



IAC-AH-SAR-V1

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

Appeal Number: HU/09660/2019

THE IMMIGRATION ACTS

**Decided under Rule 34 Without a
Hearing
At Field House
On 23 October 2020**

**Decision & Reasons Promulgated
On 28 October 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**NETRA BAHADUR GURUNG
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge J C Hamilton promulgated on 3 February 2020, dismissing his appeal under the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent made on 7 May 2019 to refuse him entry clearance and his human rights claim.
2. The appellant sought entry to the United Kingdom as the adult dependant child of a Gurkha Veteran who had in 2016 been granted settlement on that basis. It was not accepted that the appellant met the requirements of Appendix K of the Immigration Rules or any relevant policy.
3. On appeal, the judge did not accept that the appellant has a family life with his family in the United Kingdom, and on that basis that the

respondent's decision did not engage article 8 of the Human Rights Convention, and then dismissed the appeal.

4. The appellant sought permission to appeal on the grounds that the judge had erred in not putting to the appellant's witnesses or representatives matters later held against them; in misdirecting himself in law as to the correct test in establishing if family life subsists; and, in his assessment of whether or not the appellant is unemployed.
5. On 10 June 2020, First-tier Tribunal Judge Fisher granted permission on all grounds.
6. On 30 July 2020, Upper Tribunal Judge Norton- gave directions which provided amongst other matters:
 1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules¹, I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:
 - (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so
 - (b) whether that decision should be set aside.
 2. I therefore make the following DIRECTIONS:
 - (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);
 - (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;
 - (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.
 - (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.
 3. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

¹ The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

7. Both parties made submissions in response to directions, the respondent on 4 September 2020 conceding that the judge had erred as is averred in ground 1 in not putting to the appellant's representative or to his witness points identified in the grounds of appeal, in applying a higher standard of proof in respect of evidential weight to be attached to phonecards. It was accepted that the decision should be set aside and the issue of whether a family life exists be determined again.
8. In reply, the appellant avers that the matter would better be remitted to the First-tier Tribunal, the grounds as accepted indicating a lack of fairness.
9. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, and bearing in mind the concession by the respondent, I am satisfied that in the particular circumstances of this case that it would be correct to make a decision being made in the absence of a hearing.
10. I am satisfied that the judge did err in reaching his decision as is claimed in the grounds of appeal and as is accepted by the respondent. The decision clearly involved the making of an error of law as claimed as these errors went to the core of the case.
11. I am persuaded that, as the evidence will in effect need to be heard again, as the core issue needs to be determined again and as there is a taint of the appellant not being given a fair hearing, that it would in all the circumstances be appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing on all issues. For the avoidance of doubt, none of the findings of the First-tier Tribunal are preserved.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
2. I remit the appeal to the First-tier Tribunal for a fresh hearing on all issues to be heard by a judge other than Judge J C Hamilton. None of the findings made previously are preserved.

Signed

Date 23 October 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul