



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

**Appeal Number: HU/21580/2018**

**THE IMMIGRATION ACTS**

**Heard at Field House**  
**On 6 March 2020**

**Decision & Reasons Promulgated**  
**On 18 March 2020**

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**UTTAM GURUNG**

**(ANONYMITY ORDER NOT MADE)**

**Appellant**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr E. Wilford of counsel, instructed by Everest Law Solicitors

For the Respondent: Mr S. Walker, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Appellant is a national of Nepal. His father had served in the Brigade of Gurkhas in the British Army and had died on 15 March 2005. His mother had been granted indefinite leave

as the wife of an ex-Gurkha soldier on 27 August 2014 and had entered the United Kingdom on 17 October 2014.

2. On 17 June 2018 the Appellant applied for entry clearance as her adult son. His application was refused on 10 September 2018.
3. The Appellant appealed against this decision and First-tier Tribunal Judge Monson dismissed his appeal in a decision promulgated on 22 July 2019. The Appellant also appealed against this decision and on 18 November 2019 First-tier Tribunal Judge O'Brien refused to grant him permission to appeal to the Upper Tribunal. However, Upper Tribunal Judge Stephen Smith did grant him permission to appeal on 13 January 2020.

#### **ERROR OF LAW HEARING**

4. Counsel for the Appellant made detailed oral submissions based on the first two grounds of appeal. The Home Office Presenting Officer then replied and accepted that First-tier Tribunal Judge Monson had not made clear findings about the financial support provided to the Appellant via his uncle and had introduced an additional test in relation to emotional dependency which was not to be found in the relevant case law.

#### **ERROR OF LAW DECISION**

5. The Respondent had accepted the Appellant's nationality and that he was related to his parents as claimed. The Appellant did not assert that he was entitled to entry clearance as his mother's adult dependent under paragraph EC-DR.1.1. of Appendix FM to the Immigration Rules but did rely on Annexe K of Chapter 15 of the Immigration Directorate Instructions. However, to fall within this policy, the Appellant would have had to show that he was between the ages of 18 and 30 at the date of his application, which he could not. He would also have to show that his father "as the former Gurkha parent has been or is in the process of being granted settlement under the 2009 discretionary arrangements". He was not able to do this as his father had died without making any application for settlement.
6. Therefore, the appeal fell to be determined outside the Immigration Rules under Article 8 of the European Convention on Human Rights.
7. The first questions to be determined for the purpose of *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 was whether refusing the Appellant entry clearance would interfere with his exercise of his right to enjoy a family life

with his mother and whether the consequences of this interference would be of such gravity as to potentially engage Article 8.

8. At paragraph 19 of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 Sedley LJ noted that:

“... Neither blood ties nor the concern and affection that ordinarily go with them, are, by themselves put together in my judgment, enough to constitute family life. Most of us have close relatives of whom we are extremely fond and whom we visit, or who visit us from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8”.

9. At paragraph 25 Arden LJ added “because there is no presumption of family life, in my judgment 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...”.
10. At paragraph 24 she also found that “the court has to scrutinise the relevant factors. Such 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”.
11. In his decision, First-tier Tribunal Judge Monson failed to take into account the fact that the Appellant was unmarried and had not formed a family unit of his own. He also failed to take into account that the Appellant continued to live in the family home in Nepal.
12. In paragraph 41 of his decision he also stressed the need for the Appellant to show that he was emotionally dependent upon his mother and she on him. However, I note that in paragraph 17 of *Kugathas* Sedley LJ found:

“Mr Gill says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. But 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 in my view the irreducible minimum of what family life implies...”.

13. In paragraph 40 of his decision First-tier Tribunal Judge Monson also found that the Appellant had failed to establish that he was emotionally dependent upon his mother at the time that she came to the United Kingdom in 2014. This finding ignored the fact that they had

lived and worked together on a continuous basis up until that point and that the Brief note on Gurkha Family noted that in the Nepali family system members are “deeply dependent on one another for survival and opportunity” and that “even for Nepalese who have left Nepal the family tie remains strong”.

14. In paragraph 41 of his decision, First-tier Tribunal Judge Monson also found that “the fact that the sponsor chose to leave all her children and go to the UK to live there on her own in 2014 undermines the proposition that she was emotionally dependent on her children then”. However, when reaching this finding, he failed to take into account that it was her oral evidence that “she was told that she would have enough money in the UK so that she would be able to support her sons in Nepal”.
15. He also failed to take into account that in *Rai v Entry Clearance Officer* [2017] EWCA Civ 320, Lindblom LJ found at paragraph 38 that the Upper Tribunal had erred in law when concentrating on the decision by the parents of the appellant in that case to leave an adult child behind in Nepal in order to settle in the United Kingdom. He went on to find in paragraph 39 that the “real issue 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”.
16. As a consequence, I find that there were material errors of law in First-tier Tribunal Judge Monson’s decision.

## DECISION

- (1) The Appellant’s appeal is allowed.
- (2) First-tier Tribunal Judge Monson’s decision is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Monson or O’Brien.

*Nadine Finch*

Signed  
Upper Tribunal Judge Finch

Date 6 March 2020