



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05908/2013

THE IMMIGRATION ACTS

Heard at Field House
On 4 September 2013

Determination Promulgated
On 9 September 2013
.....

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BAHADUR KRISHNA GURUNG

Respondent

Representation:

For the Appellant: Ms A Holmes, Senior Presenting Officer

For the Respondent: Mr C. Howells, instructed by NC Brothers & Co

DETERMINATION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. For the sake of convenience we refer to Mr Gurung as the claimant.
2. The claimant is a citizen of Nepal born 15 August 1979. His father is a former member of the Brigade of Gurkhas and served in the British Army. In 2006, after a change of policy by the United Kingdom government, the claimant's father was

granted Indefinite Leave to Remain. Shortly thereafter the claimant's mother and three sisters were also allowed to settle in United Kingdom. The claimant came to United Kingdom as a visitor on 12 July 2007. He subsequently lodged an application for settlement as a dependent of his father. This application was refused by the Secretary of State, a decision against which the claimant appealed. The hearing of the appeal appears to have been delayed pending a decision on a lead case in the Administrative Court relating to the settlement of Gurkhas in United Kingdom. Although it is not entirely clear, it appears that the Secretary of State then withdrew her decision of 11 February 2008 and made a further decision in June 2010. Immigration Judge Callow dismissed the claimant's appeal against such decision in a determination of 12 November 2010, concluding, *inter alia*, that the claimant was not dependent on his father, and that his claims not to have been employed prior to visiting the United Kingdom were untruthful.

3. On 19 February 2013 the Secretary of State made a decision to remove the claimant from the United Kingdom. The claimant appealed this decision to the Tribunal, such appeal being heard by First-tier Tribunal Judge Morgan on the 16 May 2013, and allowed on human rights grounds (article 8) on 24 May 2013.
4. The Secretary of State appeals to the Upper Tribunal with the permission of Designated First-tier Tribunal Judge Murray, granted on 13 June 2013. Thus the appeal came before me.
5. Having heard submissions from the parties I concluded that the First-tier Tribunal's decision did not contain an error on a point of law such that it ought to be set aside. I announced my decision at the hearing, and now give my reasons.
6. I shall deal with each of the Secretary of State's grounds in turn. Paragraphs 1 to 3 of the pleaded grounds submit that the First-Tier Tribunal judge erred in failing to consider whether the claimant met the requirements of the Immigration Rules, and further, given that it is plain that the claimant could not meet the requirements of those Rules, in failing to take such fact into account. At the hearing Ms Holmes observed that the Secretary of State had carefully considered, in her refusal decision, whether the claimant met the requirements of the Immigration Rules, and concluded that he did not. She further observed that the judge made no reference to the Rules within his determination. She submitted that such failure was an error on the judge's part, and that this error was material because had the judge had regard to the Immigration Rules, his mind "may have been better concentrated" when dealing with the article 8 considerations outside of the Rules.
7. Ms Holmes is entirely correct in her observation that the First-tier Tribunal judge refer, in his determination, to the Secretary of State's considerations and conclusions made in relation to the Immigration Rules. However, that he did not do so has to be viewed in the context of the fact it was never part of the claimant's case before the Tribunal that he could meet the requirements of the Rules.

8. When a Tribunal determines an individual appeal based on article 8 considerations outside the rules, it should consider the issue of proportionality in context of the Secretary of State's clear expression, as set out in the Immigration Rules, of where the balance lies [MF (Article 8 - new rules) Nigeria [2012] UKUT 00393(IAC)]. There is, however, nothing within the determination of Judge Morgan that leads me to conclude that he was not aware that this was so, or that he did not take such an approach. The fact that the judge made no mention of the requirements of the Immigration Rules in an appeal in which the Rules were not in issue, does not of itself lead me to a contrary conclusion. Judge Morgan is a judge of a specialist Tribunal and must be taken to be aware, unless the terms of his decision clearly dictate otherwise, of the obligations imposed of him in this regard.
9. Paragraph 4 of the Secretary of State's pleaded grounds make, and assert, statements of fact, and does not particularise or identify any error of law in the First-tier Tribunal's determination. Likewise paragraphs 5 to 7 of the pleaded grounds make statements of law, but again make no attempt to identify any legal error in the First-tier Tribunal's determination.
10. In paragraph 8 of the pleaded grounds the Secretary of State observes that Immigration Judge Callow made an adverse finding in respect of the claimant's asserted dependency on his father; identifying in particular the rejection of claimant's evidence that he had been not been in employment prior to coming to the United Kingdom. Although the terms of this ground do not go on and identify claimed error in Judge Morgan's determination, at the hearing Ms Holmes submitted that Judge Morgan had erred in coming to a contrary conclusion of fact without giving due weight to, or sufficient reasons for, departing from the conclusions of Judge Callow.
11. It was pointed out to Ms Holmes during the course of her submissions that the presenting officer who had appeared before Judge Morgan had not sought to impugn the factual basis of the claimant's claim [recorded in paragraph 10 of the determination] and was content to proceed on the basis that the key factual circumstances of the appeal were not in dispute. In response Ms Holmes indicated that a note on the Secretary of State's file, drawn up by the presenting officer who had appeared before the First-tier Tribunal, suggested that the credibility of the claimant's account had not been conceded before the tribunal. She accepted however that the terms of the Judge Morgan's determination stated otherwise and that no point had been taken in this respect in grounds of application for permission to appeal to the Upper Tribunal. She was unable to explain why this was so, or why neither the aforementioned note, nor a statement from the presenting officer, had been provided to the tribunal in compliance with directions.
12. Having acknowledged her difficulties in this regard Ms Holmes did not seek to amend the Secretary of State's grounds so as to make challenge to the recording of the aforementioned concession. Had she done so I would have refused to grant permission for such amendment, ostensibly for the reasons identified in the previous paragraph. In such circumstances this ground falls away. The judge was not required

