Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/16813/2012
OA/16820/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SUJAN GURUNG – FIRST APPELLANT
PRERANA GURUNG – SECOND APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellants: Mr C Howells of Counsel instructed by N C Brothers & Co Solicitors
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal Courtney (the judge) promulgated on 10th March 2014.

2. The Appellants are sisters, and are female citizens of Nepal born 11th January 1986 and 8th January 1988 respectively. They applied for entry clearance to join their father who is settled in the United Kingdom, having previously served in the Brigade of Gurkhas.

3. The applications were refused on 7th August 2012 the Respondent not accepting that the Appellants satisfied the Immigration Rules or the Secretary of State's policy in relation to the dependants of former Gurkha soldiers. The Respondent took the view that the Appellants had used deception in their application and therefore in addition to refusing the application under paragraph 317 of the Immigration Rules, it was also refused with reference to paragraph 320(7A).

4. The Respondent considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and concluded that refusal of entry clearance would not breach Article 8.

5. The Appellants appealed to the First-tier Tribunal. Their appeals were heard together by the judge on 26th February 2014. It was made clear to the judge that the Appellants appealed only in relation to Article 8 of the 1950 Convention. The judge heard evidence from the Sponsor, and dismissed the appeals.

6. The Appellants applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had committed three errors of law which are set out below;

> "(a) Failing to consider his finding that the Sponsor permanently settled in the UK on 3rd March 2013 (he had been granted indefinite leave to remain on 17th December 2009) when finding that the father's intentions were unclear as at the date of the decision to refuse. The former is capable of shedding light on the earlier intention and thus ought to have been taken into consideration on DR (ECO: Post-Decision Evidence) Morocco [2005] UKIAT 38: [2005] Imm.A.R. 2005 principles;
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> (b) Failing to find interference with the family life between the Appellants and their father. The old Abdulaziz distinction between entry clearance and leave to remain cases was no longer a good one; see MM v Secretary of State for the Home Department [2013] EWHC 1900 per Blake J at [96] to [104] applying R (On the application of Qulia) v Secretary of State for the Home Department [2011] UKSC 45 [2012] 1AC 621. Therefore, there was an interference with the Sponsor's desire and/or ability to settle in the UK with his dependent adult children;
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> (c) Failing to place any weight on the historical injustice caused to Gurkhas and their families, when assessing proportionality. This ground will be developed below."

7. Permission to appeal was granted by First-tier Tribunal Judge White who was satisfied that the grounds and determination disclosed an arguable error of law.

8. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellants' Submissions

9. Mr Howells relied and expanded upon the grounds contained within the application for permission to appeal. In relation to the historic injustice, Mr Howells pointed out that the Sponsor in paragraph 6 of his witness statement dated 20th February 2014 which was before the First-tier Tribunal, had stated;

> "If I had been permitted I would lie (sic) to have settled in the UK when I left the army, as my family would have had a better life there. I would have found decent job there and my children would have received good, high standard education."

10. The Sponsor retired from the army in March 1995. Mr Howells submitted this should have been taken into account, and referred me to paragraphs 40-42 of Regina (Gurung and others) v SSHD [2013] EWCA Civ 8 and paragraphs 4 and 5 of the head note to Ghising and others [2013] UKUT 00567 (IAC).

11. Mr Howells submitted that the judge did not reject the Sponsor's evidence that he would have settled in the United Kingdom in 1995.

12. It was accepted that the judge had found that paragraph 320(7A) of the Immigration Rules applied at paragraphs 19 and 20 of the determination but it was submitted that this was on a narrow basis and therefore the weight to be attached to such a refusal should be adjusted accordingly. The only deception that the judge found against the Appellants was that they had made false statements in their telephone interviews on 6th June 2012, when they claimed that the Sponsor at that time was living in the United Kingdom which was untrue. Mr Howells submitted that the weight to be attached to the historic injustice outweighed the weight to be attached to the refusal under paragraph 320(7A) when proportionality was assessed.

The Respondent's Submissions

13. Mr Parkinson referred to paragraph 41 of Gurung which referred to an applicant dependent child of a Gurkha who is settled in the United Kingdom. He pointed out that at the date of refusal the Sponsor was not settled in the United Kingdom. The Sponsor was living in Nepal with both the Appellants.

