



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17646/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 16th July 2019

Decision and Reasons Promulgated
On: 13th August 2019

Before

UPPER TRIBUNAL JUDGE BRUCE
UPPER TRIBUNAL JUDGE OWENS

Between

Miss Sunita Rai
(anonymity direction not made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellants: Mr Khalid, Counsel Direct Access
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born in 1982. She appeals with permission against the decision of the First-tier Tribunal (Judge Murray) to dismiss her appeal on human rights grounds. Permission to appeal to this tribunal was granted on the 3 May 2019 by First-tier Tribunal Judge Gumsley.
2. On 4 May 2018 the Appellant applied for entry clearance to settle in the UK as the adult dependent relative of her father, an ex-Gurkha soldier who migrated to the UK

on 2 August 2016. The Appellant asserts that she has family life with her father and four siblings in the UK because she always lived with her family until they left Nepal and she remains financially and emotionally dependent on her father. Although she cannot satisfy all of the requirements of Annex K of the immigration rules, it would be disproportionate to refuse her entry because of the historical injustice towards ex Gurkha soldiers and the lack of any other countervailing factors.

3. The application was refused on 26 July 2018. The Appellant was unable to meet paragraph 9 (4) of Annex K because she was aged over 30 at the date of the application. She also could not meet paragraph 9 (5) of Annex K because she was not wholly financially and/or emotionally dependent on her sponsor. It was said that the fact that the Appellant does not meet the immigration rules outweighs the historic injustice referred to in R (on the application of Sharmilla Gurung and Others) v SSHD [2013] EWCA Civ 8. The Respondent was not satisfied that the Appellant has family life with her parents. The Respondent decided that it was not a disproportionate breach of Article 8 ECHR to refuse the Appellant entry to the UK.
4. When the matter came before the First-tier Tribunal ('FtT'), it having been accepted that the Appellant was over 30 when she made her application and could not meet the requirements of Appendix K, the primary issue was whether family life existed between the Appellant and the sponsor at the date the sponsor left the UK and whether it had endured since then. This entailed an analysis of whether the Appellant was financially and emotionally dependent on her sponsor.
5. The FtT did not accept that the Appellant had family life with her father when he left Nepal in 2016 nor that family life had endured so as to engage Article 8(1) ECHR. The following reasons were given for that conclusion:
 - i) The Appellant had provided no supporting evidence that she was living with her parents and siblings as part of a family unit when her father and siblings relocated to the UK in August 2016 despite being over 35 years old at the date of the application;
 - ii) Had the Appellant enjoyed family life with her parents and siblings when they made their application, it was unlikely that she would have waited two years to make the application after they left for the UK in 2016. The sponsor's explanation that the delay was to do with lack of finances was not evidenced;
 - iii) There was no supporting evidence as to where the Appellant currently lives and whether she lives alone or with others.

The Grounds of Challenge

6. The Appellant submits that the decision of the First-tier Tribunal is flawed in the following material respects:
 - i) *Misdirection in law. In particular:*

Having found that the Appellant continues to be financially dependent on the sponsor and that she has been in regular contact with him since 2016, the FtT failed to apply the relevant authorities on family life in general including Kugathas [2013] EWCA Civ 31 and specifically failed to apply the guidance on family life in Gurkha cases including R (on the application of Sharmilla Gurung and Others) v SSHD [2013] EWCA Civ 8 and Ghising (family life - adults - Gurkha\Policy) Nepal [2012] UKUT 00160.

- ii) Failure to consider material facts/evidence. *In particular:*

The Tribunal erred in its assessment of family life between the Appellant and the sponsor. They were living together in one household as a joint family. The Appellant provided a large number of documents to demonstrate her financial and emotional dependency on the sponsor including hundreds of pages of phone contacts, money remittances, evidence of the sponsor's pension being used by the appellant to support herself and evidence of a visit to Nepal.

The Respondent's Defence

7. By his Rule 24 response dated the 12th July 2019 the Secretary of State submits that the decision of the First-tier Tribunal contains no material error of law and that it should be upheld. It is said that neither the statement of the Appellant nor of the father gives any indication where the Appellant lives and the father does not state that she lives alone. On the basis of this 'vague evidence' the FtT was entitled to draw the conclusions in relation to the lack of family life. As far as the adequate reasoning/irrationality point is concerned, it is contended that the FtT had the benefit of hearing the evidence of the sponsor and drew conclusions that family life did not exist at the date of departure and has not been maintained since 2016. The FtT gave reasons for drawing these conclusions and they were open to the FtT on the evidence provided. The FtT directed itself appropriately.

Concession

8. At the outset of the hearing Mr Melvin accepted that had the FtT found that family life existed between the Appellant and the sponsor, that the appeal would have fallen to be allowed on human rights grounds pursuant to Article 8 ECHR because of the significance of the historic injustice in the proportionality assessment. This accords with the findings and direction of the First-tier Tribunal, and we accept, in light of the authorities, that it is a concession properly made.

Discussion and Findings

Ground (i): Misdirection in law

9. The FtT found at [15] on the basis of the extensive evidence before her that '*the Appellant may receive her father's pension (page 32) and that he has been transferring money*

to her. The Western Union money receipts from page 53 to 59 show the Nepalese calendar. The sender's documents at pages 60 to 70 show payments of around £100 in May and July 2017 and in March, June, September and November 2018 and £200 in total in January and February 2019'. At [16] the FtT accepted that the evidence showed 'financial support in the form of remittances in the region of £50 per month since May 2017'.

10. At [15] the FtT found that there was regular communication between the Appellant and sponsor. 'At pages 74 and 75 are call records from Nepal Telecom that show the Appellant ringing her father's number regularly between November 2018 and February 2019. There are further phone/viber communications print outs from page 74 to 2018 which show regular contact from October 2016'. It is accepted at [16] that 'there has been regular contact since 2016'.
11. The FtT also accepts that the Appellant is single at [15]. 'There is also confirmation at page 16 that the Appellant is unmarried from the Diktel Rupakot Majhuwaadhi Municipality'. It was also accepted that since coming to the UK in 2016 the sponsor has returned to Nepal to visit his daughter in 2018.
12. Mr Melvin's position is that these findings are insufficient on their own to lead to a conclusion that the ties between the sponsor and the Appellant amount to more than the normal emotional ties between adult family members in accordance with Kugathas (supra). He suggests that the FtT's inference, which is not explicitly stated in the decision, is that the Appellant is in fact living with a sibling in Nepal.
13. It is submitted by Mr Khalid, that having found the adult Appellant to be both financially dependent on her father the sponsor and in regular contact with him three of four times a day, the FtT was bound to conclude if directed properly to the relevant caselaw, that the relationship between the Appellant and the sponsor amounts to family life in accordance with Article 8 (1) ECHR.
14. We are in agreement with Mr Khalid. We are satisfied that since the Tribunal found that the Appellant was both financially and emotionally dependent on the sponsor in the UK, that a properly directed FtT would have concluded that the relationship between the sponsor and the Appellant amounted to more than the normal bonds of affection between adult relatives particularly in the context of Nepalese culture where it is the norm for single children to remain as dependents of their parents until they are married. In this respect we note the proposition accepted in Ghissing (supra) that young adults who have not yet founded families of their own could be considered to enjoy family life with parents and other close family members. We are satisfied that the FtT misdirected itself in law and that this is a material error. On the facts as found by the FtT, this is a family life within the meaning of Article 8.

Ground (ii): Failure to consider material facts/ evidence

15. The Appellant's position is secondly that the FtT failed to take into account the evidence before it in relation to where the Appellant was living at the time her father and siblings left Nepal, the evidence of where she currently lives and the explanation as to why the sponsor did not apply for the Appellant to join him sooner.

16. The Appellant gave evidence in her witness statement that she had always lived with her parents until they left Nepal and the sponsor gave consistent evidence in his witness statement to this effect. In his oral evidence the sponsor stated that the appellant '*is alone since I came here*'. This evidence was not challenged by the Respondent at the hearing. Nor was it asserted in submissions that the sponsor was lacking in credibility; Ms Rawlings for the Respondent rather focused on the length of time that the family members had been apart from each other. It was not submitted that the sponsor was untruthful. In these circumstances it is not apparent to us why the FtT rejected this consistent evidence particularly when the FtT accepted that the Appellant is unmarried and the FtT has experience as a specialist Tribunal in dealing with Gurkha family reunion cases.
17. The sponsor gave an explanation in his oral evidence that he did not apply for the Appellant to come to the UK sooner because of financial limitations. He stated that '*I did not have enough money to bring them*'. The FtT found that there was no supporting financial evidence to support this assertion, however this reason for rejecting the existence of family life was not raised in the original decision and the 76-year-old sponsor gave oral evidence that he was in receipt of Pension Credit and Housing Benefit. The sponsor's oral evidence in this respect was not challenged. It was not put to him that he was not telling the truth about this delay.
18. We are satisfied that the FtT gave inadequate reasons for rejecting the evidence that the sponsor had Appellant had always lived together (the Appellant's mother died in 2000), were living together at the time that the sponsor departed for the UK and that the delay in applying for the Appellant to join the sponsor was due to financial constraints. This is also a material error of law. By failing to assess the evidence adequately the FtT made erroneous findings of fact which led to negative findings in respect of family life.
19. We indicated at the end of the hearing that we were satisfied that the grounds of appeal were made out and that the decision of the FtT contained a material error of law in relation to the findings on family life for the reasons set out above.
20. We go onto remake the decision. We are satisfied, given the evidence before the FtT, that the Appellant lived as a dependent of her father in a household with her father and siblings until they left for the UK in 2016 and that at the point of their departure she was a single unemployed Nepalese female who had not set up an independent household. We find, notwithstanding the Appellant's age, that Article 8 (1) was engaged in respect of family life at the date of the sponsor's departure. We are also satisfied, given the longstanding financial support as well as the visit of the sponsor that family life between the Appellant and the sponsor has endured since their departure.
21. Given Mr Melvin's concession at the outset of the appeal, we find that in circumstances such as this, where a Gurkha can show but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent minor child that was a strong

reason for holding that it is disproportionate to permit the adult child to join the family now. In this appeal in the absence of any other countervailing factors over and above the public interest in maintaining immigration control the outcome of the proportionality assessment is in the Appellant's favour.

Decisions

22. The decision of the First-tier Tribunal is set aside for error of law.
23. The appeal is allowed on human rights grounds (Article 8 ECHR).

Upper Tribunal Judge Owens
Dated 17th July 2019