



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/19612/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Taylor House**

**Decision & Reasons  
Promulgated**

**On 21 December 2017**

**On 03 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**ENTRY CLEARANCE OFFICER (NEW DELHI)**

Appellant

**and**

**MS GAURI THAPA**

(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer  
For the Respondent: Mr S Ahmed, Counsel instructed by Everest Law Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Aujla sitting at Taylor House on 15 August 2017) allowing on Article 8 ECHR grounds outside the Rules the appeal of the claimant against the decision of the Entry Clearance Officer to refuse to grant her entry clearance for the purposes of settlement as the adult dependant family member of a Gurkha Veteran. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

## **The Reasons for the Grant of Permission to Appeal**

2. Permission to appeal was granted by First-tier Tribunal Judge Parkes for the following reasons:

The grounds argue that the Judge had not given adequate reasons for finding that there were more than the usual ties between the [claimant] and her parents. Since the Immigration Rules and guidance contain provisions relating to Gurkha families, the fact that the [claimant] did not meet the rules is significant. In the circumstances it is arguable that the Judge erred in finding that there was family life, given the circumstances between the [claimant] and the sponsor, and the length of time spent apart.

## **Relevant Background Facts**

3. The claimant is a national of Nepal, whose date of birth is 22 February 1979. Her father is a former member of the Gurkha Brigade. He was enlisted by the Gurkha Brigade on 25 November 1969, and he was discharged on 20 September 1984. On 1 September 2014, the claimant's parents were granted indefinite leave to enter and remain in the United Kingdom for the purposes of settlement. They entered the United Kingdom on 29 September 2014. On 15 June 2016, the claimant applied for entry clearance to join her father in the UK as his dependant.
4. On 2 August 2015, an Entry Clearance Officer in New Delhi gave his reasons for refusing the claimant's application. She was 37 years old. Under Annex K, an applicant had to be 18 years of age or over, and 30 years of age or under, at the date of application. She had not declared any care arrangements or requirements in Nepal. She had not mentioned any personal incapacity and she had not declared any medical conditions or disability. Therefore, he was not satisfied that she was wholly financially and/or emotionally dependent upon her UK sponsor as required under Annex K. She had been living apart from her sponsor as a direct result of her parents' migration to the UK rather than as a result of being away from the family unit as a consequence of pursuing educational or other requirements. So, she also did not meet the requirement of paragraph 9(8) of Annex K.
5. He had taken into account Article 8 ECHR. She had been living abroad without her sponsor for over 18 months and would be able to continue to live independently. Family life could continue as it may have done without interference by the refusal decision. Even if the refusal might be an interference with private life, he was not satisfied that she had established family life with her parents over and above that between an adult child and parent. This was further evidenced by her parents' decision to move to the UK without her. Accordingly, he was not satisfied that Article 8 was engaged.

## **The Hearing Before, and the Decision of, the First-tier Tribunal**

6. Both parties were legally represented before Judge Aujla. Mr Jesurum of Counsel appeared on behalf of the claimant. The Judge received oral evidence from the claimant's parents. In his subsequent decision, Judge Aujla reached the following conclusion at paragraph [40]:

Having considered the evidence presented to me, I am left in no doubt that there was an established family life between the [claimant] and her parents. I find that her parents were in regular contact with her and they were sending remittances for her upkeep. They provided accommodation for the [claimant] in the family home where they had always lived. On the evidence before me, the [claimant] had no other source of income or support. I therefore find that the claimant was dependent on her parents who had supported her throughout the period since she was born. The dependency in this case is clearly more than the normal emotional ties between parents and adult children. I therefore find that Article 8 was engaged in this appeal.

## **Discussion**

7. In this appeal, both parties rely on the guidance given by the Court of Appeal in **Rai v Entry Clearance Officer New Delhi [2017] EWCA Civ 320**, the facts of which are similar to the facts of this appeal in that Mr Rai applied for entry clearance as the dependent son of his Gurkha veteran father when he was well past the age of majority - being aged 26 - and when his father had entered the UK more than two years previously, and his mother had joined his father in the UK more than a year before.
8. Giving the leading judgment of the Court, Lindblom LJ explained at paragraph [16] onwards why the Upper Tribunal Judge had misdirected himself in considering whether Article 8 was engaged in Mr Rai's appeal.
9. At paragraph [39], Lindblom LJ noted that the Upper Tribunal Judge had referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made. Lindblom LJ continued:

