



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04257/2017

THE IMMIGRATION ACTS

Heard at North Shields (Kings Court)
On 26 April 2019

Decision & Reasons Promulgated
On 20 May 2019

Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

SABITA SUNUWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative

For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by a national of Nepal, born in 1993, against the decision of the Entry Clearance Officer refusing the appellant's human rights claim which had been on the basis that she had neither met the requirements of Appendix FM as relates to adult dependants or the requirements from the Immigration Directorate Instruction in relation to Gurkhas.
2. The judge noted that there was no dispute the appellant was the daughter of a former Gurkha soldier who had died on 23 October 2009, who with her mother now resides in the United Kingdom. The appellant's father had been a soldier for six years before being discharged on medical grounds in 1970. The appellant is the youngest of five children, all of whom are married and live in Nepal.

3. The judge heard evidence from the appellant's mother. Although satisfied the appellant's father was a Gurkha he could not be satisfied how long that had been the case before his discharge. The judge reached the following conclusions and findings as follows:

"12. I have considered whether the Appellant can satisfy the requirements of Appendix FM and in particular Section EC-DR. I am satisfied that she cannot. Firstly she cannot show that she requires long-term personal care to perform everyday tasks. I have seen no evidence that could support his proposition. Secondly I cannot be satisfied that Appellant can be adequately maintained and accommodated without recourse to public funds. On the evidence before me, the only source of income that they can show that they would have is the £636 per month in benefits. This would have to pay for accommodation as well as maintenance. On the evidence before me I cannot be satisfied that this is sufficient to maintain them adequately. Equally given the sponsor's present accommodation is not sufficient for the Appellant, I cannot be satisfied that there is adequate accommodation. As a result of these factors the Appellant cannot satisfy the requirements of either Paragraph E-ECDR.2.4 or 3.1, As a result the appeal fails under Appendix FM.

13. I have gone on to consider whether there are any exceptional factors that means that the appeal should be allowed outside the rules. In this regard I have given careful consideration to the guidance given under Annex K of the IDI and I have also taken account of the guidance published on 28th December 2017 (even though it post-dates the decision). Within these I cannot find any indication that where the Gurkha ex-serviceman has passed away, then the adult child of the Gurkha can apply on the basis of link to the widowed partner. In any event I am not, on the evidence, satisfied of the father's 4-year service or that the father would have made an application for settlement before 2009, had the option been available. As such on the evidence before e the Appellant does not qualify under any policy for entry to the United Kingdom. In these circumstances there are no exceptional circumstances that mean that the appeal should be allowed outside the rules. Indeed if the sponsor wished to continue a family life with the Appellant, this could be continued in Nepal, where she only left just over a year ago. As such the decision of the Respondent is proportionate to the legitimate aim sought, namely the preservation of the economic well-being of the United Kingdom. As such this appeal is dismissed."

4. Permission to appeal has been granted on the basis that it was arguable the Tribunal should have made findings on whether there was an Article 8 family life between the appellant and her sponsoring mother, and if so, whether the historic injustice against Gurkhas and their families was a factor in this case.
5. The appellant's mother together with a friend, a British citizen Mr Ganesh Sunuwar (they are not related but from the same village) attended the hearing. Unfortunately no interpreter had been booked, however Mr Sunuwar had a good command of English and was able to assist.
6. When on review of the issues in the case, Ms Petterson's attention was drawn to the judge having in effect made a finding of family life. The judge had also appeared to have rejected the case without proper consideration of Article 8 grounds by confining

his consideration to the absence of any specific provision in the Immigration Directorate Instructions and the absence of exceptional circumstances without giving proper weight to the family life that had been established. Ms Petterson candidly accepted that the judge had erred in relation to the proportionality exercise and she agreed the decision required to be set aside. In respect of its remaking, Ms Petterson accepted this could be undertaken without further evidence. She conceded the appellant's appeal.

NOTICE OF DECISION

7. Accordingly, the decision of the First-tier Tribunal Judge is set aside as it is accepted by the Secretary of State. We remake the decision and as also conceded, this appeal is allowed.
8. No anonymity direction is made.

Signed

Date 8 May 2019

UTJ Dawson

Upper Tribunal Judge Dawson