

THE IMMIGRATION ACTS

Decided On the Papers at Field House
On 14 May 2013

Determination Promulgated
On 30 July 2013

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

YANXIU CHU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant Yanxiu Chu was born on 23 December 1945 and is now 67 years old. She is a citizen of the People's Republic of China. She came to the United Kingdom on the last of a series of visit visas, entering the United Kingdom on 7 April 2011 with leave to remain until 1 October 2011. She applied during that stay to vary her leave to remain to indefinite leave to remain in the United Kingdom as the dependant of her daughter, Furong Xing, who is married to a British citizen, is settled in the United Kingdom and is now herself a British citizen. The appellant also has a son, Faxi Xing, who studied in the United Kingdom then returned to China.
2. The Secretary of State refused to vary her leave by letter dated 1 February 2012. The appellant appealed. At a hearing on 26 July 2012, First-tier Tribunal Judge Turquet, heard and later dismissed her appeal against the Secretary of State's decision.

3. The appellant challenged that determination and was granted permission to appeal on the basis of an apparent inconsistency in the First-tier Tribunal Judge's findings as to whether *Kugathas* family life existed between the appellant and her adult daughter.
4. The respondent filed a rule 24 Reply, the material part of which contended that:
 - "3. It is submitted that the judge's findings were open to her on the basis of the evidence presented. The appellant has a pension in China. Moreover, she has a son with whom she has lived with. The judge was entitled not to give weight to the purported medical evidence regarding the appellant's son's claimed condition. She has clearly dealt adequately with this evidence at paragraph 38 of the determination.
 4. As to Article 8 of the ECHR, the judge considered the 5 stage Razgar test at paragraph 43 and it is submitted that her conclusions were open to her. It is submitted that the grounds are mere disagreement with the judge's conclusions."
5. That is the basis on which this appeal came before me.

Factual matrix

6. The appellant is a widow. Her husband died in 2006 and the appellant was then diagnosed with a brain tumour which was operated upon in 2008. The appellant finds it difficult to remember things and becomes disorientated. For several years she has relied significantly on financial support from her daughter and son-in-law. They have supported the appellant both financially and by way of care and companionship for most of the last five years on a series of visit visas, beginning in July 2007. The appellant's case is that she needs the physical and social support of her daughter and her partner.
7. For some of the relevant period, the appellant's son Faxi also lived in the United Kingdom where he studied but he has now returned to China, married and is living in Donggun in south China. The appellant stayed with him for eight months in 2009, but her son has chronic depression, now extending over fifteen years, which leads to many suicide attempts and to his locking himself in his room. Her son's wife had enough to do caring for the appellant's son's mental health condition and was unable also to support and care for the appellant.
8. The appellant moved back to her own flat in Quingdao in northeast China, but struggled to live alone there and returned to spend time again on a long visit with her daughter and her partner in the United Kingdom. The frequent long travel was very wearing for her and on each occasion she required at least two weeks and sometimes three to recover from the journey. She was frail and vulnerable.
9. While they were considering whether to apply for leave for the appellant to remain in the United Kingdom the appellant's brother, who had inherited the flat in Quingdao, emailed to say that he had lost his job and would need to use the flat,

which only has one bedroom. The appellant does not have sufficient income to deal with the costs of a retirement home, still less the additional cost required for someone who is now rather frail and has memory loss.

10. The sponsor and her partner are willing to have the appellant living with them in the United Kingdom. Apart from her daughter Ms Xing and her son Faxi, the appellant has no other children.

The First-tier Tribunal determination

11. The First-tier Tribunal Judge considered that the appellant's account of Faxi's mental health problems was exaggerated and that she herself was not as frail as the sponsor portrayed, such that the *Kugathas* dependency test was not met. The sponsor, who was now a British citizen, could keep in touch via visits and other modern methods of communication such as Skype. The judge was not satisfied that the appellant could either meet the requirements of the Immigration Rules or show that Article 8 without the Immigration Rules entitled her to remain.

Permission to appeal

12. Permission to appeal was granted by First-tier Tribunal Judge Landes on the basis of confusion in the First-tier Tribunal Judge's decision in relation to family life which was set out in directions which I made after the oral hearing on 3 December 2012. At paragraph 41, referring to the *Kugathas* test, the First-tier Tribunal Judge found that family life had not been established. However, at paragraph 42, the judge accepted that "during her time in the United Kingdom [the appellant] has enjoyed family life with her daughter".

Upper Tribunal hearing

13. At the oral hearing, after hearing submissions from both parties, I reserved my decision. The appellant undertook to provide all her previous visa applications to the Tribunal and the Secretary of State within seven days and the respondent was directed to provide all Home Office relevant documentation relating to those applications not later than 10 January 2013. Both parties were given leave to make further submissions and the appeal decision would then be remade on the papers.

14. I gave directions as follows:

"3. In paragraphs 41 and 42 of the determination the Immigration Judge made contradictory findings as to whether the appellant's several visits to the United Kingdom over the last five or six years together amounted to the establishment of family life with her adult daughter in the United Kingdom.

