



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05336/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 February 2019

Decision & Reasons Promulgated  
On 25 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

KABITA LIMBU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr D Balroop, Counsel, instructed by 12 Bridge Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Scott-Baker (“the judge”), promulgated on 23 May 2018, by which she dismissed his appeal against the Respondent’s decision of 13 January 2016, which in turn had refused an application for entry clearance (a deemed human rights claim).
2. The Appellant, a citizen of Nepal, had applied to join her mother in this country. The Appellant is the adult daughter of a former Gurkha soldier, who passed away in 2009. The sponsor had applied for entry clearance at the same time as the Appellant.

Both relied on the Respondent's policy guidance. The sponsor's application was granted and she came to this country in 2016, leaving the Appellant behind.

### **The judge's decision**

3. At [45] the judge concludes that the Appellant could not satisfy the various requirements of Annex K to the Respondent's policy guidance and this conclusion has not been challenged.
4. The judge goes on to make the following relevant findings of fact:
  - (i) The Appellant had lived together with the sponsor in a family home prior to the latter's departure in 2016;
  - (ii) The Appellant continued to live in the family home along with three of her brothers;
  - (iii) The sponsor had been sending money back to her children on a regular basis and this money was used for all of their benefit;
  - (iv) That the brothers may have been able to contribute to the household income and that the Appellant may have been able to obtain work in the local area;
  - (v) That the sponsor had "willingly" chosen to come to the United Kingdom when she did;
  - (vi) That the level of contact between the Appellant and sponsor was not as significant as has been claimed.
5. The judge concluded that the Appellant was not financially and emotionally dependent on the sponsor [53]. It is then said, at least implicitly, that there was no family life.
6. The judge goes on to consider the issue of proportionality (given the apparent finding on the family life issue, this was not strictly necessary). She concluded that although the historic injustice point was relevant, the critical issue was the inability of the Appellant to show that Article 8 was engaged in the first place. The appeal was therefore dismissed.

### **The grounds of appeal and grant of permission**

7. The grounds of appeal set out a number of favourable findings of fact and go on to say that in light of these and the guidance provided by the Court of Appeal in Rai [2017] EWCA Civ 320 the judge was wrong to have found that there was no family life between the Appellant and the sponsor. It was also said that the judge was wrong to have concluded that, if family life had existed, the decision of the Respondent was proportionate in any event.
8. Permission to appeal was refused by the First-tier Tribunal but then granted by Upper Tribunal Judge Allen on 4 January 2019.

### The hearing before me

9. Mr Balroop relied on the grounds of appeal and submitted that the judge erred in her approach to the financial issue and the sponsor's "choice" in leaving Nepal. He placed emphasis on the guidance stated in Rai.
10. Mr Tufan accepted that the judge had erred in respect of the "choice" and financial support issues. She had failed to ask the right question in light of Rai and had speculated on whether the Appellant's brothers were able to contribute to the household income. He acknowledged that if family life had been found to exist the judge was wrong in respect of her proportionality conclusions and that the Appellant would have been entitled to succeed in her appeal.

### Decision on error of law

11. As I announced to the parties at the hearing, I conclude that the judge did materially err in law. My reasons for so concluding are as follows.
12. The core issue of family life had to be assessed in light of the well-known Kugathas framework, but also the guidance provided by the Court of Appeal in Gurung [2013] EWCA Civ 8 and, more recently, Rai.
13. At [63] and [65] the judge had accepted that family life existed between the Appellant and sponsor whilst they were both living together in Nepal. The question was whether this family life had been "broken" by the sponsor's departure in 2016 or had otherwise ceased to exist over the passage of time since that departure and up until the date of hearing.
14. The judge did accept that the sponsor was providing financial assistance to the Appellant and her three brothers. In my view she then erred in failing to address the issue of whether or not that financial assistance showed "real" or "committed" support to the Appellant (and indeed her brothers). That was the test to be applied (see, for example, paragraph 40 of Rai). It was not necessarily a question of the Appellant being *wholly* financially dependent upon the sponsor.
15. Further, as Mr Tufan has accepted, the judge engaged in undue speculation as to the possibility of the brothers providing a financial contribution to the household income. Neither representative were able to point me to any evidence in support of this conclusion. Similar speculation was involved in the conclusion that the Appellant might herself be able to find work. In my view, the judge was bound to have based her assessment on the evidence before her and the facts as found relating to the situation as at the date of hearing.
16. The second error relates to the judge's reliance upon the sponsor's willingness to have left the Appellant back in Nepal when she came to the United Kingdom in 2016. We know from Rai that the question of whether a parent exercises a "free choice" is to be treated with real caution. In particular, parents issued with entry clearance had

to “activate” that by coming to the United Kingdom sooner rather than later. This is precisely what occurred in the present case. Having regard to paragraphs 38-42 of Rai, I conclude that the judge erred by placing material reliance upon this issue.

