



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12275/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Microsoft Teams*  
On the 8 November 2021

Decision & Reasons Promulgated  
On the 25 November 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

PREM KUMAR RAI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

**Representation:**

For the Appellant: Ms. D Revill, Counsel, instructed by Everest Law Solicitors  
For the Respondent: Ms. J Isherwood, Senior Presenting Officer

DECISION AND REASONS

**Introduction**

1. The appellant is a national of Nepal. He appeals against a decision of the respondent not to grant him entry clearance to settle in the United Kingdom as the dependent son of a former Gurkha soldier.

2. His appeal was initially considered by the First-tier Tribunal (Judges of the First-tier Tribunal Maller and O'Keefe) and dismissed by a decision sent to the parties on 19 November 2020. The appellant was granted permission to appeal, and upon determining that the First-tier Tribunal panel had materially erred in law I set aside the decision on 26 May 2021.

### **Remote Hearing**

3. The hearing before me was a Microsoft Teams video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.
4. The representatives raised no concern as to the ability of the witnesses to engage in proceedings, nor did any of the witnesses raise a concern as to their ability to hear questions or provide answers.

### **Background**

5. The appellant is a citizen of Nepal and presently aged 46. He has five siblings: three brothers and two sisters, all of whom reside in Nepal.
6. His father, the appellant's sponsor Mr. Ram Bakhat Rai, was born in 1944. He served in the Brigade of Gurkhas for over nine years before his discharge in 1970, prior to the appellant's birth. His father was one of several former members of the Brigade of Gurkhas who were denied the opportunity to settle in this country until a change of policy in 2009. By this time, the appellant was aged over 18.
7. The sponsor was issued with settlement entry clearance on 25 April 2012 and entered this country in May 2012. The appellant's mother, Mrs. Man Kumari Rai, was granted settlement on the same day and entered this country with the sponsor.
8. The appellant applied for entry clearance on 21 March 2019, when aged 43. He sought settlement as the adult dependent relative of his father. The respondent considered the application in relation to Home Office policy outlined in the eligibility requirements for adult dependent children of former Gurkhas, set out in the discretionary policy for Gurkhas discharged before 1 July 1997 and their family

members, as amended on 5 January 2015. The respondent also considered the application under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules ('the Rules'). The respondent refused the application by way of a decision dated 19 September 2019.

### **Preserved Findings of Fact**

9. My decision of 26 May 2021 records the agreement of the parties that the following paragraphs of the First-tier Tribunal's decision, in so far as they confirm findings of fact, were preserved: [119]-[138] and [140]-[142]. Upon reflection, the conclusion of the last sentence of [142] is a finding of fact that should not properly have been preserved, it being concerned with an issue that is for me to consider at the resumed hearing. I therefore disregard it and consider that issue afresh.

10. Though lengthy, it is appropriate to detail the preserved paragraphs.

119. We do not find on the evidence as a whole that the appellant intended to assert in his application form that he has only ever lived in Belbari since birth. His preferred contact details that he gave in reply to the next question was an address in Kathmandu.

120. Mrs. Rai stated in evidence that shortly after their arrival in the UK, her daughter-in-law's father arranged for some of the money she received from Pension Credit, to be handed over to the appellant in Nepal. Since then they have sent money to him through the in-law's on about 7 or 8 occasions.

121. There is however no evidence produced to substantiate the latter assertion. Nor has any reason been given as to why such evidence could not have been given in properly prepared statements. Nor has any explanation been given as to why the said relative and those who supposedly handed over money to the appellant, were not called to give evidence. It has not been contended that they were unavailable or unwilling to give such evidence.

122. Nor, significantly, did the appellant make such explicit assertion in his own witness statement. He states at paragraph 4 that he has had no support from anyone but his parents. With the help of his parents' funds, he has been living in Kathmandu since 2012. There is no suggestion that he received any money from any source apart from the money transfers sent to him, as produced in the bundle. No individual has testified that they actually handed cash over to the appellant in Nepal on an occasion they went there.

