



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04395/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 16 May 2018

Decision & Reasons Promulgated  
On 3 July 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR JIWAN LIMBU  
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr Khalid  
For the Respondent: Mr Bramble

DECISION AND REASONS

1. The appellant is a citizen of Nepal born in 1986. He appealed against a decision of the respondent made on 15 January 2016 to refuse his application for entry clearance to settle in the UK as the dependant son of Kumar Limbu, a former Ghurkha soldier.
2. The respondent was not satisfied that the appellant was wholly financially or emotionally dependant on the sponsor as required under Annex K, paragraph 9(5) also that he had lived apart from his sponsor in excess of two years, paragraph 9(8) of IDI Chapter 15 section 2A 13.2.
3. The respondent considered that there were no exceptional circumstances to lead to the conclusion that leave should be issued outside the rules.

4. Finally, the application was refusal under Article 8 ECHR.
5. He appealed.

### **First-tier Hearing**

6. Following a hearing at Taylor House on 23 June 2017 Judge of the First-tier Walters dismissed the appeal.
7. He heard evidence from the sponsor. Having set out the test for the existence of family life between parents and an adult child, namely, whether “*something more exists than normal emotional ties*” (per *Kugathas v SSHD* [2003] EWCA Civ 31) the judge’s findings are at paragraph 25ff.
8. He noted the appellant’s evidence in his witness statement that when his parents left for the UK in 2011 with his younger sister he felt “*abandoned, rejected and the trauma caused by this forced separation has done nothing but harm to me*” [26].
9. He went on, however, to find that the fact that the appellant’s parents decided to leave Nepal led to the conclusion that they considered the appellant would be able to manage on his own [27].
10. He also found that the parents did not visit the appellant in Nepal in 2012, 2013 or 2014 [28].
11. The judge then found a lack of evidence of “*real, effective or committed*” financial support. Amounts remitted were “*so far below the minimum wage*” as not to be “*real*” or “*effective*” [29].
12. The judge noted that the sponsor’s annual pension from the Brigade of Gurkhas is NPR 420,825 and that it is paid into a bank account in the sponsor’s name in Nepal. However, there was no evidence either from the bank statement or from the sponsor’s witness statement that the appellant had been given drawing rights on that account [30].
13. Next, the judge was not satisfied by the sponsor’s evidence as to what the appellant had been doing since he left school. He could not comprehend how the sponsor was unable to say how old his son was at the time he left school. Also, as an ex-Gurkha how he could be ignorant as to the age limits which apply when one seeks to become a Gurkha soldier [31].
14. The judge concluded that the appellant had not shown that he has family life with his parents [32].
15. The judge ended by saying that he had considered whether there might be any exceptional reasons why the appellant should be allowed entry clearance for settlement in addition to matters set out at Annex K, IDI Chapter 15 section 2A 13.2

but concluded that he could find no exceptional circumstances justifying an exercise of discretion outwith that policy [33].

### **Error of Law Hearing**

16. The appellant sought permission to appeal which was granted on 5 February 2018.
17. At the error of law hearing Mr Khalid, referring to the grounds, submitted that the judge had been wrong to conclude that there was a lack of satisfactory evidence of financial and emotional dependency such that there was no family life. On finances there was oral evidence that the appellant was able to access the sponsor's bank account. It is accepted practice by most banks in Nepal to allow access in Ghurkha soldiers' cases without the need of a letter of authority. There was also evidence of remittances, the sponsor produced documentation for as many as he could find.
18. As for the criticisms that the sponsor showed a lack of knowledge of his son in certain aspects, he had been a cook not an officer. On the particular issue of being unable to recall the age at which the appellant left school, the question was sprung on the sponsor when he was giving evidence, perhaps he needed time to think. It was also unfair to have expected him to recall the eligibility requirements for soldiers entering the army. There were telephone records in support of the claim that there is contact. Looked at cumulatively the judge was wrong to find that such did not amount to family life.
19. Further, in the last paragraph the judge appeared to have taken the view that there was a requirement for exceptionality. Such was the wrong test.
20. Finally, the historic injustice suffered by Ghurkhas was not given any weight.
21. Mr Bramble's response was that the judge was entitled to reach the findings he made on family life for the reasons he gave having applied the correct test. He had not applied a test of exceptionality. Rather, it was having found that there was no family life whether there was anything else whereby the appeal could be allowed outside the policy.
22. Having found that there was no family life the issue of historic injustice was irrelevant.

### **Consideration**

23. In considering this matter the issue is whether at the date of hearing the appellant had established that as an adult he had family life for Article 8 purposes with his parents.
24. As indicated the judge correctly addressed himself to the proper test noting (at [24]) ***Kugathas v SSHD [2003] EWCA Civ 31*** where (at [14]) Sedley LJ cited with approval the Commission's observation in ***S v UK [1984] 40 DR 196:-***

*“Generally the protection of family life under Article 8 involved cohabiting dependants, such as parents and their dependant, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than normal emotional ties.”*

The judge also, at [29], made reference to whether there was evidence of “*real, effective or committed*” financial support.

25. In that regard the tribunal in *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 160 noted (at [54]) *Kugathas* where Sedley LJ accepted the submission “dependency” was not limited to economic dependency; at [17]. He added:

*“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 which family life implies.”*

26. In terms of finances the judge noted that despite having come to the UK in 2011 there was no documentary evidence of remittances having been sent until 2015 and that the amount sent that year was NPR 12,000 (which a currency converter website indicates to be equivalent to about £83). The amount sent in 2016 was NPR 23,000.
27. The judge noted that the World Bank states that the minimum wage is NPR 8,000 per month and the poverty line is NPR 46,625 per annum. It is not clear from the file papers whether World Bank figures were before the Tribunal or whether he researched it later. If the latter he should not have done so. However, it is not material. The judge was entitled to find that the amounts remitted were low. A claim that pre-2015 remittances were sent but that no documentary evidence was available and the amounts could not be remembered added little to the claim of financial dependency.
28. I do not find merit in the submission in the grounds that in Nepal the child of a Ghurkha has drawing rights on a parent’s account without the need of a letter of authority. The onus of proof is on the appellant. The judge was entitled to find that the appellant had not established that he had drawing rights on the account.
29. In summary, the judge was entitled for the reasons he gave to conclude that there was a lack of evidence as to financial dependency.
30. As for emotional dependency, the judge was entitled to comment adversely on the sponsor’s apparent lack of knowledge about in particular how old his son was when he left school and what he had been doing since. It is something one would reasonably expect a father to know. I did not find persuasive the submission that

perhaps the sponsor needed more time to think about it. The only other evidence that was before him amounted to a record of telephone contact and to two visits to Nepal in 2015 and 2016.

31. Looking at the evidence in the round the judge was entitled to conclude that the emotional contact between the appellant and his parents did not show something existing which is more than normal emotional ties.
32. Turning to the judge's final paragraph it is submitted that he appeared to apply a test of exceptionality in order to determine whether family life exists between the appellant and his parents. Such would be contrary to what was said in Singh v SSHD [2015] EWCA Civ 630 per Sir Stanley Burnton at [24] who stated that there is no test of "exceptionality", that all depends on the facts and that there must be something more than the love and affection between an adult and his parents or siblings which will not in itself justify a finding of family life (also referred to in Rai v ECO [2017] EWCA 320 at [61]).
33. From my reading of the judge's decision he has clearly not used the test of exceptionality of dependence in his assessment of whether family life exists. Rather, that having concluded that family life had not been established he was seeking to apply the policy, and to ascertain whether or not this is a case that could properly be regarded as exceptional, notwithstanding that to dismiss the appeal would involve no breach of the appellant's rights under Article 8.
34. It has not been suggested that there are any such exceptional circumstances.
35. Finally, on the issue of any historic injustice not being given weight, if the appellant failed to establish he has a family life with his parents, it follows that there was no need for him to embark on a proportionality assessment of which the historic injustice claim would be part of the assessment.
36. For the reasons given I conclude that the judge's decision in finding that the appellant had not shown the existence of family life was one that was open to him for the reasons he gave. His findings are adequate.

### **Notice of Decision**

The decision of the First-tier Tribunal shows no material error of law and that decision dismissing the appeal stands.

No anonymity order made.

Signed

Date: 29 June 2018

Upper Tribunal Judge Conway