Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18070/2016

THE IMMIGRATION ACTS

Heard at Field House

On Tuesday 19 December 2017

Decision & Reasons Promulgated
On Wednesday 10 January 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS VESH KUMARI LIMBU

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant:Mr G Dingley, Counsel instructed by Howe & Co, Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

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Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Nightingale promulgated on 23 August 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 14 June 2016 refusing her leave to enter the UK as the adult child of the widow of a Gurkha settled in the UK.

2. The Appellant is a national of Nepal. Her father was a Gurkha veteran. He and the Appellant's mother were settled in the UK prior to his death on 23 July 2013. Immediately after his death, the Appellant applied to enter as a dependent child but her application was rejected in 2013 and she did not appeal that decision. Her application on this occasion was made in May 2016.

3. The Appellant appealed the Respondent's decision on the basis that the refusal disproportionately interfered with her family life; alternatively, that the Respondent had failed to take into account in her discretion the historic injustice relating to the position of Gurkhas and their families.

4. The Judge dismissed the appeal. She did so firstly on the basis that there is no family life between the Appellant and her mother ("the Sponsor"). The reasoning behind that finding was that the Appellant is now an adult (and was at the date of application), that she is leading an independent life in Nepal (where she has a number of siblings) and has failed to show an emotional and financial dependency on the Sponsor. The Judge found that, even if that was wrong, there was no sufficiently serious interference with the Appellant's family life to require justification. In the further alternative, she found that any interference was proportionate.

5. The Appellant raises four grounds. The first three grounds assert that the Judge has misunderstood the facts and/or evidence and has accordingly unlawfully misdirected herself. The fourth and fifth grounds focus on the Article 8 assessment. In summary, the Appellant says that the Judge has left out of account any consideration of the historic injustice in Gurkha cases and the jurisprudence in that regard.

6. Permission was granted by First-tier Tribunal Judge Shimmin on 23 October 2017 in the following terms so far as relevant:-

> "… 2. It is arguable that the judge has materially erred in that she has misdirected herself on the facts and law and has failed to apply the law as set out in the grounds of appeal.
> 3. I grant permission on all grounds"

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Discussion and conclusions

8. I begin with the errors of fact which are asserted. The first two concern what is said at [29] of the Decision concerning the refusal of an earlier application and the making of the second application which was the subject of the decision under appeal now. It is accepted that the Appellant did not appeal the earlier refusal but instead made a second application. The Judge said this about the reasons behind that failure to appeal and the timing of the second application:-

> "… I note the previous refusal in 2013. No attempt was made to bring an appeal against this decision, and I do not accept that the documents were not received until the time for bringing an appeal had passed. If this were genuinely the case, a late appeal could have been brought with an application to extend time. It was not. Further, no application was made for the following two years during which time the appellant's father had passed away and she had moved away from the family home to live in Kathmandu to, it is said, undertake studies. I find considerable merit in the ECM's comments regarding the "window of opportunity" that was open to this appellant and which has now passed as time has moved on."
> [my emphasis]

9. The section about which the Appellant complains is that underlined above. As will become clear when I turn to consider the asserted errors of law, however, it is the last sentence in that paragraph which is central to the Judge's reasoning and not the facts leading up to that finding. In fact, as I will come to later, the lost "window of opportunity" is not that between the earlier application and this application/appeal but a failure to make an application between 2009 (or at latest 2011) and 2013 when the Appellant was still a child and prior to her father's death.

10. The Appellant was born on 4 September 1995 and did not therefore turn eighteen until 4 September 2013. Her parents were granted indefinite leave to enter on 9 March 2010. They made an application for their daughter born on 16 March 1993 and she was granted settlement on 6 May 2010. The Appellant's father and younger sibling came to the UK before the Appellant's mother who stayed with her other children in Nepal. She came to the UK on 14 October 2011. An application was made for the Appellant's younger brother and he was granted settlement on 9 February 2012.

