



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

Appeal Number: HU/15905/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28 January 2020**

**Decision & Reasons  
Promulgated  
On 10 March 2020**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**BIR BAHADUR PUN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss K McCarthy instructed by Everest Law Solicitors

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

**DECISION AND REASONS**

1. This is an appeal against a decision of the Respondent made on 13 April 2018 to refuse him entry clearance to the United Kingdom. The decision of the First-tier Tribunal promulgated on 26 June 2019 dismissing that appeal was set aside by the Upper Tribunal for the reasons set out in a decision promulgated on 18 November 2019, a copy of which is attached.
2. The issue in this case is relatively narrow: does there exist a family life between the appellant and sponsor such that Article 8(1) of the Human Rights Convention is engaged? The Secretary of State concedes that if

that is so, then the refusal of entry clearance would not be proportionate given the historic injustice in the treatment of Ghurkha families.

3. I heard evidence from the sponsor and oral submissions from both representatives.
4. The sponsor (the appellant's mother) gave evidence in Nepali with the assistance of a court interpreter. She adopted her witness statement. She confirmed that she sends money to her son; that he had no income from other sources; that he grows some crops but this was not enough to sustain him or his brother with whom he lived. She confirmed that the money transferred to him was for him and the brother, Hom Kumar. She said she was not planning to bring him to the United Kingdom but it was difficult for her now as she was elderly. She said that they had not come in 2009 as it had not been possible at that point.
5. The sponsor said she had not been to Nepal since 2018 but that she is illiterate and had to rely on what she had been told was in her passport. She said she had no relatives in the United Kingdom. She said that she did not know how to phone her son and that she needed help even to buy her own food. Since she did not know how benefits worked or her bank account, or was not even able to withdraw money from her account and that her sight was bad.
6. In cross-examination the sponsor said she did not know if she had been in the United Kingdom since December 2010 other than it was written in her passport. She said that she had visited Nepal between 2010 and 2017 and when she had done so she had withdrawn the pension money accrued and given it to her son. She said it was difficult for her to get by on benefit but she was able to save some money. It was difficult for her to travel to Nepal but she just was able to do it.
7. She confirmed that, as she had said in her witness statement, her husband's pension had not been enough after he retired and so they relied partially on agriculture. She confirmed that she had said in a previous hearing her son had done some farming job but this was a very small farm; it was not in the right location; that the ground was very steep. She said that she suffered a lot and wished she could go back but it was no longer the right place for her. She said that she was on her own now and that if her son come he would be able to help her and look after her. There was no re-examination. In response to my questions the sponsor said that people were able to help her with her bank account and to help her make phone calls to her son using Viber.
8. She said that she did not know if her son spoke English but thought that he would be able to get a job if he came to the United Kingdom but was not sure what type of job.
9. In submissions, Miss McCarthy relied on Rai submitting that on the facts as proven the appellant met that test; and, that AAO v ECO [2011] EWCA Civ 840 could be distinguishable as facts. She admitted that there was here a

financial dependence as well as an emotional dependence; that the family had formed a unit until the husband's death and thereafter. She submitted that the farming that had been undertaken by the appellant was subsistence farming, not just an income, it was necessary for him and his brother to live on. She submitted that Article 8(1) was engaged and, in light of the clear historical justice, it would be disproportionate to refuse entry.

10. Mr Tufan submitted that there was no longer family life in this case, properly applying the law to the facts and that, the appeal fell to be dismissed on that basis. He did, however, concede that where Article 8(1) met, then in light of the historic injustice he had nothing to say with regards to proportionality under Article 8(2).

### **The Law**

11. It is accepted that the appellant does not meet the requirements of the Immigration Rules. This case is argued solely on the basis that the refusal of entry clearance to the appellant is contrary to his rights pursuant to Article 8(1) of the Human Rights Convention. Accordingly, I must take into account Section 117B of the 2002 Act.

12. As was noted in Rai v ECO, New Delhi [2017] EWCA Civ 320, legal principles are not controversial as regards whether Article 8 is engaged. The Court of Appeal said this:-

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."

13. I have no reason to doubt the evidence of the sponsor which is not directly challenged in submissions. I accept that she is still in receipt of a widow's pension as a result of her husband's service in the Ghurkhas. I accept also that this money is handed over regularly to the appellant and his brother to support them in Nepal. Applying the principles set out above, I accept that family life would necessarily have existed between the appellant, his brother and his parents while they were under 18. I accept also given that they remained unmarried and continued to live in the same household this family life continued. After the father's death, the appellant and his brother continued to live in the same household with their mother until 2010 when the sponsor came to the United Kingdom. At that point the appellant was 44 years old. His mother was 70.
14. It is inevitable that the pattern of dependency within a parent/child relationship changes; as the child matures he or she becomes less dependent but equally as a parent ages then the parent may become dependent, emotionally and/or financially, on the by now adult child. I have no reason to doubt the account I have given of a family living in a remote, poor area where the family relied on subsistence farming to produce some of the food they ate but primarily were reliant on the widow's pension paid for military service. Viewing the evidence as a whole, including that of the sponsor and appellant, I am satisfied that certainly when the sponsor left the United Kingdom there continued to exist a family life between the appellant and the sponsor albeit that the reality is the sponsor is becoming more dependent on her adult sons.
15. Further, I have no reason to doubt the evidence that the financial dependency existed and that there was no possibility of any employment for the appellant given his lack of connections, education and lack of any skills over and above subsistence farming. There was clearly at that point financial and emotional dependence albeit that the latter was co-dependence between the appellant and sponsor. There was, I accept, committed and effective support.
16. There was a change in circumstances after that. The mother decided to leave Nepal and settle in the United Kingdom as in Rai and I accept that at that, as there, they did so because of the previous historic injustice (see Rai at [41] to [43]). I also accept that the reason they did not do so earlier was due to them being unable to do so.
17. Turning to the situation now, I accept that the sponsor is in poor health. I accept also that she is illiterate and does not speak English. It is inevitable, in the circumstances, that she is dependent on others for most of the activities of day-to-day life including claiming benefits and operating her bank account. I accept her account of being assisted to make phone calls via Viber to her son and a substantial number of transcripts has been provided covering the last year. No challenge is made to these and I am

satisfied that these indicate that there continues to be regular communication between the appellant and the sponsor.

18. I find that the sponsor is isolated in the United Kingdom as she has no family with her. She is, I accept, in a difficult position and, consistent with her culture and background wishes to have the support of her son. Given the level of contact between the two, I am satisfied on a balance of probabilities that she is now emotionally dependent on him albeit the financial support she receives is partly from the United Kingdom government and that the pension she receives now goes to the son. There is, I find, an inter-dependency, the sponsor being emotionally dependant on her son, the son being reliant on funds given by his mother. Whether that is of necessity is not clear.
19. I accept that they are no longer in the same country but that in my view does not mean there is no relationship of dependence. The sponsor is now 80 and I accept has no relatives to whom she can turn in the United Kingdom.
20. Taking all of these factors into account I am satisfied that as at the date of application and now there exists a family life between the appellant and the sponsor. Accordingly, I am satisfied that Article 8(1) is engaged.
21. I now turn to the issue of proportionality. It is not suggested that the decision was not in accordance with the law and I note that this is a case in which the sole issue is now proportionality. Mr Tufan made no submissions that, where Article 8(1) engaged, that the refusal would be proportionate. That is because of the historic injustice and accordingly, Section 117B notwithstanding, I am satisfied that for that reason that the public interest which would otherwise exist in refusing entry clearance given that the appellant does not speak English, does not meet the requirements of the Immigration Rules and would not be self-sufficient is outweighed on these particular facts.
22. For these reasons, I remake the appeal by allowing the appeal on human rights grounds.

### **Addendum**

23. It is of some concern that the appellant's solicitors in this case submitted a bundle which, although it bore an index relating to this case, consisted entirely of material relating to another case. I have not read it. Whether or not that is a "data loss" or whether there has been a breach of the duty of confidentiality is a matter for the appellant's solicitors.

### **Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the appeal by allowing the appeal on human rights grounds.

3. There is no anonymity order.

Signed

Date 10 February 2020

A handwritten signature in black ink, appearing to read 'James Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

**ANNEXE - ERROR OF LAW DECISION**



IAC-FH-LW-V1

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

Appeal Number: HU/15905/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 November 2019**

**Decision & Reasons  
Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**BIR BAHADUR PUN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Ms K McCarthy, Counsel instructed by Everest Law Solicitors

For the Respondent: Ms A Everett, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against a decision of the Entry Clearance Officer to refuse him entry clearance to the United Kingdom. The application was made on the basis that the appellant is the son of a former Gurkha whose mother had been granted indefinite leave to enter in 2010



on the basis of the prehistoric injustice by which Gurkhas were not allowed to settle in the United Kingdom.

