



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/00026/2014  
OA/00027/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9<sup>th</sup> November 2015

Determination Promulgated  
On 21<sup>st</sup> January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. DAL PRASAD PHAGAMI PUN (1)  
MR. YAM KUMAR PHAGAMI PUN (2)

Appellants

and

THE ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

**Representation:**

For the Appellant: Mr. R Jesurum; Counsel instructed by Howe & Co Solicitors  
For the Respondent: Ms. A Fijiwala; Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision by First-tier Tribunal Judge Beach promulgated on 3<sup>rd</sup> December 2014, in which she dismissed an appeal against the respondent's decisions of 22<sup>nd</sup> November 2013 to refuse the applications made by the appellants' for entry clearance to settle in the UK as the dependent sons of Mr Tekbahadur Phagami Pun.

## Background

2. The appellants' are both nationals of Nepal and the sons of Mr. Tekbahadur Pun, who was enlisted on 13<sup>th</sup> January 1979 to the Brigade of Gurkhas. The appellants' father was discharged from the Brigade of Gurkhas on 22<sup>nd</sup> November 1992 following a total of 15 years service that is described in his certificate of service as being 'Exemplary'.
3. The appellants father entered the UK on 18<sup>th</sup> June 2011 with his wife and was granted settlement under the 'Gurkha policy', as a former British Gurkha veteran.
4. On 19<sup>th</sup> September 2013, the appellants applied for entry clearance to settle in the UK as the dependant's of their father, an ex Gurkha soldier. Both appellants were interviewed by telephone on 13<sup>th</sup> November 2013 and both applications were refused for the reasons set out in a Refusal of Entry Clearance served upon each appellant and dated 22<sup>nd</sup> November 2011.
5. In each case, the respondent was satisfied that the appellants' parents are present and settled in the UK, but the respondent was not satisfied that the appellants met the requirements set out in the immigration rules for entry clearance as an adult dependant relative. The respondent considered the applications on Article 8 grounds and stated "*... I have seen nothing that would lead me to conclude that there are particular bonds in your case that would lead to an engagement of Article 8(1) ...*". Notwithstanding that conclusion, the respondent went on to consider the remaining matters relevant to an Article 8 assessment noting in each case:

"If I am wrong on that count and Article 8 is engaged, the second question In **Razgar** would have to be considered. In **SG (Nepal) [2012] UKUT 00265** it was held that it is not unreasonable to expect a sponsor to choose between living in their homeland with all their family or to come to the UK with only a part of it, and so would answer the second question in the negative. Going on to consider the question in **Razgar** the decision is a lawful one and satisfies the requirement of Article 8(2) in being necessary to regulate inward migration. It is notable that when your parents came to the UK they were aware that their adult children do not automatically qualify for settlement. They made their decision to settle in that knowledge. I have given due weight in respect of the balancing that needs to be undertaken by entry clearance officers when considering Article 8(2) and the proportionality of the decision. If Article 8 was engaged I would find that the decision is proportionate in the exercise of immigration control and that the human rights of your family are not infringed.

I acknowledge the historic injustice and its consequences suffered by former members of the Brigade of Gurkhas are to be taken into account. Because of the exceptional position of Gurkha veterans, and their families, the Secretary of State has made special provisions for their entry to the UK outside the Immigration Rules as an acknowledgment that it is in the public interest to remedy the injustice. However, there is no guarantee that your sponsor would have taken up the opportunity to settle immediately upon discharge. You have grown up in Nepal. You are able to live with your adult sibling in the family home in Nepal that you grew up in. Your parents chose to apply for settlement visas when you were already an adult in the full knowledge that their adult children do not automatically qualify for settlement. There is no bar to

your parents returning to Nepal either permanently or temporarily. Family life can continue as it may have done and without interference by this decision. Even If I am to accept that refusal may be an interference with private life, I am not satisfied that you have established family life with your parents over and above that between an adult child and parents. Therefore, the decision is proportionate to maintain the Immigration control and the legitimate aim pursued ...”

