



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

Appeal Number: HU/05439/2019 (P)

**THE IMMIGRATION ACTS**

**Decided without a hearing under  
rule 34**

**On 9 September 2020**

**Decision & Reasons Promulgated**

**On 14 September 2020**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THAM BAHADUR BURA MAGAR**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr S Jaisri instructed by Sam Solicitors (written submissions)

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer (written submissions)

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Nepal who was born on 28 June 1987. On 11 February 2019, the Entry Clearance Officer (“ECO”) refused the appellant’s application for entry clearance to join the sponsor (his father) in the UK as the dependent adult child of a former Ghurkha soldier.

2. The appellant appealed to the First-tier Tribunal. In a decision sent on 26 September 2019, Judge K Swinnerton dismissed the appellant's appeal. The judge was not satisfied that there "family life" was established between the appellant and sponsor for the purposes of Art 8.1 of the ECHR.
3. The appellant sought permission to appeal to the Upper Tribunal (the "UT") and, on 21 February 2020, the First-tier Tribunal (Resident Judge Appleyard) granted the appellant permission to appeal.
4. The appeal was initially listed for hearing in the UT on 23 April 2020. However, as a result of the Covid-19 crisis that hearing was adjourned. On 18 May 2020 and again on 8 June 2020 the UT (UTJ Norton-Taylor) issued directions expressing the provisional view that the error of law issue could be determined without a hearing and invited representations from both parties as to the substance of the error of law issues and also in respect of whether the appeal could be determined without a hearing. In response, the appellant made written submissions on the substance of the appeal but raised no objection to the appeal being determined without a hearing. Likewise, the respondent made written submissions on the substance of the appeal adopting the earlier rule 24 response and, by a later email dated August 2020, raised no objection to the appeal being determined without a hearing.
5. In the light of the submissions, and in the absence of any objections from either party, I consider it just and fair to determine the error of law issues without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

## **Background**

6. The appellant is the son of a former Ghurkha soldier. His father (the sponsor) together with his mother came to the UK in 2015 when they were granted indefinite leave to remain. In 2016, the appellant applied to join his parents in the UK but that application was refused by the ECO and his subsequent appeal was dismissed by the First-tier Tribunal in a decision sent on 14 September 2017.
7. On 30 October 2018, the appellant made a further application for entry clearance which was again refused by the ECO on 19 February 2019 and which is the subject of this appeal.

## **The Judge's Decision**

8. The substance of the appellant's case is that he continues to live in the family home in Pyuthan in Nepal and that he is financially dependent upon the sponsor who sends him money as financial support. He does not work or have any other source of income. The appellant's case is that he is financially and emotionally dependent upon the sponsor such that family

life exists between them and that, taking into account the 'historic injustice' in the treatment of former Ghurkha soldiers and their families, it is disproportionate to prevent the appellant joining his father (and mother) in the UK.

9. The judge heard oral evidence from the sponsor and she had before her a number of documents, including a witness statement from the appellant's mother (who did not give oral evidence) and also money transfer documents and receipts for money transferred by the sponsor to the appellant in Nepal. In addition, there were statements of telephone calls which, it was said, showed continuing contact between the appellant's family in the UK and himself in Nepal.

10. In her determination, the judge rejected the appellant's claim that he was financially dependent upon the sponsor. At para 25, she said this:

"With respect to the Appellant being financially dependent upon the Sponsor, the evidence given at the hearing by the Sponsor is that he continues to provide financial assistance to the Appellant and that this is confirmed by the money transfer receipts provided and by the Sponsor leaving monies for the Appellant when he visited Nepal. I note that the military pension of the Sponsor is paid into the Sponsor's Standard Chartered Bank account in Nepal but I was not provided with evidence that the Appellant has authority to operate the account of his father in Nepal, that these monies are used by the Appellant or that he is dependent upon them. The Standard Chartered Bank statements provided for the period from 8 August 2018 to July 2019 do not show any withdrawals at all. I do accept, though, that the Appellant has received some monies from the Sponsor by way of money transfers (as the Ria documents detail payments made in June 2017 (2), July 2017, January 2018 and September 2018) but, based upon the evidence provided, I am not satisfied that the Appellant is dependent upon the financial assistance provided to him by the Sponsor."

11. The judge then went on to consider the appellant's claim to live in the family home in Pyuthan at para 26:

"I was also directed to the part of the decision of Immigration Judge White [in the earlier appeal] that addressed the issue of where the Appellant resided. It is stated in the decision that the Sponsor first said that his son had lived all his life in the family home in Pyuthan and then later agreed that the address in Kathmandu given in the application was his son's address where he had lived for two months in order to complete the application and that the address belonged to a shopkeeper to whom he had paid rent. At the hearing before me, the Sponsor gave evidence that he asked his son to continue living in the family home in Pyuthan when he and his wife left Nepal in July 2015 and he stated that he did not know why the Appellant had put the address in Kathmandu on the earlier application. The Respondent pointed to the address stated for the appellant in the money transfer payments being in Kathmandu which, it was contended, is further evidence that the Appellant does not live in the rural family home but, in fact, lives in Kathmandu where other family members also live. I have been mindful of the fact that the Sponsor is age 74 and may not

be accustomed to answering questions in legal proceedings or able to recall precise details but, having said that and having taken that into account, I was troubled by the lack of clarity of the Sponsor's evidence in this respect and I was not persuaded that the Appellant had resided in the family home in Pyuthan since his parents left Nepal in July 2015."

12. Then, in the context of the requirements in the Rules for entry clearance as a dependent adult of a former Ghurkha soldier, the judge said this at para 27:

"The Appellant was aged 31 at the time of the application and had lived apart from his parents for more than two years at the date of the application. I have found that the Appellant is not financially dependent upon the Sponsor. I find, therefore that the Appellant has not met the entry clearance conditions."

13. At para 28, the judge went on to consider the appellant's claim that there was family life established between him and the sponsor:

"In relation to family life, I accept as credible the evidence before me that the Appellant remains unmarried and I accept also that the Appellant has not formed his own family unit. The evidence of the Sponsor at the hearing was that the Appellant now lives alone in the family home but I have stated that I am not persuaded of that. The Appellant has three other siblings who all live in Nepal with their families such that four of the five children of the Sponsor live in Nepal. The evidence of the Sponsor at the hearing was that none of his other three children living in Nepal are able to provide any support to the Appellant but I find it difficult to accept why, in an apparently close family, the three other siblings of the Appellant will not maintain regular contact with him and thereby be able to provide some form of emotional support to him. No credible reason was given as to why the Appellant would not maintain contact and have good familial relationships with his other siblings and many nephews and nieces in Nepal. I accept the evidence of the Sponsor that he speaks regularly with the Appellant although I was not persuaded by the claim that he speaks with the Appellant five times each day. The Sponsor has stated that, in Ghurkha culture, the unmarried child is the responsibility of the parents such that the Appellant, the only unmarried child of the Sponsor, remains his and his wife's full responsibility. The Appellant, though, has now been living apart from his parents for more than four years and I am not satisfied that there exists emotional dependency between the Sponsor and the Appellant over and above the normal emotional ties. I am not therefore satisfied that family life exists or that Art 8 is engaged."

14. As a result, the judge dismissed the appellant's appeal under Art 8.

### **The Grounds of Appeal**

15. In the grounds of appeal, supplemented by the written submissions made in response to the UT's directions, the appellant relies upon three grounds.

16. First, the appellant contends that the judge failed to have regard to relevant evidence-in reaching her finding at para 26 of her determination that the appellant had not established that he lived in the family home in Pyuthan. In particular, the judge failed to take into account a number of IME records of receipts of income that gave the appellant's permanent address as being in Pyuthan.
17. Secondly, the finding that the appellant had not established "family life" with the sponsor the judge failed to apply the correct approach taken in Ghurkha historic injustice cases as set out in the Court of Appeal's decision in Rai v ECO [2017] EWCA Civ 320. In particular, reliance is placed upon the fact that the evidence was that the appellant did not come to the UK with his parents initially because they could not afford the application fee. The judge wrongly relied upon the fact that four years have elapsed since the appellant's mother and father came to the UK and she failed to have regard to the long delay being occasioned by the denial of the legal right to enter the UK. In relation to Rai, the grounds place reliance upon the Court of Appeal's point (at [17]) that in determining whether "family life" exists in cases of this nature family life may fall short of what constitutes dependency but there may still be family life between adult children and parents who are settled in the UK.
18. Thirdly, it is contended that the judge was wrong, in assessing whether "family life" existed with the sponsor in the UK, to take into account that the appellant had other family members in Nepal to whom he could turn to for emotional support and dependency.

### **The Respondent's Submissions**

19. In her rule 24 notice, adopted as the respondent's submissions following the UT's directions, it is submitted that the judge considered all the relevant circumstances in determining that family life did not exist given the limited direct contact and the judge's findings that the appellant was not financially or emotionally dependent upon the sponsor even though he had not formed his own family unit in Nepal. The respondent contends that the findings of the judge were properly open to her on the basis of the evidence and against a backdrop of the previous appeal having been dismissed.

