



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/00578/2019 (V)

THE IMMIGRATION ACTS

Heard at a remote hearing via Teams  
On the 17<sup>th</sup> June 2021

Decision & Reasons Promulgated  
On the 29<sup>th</sup> June 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

TEKRAJ LIMBU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Ahmed, Counsel

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS (V)**

**Introduction**

1. I now remake the decision concerning the appellant's appeal against the respondent's decision to refuse him entry clearance to accompany his father and stepmother to the United Kingdom ('UK'), dated 30 November 2018. This follows my earlier decision, promulgated on 15 March 2021, that the decision of the First-tier Tribunal ('FTT') sent on 29 October 2019, dismissing his appeal, should be set aside and remade by the Upper Tribunal ('UT').

## Background

2. The appellant, a citizen of Nepal, was born in Nepal in February 1983 and is currently 38 years old. He continues to reside in Nepal on his own.
3. The appellant's father ('the sponsor') is also a citizen of Nepal, who enlisted in the Gurkha Brigade of the British Army in 1969 and was discharged in 1985 (when the appellant was under 18). His application for entry clearance was made jointly with his wife (the appellant's stepmother) and the appellant. The sponsor's application was successful and he entered the UK with his wife on 26 December 2018. The appellant's application was unsuccessful and he has pursued an appeal against that decision.

## Issues in dispute

4. At the beginning of the hearing the representatives agreed that the legal framework applicable to the appeal is accurately set out in Mr Ahmed's helpful skeleton argument. Given this agreement, there is no need to repeat the detailed framework here. Generally speaking, the disputed issues to be determined in entry clearance cases for the adult children of former Gurkha soldiers are two- fold:
  - (i) Is there family life between the appellant and the sponsor for the purposes of Article 8(1), ECHR?
  - (ii) Would refusing of entry to the appellant lead to a disproportionate breach under Article 8(2)?
5. In determining the first issue in this case, I bear in mind all the relevant Strasbourg principles, including the following:
  - (i) Family life is not established between an adult child and his surviving parent unless something more exists than normal emotional ties of love and affection.
  - (ii) Voluntary separation does not end family life: Sen v Netherlands (2003) EHRR 7, cited in Ghising [2012] UKUT 160 (IAT);
  - (iii) The attainment of the age of majority does not end family life: Etti Adegbola v SSHD [2009] EWCA Civ 1319 per Pill LJ;
  - (iv) The Strasbourg Court treats as presumptive or strongly indicative of family life two factors: continued presence in the family home and the fact that a dependent child has not established a family of their own: AA v The United Kingdom [2012] Imm AR I at [49];
  - (v) Dependency is crucial and should be read as 'real' or 'committed' or 'effective' support: Rai v ECO Delhi [2017] EWCA Civ 320 per Lindblom LJ at [36]-[37];

- (vi) Care must be taken not to interpret the judgments in Kugathas v SSHD [2003] EWCA Civ 31 too restrictively. There is no requirement for evidence of exceptional dependency;
  - (vii) The question of whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of a particular case. The issue is highly fact sensitive and can result in different outcomes in cases which have superficially similar features.
6. As to the second issue, Ms Cunha accepted that if there was family life for the purposes of Article 8(1), then the interference with it was disproportionate and the appeal would have to be allowed. This follows the widely accepted proposition that in cases such as this one, if there is Article 8(1) family life, unless the respondent relies on something more than the ordinary interests of immigration control, such as criminality or a bad immigration history, then the weight to be given to the historic injustice will normally require a decision in the appellant's favour. As the President of the UTIAC, Lane J, stated in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC):
- “The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.”
7. This case therefore turns entirely upon whether there is family life for the purposes of Article 8(1).

## Evidence

8. The appellant and the sponsor both relied upon detailed witness statements describing the nature and degree of their mutual support for each other and in particular of the appellant's life-long financial and emotional dependence upon the sponsor. Ms Cunha entirely accepted that the appellant has been and remains financially dependent upon the sponsor and much of the evidence relevant to emotional dependence, in particular: the appellant has always resided in the family home and continues to do so; he has never formed an independent family unit; complete financial dependence; the appellant and sponsor continue to communicate regularly.
9. At the hearing before me, the sponsor confirmed the truth of his two statements and was briefly cross-examined by Ms Cunha. He explained *inter alia*, that: there were some relatives in Nepal but they resided in remote areas and contact was therefore infrequent; the appellant did not marry because he was unable to become financially independent; the appellant has friends but he did not know their names; he gave his phone to a computer shop to take screenshots of the 'viber' contact with the appellant; he spoke a little English but the appellant spoke it well.

