Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08051/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2019	**On 18 October 2019**

Before

Upper Tribunal Judge Sheridan

Between

LALITA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Moriarty, Counsel instructed by Everest Law solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal born on 25 October 1984. She is the daughter of a former Gurkha soldier who died in 1994. Her mother ("the sponsor") entered the UK in 2012 as the widow of a former Gurkha. In 2014 the appellant applied for entry clearance in order to join the sponsor in the UK. The application was refused. Her

appeal against that decision was dismissed by First-tier Tribunal Judge Grimmett (following an earlier decision being set aside) in a decision promulgated on 26 April 2016 ("the 2016 decision"). On 3 November 2017 the appellant applied again for entry clearance. This application was refused on 26 February 2018. The appellant appealed to the First-tier Tribunal where her appeal was heard by Judge of the First-tier Tribunal Seelhoff ("the judge"). In a decision promulgated on 18 April 2019 ("the 2019 decision"), the judge dismissed the appeal. The appellant is now appealing against the 2019 decision.

2. The appellant was unsuccessful before the First-tier Tribunal in both 2016 and 2019 for the same reason, which is that it was not accepted that her relationship with the sponsor engaged article 8 ECHR. In the 2019 decision, the judge treated as his starting point (and had significant regard to) the 2016 decision.

The 2016 decision

3. In the 2016 decision, Judge Grimmett stated that in order for article 8 ECHR to be engaged the appellant was required to show more than the usual emotional ties between her and the sponsor. The judge was not satisfied that there were such ties. He found that there was nothing to show any contact between the appellant and sponsor between June 2012 and July 2014; and that there was no evidence about the appellant's life in Nepal or her contact with siblings, or to show that she was emotionally or financially dependent on the sponsor. Judge Grimmett concluded:

> "In the absence of evidence to show any regular contact between the appellant and her mother in the last 2 years and in the absence of evidence to show that she has been supported by her mother financially or that there are any continuing ties in the form of regular contact by letter, telephone or other means of communication, I was not satisfied that the appellant has shown she enjoyed article 8 family life with her mother at the date of decision."

The 2019 decision

4. In the 2019 decision, the judge directed himself that *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702 would apply in respect of the 2016 decision. At paragraph 23, at the start of the section of the decision headed "findings", the judge stated that he was required to take as his starting point findings in the previous decision. At paragraph 9, when summarising the law, the judge stated that absent good reason to depart from them he was bound by the factual findings in the 2016 decision.

5. At paragraphs 23 – 25, the judge considered the appellant's argument that there should be a departure from the findings in the 2016 decision because the legal test for determining the existence of family life under article 8(1) ECHR had been clarified by, and the appeal needed to be reconsidered in light of, the Court of Appeal judgment in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320. The judge rejected this argument because he did not accept that the 2016 decision was inconsistent with *Rai*.

6. Notwithstanding his reliance on *Devaseelan,* the judge conducted his own assessment of whether family life engaging article 8 existed (at paragraphs 28 – 36). The judge found there was a lack of evidence about the appellant and sponsor's financial circumstances (including who paid the rent and the source of their income) at the time the sponsor moved to the UK. The judge also found that there was a lack of evidence about the appellant's current circumstances and that the evidence did not support the appellant's contention that she and the sponsor had daily contact.

7. The judge directed himself at paragraph 30 that the lack of evidence concerning financial support was relevant but not determinative. At paragraph 36 the judge concluded:

> "In terms of the evidence that is before me I am not satisfied that there is a family life between the appellant and her mother. I reach this decision because the evidence taken in the round does not show that there are emotional ties above and beyond what one would expect between an adult parent and their adult child. I do not consider the [sic] adequate evidence has been given to justify me departing from the findings of the previous Tribunal and I do not consider that the previous Tribunal's findings are rendered unsafe in the way that Mr Jesurum invited me to find in light of the case of Rai."

Grounds of appeal

8. Two grounds of appeal were advanced to challenge the 2019 decision.

    a. The first ground of appeal is that the judge misapplied *Devaseelan* by treating the findings of the 2016 decision as binding rather than as a starting point and by failing to take into consideration the implications of *Rai*.

    b. The second ground is that the judge applied too high a threshold when determining whether article 8 was engaged.

9. I will now consider each of the grounds.

Was Devaseelan misapplied?

10. *Devaseelan* is a starred Upper Tribunal decision which sets out guidelines on procedure in second appeals. The guidelines explain that the first decision stands unchallenged (or not successfully challenged) as an assessment of the claim made at that time. Whilst the first decision is not binding on the second judge, as an assessment of the matters that were before the first judge it should simply be regarded as unquestioned and it is not the role of the second judge to consider arguments intended to undermine the first judge's decision.

