



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/21752/2013

THE IMMIGRATION ACTS

Heard at Field House
On 28 August 2015

Promulgated
On 9 September 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Jeni Limbu

[No anonymity direction made]

Appellant

and

Entry Clearance Officer New Dehli

Respondent

Representation:

For the appellant: Ms E Lagunju, instructed by Howe & Co Solicitors

For the respondent: Ms AB Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Jeni Limbu, date of birth 22.9.91, is a citizen of Nepal.
2. This is her appeal against the decision of First-tier Tribunal Judge Chamberlain promulgated 24.10.14, dismissing her appeal against the decision of the Entry Clearance Officer, dated 20.11.13, to refuse entry clearance to the United Kingdom as the adult dependent of Mrs Indrakumari Limbu, an ex-Ghurkha widow, resident in Nepal. The Judge heard the appeal on 2.10.14.

3. First-tier Tribunal Judge Astle refused permission on 6.1.15. However, when the application was renewed to the Upper Tribunal, on 8.5.15 Upper Tribunal Judge Finch granted permission to appeal.
4. Thus the matter came before me on 28.8.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Chamberlain should be set aside.
6. The relevant background can be briefly summarised as follows. The appellant's father served 15 years with the Brigade of Gurkhas, until 1977. It is asserted that he was unjustly denied the opportunity to apply for settlement in the UK until the injustice was corrected in 2009. He took up settlement in 2011, but died in 2013 without ever making or supporting an application for his wife and the appellant, or indeed other children to join him. On 7.11.13 his widow, the appellant's mother and sponsor, was granted settlement rights in recognition of her late husband's service. However, it is asserted that the sponsor was unable to travel to the UK because she is reliant on the assistance of the appellant for her kidney dialysis treatment.
7. The application was refused, as there are no provisions under the Rules or any discretionary criteria for consideration of adult children of ex-Gurkha widows. It is a choice for the mother whether she wishes to take up the UK settlement visa and there is no provision under the policy for entry clearance to be granted to the carer of a parent. It is clear that the appellant could not meet the adult dependent relative requirements of EC-DR.1.1 of Appendix FM.
8. The Entry Clearance Manager has pointed out that the sponsor was granted settlement under a discretionary concession afforded to the widows of ex-Ghurkas and there is no policy guidance requiring the consideration of adult children of widows, the appellant being an adult at the date of application. The discretionary guidance relating to children of ex-Gurkhas does not apply to the facts of this case.
9. The claim before the First-tier Tribunal was based entirely outside the Rules on family life under article 8 ECHR.
10. At §25 of the decision the First-tier Tribunal Judge found that family life existed between the appellant and the sponsor, but concluded at §26 that the decision did not interfere with that family life, as the sponsor had chosen to remain in Nepal with her daughter the appellant. Relevant to that decision, the judge noted that as this is an out of country application the appeal must be decided on the basis of the circumstances prevailing at the date of decision, 20.11.13. It remained to be seen whether the sponsor would or would not take up the settlement entry clearance, which will expire in November 2015.
11. In granting permission to appeal, Judge Finch found it arguable that the First-tier Tribunal Judge failed to apply the five-stage Razgar test and failed to correctly apply Ghising and others (Gurkhas/BACs - historic wrong -weight) [2013] UKUT 567 (IAC).

12. The Rule 24 response, dated 19.5.15, provides little assistance, submitting only that the First-tier Tribunal Judge directed himself properly. In her submissions at the outset of the hearing before me, Ms Weller accepted that the First-tier Tribunal Judge did not address the historic injustice issue or apply Ghising, but submitted that the error was not material as the judge found that the decision did not interfere with the family life between the appellant and the sponsor, as they were both living in Nepal. The historical injustice principles only applies in conducting the proportionality balancing exercise, but if the family life argument fails at the earlier hurdle of interference, the proportionality balancing exercise is not reached.
13. Ms Lagunju's very straightforward submissions were that as the sponsor sought and had been granted settlement rights in the UK, the decision to refuse the application of the appellant her daughter would interfere with their family life, as the appellant would not be able to join the sponsor. Ms Lagunju submitted that family life ought to be considered not simply on the basis of the existing circumstances, but the right to continue and develop family life in the UK in pursuance of the settlement rights granted to the sponsor. If the sponsor comes to the UK without the appellant the family life between them would be ruptured. Reliance is additionally placed on the exceptional and compelling circumstances of the sponsor's health and medical issues.
14. Whilst it may be argued that but for the historical injustice the appellant would have been brought to the UK with her mother and father whilst still a child, that is not necessarily so on the facts of this case. The father came to the UK on his own, leaving the sponsor the appellant behind in Nepal, and neither he nor they made any application for settlement before he passed away in 2013.
15. As the judge noted, the appellant lives in the family home with the sponsor. There was no witness statement from the appellant and no evidence adduced at the First-tier Tribunal to substantiate the claim that the only reason the sponsor remains in Nepal is that she is unable to come to the UK without the appellant. There was no evidence that the appellant is the only person who can or even does care for her mother. Neither did the judge find that the sponsor was unable to travel to the UK without the appellant. At §27 the judge found that the appellant "has failed to show that the decision effectively prevents the sponsor from enjoying her entitlement to indefinite leave. That is the sponsor's own choice." Elsewhere the judge noted that the sponsor receives financial assistance from friends in the UK.
16. On those facts and the limited evidence as found by the judge, the conclusion that the decision did not interfere with the family life enjoyed by the appellant and the sponsor is one to which the judge was entitled to come and for which cogent reasons have been provided. As the judge stated at §29, the appellant failed to demonstrate on the balance of probabilities that the decision interferes with the protected rights of either or both the appellant and the sponsor. It may be that with better or further evidence the burden of establishing the primary elements of article 8 family life could have been discharged, but as presented to the First-tier Tribunal the evidence was insufficient.
17. It follows that I find no material error of law in the decision of the First-tier Tribunal.

Conclusions:

18. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. The First-tier Tribunal did not make an anonymity order. No submissions were made on the issue. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup

Dated