



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

Appeal Number: OA/18361/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13<sup>th</sup> April 2015**

**Determination Promulgated  
On 22<sup>nd</sup> April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MISS BIMALA GURUNG  
(NO ANONYMITY DIRECTION)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Respondent

**Representation:**

For the Appellant: Ms M Benitez, Counsel instructed by How & Co Solicitors  
For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal born on 27<sup>th</sup> March 1981 and she made an application for entry clearance together with her brother (previously the second appellant but whose appeal was allowed) to join her father Ran Bahadur Gurung who was discharged from the Brigade of Gurkhas in 1972. He would have applied for settlement at that time had a policy been in force. He was subsequently given leave to remain in the UK and on 13<sup>th</sup> May 2010 travelled to the UK. His wife was granted indefinite leave to enter on 15<sup>th</sup> July 2010 and she joined him on 1<sup>st</sup> August 2010. Both the appellant and her brother's applications were refused at that time. Their

appeals were then allowed to the extent that they should be considered under the policy in force but were again both refused. Although an appeal right was given limited to human rights and racial discrimination grounds the appellants chose not to appeal. They made fresh applications on 3<sup>rd</sup> July 2013. Those applications were refused again on 28<sup>th</sup> August 2013 and are the subject of the current appeal.

2. In a determination dated 3<sup>rd</sup> September 2014 Judge of the First Tier Tribunal Boyes allowed the appeal of the appellant's brother on Article 8 grounds but refused the appellant's appeal on all grounds. The judge took into account the immigration history and stated that he did not consider that the second appellant had been separated from his parents by choice finding 'the second appellant applied for entry clearance along with his parents in 2009 but his application was refused on 2<sup>nd</sup> July 2010'. The judge took into account the immigration history in relation to the brother.
3. The appellant applied for permission to appeal on the basis that the appellant appealed together with her brother Dev Raj Gurung and their cases were similar and yet their cases were considered on a different basis. It was asserted that the judge had erred in the consideration of the appellant's case by concluding that Article 8(1) was not engaged. The appellant lived with her parents until they came to the UK [50] and the judge accepted [51] that in Nepalese culture children remained with their nuclear family until married or otherwise forming an independent life and that unemployment was high in Nepal and in the light of the cultural context and it was not implausible for the appellant still to be financially dependant upon her parents [54]. She accepted that the appellant had a close and loving relationship with her parents [60]. Nonetheless the appeal of the appellant was refused whilst that of her brother was allowed.
4. I found an error of law in First-tier Tribunal Judge Boyes' decision and set that decision aside but nonetheless preserved the findings at paragraphs 37 and the findings from 42 to 57.
5. The decision of Judge Boyes recorded that it was accepted that the appellant did not meet the requirements of the Immigration Rules.
6. Further to **Gurung & Ors [2013] EWCA Civ 8** the Court of Appeal expressly adopted the approach taken in **Ghising**:

"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."
7. In addition to the findings set out above, the findings established the following: that the first appellant at the date of the decision was 32 and the second appellant was 22. They both lived with their mother from birth until August 2010 when she came to the UK. The sponsor left the armed forces in 1972, nine years before the appellant was born and nineteen years before the second appellant was born, and he resided with them until he came to the UK. The appellants were interviewed by the

respondent by telephone on 7<sup>th</sup> June 2013 and confirmed that they lived in a rented house in Kathmandu. The family had a house in Gorkha, Nepal, but no-one lived there and the second appellant stated that they had one house in Gorkha and some land and that a brother lived there. In oral evidence the sponsor stated that he used to have a house in Gorkha but sold it. He now only had land there but a small house and land in Tanahun.

8. The judge also recorded at [53] that the first appellant stated that she had finished her secondary education in 1996 and then followed with a BA and an MA in sociology which she completed in 2006. It was claimed she was undertaking an English language course from the Practical Language Centre at the date of the hearing and provided a letter from the college dated 2<sup>nd</sup> June 2013. When asked if she had ever worked she stated that she had not. She had tried but did not get a job. Her parents had told her to look after her brother. The sponsor did not know what she had been studying but the first appellant's mother stated that she had been a student all of her life and never worked.
9. At [54] the First-tier Tribunal Judge recorded that a copy of the sponsor's standard chartered account statements were provided covering a period from 1<sup>st</sup> December 2013 to 20<sup>th</sup> June 2014. These showed the sponsor's pension being paid into the account and there are regular ATM withdrawals. This provided corroboration of the sponsor's evidence that he had provided the first appellant with an ATM card so funds could be withdrawn as required. Whilst there was an elder brother in Nepal and other relatives there was nothing in the evidence before the judge which suggested that the appellant derived any support in cash or kind from any other family member in Nepal. The judge accepted the unchallenged evidence that the unemployment levels were high in Nepal. Whilst it might appear that the first appellant was old to be financially dependent upon her family, taken in the cultural context and bearing in mind the economic situation in Nepal this evidence was accepted.
10. At the resumed hearing before me the sponsor, the appellant's father, and the appellant's mother and her brother all attended, adopted their statements and gave oral testimony through a Nepalese interpreter.
11. I take particular note of **Ghising (family life - adults - Gurkha policy) [2012] UKUT 000160** and note that each case is fact sensitive and should be analysed on its own facts.
12. Although the appellant is over thirty years of age as the offspring of the sponsor and his wife the attainment of the age of majority is not of itself sufficient to displace the presumption that there is a family life (**Etti-Adegbola v Secretary of State for the Home Department [2009] EWCA Civ 1319** and **SSHD v HK (Turkey) [2010] EWCA Civ 583** [16]).
13. The evidence of all three witnesses was consistent and credible in that the appellant had always lived within the family unit and when she was 16

years old she left Tanahun where the parents were living to stay in Kathmandu to pursue her studies. Initially at this point her older brother, who is now in Dubai, was detailed to take care of her. He left. The son Dev, whose appeal was allowed and who gave evidence before me, confirmed that he went to Kathmandu when he was approximately 12 or 13 years old and stayed with his sister. She had moved to Kathmandu when she was about 16 years old. Until the time he came to the UK they were together.

