



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/13013/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 21 January 2020

Decision & Reasons Promulgated  
On 13 February 2020

Before

THE HONOURABLE MRS JUSTICE MOULDER  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
and  
UPPER TRIBUNAL JUDGE REEDS

Between

MS BINA LIMBU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed of Counsel instructed by Courtney Smith Solicitors  
For the Respondent: Mr Melvin, Senior Presenting Officer

## DECISION AND REASONS

1. This is an appeal against the decision of first-tier Tribunal Judge Jones QC, promulgated on 2 May 2019 in which he dismissed the appeal of Miss Limbu, an adult dependant of a former Gurkha.
2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Miss Limbu as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant is a citizen of Nepal who made her application for settlement when she was 31 years of age on the basis that she is the daughter of an ex-Gurkha soldier now present and settled in the United Kingdom.
4. The entry clearance officer refused the application and that refusal was maintained by the entry clearance manager on 11 April 2018.
5. The appellant appealed against that decision under section 82 of the Nationality Immigration and Asylum Act 2002 on the grounds set out in section 84, an Article 8 appeal. Her appeal was heard on 30 April 2019 by First-tier Tribunal Judge Jones QC. Before the first-tier Tribunal the appellant's father gave oral evidence. The appellant also provided a witness statement.
6. The judge found that the appellant was 32 years of age but at the time Annex K of the Immigration Rules was amended to apply to children of ex Gurkha soldiers under 31, she was only 28. He found that the appellant's father had been discharged from the army in August 1985 and "chose to settle" in this country in July 2011 having been granted settlement in May 2011. The judge also found that the appellant resided in the family home in Nepal but stated that to the extent that she lived there rent free, then the provision of that accommodation contributed to her maintenance but did not make her financially dependent on her father. He found that from around October 2015 the appellant's father began sending her remittances in varying amounts.
7. The judge did not accept the evidence of the appellant's father that he would have settled in the UK with his then family forthwith upon his discharge from the army if able to do so. The judge took the view that the appellant's father was prepared to give "evidence of convenience" designed to procure the outcome desired by the appellant. The judge stated that the appellant's father was not a "careful or reliable witness". He did not accept his evidence that the appellant had never lived separately from him, at least not for more than two years.

8. Although the judge accepted that the appellant resided in the family home, the judge concluded that he did not consider it to be “more probable than not” that the appellant was financially dependent upon her mother and/or father. The judge said that the amounts of the remittances were in “modest amounts” which in his judgement would be inadequate to provide for the appellant’s maintenance even allowing for a very much lower cost of living in Nepal. He said that he could not “give credence” to the implied assertion that £100 – £200 per calendar month was sufficient for the appellant’s maintenance. Further he stated that the family home “like all family homes around the world” was likely to need “routine repairs and maintenance” which would need to be funded by remittances from the appellant’s father.
9. The judge did not accept the evidence “to the effect that the appellant does nothing on a day-to-day basis in Nepal other than undertake studies relating to care work”. The judge stated that the appellant did not say why she did not work, whether she applied for jobs and whether she earns money from any kind of self-employment. He said, “she does not explain how a fit and healthy 32-year-old woman, in the prime of life, spends her time, day by day.”
10. The judge found that the appellant was not “in any meaningful sense” emotionally dependent upon her father. He said that the emotional dependency asserted by her father and the appellant was an “entirely self-serving assertion, detached from reality”.
11. The judge said that he kept in mind the judgment of the *Court of Appeal in Rai v ECO (New Delhi)* [2017] EWCA Civ 320 and the ultimate question of whether family life within the meaning of Article 8 exists is to be tested against a careful consideration of all the relevant facts.
12. The judge held that the telephone contact between the appellant and her parents was part of family life but did not lead to the conclusion that there was family life sufficient to cross the relevant threshold. In relation to the visits on three occasions by the appellant’s father, the judge held that this was “equally commonplace” and insufficient to justify a finding of family life within the meaning of Article 8.
13. Finally the judge concluded that even if the appellant had established that there was family life, her appeal would still have failed. He referred to the decision in *Ghising (Gurkhas/BOCs: historic wrong: weight)* [2013] UKUT 00567 (IAC) but stated that that decision was made prior to the 2015 amendment to annex K. The judge said: “it is that Annex that now sets out this country’s and government’s policy which has been specifically designed... to meet the perceived historic wrong. It may well be that there will still be factual circumstances in which weight should

be attached to the perceived historic wrong even where an appellant does not come within the policy specifically designed to meet that perceived historic wrong.... However in the instant appeal I can perceive of no injustice to the appellant, whether historical or otherwise, given that (sic) my finding set out in paragraph 15 (vii) above [that he did not accept the appellant’s father’s assertion that he would have settled in the UK with his then family forthwith upon the discharge from the army if able to do so.]”

