IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28225/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 February 2015	**On 25 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS PYARI MAYA RAI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Khan, Representative
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nepal born on 5 March 1951. She appealed against a decision of the Respondent dated 12 June 2014 to remove her from the United Kingdom and to refuse to vary leave to remain. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Majid and the Respondent appeals with leave against that decision. For the reasons which I have set out below I found a

material error of law in the First-tier Tribunal's decision and have set it aside and have remade the decision. Thus although this appeal comes before me in the first place as an appeal by the Respondent, I have continued to refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant arrived in the United Kingdom on 10 November 2012 with a visitor's visa valid from 1 November 2012 until 1 May 2013. On 5 April 2013 the Appellant applied for indefinite leave to remain on the basis of being dependent upon her son who is settled in the United Kingdom. The application was refused on 12 June 2014 and the Respondent made a decision to remove the Appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

The Application

3. With her application to vary leave the Appellant submitted two statements, one from herself and one from her son Mr Rajip Rai. In her statement the Appellant said that she was born in Nepal and was married to an ex-army Ghurkha. Her husband had a second wife and his behaviour towards the Appellant was such that she had to divorce him. She had been visiting her son in the United Kingdom over the last few years and was here on a visit visa again. Her son was also serving in the British Army and was stationed in the United Kingdom. The Appellant had no other relatives in Nepal and was not able to care for herself. She needed assistance with bathing, preparation of clothes, changing clothes, administering medication and to be encouraged to get out of bed and conduct activities. Her son, the Sponsor, gave her £200 a month which was directly deducted from his wages and came into her account. She had an account in Nepal and the money was there for her to use if necessary.

The Explanation for Refusal

4. The Respondent refused the application stating that the Appellant's desire to live with her son and his family was insufficiently compelling to grant leave to remain in the United Kingdom. Her illnesses such as depression and hypertension could be treated in Nepal. There were numerous charities and organisations there that could assist with mental health disorders. The financial support she received from her son could continue if she returned to Nepal. As her application had been submitted for a purpose not covered by the Immigration Rules the application fell for refusal under paragraph 322(1) of the Immigration Rules.

5. As the application was made after 9 July 2012 the Respondent considered the provisions of paragraph 276ADE of the Immigration Rules and Appendix FM. Under paragraph 276ADE the Respondent noted that the Appellant was aged 63 and had entered the United Kingdom on 10 November 2012. She had not therefore lived continuously in the United Kingdom for at least twenty years. She was neither under the age of 18 nor between 18 to 25. Rather she had only lived in the United Kingdom for one year and seven months. During that time she could not have severed all ties

including social, cultural and family ties with Nepal. She had resided in Nepal for over 60 years prior to arriving in the United Kingdom.

6. The Appellant could not bring herself within the requirements of Appendix FM as she had not demonstrated she was in a subsisting relationship with a person present and settled in the United Kingdom. She had no children under the age of 18 here. Whilst a family life might be in existence between the Appellant and her son that relationship was between adult relatives and it was not sufficient to justify a grant of leave in the United Kingdom.

The Appeal

7. The Appellant appealed against that decision in grounds prepared by the charitable organisation representing her "Enough is Enough". It was argued that the Appellant was a divorcée and faced much stigma in Nepal. She had been through much emotional abuse whilst bringing up her children and wanted to be with them now. The Appellant's son wished to remain in his post in the British Army in the United Kingdom and if his mother were to die in Nepal he would be unable to return to perform the funeral rites. The Appellant had three children, her son Rajip who was in the armed forces in the United Kingdom, a daughter who was married to a man serving in the armed forces in Germany and a second son who lived in Hong Kong working in construction. Although the Appellant's son might be able to secure some help for an hour or so in Nepal it could not replace the 24 hour care she would receive with her family in the United Kingdom. There was background material to show that women in particular faced a number of problems in Nepal where domestic violence was a widespread problem and where mental health was a largely neglected area.

The Hearing at First Instance

8. The appeal came before Judge Majid when the Appellant was represented by Counsel, Ms D Qureshi, who I was told was instructed on a direct access basis (and not available to attend before me). The Judge heard oral evidence from the Appellant and at paragraph 14 of his determination quoted verbatim from the Appellant's statement which he had before him. This stated that the Appellant was on antidepressants and waiting for counselling and had no other relatives in Nepal.

9. The Judge found that the Appellant would not be a burden on public funds if her application was granted. She did not feel happy about returning to Nepal. Her ex-husband had subjected her to domestic violence and that had triggered the depression in her. In his reasons why he was allowing the appeal the Judge wrote:

> "... it is only fair that in a particular case an individual is not deprived of the protection of the Convention where that course is justified by compelling circumstances. Powerful factors are outlined in paragraphs 10 and 14 above which justify the grant of leave, respecting family and private life under the ECHR 1950.

> "I am fully conscious of the legal requirements stipulated by immigration law. It is incumbent upon me to advert to the new Rules giving respect to the animus legis dictated by the Constitutional Supremacy of Parliament. The rule of law should benefit this Appellant who should have the advantage of the company of her biological children and who has nobody left to care about her in Nepal.
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> "... I am persuaded that the Appellant comes within the law and can benefit from the relevant Immigration Rules as amended and the protections of the ECHR."

The Onward Appeal

10. The Respondent appealed against this decision, arguing that the Judge had made an error of law by treating the application as one within the Immigration Rules when it was not. The Judge had also erred in his approach to Article 8. The Judge had failed to take into account the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 nor had he taken into account or attached any weight to the requirements of Appendix FM and paragraph 276ADE, paying no regard to the Respondent's policy contained within Appendix FM for leave to remain to be granted as an adult dependent relative. The Judge had failed to have regard to the case law in respect of adult children and their parents and had failed to provide adequate reasoning to conclude that family life was engaged. The Judge had attached undue weight to his acceptance of the evidence that the Appellant was not going to be a burden on public funds and had failed to take into account other countervailing factors such as possible recourse to the National Health Service. The Judge had provided no adequate reasoning to support his conclusion that the Appellant was in her final years.

11. The application for permission to appeal came on the papers before First-tier Tribunal Judge Robertson on 8 January 2015. In granting permission to appeal he wrote:

> "It is arguable as submitted in the grounds that the Appellant was not entitled to leave to remain as an elderly dependent relative under the Immigration Rules or on the basis of her private life here and that the Judge did not conduct a proportionality exercise under Article 8 taking into account the provisions of Sections 117A and B of the 2002 Act. Permission is granted on all grounds."

The Error of Law Stage

12. When the matter was called on for hearing before me the Appellant was represented by Mr Ali Khan from the charitable organisation Enough is Enough on a pro bono basis. I was informed that Ms Qureshi who had been instructed at first instance was not available that day. I indicated that in the first place I would have to decide

whether there was an error of law such that the decision fell to be set aside. If it did I would then have to decide whether to remake the decision myself or remit the appeal back to the First-tier Tribunal for the case to be heard again. If I decided there was no error of law than the decision of the First-tier Tribunal would stand.

13. In brief submissions the Presenting Officer indicated he relied on the grounds of onward appeal. The Judge had not considered the relevant Immigration Rules but had allowed the appeal under the Rules anyway. The Section of Appendix FM which deals with dependent relatives, Section ECDR, is in relation to applications made from abroad not within the United Kingdom. The determination was devoid of analysis. Some of the law cited was out of date, some of the determination was irrelevant and in some parts it was not clear what the Judge was saying.

14. In reply it was accepted on behalf of the Appellant that she could not meet every specific requirement of the Immigration Rules. She was putting her case on the basis of Article 8. She had a son who was a serving member of the army in this country and had grandchildren. She was not a drain on public funds. If she were forced to return to Nepal her son would also have to return because it was his duty to look after her. The Appellant had a number of medical conditions including depression and diabetes and a back problem. She was 63 years old but given the much lower life expectancy in Nepal compared to the United Kingdom that was a substantial age. Medical care available for her would be way below the level obtained in the United Kingdom.

15. I indicated to the parties after the submissions that I found that there was a material error of law in the determination such that it fell to be set aside and that I would give fuller written reasons which I now do. The Judge has purported to allow the appeal on two bases, that the Appellant could bring herself within the Immigration Rules and that it would breach this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention. It is clear that the Appellant cannot bring herself within the Immigration Rules, there are no Rules which fit her situation for her to come within and as the Respondent pointed out in the refusal letter the Appellant could not claim to be in this country on the basis of a family life or private life under the Immigration Rules. It was thus an error for the Judge to nevertheless allow the appeal under the Immigration Rules. It is significant that the Judge did not identify in his determination which Immigration Rules he was of the view that the Appellant did meet.

16. The assessment of Article 8 is of necessity more at large. However, the Judge again failed in his determination to give any or any adequate reasons why he was allowing the appeal under Article 8. He paid no attention to the statutory requirements contained in Section 117 A to D of the 2002 Act. The Appellant had established her private life in this country at a time whilst her status was precarious because she was here first on a visit visa and then secondly on "3C leave" (pursuant to the Immigration Act 1971). The Judge found that the Appellant would not be a burden on public funds but did not explain why he came to that conclusion given the

possibility that the Appellant would be seeking treatment under the National Health Service.

The Disposal Issue

17. Having informed the parties that I found an error of law the issue arose as to disposal of the proceedings. I canvassed the views of the parties as to whether I should proceed to hear the matter there and then or whether I should remit the matter back to the First-tier Tribunal to be heard again pursuant to the authority of the Senior President's direction or whether the matter should remain in the Upper Tribunal but the hearing be adjourned possibly for further evidence.

18. On behalf of the Appellant Mr Khan indicated that he would request an adjournment because he would wish to call Mrs Rai's daughter-in-law, the wife of her son Rajip. The witness had not made a statement and had not given evidence to the Judge at first instance. Her evidence was to the level of support she gave to the Appellant. I was told that she dresses the Appellant in the morning, bathes her, administers her medication and helps her to go to the doctor. Mr Khan indicated he was unable to say what else the witness might add to that list.

19. I did not consider it appropriate to remit the case back to the First-tier to be heard again. There were clearly difficulties for the Appellant in arranging representation for herself and these would potentially be exacerbated by remitting the matter back to the First-tier. There had been an effective hearing of this appeal, albeit that the determination produced by the Judge was flawed in a number of material respects. I did not consider therefore that this case came within the provisions of the Senior President's direction and I indicated that I was not prepared to remit the matter and would rehear the decision.

20. Having decided that the next issue was whether I could rehear the matter there and then or would have to adjourn for further evidence. I considered the issue bearing in mind that the test of whether to adjourn is one of fairness. The proposed witness had not attended the Tribunal this afternoon, notwithstanding a direction that in the event that an error of law was found the Tribunal would expect to proceed with any necessary oral evidence being made available. No effort had been made to call the witness at first instance and no effort had been made to take a statement from the witness as to what she might give evidence about. The Appellant had said in her statement submitted with her application for variation of leave to remain that she required assistance with bathing, administering medication etc. and that does not appear to have been disputed by the Respondent. The evidence of the witness as far as I could glean added nothing of substance to the Appellant's unchallenged evidence. The Respondent's argument was that the daughter in law's care did not amount to sufficiently compelling and compassionate circumstances such that the Appellant's appeal should be allowed outside the Immigration Rules. In those circumstances I was not of the view that a just determination of the appeal would be assisted by an adjournment for the attendance of a potential witness whose exact

evidence was not known because no witness statement had been taken from her. I indicated therefore I was not prepared to adjourn the matter and the case proceeded.

The Substantive Re-Hearing

21. On behalf of the Appellant further evidence was submitted in the form of the Appellant's general practitioner records from 3 April 2013 until 20 October 2014 and correspondence from her GP regarding appointments to have blood tests taken. The Appellant gave brief oral evidence in which she denied that she had had any treatment from her GP before she made her application for a variation of leave.