14. I accept that the appellant and her brother were dependent children upon the sponsor and very much part of the family unit and relied wholly on the sponsor and his wife for financial support and accommodation. The appellant lived in rented accommodation in Kathmandu and as found by Judge Boyes relied on financial support from her sponsor father, who paid his pension into an account which she could access in Kathmandu. The sponsor and his wife were candid in stating that they lived in Tanahun and during term time the appellant and her brother would live in Kathmandu to study. The evidence was given that the children always returned home to Tanahun during the holiday times and in the times when they were in Kathmandu the parents would visit them very regularly at least every fifteen days. A feature in assessing the existence of family life is continued residence in the family home where the dependant has not yet established an independent family life, **AA v United Kingdom [2011] ECHR 8000/08**, paragraph 49.
15. In view of the evidence given in relation to employment in Nepal I accept that the appellant has remained without work and although an adult of 32, she is a single female abiding by cultural norms which is that she would stay within the family unit until she was married. Although submissions were made to the effect that the family wished the appellant to come to the UK and remain with the family rather than marrying in Nepal it is the date of the respondent's decision which is the relative time for my decision. I note that the appellant had previously made an application in 2010 and the appeal was heard in 2010 but dismissed. During that time the elder son was able to find a job abroad and he was not the subject of an application to bring him to the UK. Clearly the family are open to prospects other than marriage. I accept that the appellant is as she is and is single and the fact that she might have been married is mere speculation and possibly hopeful.
16. The appellant has, according to the evidence of the sponsor and mother, and the appellant herself, been a student all her life and has been studying English courses whilst at the same time looking after her brother until he came to the United Kingdom. In sum, prior to the sponsor and his wife coming to the UK the appellant effectively lived with them for most of the time and along the lines of a student who would live with their parents whilst at college even though the student spends time away from home. In addition the appellant had lived with her brother for nearly ten years prior to the decision made by the Entry Clearance Officer.

17. As detailed in the statements of the sponsor and his wife I find that the first appellant has a very close family bond with her parents. Oral evidence was given to the effect that the appellant has been extremely distressed at the departure of her parents and then her brother since he had obtained leave, and although this postdates the decision, for the purposes of my decision I can accept that it does indicate the very close family bond between the appellant and her mother and father and her brother Dev. The sponsor was candid that there were two siblings of his who lived in Tanahun but they had their own family and I accept that there is no immediate and close family within Nepal with whom the appellant does have a family life.
18. Cumulatively, and taking into account the previous judge's preserved findings, I therefore accept that there is the continuing existence of family life between the appellant and her parents and brother and there is a continuing intention of the whole family to maintain family unity. Overall the circumstances also point to factors in the relationship in excess of the ordinary emotional ties (**Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**).
19. As Mr Duffy submitted the key issue was the question of family life. He graciously conceded that **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567** confirmed that:
- “(2) When an appellant has shown that there is family/private life and the decision made by the respondent amounts to an interference with it, the burden lies with the respondent to show that a decision to remove is proportionate (although appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the respondent may be unaware).”
- And:
- “... ”
- (4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant's favour, where the matters relied on by the Secretary of State/Entry Clearance Officer consist solely of the public interest in maintaining a firm immigration policy.”
20. The evidence shows that the appellant would have come to the UK with her father but for the injustice that prevented the latter from settling earlier. It is clear that the appellant cannot necessarily succeed even if their family life engages Article 8(1) but the respondent should point to matters over and above the public interest in maintaining a firm immigration policy which would argue in favour of removal or refusal of leave to enter. Thus a bad immigration history or criminal behaviour may still be sufficient to outweigh “the powerful factors bearing on the appellant's side of the balance”.

21. As Mr Duffy pointed out, there were no such factors in this particular case. I too find there were no countervailing factors which weighed against the appellant.
22. I take into account Section 117 of the Nationality, Immigration and Asylum Act 2002 and conclude that the father has to date been supporting the appellant financially and note from the evidence of the brother that she can apparently speak English. It was recorded that the appellant had followed English courses in Nepal since 2013 and the brother, Dev, confirmed that she could speak English as indeed it appeared could he.
23. It was accepted by the previous Immigration Judge that the father had so far supported both children in Nepal prior to the younger son coming to the UK and that accommodation would be available.
24. I therefore have regard to Section 117B but conclude that the appellant has established a family life, there has been interference, albeit ostensibly, in accordance with the law for the maintenance of the legitimate aim but the decision to refuse entry clearance to the appellant is not a proportionate decision.
25. I therefore allow the appeal on human rights grounds

**Order**

Appeal Allowed

No anonymity direction is made.

Signed

Date 21<sup>st</sup> April 2015

Deputy Upper Tribunal Judge Rimington

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award bearing in mind the very complex nature of the appeal.

Signed

Date 21<sup>st</sup> April 2015

Deputy Upper Tribunal Judge Rimington