



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/02421/2016

**THE IMMIGRATION ACTS**

Heard at North Shields  
On 30<sup>th</sup> January 2018

Decision & Reasons Promulgated  
On 6<sup>th</sup> April 2018

**Before**

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

**Between**

SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Appellant**

And

MR DALCHAN PUN  
(NO ANONYMITY DIRECTION MADE)

**Respondent**

**Representation:**

For the Appellant: Mrs. Cleghorn, Counsel, instructed by N.C.Brothers and Co,  
Solicitors.

For the respondent: Ms. Petersen, Home Office Presenting Officer.

**DECISION AND REASONS**

**Introduction**

1. Although the Secretary of State is the appellant in these proceedings for convenience I will continue to refer to the parties hereinafter as they were in the First-tier Tribunal.

2. The appellant is a national of Nepal born on the 18<sup>th</sup> June 1988. He applied for settlement as a dependent of his father, Mr Nariman Pun, a former Gurkha. His application for entry clearance was refused on 12 January 2016. His parents came to the United Kingdom on 10 September 2011. The entry clearance officer was not satisfied he was dependent upon them. No other features were identified justifying leave on a discretionary basis.
3. His appeal was heard in Birmingham on 3 August 2017 before Judge Watson of the First-tier Tribunal. In the decision promulgated on 9 August 2017 the appeal was allowed under article 8. It was common case that the appellant did not meet the immigration rules. The judge concluded that family life existed, with the appellant being financially and emotionally dependent upon his parents. Following from this, the judge concluded the decision was disproportionate.

### The Upper Tribunal

4. The respondent sought permission to appeal to the Upper Tribunal on the basis that the judge had not given adequate reasons for finding a dependency. Reference is made to paragraph 35 of AAO -v- Entry Clearance Officer [2011] EWCA Civ 840 where it was said that for family life to exist within the meaning of article 8 in the case of adults it was necessary to show a dependency which went beyond the normal emotional ties. The grounds also argued that the decision did not take into account the public interest in immigration control. Reference was made to section 117 B and the absence of evidence that the appellant could integrate into life in the United Kingdom, particularly as no findings had been made on his ability to speak English. It was also argued that the judge misdirected themselves on the historic injustice argument and made assumptions about what might have happened.
5. Permission was granted on the basis it was arguable that inadequate reasons had been given for finding family life existed and that the judge had failed to balance the public interest in immigration control against the appellant's interests.
6. Ms. Petersen at hearing relied upon the grounds upon which permission was granted. She submitted the judge was required to take into account the appellant's policy in considering the appeal. Mrs. Cleghorn in response argued that the judge had indicated an awareness of the policy by acknowledging that it could not be met. She submitted that the judge had applied the correct test and followed the guidance given in Rai -v- ECO [2017] EWCA Civ 320. She submitted the respondent should not rely upon section 117 B in a Gurkha case in light of what was said by the Court of Appeal in Rai -v- ECO at para 56 .

7. Both representatives were in agreement that if I found a material error of law the matter should be remitted for de novo hearing in the First-tier Tribunal

### Consideration

8. In Rai -v- ECO [2017] EWCA Civ 320 the Court of Appeal considered the meaning of family life between adults in the context of article 8. In that case as is the position here, the appellant did not meet the terms of the rules. At paragraph 17 Lord Justice Lindblom referred to Lord Justice Arden at paragraph 24 of Kugathas -v- SSHD [2003] EWCA Civ31 and the need to identify the near relatives; the nature of the links between them; the age of the appellant and where and with whom he has resided and the contact maintained since. She acknowledged at paragraph 25 that family life is not established between an adult child and parent or siblings unless something more exists than normal emotional ties. In Ghising( family life-adults - Gurkha policy the Upper Tribunal accepted that Kugathas had been interpreted too restrictively and that family life could be found without evidence of exceptional dependency.
9. The judge's decision sets out the background. The appellant's parents came to the United Kingdom in order to settle on 10 September 2011. At that stage the appellant was 23. He was single. The appellant has two younger siblings, a brother and sisters, who were under 18. They came with their parents to the United Kingdom leaving the appellant behind. Rai -v- ECO at paragraphs 38 and 42 emphasise that the fact a sponsor chose to leave is a matter of financial reality and does not detract from the existence of family life. The situation at that time and up to the present has to be considered. He lives alone in rented accommodation. The judge accepted that the appellant and his parents and younger siblings formed a family unit until the separation. The appellant has three older siblings; a brother and two sisters who remain in Nepal, are married and live away from the family home.
10. The appellant's father visited him in 2012, 2014 and 2016. The judge accepted that the appellant was financially dependent upon his sponsor and concluded that he was also emotionally dependent upon his parents. The judge referred to the continuing contact between them and found article 8 engaged.
11. By the time of the refusal letter the appellant was 27 years of age. He had no medical conditions or disability. Whilst he claimed to be unemployed and to be financially dependent upon his sponsor the entry clearance officer felt it was highly unlikely he would not have worked in the past. He submitted some recent money transfers from his sponsor but the entry clearance officer was not satisfied this demonstrated financial dependence

on his parents. The entry clearance officer did not accept the existence of family life over and above that between an adult child and his parents.

12. I find Judge Watson has made bare assertions that the appellant is financially and emotionally dependent upon the sponsor. The evidence before the judge was limited and the sponsor in his statement said he had not kept documentation because he did not realise the importance of it.
13. Whether family life exists requires an evaluative consideration of all the relevant facts of the particular case and the decision is very fact sensitive. The Court of Appeal in Rai -v- ECO [2017] EWCA Civ 320 sets out the legal principles at paragraph 17 and 18 words of the decision. Whether family life exists requires a careful consideration of all the relevant facts. There is no self-direction in the decision on this but this is not fatal. However, it cannot be inferred that the necessary principles have been applied. The judge needed to have set out the ongoing contact and support given from when the sponsor and his wife left. It was not sufficient to simply make a statement. The judge has not explained what it is about the situation which makes it different from the norm whereby adult children and parents maintain contact but are independent.
14. It is my conclusion that First-tier Judge Watson did not adequately set out the basis for concluding that family life existed. Until this is done the matter cannot proceed to the proportionality stage. The decision is based on what amounts to mere statements without explaining precisely the evidential basis. For this reason I find the judge materially erred in law and the decision will have to be set aside and remade.
15. I agree with Mrs. Cleghorn's contention that section 117 A and B of the 2002 Act, in line with the comments at paragraph 55 onwards of the Court of Appeal would not affect the outcome. However, for the reasons I have stated the deficiency relates to the preliminary issue of whether family life exists in the circumstance. Until this is established the proportionality issue does not arise.

### Decision.

The decision of First-tier Tribunal Judge Watson allowing the appeal materially erred in law and cannot be sustained. The appeal is remitted to the First-tier Tribunal for a de novo hearing.

*F.J.Farrelly*

Deputy Upper Tribunal Judge

19<sup>th</sup> March 2018

Directions.

1. The appeal of remitted for de novo hearing in the First-tier Tribunal excluding First-tier Tribunal Judge Watson.
2. The appeal was previously listed in Birmingham and the appellant's representatives should advise if this is still a convenient venue. It seems likely that a Nepalese interpreter will be required but the First-tier Tribunal office should be advised by the appellant's representative.
3. In preparing for the appeal the representative should provide up-to-date evidence to show the historic and ongoing nature of the contact and support between the parties. Any evidence as to the appellant's circumstances in Nepal would be helpful.
4. It is anticipated the hearing would take 1 ½ hours.

Deputy Upper Tribunal Judge Farrelly      19<sup>th</sup> March 2018