11. At paragraphs 38 – 39 of *Devaseelan* the Upper Tribunal stated:

> "38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not – or could not be – raised before the first Adjudicator; or evidence that was not – or could not have been – presented to the first Adjudicator.
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> 39. In our view the second Adjudicator should treat such matters in the following way.
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> > (1) **The first Adjudicator's determination should *always* be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
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> > (2) **Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
> >
> > (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can *always* be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them." (Emphasis in original)

12. The grounds of appeal submit that the judge erred by treating the findings of the 2016 decision as binding rather than merely as a starting point. In addition, it is argued that the judge erred by not

departing from the findings of the 2016 decision because, firstly, circumstances had changed; and, secondly, because the decision in *Rai* clarified that the relevant test was whether the appellant was supported by the sponsor, not whether she was dependent on her.

13. Mr Moriarty argued that the decision in *Rai* emphasised that where article 8 is being considered in the context of a former Gurkha who has suffered an historic injustice, the relevant issue is not whether the appellant is dependent on, but rather whether she is supported by, the former Gurkha (or in this case, his widow). He maintained that the 2016 decision could not be relied upon because it predated *Rai* and applied the test of dependence rather than support. Ms Everett's response was that the judge considered whether the findings in the 2016 decision were still reliable in light of *Rai* and was entitled to conclude that they were.

14. I am not persuaded by this ground of appeal for several reasons. Firstly, although the judge referred, at paragraph 9, to being "bound" by the 2016 decision (which would be inconsistent with *Devaseelan),* it is apparent from reading the decision as a whole, and in particular paragraphs 28 – 36, that the judge did not in fact treat himself as bound by the 2016 decision but rather treated it as no more than a starting point. This is because, at paragraphs 28 – 36, the judge considered for himself, in detail, the evidence concerning family life and reached his own conclusion, based on that evidence, as to the existence of family life.

15. Secondly, the judge did not disregard up to date evidence because of a misconception that he was bound by the 2016 decision. On the contrary, as is evident from paragraphs 31 – 33, the judge examined in detail evidence post-dating the 2016 decision.

16. Thirdly, the judge did not err by not treating the 2016 decision as less authoritative because of *Rai.* Even if *Rai* modified the legal test under article 8(1) in the context of Gurkhas, this would not invalidate, or make less authoritative, the findings of fact in the 2016 decision. A change in the legal test might mean that the conclusions drawn from the facts need to be reconsidered, but it would not undermine the authoritativeness of factual findings based on evidence that was before the previous Tribunal. Moreover, and in any event, Mr Moriarty's argument is based on a mistaken premise that *Rai* modified the legal principles applicable to determining whether article 8 is engaged between a former Gurkha and his adult child. But this is not the case. The Court of Appeal in *Rai* did not delineate a new or modified test for the engagement of article 8 - it merely confirmed the legal position as set out in well-established case law. See *Rai* at [16] where it is stated that the legal principles are not controversial.

Did the First-tier Tribunal apply too high a threshold in determining whether the relationship between the appellant and sponsor engaged article 8 ECHR?

17. It is clear from Court of Appeal case law that the central question is whether there is real, committed or effective support between the sponsor and appellant, and that the issue to be determined is not whether there is dependency.

18. Although the judge did not use the term "support", reading the decision as a whole, it is apparent that the judge appreciated that "dependency" is too high a threshold and that a test of exceptionality is not applicable. This is clear from paragraph 12, where the judge stated:

> "Financial dependency could be an indication of such ties but is not necessary for one to find that they exist. In the context of the case of Rai in paragraph 36 it is important that the tribunal not impose any test of exceptionality."

19. The observation at paragraph 11 of the decision that "the appellant needs to demonstrate that the relationship is something beyond the norm" is consistent with the case law and does not indicate the judge considered there had to be exceptionality.

20. In any event, as noted in Rai at [34], the absence of a clear self-direction as to the legal principles bearing on whether article 8 is engaged is not fatal. The question is whether the principles were applied to the evidence in this case. In my view, it is plain from reading the decision as a whole that they were. This is not a case where the judge has found article 8 is not engaged because of an absence of financial dependency or exceptionality. The judge has looked at the evidence in the round and found that there was nothing in the evidence, either at the time the sponsor left Nepal or subsequent to her doing so, to show anything going beyond the normal emotional ties expected between a parent and adult child. Although the term "support" has not been used, the findings of the judge are, in effect, that there is not real, committed or effective support.

Conclusion

21. I am satisfied that the judge has not misapplied *Devaseelan* and has applied the correct legal principles in considering whether article 8 was engaged. The grounds therefore do not identify a material error of law.

Decision

22. The decision of the First-tier Tribunal does not contain a material error of law and stands.

Signed

Upper Tribunal Judge Sheridan Dated: 16 October 2019