### **Discussion**

20. The essential finding of the judge upon which her decision turned was that the appellant had not established for the purposes of Art 8.1 "family life" with the Sponsor (or his mother) in the UK.
21. Both parties referred me to the Court of Appeal's decision in Rai which was itself a case concerning an adult Ghurkha child who was seeking entry to the UK to join his family. In that case, the Court of Appeal set out the proper approach to the issue of "family life" under Art 8.1 of the ECHR, in

particular in the context of a case involving an adult child seeking entry to join a parent who was a former Ghurkha soldier. Lindblom LJ (with whom Beatson and Henderson LJ) agreed) set out the approach at [17] - [20] as follows:

- "17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents ... the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors ... include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not ... essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.J. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".
18. In *Ghising (family life - adults - Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

"61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. ...".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old,

who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life".

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life - adults - Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".
20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

"24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

22. At [43] Lindblom LJ reiterated that:

"Whether the Appellant did enjoy family life at the relevant time was, of course, a question of fact ... And this court will always accord appropriate respect to the evaluative judgment of an expert Tribunal on the facts it finds ..."

23. In this appeal, the judge made two adverse findings which, although she dealt with them in the context of the entry clearance requirements for an adult dependent of a former Ghurkha soldier, undoubtedly influenced her conclusion that there was no "family life" established between the appellant and his father for the purposes of Art 8 (paras 25 and 26 read with para 28). Those findings were: first, the appellant was not financially

dependent upon the sponsor; and secondly, he did not live at the family home in Pyuthan (see paras 25 and 26 respectively). I bear in mind Lindblom LJ's cautionary note in Raj at [43]. Nevertheless, in my judgment, both of those factual findings are legally flawed.

24. First, as regards the finding that the appellant is not financially dependent upon the sponsor, the judge offered no adequate reasons in para 25 given that she accepted that the appellant had received monies from the sponsor by way of money transfers between June 2017 and September 2018 and the evidence was that the appellant was unemployed and apparently had no other source of income.
25. Secondly, in relation to whether the appellant lived in the family home, the judge failed to take into account the evidence supporting the appellant's claim that he lived there which was contained within the IME records of receipts. They are contained within the appellant's bundle at pages 86 and 88-89. They immediately follow the Ria records to which the judge did make reference and refer to an address in Kathmandu. It was incumbent upon the judge to have regard to all the evidence and, in particular, to grapple with the evidence supporting the appellant's account as well as that which was unhelpful to him. The appellant's father gave evidence that sought to explain the Kathmandu address as being related to a period of time when the appellant was temporarily living in Kathmandu in order to make his application to come to the UK. If there was a discrepancy, there was some evidence that, if accepted, would resolve that discrepancy in the appellant's favour and support his account that he lived in the family home. That was an important issue in relation to whether he remained dependent upon his parents in the UK and whether any dependency amounted to "family life" for the purposes of 8.1.
26. In those regards, therefore, the judge erred in law in reaching her adverse findings which were, in my judgement, material to her adverse finding in para 28 that "family life" had not been established.
27. In addition, I am satisfied that the judge misdirected herself, and thereby imposed too high a hurdle for the appellant, in assessing whether the appellant had established "family life". Whilst the Court of Appeal in Raj did not change the legal approach to the issue of "family life", it clearly did acknowledge the need for careful scrutiny of the evidence and that periods apart, forced upon a Ghurkha family by the vagaries of the historic immigration position of former soldiers and their families, were relevant when assessing whether there was a continuation of the "family life" which existed before the family was separated. In my judgment, the judge failed properly to take into account the evidence that explained why the appellant had not initially come with his parents (because they could not afford the application fee) and the evidence that throughout the period of separation since 2015, a fair description of the appellant's behaviour was that he had sought to join his family in the UK. The four-year separation has, in effect, been forced upon the family by their



circumstances. There was clear evidence of continuing contact (which the judge accepted at least in part), money transfers and it was accepted that the appellant had not formed an independent family unit.

28. Finally, I also accept the appellant's submission that in para 28, the judge gave improper prominence to the possibility that the appellant could be supported by his close family in Nepal. That, in my judgment, did not directly counter the appellant's claim that "family life" was established with the sponsor in the UK. The fact that he could obtain (alternative) support from his family in Nepal did not negate his claim that he was, in fact, financially and emotionally dependent upon the sponsor in the UK.
29. For these reasons, therefore, I am satisfied that the appellant's grounds are made out. The judge erred in law in concluding that the appellant had not established "family life" for the purposes of Art 8.1 and that therefore the refusal of entry clearance did not breach Art 8 of the ECHR.

### **Decision**

30. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.
31. Given that the judge's underlying factual findings cannot stand, the proper disposal of this appeal, in the light of the extent and nature of the fact-finding required and para 7.2 of the Senior President Practice Statement, is that the appeal should be remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Swinnerton.

Signed

**Andrew Grubb**

Judge of the Upper Tribunal  
9 September 2020