



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/27601/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 May 2018

Decision & Reasons Promulgated  
On 23 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MR DOL BAHADUR THAPA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Ms Everett, Home Office Presenting Officer  
For the Respondent: Ms O'Callaghan, Counsel, instructed by N. C. Brothers & Co  
Solicitors

**DECISION AND REASONS**

1. The respondent (hereafter "the claimant") is a citizen of Nepal born on 6 September 1982. The claimant's father (hereafter "the sponsor") is a former Gurkha soldier who was granted indefinite leave to remain in the UK on 22 May 2009.
2. On 24 October 2016 the claimant applied for entry clearance to settle in the UK as an adult dependent child of the sponsor, relying on the Home Office's discretionary policy relevant to children of former Gurkha soldiers found at Annex K to Chapter 15

of the Immigration Directorate Instructions (hereafter “Annex K”) and Article 8 ECHR. On 21 November 2016 the application was refused. The claimant appealed and his appeal was heard by First-tier Tribunal Judge Heatherington. In a decision promulgated on 11 September 2017 the appeal was allowed under Article 8 ECHR. The appellant (hereafter “the ECO”) is now appealing against that decision.

### **Decision of Entry Clearance Officer**

3. The ECO firstly considered the claimant’s appeal under Annex K. It was found that this was not satisfied for several reasons, including that the claimant was not financially or emotionally dependent on the sponsor, the claimant and sponsor had been living apart for more than two years and the claimant was over 30 years old.
4. The ECO also considered Article 8 ECHR, but found that there was not family life between the claimant and sponsor such that Article 8 was engaged. The ECO also found that the reasons for refusing the application outweighed considerations of the historical injustice to the sponsor arising from not allowing him to settle in the UK when he retired as a soldier.

### **Decision of the First-tier Tribunal**

5. At paragraph 13, Judge Heatherington stated that the claim was being considered under Article 8(1) ECHR. After setting out some of the pertinent factual background, the judge made, inter alia, the following findings:
  - (a) The claimant does not have any financial resources and is dependent on his parents.
  - (b) The reason the claimant’s parents have only visited him once is because of the cost and the sponsor’s medical condition.
  - (c) The claimant is part of a close-knit family where he is dependent on his parents’ support.
6. At paragraph 21 the judge stated:

“The appellant’s inability to find employment and his separation from his parents results in the appellant being dependent on his parents far more than is usual for an adult child. Here the appellant’s family life is significantly more than the ordinary emotional ties between an adult child and parents. The appellant is economically and emotionally dependent on his parents. Thus, the refusal of entry clearance interferes with family life and thus Article 8(1) is engaged.”
7. At paragraph 22 the judge directed himself to consider the proportionality of the interference with the claimant’s family life arising from the refusal to grant him entry clearance.

8. At paragraph 27 the judge found that had the sponsor been able to settle in the UK when discharged from the British Army in 1979 he would have done so and he had been the victim of a historical injustice.

9. At paragraph 28 the judge stated:

“I find that the evidence in the round points to the sponsor being an honourable, loyal and trustworthy man. I believe his evidence as set out in his statement. I also accept the truth of the appellant’s evidence in his statement. I find that the much belated reward to Gurkhas for their service to the United Kingdom diminishes the weight I place on the public interest side of the balance sufficient for me to find that the Article 8(1) balance is to be given to the appellant and his family in this country. I find that the public interest of immigration control in maintaining firm and fair immigration control is not made out.”

### **Grounds of Appeal**

10. The ECO made the following arguments

- (a) The judge erred by taking into consideration the historical injustice to former Gurkha soldiers when assessing whether there was family life between the claimant and sponsor. The contention made in the grounds is that this issue should have been left to the assessment of proportionality and it was an error to treat it as a relevant factor in the assessment of whether Article 8 was engaged.
- (b) The judge failed to make findings about the claimant’s relationship with his sister and other family members and his activities over the last decade that would have been relevant to the issue of whether there is family life within the meaning of Article 8 between the claimant and sponsor.

