



IAC-AH-DN-V1

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

Appeal Number: HU/18609/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 5 March 2020**

**Decision & Reasons Promulgated
On 23 April 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**MR LAK BAHADUR PURJA MAGAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jaja, Counsel instructed by Howe & Co Solicitors

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

DECISION AND REASONS

1. The appellant, a citizen of Nepal, born on 29 October 1983, appealed to the First-tier Tribunal (“FtT”) against the respondent’s decision dated 8 August 2018 refusing entry clearance for settlement as an adult dependent relative. The basis of the application was in terms of his relationship with his mother, who is the widow of a former Gurkha soldier.
2. His appeal was dismissed by a Judge of the First-tier Tribunal (“the FtJ”) after a hearing on 13 August 2019. The nub of the appeal before the FtT, and of the appeal before me, is in terms of whether the appellant has

established that he has family life with his mother such as to engage Article 8 of the ECHR.

3. The appellant's father died on 20 June 2003. His wife, the appellant's mother, achieved settlement in the UK in 2010. In 2011 two of her other children were also granted settlement and a third in 2015.

The Ftj's decision

4. The Ftj heard evidence from the appellant's mother, Mrs Hira Purja Pun, and his brother Krita Bahadur Purja Magar, as well as from a Mr Atiparsad Pun, a family friend.
5. The Ftj recorded at [36] that it was accepted on behalf of the appellant that the only route upon which he could succeed was in terms of Article 8 outside the Immigration Rules ("the Rules"), and that that depended on whether it could be shown that there was family life between the appellant and his mother and other siblings. It was accepted that unless Article 8(1) was engaged, the appeal could not succeed. The submissions on behalf of the appellant were directed towards the issue of family life.
6. After the Ftj set out in detail the evidence and arguments on behalf of the parties, he made clear, detailed, findings of fact. He found that there was evidence of funds being sent to the appellant, although he accepted the argument on behalf of the respondent that the evidence did not establish that those funds were sent on a monthly basis. At [54] the Ftj said this:

"I have been referred to a plethora of cases on the meaning of family life, probably the most recent being Jitendra Rai. There has to be effective, or committed, or meaningful dependency and that does not only mean financial, but it also means emotional. While I have no doubt at all that Mrs. Pun loves her son, and that her son loves her, I ask myself whether there is any real evidence that since she left in 2010, the appellant has shown, or she has shown any real dependency emotionally on the other."
7. In the next paragraph he referred to the appellant's age, 35 years, and said that he was getting on with his life which consists of managing the livestock and land that the family have at the family home. He said that it was clear, although there was not much evidence about them, that there are other family members in Nepal with whom he presumed the appellant converses. Nevertheless, he found that all the statements talk in generalisations and there is very little specific evidence as to how the parties conduct their daily lives. He concluded, therefore, that it was very difficult to see where the evidence is that a 35 year old needs emotional support from his mother.
8. At [56] he said that Mrs Pun made the decision in 2010 to avail herself of the right that she had, to come and settle in the UK. He went on to state that at that time she believed she could bring her two younger children, which transpired on appeal to be correct, and it must have been understood that she could not at that time bring her other children.

9. He concluded that the family themselves must have decided that their lives, such as they were, permitted that outcome without undue interference with their family lives. He said that had that not been the case, presumably even though she had the right to come here, Mrs Pun would have stayed in Nepal. He went on to state that he did not criticise the family in any way for taking up a right that they have been given “but it clearly was a choice” and that no-one compelled them to come to the United Kingdom. He found that in making that choice they must have considered the then probability that Mrs Pun’s other children would not be joining them.
10. He said that, to some extent, defines the family life as the family saw it. The adults were obviously leading to some extent their own lives even then, and that it must be much more so the case in the 10 years that had passed.
11. He referred to the family returning to Nepal where there are other family members and which is their country of origin, and where presumably they have friends and where they still have a home. He found that the fact that they return to Nepal between them pretty frequently, given the difficulty of finances, did not indicate that the sole purpose of their visit was to be with the appellant, although that may have been “a purpose”.
12. At [59] the FtJ said that he did not find it conclusive one way or the other whether money was sent every day, every week, or every month to enable the appellant to live. He was living in a village in Nepal where it would appear the villagers survive by growing their own food, having their own livestock and getting on with their lives. He accepted that “the money that is sent is almost certainly used by the appellant to supplement such income as he may have from his farming and/or helping others in the village.” He observed that there did not appear to be an entirely consistent account of the appellant’s day-to-day activities, and a consistent account might have been expected if he was truly dependent on his mother.
13. In relation to previous Tribunal decisions relating to the appellant’s brothers, the FtJ referred to submissions on behalf of the respondent to the effect that certain aspects of them prove that the appellant was not present (in the household in Nepal) in 2010. The submissions for the appellant were that there clearly was family life within the family.
14. The FtJ concluded that the earliest of the Tribunal’s decisions in 2011 was not determinative of the position in the household in 2011 because it was written with regard to the two appellants who were then appealing and whose appeals were allowed. He pointed out that he did not have the evidence that was before the judge on that occasion, and the appellant with which the instant appeal was concerned would not necessarily have been a relevant party, or part of, the evidence in that case which related to the two younger children. He went on to accept that even if this

appellant went away for training in Nepal, he had not necessarily left the household.

