IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02868/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th January 2016	**On 4th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR HARI BAHADUR GURUNG
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Puar, Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 14th March 1982. The Appellant applied for entry clearance to settle in the UK as the dependant son of Gaj Bahadur Gurung an ex-Gurkha solider. The Appellant's application was considered as an adult dependant relative under paragraph EC-DR.1.1 of

Appendix FM of the Immigration Rules. His application was refused in a very detailed Notice of Refusal by the Entry Clearance Officer on 29th January 2014. In an equally detailed review the Entry Clearance Manager upheld the decision of the Entry Clearance Officer in a review dated 19th June 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Andrew sitting at Birmingham on 14th May 2015. In a decision and reasons promulgated on 27th May 2015 the Appellant's appeal was dismissed both under the Immigration Rules and under Article 8.

3. On 9th June 2015 the Appellant through his instructed solicitors lodged Grounds of Appeal to the Upper Tribunal. That application was refused by Immigration Judge Grant-Hutchison on 11th August 2015. On 19th August 2015 renewed Grounds of Appeal were lodged to the Upper Tribunal.

4. On 17th November 2015 Deputy Upper Tribunal Judge Archer granted permission to appeal. Judge Archer noted that the grounds asserted that the Judge had erred by failing to consider the specific Gurkha factors that arose and that whilst the Judge had referred to relevant case law he had arguably failed to adequately consider and make findings in relation to the historic injustice, Gurkha policy and Gurkha specific case law. In particular Judge Archer noted that there was no finding as to whether the Appellant's father would have settled in the UK in 1967 when he left the British Army had he been permitted to do so.

5. On 31st December 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. In the Rule 24 response the Secretary of State contended that the First-tier Tribunal Judge had clearly considered the relevant case law at paragraphs 12, 13, 16 and 17 of the determination and had made a reasoned finding based on the evidence that was presented at the appeal. The Rule 24 response contended that the Grounds of Appeal were merely a disagreement with the Judge's findings.

6. It is on that basis that the appeal comes back before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant is represented by his instructed Counsel Mr Puar. The Secretary of State appears by her Home Office Presenting Officer Mr Walker.

Submissions/Discussion

7. Mr Puar submits that there are two relevant authorities *Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC)* and *Ghising and Others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)*. Whilst Mr Puar acknowledges that there is brief reference within the decision of the First-tier Tribunal Judge to the first of these two authorities he submits that the decision overall is littered with errors of law. He starts by referring me to the basis of the appeal brought under Section 85A(2) of the Nationality, Immigration and Asylum Act 2002 as set out at paragraph

3 and then at paragraph 18 the reference to out of date medical evidence, pointing out that it was irrelevant to the determination as to what the Appellant's present condition was in 2015.

8. Thereafter he takes me to paragraph 6 of the decision. In many ways, he submits, this is the key paragraph. He submits that the Judge has made no findings of fact, has not considered *Ghising* (number 2) and has failed to consider the role of proportionality. Further he submits that for some reason the Judge has gone on to give due consideration to the decision in *JB (India) [2009] EWCA Civ 234*. He points out that the *Ghising* authority is about historic injustice and proportionality and that the Judge has failed to make findings of fact as to when the Appellant's father would have settled in the UK and to follow the test set out therein. Consequently he submits that there is a substantial error of law and that the court needs to set aside the First-tier Tribunal decision and order a new hearing.

9. He then goes on to consider the aspect of family life. He appreciates at paragraph 13 the First-tier Tribunal Judge has made reference to the authority of *Ghising* but he has not set out the appropriate test which he reminds me is one of more than emotional normalities as in *Kugathas*. Further he then turns to paragraph 18 of the First-tier Judge's decision where the Judge has considered whether the Appellant's medical condition is an exceptional factor. He points out to me that this is not the test and that the test is more than normal emotional ties i.e. an objective test. He consequently contends that by following the wrong test the Judge has in any event made a material error of law.

10. He states that the Appellant has always lived with his parents save for a two year period of separation in 2012 and reason has been provided as to why the application was delayed. The Judge he points out made no findings of fact regarding this issue but in any event submits the family bond has not been broken. He asked me to find that there is a material error of law and to submit the matter back to the First-tier Tribunal for re-hearing.

11. Mr Walker in very brief submissions agreed with the points made by Mr Puar particularly with regard to the failure of the Judge to address the authority of *Ghising [2013]* and to make a proper proportionate assessment regarding those issues. He acknowledges that the errors are material and that the approach suggested by the Appellant's Counsel should be followed.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. I am gratefully assisted in this matter by the approach adopted by Mr Walker on behalf of the Secretary of State who concedes that there is a material error of law for the reasons set out in the submissions from Mr Puar in the decision of the First-tier Tribunal Judge. In particular the Judge has failed to take due note of the guidance given in *Ghising [2013]* but where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matter relied on by the Secretary of State/Entry Clearance Officer consists solely of the public interest in maintaining a firm immigration control. The Judge has failed to carry out the proportionality assessment and has failed to address this particularly at paragraph 6 of his decision.

15. In addition the Judge's approach to the consideration of family life, and particularly his analysis that the test is not one of exceptional factors, is wrong. It is an objective test of more than emotional ties that is the test as set out within *Ghising [2012]* and the Judge has wrongly applied the test in this instance.

16. For all the above reasons there are material errors of law and the correct approach is to remit the matter back to the First-tier Tribunal for re-hearing.

Decision and Directions

The decision of the First-tier Tribunal Judge contains material errors of law and is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing with the following directions:

(1) None of the findings of fact are to stand.

(2) The appeal is to be re-heard on the first available date 28 days hence at Birmingham Hearing Centre with an ELH of two hours before any First-tier Immigration Judge other than Immigration Judge Andrew.

(3) That there be leave to either party to file and serve an updated bundle of documents upon which they seek to rely at least seven days pre-hearing.

(4) A Nepali interpreter be available.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris