Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09533/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 06 April 2016	**On 14 April 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MARVIN SALVA AQUINO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Karim, Counsel
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant entered the UK on 20 August 2014 with entry clearance as a visitor, which was valid until 31 January 2015. On 08 January 2015 he applied for leave to remain on human rights grounds.

2. The respondent refused the application in a notice of decision dated 22 February 2015 on the ground that the appellant applied to vary his leave to remain for a purpose not covered by the immigration rules (paragraph

322(1)) and there were no particularly compelling circumstances to justify granting leave to remain outside the immigration rules. The respondent considered the fact that the appellant had family members in the UK but concluded that, as an independent adult, the nature of his family ties were not such to justify granting leave to remain. The respondent noted that he said that he had no job to return to in the Philippines. Even if there was damage to certain areas after the typhoon he could return to an area that was not affected.

3. The appellant appealed the decision. First-tier Tribunal Judge Keith ("the judge") dismissed the appeal under the immigration rules and on human rights grounds. He heard and noted the evidence given by the appellant and several members of his family. He took into account the nature and extent of the various family relationships, including the appellant's relationship with his younger brother. With regard to that relationship he also took into account the best interests of the child. He noted a number of inconsistencies in the appellant's evidence in relation to his intentions when he came to the UK and with reference to what relatives he still had in the Philippines. The judge concluded that the appellant had sought to mislead the Tribunal as to where he was living before he came to the UK in an attempt to suggest that the typhoon had greater significance. In fact he was living in Manila. The evidence showed that the typhoon lost much of its force as it reached Manila. The judge found that there was no good reason why the appellant could not find work and continue to support himself as he did before he came to the UK. He concluded that the appellant did not fulfil a "caring role" for his younger brother, which was carried out by the appellant's father.

4. The appellant seeks to appeal the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal failed to adequately assess the extent and nature of the appellant's family life in accordance with the principles outlined in *Ghising (family life – adults – Ghurka Policy)* [2012] UKUT 00160.

   (ii) In particular, the First-tier Tribunal failed to give adequate consideration to the appellant's relationship with his younger brother and the best interests of the child.

   (iii) The First-tier Tribunal erred in failing to carry out a balancing exercise in accordance with the five step approach outlined in *R v SSHD ex parte Razgar* [2004] 3 WLR 58.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.

6. In *Kugathas v SSHD* [2003] EWCA Civ 31 the Court of Appeal considered the circumstances in which the right to family life would be engaged under Article 8 of the European Convention:

> "Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

7. In *Ghising (family life-adults-Gurkha policy)* [2012] UKUT 00160 the Tribunal considered the authorities relating to family life between adult relatives in some detail. The Tribunal concluded that the decision in *Kugathas* had been read too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts [56]. The Tribunal noted that the Strasbourg court found that family life existed between adult relatives in a number of cases without evidence of exceptional dependence or necessarily the need for cohabitation [60]: see for example *Boughanemi v France* (1996) 22 EHRR 228. A significant factor was whether the adult child has founded a family of his own. If he is still single and living with his parents he is likely to enjoy family life with them [61]. The Tribunal emphasised that the assessment of whether family life exists for the purpose of Article 8(1) is highly fact-sensitive.

8. The First-tier Tribunal Judge made clear findings of fact as part of his overall assessment of the credibility of the evidence given by the witnesses. The underlying reasons for those factual findings have not specifically been challenged in the appellant's grounds of appeal or in submissions at the hearing save to assert a disagreement with the judge's conclusion that the appellant's family circumstances did not give rise to the level of family life required to engage the operation of Article 8.

9. It became clear from the evidence given by the witnesses during the hearing that the appellant's father and mother had lived in the UK for some time [15]. The appellant's mother visited him in the Philippines at least once a year [18]. The appellant lived in the Philippines during that time. It emerged that he lived independently and worked to support himself in the Philippines [12-13 & 19]. The appellant's father said that he did not work because "he needed to look after and collect his youngest son from school. When it was put to him that the reason that he did not work was because of childcare responsibilities, [his father] confirmed that this was correct." [15]

10. In the context of this evidence it was open to the judge to conclude that the appellant came to the UK with no intention of returning to the Philippines. The judge made clear and sustainable findings that were open to him on the evidence when he concluded that the appellant did not fulfil any significant caring role for his younger brother. The evidence showed

that at most he helped to pick him up from school but his father's evidence was that he was the main carer for his youngest son. There was no evidence to show that the appellant performed a caring role for his brother that was akin to parental responsibility or that his attachment to his brother, after a short period of only one year, was so close that his removal would be detrimental to the child. The appellant could continue his relationship with his family as before. While the appellant is financially dependent on his family members since he arrived in the UK that is because he has no permission to work. While it is understandable that the appellant and his family would prefer to live together no particular elements of emotional dependency were in fact disclosed on the evidence. The appellant was living independently from his family for some time before coming to the UK.

11. The judge came to his conclusion with specific reference to the decision in *Ghising* [35]. His statement that it was unnecessary to consider the appellant's case outside the immigration rules is incorrect (Mr Karim accepted that the appellant could only rely on Article 8 outside the rules). However, it is quite clear that the judge considered whether family life had been established within the meaning of Article 8 with reference to the correct legal framework. Even if the last sentence in paragraph 35 is technically incorrect it is immaterial to the judge's overall conclusion, which was legally sound and was open to him on the evidence.

12. The judge made reference to section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interests of the appellant's younger brother earlier in the decision [27]. He concluded that the appellant's relationship with his brother was not such that he played a significant role in his life. Although the judge did not make detailed findings relating to the best interests of the child I conclude that any omission isn't material to the overall outcome of the appeal. It is quite clear that the child's best interests were to remain in the UK with his parents who are his main carers. The appellant and his younger brother will no doubt have developed some form of sibling relationship in the short period of time since he arrived in the UK but there was no evidence to suggest that the relationship could not continue through telephone/internet calls or visits as it had done before. The judge was entitled to conclude that the relationship between adult sibling and minor sibling was not sufficiently close that it would engage the operation of Article 8.

13. Mr Karim accepted that the focus of his challenge was to the judge's findings relating to family life and not to his conclusions relating to private life. I consider that this concession was correctly made given the very short period of time that the appellant has lived in the UK and the terms of section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), which would compel any judge to place little weight on a private life that had been established at a time when the appellant's immigration status was precarious.

14. For the reasons given above I find that it was open to the judge to conclude that the particular facts of this case did not disclose the additional elements of emotional or other dependency that gave rise to 'family life' within the meaning of Article 8 of the European Convention. As such the appellant did not even satisfy the first two questions of the five stage test in *R v SSHD ex parte Razgar* [2004] 3 WLR 58. In the circumstances it was not necessary for the judge to go on to consider in detail whether removal would be proportionate. While the judge's final conclusions were brief they were open to him on the evidence. The decision did not involve the making of an error on a point of law.

15. As an independent adult child and sibling the appellant does not meet the requirements of the immigration rules relating to family life. The Court of Appeal in *SSHD v SS (Congo)* [2015] EWCA Civ 387 recognised that it is possible for cases that fall outside the requirements to engage Article 8 but only if there are compelling circumstances not sufficiently recognised under the rules. While it is understandable that the appellant and his family would prefer him to remain in the UK a desire to remain does not necessarily equate to a right to remain. Nothing in this case discloses the kind of compelling circumstances that would breach Article 8 of the European Convention if the appellant were required to leave the UK to continue his life in the Philippines as before.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 11 April 2016

Upper Tribunal Judge Canavan