11. The first application for the Appellant was not made until 2 August 2013 but she was still at that time a minor. Reasons are given in the Sponsor's statement for the delay but the fact remains that the application was made at a time when the Appellant could have qualified

for settlement as a minor. The reason that she was refused, however, was because her father had died by the time of the application.

12. What is said in the Sponsor's statement ([9]) is that the family did not know that they were entitled to appeal and the deadline had passed by the time that they realised they could appeal. True it is that the Judge's recitation of that evidence at [29] is not entirely in line with what is said in the statement. However, if anything, the Judge's interpretation favours the Appellant rather than acting to her detriment because the Judge's understanding provides a reason explaining the failure to appeal. In any event, whether the failure to appeal was due to the Sponsor being unaware of the possibility of an appeal rather than not receiving the papers in time, the point made by the Judge that the Appellant could have sought to appeal out of time still holds good.

13. That leads me on to the second asserted error of fact concerning the timing of the second application. The Judge appears to have misunderstood that the Appellant's father died before either application and not between applications (see [29] as cited above). If the reason for the delay in making the earlier application had to do with the Appellant's father's death, that might, perhaps, be a relevant misunderstanding. However, that is not the Appellant's case (see [6] – [7] of the Sponsor's statement). The rather more pertinent part of the Judge's reasoning at [29] of the Decision is in any event that the Appellant then waited two years from the earlier refusal (on 3 December 2013) before making the second application on 27 May 2016.

14. For those reasons, neither of the first two errors of fact are material to the Judge's reasoning on the central issues. The third potentially falls into a different category. That error concerns what is said at [30] of the Decision about the source of the funds transmitted to the Appellant from the UK as follows:-

> "[30] It is said that the appellant continues to be supported by the sponsor [and] remained dependent upon her after leaving the family home. I do not find that this has been established on balance. It is said that the appellant does not have a bank account and therefore cannot give a schedule of her outgoings, but this explanation I find not credible. It would have been easy to put together a schedule of rent costs, college fees, food and books and other expenses which the appellant has. It would have then been very easy to show financial remittances which had covered these expenses from the time that the appellant left the family home to live in Kathmandu and the date of application. No such schedule or, indeed, evidence of support from 2013 has been produced. The few money transfer receipts which have been submitted are from 2016, around the time of the application, despite the claim that this appellant has been dependent upon the sponsor on an ongoing basis. <u>Further, such money remittances as there are are largely sent by the witness and not by the sponsor</u>. The sponsor is of extremely limited means. Her rent is paid by housing benefit, which she said was paid directly, yet the

> witness said he sometimes had to "top up", and she also receives a pension and pension credit. The witness sometimes buys food and helps with other expenses. There is nothing before me to show that she has any money to spare to fully support or, indeed, support in any meaningful way, the needs of the appellant. She is helped from time to time on her limited income from the witness. The witness said that when his mother asks him he sometimes sends money to the appellant, but this was not on a regular basis. There is no evidence before me that the support, if any, provided by the sponsor to the appellant has been ongoing or, indeed, is sufficient to meet her basic needs...."

15. The sentence complained of is that underlined in the above passage. It is true that the money transfers which appear in the Appellant's bundle at pages [116] to [119] emanate from the Sponsor and not the Appellant's brother settled in the UK (the "witness" as referred to by the Judge). However, in the first place this does not prove that the money comes from the Sponsor herself rather than money provided to her by the Appellant's brother. That is perhaps what is meant by this sentence in the context of the paragraph. Although the Sponsor's statement refers to her and the Appellant's father sending the Appellant money regularly and says that she did not keep the transfer receipts, that appears to relate to the time when the Appellant's father was alive. The Sponsor's statement at [43] asserts that the Appellant's siblings would be the ones supporting the Appellant if she came to the UK (although the Sponsor would accommodate her).

16. Even if this is an error of fact, once again, that sentence is not the material one to the Judge's central finding. The issue dealt with in this paragraph is whether the Appellant can show that she is emotionally and financially dependent on her family in the UK such that family life continues to exist between them notwithstanding that she is now an adult (and appears on the evidence to be living her own life away from the family home in Nepal in the area where three of her siblings apparently still live). In terms of financial dependency, as the Judge points out, the relevant issue of fact is that there is evidence only of transfers for a period between 2016 and 2017 and nothing prior to this. There is also no evidence of the Appellant's outgoings to show that she is dependent on these transfers for her living expenses.

17. Even if this is an error of fact and material to the issue under consideration, the difficulty which the Appellant faces is that the Judge, having found at [32] of the Decision that the Appellant had not established on the evidence that she still shared family life with the Sponsor, went on at [33] of the Decision to consider the position if family life were established.

18. For those reasons, the third asserted error of fact, if error it is, is not material to the Judge's reasoning.

19. I turn then to the two asserted errors of law. The first asserts that the Judge has erred in her analysis as to family life at [32] of the Decision because she has failed to take into account the previous historic injustice perpetrated against Gurkhas and their families. It is said that the case-law shows that the threshold for establishing family life is lower in consequence.

20. I note first that this analysis of the case-law runs contrary to the submission made for the Respondent as recorded at [21] of the Decision, that it is only at the proportionality stage that historic injustice becomes relevant. It also appears to be contrary to the submission for the Appellant noted at [23] of the Decision. It is no doubt for that reason that the Judge addressed this issue at [34] of the Decision when considering her reasoning in the second alternative that proportionality falls to be considered because there is family life and sufficiently serious interference with that family life to require justification (see [33] of the Decision). Indeed, it is also part and parcel of the error of law as asserted that the Judge failed to take into account the historic injustice issue when weighing proportionality.

21. In relation to this issue, what the Judge said was this:-

> "[34] …Regarding the historic injustice, the sponsor's husband had the opportunity prior to his death to make an application for the appellant to come to the United Kingdom and failed to appeal the decision made in 2013. There was an opportunity for the appellant to join her parents, but the time for this has now passed …"

22. That relates back to the point I made at [9] above about the relevance of the timing of the two applications made by the Appellant and the failure to appeal the first decision. In fairness to the Appellant, the fact that her father had died before the first application was clearly relevant to the failure of that application and it is by no means clear that an appeal against that decision would have succeeded. However, as I put to Mr Dingley it is difficult to see how the Appellant has suffered any injustice by reason of the Respondent's treatment of Gurkha cases. The reason her applications have failed is that they were left too late (as indeed is shown by the fact that both of her younger siblings were permitted to settle when they applied prior to the Appellant's father's death). Mr Dingley accepted in his submissions that the Appellant might be in some difficulty on the chronology here in showing any historic injustice arising from her position as the adult daughter of a Gurkha veteran.

23. For those reasons, the error of law asserted at (d) is not made out. The final error asserted at (e) appears to be the same point put a slightly different way by reference to the legal framework as applicable in Gurkha cases. However, there is no error of law for the same reason as above. This is not a case to be set in the context of the Gurkha policies. The Appellant's application (and appeal) failed because she

could have made an application after 2009 (and certainly after her parents settled here in 2011) at which stage her father was alive and she was still a minor. Her application failed not because of any historic injustice relating to the treatment of Gurkhas and their families but because, as the Judge put it succinctly at [34] of the Decision, "there was an opportunity for the appellant to join her parents, but the time for this has now passed." Very unfortunately, the Appellant failed because her application was simply made too late. For all of those reasons, I am satisfied that there is no material error of law in the Decision.

DECISION

I am satisfied that the Decision does not contain any material error of law. The decision of First-tier Tribunal Judge Nightingale promulgated on 23 August 2017 is maintained.

Signed Dated: 9 January 2018
Upper Tribunal Judge Smith