



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/12226/2015  
HU/12227/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated**

**Heard on 11<sup>th</sup> of January 2018  
Prepared on 23<sup>rd</sup> of January 2018**

**On 26<sup>th</sup> of January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MR MANI PRAKASH RAI - 1<sup>st</sup> Appellant  
MR DEO KRISHNA RAI RAI - 2<sup>nd</sup> Appellant  
(Anonymity order not made)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Respondent

**Representation:**

For the Appellants: Ms E. Lagunju of Counsel

For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellants**

1. The Appellants are both citizens of Nepal and are brothers. The 1<sup>st</sup> Appellant was born on 1<sup>st</sup> of February 1974 and the 2<sup>nd</sup> Appellant on

28th of March 1980. They appealed against decisions of the Respondent dated 4<sup>th</sup> of November 2015 to refuse them entry clearance to settle in the United Kingdom as adult dependent relatives of their father Mr Agamlai Rai ("the Sponsor"). He is a former Gurkha who served the Crown with exemplary service with the Gurkha rifles for 11 years from 19<sup>th</sup> of December 1960 until 10th of May 1971. Their appeals were allowed by Judge of the First-tier Tribunal Robinson sitting at Hatton Cross on 7th of April 2017.

2. The Respondent appealed with leave against that decision and the matter therefore came before me in the first place as an appeal by the Respondent. For the reasons which I set out in some detail below I have found a material error of law in the decision of the First-tier and have set it aside. I shall therefore continue to refer to the parties as they were known at first instance.

### **The Appellants' Case**

3. The Sponsor was born on 1<sup>st</sup> of January 1943. He was granted indefinite leave to enter the United Kingdom on 27<sup>th</sup> of July 2009 as he had served in the British Army for over 11 years. He and his first wife had 6 children. He married his 2<sup>nd</sup> wife following the death of his first wife. His 2<sup>nd</sup> wife was granted indefinite leave to remain on 22<sup>nd</sup> of February 2011. His two elder sons and two daughters are married and lead independent lives. The two Appellants in this case are unmarried and live with their married brothers. The Appellants stated that they were still emotionally and financially dependent on their father. He had made visits to see them in 2014 and 2017. The three communicate by mobile phone. The Sponsor suffers from heart disease and has poor hearing. His heart condition requires regular monitoring. The Appellants lived in the same house sometimes working as labourers either on farms or in wood workshops for which they were paid a small amount of money. The Sponsor's daughter-in-law sometimes cooks for them. Both Appellants are in good health.
4. The Sponsor owns the property where all four of his sons are living. The Sponsor was denied any opportunity to settle in the United Kingdom after his discharge from the British Army. That injustice was only corrected in 2009 by which time the two Appellants were over the age of 18. Had the injustice not happened the Appellants would either have been born British or have accompanied the Sponsor as minors to settle in the United Kingdom. The Appellants claim they had no fair opportunity to apply until 2009 and then only under a policy requiring exceptional circumstances. Once a new policy was introduced in 2015 they applied to join the Sponsor. The Appellants argued that there was family life between them and their father. They were unemployed and dependent on the Sponsor for their living expenses and for the roof over their heads. There were no countervailing considerations which could assist the Respondent and depriving the Sponsor of the Appellant's company would be unduly harsh.

