



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number:

IA/08767/2013

THE IMMIGRATION ACTS

Heard	at	Field	House
			Determination promulgated
On 2 September 2014		On 4 September 2014	

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Entry Clearance Officer, New Delhi

Appellant

and

Sumi Rai

(Anonymity direction not made)

Respondent

Representation

For the Appellant: Ms A Holmes, Home Office Presenting Officer.

For the Respondent: Mr M Puar of Counsel instructed by N. C. Brothers & Co Solicitors.

DETERMINATION AND REASONS: ERROR OF LAW

1. This is an appeal against the decision of First-tier Tribunal Judge Traynor promulgated on 11 June 2014, allowing Ms Rai's appeal against the decision of the Entry Clearance officer ('ECO') dated 21 March 2013 to refuse entry clearance as a dependant.

2. Although before me the ECO is the appellant and Ms Rai is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Rai as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Nepal born on 4 July 1992. Her personal, family, and immigration histories are referenced in the various documents on file and in the determination of the First-tier Tribunal Judge: the immigration history is essentially the history of the application for entry clearance. It is unnecessary to repeat any such details here save as is incidental for the purpose of this decision.

4. The Appellant's application for entry clearance was refused for reasons set out in a Notice of Immigration Decision dated 21 March 2013.

5. The Appellant appealed to the IAC.

6. The Appellant's appeal was allowed by the First-tier Tribunal for reasons set out in the determination promulgated on 11 June 2014.

7. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Cheales on 8 July 2014.

Error of Law

8. The Appellant's application was refused by the Respondent with reference to Appendix FM of the Immigration Rules. On appeal it was conceded on the Appellant's behalf that she could not meet the requirements of the Rules and that she accordingly relied upon Article 8 of the ECHR: see determination at paragraph 6.

9. It was a feature of the Appellant's Article 8 claim that she enjoyed a close family life with her younger sister Ms Supriya Rai (date of birth 10 November 1995). There were no other siblings. The Appellant and her sister had remained in Nepal when their mother had relocated to the UK following her marriage in 2000 to her second husband who was in service in the British Army. Their own father died in 2008. The Appellant and her sister had remained

together until the Appellant's sister was granted entry clearance to join their mother in the UK at or about the same time as the Appellant's own refusal.

10. Although at the date of the appeal hearing the Appellant's sister was in the UK, she did not give evidence in support of the appeal. The Respondent's representative emphasised these circumstances in his submissions - which are recorded in the determination in these terms: *"There was no evidence from Supriya to say that she was in any way affected as a consequence of separation from the Appellant. Where she is apparently in the United Kingdom the Tribunal should give weight to the fact that no evidence had been given by her, especially where it was claimed by the Appellant that she enjoys a close relationship with the Appellant. There was simply no evidence to establish the strength of connection between the Appellant and her sister. This was highly relevant when considering the application..."* (paragraph 29).

11. The Judge appears to accept the substance of this submission at paragraph 36 of the determination. The Judge records the fact that the Appellant had been living with her sister in Nepal, addresses himself to the apparent circumstances of the sister's application having been made prior to the Appellant's application, and observes that *"[v]ery little information"* had been given as to why the applications had been made separately *"particularly where it is now argued that these are sisters who have a very close relationship"*. The Judge then states: *"In the absence of independent corroborative evidence from the Appellant's sister, Supriya, who I note is an adult and capable of providing her own views, then I do not give weight to the unsupported and uncorroborated assertion made by the Appellant that she is in such a close relationship with her sister that the Respondent has affected the family life that then subsisted by granting the Appellant's sister entry clearance to the UK."*

12. I note that this is expressed as a finding in respect of the Appellant's own assertions as to the closeness of the relationship.

13. I find that I am unable to reconcile the finding at paragraph 36 with the Judge's observations at paragraphs 34 and his analysis at paragraph 40.

14. In contrast to the adverse finding at paragraph 36, the Judge appears to make a positive finding in respect of the relationship between the Appellant and her sister: *"I have no doubt that the relationship between the Appellant and her sister, whilst they were*

living together in Nepal, did amount to family life. I equally accept that the relationship between the Appellant and her sister will have been fractured by virtue of the fact that her sister was granted entry clearance to the United Kingdom and has now left Nepal and is living in the United Kingdom. Although I note that there is almost a four year gap in ages I accept that they have a close relationship, despite the fact that her sister is apparently in the United Kingdom she has not provided evidence to support the appeal."

15. At paragraph 40 in carrying out the proportionality balancing exercise the Judge places particular emphasis on the Appellant's relationship with her sister: "*I therefore find that in the circumstances the Respondent's decision will result in a breach of the Appellant's Article 8 rights, particularly in so far as her relationship with her sister is concerned*".

16. I accept that the overall thrust of the determination is sympathetic towards the Appellant. Indeed Mr Puar invited me to disregard paragraph 36 as an errant anomaly, 'sandwiched' as it was between two opposing positive references to the Appellant's relationship with her sister. However, I do not accept that it is appropriate to marginalise the analysis at paragraph 36 in this way – particularly as it is effectively an express adoption of the submissions made by the Respondent in this regard. The reality is that there is an inconsistency of reasoning between paragraphs 34 and 36, and accordingly it is not clear on what basis the Judge was satisfied it was appropriate to give positive, and particular, weight to the Appellant's relationship with her sister in his ultimate consideration of the proportionality balance at paragraph 40.

17. Whilst of less significance, in my judgement there is also a lack of clarity in the reasoning at paragraph 39. Whilst paragraph 39 appears to be no more than a consideration of the 'intermediary' test pursuant to **Gulshan** now suggested to be otiose in **MM (Lebanon) [2014] EWCA Civ 985** – the reasoning in the second clause of the first sentence following the word 'because' does not in any way support the conclusion or proposition set out in the first clause of that sentence, which includes a reference to the Appellant's separation from her sister.

18. Be that as it may, in my judgement the inconsistency of reasoning referred to in respect of paragraphs 34 and 36 in respect of a matter to which particular weight was attached at paragraph 40, amounts to an error of law. Necessarily this is a material error of law, and in consequence I find that the decision of the First-tier Tribunal requires to be set aside and remade.

19. The representatives before me were in agreement that the appeal should be reheard at a fresh hearing with all issues at large – which would also afford the opportunity of the Appellant’s sister now being called to give evidence. There was a consensus that the appropriate forum was the First-tier Tribunal, which I endorse.

20. I was told that the Appellant’s sister was not in attendance before the Upper Tribunal because she was attending College. Mr Puar also indicated that there had been no particular reason why she had not been called before the First-tier Tribunal. His indication was that in the event that the decision was to be remade there would be an expectation that the Appellant’s sister would indeed be called to give oral evidence. There is, of course, no duty or obligation for her so to do, but in the particular circumstances of this case where focus has been in significant part – though not exclusively – upon the Appellant’s relationship with her sister, if she does not now attend to give evidence, and in the absence of any clear explanation for such non-attendance, the Appellant should be aware that an adverse inference may be drawn by the Judge rehearing the appeal.

21. Whether or not Ms Supriya Rai is called at the next hearing is a matter for the Appellant and her sister: it is not necessary to make any specific Direction in this regard. Further I do not consider it otherwise necessary to make any specific Directions in respect of the rehearing: standard Directions will suffice whereby any further materials must be filed and served within seven days of the new hearing.

Decision

22. The decision of the First-tier Tribunal Judge contained an error of law and is set aside.

23. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Traynor.

Deputy Judge of the Upper Tribunal I. A. Lewis 3 September 2014