6. The appellants appealed the refusal of entry clearance and the matter was reviewed by an Entry Clearance Manager. The decision to refuse entry clearance was maintained.

#### The decision of First-tier Tribunal Judge Beach

7. It was uncontroversial that the appellants do not qualify for leave to enter the UK under the immigration rules. The appellants’ father attended the hearing of the appeal and gave evidence before the First-tier Tribunal Judge. The Judge records at paragraphs [7] to [22] of her decision the evidence that she heard and the submissions made on behalf of the parties. At paragraphs [23] to [25] she refers to the leading authorities concerning the assessment of Article 8 claims by Gurkhas and the proper approach to the historic injustice suffered by them.

8. At paragraph [28] of her decision, the Judge refers to the 5 stage test set out in **Razgar [2004] UKHL 27** and at paragraph [29] notes:

“The first matter to be considered is whether family life exists. If I find that family life does not exist, Article 8(1) will not, therefore, be engaged and that is the end of the appeal. If I find that family life does exist and Article 8(1) is engaged then I must, of course, go on to consider the factors under Article 8(2) including a proportionality assessment.”

9. The Judge found at paragraph [35] that the appellants have not shown that they have a family life with their parents and that Article 8(1) is therefore, not engaged. Her reasons for that finding are to be found at paragraphs [30] to [34]:

“30. The Appellants lived with their parents until 2011 when their parents both came to the UK. The reason why the Appellants did not apply at that time is given by the sponsor as being because the Appellants were in the middle of their studies and he had been advised to enter the UK first and then apply for the Appellants to join him in the UK.

31. There was then a further delay of 2 years before the Appellants made an application to join the sponsor and their mother in the UK. The reason given for this by the sponsor was that he had to collate the relevant documents and this took some time. The relevant documents were not expanded on and it is entirely unclear to me why it should take 2 years to collect these documents. It is clear from the evidence from the employer that the sponsor had been working for that employer for almost 3 years.

32. The accommodation address given by the Appellants in their application form and confirmed by the sponsor as being the accommodation arranged by him for the Appellants is an address in Reading. This is, of course, some distance from the sponsor’s own accommodation which, admittedly, is in an expensive part of London so it would seem unlikely that he would be able to afford accommodation in the exact

same area for the Appellants. However, there are matters which cause me some concern regarding the Appellants' accommodation. Firstly, the accommodation has been arranged in Reading and not simply another part of London. This suggests Appellants who are, in effect, autonomous from their parents. Secondly, the sponsor now states that he intends to find accommodation for the family as a whole after the Appellants arrive in the UK and that this was always his intention. However, this was not mentioned in the Appellants' application forms, the Appellants' interviews, the grounds of appeal or the sponsor's witness statement and was raised for the first time in an answer given in cross-examination. Thirdly, if the sponsor's intention was always to arrange accommodation for the family as a whole when the Appellants arrived in the UK I do not understand why he did not simply arrange this accommodation prior to the Appellants' applications to show that they would be living as a family unit and that there would be adequate accommodation available. It cannot be because of his employment (although this in itself raises queries because he is a caretaker and is presumably expected to remain on the premises yet at the same time talks of living in separate accommodation) because if his employment prevented him from doing this then he would not be able to do so after the Appellants' arrival in the UK either. I find that this explanation has been provided simply because this has now become an issue on the part of the Respondent and the sponsor is now seeking to minimise any damage to the Appellants' case and not because he had an intention of arranging such accommodation at the time of the Appellants' applications or decisions.

33. There is evidence of telephone contact between the Appellants and the sponsor and the Appellants and their mother but I would expect to see such contact when the Appellants are in another country and when they have outstanding applications to enter the UK. I would also expect to see some degree of financial support to the Appellants given that they were studying or working (in the case of the 1<sup>st</sup> Appellant) and are now unemployed. This in itself is insufficient to create a family life or show that a family life exists.

34. The Appellants are young adults who were 26 years old and 30 years old at the time of the application. It is unusual for children of that age not to have formed some life of their own. The circumstances of these particular Appellants point towards exactly this. They are living in accommodation which was formerly the family home but which was sold to an uncle, they are capable of looking after themselves (as was evidenced in their interviews) and they had no plans to live with their parents in the UK or to live particularly near their parents. The 2<sup>nd</sup> Appellant has not worked in Nepal but said that he thought this was because his education was weak and not because he was part of a family unit and was not expected to work. The 1<sup>st</sup> Appellant has worked as a waiter and temporary helper in a restaurant previously for two years."

### The Grounds of Appeal

10. The grounds of appeal advanced by the appellants concede that the appellants cannot meet the requirements of the immigration rules, and confirm that the application made by the appellants relied upon Article 8 ECHR. Broadly stated, the appellants advance four grounds:
  - a. The Judge fails to refer to material authorities concerning the assessment of Article 8 claims relating to family life between adults, and by failing to set out the test that she applied in reaching her conclusion that the appellants have not shown that they have a family life with their parents,

the Judge deprives the appellants of the means of knowing how they fell short of it. The test for family life requires more than the ordinary emotional ties, but dependence is not required. The Judge appears to discount previous cohabitation, continued residence in the family home, on-going contact and financial support. The reasons given by the Judge do not explain why family life is not present.

- b. The Judge fails to identify whether she accepts or rejects the evidence of the sponsor that he arranged the accommodation in Reading, in advance because he believed he was required to do so, but that his intention was to secure new accommodation for the whole family if the appellants are admitted.
  - c. If the Judge did reject the sponsor's evidence of his intention to live together with the appellants, the approach was unfair because it had never been claimed previously that the sponsor did not intend to cohabit with the appellants, if they were admitted to the UK. It is procedurally unfair for a finding to be made against a party who has never been put on notice or, nor been given a fair opportunity of dealing with a matter.
  - d. The Judge takes into account an irrelevant matter. The sponsor was under no requirement to have accommodation arranged at the date of application. To expect the Sponsor to secure accommodation in advance on a speculative application has no basis in the immigration rules, the Respondent's policy or the Article 8 case law.
11. Permission to appeal was refused by the First-tier Tribunal (Judge Zucker) and the Upper Tribunal (Deputy Judge Norton-Taylor). The appellants claimed Judicial Review of the decision to refuse permission and following the grant of permission to claim Judicial Review by Mr Justice Warby on 6<sup>th</sup> July 2015, permission to appeal was granted by the Vice President of the Upper Tribunal, Mr C M G Ockelton, on 8<sup>th</sup> September 2015.
  12. In granting permission to claim Judicial Review, Mr Justice Warby observed:

“The Judge adopted the Razgar 5 stage approach, concluding that the appeal failed at the first stage. It is however clear from the material supplied that there are real issues of law as to the precise tests for establishing the existence of a ‘family life’ for Article 8 purposes in this context. A particular question is what if any degree of dependency, of what nature is required to establish a family life. Permission to appeal has been granted on these issues by the Court of Appeal and permission to review a UT decision has also been granted in another case. I would regard the points of law raised by para 16 of the Grounds as arguable points, on which the Claimants have reasonable prospects of success, and points of principle of real importance...”
  13. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Beach involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me on 9<sup>th</sup> November 2015

14. At the hearing before me, Mr Jesurum relied upon the matters set out in his skeleton argument of 5<sup>th</sup> November 2015. He submits that but for the historic injustice, the appellants' father would have qualified for settlement earlier, and the appellants who would have been minors at the time, would have been granted settlement in line with the policy for minors published by the respondent. He submits that the sponsor had no fair opportunity to apply for settlement until 2009, but by then, the appellants had attained the age of majority.
15. Mr Jesurum submits that Article 8 creates a positive obligation to foster the development of family life. He submits that the appellants' Article 8 rights and those of the Sponsor and the appellants' mother are engaged and that the test for Article 8 family life between adults is whether "something more exists than normal emotional ties"; **Kugathas v SSHD [2003] EWCA Civ 31**. He submits that the following propositions are derived from the authorities:
  - a. **Kugathas** has been interpreted too restrictively in the past; **Ghising [2012] UKUT 160 at [56]**
  - b. Family life can exist without dependence; **Patel & Others -v- ECO (Mumbai) [2010] EWCA Civ 17 at [14]**
  - c. Voluntary separation does not end family life; **Sen -v- Netherlands (2003) EHRR 7**
  - d. The attainment of the age of majority does not end family life; **Etti Adegbola -v- SSHD [2009] EWCA Civ 1319 at [23]**
  - e. Critical features in assessing the existence of family life are continued presence in the family home and whether the dependant has established a family life of their own. These are sufficient to infer the existence of family life; **AA v The United Kingdom [2011] ECHR 80 at [49]**
16. Mr Jesurum submits that the suggestion in **Gurung** that emotional dependence is a requisite, is *obiter*. He submits that there are a number of features in this case, that taken cumulatively, point to the existence of a family life between the appellants' and their mother and father. He draws my attention in particular to the fact that the appellants resided with their parents until their parents' departure from Nepal and the family's determination to maintain family unity. He draws my attention to the fact that the appellants were, and are, financially dependant on their father as evidenced by the money transfer receipts that were before the First-tier Tribunal. He draws my attention to the fact that the appellants' depended, and continue to depend on their father's support for their accommodation and that the appellants are close to their parents.
17. In the event that I find that there is an error of law in the decision of the First-tier Tribunal, he submits that in assessing whether any interference to the family and private life of the appellants is proportionate to the legitimate public end sought to be achieved, if all that is relied on in the public interest side of the balance are the

interests of immigration control, then “the weight to be given to the historic injustice will normally require a decision in the Appellants’ favour”; **Ghising and others (Ghurkas/BOC’s - historic wrong - weight) [2013] UKUT 567.**

18. The respondent opposes the appeal and has filed a Rule 24 response that was adopted by Ms Fijiwala at the hearing before me. Insofar as the correct approach to the assessment of Article 8 claims between parents and adult children is concerned, she draws my attention to the decision of the Court of Appeal in **Singh -v- SSHD [2015] EWCA Civ 630.**
19. She submits that a proper reading of the decision makes it plain that the Judge properly directed herself as to the Article 8 claim and made findings that were open to her having heard the evidence of the appellants’ father. She submits that the grounds of appeal amount to a disagreement with the findings made by the Judge and are an attempt to re-open findings that were properly made. She submits that the decision does not contain any material error of law and the appeal should be dismissed.

#### Discussion

20. It is uncontroversial that the Tribunal must first determine whether Article 8 of the ECHR is engaged at all. If it is not, the Tribunal has no jurisdiction to embark upon an assessment of the remaining issues stages identified in **Razgar.** If Article 8 is engaged, the Tribunal should have gone on to consider the remaining four stages identified in **Razgar.**
21. As I have set out, the appeal was dismissed by the First-tier Tribunal upon the finding of the Judge that the appellants’ have not shown that they have a family life with the sponsor and their mother, and thus Article 8 is not engaged. It is that finding that is at the heart of the appeal before me, and the grounds of appeal advanced by the appellants. It is right to note from the outset that that in reaching her decision, the Judge referred to the decisions in **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 IAC** and **Ghising and others (Gurkhas/BOC’s: historic wrong: weight) [2013] UKUT 005672 (IAC),** but did not set out or refer to any of the other authorities relevant to an assessment of family life between adults.
22. Ordinarily, a parent and an adult child would not necessarily acquire the protection of Article 8 without evidence of further elements of dependency, involving more than the normal emotional ties. Article 8 protects the rights not only of the appellants but also their family members and each case has to be assessed on its own particular facts.
23. In **Kugathas v SSHD [2003] EWCA Civ 31,** a Sri Lankan asylum-seeker had spent about 15 years living in Germany before coming to the UK in 1999. He claimed that he faced persecution in Sri Lanka and that whilst in Germany he had enjoyed family life under Article 8 with his mother, brother and sister's family, who were recognised as refugees there. Since his arrival in the UK, he remained in touch with his family by regular telephone calls and his sister's family had also visited him in the UK for a 3-

week period. The Court of Appeal thought that the following passage in **S v United Kingdom [1984] 40 DR 196** was still relevant:

"... generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults ... would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

24. The Court of Appeal considered that the further element of dependency did not have to be economic. Accordingly, it will be necessary to show that ties of support, either emotional or economic, are in existence and go beyond the ordinary and natural ties of affection that would accompany a relationship of that kind.
25. A helpful review of the authorities, including those relied upon by the appellants in the appeal before me is to be found in the decision of Sir Stanley Burnton in **Singh - v- SSHD [2015] EWCA Civ 630**. The appellants, both Indian nationals appealed against the Upper Tribunal's dismissal of their appeals against refusals of their applications for indefinite leave to remain outside the Immigration Rules. The appellants, together with their mother, had obtained visas to join their father in the UK when aged 17 and 19 respectively. Their father and mother had returned to India to bring the appellant's three younger siblings to the UK, but the father died. The mother's application for indefinite leave to remain was granted, but the appellants' applications were refused on the grounds that that they had not established a family life with their mother in the UK as they were living independently. On appeal, the Tribunal agreed that the appellants had not established a family life in the UK as there was no evidence of dependency. It held that they had established a private life, having lived here for over three years and having established themselves as chefs in an Indian restaurant, but that their removal from the UK was justified and proportionate. The appellants challenged the decision and claimed that the Upper Tribunal wrongly held that they had no family life for the purposes of Article 8.
26. Having carefully reviewed all of the relevant authorities, Sir Stanley Burnton, with whom Lord Justice Clarke and Lord Justice Richard agreed, said:
  - "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. 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. I point out that the approach of the European Commission for Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.



25. However, the debate as to the whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in AA, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the Appellants' private life rather than their family and private life. In my judgment, she took all relevant factors into account, and her conclusion on proportionality is not open to challenge. Indeed, I would go further. In my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion.
26. However, for the sake of completeness, I add that in my judgment the Judge correctly found that the Appellants had no family life in this country to which Article 8 applies. They are independent and working. Their siblings, who are younger, are in India, and their mother understandably spends as much or more time in India than in this country. There was no evidence of anything beyond the normal bonds of affection, apart possibly from some financial support of the family in India. That support cannot lead to a finding of a family life in this country, which was the only family life for which the Appellants contended.

27. In **Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC)** , Mrs Justice Lang DBE and Upper Tribunal Judge Jordan held that:

"1. A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish, is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

2. The historic injustice and its consequences suffered by former members of the Brigade of Gurkhas are to be taken into account when assessing proportionality under Article 8(2) but the 'historical wrong' was not as severe as that perpetrated upon British Overseas Citizens and carries substantially less weight. Because of the exceptional position of Gurkha veterans, and their families, the Secretary of State has made special provision for their entry to the UK outside the Immigration Rules as an acknowledgment that it is in the public interest to remedy the injustice.

3. Given that the Gurkhas are Nepali nationals, it is not inherently unfair or in breach of their human rights to distinguish between Gurkha veterans, their wives and minor children on the one hand, who will generally be given leave to remain, and adult children on the other, who will only be given leave to remain in exceptional circumstances. The scheme that the Secretary of State has developed is capable of addressing the historical wrong and contains within it a flexibility that, in most cases, will avoid conspicuous unfairness."

28. Finally, in paragraphs 45 and 46 of **Gurung & Ors, R (on the application of) v SSHD [2013] EWCA Civ 8** the Court of Appeal said:

"45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of only limited assistance. She (rightly) accepts that, as a matter of law, in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts.

46. We think that the cases are of some assistance to decision-makers and tribunals who have to decide these issues. Paras 50 to 62 of the determination of the UT in Ghising contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that 'the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive'. The correctness of the UT's review has not been doubted before us. We endorse it. We doubt whether any useful purpose is served by further general elaboration."

29. The evidence of the appellant's father before the First-tier Tribunal is set out at paragraphs [9] to [15] of the decision and I do not repeat it here. As I have set out previously, the Judge found that the appellants have not shown that they have a family life with the sponsor and their mother and that Article 8(1) is not engaged for the reasons set out at paragraphs [30] to [34].
30. There is no requirement for a Judge to set out all of the material authorities in the course of a decision, provided that a proper reading of the decision demonstrates that the Judge applied the relevant legal principles correctly. On its own I would not have found the Judge's failure to refer to the material authorities concerning the assessment of Article 8 claims relating to family life between adults, to establish an error of law. All of the authorities make it plain that the assessment is entirely fact sensitive, but that of course means that a Judge must make findings upon the material issues.
31. There is a legal duty upon a Judge to give a brief explanation of the conclusions on the central issues on which the appeal is determined. I accept that such reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. A decision may contain an error of law where the requirement to give adequate reasons are not met. The Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, or the fact-finding process cannot be criticised.
32. I have to say that in reading paragraphs [30] to [34] of the decision it is difficult to establish whether the Judge is simply reciting the evidence before her, or making findings upon that evidence. The Judge does not in terms, state whether she accepts or rejects the appellants' account of the family life that the appellants' claim, exists between them and their parents. One might infer from what is said in those paragraphs that the Judge believed those factors to weigh against the appellants but I have some sympathy with the first ground of appeal advanced by the appellant that

the Judge deprives the appellants of the means of knowing how they fell short of the test, that has not been identified, that the Judge applied. In my judgment, the decision of the First-tier Tribunal discloses a material error of law and I set aside the decision.

33. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellants and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
34. In re-making the decision, I remind myself that the appellant's rely solely upon Article 8. The first question to be addressed where only human rights grounds are advanced, is whether Article 8 of the ECHR is engaged at all.
35. The decision in **Ghising (family life - adults - Gurkha policy)** is authority for the proposition that, where there is an interference with family life sufficient to engage Article 8(1), recognition that the family has been the victim of a "historic injustice" may well be relevant, in some cases highly relevant, when the proportionality of that interference is considered under Article 8(2), but, first it must be shown that there is family life for the purposes of Article 8, and that the interference with it (or lack of respect for it) is sufficiently serious to engage the potential operation of Article 8. The "historic injustice" has no bearing on that prior question of whether the appellants enjoy "family life" for the purposes of Article 8.
36. It is a question of fact in each case, whether relationships between adult relatives disclose sufficiently strong ties, such as to fall within the scope of Article 8. As Sir Stanley Burnton noted in **Singh**, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. The love and affection between an adult and his parents will not of itself justify a finding of a family life. There has to be something more. Appellants' such as these, do not stop enjoying a family life with their parents, upon attaining the age of 18. Equally, a person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: **Sen -v- Netherlands (2001) 36 EHRR 7**.
37. In re-making the decision, I remind myself that it is for the appellants to discharge the burden of proof and the relevant standard of proof is the balance of probabilities.
38. I have had regard to the two bundles that were before the First-tier Tribunal. The respondent's bundle included the applications made by the appellants and the documents relied upon by the appellants in support of the application. The appellants' bundle included a statement made jointly by the appellants', a statement

from their father and various other documents that I do not list but I have carefully considered.

39. The appellants filed a joint statement dated October 2014 in support of their appeal before the First-tier Tribunal. Insofar as is material to the issue before me, they stated:

- “2. When our parents settled in the UK first on 18/06/11 we did not intend to be separated as a close family for this long. Our father worked hard to raise the necessary visa fees and to be able to produce evidence of adequate accommodation and maintenance in support of our applications ...
4. We are both totally dependent emotionally and financially upon our parents. At every stage of our lives our parents are always there for us. We both finished our studies in Nepal before our parents settled in the UK on 18/06/11. Our father had paid for all our studies.
5. We are single, not working or studying. We have tried to find work in Nepal but there are very limited job opportunities. It is almost impossible to get a job if we do not have personal connections or high level work experience.
6. We rely on the money transfers our parents send us every month (approximately £150) to cover our rent and our daily requirements. Our father has been working hard in the UK for almost 3 years. He has not been able to take time off or to visit us in Nepal so that he can continue to transfer as much funds as possible to us.
7. Our father continues to receive his army pension which still gets paid into his Standard Chartered bank in Nepal. He has also used this income to support us both.
8. Our father has worked hard to provide us with adequate accommodation and maintenance in the UK. He has been living in work accommodation with our mother and rented a separate room for us stay when we applied for settlement visas.
9. Our brother Subash continues to work and live in Dubai. He had to leave Nepal to find work.
10. Our parents use mobile phone cards to telephone us both dally. The telephone reception is very bad In Nepal so It is sometimes difficult to talk.”

40. The First-tier Tribunal also had before it, the statement of the appellants' father, dated 27<sup>th</sup> October 2014. In his witness statement he stated:

- “4. My 2 sons are single, not working or studying. They are completely emotionally and financially dependent on my wife and me. They were in the same dependent situation before my wife and I left Nepal and we did not believe that we would be separated for so long after we settled in the UK first.
5. I have been working full time for almost 3 years. I use the income from my paid work (approximately £1550 pm gross) and my army pension (approximately £180 pm) to support my 2 sons in Nepal. I have not taken any holiday in order to be able to provide my sons with the most support. I have worked hard to be in a position to apply for their ILE in the UK as my adult dependent relatives and to appeal the refusal of their applications.

6. I transfer monthly money to my sons to cover their rent and living expenses. They have no other income of their own and it is almost impossible for them to find jobs in Nepal. My son Subash left Nepal and applied for a visa which allows him to live and work in Dubai.
  7. My wife and I telephone our 2 sons daily in Nepal using Lebara telephone cards. My wife does not work and she suffers from poor health. It is very painful for us all to be separated as a family so long. We have always been there for sons at every stage of their lives and we miss them a lot.”
41. The appellants produced a statement of account in respect of a Standard Chartered bank account held by the appellants’ father, into which pension credits are made monthly. The statement of account shows monthly pension credits for the twelve months between October 2013 and September 2014, but the only withdrawals shown are in respect of the “Tax on interest”. Statements relating to a ‘Lloyds Bank Classic Vantage’ account in the name of the appellant’s father were also before the First-tier Tribunal. The statements disclose the income and expenditure of the appellants’ father but do not disclose any regular payments made to the appellants’ through the bank account.
  42. The appellants’ bundle did include a number of money transfer receipts evidencing international payments made to the appellants by their father. Similarly, the respondent’s bundle that was before the First-tier Tribunal also contained a number of money transfer receipts evidencing international payments made to the appellants by their father. The money transfer receipts establish regular payments made to the appellants by their father between October 2012 and 2014.
  43. The appellants’ bundle also included a number of ‘Sainsbury’s’ receipts evidencing the purchase of Lebara mobile phone top-up vouchers to support of claim by the appellants of frequent telephone contact between them and their parents.
  44. I have also noted the evidence of the appellants’ father before First-tier Tribunal Judge Beach recorded at paragraphs [10] to [14] of her decision.
  45. Having carefully considered all of the evidence and the submissions made before me, in the end I have come to the conclusion that in the particular circumstances of these appeals, the appellants have not shown that they have a family life with their parents, from whom they have lived apart, since 2011. The reasons for my conclusion are:
    - a. I accept that the appellants lived with their parents until their parents left for the UK in 2011. They were aged approximately 29 and 24 respectively at that time. They undoubtedly enjoyed a family life with their parents whilst they were growing up and completing their education. I do not regard that family life to have been suddenly cut off when they reached the age of majority. However, on any view, the appellants were adults at the time that their parents left Nepal and they could not have had any expectation that the appellants would be able to join them in the UK. I accept that their parents and the appellants may well have hoped that they

would be able to do so, but I find that the appellants remained in Nepal as independent adults capable of living on their own.