## **The Decision at First Instance**

5. It was not argued that the Appellants could succeed under the Immigration Rules. The Judge assessed the appeals outside the Rules under the jurisprudence relating to Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The Judge found a causal nexus between the historic injustice and the actions of the Sponsor. But for the Gurkhas' inability to settle in the United Kingdom at the date of discharge when their children were young they would have come to the United Kingdom a long time ago. The Judge found that family life existed in this case based on the strong evidence that the Appellants were financially dependent on their father and there was clear evidence showing emotional ties which had been maintained through occasional visits and daily telephone contact.
6. The issue was what weight should be given to the fact of the historic injustice when assessing the proportionality of the interference with the Appellant's right to family life. The Judge found the historic wrong argument a strong one weighing in the Appellant's favour. There were additional factors, the poor health of the Sponsor which made it more difficult for him to travel to see the Appellants in Nepal and the circumstances of the Appellants themselves.
7. Section 117B (2) of the Nationality Immigration and Asylum Act 2002 provides that it is in the public interest that persons who seek to enter or remain in the United Kingdom are able to speak English. But for the injustice, the Judge found, the Appellants would have been born in the United Kingdom and would have been fluent in English. This was not a factor to weigh in the balance against the Appellants. The applicable policy relevant to Gurkha dependents contained no accommodation and maintenance requirements and therefore subsection (3) (that it was in the public interest that persons seeking to enter the United Kingdom should be financially independent) did not apply. There were no negative issues such as a poor immigration history or criminal convictions and the Respondent's policy allowed for special factors to be taken in to account in cases of this type. The Appellants had not misled the Respondent. The Judge allowed the appeal.

## **The Onward Appeal**

8. The Respondent appealed against this decision arguing that the Appellant's family ties did not demonstrate emotional dependency to the Kugathas standard, that is to say they did not demonstrate a relationship over and above normal emotional ties. The evidence had not substantiated that finding. The Appellants could not meet the Immigration Rules or the Respondent's own policy. The Sponsor and the Appellant had not lived together continuously since 2010 when the Sponsor and his wife migrated

to the United Kingdom. The voluntary separation of the family demonstrated that the Appellants were deemed to be adults able to take care of themselves in Nepal. There had been no severance of normal family ties because there had been visits and telephone contact. There was another married sibling in Nepal whose wife cooked for the Appellant's suggesting there were strong and adequate family ties already in Nepal. The Sponsor was content to migrate voluntarily to the United Kingdom leaving his children in Nepal.

9. There was no reason why the current parental support arrangements could not continue nor why the Appellant could not remain in Nepal as adult siblings being able to support each other and find work to support themselves. Even if family life was shown to exist there was no evidence to show emotional dependency beyond the norm and the disproportionality argument was not made out. The Judge had found the Appellants to be financially dependent on their Sponsor. The determination provided limited reasoning as to why this was considered to be beyond the norm particularly given that the Appellants were adult men who had found some, albeit low paid, work. The financial dependency seemed to have been a matter of choice. They had not demonstrated why they could not work or why they had shown no intention of finding work. There was no evidence of poor health precluding them from working.
10. Even if there was financial dependency, pursuant to the case of **AAO v entry clearance officer [2011] EWCA Civ 840** reliance on financial dependency did not mean there was a breach of Article 8 if entry clearance was refused. The Judge also failed to consider the public interest in the proportionality tests under the 2002 Act as to whether the Appellants would be a financial burden or able to integrate. The Sponsor was not well and was in receipt of an attendance allowance. He was receiving pension credits, carers allowance and housing benefit. The onus was on the Appellants to prove that Sponsor could provide adequate support. The Judge's statement that the maintenance and accommodation requirements did not apply was unreasoned. Given the Sponsor's poor health maintaining two adult men would be a significant challenge for him in terms of the increased living and maintenance costs which would be greater than the current arrangements to support the Appellants. There was no guarantee that the Appellants would not become a burden on the state in the future. Nor was any reason given why the Sponsor could not continue to provide financial support whilst the Appellants remained in Nepal.
11. Finally, the Respondent argued, there was no historic injustice in this case. The Appellants did not meet the conditions of the Immigration Rules, Appendices AF and FM or the Respondent's own policy (issued in 2015). The Judge had afforded significant weight to the argument of historic injustice. This was just one aspect of the proportionality assessment but was insufficient to swing the balance in the Appellant's favour.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Page on 13<sup>th</sup> of November 2017. In granting permission to appeal he wrote that the Respondent's grounds of appeal were clearly arguable. The overarching complaint was that the Judge had erred in law by finding that the two Appellants who were aged 41 and 35 at the time of their applications were emotionally and financially dependent upon their father in the United Kingdom. The central argument of the Respondent was that the voluntary separation of the family by the Sponsor when he came to reside in the United Kingdom demonstrated that the Appellants were deemed to be adults able to take care of themselves in Nepal. Permission was granted on all grounds.

