



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14597/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 19 December 2018

Decision & Reasons Promulgated  
On 18 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

NAGEN RAI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr E Shrestha, Counsel instructed by Arkas Law

For the Respondent: Ms H Aboni, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal who was born on 7 January 1991. His father (now deceased) was a Gurkha soldier, who retired in 1969.
2. On 21 July 2017 the appellant and his mother (his father's widow) applied for leave to enter and settle in the UK. The appellant's mother's application was allowed and she moved the UK.
3. The appellant's application was refused. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Bulpitt

who, in a decision promulgated on 12 October 2018, dismissed the appeal. The appellant is now appealing against that decision.

### **Background**

4. The appellant's father served in the British Army as a Gurkha between 1959 and 1969. He was discharged with exemplary service.
5. The appellant's father married in 1969 and had three children. The appellant is the oldest of the children. The other two children are married and live independently with their families in Nepal.
6. The appellant has lived all of his life within the family home with his mother (and father until he died) apart from a period of 14 months in 2012/13 when the appellant worked in the United Arab Emirates (UAE).
7. Since coming to the UK the appellant's mother has sent money to the appellant. The appellant's bundle included money transfer receipts in respect of seven transfers between 10 February 2018 and 11 September 2018.

### **Decision of the First-tier Tribunal**

8. The judge found that there was a paucity of evidence about the circumstances of the appellant. He noted at Paragraph 19 that the appellant had not made a statement and therefore there was no evidence from him about his relationship with his mother.
9. The judge found that there was a lack of detail to support the appellant's mother's claim that she and the appellant share a close emotional bond and high level of support. The judge found that there was a lack of detail in the appellant's mother's account about the appellant and found that this undermined her assertion that there was a high level of emotional support and dependency.
10. The judge found that the appellant's mother had a lack of awareness about the work undertaken by the appellant in UAE and found that her lack of knowledge was inconsistent with the claimed high level of dependency.
11. The judge attached significant weight to the evidence of the appellant living and working independently in the UAE. At paragraph 22 he stated:

"Not only does it demonstrate a level of independence which is inconsistent with the application being made, it also shows an ability to find and sustain employment which makes the claim that he has never worked in eleven years in Nepal and that he could not work now incongruous."
12. The judge did not accept the appellant's mother's claim that the appellant is completely dependent on her financially. The judge noted that no money was sent to the appellant during the first three months the appellant's mother was in the UK and that only £550 was sent over the following nine months.
13. At paragraph 24 the judge stated:

"I found therefore a distinct lack of detail about the circumstances of the appellant's life and the nature of his relationship with his mother beyond the

very general comments about their closeness. When the evidence was probed a bit closer it became clear that the appellant's mother was unable to give detail about the appellant - e.g., whether he had school friends, how he got to UAE - and was unable to give specifics of the support she gave her son."

14. The judge, having made the findings of fact described above, considered whether the policy known as "Annex K - adult children of former Gerkhas" was satisfied, and concluded that it was not on the basis that the appellant had not established that he is financially and emotionally dependent on his mother.
15. The judge also found that the appellant had not established that there is family life between him and his mother that engages Article 8 of the ECHR. The judge found at paragraph 32:

"Whilst it is clear on the evidence from the appellant's mother that she and the appellant share a close affection, the evidence does not establish on the balance of probabilities that there is something more than the 'normal' love and affection between an adult and his mother. Instead the lack of detail and the appellant's mother was able to give of the appellant's life and the evidence of the appellant's living and working independently means that it is more likely than not that the appellant is living an independent life."

#### **Grounds of appeal and submissions**

16. The grounds of appeal argue that it was unreasonable, given the factual findings, for the judge to conclude that Article 8(1) was not engaged. The grounds cite several Court of Appeal cases to support this submission, including *Rai v Entry Clearance Officer* [2017] EWCA Civ 320 and *Singh v Secretary of State* [2015] EWCA Civ 630.
17. The grounds assert that the judge erred by failing to consider in assessing Article 8(1) the historic injustice to Gurkhas, and that but for this injustice the appellant's father would have settled in the UK with the appellant many years earlier.
18. The grounds also contend that the judge attached too much weight to the fact that the appellant worked overseas for 14 months and that insufficient regard was had to the decision of the appellant to return to Nepal because he could not live apart from his mother.
19. The grounds also contend that the judge failed to appreciate that the sum of money transferred to the appellant by his mother is sufficient for maintenance in Nepal, given that the appellant is living in the family home, and that the reason money was not sent in the first three months was that the appellant's mother was not in receipt of benefits during her initial period in the UK.
20. It also contended in the grounds that the judge failed to consider unchallenged evidence that the appellant is unemployed, unmarried and lives in the family home and as such is not independent from his mother in any way and does not have any other source of income.

21. The grounds also argued that the judge failed to appreciate that the proportionality assessment under Article 8 inevitably must fall in favour of the appellant given the weight to be attached to the historic injustice.
22. In his oral submissions Mr Shrestha developed the argument made in the grounds. He submitted that the only reason the judge found that Annex K was not satisfied was that the appellant was not “financially and emotionally” dependent on his mother. However, in Mr Shrestha’s view, the evidence demonstrates that he was dependent. The only period in which money was not sent was the first three months in which the appellant’s mother was in the UK and the reason was that she was yet to start receiving her benefits and therefore was not in a position to send money during that three month period. All evidence, in his view, points to there being a high level of ongoing financial dependency.
23. He also argued that the judge had failed to take into account the decision in *Rai*, which shows that family life must be looked at at the time the appellant’s mother left Nepal, not just at the present time. He also argued that the judge had failed to appreciate that the only reason the appellant had travelled to work in the UAE was because of the historical injustice. Were it not for that injustice, in 2012 he would have been living in the UK and not travelling to the UAE.
24. Ms Aboni responded by arguing that the judge had properly directed himself and considered the relevant issues, and had reached a conclusion that was open to him on the evidence.

### **Analysis**

25. The key issue in this appeal was whether the relationship between the appellant and his mother engages Article 8(1) ECHR.
26. The test to determine whether there is family life for the purposes of Article 8 ECHR between a parent and adult child is well established in the context of children of former Gurkhas, having been addressed in cases such as *Ghising* and *Rai*. These cases make clear that the assessment of whether family life exists is highly fact specific and there is not a legal or factual presumption as to the existence or absence of family life. As highlighted by Mr Shrestha, *Rai* makes it clear that it is necessary to consider not only whether family life subsisted at the time of the hearing but also whether it subsisted when the parent left Nepal.
27. The judge correctly identified the relevant law. At paragraph 29, he accurately summarised the legal test and referred to relevant case law. He cited paragraph 24 of *Singh* where the key point is made that there is no legal or factual presumption as to the existence of family life, and that there is no requirement of exceptionality.
28. Having identified and set out the correct legal test, the judge set out several reasons why he did not accept family life within the meaning of article 8(1) existed. The reasons he gave are:
  - a) The evidence about dependency was vague.

- b) The appellant lived for 14 months in the UAE and his mother was not aware of how he got there or who he went with.
  - c) The appellant's mother was unable to give detail of the time she spent with the appellant, other than that the appellant cooked for her.
  - d) The appellant's mother was unable to give details of the conversations between her and the appellant over the last 10 months.
  - e) The evidence of the appellant living and working independently meant that it was more likely than not that he is living an independent life.
29. Mr Shrestha argued that the judge failed to follow the approach required by *Rai* which is to consider whether family life subsisted at the time the appellant's mother left Nepal. I disagree. The judge did not limit his assessment to the period after the appellant's mother moved to the UK. Rather, it is apparent from reading the decision as a whole that the judge reached the view that family life within the meaning of Article 8 had not existed for many years as, amongst other things, the appellant had lived and worked independently in the UAE.
30. Mr Shrestha is correct that the historic injustice to Gurkhas means that ordinarily the proportionality assessment under Article 8(2) would weigh in favour of the appellant. However, the proportionality of interfering with the appellant's right to respect for family life only falls to be considered if Article 8(1) is engaged. In this appeal, I am satisfied that the judge, for the reasons he gave (as summarised above in paragraph 28) was entitled to conclude that there was not family life between the appellant and his mother for the purposes of Article 8. It follows from this finding that the proportionality or otherwise of refusing the application for leave to enter was not relevant and the appellant could not succeed in his claim under Article 8. Accordingly, the decision does not contain a material error of law

**Notice of decision**

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 9 January 2019