



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-003732

First-tier Tribunal Nos: HU/61753/2023  
LH/02117/2024

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 05 November 2024**

**Before**

**UPPER TRIBUNAL JUDGE LOUGHRAN**

**Between**

**Dil Kumari Thapa Magar  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Ms D Revill, Counsel instructed by Everest Law Solicitors  
For the Respondent: Mr N Wain, Home Office Presenting Officer

**Heard at Field House on 15 October 2024**

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals with the permission of First-tier Tribunal Judge Parkes against the decision of First-tier Tribunal Judge Khan ('the judge'), dated 11 June 2024.
2. The appellant is a national of Nepal born on 24 April 1987. The appellant applied with her brother for entry clearance to join their father Dil Bahadur Thapa ('the sponsor') and their mother Nirmaya Thapa Nagar in the UK.

**The Respondent's Decision**

3. In decisions dated 18 September 2023 the respondent refused the appellant's and her brother's applications and their human rights claims.

4. The respondent refused the appellant's application in respect of Appendix ADR of the Immigration Rules because the appellant was 36 years old at the date of the application and had provided no evidence and made no statements that would lead the respondent to consider that the appellant was unable to care for herself on a daily basis i.e. to wash and dress herself and prepare food for herself. The respondent was satisfied the appellant had demonstrated no exceptional circumstances. The appellant had provided limited details of her personal circumstances, domestic arrangements or financial commitments. The respondent accepted the appellant received financial assistance from her father but she had not demonstrated that she was genuinely dependent on him. The respondent was satisfied that the appellant was able to look after herself and had not demonstrated that any financial assistance she currently received could not continue or that she could not continue to reside in Nepal.
5. The respondent was not satisfied the appellant met the eligibility requirements of the adult dependent children of former Ghurkhas discharged prior to 1 July 1997 as set out in her policy because firstly the appellant was not aged between 18 to 30, secondly the sponsor had been resident in the UK since 2019, so the appellant had been living apart from the former Ghurkha for more than two years at a time. The respondent acknowledged that the appellant may receive some financial support from the sponsor and remained in contact with him but she had not demonstrated that she is financially and emotionally dependent on the sponsor beyond that normally expected between a parent and their adult child.
6. The respondent could find nothing in the appellant's personal circumstances to lead her to believe that the appellant's case should be given special consideration on a discretionary basis.
7. The respondent was not satisfied Article 8 ECHR was engaged because:
  - a. the appellant had grown up in Nepal;
  - b. the sponsor chose to apply for settlement when the appellant was an adult in the full knowledge that the appellant would not automatically qualify for settlement;
  - c. the appellant had not demonstrated that there is a bar to the sponsor returning to Nepal either permanently or temporarily;
  - d. the respondent was not satisfied the appellant had established a family life with her parents over and above that between an adult child and their parents or that she had demonstrated real or committed or effective support from her parents.
8. The respondent was satisfied that had Article 8 ECHR been engaged, the effect of the historical injustice had not been such that the appellant had been prevented leading a normal life. The respondent considered it did not outweigh the proportionality assessment under Article 8 ECHR. The respondent concluded that refusing the application was justified and proportionate in order to protect the rights and freedoms of others and the economic wellbeing of the country.

### **The decision of the First tier Tribunal**

9. The appellant and her brother appealed against the refusal of their human rights claim. The appeal came before First-tier Tribunal Judge S Khan on 20 May

2024. The appellants were represented by Ms D Revill and the respondent was represented by Mr Irfan, a Home Office Presenting Officer. The sponsor, the appellant's mother and her brother Tika Thapa Maga all gave evidence and the parties made submissions.

10. In a decision dated 11 June 2024 the appellant's brother's appeal was allowed but the appellant's appeal was dismissed. In dismissing the appellant's appeal, the judge found at paragraph 30 that the evidence relating to the appellant's work history was contradictory. It was the appellant and her mother's evidence that the appellant had never worked as a teacher in Nepal but the sponsor and the appellant's brother's evidence, that she had. The judge was not satisfied that the witness evidence relating to the appellant's circumstances was reliable and did not accept her claim to be dependent on the sponsor and to be living at home. At paragraph 31, the judge concluded:

"I find the second Appellant has not discharged the burden on her and I am not satisfied about her personal circumstances. I am unable to make findings about her personal circumstances. I cannot make a positive finding of family life in her case based on this evidence. On this basis, her appeal is dismissed."

### **The Appeal**

11. On 7 July 2024 the appellant applied for permission to appeal. The appellant accepted that the judge was plainly entitled to note the stark contradiction in the evidence and was entitled to reject the evidence of the appellant. However, the appellant submitted that there was a clear, logical contradiction in the determination. The judge did not find the evidence of the sponsor untruthful, and it was never suggested to the sponsor that it was, but the judge describes it as unreliable and yet:
  - a. It was unchallenged evidence that the witness was of good character.
  - b. By rejecting the appellant's evidence that she did not work the judge had clearly accepted the sponsor's evidence that she did; and
  - c. In allowing the appellant's brother's appeal the judge had plainly accepted the sponsor's evidence.
12. The grounds went on to note that the evidence from the sponsor and the appellant's brother as to the appellant's current circumstances was unchallenged. Those circumstances, it was asserted, are in effect no different to those that the judge accepted in relation to the appellant's brother. The appellant observed that the evidence cannot be both reliable and unreliable.
13. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 12 August 2024.
14. The respondent submitted a response to the grounds of appeal under Rule 24 of the Upper Tribunal Procedure Rules opposing the appeal. The respondent submitted that the First-tier Tribunal Judge had not erred in law and the decision should be maintained.
15. At the hearing before me I heard submissions from Ms Revill and Mr Wain. I reserved my decision which I now give.

## **Discussion**

16. The judge identified one aspect of the witness's evidence that was discrepant i.e. it was the appellant and her mother's evidence that she had never worked as a teacher but it was the sponsor and the appellant's brother's evidence that she had worked as a teacher. The appellant accepts the evidence was discrepant and that the judge was entitled to consider the discrepancy in her assessment of the evidence.
17. The judge concludes at [31] that "it is clear that she (the appellant) had worked as a teacher for some years." The judge goes on to find "the evidence of all the witnesses unreliable on the second appellant" and that she was therefore unable to make findings in regard to the appellant's personal circumstances.
18. As highlighted above, the judge identified only one aspect of the witness's evidence that was discrepant in respect of the appellant's personal circumstances. The judge went on to make a finding in respect of that aspect i.e. she found that the appellant had worked as a teacher for some years. In those circumstances and in the circumstances where the judge has accepted the witness's evidence in respect of the appellant's brother, I am satisfied that the judge materially erred in law in finding that she was unable to make findings about the appellant's personal circumstances.
19. The judge was obliged but failed to make findings on a matter in issue i.e. the appellant's current, personal circumstances. The fact that a discrepancy arose in respect of the appellant's personal circumstances was not an adequate reason for not making those findings, especially in the circumstances where the judge made a finding in respect of that issue.
20. The First-tier Tribunal decision involved the making of a material error of law in respect of this appellant only. The decision in respect of this appellant is set aside and I find that no findings in respect of that appellant can be preserved.
21. The appellant's representatives indicated that the sponsor, the appellant's mother and her two brothers would be called to give evidence. Accordingly, I consider it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing, see AEB v Secretary of State [2022] EWCA Civ 1512 and Begum (remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC).

## **Notice of Decision**

22. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the First-tier Tribunal in respect of this appellant and remit the case to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

**G. Loughran**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**4 November 2024**