



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12749/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Microsoft Teams  
On 17 June 2021

Decision & Reasons Promulgated

On 13 July 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ISHUP KUMAR RAI

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

**Representation:**

For the Appellant: Ms K McCarthy, instructed by Everest Law  
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Nepal who was born on 19 January 1986. His father, the sponsor, is a former Gurkha soldier who retired from the British army on 30 November 1975. The appellant first made an application for entry clearance to settle in the UK together with his father, as the dependent son of a former Gurkha soldier, in 2016. Whilst his father's application was successful, the Entry Clearance Officer ("ECO") rejected the appellant's application in a decision dated 1 August 2016. The

appellant appealed against that decision but his appeal was dismissed by Judge Watson in a decision sent on 5 February 2018. Judge Watson did not accept that family life had been established between the appellant and his father under Art 8.1 of the ECHR and so dismissed the appellant's appeal under Art 8.

2. On 1 August 2018, the appellant made a further application for entry clearance to settle in the UK as a dependent adult child of a former Gurkha soldier. That application was made along with an application for entry clearance by his mother in order also to join the sponsor. His mother's application was successful but the ECO again refused the appellant entry clearance on 2 July 2019 and that decision was maintained by the Entry Clearance Manager on 9 December 2019.
3. The appellant again appealed to the First-tier Tribunal. In a decision sent on 21 December 2020, Judge G D Davison dismissed the appellant's appeal under Art 8 of the ECHR. Judge Davison was not satisfied that the appellant had established family life with the sponsor or, indeed, his mother in the UK.
4. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in law in concluding that family life was not established between the appellant and, the sponsor and his mother. Permission to appeal was initially refused by the First-tier Tribunal but, on 9 March 2021, the Upper Tribunal (UTJ Perkins) granted the appellant permission to appeal.
5. In response to that grant of permission, the ECO filed a rule 24 response on 9 April 2021 seeking to uphold the judge's decision, in particular his finding that family life had not been established for the purposes of Art 8.1.
6. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 17 June 2021. I sat in the Cardiff CJC and Ms McCarthy, who represented the appellant, and Mr Whitwell, who represented the ECO, joined the hearing remotely by Microsoft Teams.

### **The Judge's Decision**

7. Before Judge Davison, the appellant's case was that there were more than normal emotional ties, arising from financial and other dependency, between him and his parents. He relied on the fact that in 2013 he went to Saudi Arabia to work and sent money home to his parents in Nepal to support them. He stopped working in Saudi Arabia in 2016 and returned to Nepal where he lived in the family home with his mother and father. Thereafter, the appellant's first application for entry clearance (together with his father) was made in 2016 and a second application made (with his mother) in 2018. He was living at home in Nepal and despite there being a family farm, remained financially reliant on money sent from the UK by the sponsor. The appellant also claimed that because of his parents' health and circumstances in the UK (in particular that of his mother) they were dependent upon him.
8. Judge Davison took as his 'starting point' the earlier decision of Judge Watson in 2016. That decision was, of course, based upon the finding that the appellant had not

proven the required “more than normal emotional ties” in order to establish family life under Art 8.1.

9. Before Judge Davison, both the sponsor and the appellant’s mother (who was then in the UK) gave oral evidence as well as providing supporting witness statements. The appellant’s father accepted that he had not told the truth at the hearing before Judge Watson. At that hearing, he had not told the judge about the appellant’s time in Saudi Arabia between 2013 and 2016 when, the appellant now claimed, he was working and providing financial support to his family back in Nepal. It was also part of the appellant’s case before Judge Davison that in 2013, prior to going to Saudi Arabia, he had been studying and living with his sister in Nepal.
10. The judge set out the relevant law relating to Art 8, in particular in the context of so-called Gurkha cases in Rai v ECO, New Delhi [2017] EWCA Civ 320 and, as there had been an earlier adverse decision against the appellant, the IAT’s guidance in Devaseelan [2002] UKIAT 00702.
11. At para 28, the judge noted that the sponsor now accepted that he had lied about the appellant being in Saudi Arabia and working there “as he feared this evidence would lead to a refusal of his claim”.
12. At para 29, the judge found that the appellant had lived with his sister when he was studying and then after his studies went to work in Saudi Arabia.
13. At para 30, the judge considered the appellant’s claim, and the evidence concerning, his working in Saudi Arabia and his return to Nepal:
  - “30. It now having been accepted that the appellant was working in Saudi Arabia, the next issue is what caused the appellant to return. The evidence from the parents, as noted above, was divergent on this point. I find the appellant returned to be part of the entry clearance application. I do not accept that he needed to return to look after his parents. I do not accept that the ‘company’ he was working for closed down and he had no income. This was not the evidence of his Father who stated that the appellant returned alone and his friends whom he lived and worked with remained in Saudi Arabia. I find he wanted to come to the UK with his family and so returned to Nepal to be part of that application. It is not to the credit of the sponsors that they have not been credible about the reason for return. The Father’s evidence that the job was hard and the money was ‘low’ does not sit well with the appellant returning to Nepal just to be unemployed and receive no income, particularly when this is set against the backdrop of him claiming the appellant needs to be in work to financially support them.”
14. The judge’s reference to “divergent” evidence from the parents is a reference to the evidence set out at paras 20 and 21 of the judge’s determination where the judge noted that the appellant’s mother stated that he returned to Saudi Arabia because the company for whom he had worked had shut down and so he had no income (para 20). The evidence of the appellant’s father was that the job had been hard and the salary was low but he made no mention of the company having closed down and the appellant being without income (para 21).

