



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01937/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4<sup>th</sup> March 2019

Decision & Reasons Promulgated  
On 15<sup>th</sup> March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR SUBASH LIMBU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K McCarthy of Counsel, Everest Law Solicitors  
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Lloyd dismissing his appeal against the refusal of an application for entry clearance to settle in the UK as the adult dependent relative and family member of his father Mr Limbu,

an ex-Ghurkha soldier. The Appellant appealed against that decision and was granted permission to appeal by Deputy Upper Tribunal Judge Sutherland Williams in the following terms:

“Permission to appeal is granted, as the two grounds of appeal identify arguable errors of law, in particular with reference to family life.

I do not at this stage prefer to say anything further about the two grounds identified, or the further argument in relation to proportionality. These matters will be for the Judge determining this onwards appeal to decide”.

2. I was provided with a detailed Rule 24 response from the Respondent which indicated that the appeal was resisted.

### **Error of Law**

3. At the close of the hearing I reserved my decision which I shall now give. I do find that there are errors of law in the decision such that it should be set aside. My reasons for so finding are as follows.
4. Noting the Grounds of Appeal, they may be summarised as follows:
  - (i) a failure to apply the correct test for family life between adults in light of the jurisprudence concerning the historic injustice metered out to Ghurkhas and their families;
  - (ii) a failure to apply the binding jurisprudence against the factual matrix of the Appellant’s family life with his mother and their cohabitation;
  - (iii) materiality of error in relation to proportionality.
5. Looking at ground 1 against the Rule 24 response, I find that the Secretary of State is unable to defend the judge’s decision in this regard. Whilst the findings from §§50 to 62 of the decision do consider the engagement of family life, and whilst the judge notes the binding authority of *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320, the judge fails to note and apply the binding approach that should be followed in respect of Gurkha cases in particular from §52 onwards and the conclusion that, that there was family life between the Appellant and his parents at the time of separation in 2006 but not in the ensuing years, is materially flawed. This is because pursuant to [17] of Lord Justice Lindblom’s decision in *Rai* (citation *supra*), it is made plain that the proper approach is to search for support that is either real, committed or effective (pursuant to [17] of Lord Justice Sedley’s judgment in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31) which represents the irreducible minimum of what family life between adults requires. It is in this respect that there must therefore be more than normal emotional ties. However, it is also worth noting the later decision in *Patel and Others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17 wherein Lord Justice Sedley, at [14] of his judgment, stated as follows:

“You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – 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. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).”

6. In light of the decisions in *Kugathas* and *Patel* it is plain that what may constitute an extant and family life falls short of what constitutes dependency, and as such, even if the judge were right in respect of the Appellant not being dependent ‘by necessity’ but ‘by choice’, this is not a preclusion to family life being engaged between an adult family member (such as a child) and another adult family member (such as a parent) where such dependency exists and thus demonstrates support that is either real, committed or effective. I find that there is no basis in jurisprudence for the finding that family life being engaged in respect of Article 8 requires dependency ‘by necessity’ rather than ‘by choice’, or any other form for that matter. Consequently, I find that the decision is flawed in discounting family life for the reasons given.
7. As the Rule 24 response from the Secretary of State notes at §§6 and 7, as observed by Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 at [24] of his judgment, these cases “all depend on the facts” and ‘love and affection’ between an adult and his parents or siblings will not of itself justify a finding of family life, as there has to be “something more”. In this scenario, albeit the appellant is a young adult living separately to his parents, it cannot be said that he is living independently of them and in fact he gives every appearance of being *dependent* upon them, and as such I find that the assessment of whether family life was engaged between the Appellant and his parents to be fatally flawed.
8. Turning to Ground 2, I note that the Appellant has not established a family life of his own, albeit that he may have social ties in Nepal. In this regard, I find that he is still capable of forming family life with his parents (see *AA v the United Kingdom* [2012] Imm AR 1 at [49], as approved in the case of *Gurung* at [46]). As a result, I find that there is a flaw in the First-tier Tribunal Judge’s assessment that the cohabitation between the Appellant and his mother counts for ‘nothing’ because the mother has “the best of both worlds”. I cannot understand how the mother’s predicament could rationally be described in such a manner as it would be a less than perfect scenario for a mother to be parted from her dependent son, no matter if he is an adult or not. Indeed, the fact that the mother is being compelled to spend time with her son may also be evidence of the fact that there are more than normal emotional ties given that she normally resides in the United Kingdom with her husband, an ex-Gurkha soldier, and it is not normal for a mother to be compelled to travel internationally to

spend time with her adult son. I further find that such a finding fails to have regard to the practical and logistical difficulties that have been created by the historic injustice meted out to Gurkha families. As such, in my view, it does not matter whether the Appellant was living with his family or not, or whether the dependency was by choice or necessity, as family life can exist between adults regardless of whether they are living together or not in the same home, and regardless of whether there is support by means of choice or necessity, as all that matters is the fact of whether there is any dependency or support at all.

9. Turning to the final ground regarding proportionality (which I have summarised under point 3 above), had the First-tier Tribunal assessed the engagement of Article 8(2) properly it would have been clear that the minimum required to demonstrate family life was enjoyed was arguably made out against the factual matrix before it, and this would have had a material impact upon the outcome of the appeal.
10. Consequently, I find that there are material errors of law in the decision such that it should be set aside in its entirety.

### **Notice of Decision**

11. The appeal to the Upper Tribunal is allowed.
12. The decision of the First-tier Tribunal is set aside in its entirety. This matter is to be remitted to be heard by a differently constituted bench.

### **Directions**

13. This matter is to be remitted to IAC Newport, Columbus House.
14. A Nepali interpreter is required.
15. I am told that there may be four witness who will be called to give evidence.
16. The time estimate for this appeal is three hours.
17. No special directions have been sought and I do not see any reason to give any.
18. No anonymity direction has been requested and I do not see any reason why one should be given now.
19. Given that this will be the third time that the First-tier Tribunal is to hear this matter I remit this case for the specific attention of the Resident Judge at IAC Newport, so that it may be listed before the most appropriate member of that Tribunal centre.

Deputy Upper Tribunal Judge Saini

Signed

Date