2. The appellant's father ceased to be a Gurkha as long ago as 14 September 1968. He had been married in 1960 and the appellant's mother is now 80 years of age. The appellant's father died in 1992, and was only in 2010 that the appellant's mother was granted leave to enter.
3. The hearing proceeded on the basis, as is noted at paragraph 11, that the appellant could not meet the requirements of Appendix FM and the appeal was pursued on an Article 8 only basis. The Secretary of State was not represented at the hearing and the judge did put a number of questions himself. The judge directed himself at paragraph 20 in line with Kugathas [2003] EWCA Civ 31 but does not appear to have addressed anything more of the subsequent cases addressing the issue of family life such as Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) before going on to make findings.
4. In this case the judge found at paragraph [21]:-

"I find on the particular facts of this case, that family life has not been established. The appellant was an adult male in his forties, when the sponsor applied for settlement in the United Kingdom. He had no particular vulnerabilities or health problems that would have made him dependent upon his mother in adulthood, and as the respondent says, would have been caring for himself independently and fully fit and capable of leading an independent life and working at that point."
5. The judge then went on to consider matters in the alternative in the remainder of paragraph [21] noting that it was a choice that had been made. This would not have happened if there was in fact a relationship where bonds and ties of mutual dependencies that went over and above the normal relationship, nor would they have waited eight years for the appellant to apply if the need to be reunited was so pressing. The judge also concluded that there was no emotional or financial dependency relationship that had continued, nor did he accept that the appellant needed the emotional support of his mother, but rather the situation was the reverse.
6. The judge also then found at [23] there were inconsistencies in the evidence. He went on to conclude that Article 8(1) was not engaged and then did not consider Article 8(2).
7. The grounds are twofold: first, there is a submission that the judge failed to apply the correct test of the threshold of family life between adults; failed to consider evidence and made errors in the treatment of the mother's evidence; and second, that the judge erred in not conducting a proper proportionality exercise with respect to Article 8(2).
8. I turn first to the submissions regarding Article 8(1). Miss Everett for the Secretary of State submits that there was a proper finding that the family life had not been shown to exist prior to departure of the mother. I have considered that submission and I conclude that whilst if there had been a

proper finding to that effect then the rest of the challenge raised by the appellant would have fallen away, but the findings are insufficiently rigorous. What there is not in this case is any consideration of what the situation was in a chronological order. Whilst there are comments made about what was going on in Nepal in paragraph 23 these do not appear to have been brought into the circumstances of family life being established. It is an obvious point that in this case it is evident that family life must have existed at some point in the past. There is no submission to the contrary but the question is if and whether that had ceased to exist. The thrust of the judge's comments at [21] are that family life had not been established at the relevant time, that is the date of hearing or application. The failure to find facts is also evident at paragraph 21 where the judge says that even if the family were all still living together, but again there are no findings on this. I accept the submission that the judge has erred in a number of respects with regard to whether there was a choice, whether they would have waited eight years, and in finding that there was no relationship of emotional, financial dependency continuing.

9. There is a confusion of an emotional relationship which one would expect to exist between a mother and an adult child with one of dependency and it may be that the judge did not properly consider the law on this point. Further points made are that the judge did not take into account oral evidence in making findings with regard to the lack of financial dependency at paragraph 25, and whilst one of these factors is and of itself definitive or determinative, I conclude that viewing the decision as a whole it is not possible to sustain the findings reached by the judge with respect to Article 8(1) and the existence or not of family life.
10. Given that I have found the background is made out it follows that ground 2 is also made out as it may be necessary to remake the decision on that point.

### **Notice of Decision**

1. For these reasons I set aside the decision of the First-tier Tribunal for it to be remade.
2. Having canvassed the opinions of both representatives I consider that it is best retained in the Upper Tribunal for a further hearing which will require oral evidence from the appellant as well as from the Sponsor.
3. No anonymity direction is made.

Signed

Date: 18 November 2019



Upper Tribunal Judge Rintoul