15. At [62] he concluded that the appellant is living in the family home in Nepal, and is getting on with his life. He had lived without his mother for 10 years and although she may well wish that he could join her in the United Kingdom, which is her wish too, that of itself does not make family life. He accepted the argument on behalf of the appellant, “to an extent”, to the effect that family life does not necessarily stop if one party leaves the country. However, he said that there must come a point where the two parties involved are living in separate countries, and have done so for the best part of nine years, such as to mean there would need to be some very cogent evidence of “real and committed dependency” other than the appellant merely living in the family home with some money being sent to him from time to time.
16. He noted that the family speak to each other, but that is what families do in most cases. When dealing with adults, however, there needed to be more than was put before him in this appeal to establish family life. He said that it was more than simply an exercise of ticking off boxes and saying that there was financial dependence, home dependence and phone calls such as to mean that there was family life. The FtJ said that he had got no evidence at all of the content of any family life, and had no evidence of what the family do together when they are in Nepal “if indeed they do anything”.
17. He thus concluded that Article 8(1) was not engaged and that it was not necessary, therefore, for him to consider the issue of proportionality.
18. At [65] he referred to the argument advanced on behalf of the appellant to the effect that had it not been for the constant changes in the Rules, and if the Rules as they now stand had existed at the time the appellant’s mother first applied, all the appellants would undoubtedly have joined her. However, he concluded that the fact that the decisions were made when the law was such that the family were not going to be able to join Mrs Pun, helped to decide whether there was the sort of dependency that is required. He found that “in its strange way” that helped define the fact that the decision to leave, and leave the adults, was a good indication that there was not the sort of dependency required to engage Article 8.

The grounds and submissions

19. The grounds of appeal in relation to the FtJ’s decision, in summary, argue that the FtJ misdirected himself as to the law in relation to family life and applied the wrong test. In that context the grounds quote variously from the FtJ’s decision.
20. The grounds also rely on *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 at [17] on the meaning of family life to the effect that there has to be “real” or “committed” or “effective” support or dependence. It

is argued that the FtJ applied a different test, for example at [54] stating that there has to be “effective, or committed, or meaningful dependency” and stating that there needs to be dependency which is effective or committed as well as being financial and emotional. Similarly, at [54] the FtJ wrongly asked the question of whether the appellant has shown “any real dependency emotionally”. The grounds cite a further example at [55] where the FtJ stated that it was very difficult to see where the evidence was that a 35 year old “needs emotional support from his mother”. Again, it is argued that that is an incorrect test.

21. The other main element of the grounds is in terms of the FtJ focusing on, or emphasising, the family’s, or more particularly the appellant’s mother’s, “choice” to leave Nepal and settle in the UK, leaving other children, including the appellant, behind. It is argued that this is contrary to what was said at [38] and [39] of *Rai*.
22. In relation to the appeal of the appellant’s brother in 2016, it is argued that whereas the FtJ dealt with the 2011 appeal of another brother, he failed to take into account the 2016 appeal of the other brother, Bhesh, who was only 18 months younger than the appellant in this appeal and whose circumstances were identical to his. He came to the UK about a year before this appellant’s application. His appeal was allowed. Given that his circumstances were, “identical” or “virtually identical” to that of his brother, it is argued that had the FtJ considered this evidence he would have found that there was family life between the appellant and his mother.
23. In submissions, Mr Tufan conceded that if Article 8 was engaged the appeal would need to be resolved in favour of the appellant in the light of the authorities. However, it was submitted that the FtJ gave sufficient reasons for concluding that Article 8 was not engaged. He considered the lack of evidence in support of the relationship in terms of family life.
24. It was further submitted that the facts of this appeal were similar to those in *Gurung & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 8 at [48] and [50]. In the circumstances, it was open to the FtJ to conclude that Article 8 was not engaged.
25. Nevertheless, Mr Tufan did accept that it may be that the decision in *Gurung* is at odds with the guidance given in *Rai*.
26. In her submissions, Ms Jaja relied on the grounds. She submitted that in addition to the misdirection and misapplication of the correct test in terms of an assessment of family life, at [65] the FtJ compounded the errors by finding that when the decisions were made in circumstances when the law was such that the family were not going to be able to join Mrs Pun, that helped him to decide whether there was family life.
27. Ms Jaja referred, amongst other things, to the facts which supported the contention that there was family life. Thus, the family were all living

together before Mrs Pun left Nepal. Three of the siblings have now been accepted as having had family life with her. One of the appellant's brothers is only 18 months younger, and his appeal was allowed in 2016. This appellant is still living in the family home and had not previously left the household.

