



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13780/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 8 November 2021**

**Decision & Reasons Promulgated
On the 19th November 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MR RUPESH GHALE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D. Balroop, Counsel instructed on behalf of the appellant.

For the Respondent: Mr Whitwell, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Traynor (hereinafter referred to as the "FtTJ") promulgated on the 21 June 2021.
2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

Background:

3. The appellant is a national of Nepal who was born on 1 March 1986.
4. The appellant is the son of a former Gurkha soldier. The “historic injustice” experienced by former Gurkha soldiers and their families were rectified over time by changes in government policy and the Immigration Rules. As a result the appellant’s father and mother entered the UK in 2006 having been granted settlement to the United Kingdom.
5. On 10 April 2019 the appellant applied for entry clearance to the UK. The appellant had previously applied for a settlement Visa to join his father and mother in April 2007. The application had been refused and a 2nd application was made in November 2016 which had also been the subject of a refusal.
6. On 15 July 2019, the Secretary of State refused the appellant’s application for entry clearance. The decision was later maintained by the entry clearance manager. The decision letter considered the application as a dependent relative under paragraph EC-DR 1.1 of Appendix FM and also under the policy which outlined the eligibility requirements that adult dependent children of former Gurkhas as set out in the discretionary policy for Gurkha’s discharge before 1 July 1997 and their family members, as amended on 5 January 2015.
7. The Entry Clearance Officer was not satisfied that he could meet the provisions of Appendix FM on the basis that he provided no evidence that he had any disability or would be unable to care for himself. The ECO stated that he had provided limited details as to his circumstances, domestic arrangements or financial commitments in Nepal. Whilst he accepted that he may receive financial assistance from his father, had not demonstrated that he was genuinely dependent upon him. The Entry Clearance Officer was satisfied from the evidence he was a fit and capable adult who was able to look after himself. Furthermore he had not demonstrated that any financial assistance received could not continue or that he could not continue to reside in Nepal. He therefore refused the application under paragraph EC-DR 1.1 (d) of Appendix FM of the Immigration Rules.
8. As to the policy, the ECO acknowledged that there had been some financial support from the appellant’s father and that they remained in contact with him but that he had not demonstrated that he was financially and emotionally dependent upon his father beyond that normally expected between a parent and an adult child. It was noted that when his father settled in the UK in 2006 that his father had made no special arrangements for the appellant’s support and was content to leave him to look after himself. Finally the ECO took into account that the appellant was now 33 years of age at the date of the

application and therefore did not fall between the ages of 18 and 30 years of age.

9. The case was also considered on a discretionary basis to establish if there were any compassionate circumstances relating to his individual case. It was noted that he had grown up in Nepal and that his father had chosen to apply for settlement visas when he was already an adult in the full knowledge that adult children of the widow of a former Gurkha did not automatically qualify for settlement. The Entry Clearance Officer considered that there was no bar to his father returning to Nepal either permanently or temporarily. The Entry Clearance Officer was not satisfied that he had established a family life with his parents over and above that between an adult child and his parent or that he demonstrated “real” or “committed” or “effective” support from the parent and therefore article 8 was not engaged. In the alternative, if family life was engaged, there were reasons for refusing the application which outweighed any consideration of historic injustice noting that he had grown up in Nepal, his father chose to apply for settlement Visa when he was already an adult in the full knowledge that adult children did not automatically qualify for settlement. Thus the application was refused.
10. The appellant’s appeal against the respondent’s decision to refuse entry clearance came before the First-tier Tribunal (Judge Traynor) on the 11 January 2019.
11. In a determination promulgated on the 21 June 2021, the FtTJ dismissed the appeal concluding at [51] that family life was not engaged. In the alternative, at [52] he considered that the significant absence of information regarding the appellant’s circumstances was such that the appeal should be dismissed.
12. Permission to appeal was issued and permission to permission to appeal was granted by FtTJ Boyes on 14 September 2021.
13. Mr Balroop, who appeared on behalf of the appellant before the FtTJ, appeared before the Upper Tribunal. Mr Whitwell, Senior Presenting Officer appeared on behalf of the respondent. At the hearing Mr Whitwell was not aware of the Rule 24 response that had been filed with the Tribunal by his colleague Mr McVeety on 1 October 2021. In that response it was stated that the respondent did not oppose the appellant’s application for permission to appeal and therefore conceded that there was a material error of law in the decision based on the grounds of challenge. Having seen a copy of the rule 24 response Mr Whitwell did not seek to withdraw the response.
14. In the circumstances both parties accept that the FtTJ’s decision involved the making of an error of law and should thus be set aside. As to the remaking of the decision the rule 24 response referred to a

fresh continuance hearing to consider whether the appellant qualified under Article 8 as an adult child of a former Gurkha. On this issue, Mr Balroop submitted that the appeal should be remitted to the FtT for a rehearing in light of the factual findings which would need to be made and that the appellant had not had the opportunity to have his appeal properly considered before the FtT. He also referred to the new evidence filed by way of Rule 15(2A) application which would also require further consideration at a hearing and upon which further findings would need to be made.

15. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

16. In light of the grounds which challenged the assessment of the evidence and as Mr Balroop submits there are no findings that can be preserved, I accept his submission that the right forum for the rehearing is the First-tier Tribunal. I therefore remit the decision to the First-tier Tribunal for a hearing afresh.
17. In this context, Mr Whitwell stated that some of the documentary evidence was missing from the bundle that he had and requested that the appellant's legal representatives provide a full copy of the material relied upon for the next hearing before the First-tier Tribunal.

Notice of Decision.

18. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside and shall be remitted to the First-tier Tribunal for a hearing afresh.

Signed Upper Tribunal Judge Reeds

Dated 8 November 2021