



**Upper Tribunal  
(Immigration and Asylum  
Chamber)**

**Appeal Number: UI-2022-002629**  
on appeal from HU/54240/2021  
[LP/00038/2022]

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 September 2022**

**Decision & Reasons Promulgated  
On 13 November 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**RAJU GURUNG  
[NO ANONYMITY ORDER]**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

For the appellant: Mr James Khalid of Counsel, appearing by Direct Access

For the respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 25 April 2021 to refuse him leave to enter the UK as the adult child of a Gurkha discharged prior to 1 July 1997, with reference to Article 8 ECHR, and paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules HC 395 (as amended).
2. The appellant is a citizen of Nepal. He was 47 years old at the date of application. His appeal relies on Article 8 ECHR and on his emotional and financial dependence on his widowed mother in the UK.

3. **Mode of hearing.** The hearing today took place face to face.

### **Background**

4. The appellant is the adult son of a Gurkha father who served until 1968 and died in the UK in 2018, having exercised his right to come to the UK for settlement. The appellant's mother joined his father here in 2011.
5. It is not disputed that the appellant and his mother were living together in Nepal, before she came here, or that at that time there was family life between the appellant and his mother.

### **Refusal letter**

6. The Secretary of State refused the appellant's application on the basis that he was not between 18 and 30 years of age; that he did not meet the eligibility requirements for adult dependent children of former Gurkhas; and that there were no exceptional or compassionate circumstances.
7. She also refused his Article 8 ECHR claim, because she did not accept that there was existing family life between mother and son.

### **First-tier Tribunal decision**

8. The First-tier Judge recorded that the following matters were not in dispute: the appellant's nationality, his father's Gurkha service, his mother's status as his father's widow, and that the appellant and his mother had private life together in Nepal until 2011.
9. The sponsor produced evidence from her passport stamps to show that she visited Nepal on 6 occasions in 2013, 2014, 2015, 2018 and 2021. Her evidence was that she was visiting the appellant and that on each occasion, she left him with money to support him. The sponsor also told the First-tier Tribunal that in between her visits, she would send him money through friends who were visiting Nepal.
10. There is no evidence of transfer of funds by money transfer until 2021, when regular payments were made. Those payments continued into 2022.
11. The sponsor gave oral evidence. At [3], the First-tier Judge referred (inaccurately) to memory difficulties for 'the appellant' of which there was no medical evidence. It is clear from the rest of that paragraph that the memory difficulties in question were those of the sponsor. The sponsor gave evidence and answered the questions asked 'to the best of her ability' and the judge then received oral submissions. Neither the sponsor's evidence nor the oral submissions are set out in the decision, but the judge refers to having a full note of both.
12. At [13]-[22], the judge set out her understanding of the legal tests and judgments, in a variety of different fonts, suggesting a 'cut and paste' approach. The findings of fact and credibility begin at [50] on page 8 of the decision, which follows [22](there are some oddities in the numbering of paragraphs in the First-tier Tribunal decision).

13. Ms Billen for the respondent did not challenge the assertion that the sponsor 'was sending money to the appellant via associates and money transfers'. The judge accepted at [58] that the appellant was being sent money by the sponsor.
14. However, the First-tier Judge criticised a lack of evidence and/or corroboration on the following points:
  - (a) why the appellant, who is uneducated but physically and mentally fit, had not relocated to another part of Nepal and sought work there;
  - (b) proof of the appellant's access to his late father's Gurkha pension;
  - (c) the frequency and amounts of money sent to him informally between 2011 and 2020;
  - (d) evidence to corroborate the assertion that the appellant uses the money he is sent to pay for food and other necessities'; noted that there was no explanation 'as to why money transfers were only used around the period of the visa application and not before then'.
15. At [54], the judge gave no weight to two letters from Mr Kul Prasad Gurung, the Ward Chairman for Madi Rural Municipality, Kaski: a Marital Status Certificate and a To Whom it May Concern letter, both dated 17 August 2020. The Marital Status Certificate notes that the Ward Office had formed a committee to investigate, who visited the appellant at home 'and found that he is not married and independent'. The other letter, also based on a 'filed investigation [sic]', says that the appellant 'is still unemployed and he has no any other income sources. Therefore, he entirely depends on his mother'.
16. The First-tier Judge commented that there was no explanation as to how the Ward Chairman had established that the appellant was not independent, but did not consider the evidence in the certificate and letter that the Ward Office investigating committee had visited the appellant at his home to investigate the position in order to write the letters relied upon.
17. As to emotional support, the judge noted that the sponsor had visited the appellant frequently, and that there had been frequent telephone and video calls, evidenced in part by calling cards, but in 2020, by Viber calls, the log of which showed frequent contact. The judge observed that 'it is normal for parents to visit and call their children'.
18. The core of the judge's reasoning is in [58]-[59] on page 9 of the decision and is very brief:

"58. I accept that the appellant is being sent money by the sponsor, but viewing the evidence as a whole, I am not satisfied that there continued to exist a family life in the terms meant in *Raj*, given the lack of sufficient evidence of real, effective or committed emotional support.

59. Accordingly, I am not satisfied that family life exists between the appellant and the sponsor, and accordingly, the appeal is dismissed as I am not satisfied that Article 8 family life is engaged. ”

19. The appellant appealed to the Upper Tribunal.
20. The respondent undertook a case review, in which she accepted that ‘it may be difficult for the appellant to find work in Nepal’ but considered that no evidence had been provided of his attempts to find work, nor to indicate that the financial support offered by the sponsor to the appellant could not continue with him in Nepal. Any interference with family life was thus not disproportionate.
21. The appellant had lived in Nepal for 47 years, with his mother moving to the UK in 2011, when he was 38 years old, as was her right. There was insufficient evidence of ‘real, committed or effective’ support capable of amounting to *Kugathas* family life. Article 3 was not engaged.

### **Grounds of appeal**

22. In his grounds of appeal, the appellant noted that family life was accepted up to the sponsor’s departure from Nepal in 2011, when she rejoined her late husband in the UK. At [55], the judge had accepted that ‘culturally parents and their unmarried children live together until that child marries’ and that the death of his father may have brought the appellant and his sponsor mother ‘even closer’. Evidence of regular telephone calls and visits had been provided and the appellant’s evidence was that his mother ‘misses me a lot’.
23. The sponsor’s written evidence was that she left money every time she visited in Nepal (six times since she settled in the UK) and sent money through people she knew: the respondent’s Presenting Officer had not challenged that evidence. Both the appellant and the sponsor had stated that he spent the money on basic needs such as food, accommodation and clothing.
24. The First-tier Judge had erred in giving no weight to the letters from the Madi Rural Municipality and the police clearance. In addition, the First-tier Judge had not given sufficient weight to the historic injustice to former Gurkhas and their family members. The appellant’s father would have applied to settle in the UK in 1968 at the time of his military discharge, had he not been barred from so doing.
25. Overall, the appellant contended that the judge’s finding of no family life was perverse.

### **Permission to appeal**

26. Permission to appeal was granted by First-tier Judge Shaerf, as follows:

“The grounds assert the judge arguably erred in law, first in her conclusion that the financial support the appellant received from his mother, and their frequent telephone and video contact did not show there was real, effective or committed support of the appellant from his

mother, and second, in her findings which did not take into account the historic injustice worked upon former members of the Brigade of Gurkhas and their families. The grounds disclose an arguable error of law and permission to appeal is granted. All grounds may be argued.”

### **Rule 24 Reply**

27. There was no Rule 24 Reply on behalf of the respondent.
28. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

29. Ms Cunha confirmed that the respondent would seek to resist the appeal. The First-tier Judge’s findings were not perverse in the light of the evidence as a whole. The Viber calls evidence related only to 2020 and 2021 and gave limited support to the appellant’s claim to have been receiving real, effective and committed support from his mother.
30. It had been open to the judge to make the findings he did, on the evidence, and in particular in the light of his witness statement at [9]. The judge’s reasoning was adequate and his approach was in line with the guidance given by of the Court of Appeal in *Jitendra Rai v Secretary of State for the Home Department* [2017] EWCA Civ 320.
31. Ms Cunha asked me to dismiss the appeal.
32. For the appellant, Mr Khalid relied on his grounds of appeal and on the chronology set out above. The First-tier Judge’s finding on emotional dependency was perverse: he should have considered emotional and financial dependency together.
33. The evidence produced was sufficient to establish continuing family life, by reason of the sponsor’s real, committed and effective support for the appellant. He relied in particular on [57] of the First-tier Tribunal decision and on *Jitendra Rai*. The judge’s decision imposed a burden which the appellant ought not to have been required to satisfy.
34. The finding of no family life was perverse and contrary to the weight of the evidence.

### **Analysis**

35. I gave an indication at the hearing that I would find an error of law and remake the decision by allowing the appeal. I now give my reasons for that decision.
36. The evidence before the First-tier Judge included letters from the Madi Ward Chairman, following what appeared to be a proper investigation, confirming that he was single, unemployed, and entirely dependent on his mother. The police clearance showed him to have a clean record, and evidence had been produced of his father’s pension. These documents should have been given weight.

37. The regular visits by the appellant's mother and the unchallenged money which she left, or sent through other people who were travelling to Nepal, were not challenged. As regards the change in payment methods from 2021-2022, I take judicial notice of the Covid-19 pandemic which stopped international travel between March 2020 and the end of 2021, and later in some countries. The sponsor would not have been in a position to visit the appellant herself or send money through others during the pandemic period.
38. There is no account of the sponsor's evidence in the decision: it is not sufficient to say, as the First-tier Judge did at [4], that she 'took into account the entirety of her evidence, a full note of which is to be found in the recording of proceedings'. There is also no summary of the oral submissions made on the appellant's behalf, although again the judge says she has taken them into account.
39. The First-tier Judge's decision contains a number of typographical errors, including misnumbering, referring to the appellant's mother as 'he/him/his', sometimes in the same sentence as 'she/her', and other indicators of a lack of anxious scrutiny.
40. The judge set out in the decision at [18]-[21] a self-direction on the legal framework, beginning with *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11, followed by quotations from *Gurung and others (R on the application of) v Secretary of State for the Home Department* [2013] EWCA Civ 8, *Ghising and others (Ghurkas/BOCs: historic wrong: weight)* [2013] UKUT 000567 (IAC), and an extended quotation from *Jitendra Rai*.
41. At [22], the First-tier Judge mentions section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). It is not entirely clear why she did that, as there is no further reference to the section 117B tests in the findings and reasons.
42. The framework so carefully set out was not applied in the remainder of the decision. The judge's reasoning at [56]-[58] is inadequate, perverse, and contrary to the weight of the evidence and indeed the law as set out in her decision.
43. This decision is unsafe. I set it aside and substitute a decision that the evidence shows that there is family life between the appellant and sponsor, and that having regard to the historic injustice, the appeal should be allowed.

## **DECISION**

44. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

I remake the decision by allowing the appellant's appeal.

Signed [Judith AJC Gleeson](#)  
2022

Date: 4 October

Upper Tribunal Judge Gleeson