22. In closing for the Respondent it was argued that the GP records produced on behalf of the Appellant raised a concern as to whether the treatment received from the general practitioner was being paid for privately or whether it was being treated under the NHS. Whilst the Appellant was receiving money from her son her financial dependency could never suffice in terms of establishing a family life on its own. There were no more than normal emotional ties between the Appellant and her son. There was no evidence to suggest that the Appellant could not receive treatment in Nepal for her medical conditions.

23. In closing for the Appellant it was argued that the Appellant had only received treatment from her GP under the NHS after she had lodged her application for a variation for leave. There was not just financial support the Appellant received from her son but also emotional support. She received a widow's pension. It was a small amount. Her care needs were imperative. She should be able to have assistance from her family members. The only chance of that would be if she could live with her son, daughter-in-law and her grandchildren. After I had reserved my decision the Tribunal received a communication from the Appellant's representatives indicating that the Appellant was not in fact in receipt of a widow's pension, her husband may still be alive but he had deserted her.

Findings

24. The Appellant cannot bring herself within the Immigration Rules. As the Respondent points in the refusal letter she cannot bring herself within either Appendix FM or paragraph 276ADE. The provisions in the Immigration Rules for leave to enter as a dependent relative apply to entry clearance out of country applications not, as in this case, an in country application for a variation of leave which had been granted to her as a visitor.

25. The Appellant therefore seeks to remain in this country under Article 8 outside the Immigration Rules. As has been stated in the case authorities such as **MM**, the assessment of an Article 8 claim is at large but informed by UK and Strasbourg jurisprudence.

26. The Appellant has a family life with her son but that is a relationship of adults and I find there is no more than normal emotional ties. Whilst it is correct that the

Appellant's daughter-in-law assists the Appellant with day-to-day tasks, there is no reason why upon return to Nepal the money currently paid by her son to the Appellant into her account in Nepal could not be utilised to provide similar care. As the Respondent points out, there is no evidence before me that treatment is unavailable for the Appellant. It may be, as the background material relied upon by the Appellant suggests, that it is not to the same standard as in the United Kingdom but that of itself would not lead to a breach of the Convention. The relationship between the Appellant and her son has up till now been conducted at a distance with the parties seeing each other from time to time through visits. There is no reason why that could not continue once the Appellant was back in Nepal.

27. I place little weight on the Appellant's assertions that she would be subject to verbal abuse by the people because of her status as a divorced woman. Even if (as is now said) her ex-husband is not dead she is not in any contact with him and so he cannot harass her. Even if neighbours might pass unkind comments etc such occasional harassment even if it were to exist does not cross the threshold of treatment contrary to Article 3. The Appellant could therefore continue her relationship with her son upon return to Nepal and family life could be continued elsewhere. It would be a matter for the Appellant's son as to whether he wished to return to Nepal to be with her. I understand he is reluctant to leave his unit in this country to return to Nepal but given his close ties to his country of origin it is difficult to see how it would be considered to be unreasonable to expect him to return if he so wished.

28. The Appellant has only been in the United Kingdom for a very brief time. During that time she has made extensive use of the facilities of her general practitioner. It cannot be said therefore that the Appellant would not be a burden on public funds since she would continue to require considerable input from the National Health Service were she to remain in this country. Such private life as she has established here has been established whilst her status is precarious and in accordance with Section 117B little weight is to be ascribed to it when assessing the proportionality of interference with it consequent upon the Appellant's removal.

29. The Appellant's removal would be in accordance with the legitimate aim of immigration control since she has overstayed her visit visa and has made use of public funds. The legitimate aim is pursuant to the economic wellbeing of the United Kingdom. Given the little weight to be ascribed to her private life, and given the fact that her family life could be continued elsewhere and in any event is only a relationship of adults with no more than normal emotional ties, it is clearly proportionate to the legitimate aim being pursued that the Appellant's application for a variation of leave be refused and her appeal against the removal decision also be dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to vary leave and to remove the Appellant.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 25th day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have set aside the First-tier decision on the grounds that it made a material error of law, I also set aside the decision to make a fee award against the Respondent.

Signed this 25th day of March 2015

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Deputy Upper Tribunal Judge Woodcraft