15. At para 32, the judge considered whether there was a basis for departing from the earlier decision and findings of Judge Watson. The judge said this:

“32. I do not find that there are grounds to depart from the previous determination. Although I accept that the true factual position has now been accepted and the sponsor regrets not telling the truth previously and he is a man of exemplary military service. His untruth to the Tribunal no doubt weighs heavily on him. The reality is that the judge assessed the evidence on the basis the appellant was in Saudi Arabia and not in Nepal as claimed. The judge found that the evidence presented was inconsistent about the farm and the income it produced (paragraph 31), there was no evidence of frequent phone contact (paragraph 29), although there were some financially remittances, they do not establish dependency (paragraph 33). There were various reasons why the judge concluded family life was not established.”

Then at paras 33–36, the judge went on to make relevant findings based upon the evidence before him and concluded that it did not establish family life as claimed:

“33. The argument now advanced is that the untruth infected the decision and now the true position is before me the appeals need to be revisited. If I were wrong in the above finding and there were grounds to depart from the previous determination, I would make the following findings.

- The appellant lived with his sister whilst he studied. These studies were funded in part from income generated by the family farm.
- After studying the appellant went to live and work in Saudi Arabia, in Saudi Arabia he remitted some monies to his family.
- He left Saudi Arabia to return to Nepal to be part of his Father’s entry clearance application.
- There is a family farm in Nepal that surrounds the family home. Although no accurate details have been provided the piece of land was said to be large enough to support buffaloes, cows, pigs and chickens and a sufficient size to grown some maize and potatoes. I do not accept that the appellant, having lived and worked on this land for various parts of his life, would be incapable, as a fit and healthy 34 year old male, of managing the same and raising/growing some livestock and crops.
- I accept that the sponsors speak to their son and remit some money. But I do not accept that this evidences real and effective support.

34. I find the position is one created for the application. The appellant is a young adult male whose has studied and lived away from home. I accept that his parents paid for his studies and this is an element of dependency, but that is not uncommon between parents and children. He had started out on his own life and was living and working in Saudi Arabia. He returned not out of any form of necessity/dependency, but because there was an opportunity to live in the UK. The picture painted since then of him being at home, unable to farm the land in any meaningful fashion, with no employment prospects and being entirely emotionally and financially dependent on his parents is, I find, untrue and designed to achieve the outcome sought by the family. I have found the evidence about why he returned to Nepal to be contradictory and unconvincing. I have

found the evidence concerning the family farm to be inconsistent and not capable of belief.

35. I find on balance that the appellant has either been working in Nepal or has been farming the land around the property to both provide food and possibly [an] income for myself. I have found the evidence to the contrary, e.g. his Mother stating he is not able to manage the farm alone, not credible.
36. I have found no reason to depart from the previous determination. If I was wrong in that conclusion I have separately found that family life, despite the low threshold that must be applied in these types of appeals, is not established. I find there is no real, effective, committed support. I find the evidence presented to that effect was contrived to present an altered position of the reality."

16. As a result, the judge dismissed the appellant's appeal under Art 8 of the ECHR.

### **The Appellant's Challenge**

17. The appellant relies upon three grounds of appeal which Ms McCarthy developed in her oral submissions.
18. First, it is submitted that the judge erred in law in para 34 by requiring the appellant to establish a "dependency of necessity". Relying upon Kugathas v SSHD [2003] EWCA Civ 31, Ms McCarthy submitted that the relevant issue was whether the appellant has established "more than normal emotional ties" and that such ties may result from dependency which means "real, effective or committed support". There is no requirement, she submitted, that that dependency should arise out of necessity on the basis that the appellant was incapable of providing support for himself.
19. Secondly, the judge erred in law in treating the appellant's account of having worked in Saudi Arabia as incompatible with any finding that family life existed. In fact, Ms McCarthy submitted, it was evidence of continuing ties of support between the appellant and his parents and therefore of "real, effective or committed support" amounting to dependency and establishing family life.
20. Thirdly, Ms McCarthy submitted that the judge had failed to consider the relationship between the appellant and his parents in the UK (in particular his mother) and the impact upon her that the separation was having both in relation to her health and her day-to-day needs for support. She submitted that family life could be established both because of the appellant's dependency upon his parents and his parents' dependency upon him, citing Beoku-Betts v SSHD [2009] 1 AC 115. Ms McCarthy submitted that this was relied upon before the judge and referred to in para 23 of his decision being part of the appellant's submissions.

### **The ECO's Submissions**

21. On behalf of the ECO, Mr Whitwell relied upon the rule 24 response and submitted that the grounds were little more than a disagreement with the judge's finding. He submitted that there was nothing that entitled the judge to depart from the earlier decision. He pointed out that the judge cited Rai and at para 36 referred to the "low

threshold" in Gurkha cases to establish Art 8.1 was engaged. He submitted that the judge had properly approached the evidence and made sustainable findings, particularly in the light of the fact that the adverse credibility findings were not challenged. He submitted that, before the First-tier Tribunal, the appellant had not placed reliance in Counsel's skeleton argument upon the effect upon his mother's health in the UK caused by the separation. Mr Whitwell submitted that the judge had made sustainable factual findings and his appeal should be dismissed.

## Discussion

22. The correct approach to determining whether Art 8.1 is engaged on the basis of "family life" in the context of a claimed dependent adult child of a former Gurkha soldier was summarised by the Court of Appeal in Raj at [16]–[20]. Lindblom LJ (with whom Beatson and Henderson LJ agreed) said this:

"16. The legal principles relevant to this issue are not controversial.

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.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."

23. It is not suggested by Ms McCarthy that the judge misdirected himself by not enquiring whether the appellant had established "more than normal emotional ties" and dependency in the sense of "real, effective or committed support". Further, it is clear that the judge recognised, consistently with Rai, that in this kind of case the threshold was "low" (see para 36).

24. What is said by Ms McCarthy, relying upon Ground 1, is that the judge required that dependency to be of "necessity" rather than seeking to determine whether it was, in fact, established factually. In that regard, she relies upon what the judge said in para 34 in relation to the circumstances of the appellant's return from Saudi Arabia in 2016 where the judge said this:

"He returned not out of any form of necessity/dependency, but because there was an opportunity to live in the UK."

25. It would, of course, have been wrong for the judge to gloss the test in Rai and require any dependency in fact to arise out of "necessity". The fact of dependency is sufficient. It is a "question of fact" and "a matter of substance not form" (see, Uddin v SSHD [2020] EWCA Civ 338 at [31] per Sir Ernest Ryder). However, the context in

which the judge used the phrase “necessity/dependency” in para 34 was not to identify that established dependency was from choice rather than necessity but as part of the judge’s overall assessment of the credibility of the appellant’s case and whether the witnesses who gave evidence were to be believed. There was inconsistent and contradictory evidence from the sponsor’s father and mother as to why he left Saudi Arabia. One saying that he had lost his job and so had no income and the other saying, not that, but that he had low pay.

26. Likewise, the judge, in assessing whether the appellant was dependent upon his parents once he returned from Saudi Arabia, found that he was, in fact, not so dependent. At paras 33 and 34, which I have set out above, the judge did not accept that the appellant’s account (given in the witnesses’ evidence) that he could not work on the family farm and support himself was believable. That finding is not, as Mr Whitwell pointed out in his submissions, directly challenged in the grounds. It was in that context also that the judge referred to “necessity/dependency” not in order to conclude that the appellant was in fact dependent but had become so by choice, but rather in finding that the appellant was not to be believed that he was in fact dependent upon his parents because it was not accepted by the judge that he could not support himself (and therefore had not shown that he was not doing so) from the family farm surrounding the family home in Nepal.
27. Consequently, I reject Ground 1.
28. Turning to Ground 2, it is said that the appellant’s support from Saudi Arabia and his return to Nepal in 2016 was supportive of his claim that there were “more than normal emotional ties” and/or dependency between him and his parents. The difficulty with this submission is that the judge did not accept the appellant’s account (and the evidence of his parents) about these circumstances. Much of the appellant’s case turned upon the evidence of his father. His father accepted that he had previously lied in the earlier appeal hearing. He accepted that he had done so because, if he had disclosed that the appellant had worked in Saudi Arabia, then he was concerned that the claim might not succeed. The judge was entitled to give considerable weight to the fact that the sponsor accepted that he had lied previously. Of course, that a witness has lied previously does not mean that necessarily he or she is lying about each and every part of his or her evidence now. The judge must have in mind the “Lucas direction” (R v Lucas [1981] QB 720 per Lord Lane CJ at p. 723C), which, the Court of Appeal in Uddin v SSHD recognised, is applicable in immigration cases. At [11] Sir Ernest Ryder (with whom King and Bean LJ agreed) said this:

“11. I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a 'Lucas direction' (derived in part from the judgment of the CACD in R v Lucas [1981] QB 720 per Lord Lane CJ at 723C). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress,



confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases.”

29. Here, of course, the sponsor’s lie was in relation to a central facet of the appellant’s claim. Ms McCarthy did not seek to contend before me that the judge was wrong to take into account that the sponsor had previously lied. In my judgment, Judge Davison was clearly entitled to take that into account along with other matters, particularly discrepancies in the evidence of the appellant’s mother and father in reaching his adverse findings.
30. Whilst the judge accepted that there had, historically, been some support and, indeed, “an element of dependency” between the appellant and his parents, and indeed some remittances made by his parents in the UK to him since they came to the UK, it was open to the judge to find that the appellant had, in fact, not established dependency based upon financial support by his parents at the date of the hearing. The judge was entitled not to accept the evidence before him that the appellant was “entirely emotionally and financially dependent upon his parents”, rather was working or supporting himself in Nepal. That finding was open to the judge even if, as Ground 2 contends, the appellant was providing some financial support from Saudi Arabia. That financial support had ceased by the time of the hearing, indeed it had ceased in 2016 when he returned. The judge undoubtedly understood the nature of the appellant’s case about that support but, in itself, even if accepted it did not establish that family life existed subsequent to the appellant’s return to Nepal from Saudi Arabia.
31. For these reasons, I reject Ground 2.
32. Turning now to Ground 3, it does appear that Ms McCarthy raised before the judge in her oral submissions the circumstances of the appellant’s parents in the UK and that there might be emotional dependency on the appellant as a result. That would appear to be the submission summarised in para 23 of the judge’s decision. On the other hand, reading the detailed skeleton argument prepared by Ms McCarthy for the First-tier Tribunal hearing (dated 29 April 2020), it is clear that the focus of her submissions was more upon the appellant’s dependency upon his parents rather than the other way around.
33. The grounds (at para 21) refer to the witness statement of the appellant’s father at paras 26–30 (appellant’s bundle pages 8–9) that the appellant looked after his mother between 2016 (when his father came to the UK) and 2018 when she came to the UK and that they are “helpless without our son in the UK” (para 29). At para 30 reference is made to an incident where the appellant’s mother was taken to hospital as an emergency patient.
34. Whilst the judge does not directly refer to this evidence, perhaps because it was not the focus of the appellant’s case before him, I am unpersuaded that if he had done so it would have led him to conclude (or indeed could have led him to conclude) that

there were more than normal emotional ties between the appellant and his parents (in particular his mother) as a result. The evidence goes no further, in my judgment, than relating the difficulties faced by the appellant's parents in the UK due to their circumstances and age. It does not speak to the support provided by the appellant or any dependency of his parents on him in Nepal. Consequently, I am satisfied that the judge's failure to refer to this evidence did not materially affect his findings or the outcome of the appeal.

35. For those reasons, I also reject Ground 3.

**Decision**

36. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands.

37. Accordingly the appellant's appeal to the Upper Tribunal is dismissed.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
7 July 2021

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

Judge Davison, having dismissed the appeal, made no fee award. The appellant has been unsuccessful in his appeal to the Upper Tribunal. That decision also stands.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
7 July 2021