14. Mr Parkinson submitted that the judge was entitled to find that there was doubt, at the date of refusal, as to whether the Sponsor intended to settle in the United Kingdom. He had been granted the right to settle in the United Kingdom in 2009, but he had not settled in the United Kingdom until 3rd March 2013.

15. I was asked to conclude that the judge was entitled to place weight upon the fact that paragraph 320(7A) applied because both Appellants had lied in their telephone interview in connection with their applications for entry clearance. They had deliberately attempted to deceive the interviewing officer, and this should be given substantial weight when proportionality was being assessed.

16. Mr Parkinson submitted that the fact that in 2013 the Sponsor chose to settle in the United Kingdom, was not indicative that he had intended to settle in the United Kingdom at a far earlier stage. The Sponsor had asserted in his witness statement that he would have liked to have settled in the United Kingdom when he left the army in 1995, but this assertion was not supported by any evidence.

17. Overall, I was asked to conclude that the judge had not erred in law, and therefore the determination should stand.

18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. Dealing with the first ground of appeal, I conclude that the judge did not err in finding that at the date of refusal, which was 7th August 2012, (which was the relevant date as this was an appeal against refusal of entry clearance) it had not been proved that the Sponsor intended to settle in the United Kingdom.

20. The judge was entitled to take into account that the Sponsor had been granted permission to settle in the United Kingdom on 17th December 2009 but did not do so. The evidence before the judge indicated that the Sponsor activated his visa in February 2011 and travelled to the United Kingdom but only stayed one month before returning to Nepal.

21. I do not accept that the fact that the Appellant entered the United Kingdom to settle on 3rd March 2013, proved that he had that intention on the date of the decision to refuse. The judge was perfectly entitled to find that the Sponsor's intentions in relation to settlement were unclear as at the date of the decision to refuse.

22. In relation to the second ground of appeal I do not find that the judge erred in deciding that the refusal of entry clearance did not interfere with the family life between the Sponsor and the Appellants as at that time they were living together in Nepal. The judge was entitled to find that at that time it had not been proved that the Sponsor intended to settle in the United Kingdom. The judge had to consider the circumstances appertaining at the date of refusal. In any event, the judge did accept that refusal of entry clearance interfered with family life between the Appellants and their mother and younger siblings who were in the United Kingdom at that time, and therefore proceeded to consider proportionality.

23. The third ground of appeal relates to the historic injustice in Gurkha cases. Mr Howells has set out the law in brief, in his skeleton argument at paragraphs 8 and 10, where he sets out paragraph 42 of Gurung, and head note 4 of Ghising and others.

24. In my view the judge did not err in law, and in paragraph 23 set out paragraphs 59 and 60 of Ghising and others, which confirms that where Article 8 is engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this would ordinarily determine the outcome of the proportionality assessment in an Appellant's favour.

25. In my view the judge was entitled to find that it had not been proved that but for the historic wrong the Sponsor would have settled in the United Kingdom when his now adult children would have been able to accompany him as children under 18. I accept that the judge had before him the Sponsor's witness statement in which he claimed that he would have settled in the United Kingdom when he left the army in 1995 if he could have done. It is true that this evidence was not specifically rejected by the judge, but the judge was entitled to place what weight he deemed appropriate on the evidence. The judge was entitled to conclude that at the date of refusal, it had not been proved that the Sponsor intended to settle in the United Kingdom. It had not been proved that but for the historic wrong, the Sponsor would have settled in the United Kingdom when his children were under the age of 18 years. The Sponsor was granted leave to settle in the United Kingdom in December 2009 but did not avail himself of that opportunity, and did not eventually settle in the United Kingdom until March 2013.

26. In addition the judge was entitled to place weight upon the fact that both Appellants had lied in their entry clearance interviews, which invoked paragraph 320(7A).

27. Although it is possible that a different judge might have reached a different conclusion, the findings made by the judge were open to him on the evidence, and adequate and sustainable reasons were given for those findings. The grounds and submissions made on behalf of the Appellants do not disclose an error of law.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeals are dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. There is no fee award.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall