



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05384/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 30<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR BIKASH GURUNG  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K McCarthy, Counsel, instructed by Everest Law Solicitors (15 Chambers)

For the Respondent: Mr T Wilding, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Colvin dismissing his appeal against the refusal of entry clearance to settle in the United Kingdom as the adult dependent relative of his father, an ex-Gurkha soldier. The decision was promulgated on 6<sup>th</sup> July 2017. Permission to appeal was granted by First-tier Tribunal Judge Shimmin. The grounds upon which permission was granted may be summarised as follows:

“It is arguable that the judge made a material error in respect of the assessment of the Appellant’s employment. It is arguable that the judge has materially

erred in requiring financial dependency of necessity in the engagement of Article 8. It is arguable that the judge has failed to correctly apply case law in respect of Article 8(1) and to properly consider the relevant evidence in that regard. It is arguable that the judge has materially erred in law in giving weight to the 'voluntary' separation of the Appellant and his family. In the light of her finding that Article 8 was not engaged, it is not arguable that the judge erred in failing to consider Article 8(2). I grant permission to appeal."

2. I was not provided with a Rule 24 response from the Respondent but was addressed by her representative, who confirmed that the appeal was resisted.

### **Error of Law**

3. At the close of submissions I indicated I would reserve my decision, which I shall now give. I find that there is an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
4. In respect of the first Ground of Appeal and the mistake of fact concerning the Appellant's having worked in the United Arab Emirates from February 2014 until approximately August 2015, the judge stated at paragraph 29 of her decision that the work in the UAE was not disclosed by the Sponsor, his wife or the Appellant himself. In respect of the Sponsor or his wife, that is indeed correct, however, as Mr Wilding accepted, in respect of the Appellant that finding is incorrect. As to the materiality of that mistake of fact Ms McCarthy submits that this adverse assessment has gone to an adverse credibility finding in respect of the Appellant also which I accept, and to the extent that it has, it does in my view reveal an error of law. However, that in and of itself would not represent a material error such that the decision should be set aside. Thus, I go on to consider the remaining grounds.
5. In respect of the second ground and the judge's finding that Article 8(1) was not engaged because the Appellant had not established financial dependency by necessity, in my view that does reveal a clear error of law. At paragraph 28 of the judge's decision the judge carefully sets out paragraph 15 of the Annex K guidance, in relation to financial and emotional dependency. That paragraph states as follows:
 

"The applicant must be financially and emotionally dependent on the former Gurkha Sponsor. Evidence of financial dependency may include the fact that the applicant has not been supporting him or herself and working but has been financially supported, out of necessity by his or her former Gurkha Sponsor, who has sent money regularly from the UK."
6. From studying the Annex K guidance, it is clear that the judge has looked at the portion of the guidance concerning the caseworker's consideration, which ranges from paragraphs 1 to 25 of Annex K. However, what follows after in respect of paragraphs 26 and 28 represents the consideration that the judge should have had regard to in terms of the proportionality assessment in an Article 8 consideration. This is particularly important because the authority of *R (on the application of Gurung & Ors) v Secretary of State for the Home Department* [2013] EWCA Civ 8 (which upheld *Ghising & Ors* [2013] UKUT 00567 (IAC)) confirmed that the Secretary of State's

approach to the assessment of applications from adult dependent relatives of former Gurkha soldiers was not compatible with Article 8 in various forms. This would also of course include the stipulation in the guidance that a sponsored adult dependent relative should be financially dependent “by necessity”, because not least this requirement is inconsistent with the authorities of *Ghising* (see above for citation) as well as the authority of *Kugathas*, which merely required dependence that should be “real” or “effective” or “committed” (see paragraph 17 of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31). In respect of the guidance stipulating that financial support upon a former Gurkha Sponsor should be “by necessity” that position is plainly inconsistent with Article 8 jurisprudence. Therefore, given the judge’s acceptance that there were financial remittances from the Sponsor to the Appellant at paragraph 30 of the decision the element of financial dependency had been established.

7. I pause to note that although the authority of *Kugathas* remains valid, it has of course been clarified by the decision of the Master of the Rolls in *Gurung*, which accepted the statement in *Ghising* that *Kugathas* had been interpreted “too restrictively in the past” (see paragraph 56 of *Ghising*). Therefore, in my view the requirement of financial dependency by necessity is one that is incorrect as it is incompatible with Article 8 jurisprudence, and consequently the judge’s findings upon Article 8 which are approached from this flawed perspective (based upon paragraph 15 of the Annex K guidance) without having regard to that Article 8 jurisprudence represents a material error of law.
8. Although a material error of law has been identified in the decision I will briefly go on to look at the remaining issue of the “voluntary” separation between the Appellant and his family. In her submissions Ms McCarthy relied upon paragraphs 38 to 44 of *Rai v Entry Clearance Officer (New Delhi)* [2017] EWCA Civ 320, which clarified that the voluntary separation between a former Gurkha soldier Sponsor would prevent Tribunals from answering the critical question under Article 8(1), which was and remains whether, as a matter of fact, an Appellant can demonstrate that family life with their parents existed at the time of departure when they left to settle in the United Kingdom and whether it had endured beyond that, notwithstanding the departure of the sponsoring parent to the United Kingdom. In that regard I note the judge’s finding at paragraph 34 that the Sponsor and the wife made the decision to move to the United Kingdom without the Appellant and also that at paragraph 36 the judge notes the Appellant’s work in the UAE for a period of up to two years upon which she formed the view showed independence from the Appellant’s parents at the date of application, however, there is no explicit assessment in the light of those observations that the judge focused upon the dependence at the time of the application and whether family life subsisted *at that time*. Naturally it is entirely feasible that family life which subsisted could be interrupted by independency but it could equally later resume by virtue of an adult dependent relative becoming once more dependent. Thus, in light of those paragraphs in the decision and in light of paragraphs 39 and 42 of *Rai*, I do find that the judge has erred in focusing on the voluntary separation of the Sponsor and the Appellant alone rather than focusing on the subsistence of family life and dependency at the time of the later application.

9. In light of the above findings I do find that there is a material error of law in the decision such that it should be set aside. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside for legal error.

**Notice of Decision**

10. The matter is to be remitted to be heard by a Judge of the First-tier Tribunal other than Judge Colvin. The decision of the First-tier Tribunal is hereby set aside in its entirety.
11. Standard directions are to be issued.

Signed

Date 04 May 2018

Deputy Upper Tribunal Judge Saini