoted the threshold test set out by the Court of Appeal in **SS (Congo)**. The judge then applied it at paragraph 21 but found that in the light of this adverse finding on the financial dependence issue and in the light of the appellant's age he could not be satisfied that there are sufficiently compelling circumstances to justify consideration of this appeal under Article 8 outside the Rules. The judge then went on to find that because of his findings it would be very difficult for the appellant to establish that family for the purposes of the Article has been proved in this case. He held that family life could not exist on the basis of emotional dependency only.
27. I agree with the grant of permission that arguably the judge confused the test for financial dependency with that for "family life between an adult child and their parents". I note that the judge heard the appellant's appeal on 25 April 2017. The Court of Appeal's decision in **Rai** was issued on 28 April 2017, three days after the judge heard the appeal. The appellant's decision was promulgated on 2 May 2017. As the judge did not make any reference to **Rai** it is sufficient to assume that he was not aware that the decision had become public knowledge four or five days prior to promulgation.
28. Article 8 has to be looked at in the round. I find that the decisions in **Pun** and **Rai** could have made a material difference to the judge's decision. Accordingly, the judge's decision cannot stand.
29. I am of the view that the appellant's appeal under Article 8 has to be reheard.
30. The appeal is remitted to Hatton Cross to be reheard by a judge other than First-tier Tribunal Judge Miles.

Signed

Date: 27 March 2018

Deputy Upper Tribunal Judge Eshun