



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/03051/2016**

**Appeal Numbers:**

**HU/03056/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated  
On 16<sup>th</sup> February 2018**

**On 30<sup>th</sup> January 2018**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**ARUN SARU MAGAR  
ANITA SARU MAGAR  
(NO ANONYMITY ORDER MADE)**

Appellants

**And**

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

Respondent

**Representation:**

For the Appellants: Mr S Ahmed, Counsel, instructed by Everest Law Solicitors  
(19-20 Chambers)

For the Respondent: Ms A Fijiwala, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants, a brother and sister, are the adult children of a former member of the Brigade of Gurkhas, who died in 2009. They appealed to the Upper Tribunal against the decision of the First-tier Tribunal, dismissing their appeals against the respondent's refusal to grant them entry clearance to come to the United Kingdom under the Appendix Armed

Forces of the Immigration Rules HC395 (as amended) and/or Article 8 ECHR.

2. The appellants' mother, the father's second wife, came to the United Kingdom in 2012 and settled here as their father's widow. She is the sponsor in these appeals. The family background is set out in the sponsor's witness statement.
3. The appellants' father was already married to his first wife, who was in declining health, when he married the sponsor, so that she could look after the family (the father, the first wife, and their three children). Two of the first wife's children are now in the United Kingdom. The appellant's father and the sponsor had no children until after the first wife's death in 1982, when they began a family of their own. They had two children, the appellants in this appeal.
4. The appellants' father died in 2009, but the sponsor was unable to benefit from the respondent's change in policy regarding wives and widows of Gurkhas until 2012, when she had saved enough money to make an application for herself. She had only enough money for her own application and travel, but not for that of the appellants.
5. Following the decisions in *Ghising* and *Gurung*, the First-tier Tribunal was required to find as a fact whether the appellants' father intended to settle in the United Kingdom and would have done so, but for the historic injustice. The First-tier Tribunal found that the appellants and sponsor had not discharged the burden of showing that such was the case.
6. The sponsor's witness statement for the First-tier Tribunal stated that her husband was very proud of his service in the British Army Brigade of Gurkhas and several times told her that he loved the United Kingdom and that he sincerely wished to settle here with his family, but at that time there was no policy of settlement. The record of the sponsor's evidence in the First-tier Tribunal was as follows:
  - "8. In cross examination, [the sponsor] confirmed that she married her husband on April 16 1975 after he had retired from the Gurkhas. [The first appellant] was born in 1990 followed by [the second appellant] in 1991. After leaving the army, her husband worked on the family's agricultural land. [The sponsor] did not work in the United Kingdom. She was reliant on benefits. Her children [the appellants] were financially dependent on her. If they were permitted to come to the United Kingdom they would be able to work to support themselves. [The sponsor] said that she currently lives on her own in one room. She rents this from Mr Chetam Rana who lives in the house with his wife and child. If her children are allowed to come to the United Kingdom she will look for other accommodation.
  9. [The sponsor] told me that [J], a son from her husband's first wife was still living in Nepal. Her children were in touch with him although they did not live in the same place. [D and M], the other children by [the father's] first wife were currently in the United Kingdom. [M] arrived

between 2007/2008 followed by [D] in 2010. [The sponsor] told me that she has no other relatives in Nepal. The house where her children live is owned by [D]. Since arriving in the United Kingdom she has been back to Nepal on three occasions. She last went back in March 2017 for three weeks. She stayed with [the appellants].”

7. The First-tier Tribunal took into account the following matters in finding that the sponsor and appellants had not discharged the burden of proof upon them:
  - (1) The marriage between the father and the sponsor took place nine years after the father left the Gurkhas and these appellants were not born until over two decades following his leaving the army, 24 years and 25 years afterwards;
  - (2) There was no evidence before the First-tier Tribunal to indicate that the family were reduced to destitution in Nepal, which might have provided them with an incentive to come to the United Kingdom, had that been possible;
  - (3) On the contrary, in Nepal, the family were in reasonable circumstances, with a house of their own, a small area of land to cultivate and some small-time construction contracts;
  - (4) The appellants and their mother had provided was no explanation why the father would have wanted to settle here, save the sponsor’s assertion that he loved the United Kingdom; and finally,
  - (5) There was no evidence before the First-tier Tribunal that the father had ever applied for settlement in the United Kingdom or sought advice on whether or not that was possible;

It is not clear upon what evidence the First-tier Tribunal Judge made these findings of fact and credibility. None of the matters relied upon by the Judge appear to have been put to the sponsor, either in cross-examination or by the Tribunal. The father cannot be criticised for failing to seek advice on coming to the United Kingdom before he died in 2009; it was not then open to him to do so, because of the historic injustice.

8. The Upper Tribunal may only interfere with a finding of fact in the circumstances set out in *R (Iran)* at paragraph 90.2. In this case the finding of fact is procedurally unfair and inconsistent with the evidence before the First-tier Tribunal and furthermore the sponsor, was not given any opportunity to respond to the matters now relied upon during the hearing.
9. For those reasons and with some reluctance I set aside the decision of the First-tier Tribunal. I do not feel able to remake it today, without evidence from the sponsor, so I remit the appeal to the First-tier Tribunal with no findings of fact or credibility preserved.

## **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Signed: [Judith A J C Gleeson](#)  
2018

Date: 15 February

Upper Tribunal Judge Gleeson