123. It was very properly acknowledged by Ms. Revill that there is no evidence of any money transfer document prior to 2018.
124. Nor is there any evidence regarding the rent the appellant pays for his apartment in Kathamandu in which he has lived since his parents came to the UK. Nor is there any evidence of how, apart from a few receipts of money from time to time from the UK, he has been able to support himself with regard to all his other monthly needs, commitments and expenses, particularly between 2012 and 2016, the date of the first transfer receipt produced as evidence - A's bundle at p. 40
125. The money transfer receipts are produced from pages 30 of the appellant's bundle. The appellant is the recorded beneficiary and his address is given as Kathmandu, Nepal. There are two fairly indistinct transfer receipts at page 39. It appears that on 2 August 2018 the amount of £73.72 was sent. That was followed by an amount later that year of £213.45, although the exact date is very difficult to read.
126. The amounts transferred are as follows: The sum of £65.03 on 19 January 2019; £65.03 on 26 February 2019; £50.55 on 5 November 2019; £100 on 13 November 2019. Finally, the amount of £100 per transaction was sent on 3 December 2019, 1 January 2020, 16 January 2020, 1 January 2020 and 2 March 2020.
127. Accordingly, about £1100 in all was sent for the period between about the middle of 2018 and the present.
128. Mr. Barrett made a telling submission that following the ECM review dated 15 November 2019 where the appellant was granted the opportunity to supply 'full grounds of appeal and additional supporting documents', no further evidence was provided during the 28 days allowed for its submission. There has been little by way of evidence submitted since the ECM review dated 15 November 2019.
129. The appellant asserts in his witness statement that when his parents left Nepal, he looked for some odd laboring jobs but these were few and far between. The wages he received were not enough to pay for his food. It appears therefore that he was able to obtain unskilled employment. He has not contended that he is currently unable to undertake labouring jobs.
130. When expressly asked whether the appellant has tried to obtain employment or not, Mrs Rai replied that he had not tried as he is not highly educated. He has not even tried to obtain an unskilled job since they left. Having regard to her evidence in that respect, it is difficult to accept how, as she claimed, the appellant has managed to make ends meet for the period of seven years since his parents left Nepal.

131. The appellant said at paragraph 4 of his statement that his rent is 3,000 NRP a month, which includes bills. He also pays for food and mobile bills. He asserts that he has no income of his own and no support from anyone but his parents. He does not detail how much he spends on food, 'mobile bills' as well as other expenses each month. There is no evidence of any receipt of funds from any other family member, friend or any other source, in Nepal or elsewhere. Nor has the appellant himself claimed that any person from the UK has ever visited him in Nepal and handed over money to him, given to them by his mother in the UK.
132. Ms [sic] Rai stated in evidence that at the moment the appellant spend about 10-15 days in the village and then he returns.
133. It is unclear what the appellant does every day, nor why he spends part of the month in the village and part of it in his rented accommodation in Kathmandu. The Belbari municipality has provided a document at page 19 of the appellant's bundle in which the appellant is recorded as being a resident of Morang District, Belbari Municipality, Ward no 9.
134. We have also had regard to the evidence produced in respect of communication between the appellant and his parents as set out in the recent bundle from pages 11-38. The content of such communication is not provided.
135. With regard to the outgoing call on 26 October 201 [sic] produced at page 38, it states on the face of the document that '... Messages in this chat are private and protected by Viber's end-to-end encryption ..."
136. There are also some missed calls over the period. There is evidence of a call in October 2018. There are several calls made during March 2019 and thereafter from September 2019 to 1 March 2020 as follows: calls on 1 September 2019, 17 October 2019, 18 October 2019, 20 October 2019, 23 October 2019, 24 October 2019, 26 October 2019, 28 October 2019, 30 October 2019, 31 October 2019, several other dates in October 2019, 5 November 2019, 12 November 2019, 13 November 2019, 3 December 2019, 14 December 2019, 16 December 2019, 19 December 2019, and then several calls in January 202 [sic], February 2020, and the last recorded call is on 1 March 2020. No further evidence of calls has been produced since the beginning of March 2020.
137. Mrs Rai claimed during her evidence that she spoke to the appellant through her Nokia mobile phone from 2012. However, despite accepting that he still has this telephone, no phone records were produced relating to the use of this phone in order to back up that assertion. Nor has any explanation been given as to why such evidence could not have been

obtained by way of a printout from her mobile phone network. There is no contention that such evidence is currently unavailable.

138. Since visiting the appellant in Nepal in 2014 and again in 2017, there has been no further visits. It is asserted by Mrs. Rai that her husband's health has deteriorated since coming here. For the past three years he has lost his hearing; the hearing aid does not work on him 'either and mainly'; he does not 'take interest in fixing himself'; his eyesight is weak, but he does not want to wear glasses.

...

140. In sum, despite having been given an extended opportunity to provide a clear history of his living arrangements and details of his current circumstances, the evidence still remains vague. The appellant himself has provided no assistance regarding the issues of his accommodation, his day-to-day life and a proper breakdown of his monthly expenses. The claim by his mother that they provided about £100 a month shortly after coming to the UK has not been substantiated by way of any documentary or other available evidence.'

141. We find on the evidence that the appellant has also been living in rented accommodation in Kathmandu since his parents left Nepal. His mother thought he might spend about half a month in the village. Even then, there is no evidence as to why he lives for part of the month at different addresses in different locations.

142. The appellant's highest level of education, according to his mother, was the completion of Class 10. She forgot how old he was at the time. He has not been in education for a very long time ...'

### Hearing

11. I confirmed with the representatives the various bundles that were before me, and I am satisfied that all relevant documents were made available to me. I have read the filed documents with care in the preparation of this decision.
12. The appellant relies upon his witness statement, dated 3 March 2020. His mother attended the hearing and gave evidence. Oral evidence was also given on behalf of the appellant by Mr. Ram Kaji Rai, a former landlord of the appellant's parents in this country, and by Mr. Gopi Ram Gurung who ran a convenience store with a money transfer contract with IME (now RIA) through which the appellant's parents remitted money to Nepal.
13. In his application for settlement, dated February 2019, the appellant identified his permanent residential address as being in Belbari, Morang district, but that he

preferred to be contacted at his home in Chundevi, Kathmandu. Belbari lies in the eastern Terai region of Nepal, bordering India. I note that it is approximately 380kms from Kathmandu.

14. The preserved findings of fact establish that the appellant pays 3,000 NRP rent for his home in Kathmandu, which includes bills. Further to evidence from Mrs. Rai it was found that the appellant spends around 10 to 15 days in Belbari every month, with the rest of his time residing in Kathmandu.
15. In her witness statements of March 2020, Mrs. Rai confirmed that over time all of her children left home, save for the appellant, with several relocating to Kathmandu. The eldest son, Ashin, moved to the capital after he left school. He is married and has a child. She detailed in her statement that he would return to the family home to visit, "but mainly to ask for financial support". He was given animals to sell and permitted to keep the money, making in the region of 500 to 600 NRP. She stated that Ashin return to the home village and "looks after the land, animals and other produce." At the hearing she clarified that he rears pigs and chickens. She further detailed that he had experienced difficulties in finding work in Kathmandu.
16. The second eldest son, Prakash, also relocated to Kathmandu as did the youngest son, Gopal. As for the appellant, Mrs. Rai stated that "Prem came to drop us at the airport in Kathmandu. Since we were able to send him money, he moved to live in Kathmandu. He lives in a rented room. He looks for work but off and on, he gets some labor work."
17. At the hearing Mrs. Rai confirmed that five of her six children now reside in Belbari. She explained that they had returned to the home area "many years ago" and subsequently detailed that they all returned two years after she travelled to the United Kingdom with her husband, so in or around 2014. They live in rented accommodation. She accepted that in her witness statement he had stated that prior to travelling to this country she had financially assisted Ashin along with her husband but explained that they were no longer required to help him because he was able to provide for himself.
18. She denied that the appellant resided anywhere else other than in Kathmandu. She was adamant in her evidence before me that there was no family home in Belbari and so she did not know why her son gave Belbari as his permanent address when he applied for settlement. As to there being no family home, she explained that it was destroyed consequent to flooding just before she travelled to this country. The appellant and his parents were required to move and found themselves living in other people's homes before leaving Belbari in 2012. From this time the appellant resided in Kathmandu.

19. In respect of employment, the appellant confirmed by his application form that he was unemployed. He detailed in his witness statement that prior to his parents leaving for the United Kingdom he lived with them and had responsibility for their care and needs. After they left, he spent some time looking for labouring jobs, but they were difficult to find. In addition, any wages secured were not enough to pay for his food, let alone his rent. In his witness statement he declared that he had no income of his own and relied entirely upon the support of his parents.
20. The appellant relies upon evidence of remittances from his parents. In the latest bundle filed with this Tribunal there is evidence of money transfers from the appellant's father to the appellant in Kathmandu in the sums of £97 (7 March 2020), £97 (16 March 2020), £197 (18 May 2020), £197 (4 June 2020), £97.01 (2 July 2020), £300 (24 July 2020), £97 (5 August 2020), £97 (31 August 2020), £198.01 (3 October 2020), £387.01 (16 January 2021), £97.01 (13 February 2021), £397.01 (6 March 2021), £97 (3 April 2021), £97.01 (1 May 2021), £97.01 (1 June 2021), £97.01 (1 July 2021), £97.01 (3 August 2021) and £97.01 (2 September 2021).
21. Mrs. Rai confirmed that the remittances were for the appellant alone, and not for use by any other member of the family.
22. In answer to a question from Ms. Isherwood, Mrs. Rai explained that whilst the other children have returned to Belbari, "We have left [the appellant] there [in Kathmandu]. We were wishing for him to come here [to the United Kingdom]. We want help such as when going to hospital. We feel tired and ashamed for asking others to help."
23. Mr. Ram Kaji Rai and Mr. Gopi Ram Gurung were unable to provide insight into the appellant's personal circumstances, save as to what they had been told by his parents.

### Law

24. The High Court held in *R (Limbu) v. Secretary of State for the Home Department* [2008] EWHC 2261 (Admin) that a discretionary policy allowing Gurkha veterans who had been discharged before July 1997 entry clearance to settle in the United Kingdom where they could establish a sufficient connection with this country was unlawful where the factors establishing such a connection had focused on physical presence in the United Kingdom rather than reflecting the purpose of the policy, which had been to honour an historic debt. Long military service performed by the Gurkhas for the Crown at the instigation of the United Kingdom government amounted to a connection with this country wherever it was performed.



25. The Home Office issued a policy in 2009 that was identified as correcting the injustice established by the *Limbu* judgment. It provides that wives and minor children of Gurkha soldiers would be granted leave in line with the former Gurkha. The policy seeks to provide a fair opportunity for veterans and their adult children to apply for leave, though at the time elevating the requirement for adult children to one of 'exceptional circumstances'.
26. The policy was amended to remove the 'exceptionality' threshold after the Court of Appeal judgment in *R (Gurung) v. Secretary of State for the Home Department* [2013] EWCA Civ 8, [2013] 1 W.L.R. 2546 where the Court held that when considering proportionality under article 8(2) ECHR, the historic injustice that before 2004 Gurkha veterans were treated less favourably than other comparable non-British Commonwealth veterans and were not entitled to settle in the United Kingdom was one of the factors to be weighed against the need to maintain a firm and fair immigration policy, but was not necessarily determinative.
27. Annex K of the guidance is concerned with adult children of former Gurkhas and identifies that for its purpose "a former Gurkha is a Gurkha who completed their service in the Brigade of Gurkhas of the British Army between 1948 and 1 July 1997". As to settlement, the Annex establishes at para.9:

'9. In order for settlement to be granted to the adult child of a former Gurkha under this policy, a valid application for entry clearance must be made in accordance with paragraphs 24-30 of the Immigration Rules and the applicant will normally have to meet the following conditions:

1. The former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements; and
2. The applicant is the son or daughter of the former Gurkha; and
3. The applicant is outside the UK; and
4. The applicant is 18 years of age or over and 30 years of age or under on the date of application (including applicants who are 30 as at the date of application); and
5. The applicant is financially and emotionally dependent on the former Gurkha; and
6. The applicant was under 18 years of age at the time of the former Gurkha's discharge; (or if the applicant was born after discharge see guidance in paragraph 16 of Annex K of this guidance) and

7. The Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available before 1 July 1997; and
  8. The applicant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away); and
  9. The applicant has not formed an independent family unit; and
  10. The applicant does not fall to be refused on grounds of suitability under paragraph 8 or 9 of Appendix Armed Forces to the Immigration Rules or those provisions of Part 9 of the Immigration Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces.'
28. The Upper Tribunal considered 'historic wrong' in *Ghising (Ghurkhas/BOCs: Historic Wrong: Weight)* [2013] UKUT 567 (IAC), detailing at [59] and [60]:

'59. ... we accept ... that where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional "burdens" but, rather, in the weight to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:

"were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy". [41]

In other words, the historic injustice issue will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described.

60. ... If the Respondent can point to matters over and above the "public interest in maintaining of a firm immigration policy", which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a "trump card", in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of *Gurung*, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour.'
29. In *Patel v. Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17 the Court of Appeal considered an appeal concerned with entry clearance applications from relatives of British overseas citizens who had settled in the United Kingdom after having been prevented from doing so by a discriminatory law. The Court observed that if, by the time they were refused entry clearance, the adult children of those citizens were still part of their family life, the history of the discriminatory arrangements would be a potentially decisive factor in determining whether the children's right to respect for their family life under article 8 had been breached. Sedley LJ held at [14]:
- '14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children - including children on whom the parents themselves are now reliant - may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).'
30. As for dependents of Gurkhas who were subject to historic injustice, the Court of Appeal held in *Rai v. Entry Clearance Officer, Delhi* [2017] EWCA Civ 320, at [36] - [37], that the concept to which the decision-maker will generally need to pay attention is 'support', which is 'real' or 'committed' or 'effective'. The Court warned as to looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Such an approach

elevates the threshold of 'support' that is 'real' or 'committed' or 'effective' too high. Lindblom LJ further held, at [38]:

'38. Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach.'

31. The Court of Appeal confirmed in *Pun v. Secretary of State for the Home Department* [2017] EWCA Civ 2106 that the policy of redressing the historic injustice which had prevented Gurkhas from settling in the United Kingdom carried far less weight where non-dependent adult relatives of a Gurkha applied for indefinite leave to remain than it did when dependent relatives applied.

### **Decision and Reasons**

32. The appellant's case is identified by Ms. Revill in her very helpful skeleton argument, dated 26 October 2021, at paras. 14 - 15:

'14. It is submitted that the Sponsor's [appellant's father] and Mrs. Rai's migration to the UK has not severed the pre-existing family life they shared with the Appellant. When granted settlement, they faced the forced choice between, on the one hand, taking up the settlement that was long owed to them as victims of the historic injustice and, on the other, foregoing their entitlement to be in the UK. There was no realistic prospect of the Appellant accompanying or joining them under the policy then in place. Against this background, to characterize their relocation to the UK as a simple matter of choice in circumstances where they could return permanently to Nepal (as the refusal letter does at RB/19) disregards regards the historic injustice.

15. Since the Sponsor and Mrs. Rai moved to the UK, they and the Appellant have continued to provide each other with support that is real, effective, and/ or committed. They have maintained regular contact, and the appellant assists with practical issues in the UK arising from their illiteracy ... The FTT noted that there was no evidence of ongoing contact after March 2020; this reflected the fact that the Appellant's first bundle was prepared for a hearing initially listed that month and not updated prior to the hearing in October 2020. The Appellant now adduces evidence confirming that contact has been maintained since then.'

33. The appellant, an adult male, is required to establish that he is a dependent relative and so he is required to establish that he enjoys a family life with his sponsor, his father. In this matter I also consider whether he has a family life with

his mother. Relationships between adults will not necessarily acquire the protection of article 8 without evidence of further elements of dependency, involving more than the normal emotional ties: *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31; [2003] INLR 170, *R (Britcits) v. Secretary of State for the Home Department* [2017] EWCA Civ 368; [2017] 1 WLR 3345 and *Entry Clearance Officer, Sierra Leone v. Kopoi* [2017] EWCA Civ 1511; [2018] Imm AR 330.

34. The litmus test remains whether the relationship displays more than normal emotional ties. Lindblom LJ (with whom Beatson and Henderson LJJ agreed) emphasised the importance of establishing whether there was 'real, committed or effective support' passing from sponsor to appellant: *Rai*, at [36].
35. As accepted by Ms. Revill, the appellant is to establish the existence of a family life before proportionality is to be considered, and so any consideration of 'historic injustice' can only be assessed and weighed once the initial hurdle has been crossed.
36. At the outset I find that the appellant resided with his parents in Belbari before they travelled to the United Kingdom. I also accept the evidence of the appellant's mother, Mr. Ram Kaji Rai and Mr. Gopi Ram Gurung that money has been remitted to the appellant in Kathmandu. I am therefore satisfied that he presently resides in Chundevi, Kathmandu. Whether the remittances are for his benefit alone I address below.
37. I accept that Mrs. Rai is illiterate and when considering her evidence, I observe that she enjoyed little if any formal education. However, even when applying the benefit of the doubt to my assessment of credibility, I find that her evidence contains significant discrepancies.
38. The appellant's present evidence as to whether he only resides in Kathmandu is, I find, deliberately opaque. He was clear when making his application that he resides both in Belbari - identified as being at his home "since birth" - and in Kathmandu. His witness statement is silent as to his residence in Belbari, referring only to his accommodation in Kathmandu. He provides no explanation as to why he stated in his application that he resided in Belbari, though I note that he does not deny that he does have a home there.
39. Mrs. Rai was clear in her evidence before me that the appellant has resided nowhere but Kathmandu since she left the country in 2012 as the family home was lost to flooding. However, I am satisfied that the preserved finding of fact arising from her evidence before the First-tier Tribunal is the true position: the appellant spends around 10 to 15 days in Belbari every month, with the rest of his time residing in Kathmandu. The appellant therefore divides his time equally between

the properties. I take judicial note that the properties are approximately 380kms apart.

40. Mrs. Rai's evidence prior to the hearing identified the loss of the family home as having occurred some decades ago, with a new home having been built after approximately 12 months. I observe her witness statement of 3 March 2020 where she detailed:

"A few years after my **fifth birth**, the river took away our entire land including our house. We had to seek refuge with other villagers **for a year** during which we constructed our own little hut from mud and stones and whatever material we could gather." [Emphasis added]

41. I note that Mrs. Rai was aged 65 when she entered the United Kingdom, and her evidence is that at this time all six of her children had left home.
42. The evidence presented at the hearing was significantly different and, as I fairly observed to Ms. Revill, unexpected. It is now presented that only the appellant and his parents were residing at the property at the time of the flood, which was "just before" the parents left for the United Kingdom in 2012. Mrs. Rai was clear that there was no longer a family home in Belbari with its loss having been sustained close in time to their respective relocation to Kathmandu and the United Kingdom.
43. I am satisfied that Mrs. Rai was not being truthful on this issue at the hearing. Her evidence is wholly inconsistent with the evidence in her witness statement which she adopted at the hearing before the First-tier Tribunal. The divergence in the evidence, on such a momentous family event as losing a home due to flooding, spans decades, not days or weeks. I find that Mrs. Rai engaged in an ineffective effort to hide the fact that the appellant resides at the family home when he regularly returns to Belbari.
44. As to her other children, Mrs. Rai was clear in her witness statement of March 2020 that Ashin experienced difficulties in securing employment in Kathmandu and would return to the family home to ask for financial support. She accepted before me that she financially assisted Ashin until she left Nepal for the United Kingdom in 2012. However, she was clear that following their arrival in this country the remittances sent to Nepal by her husband and herself were only for the benefit of the appellant. Ashin continued to reside in Kathmandu for a further two years experiencing, on Mrs. Rai's account, problems securing employment, before returning to Belbari. No cogent reason was given by Mrs. Rai as to why financial support was only given to the appellant after her arrival in this country and not to her other children, including Ashin, the latter having on her evidence experienced

financial difficulties whilst living in Kathmandu for some decades since he left school, only returning to Belbari in or around 2014.

45. I observe Mrs. Rai's evidence that save for the appellant her other children now reside in Belbari and live in rented accommodation. She confirmed that Ashin can provide for himself as he rears pigs and chickens. He can pay his rent and attend to the needs of his family without any financial support from his parents. His siblings, including Prakash and Gopal, are also able to sustain themselves in Belbari without requiring financial support from the sponsor and Mrs. Rai.
46. The concern of the First-tier Tribunal as to it being unclear as what the appellant does every day remains valid. No addendum statement was filed on behalf of the appellant. I do not accept that in the years since the sponsor and Mrs. Rai left Nepal, the appellant has been unable to find work. Mrs. Rai's evidence was not accepted by the First-tier Tribunal as to the appellant not having even tried during such time to obtain unskilled work. Before me Mrs. Rai stated that the appellant worked on occasion as a labourer but "does not have any job". However, the appellant is both able and content to divide his time between the family home in Belbari and his residence in Kathmandu, necessitating a regular 760kms round journey. I am satisfied that such journey would take several hours, even if mainly undertaken on Nepal's highways, rather than local roads in poor condition. Such willingness is strongly suggestive that the appellant is not suffering the dire financial circumstances that have been progressively identified in this appeal as having existed over a period of nine years.
47. I further observe that on the appellant's evidence, as supported by his mother, he has found himself wholly dependent on parental remittances for the last nine years because of an inability to secure sufficient work to cover basic expenses. However, Mrs. Rai's evidence is that the appellant's siblings, including his three brothers, returned to Belbari in or around 2014 and can financially sustain themselves to the extent that they require no financial support from their parents. The First-tier Tribunal found that the appellant returns regularly to Belbari. I find it incredible that in such circumstances, seeing his siblings enjoy financial security in their home area, the appellant would return to Kathmandu for two weeks every month where he has, on his account, struggled so greatly to secure employment as an unskilled labourer that he is entirely financially reliant upon his parents.
48. I do not accept Mrs. Rai to be credible in her evidence that in the decades before she relocated to the United Kingdom the family secured only a subsistence level of income. She confirmed that the family had its own land, where vegetables were grown, and domestic animals were reared. She accepts, as the case is advanced, that animals were sold when required to provide money to Ashin. I observe that five of her children reside in Belbari and are said to not require financial support

from their parents. I find that the family's land was sufficient to provide the sponsor and Mrs. Rai with food to feed a family and to provide an income whilst the children were growing up, and the appellant remained at home helping with cultivation and rearing animals when his siblings left. I find that Mrs. Rai's effort to persuade the Tribunal that the family home was destroyed consequent to flooding was an ineffective effort to hide the fact that the appellant continues to benefit from farming on the family's land.

49. I have considered the remittances sent by the sponsor to the appellant. The First-tier Tribunal found that £1,100 was sent between the middle of 2018 and March 2020. Since then, in the region of £2645 has been sent to the appellant up to September 2021. I am satisfied that Mrs. Rai is not accurate in her assertion that this money is only for the use of the appellant. Both the sponsor and Mrs. Rai have willingly provided funds to their children over the years and no cogent reason is given for such support ending in 2012 save that the other children did not require support, which is not consistent with Ashin purportedly remaining in Kathmandu for a further two years with his family and without employment. I find that the appellant and Mrs. Rai have deliberately withheld the true facts. I am satisfied that no member of the family was ever in grave financial difficulty. Whilst the parents provided financial support in Nepal, such support was given as a top up to their children's income, not in circumstances where the children were not working and destitute. As Mrs. Rai accepted in her evidence, her other children can financially support themselves whilst living in Belbari. I do not accept that several of them would have spent years living in destitution, with little employment, in Kathmandu when such opportunities for financial stability existed in their home area. I find that the remittances sent by the sponsor and Mrs. Rai since they arrived in the United Kingdom have been for the use of all six of their children, to be added to the sufficient income they receive through their own labour. Whilst extra funds may benefit the spending ability of each of the children and their own families, the remittances are not capable of establishing dependency, because it does not equate to real, committed or effective support. I find that the money is sent to the appellant as a means of ensuring its distribution, thereby avoiding the additional fees of sending money directly to individual children.
50. I find that the appellant is earning sufficient financial income from the family land, whilst residing in the family home, and from working in Kathmandu. I am not required to identify what work or business he undertakes in Kathmandu, but I conclude that it is of sufficient reward to require him to spend time away from the family home in Belbari. I am satisfied that both the appellant and Mrs. Rai have taken steps to seek to hide the true situation, and to present the appellant as financially destitute so as to secure his entry into this country.



51. As to emotional support, at its highest the appellant's case was advanced on the regularity of telephone contact between the appellant and his mother and more rarely with his father who does not like talking on the telephone. A lack of sufficient evidence was noted by the First-tier Tribunal. Further evidence has been provided for the resumed hearing, consisting of Viber screenshots evidencing video calls from March 2020. Such contact is to be expected between loving parents and child. As I have found that the parents are remitting funds to their other children, telephone or other contact is expected to also occur with them. Neither Mrs. Rai nor the appellant assert that there has been a breakdown in the parents' relationship with the other children. I find that the evidence of regular contact in this matter between the appellant and his parents is insufficient to establish real, committed or effective support between the appellant and his parents amounting to dependency for the purposes of article 8(1).
52. It was also submitted that the appellant assists his parents from Nepal on practical matters, identified by Mrs. Rai in her witness statement as, "when the posts came to our house or if we were to speak to the medical personnel or other officials, we spoke with Prem first and described him with someone in the UK and let him explain our problems in the past." I note the case presented on behalf of the appellant that he left school in Class 10 (aged 15 or 16) and his lack of education was the reason he could only undertake unskilled work. There is no evidence presented that he speaks English to such level that he could engage from Nepal in discussions with British officials or medical practitioners. I observe Mrs. Rai's evidence before me that both she and her husband are reliant upon members of the community to aid when they go to the hospital or for other tasks. I find that the true position has been exaggerated. Whilst the sponsor and Mrs. Rai may talk about matters with the appellant and seek his opinion or advice, as is common within families, he does not undertake steps to engage with officials or medical practitioners. I find that there is no emotional dependency between the appellant and his parents to establish a family life for the purposes of article 8(1).
53. I find that a family unit existed between the appellant and his parents before the latter relocated to this country in 2012 and that there has continued over the last 9 years to be an emotional bond. Such a bond also exists between the parents and their five other children. I find that the family members remain in contact with each other. However, the appellant is a 46-year-old male who leads an independent life in Kathmandu, is financially secure in his own right and is able to split his time between the capital city and the family home in Belbari without any adverse impact upon his day-to-day life. I find that family life for the purposes of article 8 ended when the appellant's parents left Nepal in 2012. I am satisfied that there exists no real, committed or effective support between adult relatives. I find that the evidence filed with the Tribunal does not establish to the required

standard that the appellant is emotionally or financially dependent upon his mother and father, nor are they upon him.

54. In such circumstances I find to the required standard that no family life exists in this matter that gives rise to the existence of protected rights under article 8(1). I am therefore not required to proceed to consider whether the respondent's decision is a proportionate one for the purposes of article 8 and so I am not required to consider historic injustice. I find that the respondent's decision is a lawful one.
55. I have found Mrs. Rai not to be a credible witness. However, it is understandable that at a time when both she and her husband are subject to advancing years, they would want the benefit of family support. They arrived in this country many years after they had hoped to, consequent to previous failures of the respondent's policy, and since their arrival Mr. Ram Bakhat Rai is subject to increasing frailty. I am satisfied that the true position is encapsulated by Mrs. Rai's heartfelt explanation that they wish for their son to live with them in this country because they are tired and feel ashamed of having to ask others for support. However, whilst understanding the couples' position, this alone is not a sufficient basis for the appellant to secure settlement to this country, nor does it establish a family life under article 8(1).
56. I take this opportunity to thank Ms. Revill and Ms. Isherwood for their succinct and helpful submissions.
57. The appeal is dismissed.

### **Notice of Decision**

58. By means of a decision dated 26 May 2021 this Tribunal set aside a decision of the First-tier Tribunal promulgated on 19 November 2020 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
59. The decision is re-made, and the appellant's appeal is dismissed.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 22 November 2021