



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/06367/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28<sup>th</sup> July 2017**

**Decision & Reasons  
Promulgated  
On 08<sup>th</sup> August 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGINTY**

**Between**

**MR MAHESH GURUNG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Jesurum, Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge S D Lloyd promulgated on 3<sup>rd</sup> April 2016, in which he dismissed the Appellant's appeal against the decision of the Entry Clearance Officer in New Delhi to refuse to grant entry clearance to the Appellant to settle as the dependent son of a former Gurkha soldier.
2. Permission to appeal had been granted by First-tier Tribunal Judge Scott-Baker on 17<sup>th</sup> June 2017, who found that it was arguable that the judge made no findings under Annex K, a policy introduced in respect of Gurkhas

on 5<sup>th</sup> January 2015, which had not been considered in the previous decision of First-tier Tribunal Judge Nixon.

3. The judgment of Judge Lloyd clearly took account of the decision made by Judge Nixon and found that in effect nothing had changed since the previous decision at paragraph 26 and relied upon the previous decision of Judge Nixon following **Devaseelan** for refusing the Appellant's appeal on human rights grounds. However, Judge Lloyd in fact noted in the chronology that the Appellant had actually made a fresh application following the refusal from Judge Nixon on the basis of a new policy that had been brought in by the Respondent at Annex K. The decision of the Secretary of State dated 24<sup>th</sup> August 2015 was based upon that policy under Annex K and then whether or not there were any exceptional circumstances going beyond that policy under which the appeal should be considered and allowed under Article 8. It was that decision which was appealed to First-tier Tribunal Judge Lloyd.
4. As has been quite properly conceded by Mr Tarlow on behalf of the Secretary of State this morning, Judge Lloyd regrettably when considering the appeal did not consider the provisions of the new Annex K when considering the appeal and Mr Tarlow quite properly concedes that that has to be a material error of law in the circumstances, when the original decision was based upon findings under Annex K which the Appellant had sought to challenge at the appeal hearing. The original judgment from Judge Nixon was not based upon Annex K, and therefore to that extent the decision of Judge Nixon not relevant. Mr Tarlow quite properly concedes that the judge should have considered the claim under Annex K but has failed to do so and that is a material error of law. Although the judge was clearly considering the claim on the Article 8 basis, given the fact that question as to whether or not the requirements of the policy under Annex K were met is a very relevant consideration in considering the proportionality issue under Article 8 the failure to consider Annex K does infect the entirety of the decision and does therefore, as Mr Tarlow concedes, amount to a material error of law.
5. The decision of First-tier Tribunal Judge Lloyd is set aside in its entirety and the case remitted, as agreed between the parties back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge S D Lloyd.
6. I note that the Sponsor and witnesses in the UK are all now said to live in the London area and Mr Jesurum on behalf of the Appellant has therefore asked that the rehearing be at Taylor House or any other convenient local London Tribunal rather than the appeal being remitted back to Birmingham. That seems entirely appropriate. I therefore do set aside the judgment of First-tier Tribunal Judge Lloyd and remit the case back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge, other than First-tier Tribunal Judge Lloyd, preferably to be reheard at an oral hearing at Taylor House.

Notice of Decision

The decision of First-tier Tribunal Judge S D Lloyd does contain a material error of law and is set aside;

I remit the case back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge, other than First-tier Tribunal Judge S D Lloyd, to be reheard at an oral hearing at Taylor House.

No anonymity direction is made.

Signed

Date 6<sup>th</sup> August 2017

Handwritten signature in black ink, reading "RFM McGinty". The signature is written in a cursive, slightly slanted style.

Deputy Upper Tribunal Judge McGinty