Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23545/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 July 2014	**On 18 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

ABHISEK GURUNG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance
For the Respondent: Mr E Tufan, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the respondent in the Tribunal below ("the Secretary of State") against the decision of the First-tier Tribunal to allow the appellant's appeal against the decision of the Entry Clearance Officer ("ECO") refusing entry clearance to the UK. I will refer to the appellant by

his designation before the First-tier Tribunal even though he is the respondent in this tribunal.

2. The appellant is a citizen of Nepal who was born on 30 October 1994. He applied for entry clearance to the UK as a dependent child of Roma Gurung. Roma Gurung claimed to be the widow of an ex- British army Gurkha. She applied to settle in the UK and the appellant applied to go with her. Following an interview by telephone with Roma Gurung on 10 and 11 September 2012, on 12 November 2012 the ECO decided to reject the application for entry clearance under paragraph 297 of the Immigration Rules.

3. The Entry Clearance Officer decided that the appellant could not be accommodated without recourse to public funds in accommodation which his parent, parents or relative of the child was seeking to join owned or occupied exclusively. In addition, the ECO was not satisfied that the appellant would be maintained adequately by the parent, parents or relative without recourse to public funds under paragraph 297(iv) and (v). In addition, the ECO took into account the requirements of the Human Rights Act which incorporated into English law the European Convention on Human Rights (ECHR) and in particular the responsibilities on the UK to comply with Article 8. Article 8 protects the right of an individual to a private or family life. The ECO considered the requirements of Article 8 but noted that the appellant had step-siblings in Nepal, the appellant's father had lived in Hong Kong but had since died and there was no guarantee that the family unit would be reunited in the UK. The appellant's mother was not present and settled in the UK at the date of the decision (12 November 2012) and the appellant was by then 18. Mrs Gurung did not come to the UK until 10th January 2013, according to paragraph 7 of the decision of the First-tier Tribunal. The ECO therefore considered he was justified in refusing the appellant's application on human rights grounds as well as under the rules.

4. Judge of the First-tier Tribunal L K Gibbs considered that the appellant had not demonstrated that he satisfied the accommodation requirements of the Immigration Rules. Accordingly, the appellant did not qualify for entry clearance under paragraph 297(iv) of those Rules. However, having considered the correct approach to Article 8 in cases such as **Gulshan [2013] UKUT 00640 IAC** there were, in the Immigration Judge's view, reasons for finding that on balance the refusal of entry clearance was a breach of Article 8 of the ECHR.

Proceedings before the Upper Tribunal

5. The Secretary of State lodged an application for permission to appeal with accompanying grounds. These were lodged on 2 May 2014. They state that the First-tier Tribunal erred in its assessment of Article 8. The Immigration Rules sufficiently recognised the need for private or family life to be promoted in certain circumstances but there was no evidence that

the relationship between the appellant and his mother amounted to "more than the normal emotional ties" that existed between such close relations. It was therefore submitted that the Judge materially misdirected herself on law and there were compelling circumstances justifying setting aside the decision.

6. In granting permission, Judge of the First-tier Tribunal Brunnen thought that it was arguable that there was no sustainable basis for finding that family life existed or for finding that the respondent's decision was disproportionate for the purposes of Article 8. Accordingly, there were no arguably good grounds for the judge to conclude that Article 8 was engaged and the Secretary of State therefore was given permission to appeal on that basis.

7. A notice of hearing was sent out on 17 June 2014 indicating that the appeal would be heard at 2pm on 22 July at Field House. It was sent to the appellant's stated representatives, then an organisation called Enough is Enough, and sent to the appellant personally. Standard directions were issued which indicated that the Upper Tribunal would decide the case on the evidence before the First-tier Tribunal and would not hear fresh evidence not before that Tribunal. Bundles were to be filed with any documents to be relied on before the Upper Tribunal.

8. Shortly before the lunch adjournment a fax was submitted to the Tribunal by Enough is Enough indicating that the appellant's direct access barrister was "unaware of the hearing." I caused an email response to be written. This stated that the hearing would proceed at 2pm notwithstanding the lack of attendance by any legal representative. There was in fact no attendance on behalf of the appellant and I proceeded to deal with the appeal in his absence. Having regard to the requirements of Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I decided it was appropriate to proceed with the hearing in the absence of the appellant since he had clearly been given notice of the hearing. The absence of his legal representative was regrettable but not a matter justifying adjourning the proceedings and it did not appear to be in the interests of justice to do so.

