



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

Appeal Number: UI-2021-000927  
on appeal from HU/07559/2020

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 17 March 2022**

**Decision & Reasons  
Promulgated  
On 17 May 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
DEPUTY UPPER TRIBUNAL JUDGE WELSH**

**Between**

**MR DHARENDRA RAI**

**and**

**ENTRY CLEARANCE OFFICER  
SHEFFIELD**

Appellant

Respondent

**Representation:**

For the Appellant: Mr James Khalid of Counsel, appearing by Direct Access  
For the Respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal, dismissing his appeal against the respondent's decision, dated 8 June 2020, refusing his human rights claim as the adult dependent child of a former Gurkha soldier. The Appellant is a citizen of Nepal.

## **Background**

2. The appellant was born on 10 March 1982 and has always lived in Nepal. On his account, he has never had a job. His father was discharged from the Gurkhas in 1969 and was granted indefinite leave to enter the United Kingdom (“UK”) in 2011, when the appellant would have been 29 years old.
3. On 22 January 2015, the respondent added Annex K to the Immigration Rules HC 395 (as amended), to define the scope for adult dependent children of Gurkhas to join them in the UK. The Age provision at [14] of Annex K provides that on the date of application, the adult child of a former Gurkha must be between 18 and 30 years old:

“If the applicant is over 30 years of age, the application under this policy *must be refused on this basis*. But where an applicant is over 40, decision makers must still consider if Article 8 otherwise applies.”

4. It was not until 2020 that the sponsor applied for the appellant and his younger sister to join him in the UK. The appellant was then 38 years old and is now 40 years old. The appellant does not rely on Annex K of: he accepts that by reason of his age, he cannot bring himself within that concession. He relies on Article 8 ECHR and seeks discretionary leave to enter outside the Rules.
5. The basis of the Appellant’s claim is that he continues to enjoy family life with his father within the meaning of Article 8 of the European Convention on Human Rights (“ECHR”) and that, but for the historic injustice suffered by Gurkha veterans, his father would have settled in the UK upon retirement and the Appellant would have either been born in the UK or joined his father as a dependent child.

## **Refusal decision**

6. In her decision on 8 June 2020, reviewed on 2 February 2021, the respondent was not satisfied that the appellant continued to enjoy family life with his father nor, in the alternative, that “the effect of the historical injustice is not such that you have been prevented in (sic) leading a normal life”. She declined to grant the appellant discretionary leave to enter, on Article 8 grounds outside Annex K.

## **First-tier Tribunal decision**

7. The First-tier Tribunal heard oral evidence from the sponsor. It emerged during that evidence that the appellant is one of 7 siblings. In addition to his younger sister who lives in the UK with his father, the appellant has four other married sisters in Nepal, at least one of whom lives in the same

area as the appellant, and a brother who shares what used to be the family home with him.

8. The Judge found the sponsor's evidence that the sister in the UK was the appellant's only sibling, and that he had no other children, to be deliberate falsehoods. It also emerged that the appellant does have employment: he does domestic work for villagers, relatives or friends, for which he is paid. There were various other credibility issues also.
9. The First-tier Judge found the appellant's and sponsor's accounts to lack credibility. He found as a fact that that the Appellant does not enjoy family life with his sponsor father within the meaning of Article 8 ECHR.
10. The appellant appealed to the Upper Tribunal.

### **Permission to appeal**

11. On 16 November 2021, permission to appeal was granted by a Judge of the First-tier Tribunal. First-tier Judge Sullivan, when granting permission, noted that the grounds of appeal were mainly a disagreement with the First-tier Judge's findings of fact and credibility, but concluded that:

"3. By a very narrow margin, given that the Judge was plainly entitled to be unimpressed at the way in which the evidence was presented, the grounds cross the applicable threshold of arguability such as to merit full consideration by the Upper Tribunal. "

12. The grounds upon which permission was granted were not restricted.

### **Rule 24 reply**

13. In her rule 24 response, dated 16 December 2021, the respondent submitted that the grounds amount to no more than a disagreement with the proper findings of the Judge. She noted that the appellant accepted that he could not bring himself within the Rules and argued that the grounds of appeal were no more than a disagreement.
14. She concluded thus:

"4. Having heard the evidence of the sponsor and highlighted numerous inconsistencies, both within the sponsor's and appellant's evidence, the First-tier Judge was entitled to find that the domestic circumstances of the appellant, his claim to be dependent on the sponsor and evidence of dependence, was simply not credible, consistent, or could be relied upon. The relevance of a bro in Nepal is relevant to assertions made as to the domestic set up the appellant lives in, and an overall credibility factor, but it is clear that the First-tier Judge rejected the claim to family life on a cumulative assessment taking into account overall credibility, and

inconsistent evidence as to employment, and absent evidence of communication and dependence/support between sponsor and appellant.  
..."

## **Upper Tribunal hearing**

15. The grounds of appeal were so imprecisely drafted that it was unclear what errors were being asserted. In his oral submissions, Mr Khalid reframed the grounds as follows:

(1) **Unfairness** - the Judge made an adverse credibility finding without giving the sponsor, who gave evidence, an opportunity to address the point of concern.

(2) **Irrationality** - the adverse credibility finding, which is the subject of ground 1, was in any event an irrational conclusion.

(3) **Incorrect application of the law** - in his assessment of family life, the Judge failed to apply the principles identified in Kugathas Secretary of State for the Home Department [2003] EWCA Civ 31 (21 January 2003)

16. Having heard Mr Khalid's oral submissions, we indicated that it would not be necessary for Mr Tufan to address us.

17. At the end of the hearing, we reserved our decision, which we now give.

## **Analysis**

### **Ground 1 - unfairness**

18. The complaint relates to [17] of the Judge's decision, which we set out in full:

"The appellant is one of 7 siblings. I am satisfied that the youngest daughter has moved to the United Kingdom with the sponsor and his wife. I heard oral evidence that the other four daughters have married and that each of them lives in Nepal with her own family, including at least one who lives in the Panchtar area of Nepal. I heard oral evidence, which I accept, that the appellant's only brother, Nahendra, lives Nepal in the family home with the appellant. I find that in writing in his witness statement "*I have no relatives and immediate family members in Nepal who I can turn to for any kind of help and support*" the appellant displayed a lack of candour. Likewise the sponsor in writing that he had made applications for "*both of my children, son Dhanendra and daughter Ranjana ...*" and "*As Ranjana, his only sibling, is already in the UK with us, he finds himself lonely and isolated.*" His further assertion "*I have no other children*" is manifestly inaccurate (he uses the term children to refer to sons/daughters who are adults). The

credibility of both sponsor and appellant is damaged as a consequence of this inaccurate written evidence.”

19. Mr Khalid submitted that the Judge ought to have given the sponsor an opportunity to address the discrepancies between the oral and written evidence identified in the passage above and that the failure to do so gives rise to unfairness such that the decision should be set aside.
20. We conclude that the Judge did not err in his approach. This was not a case of the Judge making adverse credibility findings on matters upon which no evidence had been led at the hearing or upon matters which were unknown to the parties. The sponsor gave oral evidence that plainly contradicted both his and the appellant’s written evidence. We cannot see how the Judge asking the sponsor to explain the contradiction would have benefitted his assessment or that a failure to do so undermined his conclusions. Furthermore, it is an established principle that it is not a requirement that each and every credibility issue be put to a witness.

## **Ground 2 - irrationality**

21. Mr Khalid submitted that accurate information about the appellant’s siblings was disclosed as part of the appellant’s case (in examination-in-chief and on the kindred roll) and therefore it was irrational of the Judge to conclude that the information in the written evidence was deliberately misleading, as opposed to mistaken or incomplete.
22. We cannot agree with Mr Khalid. The matters he identifies are not of such force that no reasonable judge would have reached the conclusion that this Judge did. It is far from uncommon for a witness, when giving oral evidence, to reveal a truth that they found easy to hide when writing a statement, particularly when the question is asked of them by their own Counsel. Nor is it obvious that, prior to drafting their written statements, the appellant and the sponsor would have been aware that the kindred roll was a document that would be considered by the Judge. In any event, the kindred roll records the appellant as having two siblings, not the six he actually has, and does not record that the appellant lives with his brother.
23. The witness statements are very clear and drafted for the specific purpose of bolstering the claim that the appellant enjoys family life his father. In these circumstances, we conclude that the Judge was entitled to reach the conclusion he did. Indeed, we struggle to identify any innocent explanation for the discrepancy between the oral and written evidence.

## **Ground 3 - failure to apply relevant case law**

24. Mr Khalid submitted that the Judge failed to follow Kugathas. We do not agree with Mr Khalid. Whilst the Judge did not cite this case, that is not of

itself capable of amounting to an error of law. In a carefully and logically reasoned decision, the Judge took a structured approach to the question of family life which was entirely consistent with the application of the principles in Kugathas. The Judge considered and made findings in relation to financial support, before moving on to consider the nature and extent of emotional support and then used those findings to reach a rational conclusion on the question of whether the appellant enjoys family life with his father. There was no error in the Judge's approach.

### **Decision**

25. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision.
26. The decision to dismiss the appeal stands.

Signed [C Welsh](#)  
Deputy Upper Tribunal Judge Welsh

Date 23 March 2022