

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/02347/2015**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 9 May 2018** | **On 12 June 2018** |
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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**chetan gurung**

(anonymity direction not made)

Appellant

**and**

**ENTRY CLEARANCE OFFICER – NEW DELHI**

Respondent

**Representation:**

For the Appellant: Mr S Ahmed of Counsel instructed by 12 Bridge Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Ghani promulgated on 11 January 2017.

2. The Appellant is a citizen of Nepal born on 24 June 1984. He is the son of Mr Niraj Kumar Gurung, a former Gurkha soldier who joined the British Army in September 1970, and retired from the army in August 1989 with an exemplary service record.

3. On 11 June 2015 the Appellant applied to the Entry Clearance Officer in New Delhi for entry clearance as the adult dependent relative of a Gurkha veteran settled in the United Kingdom. The application was refused for reasons set out in a Notice of Immigration Decision dated 1 July 2015.

4. The Respondent gave consideration to the Appellant’s application in the first instance by reference to Annex K, paragraph 9 of the IDI Chapter 15 Section 2A 13.2 - which represented the policy in respect of Gurkha soldiers and their dependent adult relatives. The application was dismissed with particular reference to paragraph 9(5) which requires that an applicant be “*financially and emotionally dependent on the former Gurkha*”. The application was also dismissed under the Immigration Rules with reference to Appendix FM. (I note that it is not suggested on behalf of the Appellant that he could possibly have succeeded under the Immigration Rules.) The Respondent also gave consideration to the Appellant’s application under Article 8 of the European Convention on Human Rights with particular reference to the decision in **Ghising and others [2013] UKUT 00567 (IAC)**, but was not persuaded that there would be a breach of the Appellant’s human rights consequent upon a refusal of entry clearance.

5. Notwithstanding the refusal, aspects of the Respondent’s decision were favourable in evaluation of parts of the Appellant’s case. In particular the decision-maker was satisfied that the Appellant’s father was present and settled in the United Kingdom, had been granted settlement under the 2009 discretionary arrangements, and that the Appellant was the son of a former Gurkha. The Respondent was also satisfied that the Appellant had been under 18 years at the time of his father’s discharge and was “*minded that an application for settlement would have been made before 2009 had the option to do so been available to the Sponsor on discharge before 1 July 1997*”. The decision-maker also appeared satisfied that the Appellant was financially dependent upon his father.

6. It was also noted, albeit more by way of an adverse feature of the Appellant’s case, that the Appellant was living with his mother and brothers in Nepal. The Notice of Immigration Decision states “*Family life can continue as it may have done and without interference by this decision*”. In this context it is to be noted that it was recognised that the Appellant’s mother wanted to settle in the UK but that her application for indefinite leave to enter was being held up by reason of an issue in respect of obtaining suitable TB certification.

7. The Appellant appealed to the IAC.

8. The appeal was dismissed for reasons set out in the Decision of First-tier Tribunal Judge Ghani.

9. The Appellant applied for permission to appeal which was refused in the first instance by First-tier Tribunal Judge Grant-Hutchison on 7 August 2017, but subsequently granted by Deputy Upper Tribunal Judge Chamberlain on 5 October 2017. Judge Chamberlain considered that it was arguable that the First-tier Tribunal Judge had erred in making findings on issues which were not in dispute, in particular in respect of financial dependency and the age requirement under the Respondent’s policy. It was also considered arguable that the Judge had applied a higher threshold than that required by the policy in respect of emotional dependency. Yet further it was considered arguable that the Judge had erred in her finding that Article 8 was not engaged with reference to the case of **Rai [2017] EWCA Civ 320**, and in the subsequent finding that the decision was proportionate.

10. In this latter context, before me Ms Everett frankly acknowledged that she faced some difficulty in resisting a challenge to the Judge’s observation at paragraph 20 in respect of the Appellant’s father’s decision to live in the United Kingdom. The Judge stated: “*The sponsor made a conscious decision to live apart from the Appellant and carry on his life in the United Kingdom*”. This observation was made in the context of considering the nature and quality of the family life that might or might not exist as between the Appellant and his father.

11. In the case of **Jitendra Rai v Entry Clearance Officer – New Delhi [2017] EWCA Civ 320** the Court of Appeal in a judgment given by Lord Justice Lindblom with whom Lord Justice Henderson and Lord Justice Beatson agreed, identified that the Tribunal had made a number of references to the Appellant’s parents’ willingness to leave Nepal to settle in the United Kingdom (see for example at paragraphs 35 and 38). The court then says this at paragraph 39:-

“*The Upper Tribunal Judge referred repeatedly to the Appellant's parents having chosen to settle in the United Kingdom, leaving the Appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: ‘… not compulsory but … voluntarily undertaken ‘(paragraph 20), ‘… having made the choice to come to the United Kingdom’ (paragraph 21), ‘… the willingness of the parents to leave …’ (paragraph 23), and ‘… their voluntary leaving of Nepal and leaving the Appellant …’ (paragraph 26). But that, in my view, was not to confront the real issue under Article 8(1) in this case, which was whether, as a matter of fact, the Appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.*”

12. It seems clear in these circumstances that the departure of a Gurkha veteran parent to exercise the right of taking up the opportunity to settle in the United Kingdom should not inevitably be seen in itself as indicative of an absence of family life. It seems to me that there is an error of approach indicated by the Judge’s emphasis herein on the “*conscious decision to live apart*”. This, it must be recalled, is in the context of an Appellant who continued to live in the home of his sponsor-father in Nepal along with the sponsor’s wife, that is to say the Appellant’s mother.

13. Nor did Ms Everett resist the suggestion that the First-tier Tribunal Judge had made a clear factual error in consideration of the age limits under Annex K. Not only had the Judge made such an error, but in doing so she had gone behind the position accepted by the Respondent. In this regard, Annex K paragraph 9(4) refers to the age limits for an applicant as being “*18 years of age or over and 30 years of age or under*”. At the date of the Appellant’s application the Appellant was indeed 30 years old. However, for reasons that are unclear, the First-tier Tribunal Judge appears to have determined that the Appellant was in fact 31, and that in those circumstances Annex K did not apply to him irrespective of any issue of emotional dependency. This was a clear factual error. It seems to me that it is likely also a material error because a consideration of Annex K and its applicability to the Appellant would be a relevant matter to be considered in the overall context of Article 8 - a point to which I will return shortly. It also seems to be clearly the case that the First-tier Tribunal Judge went behind the Respondent’s acknowledgement in respect of financial dependency in respect of Annex K.

14. On emotional dependency under Annex K, I note the following from paragraph 16 of the First-tier Tribunal Judge’s decision:-

“*As regards emotional dependency, I find that it is no more than normal emotional ties between an adult child and his father. The father took a decision back in 2007 to leave Nepal and settle in the United Kingdom*”.

Again, it seems to me that the Judge therein regards the voluntary separation as a significant obstacle to establishing family life by reference to emotional dependency. This again runs contrary to the guidance or advice that is to be gleaned from the decision in **Rai**.

15. I return then to the relevance of Annex K to an overall consideration of a decision that is being appealed on human rights grounds. I do so because in the history of the proceedings before the Upper Tribunal there was a hearing on 5 January 2018 in which the then Presenting Officer raised arguments in respect of the applicability or otherwise of Annex K and the way in which the Tribunal should or should not be allowed to give consideration to it. This resulted in an adjournment of the appeal with directions being issued by the Tribunal for the filing and service of skeleton arguments. The Respondent filed a skeleton argument drafted by the Presenting Officer who had appeared on 5 January 2018 and dated 25 January 2018. The Appellant subsequently filed a skeleton argument drafted by Mr Ahmed on 20 March 2018. In brief, the Respondent’s skeleton argument seeks to suggest that because the Tribunal had limited jurisdiction to allow an appeal on the basis of it being not in accordance with the law, it was not appropriate to have regard to policy when evaluating an Article 8 claim. Ms Everett does not pursue that line of argument before me. It is common ground before me that in an Article 8 appeal it is appropriate and relevant to have regard to matters such as policy or the Immigration Rules as being helpful indicators of where proportionality may lie in any particular case. It is not suggested that the Tribunal ‘steps into the shoes’ of the Respondent and makes a decision in accordance with the Respondent’s policy or applies the policy directly to a particular case; nonetheless, if on the facts an applicant appears to satisfy the requirements of a policy, just as if an appellant appears to satisfy the requirements of the Rules, this may provide a powerful indicator of where proportionality lies. To that end, notwithstanding the way the matter was raised before the Tribunal in January and in the Respondent’s skeleton argument, I am not today invited to consider that Annex K is in some way irrelevant or ‘out of bounds’ for the Tribunal’s considerations.

16. Drawing the above matters together, I am satisfied that the First-tier Tribunal Judge did fall into error of law in evaluating whether or not family life existed as between the Appellant and his father. It seems to me that the engagement of family life being a core issue in the appeal, such errors were material. It is on this basis that I set aside the decision of the First-tier Tribunal.

17. For completeness I note that Mr Ahmed in the grounds of appeal, and initially before me today, maintained a position to the effect that the Respondent had conceded Article 8(1) to be engaged but had in substance made a decision based upon Article 8(2) and proportionality. However, on closer analysis of the Notice of Immigration Decision it seems adequately clear that the decision-maker was making a finding to the effect that Article 8(1) was not engaged. Indeed it appears overt in the following passage: “*I am not satisfied that you have established family life with your father over and above that between an adult child and father*”. I do not identify a concession on the part of the decision maker in respect of Article 8(1).

18. This matter is also made adequately clear by the Entry Clearance Manager’s review dated 20 September 2015. The Entry Clearance Manager says in terms, having made reference to the Entry Clearance Officer’s decision, “*On this basis I am satisfied that Article 8(1) is not engaged*”. Mr Ahmed, on reflection, acknowledged that he could not advance a case on the basis that Article 8(1) had been conceded.

19. Be that as it may, for the reasons I have already given the decision of the First-tier Tribunal Judge is set aside. After discussion with the representatives as to the best means of remaking the decision, I have reached the conclusion that the decision can be remade on the basis of all of the available materials before the Tribunal presently, and without the need for a further hearing.

20. Ms Everett acknowledged that in accordance with the matters set out in the Notice of Immigration Decision and the case of **Ghising**, that if the Appellant is able to demonstrate that Article 8(1) is engaged, then he is entitled to succeed in his appeal on human rights grounds.

21. The Appellant’s case on Article 8 is helpfully summarised at paragraph 33 of the grounds of appeal to the Upper Tribunal:

“*The Appellant was just over eighteen when his father entered the UK. The Appellant was living with his father, mother and brothers when his (sic) at the time his father entered the UK for settlement. The learned Judge accepts that the Appellant is living with his mother (who has already applied to join the Sponsor) in the family home. It is clear from the above that a family life had existed at the time of his father’s departure to settle in the UK. This has endured despite the Sponsor having left the UK as Sponsor still lives with his mother, in the family home supported by his father and mother and there is regular and frequent contact between the Appellant and the Sponsor. The Appellant does not work and has no source of income other than his parents provide. It is submitted that there is real, committed and continued support from the Sponsor to the Appellant.* ”

22. This pleading reflects the observations in **Rai** as to the nature of the real test, that is to say whether there was family life at the point of the Gurkha veteran’s departure for the UK and whether that has endured.

23. Certainly, the Respondent considered that family life had endured so far as the family unit in Nepal was concerned - that is to say family life between the Appellant and his mother, notwithstanding the Appellant’s age. See the Notice of Immigration Decision: “*You have your mother and two brothers living with you in Nepal. Family life can continue as it may have done…*”. In the circumstances it seems to me it is a relatively small additional inference to say that family life continued not only with one parent, but the also with the other parent notwithstanding his absence by reason of relocation to the UK - such absence ameliorated by frequent contact by telecommunication and visits.

24. But the situation as things stand today has altered. The Appellant’s mother has now obtained entry clearance to the UK and is present in the UK with settled status. She attended the hearing today. A witness statement has been filed from the Appellant’s mother dated 28 December 2017. She confirms the circumstances described in the previous materials with regard to the family circumstances, and adds that she was granted indefinite leave to enter on 24 October 2017 and entered accompanied by her husband on 21 November 2017. She talks of missing the Appellant immensely since coming to the United Kingdom, and that this is the first time that she has been away from him. She states that whilst in Nepal she was able to look after him as he was with her. She maintains contact with him now over the telephone almost every day, but that is not the same as living together. The Appellant is her youngest child and she says that she is especially close to him and wants him to be allowed to join her and her husband in the UK.

25. It was also indicated to me that both of the Appellant’s brothers are now living in the United Kingdom with their respective wives. The Appellant is, in those circumstances, the ‘left behind child’.

26. I bear in mind that the Respondent acknowledged that family life existed between the Appellant and his mother, but considered that there was no interference with family life because the mother continued to live in Nepal. That situation has changed. It follows that there has been a fracture of family life. It is not enough to say that this was a matter of choice, bearing in mind the context of these types of cases, the context of the historical injustice, and the acknowledged circumstance that the Appellant’s father would have sought to enter the United Kingdom with his family at a much earlier stage had there been an available procedure so to do.

27. In all such circumstances it seems to me clear enough that the Appellant’s continued exclusion from the United Kingdom by reason of the Respondent’s decision does indeed constitute an interference with his family life as between him and both his mother and father. On that basis I find that Article 8(1) is indeed engaged.

28. Bearing in mind Ms Everett’s concession in the event of such a finding, and with reference to the applicable case law – in particular **Ghising** - it seems to me that it would indeed be disproportionate for the Respondent’s decision to be maintained. In this regard the historical injustice comes into play in the proportionality exercise, and it is not suggested that there are any other countervailing factors that might argue against the Appellant being allowed to enter the UK.

29. In all the circumstances I therefore allow the appeal on human rights grounds.

**Notice of Decision**

30. The decision of the First-tier Tribunal contained an error of law and is set aside.

31. I remake the decision in the appeal. The appeal is allowed on human rights grounds.

32. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed: Date: **10 June 2018**

**Deputy Upper Tribunal Judge I A Lewis**

**TO THE RESPONDENT**

**FEE AWARD**

I have allowed the appeal and in all of the circumstances make a full fee award.

Signed: Date: **10 June 2018**

**Deputy Upper Tribunal Judge I A Lewis**

(*qua* a Judge of the First-tier Tribunal)