Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11011/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th of April 2018	**On 13th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR DEORAJ LIMBU
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Shrestha of Counsel
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nepal born on 1st of January 1977. He appeals against a decision of Judge of the First-tier Tribunal Khan sitting at Hatton Cross on 20th of July 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 18th of March 2016. That decision was to refuse the Appellant's application for entry clearance as the adult dependent son of his mother, the widow of an ex-Gurkha, pursuant to section EC-DR.1.1 of Appendix FM of the Immigration Rules and Annex K of IDI Chapter 15, section 2A 13.2 as amended on 5th of January 2015.

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The Appellant's Case

2. The Appellant's case was that he was unemployed and therefore financially dependent upon his mother who in turn was dependent upon her deceased husband's army pension and her pension entitlement in the United Kingdom. The Appellant maintained daily contact with his mother by telephone. His mother was willing and able to maintain and accommodate him without recourse to public funds. The Appellant was dependent upon her for financial and emotional support.

The Reasons for Refusal

3. The Respondent refused the claim stating that the Appellant's mother was reliant on public funds in United Kingdom and as her dependent the Appellant too would become dependent upon public funds. The Respondent was not satisfied that the Appellant's mother's income was sufficient to adequately support the Appellant as well as meet her monthly outgoings in the form of rent, bills and maintenance. The application was refused under section EC-DR 1.1 (D) of Appendix FM.

4. Under Annex K the former Gurkha Sponsor must have settled under the 2009 discretionary arrangements and be in the process of being granted settlement in the United Kingdom under the discretionary arrangements at the same time as the applicant. In this case the Appellant's late father did not fall within that requirement and Annex K did not make provisions for the adult children of an ex-Gurkha widow. The Appellant was 39 years of age and had not declared any care arrangements or requirements in Nepal. There was no personal incapacity or medical conditions or disability. The Respondent was not satisfied that the Appellant was wholly financially and/or emotionally dependent on his UK Sponsor as required by Annex K. That he was living apart from his mother was a direct result of her decision to migrate to the United Kingdom rather than as a result of the Appellant being away from the family unit as a consequence of educational or other requirements. There were no exceptional compassionate circumstances in this case why the application should be allowed. This decision was upheld on appeal by the entry clearance manager.

The Decision at First Instance

5. The Judge heard evidence from the Appellant's mother who said she only had one son the Appellant. He collected her husband's pension in Nepal. That was where the pension was paid to her and she gave the Appellant a certain amount of money out of it. She had been giving money to the Appellant since 2011 when she came to the United Kingdom. When she was in Nepal she and the Appellant had no place of their own, they lived in rented accommodation. She had daily contact with the Appellant sometimes 2 or 3 times per day. She returned to Nepal in 2014 for four

weeks and again in 2017. The Appellant had not done any work since leaving university in 2000 because he could not find any work. There were no jobs available in Nepal even though he had been to the capital Kathmandu to look for work.

6. Although she said she had only one son she in fact had another son who had gone to India but she sometimes forgot things. She had no contact with her son in India. She had lived at an address in Hounslow for the past three years and did not know why her statement gave an address in Bracknell. In answer to questions from the Judge she said that her son in India was older than the Appellant. He had gone there in about 2009, he was not married and had no children. She had not been to Nepal earlier than 2014 because of insufficient funds.

7. At [26] to [34] the Judge set out his conclusions. He found the Sponsor's evidence to be vague and evasive for example on how many sons she had and why the Appellant had not worked since completing his education in 2000. Although she had substantial funds in her account in Nepal she continued to send money from the United Kingdom to the Appellant. This was just to support the Appellant's application to the United Kingdom. There was nothing to show the Appellant was being financially supported before 2011 or how he had been supported whilst he was at university. The Sponsor's evidence was neither credible nor consistent.

