Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13208/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 25 February 2014	**On : 04 March 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

PAHAL SING GURUNG

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Ball, instructed by Howe & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nepal born on 25 May 1991. He applied for entry clearance to the United Kingdom as the over-age dependent relative of his father Bahadur Gurung, who had been granted indefinite leave to enter on the basis of his former services in the Gurkhas. He has been given permission to appeal against the determination of First-tier Tribunal Judge Cohen dismissing his appeal against the respondent's decision to refuse his application.

2. The appellant made his application for entry clearance on 26 April 2012. His parents were both granted settlement under the HM Forces rules on 22 February 2010 and had entered the United Kingdom on 9 May 2010. They had applied for settlement together when he was 18 years of age but his application was refused on 16 July 2010 and this was therefore his second application. When interviewed about his application the appellant stated that he had one brother and five sisters who were all married and lived in India or Nepal. He had a grandmother and uncle living in Nepal and his parents were living in the United Kingdom. He was living alone in rented accommodation and was studying. He was supported financially by his parents. He was the youngest child of the family and the only unmarried child and therefore, according to his culture, remained part of his parents' family unit.

3. The appellant's application was refused by the respondent on 11 June 2012 under paragraph 317 of HC 395 and the Home Office policy, on the grounds that it was not accepted that he was dependent upon her father or that he was living alone outside the United Kingdom in the most exceptional compassionate circumstances, given in particular that he had siblings and other family members living in Nepal. The respondent was also not satisfied that the appellant's father was in a position to accommodate and maintain him in the United Kingdom without having recourse to public funds and therefore refused the application under the Immigration Rules. The respondent considered the appellant's application under the Home Office policy for dependants over the age of 18 of Foreign and Commonwealth HM Forces members but concluded that he did not fall within the terms of the policy since there were no exceptional circumstances in his case. The decision was also considered not to be in breach of Article 8 of the ECHR.

4. The appellant's appeal was heard before First-tier Tribunal Judge Cohen on 14 October 2013. It was conceded on behalf of the appellant that he could not meet the requirements of paragraph 317 of the immigration rules. The judge heard evidence from the sponsor who explained that his son, the appellant, had moved into independent accommodation with his friends when he was aged about 14 to 15 years old in order to attend school, about four hours' journey from their village, but would return home during the school holidays for a maximum of a month each time. The judge, in considering Article 8 of the ECHR, found that the relationship between the appellant and the sponsor did not extend beyond that of normal family ties, although he also accepted that there was limited family life between them. On the basis that he had been living an independent life since the age of 14 or 15, he considered that the appellant's exclusion from the United Kingdom was appropriate. He found there to be no "exceptional circumstances" under the policy and concluded that any interference with family life would be proportionate and not in breach of Article 8. He accordingly dismissed the appeal.

5. Permission to appeal to the Upper Tribunal was sought on the grounds that the judge had made inconsistent findings in regard to family life and as to whether Article 8 was engaged on that basis; that the judge had erred by using an exceptionality test in his proportionality assessment under Article 8; that the judge's treatment of the "historic

injustice" to Gurkha veterans was inadequate; and that he had failed to apply anxious scrutiny in making his decision.

6. Permission to appeal was granted 28 January 2014 on the grounds raised.

Appeal Hearing and Submissions

7. At the hearing I heard submissions from both parties on the error of law.

8. Mr Ball expanded upon the grounds of appeal, submitting that the judge had failed to make clear findings on the existence of family life for the purposes of Article 8, a crucial matter in this category of case, and had failed to engage with the principles in Gurung and others [2013] EWCA Civ 8. The respondent had failed to point to any matters over and above the public interest in maintaining a firm immigration policy to justify the interference with the appellant's family life.

9. Mr Avery submitted that the judge had found that family life had not been established, but had then gone on to consider the case in the alternative on the basis that there was limited family life since the appellant was leading an independent life. He had looked at the "historic injustice" and had decided that any interference was proportionate. He was entitled to reach such a conclusion.

10. I advised the parties that, in my view the judge had erred in law. His findings on family life were inconsistent. In this category of cases it was essential for there to be a clear finding in that respect, since that was the starting point upon which the principles in Gurung were founded. The judge had not properly engaged with the principles in that case and in the circumstances his conclusions were not sustainable. Accordingly I set aside the judge's decision and enquired of the parties as to the process of re-making the decision.

11. Although there was no objection by the parties to the decision being re-made by myself on the basis of the findings of fact at paragraph 10 of the judge's determination, it seems to me, upon reflection, and upon a careful consideration of the evidence and the findings, that this is a case that would benefit from further oral evidence to clarify matters, given the clear absence of findings on crucial aspects of the case.

12. Whilst Mr Avery did not challenge the findings at paragraph 10, he relied upon the fact that the judge, in paragraph 11, noted inconsistencies in the evidence of the sponsor about the appellant's living arrangements. Indeed the judge, having noted inconsistencies in the evidence, did not go on to make clear findings in that regard. The findings are particularly unclear as to the appellant's circumstances in the two years between his parents departing from Nepal in May 2010 and the decision to refuse entry clearance in June 2012 and did not appear to address that period at all. Although there was evidence before the judge, at page 73 of the appeal bundle, to the effect that the appellant was still studying at the same institution in June 2013, that evidence suggested that he remained in the same school year as stated in a previous letter of 3 April 2012 at page 34 of the bundle. That was not

addressed by the judge and there were indeed no clear findings as to whether or not it was accepted that the appellant was still studying, a matter that had been raised in the entry clearance decision. In addition, no findings were made by the judge about the appellant's emotional ties to his parents in the two years following their departure from Nepal and at the time of the entry clearance decision, nor indeed about the financial ties, albeit that there was relevant documentary evidence contained in the appeal bundle before him. Neither was any consideration given to the appellant's relationship with his siblings who remained in Nepal. All of those matters were material to the question of whether family life existed at the time of the decision to refuse entry clearance but were not addressed by the judge by way of clear findings.

13. In all of these circumstances, it seems to me that the appropriate course would be for the appeal to be remitted to the First-tier Tribunal for the case to be determined afresh and for fresh and clear findings to be made on the appellant's circumstances and his family ties, in order to establish whether Article 8 was engaged on the basis of family life. Clearly if it was found that that was the case, it would then be for the First-tier Tribunal to go on and determine whether the appeal would succeed under Article 8 in the light of the guidance in Gurung and Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567.

14. For all of these reasons, I find that the decision of the First-tier Tribunal contains errors of law and has to be set aside. In the circumstances, it is appropriate for the appeal to be remitted to the First-tier Tribunal for all matters to be determined.

DECISION

15. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Cohen.

Signed Date

Upper Tribunal Judge Kebede