



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03906/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 18 December 2017

Decision & Reasons Promulgated

On 23 January 2018

Before

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR RUBIN SUNUWAR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

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

Respondent

**Representation:**

For the Appellant: No representation

For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal now aged 27. On 23 December 2015 he applied for entry clearance to settle in the UK as the dependent son of sponsor Mr Sunuwar Khadga Bahadur, a former Gurkha soldier who came to the UK for settlement in

February 2011. The appellant is the sponsor's youngest son. The respondent refused his application on 14 January 2016. The appellant appealed. He did not pay the fee for an oral hearing and his case was determined on the papers by Judge Aziz of the First-tier Tribunal. In a decision sent on 24 February 2017 Judge Aziz dismissed his appeal.

2. The appellant's grounds of appeal appear to be drafted by the appellant himself but essentially take issue with the judge's assessment that he was not financially and emotionally dependent on the sponsor.
3. At the hearing the appellant was not legally represented. The sponsor attended together with his wife but it was clear neither spoke English adequately. A family friend, Ms Chandika Sunuwar, attended with them and was able to communicate with them on and impart salient matters to them, but was not able to help convey the sponsor's view of the proceedings.
4. Having discussed the case with Mr Duffy, I satisfied myself that it was appropriate to proceed with the hearing, notwithstanding lack of input from the sponsor. The reason for that is that Mr Duffy conceded that the judge's decision was legally flawed.
5. There are several ostensible difficulties with the judge's assessment of the key issues in this appeal. At paragraphs 39-42 the judge stated:
  - "39. The appellant's case is that even though he is an adult, he is emotionally and financially dependent upon his parents. He has not established an independent family life (unlike his other siblings). It was always his parents' intentions for him to join him in the United Kingdom and the only reason they are living apart is because of this immigration decision.
  40. There is a large amount of documentary evidence submitted in support of the assertion that the appellant is financially dependent upon his parents and that they continue to support him following the completion of his education. I am also persuaded that the appellant has been able to submit evidence that he is in regular and ongoing contact with his parents and that they do visit him in Nepal.
  41. However, the appellant does not dispute the respondent's assertion that he is an able-bodied individual. In such circumstances, I do not find that the appellant has been able to provide satisfactory explanation as to why he is unable to work. He is a young, educated man in his mid-20s. Whilst he may be financially supported by his parents, there is nothing on the evidence before the Tribunal to indicate that any such dependency is out of necessity.
  42. The case law in this area establishes that there must be 'elements of dependency going beyond the normal emotional ties'. If such dependency is not found, then the refusal to admit members of the family simply does not constitute interference with family life. On the evidence before the Tribunal, I find that the

appellant has not been able to persuade the Tribunal that there are elements of dependency which go beyond normal emotional ties”.

6. Given the judge’s acceptance of financial dependency, it is clear that the appellant was entitled to consider that his case fell within the material scope of Article 8(1) of the ECHR so long as he was able to establish emotional dependency. The only clear reasons given by the judge for finding that the appellant was not emotionally dependent were that:
  - (1) he was someone who was able to work and was young and educated;
  - (2) the dependency was not dependency of necessity.

In reaching these conclusions the judge failed to conduct any kind of weighing up of the relevant evidence. Relevant evidence included the appellant’s account of his parents visiting him once a year, and maintaining regular electronic communication with him. Following the Court of Appeal judgment in **Rai [2017]** EWCA Civ 329 and the Court’s finding in that case that one “critical” question when assessing whether there exists “family life” for the purposes of Article 8(1) is whether “even though the appellant’s parents had chosen to leave Nepal to settle in the UK when they did, his family life with them subsisted then and was still subsisting at the time of the [tribunal] decision”. The judge wholly failed to consider this issue. The judge was wrong to decide the issue of emotional dependency without taking into consideration the above factors. The judge was also wrong to require that the dependency be of necessity. That is not the test in Gurkha soldier family cases.

7. Mr Duffy also saw as a further deficiency in the judge’s decision his failure to analyse Annex K criteria, given that this Annex does not treat the length of time an applicant has lived apart from the sponsor{s} as determinative.
8. In light of the above, I conclude that the judge’s decision is vitiated by legal error and is to be set aside.
9. Given that the key issues in this case are highly fact-sensitive, I consider that it should be remitted to the FtT (not before Judge Aziz). However, as things stand at present, the case will have to proceed, as before, as one to be determined on the papers, as the appellant has not paid the requisite fee of £80 stipulated by the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011.

If the appellant wishes to achieve an oral hearing he will need to pay that fee as soon as possible.

10. Assuming the appellant pays this fee, the case would then (instead) be listed for an oral hearing at which the sponsor would be able if he chose to give oral evidence and also be represented. At the end of the hearing before me I conveyed via Ms Sunuwar the importance that the sponsor seek legal assistance if he wishes to effectively participate in this appeal.

11. In order to give the appellant and sponsor time to take stock of
- (1) whether they wish to have an oral hearing before the FtT (on remittal);  
and
  - (2) whether they decide to obtain legal representation,

I direct that the FtT list this for a Case Management Review hearing (or its equivalent) not before 31 February 2018.

12. To conclude:

The decision of the FtT Judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Aziz).

The case will be first considered at a Case Management Review hearing to be held at Taylor House.

No anonymity direction is made.

Signed:

Date: 21 January 2018

Handwritten signature of H H Storey in black ink.