



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

Appeal Number: HU/14320/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 December 2020**

**Decision & Reasons Promulgated  
On 19 January 2021**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE  
DEPUTY UPPER TRIBUNAL JUDGE STOUT**

**Between**

**INDRA LAMA**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

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

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal, born on 11 August 1979. He applied for entry clearance on 10 March 2018, at the age of 38 years, to settle in the UK as the adult dependant relative of his father, an ex-Gurkha soldier, who was issued with a settlement visa and came to the UK in 2009 followed by his wife and son, the appellant's mother and brother, in 2011.

2. The respondent refused the appellant's application for entry clearance on 5 June 2018 on the basis that he did not meet the requirements of the immigration rules, he did not meet the requirements of the Home Office policy

in Annex K, IDI Chapter 15, section 2A 13.2 and it was not accepted that Article 8 was engaged on family or private life grounds. The respondent did not accept that the appellant was wholly financially dependent upon the sponsor and noted, furthermore, that whilst he had made an application in 2009 to join his parents in the UK, that application was refused because he did not meet the requirements of the immigration rules and in addition it was found that he had submitted false documents in support of his application. The respondent considered that the effect of the ‘historic injustice’ in relation to ex-Gurkhas was not such that he had been prevented from leading a normal life and concluded that the decision to refuse entry clearance was not disproportionate.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge O’Keefe on 13 May 2019 and dismissed in a decision promulgated on 4 June 2019. The judge heard from the appellant’s father and brother and noted that the only issue before her was Article 8, it having been accepted that the appellant could not succeed under the immigration rules or the respondent’s policy in Annex K. The judge accepted the sponsor’s evidence that the appellant had been left on his own in Nepal and had not married, and that he had lived in the same house as at least one of his parents until 2011. She accepted that the appellant and his parents enjoyed family life together before they were granted settlement and moved to the UK. However, she did not accept that family life still existed. The judge accepted that the sponsor sent the appellant 22,000 rupees a month but did not accept that he was wholly financially dependent upon his parents because his bank statements showed him to be in credit despite there being a gap of three months in those payments. The judge did not find it credible that the appellant had never found any work in Nepal and, whilst she accepted that the sponsor had returned to Nepal to visit the appellant and that they spoke regularly on Viber, she did not accept that there was real, effective and committed support and did not accept that there was anything above the usual emotional ties between adult children and their parents. She accordingly found that family life did not currently exist and she dismissed the appeal.

4. The appellant sought permission to appeal to the Upper Tribunal on the basis of two different sets of grounds. Permission was granted and the matter then came before Upper Tribunal Judge Plimmer on 7 January 2020 to consider the error of law issue. UTJ Plimmer identified six grounds of appeal in total, namely:

- (1) The FTT had misdirected itself in law in requiring the appellant to be “wholly” financially dependent on his parents;
- (2) The FTT had erred in law in omitting to consider the relevant factor of historic injustice from an assessment of whether family life existed for the purposes of Article 8(1);
- (3) The FTT had erred in law in effectively requiring the support to be real *and* committed *and* effective in contravention of the guidance in Kugathas v SSHD [2003] EWCA Civ 31 and subsequent authorities which demanded simply that the support be real *or* committed *or* effective

- (4) In determining whether or not family life constituted family life for the purposes of Article 8(1), the FTT left important considerations out of account;
- (5) The FTT failed to consider all the relevant factors cumulatively before deciding that family life did not continue to exist as at the date of the hearing; and
- (6) The FTT drew adverse inferences from the father's credibility without giving or attaching any weight to his character as attested by his military service.

5. UTJ Plimmer found that grounds 1 and 3 were not made out, but she had concerns about grounds 2, 4 and 5, owing to the judge's failure to take into account and consider, alongside all the other factors, that the appellant was part of a joint application with his family back in 2009, which she considered to be linked to the historic injustice arguments. The fact that the appellant might have been successful in 2009 if Annex K had applied at the time was material when taken together with a number of other factors pointing in favour of family life, such as at least partial financial dependence, regular visits back to Nepal, regular speaking contact between the family members, the appellant not having formed an independent family unit of his own and having continued to live in the family home. UTJ Plimmer also found merit in ground 6, considering that the judge had failed to provide adequate reasons for rejecting parts of the sponsor's evidence and, in addition, that the sponsor had not been given an opportunity to explain how the appellant maintained a credit in his bank account despite there being a gap of payments for a few months.

6. In the circumstances UTJ Plimmer set aside the judge's decision with no findings preserved, save that there was family life pursuant to Article 8(1) in 2009 and that the appellant's parents had provided him with some financial support and had visited him since then.

7. The matter was listed for hearing but for various reasons was adjourned on two occasions, with directions made for the respondent to produce the refusal decision in relation to the appellant's entry clearance application made in 2009, for the sponsor to produce a copy of the entries in his passport and for the appellant to produce a witness statement and evidence addressing:

- (a) the assertion that he had never been able to obtain employment or self-employment in Nepal;
- (b) the assertion that that was partly, or solely, due to the fact that the sponsor served in the British Army;
- (c) the assertion that he continued to live in the rented accommodation which he used to share with the sponsor and that the rent was paid for by remittances from the sponsor;
- (d) the need for objective evidence in the form of entries in the sponsor's passport to confirm his visits to Nepal;
- (e) that fact that it was now asserted by the respondent that she was not satisfied that the sponsor was visiting the appellant in Nepal; and

(f) the weight placed by the respondent on the submission by the appellant of false educational certificates in 2009.

8. In response to the directions, the appellant served a supplementary bundle with a further statement from the sponsor and with his own witness statement, together with additional bank statements. The respondent, having received the supplementary bundle, maintained her position that family life had not been established for the purposes of Article 8.

9. The matter then came before us for a resumed hearing, to re-make the decision on the basis of the preserved findings. Ms Cunha produced the refusal decision, dated 2 July 2010, in relation to the appellant's application for entry clearance made in 2009.

10. The sponsor, the appellant's father, gave oral evidence before us through an interpreter. He confirmed that his two statements were true and he adopted them as his evidence. He produced his passports to show the stamps for his visits to Nepal, between 2010 and February 2020, as well as his certificate of discharge from the Army on 17 June 1982 which confirmed his exemplary conduct in service. The sponsor stated that whenever he went to Nepal he stayed with the appellant in the rented house. It was not the previously rented three-bedroom house where the family had lived together, but a smaller one-bedroom house. Prior to leaving Nepal he had lived with his wife and the appellant and his other son Binod, until Binod left to study in the UK. The sponsor said that money was transferred every month from his bank account to the appellant's account, but in addition he would send money through friends when they travelled to Nepal and would also give him money when he was in Nepal himself. His son spent the money on learning English and on his rent. If he was able to come to the UK, he would find a job and earn money.

11. When cross-examined by Ms Cunha, the sponsor said that he had a third son who had gone to India many years ago, and with whom he had no contact. His son had had a problem with his mother, at a time when he, the sponsor, was working abroad after his discharge from the army in 1982, and there had been no contact since that time. After he and his wife left Nepal, he rented the one-bedroom house instead of the three-bedroom, for the appellant, and that was where they stayed when they went to visit. The sponsor said that he opened the appellant's Standard Chartered bank account in 2015, so that he could transfer money to him from his own account which he had opened in about 1999 or 2000. His army pension went into his own Standard Chartered Bank account and the monthly transfers of 22,000 rupees were then made from there into the appellant's account. The sponsor said that the appellant had made his entry clearance application in 2009 together with his mother. His wife, the appellant's mother, was issued with the visa but his son was not. He had no idea that his son had submitted false educational certificates with his application and would have put a stop to it if he had known. His two daughters (his biological daughter and his brother's daughter) did not apply to come to the UK because they were older and were married. At

the time he came to the UK they lived in the three-bedroom house, but they had since moved out and had their own families. The sponsor confirmed that he opened the bank account for the appellant in 2015 and accepted that there was no evidence of the account prior to November 2017. The sponsor said that the appellant could not find work in Nepal.

12. We then enquired why the appellant had not made another entry clearance application until March 2018 and the sponsor's response was that he had not applied for him as a punishment, although he had been supporting him financially. He could not explain why the application was made when it was. The rent for the house, 11,500 rupees a month, was paid by the appellant from the money he sent him. We enquired why there was no evidence of the rent payments, particularly as the lack of such evidence had been raised by the previous Tribunal as a matter of concern, and the sponsor replied that it was difficult as he would have to contact the landlord. We enquired whether the sponsor was aware of the extra 30,000 rupees which had been paid to the consultancy for the appellant's application in 2009 with the false educational certificates, as mentioned in the appellant's statement, and the sponsor said that he was not aware of that as the appellant's mother and brother had paid for that. His brother had sent the money from the UK. We asked the sponsor why his son's bank account appeared to have had no balance on 1 November 2017 and he agreed that the account was opened at that time. Prior to that, money was sent through neighbours and when he went to visit him in Nepal. To Ms Cunha's further questions, the sponsor said that he had sent money to his son prior to November 2017 through friends, but he had no evidence of that. The sponsor confirmed that he sent money through Hundi, he believed on one occasion, but he did not have the receipt. He sent money with his uncle as well.

13. Both parties then made submissions before us.

14. Ms Cunha asked us to give weight to the fact that the refusal decision of 2009, which referred to the use of false documents, was not appealed, and that there was an inconsistency as to who, and which of his children, were living in the house at the time the sponsor left Nepal. The sponsor's evidence about the money given to the appellant was inconsistent, as to the date he opened a bank account for his son and as to the method of sending money, by Hundi, neighbours and friends. It was not accepted that the sponsor was supporting the appellant as claimed. It was not plausible that the appellant, at the age of 38 years, had never had a job. The whole claim was lacking in credibility. There was, in addition, no evidence of emotional ties going beyond the normal emotional ties between adult children and their parents. It had therefore not been shown that family life was established for the purposes of Article 8(1), but even if had been, the deception exercised by the appellant in his previous application outweighed the historic injustice applying to ex-Gurkhas.

15. Ms Jaja submitted that the matter of the false educational documents submitted with the 2009 application was a peripheral

matter and did not impact on the relevant questions for settlement or upon the historic injustice question. The sponsor had not been inconsistent about the appellant having lived in the same household as his parents in 2009, as that was accepted in the refusal decision of 2 July 2010 and was in fact the main reason why the application was refused at that time. Whether or not the sponsor gave differing evidence about the date the appellant's bank account was opened, this was not a memory test, particularly bearing in mind his age, and the nub of the case was simply whether there was family life. The real heart of the matter of emotional support was the evidence of regular visits to Nepal and the regular contact by telephone calls. It was a preserved finding that there was family life in 2009. The relevant question, therefore, further to the case of Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320, was whether it had continued since then. Ms Jaja relied on the two tests set out in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, namely that of Lady Justice Arden, "something more exists than normal emotional ties" and dependency, and that of Lord Justice Sedley, "real" or "committed" or "effective"... "support". Ms Jaja submitted that subsequent authorities had found that Kugathas was being interpreted too restrictively. The bank transfers were evidence of financial support, even if taken from 1 November 2017, and the consistent evidence was that the appellant was 38 years of age, unemployed and entirely dependent upon his father. The appellant therefore satisfied the relevant tests for dependency. The regular trips to Nepal, the fact that the sponsor applied for his wife and son to join him when he came to the UK, and the bank transfers were illustrations of committed support. The sponsor gave a proper explanation for having waited so long to re-apply for his son to join him, namely that he was punishing him for having submitted false documents with his first application. All of these matters, together with the fact that the appellant remained living in the family home, showed that family life was made out for the purposes of Article 8(1). The 'historic injustice', of the family being denied the opportunity to settle in the UK in 1982 when the sponsor was discharged from the army, when the appellant was three years of age, was not outweighed by any criminality. The decision was disproportionate and the appeal should be allowed.

## **Consideration and findings**

16. The starting point in the re-making of the decision in this case is the preserved finding of the First-tier Tribunal that there was family life pursuant to Article 8(1) in 2009. At that time, and prior to the sponsor coming to the UK, other than the sponsor's periods of employment overseas, the family lived together as one household in their three-bedroom rented house in Nepal. That is not disputed, although there has been some inconsistency in the evidence as to who else lived in the house in terms of siblings. It is also of significance, when considering the matter of 'historic injustice', that had the current rules and policy been in force at the relevant time, the appellant would have been able to settle in the UK with his father and the family as a unit, when his father was honourably discharged from the army in 1982, at a time when he was three years of age. By the time his father, the sponsor, was able to apply for, and was granted, settlement, he was no longer a child but was a man of 30

years of age and therefore could not qualify within the relevant rules or policy. Thus, the grounds for a successful Article 8 claim were laid, in accordance with the recent jurisprudence, subject to two matters, namely whether there still existed an extant family life which would engage Article 8(1) and, if there was, whether the submission of false educational certificates with the application made in 2009 was such as to outweigh the historic injustice in the proportionality assessment.

17. The focus of this case has been on the first question, whether family life was maintained, as the appeal was previously dismissed on the basis that it was not. As found in the case of Rai, the question of whether family life was still enjoyed is “*highly fact-sensitive*”([19]) and the real issue is “*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*” ([39]), as reiterated at [42], “***whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision.***” In the case of Rai, it was found that the Upper Tribunal had not properly addressed that question. That is the question we have to consider in this appeal.

18. Turning to the facts of this case, we are entirely satisfied with the account of the sponsor's regular visits to Nepal, having seen stamps in his passport confirming his annual (and on one or two occasions, biannual) visits to Nepal and we accept that the sponsor was staying with the appellant for the majority of time during those visits. We also accept that the appellant maintains regular contact with his parents through Viber. We accept that those are evidence of a continuing emotional connection between adult family members, but they are not in and of themselves evidence of emotional connection going beyond that. It is commonplace for adult family members who are able to do so to remain in regular contact and to visit each other. We also accept that there has been some financial support from the sponsor and note that such a finding has been preserved from the previous decision of the First-tier Tribunal. However, for the reasons we set out below, we do not accept that those matters are in themselves, and without more, sufficient to meet the relevant tests for protected family life under Article 8(1), as set out in Kugathas and in the subsequent cases including Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160, Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8 and Rai. We do not consider that they demonstrate, in this particular case, anything more than the usual ties between adult children and their parents.

19. When considering the evidence required to take the appellant's circumstances beyond those normal ties, we find there to be a number of concerns which lead us to conclude that we simply do not have a proper and reliable account of the appellant's circumstances in Nepal. Whilst we have every respect for the sponsor, whom we note was honourably discharged from

the army having demonstrated exemplary conduct during his service, we have some difficulty accepting his evidence before us as sufficient, without more, as establishing those circumstances, given the inconsistencies which arose in his account of how he had been supporting his son as well as other aspects of his evidence.

20. We accept, from the documentary evidence before us, namely the bank statements for the appellant and the sponsor, that the sponsor has been transferring, and continues to transfer, a sum of money to the appellant every month from his Standard Chartered bank account, of 22,000 rupees and increasing to 30,000 rupees in September 2019. However, the first of such transactions shown in the bank statements before us (the appellant's Standard Chartered account at page 14 of the initial bundle) is on 30 November 2017 and, as we pointed out at the hearing, the account does not appear to have had any funds in it prior to an unidentified deposit made on 29 November 2017. The sponsor agreed that he had started transferring funds through bank transfers at that time, although his evidence was previously that he had opened the account and started transferring funds in 2015. His evidence as to how he transferred funds to his son prior to opening the bank account was quite different as between his witness statement and what he told us at different points in the hearing. There was simply no consistent account of how he was supporting him prior to November 2017. The sponsor's statement of 10 December 2020, at [7], referred to the medium of transfers used in the past being through Hundi and that this was the best way of making transfers, yet his evidence before us was that he used Hundi only once. He also referred to friends, neighbours and an uncle taking money to the appellant, but his account varied and he accepted that he had no evidence to support his claim. As such, we were left with an inconsistent and unreliable account of how the appellant was supported financially in the years after his parents left Nepal and prior to November 2017 and we cannot therefore be satisfied that he has been reliant upon his father for his support.

21. That period of time is also of some concern because the sponsor could not offer a satisfactory reason as to why the appellant did not attempt to join him in the UK again until March 2018, some eight years after his previous unsuccessful application. Had there been an enduring family life and a strength of ties to the extent claimed we consider that there would be some reasonable explanation for the delay, particularly considering the introduction of the policies and the developing caselaw which would have enabled the appellant to make a viable application at a much earlier stage. The sponsor's only explanation was that he was punishing the appellant for having submitted false documents in his first application, but eight years is a very long time to wait if there is a genuine subsisting family life, and he could not explain why it was that he then agreed to support an application at the time it was made. In short, we do not accept his explanation for the delay in making a second application as a credible one. Both the delay, and the lack of an adequate explanation for it, tell against the subsistence of family life during this period. It is significant that it was during that period that the evidence of how the appellant was supported financially is deficient, as we have discussed above. The fact that



the evidence of financial support commences only a few months prior to the application being made tends to suggest that it was put in place with the application in mind.

22. Added to that is the fact that there still remains no evidence, other than the sponsor's oral evidence, as to how the rent on the appellant's accommodation is paid, despite the concerns in the First-tier Tribunal and the directions made in that respect. Further, there remains no adequate explanation as to why the appellant has been unable to find any employment in the six to eight years since his parents left Nepal, again a matter upon which directions were made further to the observations of the previous First-tier Tribunal but to which no proper response has been provided.

23. In addition, we note the inconsistent evidence about what happened in the application made in 2009, in which false documents were submitted. The evidence in the appellant's statement, at [2], was that his parents had paid all the fees for the application and although in his statement he made clear that his father had not known about the false documents, he did not say that the additional 30,000 rupees for those documents had come from anyone other than the sponsor. However, when we asked the sponsor why he had not questioned the appellant about the additional 30,000 rupees that had to be paid to the consultancy in relation to the false educational certificates, he said that he had no idea about that as the appellant's mother and brother had paid the fee, which he then changed to only the appellant's brother. We note that the appellant's brother's statement gives no indication that that was the case.

24. In the light of all these concerns, we are unable to conclude that we have a reliable account of the appellant's circumstances in Nepal from the time his parents left and in the intervening years up to the current time. The evidence suggesting that he has been consistently financially supported by his father is unreliable and there is no evidence of emotional support over and above the normal emotional ties between adult family members. We give due weight to the fact that the family was unable, due to the historic injustice, to settle in the UK together and that had the sponsor been able to settle here after leaving the army he would have brought the appellant with him as part of the family unit. However, that time has passed and the appellant is now a man of 41 years of age who has lived apart from his parents for over nine years and we cannot accept, on the evidence before us, taking all matters into account both in the appellant's favour and against him, and even if he has remained unmarried, that he remains a part of the family unit in accordance with the relevant tests such that there is an extant protected family life for the purposes of Article 8(1). As such we conclude that Article 8 is not engaged and the question of proportionality under Article 8(2) does not, therefore, arise. We do not consider the respondent's decision to refuse entry clearance to be disproportionate.

## **DECISION**

25. The making of the decision of the First-tier Tribunal involved an error on a point of law and has been set aside. We re-make the decision by again dismissing the appeal.

Signed S Kebede

Upper Tribunal Judge Kebede  
2020

Dated: 21 December