9. I heard brief submissions by Mr Tufan who said that the Immigration Judge had erred in allowing the appeal under Article 8. He had made contradictory findings. Having clearly found an absence of the required accommodation in paragraph 14 of her determination the Immigration Judge should not have even gone on to consider Article 8 on these facts. As an "out of country" case the appellant had the burden of showing there was some exceptional basis for allowing her appeal outside the Immigration Rules before a claim based on Article 8 could be justified.

10. At the end of the hearing I reserved my decision as to whether or not there was a material error of law in the decision of the First-tier Tribunal.

Discussion

11. The appellant has a complicated family background. His father, Manbah Adur, was in the Gurkhas and his mother, Roma, was Manbar Adur's second wife. Manbah Adur's first wife, Chandrakurmari, had chosen not to take up her right to settle in the UK having considered the guidance outlined in the IDI at chapter 15. The appellant's father had died in Hong Kong on 3 March 2008.

12. I remind myself that as this was an entry clearance case it was necessary for the First-tier Tribunal to consider the evidence at the date of the decision, not at the date of the hearing (see section 85A (2) of the Nationality , Immigration and Asylum Act 2002). The date of refusal was 12 November 2012. As at the date of the decision Roma had not even settled in the UK. She claimed to have done so by the date of the hearing, it seems, from the Immigration Judge's determination, solely for the purpose of giving evidence at that hearing.

13. It seems that by the date of the hearing the appellant and his mother were separated, the appellant remaining in Nepal with Mrs Gurung's sister and her sister's daughter. By the date of the decision the appellant had reached 18.

14. It is also relevant to note that at the date of the hearing Mrs Gurung's stepson , Mr Gurung, gave evidence to the effect that he could not accommodate the appellant because it had not yet been arranged with his landlord. There was also evidence at the hearing that Mrs Gurung sent money back to Nepal for the benefit of her son.

Consideration of the decision of the First-tier Tribunal

15. Dealing with the restriction on post-decision evidence, the Immigration Judge said at paragraph 13 of her determination that she was entitled to take into account evidence not before the ECO provided it appertained to the circumstances existing at the date of the decision. Having taken account of the evidence she found in paragraph 14 of her determination that the refusal had been correctly made under paragraph 297 (iv) of the Immigration Rules. However, the Immigration Judge then went on to consider Article 8.

16. The fundamental problem with the decision of the First-tier Tribunal in relation to the application of that article is the lack of analysis. The appellant's mother had not come to the UK at the date of the decision is ignored and the appellant and Mrs Gurung had not by the date of the hearing formed any family life in the UK.

17. The Immigration Judge attached weight to the "historic injustice" suffered by the Gurkhas but I find that was not a proper reason for embarking on a "freestanding" Article 8 claim and deciding that the Secretary of State

would be in breach of her international obligations by refusing entry clearance to a foreign national. Article 8 does not guarantee that family life must be exercised within the UK, as has been repeatedly said in the cases.

18. In any event, the Immigration Judge appears to have adopted an incorrect approach to Article 8. She claims to have attached weight to the needs of the respondent to control immigration in paragraph 21 of her determination. She then went on to assess proportionality. First of all it was wrong of the Immigration Judge to decide as a fact that the appellant could be accommodated in the UK without recourse to public funds. She had already found that the appellant could not be accommodated by the sponsor in paragraph 14 of her determination. Who else was to accommodate the appellant? Additionally, she did not in fact consider the public interest of controlling immigration into the UK or the possible expense to the public purse/pressure on resources by virtue of the fact that the appellant a foreign migrant would have no place to live and no employment here.

19. I find that this was a determination which did not properly analyse the requirements of a freestanding Article 8 claim if indeed such a claim should have been considered at all. It seems the evidence of family life was questionable even if the Immigration Judge was entitled to look at post-decision evidence in that regard (see paragraphs 43 and 44 in the case of **Patel** [2013] 1 All ER 1157 which suggests there is jurisdiction to consider any new matter).

20. In the light of these criticisms of the approach adopted by the Immigration judge I find that there was a material error of law such that the decision of the First-tier Tribunal must be set aside. Given that there is no basis on which an Article 8 claim could succeed on these facts I find that entry clearance was correctly refused in this case.

Decision

The decision of the First-tier Tribunal contains a material error of law in relation to the allowing of the appeal under Article 8. That decision falls to be set aside. I substitute the decision of this Tribunal which is to dismiss the appeal on Article 8 grounds. Accordingly, the ECO's decision to refuse entry clearance stands.

Signed Date

Deputy Upper Tribunal Judge Hanbury