to give further reasons for departing from a finding made by Judge Callow; it was sufficient that he proceeded on a basis of fact accepted by the parties before him.

13. Paragraph 9 of the pleaded grounds is narrative, and again, does not seek to identify or particularise an error in the First-tier Tribunal's determination.
14. In paragraphs 10 and 11 of the grounds it is submitted that the judge erred in (i) giving undue weight to his finding that the claimant was financially and emotionally dependent on his parents and (ii) failing to give sustainable reasons for finding that the claimant's relationship with his parents went beyond "normal emotional ties".
15. I reject both of these submissions. As to the former, matters of weight are for the judge determining the appeal. It cannot be said that the weight attached to the claimant's dependency on his parents was, on the facts of this case, perverse, and neither did Ms Holmes seek to persuade me that this was so.
16. As to the second of the aforementioned submissions, Ms Holmes accepted that it had been conceded before the First-tier Tribunal that article 8(1) of the Human Rights convention was engaged. It is in this context that the conclusions and the findings of the First-tier Tribunal judge, made in relation to article 8 (1), must be taken. The judge proceeded on the basis of the accepted facts. He set out a summary of the relevant facts in paragraphs 12 to 14 of the determination. He accepted that the claimant was, and had always been, a member of his father's household; save for a short period of time between the claimant's family members' arrival in the United Kingdom and the claimant's arrival here. The judge concluded that the claimant had not established an independent life and that he was still financially and emotionally dependent on his parents. These were findings open to the judge on the available evidence.
17. The claimant's circumstances were such that it was open to the judge to conclude that he had a family life with his parents in United Kingdom. In any event, even if it could be said that the claimant's circumstances do not establish he had a family life here, the close bond he shares with his family members in the United Kingdom clearly demonstrate he has a substantial private life here, interference with which would patently lead to the engagement of article 8. Consequently, as the judge identifies in paragraph 10 of his determination, the appeal turned on whether it would be proportionate to remove the claimant.
18. Paragraph 12 of the pleaded grounds appears to relate to different case altogether. It is prefaced on the claimant being outside of the United Kingdom; asserting, *inter alia*, that the First-tier Tribunal failed to provide adequate reasons as to why family life could not continue as presently constituted. The ground further asserts that separation and interference with claimant's family life was one of choice and personal preference, not necessity. It is to be recalled that it was the claimant's case, and the finding of the First-tier Tribunal, that family life should continue as it is at present; the claimant and his parents living together as a family unit in the United Kingdom.

19. Finally, as to the submission in paragraph 13 of the grounds that the judge erred in failing to give adequate reasons for his proportionality assessment, I find this to be unarguable. As I have identified above the First-tier Tribunal judge set out the circumstances of the claimant's relationship with his family members, both prior, and subsequent, to his arrival in the United Kingdom. He made findings of fact that were open to him regarding the issue of the claimant's dependency on his parents and took into account, as he was entitled to, the historic injustice caused to the claimant and his father as a consequence of the delay in the UK authorities recognising that Gurkhas should have had their service to this country rewarded by being allowed to settle here. Whilst the judge makes no reference to the Court of Appeal's decision in Sharmilla Gurung [2013] EWCA Civ 8, his conclusions are entirely consistent with it. The court in Gurung observed, when considering appeals relating to refusals of entry clearance of 'over-age dependents' of former members of the Brigade of Gurkhas, that "*If a Gurkha he can show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now.*" The claimant's father stated, and his evidence was accepted, that he would have settled in the UK upon his retirement from the Brigade of Gurkhas had the opportunity to do so been available to him. At such time the claimant would have been under the age of 18.
20. Looking at the determination as a whole I find that the First-tier Tribunal Judge took into account all materially relevant matters, and did not take into account any irrelevancies. The determination read as a whole makes sense, and the tribunal's conclusions were reasonably open to it having regard to the accepted evidence.
21. For all these reasons I conclude that the determination of the First-tier Tribunal did not involve the making of an error on a point of law and must remain standing.

Decision

For the reasons given above, the decision of the First-tier Tribunal does not contain an error of law capable of affecting the outcome of the appeal and it therefore remains standing. The claimant's appeal is allowed on Article 8 ECHR grounds.

Signed:



Upper Tribunal Judge O'Connor
Date: 4 September 2013