IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02661/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 March 2016	**On 19 April 2016**

Before

Mr H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)

Between

TARAN CHONGBANG (LIMBU)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr H Dieu, Counsel instructed by N.C. Brothers & Co Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Kainth) dismissing an appeal by the appellant against the

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respondent's decision dated 20 January 2014 refusing her entry clearance as an adult dependent child of her father and sponsor, a former Ghurkha soldier.

Background

2. The appellant is a citizen of Nepal born on 25 November 1978. She applied for entry clearance on 25 November 2013 but she was not able to meet all the requirements of the rules set out in para EC-DR1.1 of Appendix FM. The respondent was satisfied that the appellant had close family in Nepal to turn to should the need arise and was not satisfied that she required due to age, illness or disability long-term personal care to perform everyday tasks or that she would be adequately maintained, accommodated and cared for in the UK by her sponsor without recourse to public funds. The respondent went on to consider the application under the policy for dependants set out in IDI, chapter 15, s.2(a), 13.2, but found that she was unable to bring herself within its terms. He went on to consider article 8 but found that it was not shown that there was family life within article 8(1) but, if there was, that refusal would be proportionate to a legitimate aim. Following the filing of a notice of appeal the decision was reviewed but maintained and the appeal therefore proceeded to a hearing.

The Hearing before the First-tier Tribunal

3. At the hearing the judge heard oral evidence from the appellant's father and mother, the appellant's brother and her first cousin. It was accepted at the hearing that the only issue for the judge was article 8, the appellant accepting that she could not satisfy the requirements of the immigration rules. The judge reminded himself of the relevant jurisprudence set out in Razgar [2004] UKHL 27 and Huang [2007] UKHL 11 and more specifically in relation to adult family dependants of former Ghurkha soldiers, Gurung v Secretary of State for the Home Department [2013] EWCA Civ 8 and Ghising and Others (Ghurkhas: historic wrong; weight) [2013] UKUT 567. It was argued on behalf of the appellant that the historic injustice she had suffered should be a formidable and weighty factor in the balancing exercise under article 8 [22]. The judge referred to the guidance in AAO v ECO [2011] EWCA Civ 840 that family life would not normally exist between parents and adult children within the meaning of article 8 in the absence of further evidence of dependency which went beyond normal emotional ties and that financial dependency was not in itself sufficient to create a strong bond under article 8. The judge then referred to Ghising that if a Ghurkha could show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult children would have been able to accompany him as a dependent child under the age of 18, that was a strong reason for holding that it was proportionate to permit the adult child to join the family.

4. The judge found that it was clear from the evidence of the sponsor and the witnesses that they enjoyed a close family bond. They remained in regular contact and family members visited the appellant in Nepal. The judge noted that the appellant's mother had returned to her home country to visit the appellant on no fewer than five times and in December 2010 she remained with her for a period of about three months. The judge accepted that the appellant did not enjoy the best of health and there was numerous documentary evidence to this effect. Her medication was paid for by family members in the UK. She was unable to work and received regular financial support and accommodation was provided for her.

5. The judge accepted that the appellant received emotional and financial support. Her parents and family members visited her regularly but it could not be said that there were greater emotional ties in this appeal than one would expect in a normal loving family relationship. It was understandable that her family in the UK were concerned for her wellbeing but that did not in itself equate to circumstances which were out of the ordinary or not expected. The judge noted that the appellant's father had enlisted in the Ghurkha Brigade on 7 October 1964 and was discharged on 26 October 1971. His conduct had been exemplary. He was aged about 24 when discharged and although he made reference in his witness statement to the fact that had he had the opportunity he would have made an application for settlement in the UK, there was no certainty that he would have proceeded with this. The judge also noted that in the decision letter the respondent had carefully considered the appellant's article 8 application taking into account the historic injustice and provided comprehensive reasons why the appellant's application failed. He concurred with those reasons [29].

6. The judge then went on to deal with the five questions set out in Razgar. He concluded that there would be no interference with respect to the appellant's right to respect for her family life as the status quo would continue as it had done for the last five years. In connection with the second question, no facts had been identified or accepted which would give rise to the engagement of article 8 concerning consequences of sufficient gravity to the appellant or others. The interference was in accordance with the law and the judge found that the decision was proportionate given the need to maintain immigration control and the economic well-being of the country. He took into account s.117B of the Nationality, Immigration and Asylum Act 2002 as amended. He noted that the appellant was not in the best of health and if allowed entry into the UK there was a strong likelihood that she would require the assistance of the National Health Service and this would have a knock-on effect with regards to the economic well-being of the United Kingdom and the utilisation of scarce resources. Taking everything into account the judge found that the respondent had not reached a decision which could not be supported in law.

Submissions

7. In the grounds it is argued that the judge erred by failing to consider whether the appellant's financial dependency could or did amount to real, effective and committed support and had failed to apply the guidance set out by the Court of Appeal in Kugathas [2003] EWCA Civ 31 when assessing whether there was family life within article 8. The grounds further argued that, as the judge had made no express adverse credibility findings about the sponsor's evidence, in the light of the fact that he had made an unequivocal and uncontested statement that he would have settled in the UK when he left the army that it was not open to the judge to find otherwise than he would have so settled had he been permitted to do so. It is further argued that the judge did not consider the interplay of s.117B of the 2002 Act and the decisions in Gurung and Ghising. The possible future use by the appellant of the NHS had to be balanced with the fact that even after the introduction of the immigration healthcare surcharge, applications for settlement from adult dependent children were exempt.

8. Mr Dieu adopted these grounds. He submitted that the judge's approach to article 8 was flawed in that there had been no explicit finding on whether family life within article 8 existed. He further submitted that the judge had failed to consider the fact that, even where family members have lived apart for a considerable period of time, article 8 may nevertheless oblige the state to facilitate family reunion and not merely to refrain from interfering with the existing level of contact. The judge had failed to give proper weight to the historic injustice to Ghurkha families which was a significant factor to be weighed in the balance. He had erred in his finding that there was no certainty that the sponsor would have settled in the UK had he had an earlier opportunity of doing so [27] as he had been unequivocal on this issue in his statement. The judge had failed, so he argued, to take into consideration the fact that the appellant's health had deteriorated in November 2010 or to give proper account to the healthcare surcharge and the exemption applying to Ghurkha settlement claims.

9. Ms Isherwood submitted that the grounds amounted to a disagreement with the judge's findings. The appellant had not been able to meet the requirements of the rules. The judge had gone through the evidence. He had accepted that there was a close family bond between the sponsor and the appellant's witnesses but had been entitled to conclude that any interference caused by the refusal of entry clearance would not give rise to the engagement of article 8 but if it did that the decision would be proportionate to a legitimate aim.

Assessment of whether the judge erred in law

10. I must consider whether the judge erred in law such that the decision should be set aside. It is argued firstly on behalf of the appellant that the judge made no explicit determination of whether there was family life

within article 8(1). However, the first question identified in Razgar is whether the decision would be an interference with the exercise of an applicant's right to respect for private or family life and the second that, if so, would such interference have consequences of such gravity as potentially to engage the operation of article 8. The judge identifies at some length the facts relating to the appellant's family life in [20], her age, the fact that she had spent her entire life in Nepal and prior to 2010 had lived with her parents and siblings, she was unmarried and unemployed, her accommodation was provided by her father by way of rental payments and she received financial support from her parents and siblings. She had extended family members who lived in a remote village and she kept in regular contact with family members via telephone. The judge then went on to consider the issue of historic injustice reminding himself of the relevant authorities.

11. In [25] the judge said it was clear from the evidence that there was a close family bond and in [27] that the appellant received emotional and financial support from her parents but he found that it could not be said that there were greater emotional ties in the present appeal than one would expect in a normal loving family relationship and that it was understandable that the appellant's family in the UK were concerned for her but that did not in itself equate to circumstances which were out of the ordinary or not expected. When considering the Razgar questions in [30] the judge set out as his conclusion that there would be no interference with the appellant's right to respect for her family life as the status quo would continue as it had done for the previous five years. Even if the judge did not make an explicit finding on the existence of family life, he was entitled to take into account that the status quo would continue as it had done so for the last five years and to find in respect of the second question in Razgar that no factors had been identified of sufficient gravity to engage article 8.

12. This was an issue of fact for the judge to resolve on the evidence before him. There is no reason to believe that he was unaware that article 8 might oblige the state to facilitate family reunion and not merely to refrain from interfering with the existing level of contact or that the threshold for engaging article 8 was not an especially high one. I am satisfied that the judge took all relevant factors into account and properly directed himself on the law when reaching the decision that in the particular circumstances of this appeal article 8 was not engaged.

13. In the skeleton argument produced by Mr Dieu it is argued that it was confusing for the judge to continue to consider the other relevant questions in article 8 but, generally, it is an entirely sensible course for a judge to deal in the alternative with all the issues. On the issue of proportionality I am satisfied that the judge reached a decision properly open to him on the evidence. The respondent in the original decision and in the decision on review took into account the issue of the historical injustice when considering proportionality within article 8(2) and the judge

was entitled to agree with those reasons. It was also a matter for the judge to decide what inferences could properly be drawn from the evidence about whether it was shown that the sponsor would have made an application for settlement in the UK at an earlier time if he had had the opportunity of doing so. The judge's comments and findings on this issue were properly open to him.

14. Further, I am not satisfied that there is any substance in the arguments relating to the deterioration in the appellant's health. The judge left out of account the impact of the exemption from the healthcare surcharge when considering the public interest but I am not satisfied that this factor would have had any material bearing on the outcome of the proportionality assessment but in any event he was considering proportionality in the alternative. When the decision is read as a whole the judge came to findings and conclusions properly open to him for the reasons he gave. I am not satisfied that he erred in law in any way capable of affecting the outcome of the appeal as argued in the grounds and submissions.

Decision

15. The First-tier Tribunal did not err in law. It follows that its decision stands.

Signed Date: 13 April 2016

H J E Latter

H J E Latter
Deputy Upper Tribunal Judge Latter