4. At paragraph 41, having referred to the test in *Kugathas* [2002] EWCA 31 the First-tier Tribunal Judge found that family life had not been established. At paragraph 42, however, she did accept the existence of family life:

“42 ...The appellant has now been living in the United Kingdom for over one year. However she came on a visit visa and can have had no legitimate expectation of staying for a longer period than six months. She has spent the majority of her life in China. She has made a number of visits since 2006. I accept that during her time in the United Kingdom she has enjoyed family life with her daughter. Her son was also in the United Kingdom during many of her visits but he has now returned to China. She actually lived with him there.”

It is most unfortunate that there should be contradictory findings in two successive paragraphs in the determination. The findings of fact in relation to family life constitute a plain error of law on the basis of which the determination must be set aside and re-made.

Directions

5. I consider that this determination can be re-made on the papers. I directed at the hearing as follows:

- (a) The appellant to provide copies of her previous visa to the respondent and the Tribunal within seven days together with Home Office reference numbers as appropriate. That was complied with promptly by her new representatives, TKD Solicitors.
- (b) The respondent to locate and serve the relevant documents from the overseas post in relation to the present application, not later than **10 January 2013**. That does not appear to have been complied with.
- (c) I further directed that each party have leave to make further submissions to accompany their additional documents, if so advised, and that if the respondent exercised that option, the appellant have leave to respond to such submissions within seven days thereafter such that all submissions should be complete by **17 January 2013**.
- (d) The substantive re-making of this decision would then be considered as a paper case.

6. In the light of the non-compliance by the respondent, I would normally proceed to determine the appeal on the documents before me. However, the appellant's previous representatives made additional written submissions on 28 September 2012. They were in essence the same as the original grounds of appeal with the addition of arguments at paragraphs 6 - 8 based on a case which was then pending before the Court of Appeal relating to the adult children of Ghurkha families. That was published on 21 January 2013 as *Gurung & Ors, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWCA Civ 8.

7. In the interests of justice, the Tribunal now invites the parties to make written submissions on *Gurung*, if so advised, to be received by the Upper Tribunal not later than **14 February 2013 final**.”

4. The appellant has complied with the directions fully, but the respondent has not. I therefore have no idea what the respondent has to say about the previous applications or about the *Gurung/Ghising* argument on adult dependency. The key

paragraph is paragraph 50 of *Gurung* in which the Master of the Rolls, giving the judgment of the court, says this:

“50. ... The critical issue was whether there was sufficient dependence and in particular sufficient emotional dependence by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the First-tier Tribunal to determine. In our view the First-tier Tribunal was entitled to conclude that although the usual emotional bonds between parents and their children were present the requisite degree of emotional dependence was absent.”

The Court of Appeal in *Gurung* expressly approved the analysis in *Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC)* summarised at point 1 of the guidance therein given:

“(1) A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children each case should be analysed on its own facts to decide whether or not family life exists within the meaning of Article 8(1). Whilst some generalisations are possible each case is fact-sensitive.”

That is the result of a detailed and rigorous analysis set out at paragraphs 48 to 72 of the determination in *Ghising* and in particular at paragraph 62 thereof:

“62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment rather than applying a blanket rule with regard to adult children each case should be analysed on its own facts to decide whether or not family life exists within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings:

‘We do not think that *Advic* is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment the recognition in *Advic* that whilst some generalisations are possible each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted and to explain quite shortly and succinctly why it is that Article 8 is or is not engaged in a given case.’ (*Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950*).”

Discussion

5. I have before me all the information which was before the First-tier Tribunal and in addition I have the information as to what was said in relation to the appellant’s various visits to the United Kingdom. The first of these was on 5 May 2008 when the appellant produced an invitation letter from her daughter’s partner requesting a two year family visit visa and the Entry Clearance Officer noted that the appellant had

spent nearly seventeen months in the UK on three previous six month visit visas. The appellant said that she would stay for six months as her husband was now deceased. The application was refused.

6. The appellant's savings in a second application amount in total to approximately £8,400 at today's rates. However, the reason for that may well be that during the long period she has spent in the United Kingdom during which she is supported by her daughter she has no call on her funds in China. Alternatively, since it is her evidence that she depended whilst in China on monies sent from her daughter, it may well be that these are some of those monies, we simply do not know.
7. The respondent has had an opportunity to comment both on the case of *Gurung* and on the evidence produced by the appellant, but has chosen not to exercise it, and I assume therefore that she has nothing to add to the submissions that she made at the hearing last December.
8. I am satisfied, on the evidence before me that this appellant, who is a 67-year old widow who is frail and forgetful after an operation for a brain tumour in 2008, both in China and in the United Kingdom, depends on her close relationship with her daughter who lives here and is now a British citizen. It appears that she no longer has a home available to her in China and that because of her son's ill-health, and her daughter-in-law's unwillingness to have her, his home is not a suitable place for her to receive the social and emotional care which her health and age require.
9. It is clear from the determination that the First-tier Tribunal Judge was aware of the closeness between the appellant and her daughter which in at least one place in the determination he regarded as being family life. I consider, having regard to all of the facts in this case, that that is the proper analysis and that although in Western terms the appellant is not old, for a woman with a brain tumour and some memory loss the relevant level of emotional dependency has been established and accordingly this appeal will be allowed under Article 8 ECHR.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by allowing it.

Consequential Directions

Forthwith on receipt of this decision the respondent shall grant the appellant leave to remain for such period as is necessary to give effect to this determination.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Date:

Signed:

Judith Gleeson
Judge of the Upper Tribunal