- b. The appellants have been separated from their parents since 2011 and whilst they maintain regular contact with their parents, they are now young adults who were 30 and 26 at the time of their applications. As adults who have looked after themselves since their parents have been away, I find that the appellants will have established their life as independent adults on their own, in Nepal.
- c. Even after the appellants' parents had established themselves in the UK, there was a delay of about two years in the appellants making their application. Their father's explanation for this delay before the First-tier Tribunal was that he had to collate the relevant documents. He had however been working for some considerable time before the application was made and I do not accept the explanation provided for the delay. In my judgment, it is more likely that there was no immediate need for an expeditious application because the appellants were quite able to live by themselves as independent adults, in Nepal in the absence of their parents.
- d. There is no evidence before me that the appellants are in any way vulnerable. Such evidence as there is before me about the appellants living arrangements, is that the two appellants live together in the property that was formerly owned by their father, but which is now owned by their uncle. The appellants pay a monthly rent of 3500 NRs, per calendar month, and they share the kitchen, lounge and bathroom. There is no evidence to the effect that this living arrangement is precarious or likely was available in the short term only. There is no evidence that the appellants are vulnerable in any way, such that they have a particular dependence that can only be met by their parents.
- e. The evidence of the appellants and their father is that the appellants' are completely emotionally dependent on their parents. I do not accept that they are. The appellants have now lived apart from their parents since 2011. I am prepared to accept that the appellants have the normal emotional ties that might be expected between parents and their adult children, but such emotional ties are not sufficiently strong, so as to fall within the scope of Article 8.
- f. The evidence of the appellants and their father is that the appellants' are completely financially dependent on their parents. There is evidence before me of international payments being made by the appellants' parents to the appellants, covering a period of about 24 months between October 2012 and October 2014.. In my judgment although the money sent to the appellants by their parents establishes an element of dependency, it is not one which in my judgment takes the matter very far. The provision of such money can be as much an insulation against family life as evidence of it. Beyond the explanation in their witness statement that the appellants have tried to find work in Nepal but there are very

limited job opportunities, there is no explanation as to why neither appellant has sought to further their studies or secure employment to support themselves. Such financial dependency that they have upon their father appears to be one of choice.

- g. There is no evidence before me that the appellants as young healthy males, could not support themselves financially if they chose to do so. Their brother Subash who was born on 27<sup>th</sup> September 1985 and so is younger than the first appellant, but older than the second appellant, has been able to do so, albeit away from Nepal.
- h. The first appellant completed his education in 2000 and obtained a Senior Level Certificate. That was before his parents left Nepal. He worked temporarily as a waiter but that employment appears to have come to an end, when the business closed. His dependence upon his parents will have diminished when he was working, and to some extent capable of supporting himself. The second appellant completed a Bachelor degree in Business Studies in 2011 and has not worked in Nepal.
- i. The appellants' both live together and there is no evidence that they are unable, as independent adults, to manage their lives.
- j. Although some family life inevitably remains between parents and children, there comes a time when it becomes weak. The appellants have now lived apart from their parents for a number of years and had done so, at the time of their applications. Although they remain in regular telephone contact with their parents, they have not physically seen each other since the appellants' parents arrived in the UK in 2011.

46. It is a question of fact in each case, whether relationships between adult relatives disclose sufficiently strong ties such as to fall within the scope of Article 8. Having carefully considered all evidence before me I find that any family life which the appellants had with their parents diminished after their parents arrival in the UK in 2011. In my judgment the appellants had not been exercising family life for a lengthy period by the time of their applications and such family life as has remained between the appellants and their parents, has weakened with the passage of time.

47. In my judgment the relationship between the appellants and their parents is one between adult relatives that discloses nothing different from what might be expected between such relatives. It is unsurprising that the appellants are in regular contact by telephone with their parents, or that the appellant's father assists them financially whilst they are not working. The appellants had already attained the age of majority when their parents left for the UK. The appellants have lived alone as adults, since their parents departure and in light of the fact that they were able to do so for a number of years before their applications were made, it seems to me that it is not possible to say that there has either been an interference with family life, or a lack of respect for family life, which amounts to a breach of Article 8.

48. Looking at the matter through the five Razgar questions, in my judgment the appellants have not shown that they have a family life with their parents and as such their appeal fails at the first hurdle.

Decision:

49. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

50. I set aside the decision and re-make the decision in the appeal. I dismiss the appeal.

Signed:

Date:

Deputy Upper Tribunal Judge Mandalia