But that, in my view, was not to confront the real issue under Article 8(1) in this case, which is whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.
10. At paragraph [42], Lindblom LJ reiterated that the critical question under Article 8(1) was whether the appellant's family life with his parents had subsisted at the time they chose to leave Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision.*"
11. Having identified the errors in the decision of the Upper Tribunal Judge which were enough to invalidate it, Lindblom LJ concluded as follows in paragraph [58]:

I accept that, if the Article 8(1) question had been dealt with as it should have been, the outcome might have been the same, but I find it impossible to say that it would inevitably have been so. It follows, in my view, that this appeal should be allowed and the case submitted to the Upper Tribunal for redetermination.

12. As I explored with Mr Ahmed in oral argument, the repeated use of the past tense in the Judge's discussion of family life at paragraph [40] raises a concern that he was not asking himself the right question. This concern is magnified by the Judge's earlier self-direction at paragraph [30] where he said:

The issue before me therefore is whether there was (my emphasis) extant family life between the [claimant] and the sponsor and, in that context, I do take on board the submissions made by Mr Jesurum that family life includes the right to develop family life.

13. In order to find that Article 8(1) was engaged, the Judge needed to be satisfied that family life between the claimant and her parents was subsisting at the date of the hearing. If it was not subsisting, the claimant could not succeed on the ground that she had a right to develop family life with her parents.
14. In his skeleton argument for the hearing before Judge Aujla, Mr Jesurum submitted at paragraph 10(8) that a degree of emotional dependence was required, following **R (Gurung) v SSHD [2013] 1 WLR 2546** at paragraph [50]. But the Judge made no finding one way or the other as to whether there continued to be a degree of emotional dependence.
15. As submitted by Mr Avery, the concern as to whether the Judge was asking himself the right question is reinforced by a misdirection which the Judge made earlier in his decision at paragraph [14]. In that paragraph he said that, in accordance with the Tribunal decision in **GR (ECO: Post-decision evidence) Morocco [2005] UKIAT 0038**, "*which I consider still to be good law*", *I may take into account evidence coming into existence after the date of the decision, if it related to a matter arising on the date of the decision*". In fact, under the new statutory regime, the Judge was mandated to consider the appellant's human rights claim as it stood at the date of the hearing, and he was not confined to post-decision evidence which related back to a matter arising on the date of the refusal decision.
16. I accept that the Judge made reference to the case of **DR (Morocco)** by way of a fall-back position, and that his primary position was that he might take into account any evidence placed before him, "*including any post-decision evidence relating to the matter in issue.*"
17. Nonetheless, I can find no clear recognition in his reasoning that the claimant was required not only to show that she enjoyed family life with her parents at the time of their departure from Nepal, but she also needed to show that family life with her parents was still subsisting at the date of the hearing. Moreover, there is no clear recognition in his reasoning that it was not enough that there should be continuing financial dependency, but that continuing emotional dependence was an essential requirement for a finding of subsisting family life at the date of the hearing.
18. I accept that in her witness statement the appellant said that she shared all her thoughts and emotions with her parents, and that she continued to be emotionally reliant on them; and that in her witness statement the

appellant's mother said that her daughter required their emotional support to keep her morale high. However, the Judge did not comment on this evidence, and he also did not directly engage with the closing submission of the Presenting Officer that the evidence of telephonic contact only started in July 2016, and the evidence of financial remittances only started in October 2015, whereas the sponsor had come to the UK in September 2014.

19. For the above reasons, I consider that the Judge did not give adequate reasons for finding that Article 8(1) was engaged, and that his decision to allow the appeal under Article 8 was thereby fatally flawed such that it must be set aside in its entirety and remade.
20. In the event that an error of law was made out, the representatives were in agreement that the appropriate course was for this appeal to be remitted to the First-tier Tribunal for a fresh hearing, with none of the findings of fact made by the previous Tribunal being preserved.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, such that it must be set aside and remade.

### **Directions**

**This appeal is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any Judge apart from Judge Aujla. None of the findings of fact made by the previous Tribunal shall be preserved.**

**I make no anonymity direction.**

Signed

Date 28 December 2017

Judge Monson

Deputy Upper Tribunal Judge