



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/11587/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 October 2019

Decision & Reasons Promulgated  
On 21 October 2019

Before

UPPER TRIBUNAL JUDGE BLUM

Between

NETRA PRASAD LIMBU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr M Moriarty, Counsel, instructed by Everest Law Solicitors

For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Plumptre (the judge), promulgated on 10 May 2019, in which she dismissed the appellant's appeal against the respondent's decision dated 9 May 2018 refusing his entry clearance application to join his mother, the widow of a former Ghurkha soldier.

## Background

2. The appellant is a national of Nepal, date of birth 8 March 1980. His mother, Mrs Jan Kumari Limbu, is the widow of Mr Kamal Bahadar Limbu, a former Gurkha who died on 18 January 2001 in Nepal. The appellant's father had enlisted as a Gurkha on 13 September 1970 and was discharged on 21 May 1986 having served in the British Army for 15 years and 250 days. The appellant, the youngest of three children, was born in Syria where his father was deployed, his sister was born in Nepal on 16 September 1977 and his older brother was born in Hong Kong on 9 December 1978.
3. The appellant's mother learnt about a change in policy relating to Gurkhas which allowed ex-Gurkhas and their families to live in the UK. She saved money in order to make an application to settle in the UK under the policy and was granted ILR on 21 June 2012. She entered the UK on 12 May 2013, the delay caused in part because she had to save money for her plane ticket.
4. The appellant's mother stayed in the UK for 10 months and then returned to Nepal on 9 March 2014 and remained for nearly 2 years before returning to the UK on 27 January 2016. She saved up more money in order to make an application for the appellant although she had insufficient funds to make an application for her daughter.
5. The appellant applied for entry clearance on 3 April 2018. The respondent refused the application under Annex K of the Immigration Directorate Instructions (IDI), Chapter 15, section 2A 13.2, as amended on 5 January 2015, and paragraph EC-DR.1.1 of Appendix FM of the immigration rules. The respondent also refused the application under Article 8 ECHR as she was not satisfied that the appellant had established family life with his widowed mother sufficient to trigger the operation of Article 8. The appellant exercised his right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002.

## The decision of the First-tier Tribunal

6. It was conceded at the First-tier Tribunal hearing by the appellant's representative that the appellant could not meet the requirements of Appendix K of the IDIs or the requirements of Appendix FM and that the appeal was to be determined by reference to Article 8 alone.
7. Although there was cross examination of the appellant's mother concerning the location of his older brother and other relations/family members in Nepal, and in respect of documents produced from Nepal, there was little or no challenge to the facts set out in the mother's witness statement [9].
8. The judge found that, after spending 3 years living with their father in Brunei, the appellant and his siblings accompanied their mother back to Nepal where

they lived in the family home in Dudhe, Jhapa District ([14] & [15]). Their living circumstances were basic. There was a plot of land attached to the house on which the appellant's family grew food and other necessities were paid for out of his late father's Gurkha pension (around 300 Nepali rupees) [14]. The judge found that, until their mother chose to settle in the UK, the appellant and his sister lived in the same family house with their mother, growing their own food supplemented by the mother's widow's army pension (the oldest son lives in Hong Kong and has no wish to enter the UK).

9. The judge accepted that the appellant and his sister had never found employment in Nepal and that they were unmarried ([18] & [23]). The judge accepted that the appellant's mother stayed in the UK for 10 months after first entering and then returned to Nepal for nearly 2 years [20]. The judge also accepted that the appellant's mother had visited him and his sister in Nepal [21].
10. The judge accepted the calculations of the appellant's representative that his mother had a monthly income of £752.53 of which £300 went on rent (made up from housing benefit and pension credit) [22]. The judge found that the appellant had three maternal aunts one of whom lived in the same Jhapa District, another who lived in Morang, and the third who lived in a hilly area that the mother did not name. The judge accepted that all her late husband's siblings had died and that there were no paternal aunts or uncles living in Nepal [24].
11. At [25] the judge adopted the respondent's statement, contained in the decision refusing entry clearance, that generally the protection of family life under Article 8 involved cohabiting dependents, usually parents and dependent minor children, and that relationships between adults would not necessarily acquire the protection of Article 8 without evidence of further elements of dependency involving more than normal emotional ties and that "if dependency is read 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 this represents the irreducible minimum of what family life implies" (citing from Sedley LJ in **Kugathas** [2003] EWCA Civ 31).
12. At [26] the judge adopted the 5-step approach set out in **Razgar** [2004] UKHL 27. The judge accepted, at [27], that the fact that the appellant's mother chose to come and settle in the UK was not a factor to be held against him. The judge also acknowledged the legal representative's submission that, "... but for the historical injustice the appellant's ex-Gurkha father would have come to the UK with his children to settle in the UK."
13. At [28] the judge stated,
 

"I find some force in the Presenting Officer's submission that the appellant has close family members, namely his older sister and 3 maternal aunts, and hence family life with family members all living in Nepal, and that essentially the

appellant and his older sister are living independent lives from their mother as the appellant is now 39 years old and his sister 43 years old. I accept the sponsor mother's oral evidence that her 2 adult children continue to live in the family home and grow crops to support themselves on the plot of land attached to the house."

14. The judge then referred to the Court of Appeal decision in **Rai** [2017] EWCA Civ 320 noting that Mr Rai was 26 years old at the time of his application for leave to enter based on his relationship with his late Gurkha father and distinguishing **Rai** from the present case because the appellant was aged 38 at the time of his application "... and hence well outside the age limits of the policy set out in Annex K and adopted by the Respondent to right the "historic injustice" of adult dependent children of ex-Gurkha children" [30]. At [31] the judge found that the present case was not an historic injustice case in the sense that the appellant's ex-Gurkha father died many years before the latest policy incorporated into Annex K came into being in 2015, and because the appellant was considerably older than the age limits of between 18-30 years for adult dependent children and because he was living an independent life with his sister.

15. At [32], after noting that the appellant's mother chose to settle in the UK at some financial sacrifice to herself when she was well aware of that adult dependent children were not automatically granted settlement, the judge found there had been "... a considerable emotional sacrifice by the sponsor mother since she has no relatives in the UK, has hearing problems and lives on her own with a neighbourly landlady who was much younger than her and who is not a relative." At [34] the judge stated,

"It was troubling to learn that the sponsor had sent the sum of £425 to her son in Nepal - see page 38 virtually all the sponsor mother disposable income for that month which would last a long time in Nepal, and that she did so because he had borrowed money from friends. As submitted by the presenting officer, I find that the money transfers are sporadic and conclude that she is not the appellant's sole source of income. I find that financial dependence has not been established, and that the appellant is an adult who has been living an independent life in Nepal."

16. At [35] the judge stated,

"I give weight to the fact that the appellant is a healthy adult male who has spent all of his life in Nepal and lives in the family home with his adult sister and that they have a plot of land which they can cultivate and grow crops to maintain themselves. I find that although it has been argued in Nepalese Gurkha cases that Kugathas has been to restrictively interpreted, there was no evidence to indicate more than normal emotional ties between the appellant and his sponsor mother on the facts of this appeal. I accept that there was evidence of telephone contact as one would expect. I adopt the reasoning of the manager on review that Article 8 is not engaged on the facts of this appeal."

17. Having found that Article 8 was not engaged the judge dismissed the appeal [37].

### The grounds of appeal and the parties' submissions

18. The grounds of appeal contend that the judge's factual findings clearly pointed to the existence of Article 8 family life and that the reasons upon which she relied in concluding otherwise disclosed errors of law. The judge found that the money transfers from Mrs Limbu to the appellant were 'sporadic', but she failed to give adequate reasons for this conclusion and her conclusion was not supported by the documentary evidence. Even if the transfers were sporadic, this was irrelevant to determining whether there existed 'real', 'effective' or 'committed' support. The Judge's conclusion that the appellant was leading an independent life was principally based on his age, but there was no upper age limit to the existence of family life and the judge's reference to Mr Rai's age and the time limits in Appendix K disclosed a misunderstanding of the relevance of the 'historic injustice' which impacted on her assessment of the existence of family life.
19. In his oral submissions Mr Moriarty submitted that the existence of an historic injustice underpinned the mother's application and entry to the UK and that it contextualised the family relationship. Having regard to the actual money transfers the judge was not entitled to call them sporadic, and they demonstrated financial dependence. The judge's finding that the appellant was living an independent life was based on his age and in reaching this finding she improperly considered the age limits in Appendix K when assessing the actual nature of the Article 8 relationship.
20. Ms Bassi accepted that the judge's finding that the money transfers were 'sporadic' was not supported by the actual evidence of money transfers. Ms Bassi also accepted that the judge's reasoning at [30] was difficult to uphold because the time limits in Appendix K were not determinative of the existence of family life. Mr Bassi nevertheless submitted that the decision was sustainable because the judge did refer to **Rai** and directed herself in accordance with the **Kugathas** approach and was entitled to find that the appellant was living an independent life because he and his sister grew crops and because of his age.

### Discussion

21. The approach to relationships between adult children and their parents has been considered in a line of cases beginning with **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31 and which include **Singh & Anor v Secretary of State for the Home Department** [2015] EWCA Civ 630, **PT (Sri Lanka) v Entry Clearance Officer, Chennai** [2016] EWCA Civ 612, **Butt v**

**Secretary of State for the Home Department** [2017] EWCA Civ 184, and **Rai v Entry Clearance Officer, New Delhi** [2017] EWCA Civ 320. “In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8.... It all depends on the facts.” (**Singh**, at [24]). In determining the nature and quality of the relationship between the appellant and his mother the judge asked herself whether the appellant’s mother provided him with "support" which was "real" or "committed" or "effective" (see, for example, paragraph 36 of **Rai**) and whether there were further elements of dependency involving more than the normal emotional ties. In concluding that there was no relationship of sufficient quality to engage Article 8 the judge relied on her findings that the appellant was living an independent life and that he was not financially supported by his mother. For the reasons essentially contained in the grounds I am persuaded that, in reaching her conclusion, the judge misdirected herself in relation to the evidence of financial support and misdirected herself in respect of the relevance of Appendix K to the appellant’s age when assessing whether he was living an independent life and in respect of his relationship with his mother.

22. Ms Bassi properly accepted, and it was, in any event, manifestly clear from the money transfer receipts, that the appellant’s mother sent him funds relatively regularly and frequently. The appellant’s bundle contains transfer slips relating to the transfer of funds in January, February and March 2019, in January, February, April, June, July, August, September, October and November 2018, and in December 2017. Most of these transfers were for between £60 and £150, although the transfer in March 2019 was for £425. The judge expressed concern at this last transfer, which was caused by the appellant having to borrow money from friends, commenting that his mother would have had “virtually nothing” to live on for that month. The reasons for the transfer were not however challenged and, as pointed out in the grounds, this large transfer supported the appellant’s claim as it indicated that the appellant’s mother was his ultimate source of money and that he had to rely on her to pay off a loan. The evidence did not disclose ‘sporadic’ transfers. To the extent that the judge relied on her finding that the money transfers were ‘sporadic’, she took into account an irrelevant consideration. Nor was there any other evidential basis supporting the judge’s finding that the appellant’s mother was not his sole source of income. The judge accepted that the appellant had never been employed in Nepal [18], that the family grew their own food and that other necessities were paid out of his late father’s Ghurkha pension [14].
23. I am additionally persuaded that the judge erred in law by finding that the appellant was leading an independent life primarily because of his age. The judge was undoubtedly entitled to have regard to the appellant’s age when determining whether he was leading an independent life. This is unarguably a significantly relevant factor. As a general observation the older adult children get, the more likely it is that they will be living independent lives and that their relationships with their parents, even if close, will be insufficient to engage

Article 8. On the facts of this case the judge accepted that the appellant had always lived with his mother and continued to reside in the family home even after she came to the UK, that he was not employed and not married, that the appellant's mother returned soon after entering the UK and remained for nearly two years, that she visited Nepal and that they maintained frequent telephone contact. The mother's statement, which the judge acknowledged was not challenged, indicated that the appellant and his mother missed each other intensely, that the appellant was miserable being separated, and that he has never had an independent relationship.

24. At [28], whilst noting that the appellant lived with his sister and that they support themselves by growing crops, the judge essentially concluded that the appellant was leading an independent life because of his age. There is however no upper age limit on family life amongst adults (see **Etti Adegbola v SSHD** [2009] EWCA Civ 1319). It is not apparent that this was appreciated by the judge. Moreover, at [29] and [30] the judge distinguishes the facts of **Rai** from the present case because Mr Rai was 26 years old at the relevant time and, as a 38 year old (at the date of his application), the appellant was "well outside the age limits of the policy set out in Annex K and adopted by the Respondent to right the "historic injustice" of adult dependent children of ex Ghurkha children [sic]." As accepted by Ms Bassi, this reasoning is difficult to follow. The judge appears to be saying that, because the respondent has set her 2015 policy with an upper age limit of 30, and because the appellant was over 30, this was not a historical injustice case as the appellant's father died in 2001 and the policy only came into being in 2015 (see [31]). This reasoning is unsustainable in light of **Limbu** [2008] EWHC 2261 (Admin) and **Gurung** [2013] EWCA Civ 8. But for the historical injustice the appellant would have settled in the UK with his family in 1986, when he was 6 years old. The injustice was partially corrected in 2009 but by that time the appellant was 29 years old. Had Annex K been introduced in 2009 the appellant is most likely to have fallen within its terms. The injustice of excluding children aged over 18 was not addressed until the 2015 version of Annex K but by this time the appellant was over the age of 30. The historic injustice has always directly affected the appellant. By seemingly determining, at least to a material degree, whether the appellant was leading an independent life by reference to Annex K, the judge has misdirected herself in law.
25. I satisfied, for the reasons given, that the judge's decision contains errors on points of law and that it must be set aside.

### Re-making of decision

26. With the consent of both parties I proceeded to remake the decision. The appellant's representatives had provided further evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The new

evidence consisted of further documents evidencing money transfers from Mrs Limbu to her son, further regular and frequent telephone calls, and documents showing that Mr Limbu had booked to visit Nepal in November 2019. The appellant's mother was not called to give further oral evidence.

27. Ms Bassi submitted that this further evidence was similar to that already considered by the First-tier Tribunal and that the evidence did not demonstrate that Article 8 was engaged. Mr Bassi accepted that if Article 8 was engaged (i.e. if there was family life between the appellant and his mother), the refusal of entry clearance constituted an interference with Article 8, and that, in light of the historical injustice, the proportionality assessment was likely to fall in favour of the appellant, taking full account of the factors in s.117B of the Nationality, Immigration and Asylum Act 2002.
28. Mr Moriarty invited me to find that the payments made to the appellant by his mother remained significant, that he was not leading an independent life as he was not in a relationship with anyone else and had never been, and, in light of their previous cohabitation and the strength of their relationship, the appellant's mother provided him with "support" which was "real" or "committed" or "effective".
29. I remind myself that the burden rests on the appellant to demonstrate the existence of family life and that the respondent's decision breach Article 8, and that the standard of proof is the balance of probabilities.
30. There has been little challenge to the basic facts of this case. There is no reason for me to disturb most of the primary findings of Judge Plumtre, other than those I have already considered above. The appellant is a 39-year-old man who lives, together with his 43-year-old sister, in a house owned by their mother with a small plot of land which they use to cultivate their own food. Until his mother obtained entry clearance under the Ghurkha policy the appellant had always lived with his mother and sister. He has never been in employment and has never been in a relationship. The appellant became demoralised when his father died and left education. According to his statement the appellant spent most of his time at home doing chores. Having spent his whole life living with his mother the appellant now misses her considerably and she misses him. There was no challenge to this evidence and I accept it as being accurate. The appellant maintains that he is financially dependent on his mother. The evidence relating to money transfers, which I have already considered, supports this assertion. I find that the appellant (and his sister) rely on their mother for their living expenses and other needs.
31. After she entered the UK in pursuit of her entitlement as a result of her late husband's service in the British Army, the appellant's mother returned to Nepal for nearly two years. I am satisfied this was in order to maintain her relationship with her son and daughter. I find this is indicative of a strong family bond between the appellant and his mother. Although the appellant is



now 39 years old, he has always lived with his mother, he has never been in any relationship of his own, and has always been financially supported by her. This points to a very strong emotional relationship between the appellant and his mother. Although the appellant has some extended family in Nepal and he lives with his sister, neither can be described as living independently. They both reside in their mother's home and rely on her for financial support. In the relatively unusual circumstances of this case, where the appellant has never previously lived apart from his mother and has no significant qualifications, and has never worked, I am persuaded that he is being provided with real or committed or effective support by his mother and that this relationship does contain elements elevating it beyond the normal emotional ties between adult children and their parents. I consequently find there is family life between the appellant and his mother within the terms of article 8(1) ECHR, and that the refusal of entry clearance interferes with that family life relationship.

32. Having found that there is family life, and in light of Ms Bassi's concession in respect of article 8(2), and in the absence of any other factor relating to the appellant's character, and having full regard to the factors in s.117B of the Nationality, Immigration and Asylum Act 2002, I find, particularly in light of the historic injustice, that the refusal of entry clearance constitutes a disproportionate interference with Article 8.

### Notice of Decision

**The First-tier Tribunal decision is vitiated by material errors of law and is set aside.**

**I remake the decision, allowing the appeal on human rights grounds.**

*D. Blum*

18 October 2019

Signed  
Upper Tribunal Judge Blum

Date