



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02340/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at : UT(IAC) Birmingham

**Decision & Reasons
Promulgated
On 24 July 2017**

On 18 July 2017

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

BAUDHARAJ GURUNG

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A O'Callaghan, instructed by N C Brothers & Co Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 2 December 1987. He has been given permission to appeal against the decision of First-tier Tribunal Judge Nixon dismissing his appeal against the respondent's decision to refuse his application for entry clearance.

2. The appellant applied for entry clearance to settle in the UK as the adult dependant relative of his father, an ex-Gurkha soldier. The respondent considered his application under the Home Office policy outlined in Annex K, IDI Chapter 15, section 2A 13.2 as amended on 5 January 2015. The respondent

noted that the appellant's father was issued with entry clearance on 14 April 2000 and settled in the UK on 27 May 2010, under the 2009 discretionary arrangements. His mother had settled in the UK on 4 June 2011, after being granted indefinite leave to enter. The respondent noted that the appellant was under 18 years of age at the time of his father's discharge and took account of the fact that an application for settlement would have been made before 2009 had the option to do so been available to his father on discharge. The respondent noted that the appellant had one sibling settled in the UK. Given that the appellant's parents had been present and settled in the UK for over four years and four months at the time of the appellant's application, the respondent considered that the appellant had been living apart from his sponsor for more than two years at the date of application and therefore refused the application under Annex K, paragraph 9(8) Annex K, IDI Chapter 15, section 2A, 13.2. The respondent noted that the appellant was one of four children and that, whilst one was in the UK, the others were in Nepal and could support him emotionally. The appellant's living conditions were adequate, he was in good health and his father could continue to financially support him from the UK. The respondent was therefore not satisfied that the appellant was wholly financially and/or emotionally dependent on his UK sponsor as required under Annex K, paragraph 9(5), IDI Chapter 15 section 2A 13.2. The respondent also considered and refused the application under paragraph EC-DR.1.1 of Appendix FM and Article 8 of the ECHR. The application was refused on 1 July 2015.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Nixon on 13 October 2016. The appeal was pursued on Article 8 grounds only, as it was conceded by the appellant's representative that he could not meet the requirements of the immigration rules and did not fall within the terms of the policy. The judge heard from the sponsor, the appellant's father and noted the evidence that the appellant was unemployed and unmarried and lived in the family home with his sister who was also single and unemployed. It was stated that the appellant suffered from depression and was in poor health. He kept in touch with his parents every day by telephone and Viber and he was financially supported by the sponsor. The sponsor explained that the only reason why he had applied for his son to come here, and not his daughter, was that he only had sufficient funds for one application and wanted his son to come as he had four daughters. The sponsor last visited the appellant and his sister in 2013. The appellant stated in his evidence that he was worried about the sponsor's ill-health.

4. The judge found that the appellant's representative had properly conceded that the appellant could not meet the requirements of Annex K or Appendix FM and she therefore went on to consider Article 8 outside the immigration rules. She accepted, from the judgment in Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8, that the appellant may well succeed on the proportionality assessment as a result of the historic injustice point, but that the relevant matter to determine was whether Article 8 was engaged at all and whether family life existed between the appellant and his family. The judge concluded that the appellant had failed to show that there was sufficient emotional dependence on his parents to

justify the conclusion that they enjoyed family life and she found that Article 8 was therefore not engaged. She accordingly dismissed the appeal.

5. Permission to appeal to the Upper Tribunal was sought by the appellant on the grounds that the judge had failed to give weight to the historic injustice point in assessing family life; that the judge had failed to give weight to the factors that the appellant could satisfy in paragraph 9 of Annex K when assessing whether Article 8 was engaged; that the judge had failed to consider the intention of the policy in Annex K; that the judge had failed to consider that the family unit had resided together until the sponsor and his wife exercised their right to enter the UK; that the judge had failed to identify a time when the family life was severed for the purposes of the Article 8(1) consideration; and that the judge failed to give weight to the appellant's inability to succeed under the policy as a result of the recent changes.

6. Permission was then granted on 16 March 2017.

Appeal Hearing

7. Ms O'Callaghan expanded upon the grounds, submitting that the judge had given insufficient weight to various factors relevant to the policy in Annex K, to the fact that the appellant had not formed an independent family unit in Nepal and to the fact that the family had lived together until the sponsor and his wife came to the UK. Article 8 was engaged prior to the sponsor and his wife leaving Nepal and it continued after they had come to the UK. The judge had failed to say when family life was severed. The sponsor had provided reasons why he had not visited the appellant more often in the UK and the judge had failed to consider the financial issues. There had been no consideration of the appellant's ill-health. Insufficient weight had been given to the historic injustice.

8. Mr Mills submitted that the judge properly focussed on the question of family life and gave more than adequate consideration to that issue, fully aware of the context in which the case was to be considered and the relevant policy.

Consideration and findings

9. It seems to me that the grounds of challenge are in fact more relevant to an assessment of proportionality rather than the question of whether family life existed between the appellant and his parents. Clearly the judge was fully aware of the context in which the appellant's case was to be decided, having had regard to the terms of the policy in Annex K and had regard to the case of Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8. The judge properly focussed on the question of family life and her approach to that question was entirely consistent with that set out in Gurung, where the Court of Appeal said at [45]: "*Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case*" and at [46] endorsed the guidance in Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160. She asked herself the relevant question, namely whether

there existed emotional and other ties over and above the normal ties between adult family members, reflecting the conclusion reached in Gurung at [50], that in that case “*the requisite degree of emotional dependence was absent*”.

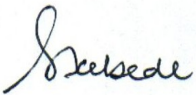
10. At [11(4)] to [11(7)] the judge gave detailed reasons why she considered that the relationship between the appellant and his parents did not constitute family life for the purposes of Article 8(1). She had full regard to the circumstances in which the appellant’s parents came to the UK, to the appellant’s financial dependence on his father, to his regular contact with his parents by telephone and Viber and to his single status, but she provided cogent reasons as to why that was not sufficient in itself to demonstrate that family life existed. Contrary to the submissions made by Ms O’Callaghan, the judge gave full consideration to the reasons why the sponsor had not applied for his daughter to come to the UK and why he had applied only for the appellant to come, she gave full consideration to the reason why the sponsor had made only one visit to Nepal and she had full regard to the appellant’s claim as to ill-health, noting with respect to the latter that no supporting evidence had been provided. The judge addressed all of these matters and provided reasons for according them the weight that she did.

11. For the reasons fully and cogently given the judge was perfectly entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent, so that Article 8 was not even engaged. That was a conclusion which was fully and properly open to her on the evidence before her. The grounds are simply a disagreement with that conclusion and have no merit.

12. Accordingly I find no errors of law in the judge’s decision. I uphold the decision.

DECISION

13. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed 
Upper Tribunal Judge Kebede

Dated: 19 July 2017