Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/12092/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 October 2014	**On 21 October 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr RAJIN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr G Gurung, sponsor

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Nicholson on 12 August 2014 against the determination of First-tier Tribunal Judge Kanagaratnam who had allowed the Respondent's appeal against the refusal of his application for entry clearance as a dependant child in a determination promulgated on 7 July 2014.

2. The Respondent is a national of Nepal, born on 3 June 1995, currently resident there. He had applied for entry clearance for settlement under paragraph 297 of the Immigration Rules as the son of Mr Ganesh Gurung ("Mr Gurung"), a national of Nepal with ILR, on 8 October 2012. The Entry Clearance Officer accepted that the Respondent's late mother had been married to his sponsor, but the Respondent had stated that the Respondent was not his biological father and it was not accepted that there was a recognisable family relationship between them. There was no evidence that money transfers had taken place for the Respondent's support. The Respondent had resided with other relatives in Nepal since the death of his mother in 2000. Adequacy of accommodation was not proven. Refusal did not amount to a breach of Article 8 ECHR. The application was refused on 5 April 2013.

3. Permission to appeal to the Upper Tribunal as sought by the Secretary of State was granted because the judge had not considered whether paragraph 297(i) of the Immigration Rules had been met, given that it was admitted that the sponsor was not the Respondent's biological father, nor whether paragraph 297(i)(f) applied, i.e., whether there were serious and compelling family or other considerations which made his exclusion undesirable.

4. Directions were made by the Upper Tribunal in standard form. It was directed that the appeal would be reheard immediately in the event that a material error of law was found.

Submissions – error of law

5. Mr Bramble for the Appellant (the Secretary of State) relied on the grounds and the grant of permission to appeal. The judge had not addressed the consequence of the fact that although the Respondent had applied to join the sponsor on the basis that the sponsor was the Respondent's father, it had been admitted after the entry clearance application had been submitted that the sponsor was at best the Respondent's stepfather, subject to proof of the death of the Respondent's biological father. Such proof had not been provided. The definition of "parent" set out in paragraph 6 of the Immigration Rules applied. Nor was there any evidence that the sponsor had adopted the Respondent, or that there had been a *de facto* adoption recognised under paragraph 309A of the Immigration Rules. Even had the judge found that the sponsor was a "relative" (and how he would have done so was not obvious), paragraph 297(i)(f) had not been the subject of any findings. At [9] of his determination the judge had misstated the facts: the entry clearance application had not stated that the sponsor was not the Respondent's biological father. Moreover, the accommodation issue had not been conceded and yet the judge reached no finding on the point. The determination should be set aside, and the appeal reheard and dismissed.

6. Mr Gurung, the Respondent's sponsor, was not in a position to assist the tribunal on the legal issues which arose. Mr Gurung informed the tribunal that he had always acted as the Respondent's father and had supported him. The Respondent was currently studying in Nepal. There had never been a formal adoption under Nepalese law.

The error of law finding

7. The tribunal gave its decision at the hearing that the Secretary of State's appeal would be allowed and briefly explained its reasons and stated that detailed reasons would be given which now follow. Mr Bramble's submissions were correct. The judge had erred in a number of ways. First and foremost, the judge had failed to consider the consequences of the fact that the Respondent had admitted that he was not the biological son of his sponsor, after the entry clearance application had been made. The judge was mistaken in finding against that evidence that the sponsor's evidence had been

forthright that he had at the inception stated that the Respondent was not his biological son. The documents before the tribunal used the term "father" without qualification: see, e.g. Q.78 of the application form where it is stated "He [i.e., the sponsor] is my biological father", which is admitted to be untrue. There was no evidence of adoption by the sponsor under Nepalese law. As the sponsor and the Respondent had lived apart, *de facto* adoption had not and indeed could not have been shown. RM (Kwok On Tong: HC 395 para 320) India [2006] UKAIT 00039 applied and the judge was required to ensure that the whole of the relevant immigration rule had been met before allowing the appeal.

8. The judge had similarly failed to consider the accommodation requirements of paragraph 297(iv), which had been placed in issue by the Entry Clearance Officer. The determination was silent on the point. That was a material error of law.

9. It was also the case that the judge had failed to consider whether paragraph 297(i)(f) applied, i.e., whether there were serious and compelling family or other considerations which made his exclusion undesirable. That was a further material error of law.

10. There are various other errors in the determination, beginning with the incorrect statement that the appeal had been determined by the judge on the papers, when, as stated elsewhere in the determination, representatives of both parties had been present for the hearing. Such mistakes really ought not to occur. They reinforce the impression that the judge had not given the appeal proper attention.

11. Accordingly, for all of these reasons, the tribunal finds that the determination must be set aside and remade. The Secretary of State's appeal to the Upper Tribunal is allowed.

The fresh decision

12. In this part of the determination for convenience and clarity the tribunal will refer to the parties by their original titles in the First-tier Tribunal. There was no need for any

further evidence for the original decision to be remade, and no need of any further submissions.

13. As has already been noted, there was no evidence before the tribunal to show that the Appellant's sponsor was capable of being recognised as the Appellant's parent as that term is defined in paragraph 6 of the Immigration Rules. The application was accordingly misconceived. Mr Gurung had informed the tribunal that there had never been an adoption under Nepalese law. Although there was some evidence that Mr Gurung had contributed to the Appellant's support in Nepal, the Appellant's upbringing has been in the hands of other relatives, and not the sponsor. Mr Gurung has been engaged in full time work in the United Kingdom since 1996, save for periods of illness. The tribunal is not satisfied that Mr Gurung has had sole responsibility for the Appellant's upbringing and so finds. Nor was there any evidence that the Appellant was not being properly looked after in Nepal.

14. As to accommodation, the only evidence before the tribunal showed that Mr Gurung is a lodger, with a bedroom in shared accommodation. There was no evidence of the landlord's consent to the presence of an additional person in that bedroom, or that there was any additional accommodation available at the house in question. Indeed, the landlord stated in his letter confirming Mr Gurung's occupancy that the landlord had two daughters living with him and that Mr Gurung occupied the spare room. The arrival of a young male stranger is matter which would require express consent. The tribunal finds that the Appellant was unable to show that adequate accommodation was available.

15. Thus the Appellant was unable to show that his application satisfied paragraph 297 of the Immigration Rules and his appeal must be dismissed. Although Article 8 ECHR was not specifically argued, the tribunal treats any such issue as obvious: see R v the Secretary of State for the Home Department, ex p Robinson [1997] 3 WLR 1162. It is plain that the level of family life between the Appellant and the sponsor is weak but more importantly that the refusal decision does not create an interference as it simply maintains the *status quo*, i.e., the existing situation.

DECISION

The making of the previous decision involved the making of an error on a point of law. The appeal to the Upper Tribunal is allowed. The decision of First-tier Tribunal Judge Kanagaratnam is set aside and remade as follows:

The appeal is DISMISSED

Signed **Dated**

Deputy Upper Tribunal Judge Manuell **20 October 2014**

TO THE RESPONDENT
FEE AWARD

The appeal was dismissed and so there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell **20 October 2014**