Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06019/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 May 2019	**On 20 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR SANTOSH SHAHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Miss K McCarthy, Counsel instructed by Everest Law Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal born on 15 October 1983. The appellant appealed to the First-tier Tribunal against the decision of the respondent Entry Clearance Officer dated 6 August 2015 to refuse his application for entry clearance to settle in the United Kingdom as the adult dependent son of Arjun Sahi, a former Gurkha. The appellant initially appealed this refusal at a hearing on 4 January 2017 where the appeal was dismissed by the First-tier Tribunal. That decision was vitiated by error of law following a decision of 18 January 2018 of the Upper Tribunal and remitted to the First-tier Tribunal to be heard de novo. In a decision promulgated on 12

December 2018, Judge of the First-tier Tribunal R L Walker dismissed the appellant's human rights appeal.

Error of Law Decision

The appellant appeals with permission on the grounds that:

Ground 1

The judge failed to apply the correct test for family life between adults;

Ground 2

The judge's decision was unfair in disregarding relevant evidence and in making adverse findings that the appellant could have applied earlier as a student when such was not raised either by the respondent or at the hearing;

Ground 3

The judge erred in relation to proportionality.

2. Following submissions on the grounds of appeal Miss Everett quite properly conceded that she could not defend the judge's conclusions. She conceded that the judge was wrong in his conclusion at paragraph 32 of the Decision and Reasons that the historic injustice point would be insufficient to enable the appellant's human rights claim to succeed, when the jurisprudence (see including **Rai v ECO, New Delhi [2017] EWCA Civ 320** and others) said otherwise.

3. It was Miss Everett's submission that, as the only way to save the decision of the First-tier Tribunal was to persuade the Upper Tribunal that the judge's decision in relation to Article 8 not being engaged in respect of family life, she was in some considerable difficulty. As she accepted although the judge referenced, in substance if not in form, the **Kugathas** test, he failed to apply the correct test of whether the support between the appellant and his parents was real, effective or committed, as approved in **Rai v ECO, New Delhi**.

4. That concession was properly made. The judge, having set out the evidence, went on to find that there was no family life between the appellant and his brother but that "the situation is different with regard to his parents. I accept there is some degree of established family life." ([24]). The judge based his findings on the fact that the appellant was living in family properties which was demonstrated including through the appellant's father's oral evidence. The judge went on to accept, at [25], that the appellant was in regular contact with his parents, including as shown by messages and that there had been regular money transfers. Whereas the judge accepted that this was evidence of some financial support he also indicated that this was intended for the upkeep of the family properties which the family used for visits. However, even if this is the case any such use of the properties would not, in my view, detract

from a finding of real or effective or committed support in terms of whether or not Article 8(1) is engaged and whether there is family life. The judge failed to ask himself the correct question, when considering whether Article 8 was engaged. I am satisfied that ground 1 demonstrates an error, as properly conceded by Miss Everett. Even if I had not been there was further merit in both the remaining grounds in relation to both fairness and proportionality.

5. The decision of the First-tier Tribunal contains an error of law. I preserve the judge's findings of fact from paragraphs [19] to paragraph [25].

Remaking the Decision

6. Although Miss Everett was not entirely convinced that the decision could be remade without a further hearing given the errors made by the First-tier Tribunal, I am satisfied that there is sufficient information in the information evidence before me to remake on the papers, including on the basis of reserved findings.

7. I am satisfied that the First-tier Tribunal took the wrong approach in its ultimate conclusions, in assessing whether family life existed, having made a number of positive findings on the facts, which I have preserved. Although the judge set out, at [5], the case law taken into consideration by the Entry Clearance Officer including **Gurung & Ors [2013] EWCA Civ 8** and **Ghising and others [2013] UKUT 00567 (IAC)** the First-tier Tribunal's conclusions failed to apply the correct rationale. Although the judge found that the appellant and his parents had established some degree of family life, the judge was not satisfied that the relationship was one that goes beyond normal family ties and therefore did not accept that any interference caused by the respondent's decision to the appellant's family life was of such gravity as to engage Article 8 (the second limb of the **Razgar** test).

8. It is undisputed in this case that the appellant's father and the sponsor was a Gurkha who served in the Brigade of Gurkhas for over twenty years, discharged in 1993 with an exemplary record of conduct, having been promoted from the ranks to become a commissioned officer and awarded the long service and good conduct medal. The appellant was 10 years old when his father was discharged from the Gurkhas and along with other Gurkhas the sponsor was denied any opportunity to settle in the UK, such injustice not being correct until 2009 by which stage the appellant was an adult. It has always been maintained by the sponsor, and not specifically disputed and which I accept, that he had an exemplary military conduct record upon completion of his service and received a positive recommendation from his commanding officer based on his experience, being described by his superiors as honest and a man who could be wholly relied on and having integrity. Again such descriptions of the sponsor were not disputed by the respondent and I accept that the sponsor is a man of good character. Although such good character does not of course mean that I must accept everything the sponsor says, I have considered it in the round.

9. I further accept that, as noted by the sponsor in his first witness statement dated 20 December 2016, he would have settled in the UK had he been given the opportunity on retirement and would have taken his children, who were then aged 10 with the older child aged 4, with him. The sponsor applied for settlement the year that the policy was revised and was granted indefinite leave to enter on 17 September 2009, his wife receiving her indefinite leave to enter on 29 January 2010. The sponsor notes that both his sons were over 18 and he was told that they would not qualify for settlement. His younger son applied for a student visa to study in the UK, the sponsor noting that he could only afford the education of one child at that point and therefore the older child, the appellant in this case, was left behind. I accept on balance on the basis of all the evidence before me that this is the case, taking into consideration in the round, the undisputed integrity of the sponsor. Although in the findings I have set aside the First-tier Tribunal Judge stated that the sponsor had his income as a security guard and was able to accumulate savings, I accept, and again such was not specifically disputed before me, that he did not have either when he applied for settlement in 2009.

10. For the avoidance of doubt, although not specifically determinative of family life, I am satisfied that there was no element of choice in the appellant not entering the UK or seeking to enter the UK before he did (and I further accept that although the appellant's brother entered as a student, there was never any suggestion that the appellant wished to study in the UK and chose not to).

11. I have considered the five stage test in **R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368**. It is settled law that the Article 8 rights of the entire family must be considered (**Beoku-Betts [2009] 1 AC 115**). In considering whether family life exists between the appellant and his family members I have considered all the evidence. The appellant was 10 years old when his father was discharged from the Gurkhas. I accept, and such is not disputed, that the appellant resided with the family in Nepal until the departure of his parents, the sponsors, to the United Kingdom, and as indicated above, there was no opportunity for the sponsor to apply for settlement before he did in 2009. The appellant's younger brother obtained leave to remain as a student in 2011 and has since settled in the UK.

12. Clearly the sponsor faced a choice between availing of settlement in the UK or continuing family life as it then was in Nepal. It is uncontroversial that family life, for the purpose of Article 8, can exist between adult children and their parents. I take into consideration that the appellant remained in the family home throughout and it was the consistent evidence before me (including in the sponsor's three witness statements) that the appellant has remained dependent on his father for all of his needs, financial and otherwise.

13. Although, again in findings set aside, the First-tier Tribunal had difficulty accepting the claims that the appellant is unemployed, I have considered all the evidence in the round. As identified at the hearing before me, the

judge appeared to concentrate on just one of the sponsor's witness statements and did not appear to consider the witness statement dated 6 November 2018 which specifically addressed the issues of why the sponsor is not working and what he is doing in Nepal.

14. I take into consideration that the sponsor in his witness statement dated 6 November 2018 gave consistent evidence about the appellant's life in Nepal, including that the appellant has during this time been concentrating on being reunited with his family in the UK and that the family have focused their efforts on keeping his morale high, including with day-to-day contact and sending the appellant money for his day-to-day expenses and paying utility bills. There is also evidence that the sponsor sends some clothes through friends going to Nepal which has never been specifically disputed and which I accept. The sponsor described how he was unable to visit between 2011 and 2014 due to his employment and the lack of holidays, but that he visited in 2014 with his wife and spent three weeks in Nepal and that there have been subsequent, more frequent visits.

15. Although the appellant passed his school qualification in 2003 I accept the consistent evidence that he has not been in any regular education since then; it was the sponsor's evidence that although the sponsor made him take some courses in Nepal to see what his aptitude was like, he did not pursue any career and since 2008 he has just remained at home. It was the sponsor's evidence, which has been consistent and which I accept that he tried to encourage the appellant to leave the house and find some more courses and that he is committed to him standing on his "own two feet", but that this is difficult whilst he is alone and in Nepal without his father's guidance. I take into consideration the Gurkha culture of supporting adult children. This is corroborated by the sponsor's evidence that he has supported his younger son, Surendra, in the same way and who, although he is now making his own living and contributing to the household, continues to live with his parents in the UK.

16. The sponsor noted in his witness statement that he has continued to try and guide the appellant and that his son tells him that he does not qualify for the jobs listed in the newspaper as they are for highly educated and highly skilled people and he does not have the courage to apply for them, whereas basic jobs are already taken by people who refer and recommend their own "kith and kin" for the jobs. The appellant feels he is at an advantage given that he is "barely school level educated" with just a three month long computer hardware diploma course completed in 2007 and a one month certificate course for food and beverage service.

17. I am satisfied that it is plausible that the appellant might have remained in the family home as claimed. I take into account that he has also consistently claimed to have been unmarried and unemployed and remained dependent on his father who has given consistent, detailed, and what I find to be credible evidence, which I have considered in the context of someone who has been found to be of exemplary character through his service as a Gurkha.

18. Although the respondent Entry Clearance Officer had queried contact and financial support the appellant had produced significant documentary evidence before the First-tier Tribunal of regular contact between the appellant and his parents and of regular money transfers and I rely on the preserved findings of Judge Walker at [25]. Although Judge Walker had "no doubt" that the financial support to the appellant was also intended for the upkeep and maintenance of family properties in Nepal, this does not advance the respondent's case any further and I am satisfied that the appellant has demonstrated that he receives real, committed and effective support, including that he resides in the family property and that the financial support also goes to meet his own essential needs.