### **The Hearing Before Me**

13. At the hearing before me to determine whether there was a material error of law, the Respondent relied on the detailed grounds of onward appeal. There were three main grounds: (i) the Judge's treatment of the issue of emotional dependency; (ii) his treatment of the financial aspects of the case and (iii) the issue of historic injustice.
14. The Appellants were able to take care of themselves and there had been no severance of normal family ties. There was no obvious reason why the Appellants could not find work. They had been employed in low paid work. The Sponsor was in poor health receiving attendance allowance and could not continue to provide financial support for the Appellants. They could not succeed under the Immigration Rules. The evidence provided meant they could not meet the conditions imposed in case law. The Judge was seeking to change the wording of the 2002 Act. The Judge was wrong in law at [35] of the determination (dealing with the relevance of proficiency in English and accommodation and maintenance requirements).
15. In reply counsel argued that the determination was sound. The Judge had considered all the relevant case law. There was a two-part test: whether Article 8 was engaged and if so the proportionality of the interference. The Judge had concluded there was strong evidence to support dependency. The Respondent's grounds of appeal were merely an attempt to reargue the case. There had to be further elements of dependency which the Judge found. There was evidence such as money transfers. There were regular visits and regular telephone calls. The Judge had applied the Kugathas test correctly. It was conceded by the Respondent that family life had not been severed. The Appellants relied on the recent Court of Appeal decision of **Rai [2017] EWCA Civ 320**. Just because the Sponsor had left his children in Nepal that should not be held against them. The Sponsor had left them with the understanding that he would continue to support the Appellants. The Appellants were entitled to choose to be dependent upon the Sponsor. The Judge had regard to the provisions of section 117B.
16. I raised the point with counsel as to what weight in the balancing act the provisions of the 2002 Act had against the argument of historic injustice

referred to by the Upper Tribunal in **Ghising [2013] UKUT 567**, a case decided before section 117B came into force. That section was inserted into the 2002 Act by the provisions of the Immigration Act 2014. Counsel conceded that it was not open to the Judge to find in the Appellant's favour on the historic injustice argument alone (see the Court of Appeal decision in **Gurung**) but there were no other factors which tipped the balance in the Respondent's favour. The Judge was correct to find that the Respondent's decision was a disproportionate interference.

### **The Decision in Rai**

17. Shortly after the Judge heard this case in the First-tier, the Court of Appeal handed down their judgement in the case of **Rai**. The facts of that case (which were not in dispute) were very similar to the facts of the instant case before me. Mr Rai was born in Nepal on 1<sup>st</sup> of January 1986. He was the youngest of his parents' six children. His father, Birkha Bahadur Rai, was born in Nepal on 1<sup>st</sup> of January 1941, enlisted in 7 Gurkha Rifles as a boy in 1956, fought in the conflicts in Borneo and Malaya, and was honourably discharged in August 1971. The Appellant could not meet the Immigration Rules and the case was considered by the Deputy Upper Tribunal Judge outside the rules under Article 8.
18. The Appellant's argument, relying on the Upper Tribunal authority of **Ghising**, was that where family life was engaged, the historic injustice argument would tip the balance in favour of the Appellant and the appeal should be allowed. The Upper Tribunal set aside the decision at first instance and proceeded to re-determine the matter. The Court of Appeal did not criticise that aspect because the facts in the case were not in dispute, it was a question of the assessment of those facts. What the Court of Appeal did criticise was that the Upper Tribunal Judge had not expressed a distinct and definite conclusion on the question of whether or not the Appellant in **Rai** did in fact enjoy family life with his parents, within the meaning of Article 8(1).
19. Further as was submitted to me, the Court of Appeal had stated that even though the Appellant's parents in that case had chosen to leave Nepal to settle in the United Kingdom when they did, the Appellant's family life with his parents subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. In other words, the Tribunal could not find that Article 8 was not engaged by virtue of the separation. The appeal was allowed and remitted back to the Upper Tribunal for the issue of whether Article 8 was engaged to be re-determined. Since there had been no proper consideration of whether Article 8 was engaged, there could have been no proper proportionality exercise carried out.
20. Counsel had raised in the Court of Appeal the argument that in view of the historic injustice underlying the Appellant's case, the provisions contained in section 117B would have made no difference to the outcome, and certainly no difference adverse to him. As I understand the decision in Rai,

the Court of Appeal did not make a ruling on that point because the decision of the Upper Tribunal under appeal did not reach that far as the Judge had not considered the 2002 Act in any detail.

## **Findings**

21. It is accepted in this appeal that the Appellants cannot succeed under the Immigration Rules and that their claim is therefore outside the rules under Article 8. The Judge at first instance found Article 8 was engaged because of their financial and emotional dependence on the Sponsor. Having found that Article 8 was engaged, he decided that the decision under appeal was a disproportionate interference with the rights protected by Article 8. The Respondent disputes both aspects of the case, whether Article 8 is engaged at all but if it is he argues that the decision is a proportionate one.
22. The grounds of onward appeal and the grant of permission to appeal laid great emphasis on the voluntary separation of the family by the Sponsor travelling to the United Kingdom in 2009. As the Court of Appeal made clear in **Rai**, this is not of itself a decisive point since one has to consider whether there was family life at the time of the separation and whether that family life continues. The Respondent's argument is that at the time of separation and indeed now there was no more than normal emotional ties and the Judge was wrong to find on the facts that the relationship amounted to more than that.
23. Undoubtedly there is family life between a parent and his children and the threshold to cross to show this is not a particularly high one. The issue is whether that family life extends beyond normal emotional ties to become something which incurs the protection of Article 8 against disproportionate decisions. As patterns of family life change, a degree of flexibility has to be shown in interpreting what constitutes family life beyond normal emotional ties but the position remains when dealing with adult dependents that they must be able to establish the existence of that dependency to acquire protection.
24. In **Rai** the Court of Appeal considered the issue of what constituted dependency. Was there real or committed or effective support shown by the Sponsor to the Appellant? The Appellant in that case, as the two Appellants in the instant case before me, had never left the family home or founded a family of his own. In applying for leave to enter the United Kingdom, the Appellant's parents had taken up what had long been owed to them, but that, in the face of the financial difficulties, they had had to make an unenviable choice between applying for leave and continuing their family life with their son in the family home in Nepal.
25. The problem in this case is that the evidence of financial dependency upon the Sponsor was not so clear cut. The Appellants had a working history in Nepal albeit the Judge did not deal with that in any great detail. They were

aged 41 and 35 at the date of application and were in good health. The Appellant in the case of **Rai** was unemployed, as the Appellants are said to be in this case. That there was no good reason why the Appellants were unemployed would not be necessarily a decisive factor although relied upon by the Respondent in the initial refusal decision. One could have a dependency of choice. My concern is whether there was indeed a financial dependency by the Appellants on the Sponsor at the date of application.

26. The Appellant's argument was that they were living in the Sponsor's house in Nepal with their 2 brothers and their brothers' families and that some cooking was done for them by their sister-in-law. They were receiving remittances from the Sponsor which was evidenced by money transfers. Even assuming that those money transfers were solely for the benefit of the Appellants the issue would still have to be determined whether the Appellants were mainly or wholly dependent upon those money transfers (and the provision of accommodation) or whether they had an economic capacity which was supplying them with financial wherewithal. I do not consider that the evidence which was before the Judge was clear enough for him to be able to come to the decision that there was a financial dependency. The difference in the standard of living between Nepal and the United Kingdom could well mean that a modest income would be sufficient to live on for an applicant in Nepal.
27. That does not deal with the matter because there was still the issue of an emotional dependency both at the date of separation and now. The Judge relied on evidence of continuing contact in the form of two visits by the Sponsor in nine years and daily telephone calls. It is difficult to see how a level of contact such as this could amount to more than normal emotional ties. The position might have been different if there had been evidence of ill-health on the part of the Appellants whether psychological or otherwise for which the Sponsor was providing assistance to them but that does not appear to be the case. The Appellants' mother had died in 2002 a substantial period of time ago. There was nothing in the relationship and the facts as found by the Judge to indicate that the Appellants were emotionally dependent upon the Sponsor. They were living in a communal setting with their two brothers and their brothers' families. There may have been a degree of emotional dependency on their siblings but that is not relevant for the purposes of this appeal.
28. What is relevant is whether there was an emotional dependency on the Sponsor when he was living in the family home in Nepal and since his relocation to the United Kingdom. Given the Appellants' ages and their state of health, their ability to work and the domestic arrangements which they have made with their siblings, I do not find that the Judge was right to conclude that there was emotional dependency over and above normal emotional ties. The separation of itself is not conclusive against establishing whether family life existed. Nevertheless, there is some force in the Respondent's argument (as can be seen from the grant of permission by Judge Page) that the voluntary separation demonstrated



that the Appellants were deemed to be adults able to take care of themselves in Nepal. In other words that at the date of separation it was not the perception of the Appellant and Sponsor that the Appellants were in need of emotional support from the Sponsor over and above normal emotional ties.

29. I remind myself that the authorities emphasise that these cases are fact sensitive. That the Appellant in **Rai** could potentially show there was financial or emotional dependency does not of itself mean that the Appellants in the instant case before me can do the same. On the basis therefore of the analysis required by the decision in **Rai**, I find that the Judge materially erred in law in finding that Article 8 was engaged in this case and the Appellants cannot succeed on that basis.
30. I would reiterate at this point that the appeal came before me initially to decide error of law. I set the decision of the First-tier aside and re-make the decision in this determination. I must set out my conclusions in some form of order however and therefore have considered both the issue of whether Article 8 was engaged at all and if it was whether the Appellants could succeed thereunder.
31. There were detailed arguments made to the Judge (which he accepted) that the appeal should succeed under Article 8 because of the historic injustice perpetrated on the Gurkhas. I proceed to consider this appeal in the alternative on an "even if" basis as the Judge found that there is family life in this case because there was an element of dependency which attracted protection. The question is whether the decision of the Respondent interferes disproportionately with the enjoyment of family life and the duty to promote family life because of the weight to be given to the historic injustice argument in the proportionality exercise.
32. The Judge found at [34] that the Respondent's decision was in accordance with the legitimate aim of immigration control. The question was whether it was proportionate to that legitimate aim. In **Ghising** the Upper Tribunal made clear that a substantial weight should be attached to the historic injustice such that an Appellant would succeed under Article 8 outside the rules (in the absence of criminality or deception neither of which are relevant in this case) if the only argument for the Respondent was the public interest in maintaining immigration control. The historic injustice was the delay in allowing Gurkhas and their dependents to enter the United Kingdom. But for that delay Gurkhas and their dependents would have entered the United Kingdom some time ago.
33. This, the Judge pointed out would potentially have had a knock-on effect. Coming into the United Kingdom at an early age would mean that persons who are now adults would have acquired a knowledge of the English language which the Appellants have been unable to acquire living in Nepal. They might have been born here and settled. The Judge dismissed the argument that the Appellants were unable to meet the financial

conditions stating that “the applicable policy in this case contains no accommodation and maintenance requirements”. That is not accepted by the Respondent.

34. The Respondent’s policy was formulated in 2015 to take into account changes in the law. It was reissued in 2017 with some minor alterations. It applies to adult dependents who were aged 30 or under at the time of application. It thus excludes these Appellants. It also requires that applicants should not be living in a different family unit with relatives who are caring for them, which on the facts as found by the Judge would also tend to exclude the Appellants. The Judge was wrong to say that the policy made no mention of financial support. The requirement is that there be adequate maintenance and accommodation. If the policy does not apply, as it does not in this case, one falls back on the financial requirements of the Immigration Rules.
35. This is an application by adult dependent relatives. They must provide evidence that they can be adequately maintained, accommodated and cared for in the United Kingdom by the Sponsor without recourse to public funds. No particular financial limit is specified in that part of Appendix FM and one therefore falls back on the pre-2012 case law that adequate financial provision was satisfied at the income support level. There was no financial calculation by the Judge in this case because he did not consider that the financial requirements would apply. I disagree with that but of more difficulty is whether the Sponsor in this case who is in poor health can meet the financial requirements. The Judge had no evidence that he would be able to support two mature adults at or above the income support level. The Judge was aware of the Sponsor’s failing health. It is as the Respondent submits very unlikely that the Sponsor would be able to continue to support the Appellants sustainably for a considerable period of time. The likelihood must be that the Appellants would become a burden on the state.
36. The Appellants do not speak English and their argument is that they have had no opportunity to learn. In the proportionality exercise, on their side of the scales, they have: (i) their claimed dependency, which I rejected for the reasons given but which I am now considering in the alternative; (ii) the historic injustice argument which they say extends to matters such as their English language ability; (iii) that there is no criminality or deception involved in this case and (iv) there is nothing beyond the public interest in immigration control.
37. On the Respondent’s side of the scales is: (i) the need to maintain immigration control; (ii) the concern that the Appellants would not be financially independent upon arrival in this country but would be dependent on someone in poor health; (iii) they would become a burden on the state and (iv) they cannot speak English.

38. I remind myself that the case of **Ghising** was decided before the statutory provisions in section 117B came into force. I cannot ignore the section which is mandatory and applies to all applications. The section makes it clear that there is a public interest against the admission of persons who cannot speak English and who are not financially independent. The issue of the historic injustice is a factor to be weighed but its status as something of a trump card has been reduced since Parliament enacted the amendments to the 2002 Act. **Ghising** is case law of the Upper Tribunal which I must pay particular attention to but I am bound by statute and I must therefore take into account the obvious difficulties in this case faced by the Appellants in that they do not speak English and they are unlikely to be financially independent for the reasons which I have given.
39. The Appellants argue that they have not had the opportunity to learn English because they were not admitted earlier. The statute makes no such exceptions. There is a remedy for the Appellants who could take lessons and pass the appropriate test. That requirement is not in itself a breach of Article 8 and I do not consider that the inconvenience to the Appellants, if any, of having to do this is of such severity that it both forms part of the historic injustice argument and tips the scales in their favour.
40. The Court of Appeal in **Rai** did not consider whether the 2002 Act outweighed the weight to be given to the historic injustice argument. I find that even if the Appellants were dependent on their Sponsor (whether financially or emotionally) and had suffered an historic injustice, the wording of the statute would still mean that substantial weight needed to be attached to the Respondent's side of the scales.
41. These are two mature men with a working history in Nepal who have in the past not been financially dependent upon the Sponsor. Even if they could demonstrate emotional dependency on their Sponsor, they are enjoying family life with their siblings at present which will not be interfered with and is on the basis of the evidence before the Judge involving some element of care, such as the preparation of meals. I do not consider great weight should be placed on the dependency argument even if (which I reject) it can be maintained. Nor do I find that the historic injustice argument outweighs the clear provisions of a statute.
42. On the facts of this case I do not find that the Respondent's decision to refuse entry clearance to the Appellants is a disproportionate interference with protected rights. The Appellants cannot succeed outside the Rules and the Judge was wrong in law to find that they could. There are no exceptional circumstances in this case. The historic injustice argument has some weight but the provisions of the statute have substantial weight if the case reaches the proportionality stage. As the essential facts of the case, although not the legal interpretation of them is not in dispute I am able to re-decide the appeal without a further hearing. I therefore set aside the decision of the First-tier Tribunal and remake the decision by dismissing the Appellants' appeals against the decision of the Respondent

to refuse them entry clearance. I make no anonymity orders as there is no public policy reason for so doing.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision and dismiss the Appellants' appeals against the Respondent's decision to refuse entry clearance.

Appellants' appeals dismissed

Signed this 23<sup>rd</sup> of January 2018

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge

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

As I have set aside the decision in this case, I set aside the fee award. I have dismissed the appeal and therefore there can be no fee award.

Signed this 23<sup>rd</sup> of January 2018

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge