



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14029/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 April 2018

Decision & Reasons Promulgated  
On 1 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I.A.M. MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PREM RAJ LIMBU

Respondent

**Representation:**

For the Appellant: Ms Pal, Home Office Presenting Officer

For the Respondent: Ms A O'Callaghan, Counsel for NC Brothers & Co Solicitors,  
Reading

**DECISION AND REASONS**

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Nepal born on 30 April 1988. He appealed against the decision of the Entry Clearance Officer made on 5 May 2016 refusing his application for entry clearance to the United Kingdom as an adult dependent relative of his father, the sponsor, Mr Dinesh Prakash Limbu (a former Gurkha soldier). His appeal was heard by Judge of the First-Tier Tribunal Swinnerton on 11 August 2017 and allowed in a decision promulgated on 21 August 2017.
3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Doyle on 22 February 2018. The grounds assert that the Judge's Article 8 ECHR assessment is flawed as he failed to take account of Section

117B of the 2002 Act. The Judge's findings of fact and reasons run from paragraph 23 to paragraph 30 of the decision. He carefully considers the respondent's policy under Annex K of the Immigration Rules and gives good reasons for finding that the appellant meets the requirements of Annex K of the Rules. What is missing from the decision is an Article 8 ECHR assessment and consideration of Section 117B of the 2002 Act. The permission states that the determinative question may be the question of materiality.

4. There is a Rule 24 response/skeleton argument which states that the Judge makes satisfactory findings about the appellant's financial and emotional dependence on his sponsor. The Judge finds that the appellant does not lead an independent life and even though he lived away from his family while studying, since returning significant efforts have been made to maintain family life by the sponsor. The Judge finds that the appellant satisfies the conditions under the Immigration Rules, i.e. Annex K, paragraph 30 of his decision. The response goes on to state that the Judge has not made an error of law as he is not required to undertake an Article 8 assessment outside the Rules. The response states that the Judge does not require to consider Sections 117A and B of the Act as they are not applicable because he has found that Annex K has been satisfied. Alternatively, the evidence before the Judge included that of the appellant's education, his sponsor's employment and the availability of accommodation for the appellant. Considerations under the 2002 Act would have made no difference to the outcome in this matter as it was accepted that in view of the "historic injustice" underlying the appellant's case, considerations under Section 117 of the Nationality, Immigration and Asylum Act 2002 would have made no difference to the outcome and certainly nothing adverse to the appellant. The case of Jitendra Rai [2017] EWCA Civ 320 is referred to.

### The Hearing

5. The Presenting Officer submitted that the grounds state that the Judge's findings are inadequate relating to Article 8. The findings are at paragraph 23 to paragraph 30. The Presenting Officer submitted that the Judge found that there is family life but he submitted that the Judge made no findings on whether the refusal to grant entry clearance would disrupt this family life, and he did not consider proportionality. Instead he allowed the appeal. He also made no findings relating to Section 117B of the 2002 Act. She submitted that just to say that there is family life is not sufficient. What the Judge should have done was carry out a step by step process and after paragraph 28 of the decision there are no human rights findings.
6. Counsel for the appellant submitted that the Judge finds that this application meets the terms of Annex K of the Immigration Rules and gives reasons for finding this. I was referred to the Home Office policy 2015, paragraph 24 which states that separate guidance has been issued to Presenting Officers with details of how they should consider any cases which are part-way through the immigration appeal. The Judge analyses the Home Office policy and bases his decision on the Home Office's requirements. The Judge sets out these requirements and gives appropriate reasons for finding that this claim meets the requirements. Because he has found that Annex

K has been satisfied he does not require to undertake an Article 8 assessment. The terms of the Rules have been satisfied and I was asked to consider paragraphs 3 to 6 of the decision which refer to two cases about Gurkhas being *Gurung & Others* [2013] ECWA Civ 8 and *Ghising & Others* [2013] UKUT 00567 (IAC). In these cases it was found that Article 8 was engaged and that but for the historic wrong the appellant would have settled in the United Kingdom long ago. The Entry Clearance Officer found that the effect of the historic injustice in this case does not outweigh the proportionality assessment under Article 8 but in this case, there is no need for an Article 8 assessment as Annex K has been satisfied. She submitted that in any event the appeal would have been found in favour of the appellant even if Section 117B had been taken into account because of the historic injustice.

7. Counsel submitted that the Judge analysed matters properly and was correct to allow the appeal.
8. The Presenting Officer submitted that this is a human rights appeal and not only the Immigration Rules have to be considered but also Article 8 and the Judge has made no findings under Article 8. I was referred to the permission which states that Article 8 and Section 117B should have been considered by the Judge.
9. Counsel submitted that this appellant has been on his own in Nepal since 2005 but there have been regular visits and the sponsor and the appellant have not been separated for more than two years. She submitted that the Judge's decision is correct and should stand.
10. The Presenting Officer submitted that the reasons for the refusal by the home office outweigh the historic injustice in this case and the decision should be set aside.

### **Decision and Reasons**

11. At paragraph 24 of the First-Tier Judge's decision he refers to the new policy which was introduced and this applying to applications decided on or after 5 January 2015 and so applying to this appeal. At paragraph 26 he refers to the sponsor stating that the appellant would have intended to settle in the UK before now had he been able to. The Judge believes that the appellant is financially and emotionally dependent on the sponsor and he accepts that the appellant is not married, lives alone and has no immediate family in Nepal. He also refers to the money given by the sponsor to the appellant to pay for his rent and the sponsor's visits to Nepal to visit his son. The Judge therefore finds that the appellant has satisfied the conditions of Annex K as an adult child of a former Gurkha and that entry clearance should be granted to him and it would be disproportionate not to grant it.
12. The respondent states that Annex K 9 (8) cannot be satisfied as the appellant has lived apart from his sponsor for over 10 years. The respondent finds that there are no exceptional compassionate circumstances in this case.

13. The respondent considers Article 8 of ECHR and refers to the said cases of *Gurung & Others* and *Ghising & Others*. What the appellant has to show is that but for the historic wrong the appellant would have settled in the United Kingdom long ago and if he can show this then the appeal should be allowed. The Judge is satisfied that there is family life between the sponsor and the appellant but the respondent is not and finds that the effect of the historic injustice has not been such that the appellant has been prevented from leading a normal life and so the Article 8 claim fails to succeed in the proportionality assessment under Article 8.
14. I have studied Annex K and have noted that this is an application decided after 5 January 2015. Paragraph 9 (8) of Annex K cannot be satisfied. Apart from this paragraph the remainder of Annex K appears to be satisfied. It is true that the sponsor has visited the appellant regularly and supports the appellant but at paragraph 19 of Annex K under the heading "Living Apart" again the period of two years is referred to. The appellant however is not living independently or in a different family unit.
15. This is a human rights claim and as such Article 8 has to be considered as does Section 117 B of the 2002 Act. I find that Annex K cannot be satisfied. A proportionality exercise has to be carried out. In this proportionality exercise the historic injustice must be given considerable weight. What the appellant has to show is that but for the historic wrong the appellant would have been settled in the UK long ago. Matters over and above the public interest and maintaining a firm immigration policy must be shown by the respondent.
16. As the judge did not consider Article 8 properly or Section 117B of the 2002 Act there is a material error of law in the First-Tier Judge's decision.

### **Notice of Decision**

I direct that the decision of the First-Tier Tribunal is set aside. None of its findings are to stand other than as a record of what was said on that occasion. It is appropriate in terms of Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing.

The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Swinnerton.

Anonymity has not been directed.

Signed

Date 30 May 2018

Deputy Upper Tribunal Judge I.A.M. Murray