



IAC-AH-CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/15177/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 14 October 2014**

**Decision and Reasons
Promulgated
On 31 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

**TRIDEV GURUNG
(ANONYMITY DIRECTON NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Jafar of Counsel

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of the State is the appellant to this appeal but for the sake of consistency I refer to her as the respondent and to the original appellant as such.

2. The appellant is a 27 year old citizen of Nepal born on 28 August 1987. In a determination promulgated on 5 August 2014 in the First-tier Tribunal, Judge Beg allowed his appeal against the Entry Clearance Officer's decision refusing him entry clearance to the United Kingdom for settlement as the dependent son of a former Gurkha soldier. The appeal was dismissed under the Immigration Rules but allowed, outside the Rules, under Article 8 of the ECHR.
3. The grounds seeking permission to appeal argue that the judge erred in that she "made no case specific findings as to case specific arguably good grounds and compelling circumstances not sufficiently recognised under the Rules and proceeded simply to undertake a freestanding Article 8 assessment". On 28 August 2014 First-tier Tribunal Judge T R P Hollingworth granted permission to appeal for the following specific reason:

"It is arguable the judge focussed too heavily on the 'historic injustice' aspect of the appeal. Ignoring the fact the appellant introduced documents with his application that were false. And giving insufficient reasons why there were compelling or exceptional circumstances pursuant to Article 8".

4. In his submissions on the question of error of law, Mr Wilding relied on two grounds. Firstly he submitted that the judge in the First-tier Tribunal had failed to engage with the guidance in **Gulshan [2013] UKUT 640** in that she had not given any or adequate reasons why there were compelling circumstances requiring her to consider Article 8 outside the Immigration Rules. The second submission was that the judge had failed to take into account the undisputed fact that the appellant had submitted a false document with his application which purported to show that he had passed certain examinations in Nepal; the appellant had altered the certificates to show higher marks indicating that he had passed the exams and not failed them. It was said that he did this, not to deceive the immigration authorities, but so as not to cause distress to his parents who thought that he had passed the exams. Nevertheless, Mr Wilding submitted that this was an important factor that must be taken into account.
5. In reply, Mr Jaffar submitted that the education documents were irrelevant to the question of family life under Article 8. They had not been changed in order to deceive the immigration authorities but rather to satisfy the appellant's parents. His parents do not speak English and to this day they do not know that he failed the exams. It is not in dispute that he attended the course in question and it was submitted that the judge at [13] clearly took this factor into account in her assessment. In the First-tier Tribunal the judge had heard evidence from the appellant's father and he was not asked about the appellant's studies. The deception in question was not criminal behaviour nor matters of economic issue and therefore were not related to immigration control. It was submitted that the judge had not made any material error of law in her determination.

6. I reserve my decision and have since reviewed all the evidence that had been before the First-tier Tribunal as well as the submissions that were made to me.
7. I am satisfied that there is no merit in the respondent's submissions that the judge was not entitled to carry out a freestanding assessment of the appellant's family life under Article 8. At [8] she referred to **Gulshan** and **Nagre** but does not appear to have been referred to the Court of Appeal decision in **MM [2014] EWCA Civ 985** which was handed down shortly before the First-tier Tribunal hearing. At [128] of the Court of Appeal decision Aikens LJ said this:

“**Nagre** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker.”

8. There was no requirement therefore for the First-tier Tribunal Judge to give reasons why she proceeded to consider Article 8 outside the Rules. There was no suggestion that the appellant could succeed under the Article 8 provisions of the Rules and therefore the only potential issue was whether he had a reasonable claim outside the Rules. There was no error of law in her proceeding on that basis.
9. The judge's consideration of the Article 8 claim, following the conventional approach under **Huang**, reveals no error of law. She considered the dependency of the adult appellant with his parents and she was entitled to consider the “historical injustice” to ex-Gurkha soldiers as part of her assessment of proportionality. Her reasons for considering the overall balance between the competing rights of the appellant (and his family) against those of the respondent could perhaps have been more clearly shown but taking the determination and reasons as a whole it cannot be said that there was any error of law in her approach or in her final decision.

Decision and Reasons

There was no error of law in the First-tier Tribunal determination and that decision shall therefore stand.

No anonymity direction was requested and none is made.

Deputy Upper Tribunal Judge David Taylor

30 October 2014