



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24135/2016

THE IMMIGRATION ACTS

Heard at Field House
On 31 August 2018

Decision & Reasons Promulgated
On 7 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ENTRY CLEARANCE OFFICER
NEW DELHI

Appellant

and

BIDHYA GURUNG
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, a Senior Home Office Presenting Officer
For the Respondent: Mr D Shresthe, Counsel instructed by Courtney Smith Solicitors

DECISION AND DIRECTIONS

1. The Entry Clearance Officer appeals with permission against the decision of First-tier Tribunal Judge Davidson on 9 October 2017 allowing the claimant's appeal on Article 8 grounds only. The claimant is a Nepalese citizen who is now 28 years old and has lived independently in Nepal since her parents came to the United Kingdom when she was 21, in 2011.
2. The claimant is the daughter of a Ghurkha father settled in the United Kingdom who claimed a right to enter the United Kingdom for settlement, pursuant to the Immigration Directorate Instructions, Chapter 15, Annex K, which makes provision for the adult dependant children of former Ghurkha soldiers who have settled in the

United Kingdom, alternatively on Article 8 ECHR grounds. There was no challenge to the finding by the First-tier Judge that the claimant could not succeed under Annex K.

3. First-tier Judge Davidson erroneously remade the Article 8 decision in 2017 (the Davidson decision) without starting from the findings of fact and credibility by First-tier Judge Widdup in 2015 (the Widdup decision): the Widdup decision should have been treated as the *Devaseelan* starting point, and the facts therein treated as settled, unless very good reasons were given for allowing the matter to be re-litigated and a different conclusion reached.
4. At an error of law hearing on 19 June 2018, I allowed the appeal and set aside the decision of Judge Davidson in relation to Article 8 ECHR. I directed that the Article 8 ECHR decision be remade in the Upper Tribunal.
5. I also directed the parties to provide written submissions on Article 8 ECHR and *Devaseelan*, indicating that I would then consider whether the appeal could be remade on the basis of the written submissions and the findings of fact in the Widdup decision, or whether a further oral hearing was necessary.

The *Devaseelan* starting point

6. In October 2015, the appeal before Judge Widdup was advanced on Article 8 grounds only. The Judge found that the claimant's father was an entirely credible witness and made the following findings of fact:
 - (a) The claimant was the adult daughter of a former Ghurkha who is settled in the United Kingdom. Her parents came to the United Kingdom in 2011. They could not come previously, because of the historic injustice, and when they did come, they had to make the difficult choice between staying in Nepal, or leaving their daughter behind, as they could only afford to take up the option for themselves.
 - (b) Before they came here the claimant was living with them in rented accommodation in Nepal. She was already 21 years old but was still being supported by her parents, as a student: she was completing her school studies.
 - (c) Their son was in Australia and their other daughter was already in the United Kingdom.
 - (d) The claimant's parents did not have enough money to bring her with them when they came in 2011: they had to borrow from friends and family for their own application. They had not seen her since 2011, keeping in touch only by telephone calls. She had lived independently of them since then, but receiving thrice weekly telephone calls and money from her father. She has never worked.
 - (e) In 2015, the claimant was still a student, still living in the same rented house. The claimant's mother was taken ill in June 2012 and would benefit from having her adult daughter's company and assistance at their home in the United Kingdom.
 - (f) The claimant's father has been sending money to the claimant. However, Judge Widdup considered that she was healthy and able to look after herself. The Judge

did not accept that the claimant had the emotional dependency on her parents which was asserted by her father (although he found him an entirely credible witness).

- (g) On balance, Judge Widdup found that the relationship of the adult daughter and parents in this appeal was not of such closeness as to amount to family life.
7. The claimant cannot meet the requirements of Annex K because before this application was made, she had lived apart from her parents for more than 2 years. It is also accepted that she does not meet the adult dependent relatives provisions of Appendix FM of the Immigration Rules.
 8. The appeal could succeed only if Article 8 ECHR applied and the decision not to admit the claimant were proportionate.

Evidence to Davidson Tribunal

9. In 2017, the claimant's father told the Davidson Tribunal that his daughter was still studying in Nepal: she lived alone, had completed her schooling but was now learning hairdressing on a beautician course with neighbours. He did not consider that she was capable of working.
10. The appellant's father had visited her in 2016 in Nepal, the first visit since his departure in 2011. Her mother had not been able to travel with him, due to her health issues.
11. The claimant's other sister gave evidence: she was still living in the United Kingdom (her husband also serves in the British army) and she has a family of her own, including an autistic child. The sister works at Tesco and finds it hard also to care for her parents. The claimant's few friends in Nepal were now all in the United Kingdom; the sister sent the occasional gift of money to her sister in Nepal. Her brother in Australia was now an Australian citizen and did not help support the claimant in Nepal.

Article 8 submissions

12. For the claimant, Courtney-Smith & Co solicitors submitted that applying the law as it now stood, on the facts found by the Widdup Tribunal, a finding of family life in Nepal in 2011 was appropriate. Only one of the cited authorities post-dates the decision of the Widdup Tribunal and that is *Rai v Entry Clearance Officer New Delhi* [2017] EWCA Civ 320, in particular at [36]-[37] in the judgment of Lord Justice Lindblom (with whom Lord Justices Henderson and Beatson agreed). The solicitors contend that if that decision, and the other authorities referred to at [25] in their submissions, had been considered, Judge Widdup would have found that there was family life in 2011 and allowed the appeal under Article 8 ECHR.
13. The Entry Clearance Officer did not comply with the direction to provide further written submissions: as at today's date they have not responded to the direction on 15 June 2018.

Discussion

14. The facts in this appeal are strikingly similar to those in *Rai*:

“41. The burden of the evidence of the appellant's father and mother in their witness statements, and the appellant's in his, was this: that, in consequence of the "historic injustice", it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children – the appellant and their daughter Chandra; that the stark choice they had had to make was either to remain with the appellant and Chandra in Nepal or to take up their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, "an integral part of the family unit" even after his parents had settled in the United Kingdom.

42. Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1). Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it.”

15. I have regard to the fact that, far from living independently as the Widdup Tribunal found, this young woman continues to live in her father's rented house, on financial contributions from him (and sometimes her sister), and to pursue a rather haphazard course of study which in seven years has not made her employable in Nepal, and that she is still telephoned several times a week. I also have regard to her father's visit to the appellant in 2016 and to the isolation her sister mentioned to the Davidson Tribunal. I am satisfied that it is appropriate to depart from the finding by the Widdup Tribunal that family life did not exist between this appellant and her family before they went to the United Kingdom in 2011, and that family life continues to exist today, although she is 28 years old.
16. The Entry Clearance Officer has chosen not to make any further submissions. On the evidence before me, I am satisfied, having regard to the historic injustice, that it is disproportionate to exclude this appellant from the United Kingdom and I allow the appellant's appeal.

DECISION

17. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

I remake the decision by allowing the appeal.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 31 August 2018