19. I find therefore that the appellant was dependent and has remained dependent on his father throughout, including since obtaining his majority and since his parents and brother left for the UK. If anything, the emotional support which his family have had to give the appellant has increased during the time he has remained alone and focused on joining his family in the UK. The extent of such support which I accept is inherent in Gurkha culture, including for adult children, is emphasised by the fact that the appellant's younger brother who is also an adult remains living with his parents in the UK. I am satisfied that family life existed, including at the date of departure and has continued to do so and I have placed weight on the witness statements and additional documentary evidence from the sponsor of the continued dependence

20. I accept the consistent evidence that regardless of the appellant's age he has remained emotionally close to his parents as evidenced by the continuing contact and financial and emotional support and I accept that I can place weight on the evidence provided including of communication records of Viber and phone call details, electronic details, electronic ticket records, family photographs, remittance evidence, bank statements and of visits, all of which I have considered in the round.

21. I accept that in deciding whether family life exists, the test remains whether something more exists than normal emotional ties (**Kugathas v SSHD [2003] EWCA Civ 31**) and relevant factors include who the relatives are, the nature of the links, age, where and with whom the appellant has resided in the past and the nature of the contact. I accept that in order to establish family life it is not necessary to find that support is indispensable, which it is unlikely to be in an appellant of this age. However, I must consider the nature of those ties in light of the Court of Appeal guidance in **Rai** and its endorsement at [36] of Sedley LJ's opinion in **Kugathas** that dependence means support which is real, or committed or effective. I have considered this in the context of the Upper Tribunal in **Ghising [2012] UKUT 160** which indicated that **Kugathas** had been interpreted too restrictively in the past and the Court of Appeal in **Patel & Ors v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17** confirmed that family life can exist without indispensable support.

22. Attainment of the age of majority in itself does not mean that family life has ended and in this case I have given weight to the fact that family life

has continued in the family home, together with what I have found to be evidence of continued emotional and financial support. I am satisfied that there is real, committed and effective support by the appellant's father and mother of the appellant, and in such circumstances I am satisfied that family life has continued to exist.

23. I am satisfied that the question of whether the respondent's refusal would interfere with that family life must be answered in the affirmative, and that given the low threshold, such interference is sufficiently serious to potentially engage Article 8. Such interference is in accordance with the law and for the legitimate purposes of maintaining effective immigration control. I therefore address the final question in **Razgar,** as to whether the interference is proportionate. In so doing I have had regard to Section 117 of the Nationality, Immigration and Asylum Act 2002, the public interest consideration. I take into consideration that Section 117B represents the ordinary interests of immigration control.

24. I take into account that there is no evidence of the appellant's proficiency in the English language or of financial independence and that therefore the public interest is engaged in this respect. I further accept that the appellant cannot meet the Immigration Rules or the policy. However, I must consider this in the context of the historic injustice to Gurkhas and the relevant jurisprudence.

25. I must give appropriate weight to the historic injustice, as conceded by Miss Everett, although I have reminded myself that this is not the only issue to be considered. **Patel & Ors** (above) confirms that whilst the interest in immigration control would in most cases outweigh Article 8 rights, in historic injustice cases the reverse is true and the approach in **Patel** is a compensatory one in terms of "righting the wrong". The Court of Appeal in **Rai** (as above) confirmed that whilst the Tribunal must have regard to Section 117B, it was correct that given the historic injustice, such considerations, in themselves, would not make an adverse difference to the outcome.

26. I have considered, as outlined in **Ghising and others [2013] UKUT 567 (IAC)** that a bad immigration history of criminal behaviour may tip the balance in the respondent's favour, but if all that is relied on is the public interest, "the weight to be given to the historic injustice will normally require a decision in the Appellant's favour.". It is not disputed that this is not a case where there is a bad immigration history of criminal behaviour, and therefore there are no countervailing factors.

27. I have considered further in the appellant's favour that the sponsor sacrificed many years of his family life to serve in the British Army, serving well in excess of the four years necessary to qualify for settlement, and that the sponsor's access to his family during that time was more limited than that enjoyed by other soldiers of the British Army (the sponsor gave evidence in his first witness statement dated 20 December 2016 that he was only allowed to live with his wife during his six months' leave after three years of service and that in his view, which I accept, he sacrificed his

family life in service of the crown) (see **R (Perja) v MOD [2004] 1 WLR 289**).

28. For the reasons set out above therefore I am satisfied the respondent's decision represents a disproportionate interference with family life.

Notice of Decision

29. The decision of the First-tier Tribunal contains an error of law and is set aside (other than where specifically preserved). I remake the decision allowing the appellant's appeal.

30. No anonymity direction was sought or is appropriate in this case and none is made.

Signed Date: 15 May 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I make a full fee award.

Signed Date: 15 May 2019

Deputy Upper Tribunal Judge Hutchinson