IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10590/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2nd March 2015

Decision & Reasons Promulgated
On 10th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR NABIN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs P Glass (Counsel)
For the Respondent: Mr S Whitwell (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge K St J Wiseman, promulgated on 27th October 2014, following a hearing at Richmond on 16th September 2014. In the determination, the judge allowed the appeal of Nabin Gurung. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Nepal, who was born on 12th March 1985. He appealed against the refusal of a variation of leave to remain in the UK in a decision dated 21st February 2014.

The Appellant's Claim

3. The Appellant's claim is that he wishes to stay in the UK as the dependent of his father, Harka Gurung. Harka Gurung gave evidence before the judge, that he left the Gurkhas in 1977. He would have settled in the UK had the opportunity presented itself. It was only around 2009 that British policies seemed to change to enable such settlement to take place. Mr Harka Gurung did not apply for another three years because his son was studying in the UK and "he had to pay for his fees and could not afford to pay the costs of settlement" (paragraph 29). Mr Harka Gurung explained that his son, the Appellant, had come to the UK as a student in 2009. There was evidence before the judge from the Sponsor's wife, Dhanmaya Gurung, the Appellant's mother, that the family was a close-knit family and lived together (paragraph 33). The family had lived together until November 2009 when the Appellant came to the UK and began living together again immediately when the opportunity presented itself. The Appellant's parents came in August 2013. The Appellant was the youngest child of his parents (paragraph 37).

The Judge's Findings

4. In a careful and detailed determination, the judge gave a comprehensive explanation as to how the law in relation to the settlement of Gurkhas has taken place in the UK over a number of years. The cases have taken many years to develop (paragraph 41). One particular difficulty remains and that is in relation to the admission of "adult dependent children" (paragraph 42). The difficulty is exacerbated where the child becomes an adult even before the parent has the opportunity to apply to settle in the UK (paragraph 42). The cases have referred to the rectifying of an "historic injustice" (paragraph 43). The development of cases is such that Gurkha cases appear almost to be "in a category of their own in this respect" (paragraph 44).

5. A pivotal case has been that of **Patel v ECO (Mumbai) [2010] EWCA Civ 17**. The judge held that the factual situation there was almost identical to the factual situation here (see paragraph 48). As he observed,

> "The Appellant in this case is some three years older but quite frankly, once one is dealing with individuals who are in their mid 20s in any event, precise distinctions in age can surely mean very little. In all the cases in question, it could be said that the Appellant is of an age where he could and perhaps should be independent both personally and financially but that does not seem to have affected very much the eventual result of the cases in question" (paragraph 48).

6. I should make it clear at this stage that there is no suggestion at all that this observation is in any way incorrect and not brought about by the cases that the judge referred to.

7. The judge then referred to three lengthy decisions of the courts, namely, **<u>Ghising</u> [2012] UKUT 00160; <u>Gurung</u> [2013] EWCA Civ 8,** and **<u>Ghising</u> (Gurkhas/BOCs; historic wrong; weight) [2013] UKUT 00567**.

8. The judge, on the basis of these cases, concluded that,

> "There is no doubt in my view that the position of the adult dependent children of Gurkhas who have settled here had been significantly stronger and was even thought to be the case a few years ago and as I have previously indicated, it is something of a coincidence that the facts in this run of judgments in the same case and the facts in the case before me are very similar" (paragraph 51).

The appeal was allowed. It was allowed under Article 8. It was not allowed under the Rules.

Grounds of Application

9. The grounds of application state that the judge did not explain in his determination the findings in relation to family life between the Appellant and the parents.

10. On 16th December 2014, permission to appeal was granted on the basis that the judge may have placed too much reliance upon historic injustice.

Submissions

11. At the hearing before me on 2nd March 2015, Mr Whitwell submitted that the judge had not made proper findings in relation to family life between the Appellant, who was already in the UK, when his mother and father arrived here, and the relationship between them. When the judge gives his reasons from paragraph 41 onwards, there is no factual explanation of the evidence relied upon to support the findings made. It has simply been said that there is an historic injustice here. Indeed, at paragraph 31 to 32, when cross-examined, the Appellant stated at the hearing that he had heard on the grapevine that there is a possibility of him settling in the UK and he was relying on this. That was no reason upon which to raise an expectation of the appeal being allowed.

12. For her part, Mrs P Glass submitted that the material facts are all set up in the body of the determination. The finding is clear that the family members had all lived together until 2009. Then the Appellant had come to the UK. He had been joined by his parents in 2013. They immediately started living together again. Family life existed. Furthermore, the Appellant has been dependent upon his parents and this is made clear at paragraphs 27 to 28. Therefore, all the matters in issue are properly dealt

with. The facts of this case are indeed properly explained at paragraph 47. The judge here holds that the facts in this case, when compared to the facts in **Patel**, are "as close as it could be". Therefore, there could hardly be any dispute as to why the appeal was allowed. Second, insofar as the judge places reliance upon "an historic injustice" he does so because he is bound by the authorities. He sets out the three authorities he relied upon. What is in operation here is a complimentary principle. Mrs Glass also drew my attention to the latest guidance of 5th January 2015 from the Home Office which actually reflects the case law that the judge had referred to. All in all, therefore, there could be no basis for challenging the decision.

13. In reply, Mr Whitwell submitted that the case was not on all fours with the evidence that was set out, because the onus did not show how the case was similar to the others.

No Error of Law

14. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law such should be set aside. This is a careful and detailed determination. The judge clearly displays mastery of both the law in this complex area as well as the facts before him. First, as far as the facts are concerned, his findings are made in the body of the determination, that, even though the Appellant had first arrived in the UK as a student, nevertheless, the family have been living together until 2009 in Nepal, and as soon as his parents arrived here, they began living together again immediately. Second, the judge makes it clear that the son was dependent upon his father. Finally, and no less importantly, it is indeed the case that the facts here are very similar to the facts of the cases that the judge refers to. This is clear from what the judge states at paragraphs 49 to 51. Accordingly, the decision was one which was plainly open to the judge to make.

Notice of Decision

15. There is no material error of law in the original judge's decision. The determination shall stand.

16. No anonymity direction is made.

Signed	Date
Deputy Upper Tribunal Judge Juss	10th March 2015