



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

Appeal Number: HU/07315/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 14th September 2018**

**Decision & Reasons
Promulgated
On 25 September 2018**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR BIJAY NEMBANG
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Jarvis (Senior Home Office Presenting Officer)
For the Respondent: Mr D Bhattarai (Bhattarai & Co)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a Decision and reasons of the First-tier Tribunal, Judge Manyarara, promulgated on 28th February 2018.

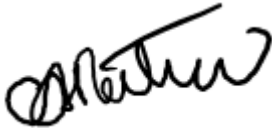
2. The appeal before the First-tier Tribunal related to a Nepalese national born in 1990 who is the adult son of a former Gurkha. The circumstances of this particular case were rather unusual in that the Appellant arrived in the United Kingdom as a student with valid leave before his parents came, as his father was entitled to as a former Gurkha. The Appellant then sought leave to remain as the adult child of a Gurkha. At the hearing it was acknowledged that the Appellant could not meet the requirements of the Rules as he was already in the UK. The appeal proceeded on the basis of human rights, outside the Immigration Rules only.
3. The Judge found as a fact that since 2014 the Appellant had been living as part of the family unit and was dependent on his father. The Judge made findings in relation to family life being engaged at paragraph 79 of the Decision where he says:

“Whilst the sponsor spent some time in Bahrain prior to the family’s arrival in the United Kingdom, I accept that this was because he needed to support his family and he could not find any employment in Nepal after his discharge as a Gurkha. This was the only reason for the geographical separation of the family. I find that the sponsor’s decision to go and work in another country in order to support his family financially is a testimony to the ties that exist in this family unit. The appellant is now aged 27 and is living in a single family unit with his parents and his siblings. As a result of the shared history in this appeal, I am satisfied that there is a family life in this appeal and the ties that exist in this family unit are more than normal emotional ties.”
4. Having so found, the Judge then falls into error in concluding that it was appropriate to remit the matter to the Home Office to consider whether a grant of leave is appropriate in line with published guidance in the light of the findings that he had made. The amended Section 84 of the Immigration and Asylum Act 2002, which sets out the possible grounds in an appeal, no longer includes as a ground of appeal, that the decision is unlawful. The Tribunal is empowered, in a human rights appeal, only to allow it if the Decision is in breach of the ECHR or dismiss it if it is not. To that extent the Judge erred in reaching the Decision that he did and the Decision must therefore be set aside. So much is accepted by both parties before me.
5. Mr Jarvis then helpfully indicated that in the light of the findings that family life was engaged and in light of case law in relation to family members of former Gurkhas, the Home Office would be unable to put forward an argument that removal was proportionate and thus it would be appropriate for me to redecide the appeal and allow it on human rights grounds. Accordingly, that is what I do.

Notice of Decision

6. The appeal to the Upper Tribunal is allowed and in redeciding the appeal against the Secretary of State's decision, the appeal is allowed.

No anonymity direction is made.



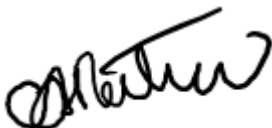
Signed
2018

Date 20th September

Upper Tribunal Judge Martin

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because it was only on appeal that a finding was made that Article 8 was engaged. The Appellant did not meet the Immigration Rules.



Signed
2018

Date 20th September

Upper Tribunal Judge Martin