



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/13964/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 18 August 2014  
Prepared 18 August 2014**

**Determination  
Promulgated  
On 3 September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Appellant

**and**

**MR SAFAL GURUNG**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Presenting Officer

For the Respondent: Mr M Puar, Counsel instructed by N. C. Brothers & Co  
Solicitors

**DETERMINATION AND REASONS**

1. In this determination I shall refer to the Respondent as the Claimant and to the Appellant as the ECO - New Delhi.

2. The Claimant, a national of Nepal, appealed against the ECO's decision of 17 June 2013 to refuse entry clearance as a dependent child of an ex-Gurkha soldier under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules HC 395 and with respect to the Secretary of State's policy as identified in IDI Chapter 15 Section 2A 13.2 as amended. The appeal came before First-tier Tribunal Judge Kainth (the judge) who allowed the appeal under Article 8 of the ECHR.
3. No issue is taken with the position as the judge found it to be for it was accepted that the Claimant could not succeed under the Immigration Rules.
4. The ECO's complaints were essentially a lack of adequate reasons for the judge's acceptance of there being dependency beyond the normal emotional ties between an adult child and parent with reference to *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31.
5. It was further complained that the judge had failed to consider how when the Claimant was of the age he was and had not been living with the Sponsor for five years there were continuing emotional ties between the Claimant and Sponsor. There is of itself no attack upon the findings of fact made so much as the reasoning for the conclusion that Article 8 ECHR was engaged.
6. At the hearing of the appeal before the judge the Sponsor for the Claimant, his father, gave evidence and produced a witness statement as did the Claimant. It is evident from the statement that there is virtually no description of emotional ties as between the Claimant and the Sponsor or the Sponsor's wife, the mother of the Claimant.
7. The judge plainly had evidence to show that the Claimant was financially dependent on his father and were it not for such financial support the

Claimant simply would not be able to continue his protracted studies nor would he be able to support himself claiming that employment prospects and the like were so poor in Nepal that he would not, at any stage even it would appear with education complete, be able to find work.

8. The judge's determination is not particularly clearly written. For example at paragraph 19 of the determination, contrary to what thereafter follows, the judge said without it being in quotes, contrary to Mr Puar's submissions that it should be, "... I have every empathy with respect to the position the Appellant now finds himself in. However, for reasons which will become clearer the Claimant cannot succeed under Article 8". However, it is sufficient to say that as thereafter set out the judge found the exact opposite, allowed the appeal under Article 8 ECHR and never reconciled one conclusion with the other. It could be that this was a typographical error but even if the 'not' was not included, the sentence still does not make that much sense or why explain why empathy might be relevant.
9. Similarly the judge makes a clear and unequivocal finding of fact when he stated at paragraph 23 "I accept the unchallenged evidence of the Sponsor that the Appellant (Claimant) is entirely reliant on his father for support and maintenance". The judge goes on at paragraph 25 to say:

"It is clear to me that prior to 2009, the Appellant enjoyed family life with his parents. Thereafter the Appellant in my assessment has formed a limited independent life for himself. I accept that the Sponsor provides financial support for the Appellant. I therefore conclude that in answer to question (1) [of Razgar] the removal would breach the United Kingdom's obligations under Article 8. The interference would not be legitimate and in accordance with the law. The interference engages the operation of Article 8 and it would not be proportionate to the legitimate public end sought to be achieved. In answering questions (3), (4) and (5), the proposed interference

would not be proportionate, legitimate and would deprive the Appellant of ongoing contact with his family. The separation of the family unit was never intended to be anything more than temporary.”

10. As to why refusing the application would deprive the Appellant of ongoing contact is less than clear because of course there was nothing to stop the telephone contact which was apparently regular and continuing. If the judge intended to mean that it would deprive the Claimant of contact with his family simply as a fact in the direct physical contact sense then that may be adequate as an explanation.
11. As to the intentions over the separation of the family unit that seems to me to be entirely a separate matter completely unrelated to the required exercise because of course it was ultimately a matter of choice that the family separated by the arrangements being made and the factual circumstances at the time of the application.
12. It is said by Mr Puar that it is not for me to go behind the reasoning of the judge’s finding as to the support, that is emotional support, that the Claimant gathered from the Sponsor. Therefore much turns on what can sensibly, on the evidence, be the factual basis of the conclusion that the Claimant was entirely reliant on his father for support.
13. I should say that the statement of the Claimant does not actually identify any particular emotional connection with his father or his mother or indeed any other relative with whom he would wish to re-establish connection or plays in his life or in his decision-making or any other aspect of his social life with whom he has connections or indeed might play a part in the emotional life.
14. Similarly the statement of the Sponsor again identifies the support he provides which he plainly identifies as financial and he too makes no

particular reference to the emotional connections which are prayed in aid as the interpretation of the word 'support'.

15. It seems to me, were it for me to consider, the matter that the evidence simply was not there to show the emotional support or ties that were of significance so as to engage Article 8.1 in that respect. However, the judge did make a number of findings of fact in the context of the relevant case law and concluded that in the judgment exercise in answer to the fifth question raised in Razgar the position was that the ECO's decision was disproportionate. I have in mind the guidance contained within R (Iran) [2005] EWCA Civ 982 as well as E & R [2004] QB 1044 CA and the general guidance repeatedly given in the Court of Appeal that the Upper Tribunal should not interfere with decisions made by judges simply because it disagrees with the outcome or would have reached a different conclusion itself.
16. I find in this case that, despite the poorly written decision, the Respondent's grounds which have not been amended since either before permission was given or after cannot avoid the finding that the judge made as to the dependency arising between the Claimant and the Sponsor. The analysis by the judge was superficial and bordered upon being inadequate but I do not find it sufficiently deficient to conclude that the claim of inadequate reasons as to how Article 8 was engaged means that the original Tribunal's decision should not stand.
17. In the circumstances, confined as I am to the grounds of appeal, I find that in this case, although on grounds being differently drafted I could well have reached a different decision that the appeal by the ECO fails.
18. The original Tribunal's decision stands.

Signed

Date 27 August 2014

Deputy Upper Tribunal Judge Davey