



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04419/2013

THE IMMIGRATION ACTS

Heard at Field House
On October 20, 2014

Decision & Reasons Promulgated
On November 6, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MISS SARSWATI RAI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Whitwell (Home Office Presenting
Officer)

For the Respondent: Mr Howells, Counsel, instructed by NC
Brothers & Co Solicitors

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born February 10, 1991 is a citizen of Nepal. The appellant applied under the Immigration Rules (Appendix FM) for entry clearance as an adult dependant on November 1, 2012. The respondent refused her application on January 3, 2013 on the basis she did not meet the Immigration Rules and there were no exceptional circumstances that merited consideration outside of the Rules under article 8 ECHR.
3. On January 28, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 arguing the application should have been allowed under the Immigration Rules or alternatively under article 8 ECHR. The respondent considered the grounds of appeal on June 6, 2013 and reiterated that the discretionary guidance relating to children of ex Gurkhas did not apply in this case.
4. The matter was listed before Judge of the First-tier Tribunal Howard (hereinafter referred to as "the FtTJ") on July 14, 2014. In a determination promulgated on August 6, 2014 he allowed the appellant's appeal under article 8 ECHR.
5. The respondent appealed that decision on August 14, 2014 arguing the FtTJ had erred by not following the approach set out in Gulshan (Article 8-new rules-correct approach) [2013] UKUT 640.
6. Permission to appeal was granted by Designated Judge of the First-tier Tribunal French on August 27, 2014 who found the FtTJ may have erred by:
 - a. Considering article 8 ECHR without any prior findings under the Rules.
 - b. Failing to consider whether there were good arguable reasons for going beyond the Rules.
 - c. By failing to consider concepts such as "compelling circumstances" or "unjustifiable harshness" when considering proportionality
7. Designated Judge of the First-tier Tribunal French added that there may be an issue as to whether the error was material but that was not an issue to be decided at the stage permission was given.
8. No Rule 24 response was filed by respondent.

9. I was informed the sponsor was in attendance but she did not attend the actual hearing.

SUBMISSIONS ON ERROR IN LAW

10. Mr Whitwell relied on the grounds of appeal and submitted there had been an error in the FtTJ's approach. He sought to expand his grounds, albeit without permission, by drawing to my attention errors in the FtTJ's approach. In particular, he submitted the FtTJ had erred in suggesting the facts were similar to those in Ghising (Family life-adults-Gurkha policy) [2012] UKUT 160 because in this appeal the person settling in the United Kingdom was not a Gurkha but his widow and she had not been granted status under the HM Forces policy as had been the case in Ghising. The FtTJ had erred in assuming he would have settled here because there nothing before the FtTJ that supported this suggestion. These errors affected the proportionality assessment.
11. Mr Howells submitted the FtTJ did not make any error. He argued that the grounds of appeal were limited to whether the FtTJ had erred in his approach. He submitted the test in Gulshan was incorrect as it firstly did not reflect the findings made by the Master of the Rolls at paragraphs [38 to [46] of MF (Nigeria) v the Secretary of State for The Home Department [2014] 1WLR 560 or the Court of Appeal's observations at paragraphs [128] to [131] of MM (Lebanon) & ors [2014] EWCA Civ 985. This appeal had only proceeded on the basis of human rights and it was clear the Immigration Rules do not have regard to the policy on Gurkhas and the FtTJ was bound to consider the case outside of the Rules and his findings were properly set out in his determination. There was therefore no error and even if his approach had been incorrect it was not material.

ASSESSMENT OF ERROR IN LAW

12. At the date of her application the appellant was almost 21 years of age. Her father had been a Gurkha soldier and her mother had been granted leave to settle in New Delhi under the Secretary of state's concession afforded to widows of ex-Gurkhas and not under the HM Forces rule. She was eventually granted leave to settle in the United Kingdom.
13. The respondent submitted there were no instructions to Entry Clearance Officers to consider adult children of widows under any discretionary criteria.
14. At the original hearing no oral evidence was called and the hearing went by way of submissions albeit the FtTJ was provided with a bundle of documents containing witness statements from the appellant, her mother and her mother's landlord. The FtTJ had before him various

documents including the sponsor's bank statements. The sponsor was in receipt of disability living allowance (high rate for mobility and middle rate for care) totalling £444.80 every four weeks. Her income matched her outgoings albeit she seemed to spend slightly more than she received and as at May 30, 2014 her account was just in credit with no overdraft facility.

15. The FtTJ did not set out the submissions but Mr Howells informed me that it had been conceded at the hearing that the Immigration Rules could not be met. I had Mr Howell's skeleton argument and this confirmed it was only an article 8 appeal.
16. The respondent was granted permission because the FtTJ had not demonstrated any engagement with the Rules and in particular the requirement that the FtTJ should demonstrate that he felt there were circumstances that merited dealing with the case outside of the Rules. The FtTJ did not have regard to the fact the Rules were not met and allowed the appeal based on Mr Howells's submissions concerning the Gurkha policy.
17. The respondent's grounds of appeal were limited and attacked the FtTJ's approach rather than his actual findings. Mr Howell has submitted that in the absence of any application to amend the grounds I am confined to the grounds submitted. Mr Whitell did not seek leave to extend his grounds although he did set out the other issues in his submissions.
18. Mr Howells submitted there was no requirement to conduct the two stage approach set out in Gulshan and following the decision in MM (Lebanon) & ors [2014] EWCA Civ 985 I agree with him. However, in order to consider the case outside of the Rules the FtTJ has to be satisfied that there are exceptional and compelling circumstances that would make refusal of entry unjustifiably harsh.
19. The FtTJ considered the evidence in the case and gave reasons (unchallenged) for allowing the appeal. He was satisfied that family life existed and gave reasons for this in paragraph [13] of his determination. He then considered interference and whether such interference was necessary before considering what the court in MM (Lebanon) & ors [2014] EWCA Civ 985 emphasised was necessary namely a proportionality assessment.
20. Having given his reasons for find there was family life and having identified this as a Gurkha case (rightly or wrongly) he then set out why he felt refusing entry was disproportionate including having regard to the public interest. The respondent's grounds of appeal were limited and

if it had been argued more widely then there may well have been a stronger argument but that was not the position I was faced with.

21. Although I accept that the FtTJ did not set out the law or the correct approach I am satisfied that he found circumstances he viewed as both exceptional and compelling and that they merited consideration outside of the Rules because refusal would be unjustifiably harsh. Accordingly, any error in approach was not material because he would have reached the same conclusion in any event.
22. I therefore find there has been no error in law.

DECISION

23. There is no material error of law and I uphold the original decision.
24. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no application has been made to alter the position.

Signed:

Dated: **October 20, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not alter the decision to refuse a fee award.

Signed:

Dated: **October 20, 2014**

Deputy Upper Tribunal Judge Alis