Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15202/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th October 2013	**On 25th November 2013**

Before

UPPER TRIBUNAL JUDGE RENTON
UPPER TRIBUNAL JUDGE McGEACHY

Between

DIPAK KALYAN KERAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - MUMBAI

Respondent

Representation:

For the Appellant: Mr M Gill QC, Counsel, Instructed by Markand & Co
For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of India born on 16th July 1990. He applied for entry clearance to settle in the UK with his mother, the sponsor Kesharbai Kalyan. That application was refused for the reasons given in a

Notice of Decision dated 19th May 2010. The Appellant appealed and his appeal was heard by Judge of the First-tier Tribunal Malins (the Judge) sitting at Hatton Cross on 2nd December 2010. She decided to dismiss the appeal for the reasons given in her Determination dated 8th January 2011. The Appellant sought leave to appeal that decision which was initially refused but following an order of the High Court, granted on 30th August 2013.

Error of Law

2. It is first necessary for us to consider if the judge made an error on a point of law so that her decision should be set aside.

3. The bare facts of this case, which are not in dispute, are that the Appellant was born on 16th July 1990, some three months after the death of his father. The Appellant was brought up by his mother as a single parent. The Sponsor was born a Citizen of the UK and Colonies (CUKC) and under the provisions of the British Nationality Act 1981 became a British Overseas Citizen (BOC). On 30th August 2008 the Sponsor exercised her right to come to the UK leaving her son, the Appellant, in the care of extended family members in India. The Sponsor registered as a British citizen on 19th February 2009 and was issued with a UK passport on 9th April 2009. Thereafter the Sponsor began working and from May 2009 sent regular remittances to India for the upkeep of her son. At the time of the Appellant's application for entry clearance, he was a full-time student at the National Institute of Computer Training. The Sponsor visited the Appellant in India for about four weeks in December 2009. Since then the Sponsor has kept in regular contact with the Appellant by telephone conversations and birthday cards.

4. On the basis of this evidence, the Judge found that the Appellant did not qualify for entry clearance under the provisions of paragraph 317 of the Statement of Changes in Immigration Rules HC 395. Indeed, it was not argued before her that he did. Further, as regards Article 8 of the ECHR, the Judge found, following the decision in **JB and Others (Children of former British Overseas Citizens – limits of NH) India [2008] UKAIT 00059**, that there was no family life between the Appellant and the Sponsor. Alternatively, the Judge found that if there was such family life, the interference with it was proportionate.

5. At the hearing, we heard a lengthy submission from Mr Gill QC based upon the grounds of application in which he argued that the Judge had erred in law particularly in respect of her finding that the Appellant and the Sponsor did not enjoy a family life. Ms Horsley responded with a submission to the contrary. Those submissions are recorded in the Record of Proceedings and need not be repeated here.

6. We found that there was an error on a point of law in the Judge's decision. In particular, we were satisfied that the Judge erred in law in her finding that there was not family life between the Appellant and the Sponsor. The

existence of family life is a question of fact, and yet the Judge appeared to be influenced by what was found in **JB and Others**. Further, in this appeal the Judge had to consider whether family life existed between a parent and her adult son. (The Appellant was 19 years and 10 months of age at the date of decision). To decide that issue, the Judge found "no evidence of an exceptional or other dependency". This is the wrong test. The test given in **Kugathas v SSHD [2003] EWCA Civ 31** is that the relationship between a mother and her adult son would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties. In this case there was clear evidence of such dependency, if only that of the Sponsor's funding of the Appellant, and therefore the judge should have concluded that there was family life between the Appellant and the Sponsor. We accept that the Judge went on to consider in the alternative whether the interference to family life was proportionate, but the error was material because the erroneous finding of no family life clearly had a bearing upon the Judge's decision as to proportionality. In paragraph 8.4 of the Determination she drew a distinction between "strong family life" and her finding of no family life.

7. We therefore set aside the decision of the Judge and proceeded to remake that decision on the basis of the evidence before the judge. We heard no new evidence because in cases of this nature Article 8 issues have to be decided according to the circumstances at the date of decision.

Re-made Decision

8. We heard further submissions from both representatives in respect of the re-made decision which again are recorded in the Record of Proceedings and will not be repeated here.

9. We find that at the date of decision there was a family life between the Appellant and the Sponsor for the reasons already suggested. Although the Sponsor voluntarily came to the UK in August 2008 leaving the Appellant with members of her extended family in India, it is apparent from the evidence that thereafter the Appellant formed no independent life but continued to be dependent upon his mother financially and for emotional and other support during his studies. We are also satisfied that the decision of the Respondent amounts to an interference with that family life of such gravity as potentially to engage the operation of Article 8. The effect of the Respondent's decision is to prevent the Appellant and the Sponsor from enjoying family life in the same household. As the Sponsor is a British citizen, she has every right to remain in the UK.

10. It is not in dispute that the interference is in accordance with the law, and necessary in a democratic society to maintain the economic well-being of the country through immigration control. We must now decide if the decision is proportionate.

11. The public interest to which we must attach weight is represented by the fact that the Appellant has no right to entry clearance under the Immigration Rules. However, we find that the weight to be attached to that public interest is reduced considerably by the need to correct what has been described in this appeal as the "historical wrong". This is a reference to the historical discrimination against East African Asians, the barriers created in terms of their ability to come and settle in the UK with their children, and the subsequent recognition by the UK Government that those historical wrongs needed to be undone as described in **NH (India) [2007] EWCA Civ 1330**. It is to be noted that the Sponsor in this appeal is of Kenyan origins. It was argued by Ms Horsley that in this case the historical wrong was of little significance because of the Sponsor's delay in seeking a redress of that wrong. However, as argued by Mr Gill QC, any such delay was explained satisfactorily by the Sponsor's circumstances upon her arrival in the UK.

12. On the other side of the balance, we find that there was a particularly strong family life between the Appellant and the Sponsor, no doubt as a consequence of the circumstances of the Appellant's birth. It is true that the Sponsor chose to come to the UK leaving the Appellant in India, but we are satisfied from the evidence that that action did not amount to an abandonment of the Appellant. The Sponsor continued to be financially responsible for him, and has assisted him as best she can through his studies. She has maintained close contact with the Appellant even to the extent of visiting him in India. The Appellant has not formed any independent life in India and it is apparent from the evidence that he still considers his family to consist of him and his mother. There is no evidence of any physical hardship experienced by the Appellant living in India, but it is also clear from the evidence that he will be adequately maintained and accommodated in the UK and will not become a burden upon the state.

13. Taking all these factors into account, we find that the circumstances of the Appellant outweigh the public interest and that therefore the interference is disproportionate to the legitimate public end sought to be achieved.

Decision

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

We set aside the decision.

We re-make the decision in the appeal by allowing it on Article 8 ECHR grounds.

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 and we do not find it necessary to do so.

Signed Date

Upper Tribunal Judge Renton