



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/01456/2021  
[UI-2021-001207]**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 March 2022**

**Decision & Reasons Promulgated  
On 26 April 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
DEPUTY UPPER TRIBUNAL JUDGE WELSH**

**Between**

**MR DEJIN RAI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Moriarty of Counsel, instructed by Everest Law Solicitors

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal against the decision of First-tier Tribunal Judge Stedman (“the Judge”), promulgated on 2 November 2021. By that decision, the Judge dismissed the appellant’s appeal against the respondent’s decision, dated 25 January 2021, refusing his human rights claim.

2. The appellant is a citizen of Nepal, born on 27 November 2002. His father died in 2012. At that point, his grandfather, a Gurkha veteran, was already settled in the United Kingdom (“UK”). Since the death of his father the appellant has lived with his aunt and uncle save for a brief period, immediately after the death his father, when his grandparents temporarily returned to Nepal and he resided with them. He applied for entry clearance to join his grandfather in the UK, relying upon paragraph 297(f) of the Immigration Rules HC 395 (as amended).
3. The appellant does not challenge the judge’s finding that he does not meet the requirements of Annex K of the Immigration Rules: the relationship relied upon is not one of parent and child, but grandparent and grandchild, and therefore falls outside the provision made on 22 January 2015 extending the scope of provision for the children of former Gurkhas. At [3]-[4], Annex K specifically excluded ‘grandparents, grandchildren, siblings or wider family members or a former Gurkha’ who must qualify under the Immigration Rules HC 395 (as amended), either as Appendix FM dependent relatives or under some other provision of the Rules.

### **First-tier Tribunal decision**

4. On 2 November 2021, First-tier Judge Stedman dismissed his appeal. The evidence fell far short of demonstrating that the appellant could bring himself within paragraph 297 of the Rules. The appellant’s family life, if any, was with his aunt and uncle, not his grandparents in the UK. There were no exceptional circumstances for which leave to remain should be given outside the Rules.
5. The appellant appealed to the Upper Tribunal.

### **Permission to appeal**

6. The sole ground of appeal is that the judge erred in failing to take into account, when conducting the proportionality assessment under Article 8 outside the Rules, the historic injustice suffered by the appellant’s family as a result of his grandfather being unable to settle in the UK following his discharge from the British Army.
7. On 30 December 2021, permission to appeal was granted in very brief terms by First-tier Judge Moon:

“1. The in-time grounds assert that the Judge erred in failing to consider the Article 8 rights of the sponsor and his wife, who are the appellant’s grandparents. It is also asserted that the Judge erred in not considering any weight that should be placed on the historic injustice in these circumstances.

2. It is arguable, as set out in the grounds, that the Judge erred in not considering or discussing these aspects of the appeal.”

8. There was no Rule 24 Reply by the respondent.

### **Upper Tribunal hearing**

9. We heard oral submissions from Mr Moriarty. During the course of this decision, we address the points he raised. We did not need to hear from Mr Tufan. At the end of the hearing, we reserved our decision.

### **Analysis**

10. For the appellant, Mr Moriarty accepted that there was insufficient evidence before the Judge to support the assertion in the grounds that the Appellant’s Gurkha father would have benefited but for his premature death. Mr Moriarty argued that the existence of family life between the appellant and his aunt did not preclude him enjoying family life with his grandfather, by which we understood Mr Moriarty to mean that it was implicit that the judge had accepted that family life exists between the appellant and the sponsor. Alternatively, he submitted that the judge’s finding was insufficiently clear.

11. The sole effective ground of appeal was a challenge to the finding by the First-tier Judge that there was no family life between the appellant and his grandfather, set out at [19] in the First-tier Tribunal decision:

“... it is very clear that the appellant’s family life is at home with his aunt and uncle who have been responsible for his day-to-day care for virtually all of his childhood and now into adulthood.”

12. We remind ourselves of the narrow circumstances in which it is appropriate to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed.

13. We do not agree. The Judge’s findings of fact were open to him on the evidence, oral and written, before him and the standard for interference by the Upper Tribunal is not reached.

14. In any event, even if the Judge had found that family life exists between the appellant and the sponsor, we are not persuaded by Mr Moriarty’s argument in relation to historic injustice. Mr Moriarty emphasised that he was not submitting that this case falls within the ambit of application of the principle of historic injustice, as described, for example, in Gurung and

others, R (on the application of) v Secretary of State for the Home Department [2013] ECWA Civ 8. Instead, he submitted that the fact of the historic injustice should be given some weight in the proportionality assessment and that the Judge erred by not taking this factor into account at all.

15. The decision of the Upper Tribunal in Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) predated the introduction of Annex K. The historic injustice is now provided for within Annex K and the appellant has not advanced any exceptional circumstances which ought to have resulted in the grant of leave to enter outside the Rules.
16. These grounds of appeal disclose no arguable error of law in the Judge's decision, still less one which was material to the outcome of the appeal.
17. We dismiss the appeal and uphold the decision of the First-tier Tribunal.

### **Decision**

18. For the foregoing reasons, our decision is as follows:

The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision but order that it shall stand.

Signed **C Welsh**  
Deputy Upper Tribunal Judge Welsh

Date 23 March 2022