17. In respect of emotional dependency, the judge was entitled to find that there had been a degree of exaggeration as to the level of contact between the Appellant and sponsor. However, the two errors identified above render the overall conclusion on the issue of family life to be unsound.
18. The errors in respect of the family life issue are clearly material to the outcome of the appeal as a whole. This is in part because of Mr Tufan’s concession, but also because the judge herself stated in [73] that the “critical” factor in her assessment under Article 8(2) was the fact that in her view Article 8 had not been engaged in the first instance.
19. In light of the above I set the judge’s decision aside.

### **Remaking the decision**

20. Both representatives were agreed that I could and should remake the decision in this appeal based on the evidence now before me. This I now do.
21. Based upon that evidence as a whole, the judge’s unchallenged findings, and the position adopted by Mr Turfan, I make the following findings of fact.
22. The Appellant and sponsor lived together in a family home up until the departure of the latter from Nepal in 2016. I find that during their cohabitation the Appellant was dependent upon both of her parents and, after the death of her father in 2009, upon the sponsor alone. I find as a fact that there was family life.
23. I find that the sponsor applied for both herself and the Appellant in 2015 for entry clearance to come to the United Kingdom. This clearly indicated an intention for that part of the family to remain united and to travel to this country together. The decision of the sponsor to in fact leave Nepal after the grant of entry clearance did not represent a “free choice” in any real sensible understanding of that term. I find that she had to come to this country in order to take advantage of the entry clearance and the right to settle here, a right which arose out of the recognition of the historic injustice done to Gurkhas and their families over the course of time.
24. I find that the sponsor has sent money back to the Appellant and her siblings on a regular basis over the course of time. The amounts may not be particularly large, but I have regard to the sponsor’s means and find they represent a fairly significant amount of her own income. I agree with Judge Scott-Baker that the money was not purely for the benefit of the Appellant, but also went to assist her three brothers with whom I find she continues to live in the family home.
25. However, I find that the financial assistance is an important and necessary element of the household income. Indeed, there is no evidential basis for me to conclude that there was other money coming in from any form of employment. It is clear to me

that the sponsor's remittances constituted "real" and "committed" financial support for the Appellant. The same would probably apply to the three brothers as well.

26. Albeit by a relatively narrow margin, I also find that there has continued to be an emotional dependency by the Appellant on the sponsor. I accept that there has not been as much contact as might otherwise have been the case, but given the fact of the cohabitation up until 2016, the financial assistance thereafter, and the fact that the Appellant is the only daughter of the sponsor, it is more likely than not that there has been a requisite level of dependency beyond normal ties. I note in this regard that Mr Tufan has not sought to argue to the contrary.
27. This is a case in which there may not be any exceptional features of the dependency, but that is not of course the test (see paragraph 36 of Rai).
28. Overall I find that there is continuing family life between the Appellant and sponsor.
29. Moving straight on to the issue of proportionality, Mr Tufan has conceded that in the particular circumstances of this appeal the historic injustice issue outweighs the important public interest consideration of effective immigration control (as these are represented within section 117B of the NIAA 2002).
30. In light of this properly made concession and the various authorities, I conclude that the Respondent's decision was a disproportionate interference with the Appellant's family life and therefore unlawful under section 6 of the Human Rights Act 1998.

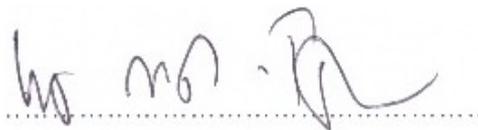
### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside.**

**I re-make the decision in this appeal by determining that the Respondent's refusal of the Appellant's human rights claim was unlawful under section 6 of the Human Rights Act 1998.**

**I therefore allow the Appellant's appeal.**

**No anonymity direction is made.**



Signed

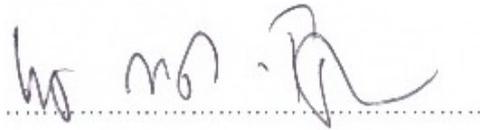
Date: 19 February 2019

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00.

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 19 February 2019

Deputy Upper Tribunal Judge Norton-Taylor