10. An issue arose during the course of the sponsor's evidence regarding the repetition of "last seen 49 minutes ago" in some of the 'viber' messages. After a short break Mr Ahmed and Ms Cunha were able to confirm the following: there was no allegation of fraud or dishonesty on the part of the respondent; the respondent accepted that the messages were genuinely taken from the sponsor's mobile phone and there continued to be contact; albeit the respondent had concerns as to the frequency of this contact given the confusion caused by the references to "last seen 49 minutes ago".

### **Submissions**

11. Ms Cunha accepted that some evidence supported emotional dependency such as the financial dependency, where the appellant always resided and the fact they continued to be in contact. She submitted that when the evidence was viewed as a whole, there was insufficient evidence to establish real or committed family life for the purposes of Article 8(1).
12. Mr Ahmed relied upon his comprehensive skeleton argument and invited me to find the evidence of emotional dependency and committed family life to be clear from the credible evidence available.
13. At the end of the hearing I reserved my decision, which I now give with reasons.

### **Assessment**

14. The clear evidence from both the sponsor and the appellant both before the FTT and me supports their claim that notwithstanding the appellant's relatively advanced age, they have had at all material times enjoyed family life for the purposes of Article 8(1).
15. I heard evidence from the sponsor and accept that he provided entirely straightforward and honest evidence. Ms Cunha did not submit otherwise. The sponsor candidly accepted that he did not know the name of his son's friends but that they continued to speak almost daily. Whilst that might seem contradictory, I accept that as a relatively elderly person (the sponsor is 69 but life expectancy in Nepal is now 71), the sponsor has focussed on other more immediate matters relevant to this appellant.
16. I entirely accept the evidence from the sponsor, which was supported by the witness statements of the appellant and documentary evidence. Whilst there was a degree of confusion arising from the 'viber' messaging and the references to "last seen 49 minutes ago", when this is considered alongside the remaining evidence, I am satisfied that the evidence as a whole demonstrates genuine, continued, regular and meaningful contact between the appellant and sponsor. In this regard I note that there is evidence that this type of communication has taken place since the sponsor came to the UK in December 2018.

17. Having considered all of the evidence I accept the following matters:
  - a. For the entirety of his life the appellant has been completely financially dependent upon the sponsor because he has not able to find employment in Nepal;
  - b. The appellant was adversely affected by the death of his mother (the sponsor's first wife) when he was 21, and this has significantly contributed to the particular closeness between father and son;
  - c. At all material times and up until the sponsor came to the UK in 2018, father and son lived together as part of the same household;
  - d. Since then there has been regular substantial contact between them;
  - e. The sponsor has effectively illustrated the unusual degree of dependence on the part of the appellant upon him, which I accept, by contrasting this relationship with his relationships with his other three children, who have all been able to achieve independence upon becoming adults;
  - f. The family were separated by circumstance and for reasons relating to the history of the respondent's Gurkha policies and the family's limited financial resources; this historic injustice has meant that it is inaccurate to describe the sponsor's migration and the physical separation of the family unit as having been undertaken by choice - see Rai at [38];
  - g. The appellant's circumstances remain unchanged since the sponsor was in Nepal living with him as part of a family unit. The appellant remains unmarried, out of work and entirely financially dependent upon the sponsor). If anything, their emotional dependence upon each other has increased: life in Nepal has become miserable and insecure due to the Covid-19 pandemic and the sponsor has become older and frailer. These circumstances have led to an increase in mutual emotional dependency, which can now be described as significant;
  - h. This emotional dependency has intensified in a manner that is consistent with the appellant's background and culture. He is expected and wishes to look after his parents as they age.
18. I am satisfied that it is more likely than not that there has been real, effective and committed support between the appellant and the sponsor at all material times and this continues now. It therefore follows that there is family life for the purposes of Article 8(1).
19. I accept the submissions on behalf of the appellant that the decision is disproportionate. Ms Cunha accepted that there are no countervailing considerations that could assist the respondent, and in the circumstances if I found that Article 8(1) was met, the balancing exercise fell to be decided in the appellant's favour. Forcing the sponsor to choose between the appellant's company in Nepal or the settlement he should have enjoyed long ago would be unduly harsh. It is clear from the evidence that but for historic injustice the

sponsor would have settled in the UK at a time when the appellant would have been able to accompany him.

20. I note that it is in the public interest that immigrants to the UK speak English and are financially independent (see sections 117B(1) - (3) of the Nationality, Immigration and Asylum Act 2002). I accept the sponsor's evidence that the appellant can speak English and wishes to obtain employment as a security guard. The former is a neutral factor and the latter is not assured given his lengthy period of unemployment. I must weigh this against the appellant, in the Article 8 proportionality assessment, together with the public interest in the maintenance of effective immigration controls. However because of the historic injustice, the weight attached to the public interest is reduced, and outweighed by the strength of the family life between the appellant and the sponsor.

### **Decision**

21. I allow the appellant's appeal on human rights grounds.

Signed: *Ms Melanie Plimmer*  
Upper Tribunal Judge Plimmer

Dated: 17 June 2021