14. Permission to appeal was sought on the grounds that (i) there was actual or apparent bias on the part of the first-tier Tribunal Judge; (ii) the judge misdirected himself as to the principles governing the assessment of the existence of family life; (iii) the judge erred in his approach to proportionality under article 8 by failing to attach any or any adequate weight to historical injustice caused to Gurkhas and their families and failed to apply the principles set out in *Gurung* [2013] EWCA Civ 8 at [40] to [42] and *Ghising (Gurkhas/BOCs: historic wrong: weight)* [2013] UKUT 00567 (IAC).
15. Permission to appeal was granted on 22 October 2019. In granting permission for the appeal, Upper Tribunal Judge Stephen Smith stated, amongst other things, that it was arguable that the judge erred when assessing whether family life existed for the purposes of Article 8. The judge said that there was “no evidence” concerning various planks of the appellant’s case whereas there was evidence in the appellant’s witness statement and the sponsor’s oral evidence given at the hearing. If the judge meant that there was no oral evidence that he accepted or documentary evidence, arguably he should have explained why. The judge’s dismissal of the unchallenged financial evidence was arguably based on his speculation concerning the cost of living in Nepal. Upper Tribunal Judge Smith therefore concluded that it was arguable that by failing to articulate the specific issues which lay at the heart of the operative reasons for dismissing the appeal, the judge failed to give sufficient reasons for reaching his findings.
16. Before this tribunal the ground of apparent/actual bias was not pursued in oral submissions. Instead counsel for the appellant focused on the failure to engage with the evidence as to whether or not there was family life and the approach to proportionality.
17. It was submitted for the appellant that no questions were put to the appellant’s father in relation to matters on which the judge subsequently made adverse findings. In relation to the judge’s findings in relation to remittances it was submitted that the judge referred only to remittances being sent from October 2015 whereas the evidence of the appellant’s father in his witness statement was that he started sending monies to the appellant immediately after her return to Nepal (in January 2014). It was submitted that therefore the judge’s conclusion

that the remittances were inadequate was not based on the totality of the evidence. It was further submitted that the conclusion on the need for maintenance of the family home was entirely speculative.

18. It was submitted that the judge was wrong to reject the evidence of the appellant's father on the basis that he asserted that his daughter had never lived separately from him, at least not for more than two years in the light of the evidence in the father's witness statement.
19. It was submitted that it was clear from the record of proceedings that no questions had been asked by the judge as to whether or not the appellant was in fact working.
20. Finally it was submitted that the judge's finding that she was not emotionally dependent did not deal with the evidence that she was the only child in the family who remained in Nepal the other (surviving) children being in Australia, serving in the British Army and in the UK.
21. As to the conclusion on proportionality, it was submitted for the appellant that the conclusion was wrong and demonstrated that the judge had failed to grasp the principles to be applied in Gurkha cases.
22. For the respondent it was submitted that the appellant had not shown evidence of her needs and outgoings and that it was open to the judge to conclude that the amount which was being sent by her father was not sufficient. Further it was submitted that the fact that the appellant had studied in the UK in 2010 demonstrated that she wished to be independent. It was submitted that the visits did not establish family life and the onus was on the appellant to show that the requirements were met.
23. In relation to proportionality, it was accepted for the respondent that if family life was found, then it needed something "quite extraordinary" to take away from the historic injustice. It was accepted that the judge's approach to the Article 8 proportionality assessment was not sustainable and that it would need something like a criminal conviction to outweigh the factors bearing in favour of granting leave in Gurkha cases.
24. The approach to relationships between adult children and their parents has been considered in a line of cases beginning with *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 and which include *Singh & Anor v Secretary of State for the Home Department* [2015] EWCA Civ 630, *PT (Sri Lanka) v Entry Clearance Officer, Chennai* [2016] EWCA Civ 612, *Butt v Secretary of State for the*

*Home Department* [2017] EWCA Civ 184 , and *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320.

25. The courts have given guidance on assessing the existence of family life where the separation of the parties has been exacerbated by a "historic injustice".
26. In *Patel* [2010] EWCA Civ 17, Sedley LJ stated at [14] 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".
27. In *Rai* [2017] EWCA Civ 320 at [36]-[37] Lindblom LJ found that the Upper Tribunal had erred in law in assessing the existence of family life by "looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them."
28. " 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.... It all depends on the facts." ( see *Singh*, at [24]).
29. It is clear from paragraph 17 of *Rai* which references *Kugathas* that if dependency is read down as meaning "support" in the personal sense and if one added echoing Strasbourg's jurisprudence "real" or "committed" or "effective" to the word "support" then it represents the irreducible minimum of what family life implies. Therefore in determining the nature and quality of the relationship between the appellant and the sponsor the FtTJ was required to asked himself whether the sponsor provided her with "support" which was "real" or "committed" or "effective" (see, for example, paragraph 36 of *Rai*) and whether there were further elements of dependency involving more than the normal emotional ties.
30. At paragraph 16 of the judgement, the first-tier Tribunal correctly noted that the question of whether family life exists is to be tested against a careful consideration of the relevant facts. However the judge appears to have started from the proposition that she was "a woman in the prime of life who, absent debilitating physical or mental deficits, would ordinarily be expected to be living a meaningful independent life." Having started from that position he then rejected the evidence that the appellant was financially and/or emotionally dependent upon her parents.

31. The unchallenged evidence was that the sponsor had provided money remittances to the appellant from 2015. The judge referred to the remittances as "quite inadequate.". This was based on his two assertions; firstly, that even allowing for the lower cost of living, the sums of £100-£200 were insufficient for the appellant's maintenance needs in Nepal and secondly, further sums of money were required for repairs and maintenance on the family home.
32. We are satisfied that there was no evidential foundation for either of those findings on the evidence before the judge and were in our view wholly speculative.
33. In addition, in his assessment of the "adequacy" of the maintenance provided, the judge failed to take account of other evidence before him set out in the witness statement of the sponsor (at paragraph [16]) which made reference to other amounts of financial support sent through the traditional transfer system of HUNDI and that sums were also sent via family and friends who were visiting Nepal.
34. He also left out of his consideration other relevant evidence capable of supporting the claimed "family life" which was that she has no family in Nepal, she is living in a house rent free supported by her father and she is unmarried and not working. If the judge did not accept that evidence, it was incumbent on the judge to set out his reasoning.
35. The second error relates to the FtTJ's consideration of the sponsor's evidence relevant to the issue of "historic injustice". Under the policy the following is cited:

**"Historical Injustice**

17. In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here). If a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement will normally be considered to have been met.

18. Examples of countervailing evidence might include situations where:

the sponsor did not apply promptly when the discretionary police was announced; or

the sponsor has a history of dishonesty;

the former Gurkha did not return to his family in Nepal on discharge (e.g. because he went to work elsewhere).

If the decision maker does not feel that this requirement is satisfied and they have referred the matter to a senior decision maker, they should normally propose refusal of the application on this ground.

36. At paragraph 15(vii) the judge set out that he did not accept that the sponsor would have settled in the UK upon his discharge from the army, if able to do so, based on his assessment that the sponsor had given "evidence of convenience" concerning the financial and emotional dependence of the appellant upon the sponsor and that sponsor had stated that he had not lived apart from the appellant for more than two years.
37. We are satisfied that the basis on which the judge rejected the evidence of the sponsor is inadequately reasoned. As set out above, the assessment made of dependency between the appellant and the sponsor was flawed. Furthermore, when making that finding the judge failed to take into account the sponsor's evidence in his witness statement on this issue and also failed to have regard to the chronology of events in this context. The appellant had been living with her parents in Nepal prior to her entering the UK as a student on the 20 October 2010. She was supported by her parents whilst a student. When the sponsor entered the UK on 21 July 2011, the appellant and the sponsor resumed family life together and in 2013 her mother entered the UK and the family lived together until the appellant returned to Nepal in 2014 and the visits had been made to Nepal where the sponsor and the appellant had lived together. The reference to not living apart for two years was a reference to that chronology.
38. Further the basis on which the judge rejected the evidence of the father that he would have settled in the UK on discharge from the army is not in our view adequately reasoned in the light of his clear evidence.
39. Accordingly, we find that in this case the first-tier Tribunal judge fell into error in that he failed properly to consider the evidence in reaching a conclusion on the existence of family life.
40. As the first Tier Tribunal judge concluded that there was no family life, his conclusion on proportionality was obiter. However as was conceded in oral submissions for the respondent, it is difficult to understand the approach of the judge to proportionality having regard to Annex K (Adult Children of Former Gurkhas) which states:
- “26. Where an application falls for refusal under this policy, the decision maker must consider whether Article 8 otherwise requires them to be granted leave on the basis of exceptional circumstances in accordance with the guidance contained in Appendix FM 1.0b: Family Life (as a Partner or Parent) and Private Life: 10-year Routes.*
- 27. As part of any proportionality aspect of this consideration, decision makers must take account of the following relevant case law:*
- The Court of Appeal confirmed in Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] ECWA Civ 8 (21 January 2013) that the “normal position is that they (adult dependent*



*relatives) are expected to apply for leave to enter or remain under the relevant provisions of the Rules or under the provisions of Article 8 of the European Convention on Human Rights". The Court also found that the historical injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 consideration of the case but was not determinative. If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now". The Upper Tier Tribunal found in Ghising and others [2013] UKUT 00567 (IAC) that where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the Appellant's favour, where the matters relied upon by the Secretary of State/entry clearance officer (ECO) consist solely of the public interest in maintaining a firm immigration policy. If the Secretary of State/ECO can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Secretary of State/ECO's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance." [emphasis added]*

41. In our view, this was not a case where the Secretary of State could point to matters such as a bad immigration history and/or criminal behaviour which outweighed the "powerful factors" bearing on the appellant's side of the balance.
42. Accordingly, the error in relation to family life was material, since the outcome of any proportionality balance would in the circumstances of this case come down in favour of the appellant.
43. For the reasons set out above we are satisfied that the decision of the first-tier tribunal involved the making of an error on a point of law and set aside the decision of the first-tier Tribunal.
44. We now proceed to remake the decision, no fresh evidence being required or relied upon.
45. We accept that it was for the appellant to show that there was family life between the appellant and her father and the question whether an individual enjoys family life is one of fact depends on a careful consideration of the facts. We also accept that it is unclear why the appellant is not working in Nepal but the evidence is that amounts are being sent on a regular basis by the appellant's father and that she is not working. There is no evidence which rebuts that evidence and we note that Annex K states:

“evidence of financial dependency may include the fact that the applicant has not been supporting him or herself and working but has been financially supported, out of necessity by his or her former Gurkhas sponsor, who has sent money regularly from the UK”.

46. We also take into account that the pre-migration position was that the appellant had lived with the sponsor as a family unit prior to her entry as a student in 2010 and upon both her parents arrival, her father shortly thereafter in July 2011 and her mother in 2013, the parties lived together as a family unit with them continuing to provide support, both in a financial and emotional sense.
47. Since their separation, the evidence also supports a conclusion that she is emotionally dependent upon her father: the evidence of emotional dependency is not just the visits and telephone calls referred to in the judgement of the first-tier Tribunal but also the evidence that there is no other family members in Nepal.
48. In our view on the evidence when considered holistically, the appellant has demonstrated that she is financially and emotionally dependant on the sponsor and that that the support provided is that which is 'real' or 'committed' and 'effective'. We find that there is family life between the sponsor and the appellant.
49. Accordingly we then proceed to consider proportionality. If the appellant falls for refusal under the policy by reason of the fact that she does not meet the requirement not to have lived apart for more than 2 years, then Annex K requires consideration of whether Article 8 requires the appellant to be granted leave on the basis of exceptional circumstances. As noted above, Annex K requires the decision maker to have regard to the case law and “where it is found engaged and, but for the historic wrong, the appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the article 8 proportionality assessment in the appellant’s favour, where the matters relied upon by the Secretary of State/entry clearance officer consists only of the public interest in maintaining a firm immigration policy”.
50. The evidence of the sponsor is that he applied for settlement in 2011, at that time the appellant was already in the UK but she was an adult. When the policy changed in 2015 to allow adult dependent children of former Gurkha soldiers up to the age of 30 to apply for settlement, the appellant did not do so on the basis that the appellant’s name was not mentioned in the official family records (the “kindred roll”). Although the First Tier judge rejected that explanation on the basis that there was nothing within the policy which referred to any requirement to appear in the family records, this has no bearing on her entitlement and there was no evidence which would justify a finding that the appellant’s father was not

credible in this regard. The policy does state that the relation to the sponsor has to be adequately demonstrated.

51. Accordingly we find that but for the historic wrong, the appellant would have settled in the UK and in this case there are no factors such as a bad immigration history or criminal behaviour to outweigh the “powerful factors” bearing on the appellant’s side of the balance.
52. We therefore conclude that the appellant’s Article 8 rights outweigh the interests of the Secretary of State in maintaining a firm immigration policy and we remake the decision by allowing the appeal against the decision of the respondent to refuse entry clearance for settlement.

Signed

Date 11 February 2020

Mrs Justice Moulder  
Sitting as a Judge of the Upper Tribunal

**TO THE RESPONDENT**  
**FEE AWARD**

This is a fee exempt appeal.