### **Submissions**

11. Ms Everett argued that the judge erred by having regard to the historical injustice in assessing whether Article 8 was engaged (Article 8(1)) when this should only have been considered at the proportionality stage (Article 8(2)).
12. She also argued that the evidence did not support a finding of dependency given the claimant’s relatively advanced age, education and family circumstances. She submitted that given the claimant’s age there would need to be more evidence to show dependency. She also argued that the judge’s conclusion that family life existed was undermined because of the absence of findings in relation to the support the claimant received from the sponsor.
13. Ms O’Callaghan, in response, submitted that the judge made clear findings to support his conclusion that family life existed, based on the claimant’s financial and emotional dependence on his parents.
14. She accepted that the judge at paragraph 28 had referred to Article 8(1) but in her view this was most likely inadvertent (and in any event not material) given that the

judge in this part of the decision was addressing proportionality under 8(2) and it was her contention that the issue of historical injustice was only considered by the judge in the context of proportionality under Article 8(2).

15. Ms O'Callaghan also submitted that the judge properly addressed the factual evidence as set out in witness statements which was sufficient to establish a factual basis for his findings about the existence of family life.

### Analysis

16. There were two issues for the judge to address. The first was whether there was family life between the claimant and sponsor such that Article 8(1) ECHR was engaged. Relevant considerations for this issue were, inter alia, whether the claimant has formed an independent life and the extent of his financial, emotional and practical reliance on the sponsor.
17. The second issue, which arises only if family life within the meaning of Article 8(1) is found to exist, is whether refusing entry to the claimant is proportionate under Article 8(2). It is at this stage that the historical injustice experienced by the sponsor as a former Gurkha soldier is a relevant consideration.
18. Reading the decision as a whole I am satisfied that the judge has addressed both of these issues and has had regard to the appropriate considerations for each.
19. At paragraphs 18 to 21 the judge made a number of findings of fact relevant to the issue of whether family life existed between the claimant and sponsor. These findings include that the claimant:
  - (a) has no financial resources of his own,
  - (b) is provided rent-free accommodation by the sponsor,
  - (c) is regularly sent money by the sponsor,
  - (d) is unable to find employment,
  - (e) regularly communicates with his parents
  - (f) has emotional ties with the sponsor that significantly exceed that which is ordinary for parents and an adult child.
20. On the basis of these findings it was open to the judge to conclude that family life existed between the claimant and sponsor under Article 8(1) irrespective of the claimant's age.
21. Having found that family life exists, the judge proceeded to address the second issue, which is whether refusing the claimant entry to the UK was proportionate. It is in this part of the decision that the judge has given weight to the historical injustice experienced by former Gurkha soldiers. Although at paragraph 28 the judge referred

to the “historic injustice” affecting “the Article 8(1) balance”, it is readily apparent, reading the decision as a whole, that in this part of the decision the judge was considering Article 8(2) and proportionality. The judge’s reference to Article 8(1) rather than Article 8(2) was, in my view, no more than an inadvertent slip but if it amounts to an error of law it is certainly not material. It is the substance that matters and it is clear that in paragraph 28 the judge was considering the proportionality of refusing the claimant entry and the weight to be given to the public interest in this context. The judge therefore followed the correct approach and the core argument advanced by Ms Everett is not established.

22. Ms Everett also argued that the evidence before the judge was not sufficient to establish that family life existed. I disagree. The claimant and sponsor, in their witness statements, stated, amongst other things, that the claimant lives rent free in the sponsor’s property, has no income of his own, is entirely financially dependent on his father (receiving money through the hundi system where no records are kept) and does not receive support from other family members. These factors, if accepted (which they were), taken together, amount to a sufficient basis to find for the existence of family life within the meaning of Article 8 ECHR.
23. I am therefore satisfied that the judge reached a conclusion that was open to him and the decision does not contain a material error of law.

**Notice of Decision**

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law and stands.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 21 May 2018