28. It was submitted that accommodation was a pointer towards family life. He has no employment except farming. There is financial support which the Ftj found at [59] supplemented the farming income.
29. Although the Ftj said at [59] that there did not appear to be an entirely consistent account about the appellant's day-to-day activities, it was not clear to what this was a reference.
30. Other pointers to the existence of family life are the regular visits by the appellant's mother to Nepal in 2012, 2015, 2016, 2017 and 2018 as recorded at [28] of the Ftj's decision, as well as the evidence of phone contact. Similarly, the appellant is unmarried, as in the case of *Rai*, and does not have an independent family life.
31. In relation to the decision in *Gurung* relied on by the respondent, that was a case which was decided on its own facts. There it was found that there was a lack of evidence of family life between the appellants and their father who was their sponsor. That is not the only basis upon which the appeal of this appellant was dismissed.

Assessment and conclusions

32. As already identified, the issue in the appeal before the Ftj was whether there was family life between the appellant and his mother, in particular. In *Rai* the Court of Appeal set out the legal principles relevant to the assessment of whether there is family life. At [17] - [20] the court said the following:

"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.JJ. 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."

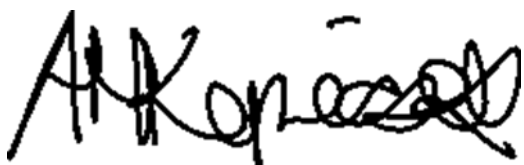
33. At [54] the FtJ expressly referred to the decision in *Rai* but unfortunately appears to have adopted a test other than that which appears in *Rai* at [17] and onwards. I agree with what is said in the grounds in terms of the FtJ having applied an elevated test to the question that needed to be determined. What has to be real, committed or effective, is *support* and not *dependency*, as explained in that decision.
34. Similarly, the FtJ adopted an elevated test at [54] when stating that there needed to be financial and emotional dependency. That again, elevates the test beyond that described in *Rai*.
35. Again, where, at [63] the FtJ said that there needed to be some very cogent evidence of "real and committed dependency" this also represents a misapplication or misstatement of the correct legal test as set out in *Rai*.
36. In addition, I consider that there is force in the grounds in terms of what the FtJ said at [56], [57] and [65] on the issue of "choice". This was the same error as was identified in *Rai* from [38]. There, the Court of Appeal said this:
 38. Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach.
 39. The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "... not compulsory but ... voluntarily undertaken ..." (paragraph 20), "... having made the choice to come to the [United Kingdom]" (paragraph 21), "... the willingness of the parents to leave ..." (paragraph 23), and "... their voluntary leaving of Nepal and leaving the Appellant ..." (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case,

which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”

37. In the light of the matters identified above, I am satisfied that the FtJ erred in law such as to require his decision to be set aside. It was agreed by the parties that in those circumstances I was able to re-make the decision on the basis of the evidence before the FtT.
38. Above, I have summarised the evidence that was before the FtJ. The evidence is that the family were all living together before Mrs Pun left Nepal. Three of the siblings have now been accepted as having had family life with her. One of the appellant’s brothers is only 18 months younger than him, and his appeal was allowed in 2016. This appellant is still living in the family home and had not previously left the family household.
39. He is provided with financial support which supplements his farming income. The fact that there are, and have been, regular visits by the appellant’s mother to Nepal in 2012, 2015, 2016, 2017 and 2018 is also a matter to be taken into account. I accept that those visits have been to see the appellant. There is evidence of phone contact. Similarly, the appellant is unmarried, as in the case of *Rai*, and does not have an independent family life.
40. It is the combination of those facts which establishes on a balance of probabilities that there is in this case real, committed, and effective support such that there exists family life between the appellant and his mother.
41. As indicated at [23] above, it was conceded on behalf of the respondent that in those circumstances the proportionality balance under Article 8 would fall to be decided in favour of the appellant when assessing the public interest in the light of the ‘historic injustice’ principle that applies to Gurkha cases. Accordingly, the appeal is allowed on Article 8 grounds.

Decision

42. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and re-made, allowing the appeal on Article 8 grounds.



Upper Tribunal Judge Kopieczek

Date: 08/04/2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email