8. The Judge did not find it credible or consistent that the Appellant would not have undertaken employment or that no work was available to him in Nepal. If the Appellant had not undertaken any work during his adult life it was from choice rather than necessity. The Appellant could not bring himself within the provisions of annex K and the Judge did not accept that the Appellant was financially or emotionally dependent on his mother. The requirements of Appendix FM could not be met either. Any family and private life ties between the Appellant and his mother amounted to no more than normal emotional ties. The Appellant had spent the whole of his life in Nepal and had friends and lived in the community there. The Respondent's decision was proportionate in all circumstances. The Judge dismissed the appeal

The Onward Appeal

9. The Appellant appealed against this decision making two main points. The 1st was that the Judge had erred in finding that the family life between the Appellant and his mother did not amount to more than normal emotional ties. The 2nd was that the Judge had failed to consider the historical injustice in the proportionality balancing exercise at [34] of the determination. The grounds criticised the Judge's findings relating to the money sent by the Sponsor to the Appellant. It was not open to the Judge to find that the financial support provided to the Appellant was a matter of choice not necessity.
10. Citing the case of **Pun [2011] UKUT 377** this ground stated: "Although a contrived dependency would carry little if any weight, if financial

dependency was of choice to the extent that an applicant was dependent so that they could pursue further studies this would not, without more, mean that such a dependency could not properly be taken into account.

11. The 17,000 Nepali rupees received by the Appellant from his mother's account in Nepal was not always sufficient to pay for studies and living expenses. It was not open to the Judge to find that the Appellant was not working because of choice. The Appellant had been unable to find work in Nepal as employment was scarce there. That had not been challenged by the Respondent. The Appellant was emotionally dependent on the Sponsor and there was extensive evidence of contact between the two. The Appellant had lost his father when he was 14 years old and had not seen his brother since the brother left for India. The Sponsor had maintained regular contact with the Appellant since coming to the United Kingdom in 2011. Family life had existed at the time the Appellant's mother left Nepal and had endured as there was regular contact.

12. In relation to proportionality the grounds cited at some length from the Court of Appeal decision in **Gurung [2013] EWCA Civ 8**. The historic injustice was an important factor to be taken into account in the balancing exercise. The adult dependent child of a Gurkha who was settling in the United Kingdom had a strong claim to have his Article 8 rights vindicated notwithstanding the potency of the countervailing public interest in the maintenance of a firm immigration policy. If a Gurkha could show that but for the historic injustice he would have settled in the United Kingdom at a time when his dependent now adult child had been able to accompany him as a dependent child under the age of 18 that was a strong reason for holding that it was proportionate to permit the adult child to join his family now.

13. In **Ghising [2013] UKUT 567** it was held that the historic injustice would carry significant weight on the Appellant's side of the balance and was likely to outweigh matters relied upon by the Respondent where those consisted solely of the public interest in maintaining a firm immigration policy. The Judge had made no reference to these authorities in his decision.

14. Permission to appeal was granted by Judge of the First-tier Tribunal Foudy on 8th of February 2018. She found it arguable that the Judge's finding that there was no dependency between the Appellant and his mother may amount to an error of law in the light of the Court of Appeal decision in **Rai [2017] EWCA Civ 320**.

The Hearing Before Me

15. As a consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was I would give directions for the rehearing of the matter. If there was not then the decision at Firstt instance would stand.

16. For the Appellant counsel argued that the Judge was wrong to say that there was no family life in this case. The Judge had failed to take into account the most recent authority of the Court of Appeal in the case of **Rai**. That case dealt with how Article 8 was engaged in a case where there were adult dependent children. This case was about an Appellant who was the child of a former Gurkha soldier. The Appellant's father died when the Appellant was 14 years old. The Appellant's mother had been sending money to the Appellant since she came to the United Kingdom in 2011, it was not a case that she had only been sending money since the refusal. There was evidence of regular every day contact between the Appellant and his mother. In the light of all this evidence the Judge had to consider whether family life existed.

17. He had failed to take into account all of the jurisprudence on the subject of Gurkha dependents. He dealt with the issue of Gurkhas in one paragraph. The Respondent's own guidelines said if an applicant could not satisfy the policy, consideration had to be given to Article 8. The issue in the case following **Rai** was whether there was real effective support from the Appellant's mother for the Appellant. The Judge had not even dealt with that. The question was whether there was family life between the Appellant and his mother when his mother chose to come to the United Kingdom. The Judge had not made any findings on that point either. Hundreds of pounds had been spent on telephone calls between the Appellant and his mother and there was evidence of money sent by her to him.

18. The Judge had echoed the Respondent's view that because the Appellant had not met the requirements of the rules the decision was proportionate under Article 8. The Appellant's older brother had disappeared and was not in contact with the family. The correct course of action was to set the decision of the First-tier Tribunal aside and remit the matter back to the First-tier to for a proper assessment to be made.

19. In response the Presenting Officer argued there was no material error of law in the determination. Whilst it was true that the case law had not been mentioned in the determination the Appellant had left university 16 years ago. He was living within his community in Nepal and there were no more than normal emotional ties between him and his mother. Had the Judge incorporated **Rai** into his decision it would have made no material difference. The decision should stand. In conclusion counsel argued that the failure to take the cases into account was an error of law. The grounds had referred to the case of **Pun** (see paragraph 10 above). This was not a contrived dependence. The Judge had made a material error of law in coming to that conclusion.

Findings

20. The issue in this case was whether the Appellant could succeed outside the Immigration Rules under the provisions of Article 8 (right to respect for private and family life) of the Human Rights Convention. It appears that there is a typographical error at the end of [33] of the determination

where the Judge wrote "the Respondent decision is breach of Article 8 of the ECHR". It is clear from the general tenor of the determination that the Judge meant to say there that the Respondent's decision was not a breach of Article 8. The Judge considered for himself Article 8 at [34] and rejected the claim.

21. The point in this case was whether there was family life between the Appellant and his mother which went beyond normal emotional ties. In **Rai** the Court of Appeal made it clear that what had to be considered when assessing Article 8 was whether there was family life between the Appellant and his parent at the time of the separation when the parent came to the United Kingdom and whether that family life continued. Where the Upper Tribunal had erred in that case was in concentrating on the decision of the Appellant's parents to leave Nepal and settle in the United Kingdom.

22. At paragraph 34 of the Court of Appeal decision it was made clear that it was not of itself fatal if a Judge did not give a clear self direction in the terms synthesised in the Upper Tribunal's decision in **Ghising**. What was necessary was to consider whether the support if any provided by the parent in the United Kingdom was real or committed or effective. In **Rai** the Court found "ample and undisputed evidence on which the Upper Tribunal Judge could have based the finding that such support was present in the Appellant's case". What the Court of Appeal also stated was whether an Appellant enjoy family life at the relevant time was a question of fact for the Tribunal to decide.

23. Did the Judge's decision in the instant case fall short of a careful consideration of all the relevant facts in deciding whether the Appellant did enjoy family life at the relevant time? The Judge's conclusion section was concise, it occupied two pages of the determination, but the Judge had set out the evidence and submissions before him. The difficulty for the Appellant in this case was that the evidence given by the Sponsor was found to be vague and evasive. The Judge was clearly unimpressed by the Appellant's mother's oral evidence that she only had one son when her statement had said she had two. The Judge noted that the mother was extremely vague as to why her son in India did not keep in touch with her and the Appellant.

24. The burden of establishing that the family life which existed between the Appellant and his mother went beyond normal emotional ties lay on the Appellant. If the evidence produced by the Appellant to the Judge was not credible and/or was vague and evasive, it was not surprising that the Judge in those circumstances would not find that family life beyond normal emotional ties existed. The Appellant's case rested on stating that he was dependent upon his mother both financially and emotionally. The Judge rejected both arguments. Funds were being sent from the United Kingdom to the Appellant as a matter of choice not necessity and there was no evidence to show how the Appellant had been supported whilst he was at university.

25. The Appellant was now aged 40 years and the Judge did not find it credible or consistent that the Appellant would not have undertaken employment in Nepal. The grounds of onward appeal claimed that the money sent by the Appellant's mother to the Appellant was "not always sufficient to pay for his studies". The Appellant had claimed to the Respondent that he had commenced a BEd course in 2015, see [14]. Whether the Appellant was still studying was unclear. The Sponsor in her evidence claimed that the Appellant could not continue with his studies because there were always strikes in colleges in Nepal. In the absence of clear evidence that the Appellant was still studying it is not perhaps surprising that the Judge found the evidence he did receive as to dependency to be implausible.

26. The Judge had to make a finding whether the Appellant could discharge the burden of showing that he was unable to work when there were no documented medical concerns in this case and there was no evidence of jobs whether in the hotel trade or otherwise being applied for and rejected. Rather more evidence (that could reasonably be obtained) needed to be produced than was made available. The grounds claimed that the Respondent had not challenged the Appellant's inability to find work in Nepal. That is not strictly accurate. Leaving aside that a refusal letter is not a pleading, the Respondent's view was that the Appellant was a fit and capable adult who was able to look after himself. That necessarily meant that the Respondent considered the Appellant could work. The Judge was entitled to deal with this issue in his determination. and the Sponsor had been given the opportunity in oral evidence to deal with the point, see [20] of the determination. The evidence before the Judge fell far short of demonstrating an inability to find or hold down a job.

27. There is a family life between a mother and her son but where, as in this case, it was a relationship between two adults it was necessary for the Appellant to show that that relationship went beyond normal emotional ties, that is that there was a dependency. If the Appellant could not could not show that then the Article 8 claim would stop at that point. There was sufficient in the determination to indicate why Article 8 was not engaged in this case. This was not because of the decision of the Appellant's mother to leave the Appellant behind and travel to the United Kingdom (the error of the Upper tribunal in **Rai**). It was because there was no cogent evidence of dependency either at the date that the Sponsor left to come to the United Kingdom or subsequently.

28. The Judge's finding was that as a 40-year old man who had completed his university education the Appellant would not remain unemployed for the length of time claimed. The financial dependency was not accepted. This was a contrived dependency which was rejected by the Judge. This was not a case of a dependency being continued because the Appellant wished to continue in higher education while an adult, see above. The Appellant's university education had finished in 2000. There was no reason why the Appellant should be dependent on money sent to him by his mother particularly as there was no good reason why he had failed on his case to find a job. There were gaps in the history as to how the

Appellant had been supported at times which inevitably undermined the credibility of the Appellant's application. The evidence about the Appellant's older brother was particularly unsatisfactory. The evidence ranged from there being only one son of the Sponsor to two sons. If the Sponsor could not be relied upon to say how many children she had what evidence she gave as to dependency whether at the date of separation or subsequently could be relied upon? It is not for the Upper Tribunal as an appellate jurisdiction to second-guess a Judge in those circumstances. I remind myself that Judge Khan had the benefit of seeing the Sponsor give evidence which he found fell short of proving the Appellant's case.

29. The 2nd argument made in the case of **Rai** was the issue of proportionality which relates to the argument attached to the historic injustice. It was argued before the Court of Appeal that such weight is given to that argument that it will normally be enough to cause the proportionality balance to fall in an Appellant's favour. That argument overlooks the fact that after **Ghising** was decided Parliament enacted Section 117A to D of the Nationality Immigration and Asylum Act 2002. That stipulates the matters which must be taken into account when assessing the proportionality or otherwise of interference with family life. Any argument as to historic injustice does not relieve the Tribunal of the obligation to consider such provisions.

30. The Respondent had considered this matter in his refusal notice when it was stated that the Appellant's mother was reliant on public funds and as her dependent the Appellant would become an extension of this. This would be a clear breach of section 117B (3). The matter was left somewhat open by the Court of Appeal in **Rai** because the case did not reach as far as to consider the issue of proportionality since the Upper Tribunal had not correctly considered whether there was family life between the Appellant and his parents.

31. In the instant case before me the Judge has considered whether there was family life between the Appellant and his mother and found that it did not go beyond normal emotional ties. At paragraph 51 of **Rai** the Court of Appeal stated that if the Appellant had failed to establish he had a family life with his parents it would follow that there was no need for the Judge to embark on a proportionality assessment. It was not strictly necessary for Judge Khan to consider the issue of proportionality since he found that there was no family life beyond normal emotional ties to be interfered with.

32. Nevertheless, the Judge did go on to consider the Article 8 proportionality issue at [34] and found that the Respondent's decision was a proportionate interference with the Appellant's private and family life. The Judge explained why the Appellant's private life was not disproportionately interfered with because of the Appellant's ties to his community in Nepal. The Judge did not refer to Section 117B in terms although that is not an error in itself. Section 117B would not have assisted the Appellant since he could not show self-sufficiency as the Respondent pointed out in the refusal letter. It is difficult to see how the

historic injustice argument would have tipped the balance in the Appellants favour given the effect of the statute, even assuming the case would have reached that far.

33. This case as so often with Article 8 appeals turned very much on its own facts. The Judge's decision was open to him on the evidence before him given the unreliability of the oral evidence he received. I agree with the submission that the grounds of appeal in this case amount to no more than a disagreement with the result. They do not indicate any material error of law on the Judge's part and I therefore dismiss the Appellant's onward appeal against the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5th of April 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 5th of April 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge