Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00714/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd March 2015	**On 9th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS HEM KUMARI PAHIM
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:
For the Appellant: Mr P Richardson (Counsel)
For the Respondent: Mr S Whitwell (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Adio, promulgated on 4th December 2014, following the hearing at Hatton Cross on 17th November 2014. In the determination, the judge allowed the appeal of Hem Kumari Pahim. The Respondent subsequently for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Nepal, who was born on 25th August 1979. She appealed against the decision of the Respondent dated 3rd December 2013 to refuse her entry clearance to join her mother as an adult dependant. The application was considered under paragraph EC-DR1.1 of Appendix FM. The Respondent's view was that there were no instructions to Entry Clearance Officers to consider adult children of ex-Gurkha widows under any discretionary criteria. The Respondent decided that the Appellant had not shown she is required due to, either age, illness or disability, long-term personal care to perform everyday tasks for her mother in the UK. Second, the Respondent was also not satisfied that the Appellant would be maintained and accommodated by her mother without recourse to public funds. The application was rejected.

The Judge's Findings

3. The judge recounted the facts. He observed how the Sponsor's husband had been discharged from the army in 1959 before the Sponsor's marriage. The Sponsor, Mrs Dhan Meyaa Limbu, then had her daughter, Hem Kumari Pahim, born to her in 1979. This was twenty years after her husband's discharge. Her husband then died when he was 81 years old. Since that time, the Sponsor and the daughter have been very close. In fact, they had been living together (see paragraph 5).

4. When the Sponsor came to the UK, her daughter, the Appellant, did not come with her. She was not allowed to do so. However, the Sponsor speaks to her daughter "most of the time every week" (paragraph 6). Her daughter is well and is studying a Masters degree. It was the Sponsor who paid for the Appellant's Masters degree programme. The Appellant is living with a relative. Indeed, "her daughter is paying for rent and studying in Nepal" (paragraph 6).

5. The judge found that the Sponsor had made it clear that there are regular payments made to her daughter through her Nepalese account and that the Sponsor was credible (paragraph 15). The judge had regard to the well established authorities of **Gurung [2013] EWCA Civ 8** and **Ghising [2012] UKUT 00160**. The case of **Gurung** made it clear that ultimately the question of whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts. The judge held that,

> "In the present case, the only time that the Appellant and her mother has spent apart has been between 2011 and the present time when the Sponsor has been settled in the UK. Furthermore, the Sponsor has been back to her daughter in Nepal even though she only spent thirteen days with her but gave a credible reason to avoid paying double rent …. I find that the Appellant is still financially dependent on the Sponsor and there are emotional ties between both of them. The Sponsor has stated that she calls her daughter most of the time" (paragraph 17).

6. The judge went on to hold that there were only three years in which the Sponsor and the Appellant had not lived together and that the voluntary separation between them cannot itself indicate that there is no family life in existence (paragraph 18). In concluding, the judge held that the decision of the Respondent "would prevent the Appellant and her mother living together under the same roof on a daily basis as they were living before the Sponsor came to the UK in 2008" (paragraph 19).

7. This was a case where the courts had routinely emphasised the importance of rectifying a "historic injustice" with respect to Gurkhas and this consideration is an important factor to be taken into account in the balancing exercise (paragraph 20).

8. This was also a case where the Appellant's father

> "served with the British military for fifteen years and he has an exemplary record. He was also decorated with medals. His wife has been allowed to settle in the UK as the only remaining member of the family but for the historic wrong the daughter also would have been in a position to settle with her mother and father if the father was alive and opted to settle in the United Kingdom" (paragraph 21).

The appeal was allowed.

Grounds of Application

9. The grounds of application state that the judge failed to apply Section 117B of the 2002 Act as amended. Furthermore, the judge failed to determine that the Appellant would be financially independent as required by the latest public interest considerations.

10. On 26th January 2015, permission to appeal was granted.

Submissions

11. At the hearing before me on 2nd March 2015, Mr Whitwell, appearing on behalf of the Respondent, Entry Clearance Officer, submitted that there were four Grounds of Appeal originally, but that on reflection, he would have to withdraw two of these. First, it is made clear (at paragraph 12 of the sponsoring mother's witness statement) that had her husband been able to apply earlier, he would have done so, at a time when their daughter was under 18. Therefore, Ground 4 would have to be withdrawn insofar as it suggest that there is no historic injustice here. Second, Ground 1 would also have to be withdrawn because it suggests that there is no family life constituted, given that normal emotional ties are to be expected in such cases anyway. That left grounds two and three.

12. Ground 2 states that the judge was wrong to uphold (at paragraph 17) that "the Appellant is still financially dependent on the Sponsor". However, the question of "financial independence" as explicated in Section 117B, has recently been visited by the Tribunal in **Dube [2014] UKUT 90**, and that case has made it clear that, provided

that the judge refers to the relevant considerations, it is unnecessary to specifically refer to the statutory provisions of the amended 2002 Act, in relation to the public interest considerations. Therefore, this ground also could not be taken any further. That left Ground 3 and this was important because in the application (at question 2.9) the Appellant had said that there was an income of £400 per month, but this was in the form of a pension credit for the sponsoring mother and there was no evidence of what the outgoings were of the mother to enable the judge to conclude that the parties would be financially independent.

13. For his part, Mr Richardson submitted that the suggestion that the Appellant may have been financially independent in Nepal was misconceived. It was misconceived because it was based upon the misreading of the judge's statement that, "her daughter is paying for rent and studying in Nepal" (paragraph 6). The fact that the daughter was paying rent did not mean that the daughter had independent means. This was because paragraph 6 had to be read as a whole and this made it clear that, "the Sponsor paid for the Appellant's Masters degree programme" (paragraph 6). Accordingly, it was clear that the Appellant was essentially dependent upon her sponsoring mother.

No Error of Law

14. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. First, the case of **Dube [2015] UKUT 90** makes it clear that Section 117A to Section 117D does not represent any kind of radical departure from the established jurisprudence on Article 8. What these provisions do is to make a case for the need for a structured approach. It is also made clear that judges are duty bound to have regard to the specified considerations and specific enumeration of the provisions is not necessary. In this case, it was clear that the judge did do so.

15. The Judge was clear that, "the Sponsor is also on pension credit evidence of which was provided before me" (paragraph 19). There was no suggestion that there was any issue of financial independence arising from this.

16. Second, the judge applied the case law in a meticulous manner, and made findings of fact that are beyond reproach. For example, the judge held that it was only for three years that the Sponsor and the Appellant had not lived together, (paragraph 18), but that otherwise there was a subsisting family life between them, and that the affect of the decision of the Respondent "would prevent the Appellant and the mother living together under the same roof on a daily basis as they were living before the Sponsor came to the UK in 2008" (paragraph 19).

17. Proper consideration was given to the requirement giving regard to "historic injustice" (paragraph 20). Issues of integration into society, which are relevant under the new public interest provisions, were specifically considered (paragraph 21). The judge properly concluded that,

> "the Sponsor is quite elderly and the closest relative she has to her is her daughter who she has been very close to since the death of her husband. She makes it clear in her witness statement that to deny her daughter entry would be denying her the family support from the only daughter which she cherishes and treasures the most" (paragraph 22).

These findings were perfectly open to the judge.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 6th March 2015