Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08484/2012
OA/08485/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 10 July 2013	**On 24 July 2013**

Before

UPPER TRIBUNAL JUDGE SPENCER
UPPER TRIBUNAL JUDGE RINTOUL

Between

MILAN GURUNG	First Appellant
MILINA GURUNG	Second Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellants: Mr Ahmed, Counsel, instructed by Everest Law solicitors
For the Respondent: Mr Melvin, Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal with permission against the determination of First-tier Tribunal Judge Suchak promulgated on 1 March 2013 dismissing their appeal against the decision of the respondent not to grant them entry clearance to the United Kingdom as the dependants of their mother who is settled in the United Kingdom.

2. The first appellant was born on 11 October 1984; the second appellant on 8 December 1989. Both are citizens of Nepal and are brother and sister. The appellants' mother is a widow who on 23 September 2009 was granted indefinite leave to enter the United Kingdom pursuant to the concession offered to the widows of ex-Gurkhas, outside

the Immigration Rules. The appellants' father had served in the Gurkhas, retiring in 1994. He unfortunately died on 18 November 2003.

3. Both of the appellants live in Nepal and are in full-time education which is paid for by their mother. She also pays for their accommodation and all their other expenses out of her wages in the United Kingdom and the widow's pension she receives from the British Army. It is also the appellants' case that they lived together with their mother until her departure for the United Kingdom; that they continue to live together; and, that they continue to have ~~a~~ family life with their mother. The appellants' mother maintains contact with them by Skype, email and telephone. She has also visited them in Nepal in 2011.

4. On 30 January 2012 the appellants applied for entry clearance to the United Kingdom to join their mother. It is the appellants' case that they are emotionally and financially dependent on their mother; that ~~a~~ family life still exists between them; that had their father been given the opportunity to emigrate to the United Kingdom upon discharge from the forces, he would have done so; and, that in all the circumstances, bearing in mind the historic injustice done to the Gurkhas, it would be a breach of their rights pursuant to Article 8 of the Human Rights Convention to refuse to grant them entry clearance to join their mother in the United Kingdom.

5. The respondent refused the application on the basis that the appellants did not meet the requirements of paragraph 317 of the Immigration Rules; that there were no instructions to Entry Clearance Officers to consider the adult children of widows under any discretionary criteria, the discretionary policy regarding the adult descendants of Gurkhas not being applicable to the adult children of widows. The respondent was not satisfied that there were particular bonds in the case of either appellant such that a family life was established or that therefore Article 8 of the Convention was engaged; and, that even were there a family life, any interference arising from refusal to grant entry clearance was proportionate bearing in mind the need to maintain immigration control and the fact that there was no bar on the appellants' mother returning to Nepal.

6. The appellants appealed against these decisions on the basis that they constituted a breach of the appellants' and their mother's rights to respect for their family and private lives.

7. In the Entry Clearance Manager's response, the respondent submits that it was correct for the matter not to be considered under the discretionary guidance; that the appellants had provided no evidence to show that they were incapable of functioning without their mother; that the appellants were healthy adults capable of making a living, who lived together in Nepal and all the factors suggested that their wish to join their mother was one of choice rather than necessity, and the evidence in support of to the applications was unexceptional.

8. The appeals were heard by Judge Suchak on 20 February 2013. Both parties were represented by Counsel. The judge found that:

(i) the appellants were adults at the time their mother made an application for entry clearance and that she was aware that this would leave them in Nepal; that it was 21 months later that the appellants applied for entry clearance to join their mother and in the circumstances, at the date of applications, there was no family life between the appellants and their mother [33];

(ii) even had family life been established, there was nothing to indicate that the appellants' father would have settled in the United Kingdom [36], that although the sponsor stated her husband would have applied to come to the United Kingdom following discharge from the service in 1994, there was no evidence to show that he had taken any steps to do so; and,

(iii) in the circumstances, the refusal was proportionate and there was nothing in the evidence to show that there should be a departure from the ordinary principles of maintaining immigration control [36] although he noted that if a Gurkha could show that but for the historic injustice he would have settled in the United Kingdom at a time when his dependent children would have been able to accompany him under the age of 18, there was a strong case in holding that it was proportionate to permit the adult children to join his family now [35].

9. The appellants sought permission to appeal on the grounds that the judge erred:

(i) in finding that there was no family life between the appellants [3], failing [3(i)] to consider that the appellants had enjoyed family life with their mother continuously for their whole life before she left for the United Kingdom; that they had no other close family in Nepal [ii]; and failing to give proper effect to the decision of the Court of Appeal in Gurung & Ors v SSHD [2013] EWCA 8, in particular not having regard to the facts as a highly fact-sensitive issue and in failing to consider the appropriate cultural context;

(ii) in concluding that there was no evidence to show that the appellants' father had taken any steps to apply to come to the United Kingdom, as he had ignored the evidence of his sponsor on this point which had not been challenged [4;] and, had failed properly to analyse the historic injustice, erring in stating that the appellants' father had not taken steps to apply for entry clearance when there had been no provision under the Rules to permit this [4(iii)].

10. Permission to appeal against this decision on all grounds was granted by First-tier Tribunal Judge Landes on 5 June 2013. In her response to the grant pursuant to Rule 24, the respondent opposes the appeal, indicating that the judge directed himself appropriately and made appropriate findings in respect of family life and dependency for which adequate reasons were given.

Does the determination of the First-tier Tribunal involve the making of an error of law?

11. Whist the judge was correct to state [33] that the appellants were adults at the time of application, there is no indication from this that the judge considered the appellants

submissions in relation to Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) that family life may continue despite children attaining the age of majority, nor is there any indication that he considered the degree of emotional dependence as an addition to financial dependence given the fact that this was a highly fact-sensitive issue. It is unclear from the determination that the judge considered adequately the question as to what emotional dependence there may or may not have been over and above the usual ties.

12. Whilst we note Mr Melvin's submission that this is implicit in the judge's determination, we are not satisfied that this issue had been addressed adequately such that the appellants could discern from the determination why their appeals had been dismissed.

13. That error is not, however, necessarily material; the judge did consider what the position would be were he to have found that family life existed [34 to 35].

14. We consider that although the judge correctly asked the question as to whether the appellant's father would have settled in the United Kingdom had he been able to do so, the judge misdirected himself in considering the issue of intention given the reference [36] to there being no evidence to show that the father had taken any steps to join the United Kingdom. It is not the case that to succeed it must be shown that the retired Gurkha took steps to settle in the United Kingdom; indeed, given that there was no provision for him to have done so in the Immigration Rules and the Human Rights Act 1998 was not in force when he was discharged, the judge failed to make an adequate finding on this issue.

15. We note Mr Melvin's submission that no reasonable judge could have concluded, on the basis of the evidence before the Tribunal, either that there was family life or that the appellants' father had had an intention to come to the United Kingdom. We do not accept that proposition. As was noted in Ghising and Gurung & Ors v SSHD [2013] EWCA 8 whether family life exists is a highly fact-sensitive issue, and there is also a range of possible decisions a judge could reasonably have come concerning the father's intention to come to the United Kingdom..

16. For all these reasons, we consider that the errors disclosed in the determination are material in that they were capable of affecting the outcome of the decision. We therefore announced that to be our decision and that we would re-make the decision.

Re-making the Decision

17. At the request of Mr Ahmed, we heard further evidence from the sponsor, who gave evidence through the court interpreter. We also had before us an additional bundle, containing an additional witness statement from her, produced by the appellants.

18. Ms Gurung adopted her witness statements and was cross-examined. She said at the time of the application the appellants were living together in Kathmandu, which they do even when at university. She said that they were living in Kathmandu when she had come to the United Kingdom in 2010 and she said that she had lived at the

family home in the village. She then said that she had in fact lived in Kathmandu from 1991, prior to that they had been in Hong Kong. She then said that the family had all been living together in the same place in 2010 before they came to the United Kingdom.

19. The sponsor said that her son had applied to join the British Army in 2002. She said that she did not know if he wanted to join the British Army and that was entirely up to him. She said that if the children wished to, they would continue to study in the United Kingdom and she did not think her son would join the army and he would like to study further. She said that was what she would prefer.

20. The sponsor said that the children were physically fit and do not need any help with special needs.

21. The sponsor said that after her husband had been discharged in 1994 he had gone to Hong Kong where he had worked for eighteen months and then returned to work as a security guard at the American Embassy in Kathmandu, a job he had been doing when he died.

22. The sponsor said that her husband would have applied to come to the United Kingdom had he been allowed to do so when he was discharged, adding that he would have done so had he been offered the opportunity and that was why she had come to the United Kingdom. She said it was in 2007 when she found out she could come here; her husband had not made any application for entry clearance to the United Kingdom in any capacity after he had been discharged.

23. The sponsor was asked what relatives she had in Nepal at the time of application. She said just the two children and, asked again, that she was sure that this was the case. On further questioning she confirmed that she has two brothers and two sisters living in Nepal, as well as some distant relations in the Kathmandu Valley. She said that one of her sisters lives in Khotan, up in the hills, and both her brothers live in the hills also. Asked about her children's mention of other relatives, she said that these were distant relations who were also living far away, adding that these were neighbours, it being normal to refer to neighbours as relations, particularly if they were older. After stating that the distant relatives lived in the Kathmandu Valley, she said that they were not in fact neighbours but were descended from the same great-grandfather as her husband.

24. The sponsor said that her daughter wished to study if she entered the United Kingdom and would, if necessary, go away to study at university in which case she would go to live with her and get work there.

25. In re-examination the sponsor confirmed that one of her sisters lived several days' journey from Kathmandu, the other six hours away by bus. Then she said her brothers lived about five hours away. She said that her children had little contact with their aunts and uncles, meeting once a year at a festival in an uncle's village. She said her brothers and sisters were not supporting the children financially and had their own children. She said that they rarely had contact with the relatives in the

Kathmandu Valley, only going to visit on, for example, the case of someone's death. She said she was the only one who gives them emotional and financial support.

26. The sponsor said that she knew her husband would have taken the opportunity to come to the United Kingdom had it been open to him as they used to talk about it, but she did not recall any of the dates as it occurred after his discharge in 1994. She said that they had discussed this when he had retired as their finances were not that good and they had discussed going abroad, possibly for a better opportunity, and to be financially secure. She said that the United Kingdom had been mentioned as he had been here some six times while serving in the army and he liked this country.

27. In response to our questions the sponsor said that in 2010 when she left Kathmandu she had been living in a rented house where her children had continued to live. Asked why she had said that before coming to the United Kingdom she had lived in the family house in the village, she said that this was a long time ago. The sponsor said that there were people living in the house in the village but this was old and they were unable to charge rent for it.

28. The sponsor said that after she had gone to visit her children in 2011, she had moved them to a better place and they still lived in the same place now.

29. The sponsor said that she would work hard and do overtime to finance her children's studies even though they might have to pay overseas student fees if they came to the United Kingdom; she had a rough idea of what this would be.

30. Mr Melvin submitted that there was on the facts at the date of decision no family life between the appellants and their mother, there being no signs of emotional dependency over and above normal ties. He submitted also that the evidence from the sponsor was vague and at odds with what was said in the application forms and what the appellants had said as to the relatives that they had in Nepal. He submitted that the sponsor was willing to bend the truth to enhance the claim that the children were emotionally dependent on her.

31. Mr Melvin submitted further that there was no real evidence that the sponsor's husband had intended to come to the United Kingdom and the decision was proportionate.

32. In reply, Mr Ahmed submitted that we should accept the sponsor's evidence in all its aspects; that the family unit had existed prior to the sponsor's departure to the United Kingdom and had not subsequently been broken. He submitted that there were no other members of the family on whom they could depend and the sponsor had continued to assist them financially and emotionally. He asked us to note that the appellants were still in full-time education, and it had not been suggested that they had any other work or income.

33. Mr Ahmed submitted that the sponsor's evidence was not vague and her evidence was that her husband had served here six times, which was not in dispute, and had clearly formed an intention to come here, although he accepted that given the

impossibility of doing so, this was only a desire or wish. He submitted that an inference could fairly be drawn from the evidence that the sponsor's husband would have settled here had he been able to do so.

34. In assessing whether family life has continued to exist between the appellants and their mother, despite their having reached the age of majority, we proceed on the basis that this is a highly fact-sensitive issue as noted both in Gurung & Ors and Ghising .

35. We consider that the learning on this issue establishes that family life exists between a parent and children from birth and will usually continue until the child reaches the age of 18. We accept also that achieving that age does not in itself necessarily mean that family life ceases to exist, particularly where the family continues to live together, and where the individual has not yet established a family with another person.

36. We have considered carefully the evidence of the sponsor and the appellants as well as the other evidence led before us.

37. The evidence of the appellants is limited. While a statement from both was submitted with the application, no witness statement from either of them was produced for the appeal before Judge Suchak or the appeal before us, although there were statements from their mother in respect of both hearings.

38. The statement in support of the application, dated 22 January 2012, was drafted in the names of both appellants. It was recorded that their father passed away, since when their mother has been responsible for education fees, flat rent and extra expenses. It was said also, "This is the first time that we three have lived separately after our father's death so we wish to join our mother as soon as possible". It was said also, presumably by the first appellant, that he wished to join the British Army and that they were seeking to apply for settlement not only to join their mother but to get a better education and wider opportunities. Then details of the appellants' educational history were set out, it appearing that the first appellant was studying a Bachelor's Degree in Business Studies; the second appellant studying for a Bachelor's Degree in Interior Design.

39. In their application forms [part 3] the first appellant stated that he and his sister had lived at the same address for approximately five years and under section 8.5.2, that he lived on campus during school and in form VAF4A, it was stated that the first appellant's mother's sister lived in Nepal, she being the only other family member who was declared. The second appellant's application forms contained identical information.

40. In her initial statement dated 7 February 2013 the sponsor stated [18] that the children did not lead independent lives and relied totally on her for support academic, accommodation, educational matters and all other matters. She also stated [19] that she still had a lot of responsibility towards the children and that without that help they would not be able to deal with matters independently. She stated that

she paid for their accommodation and school fees [21] and [25] that her children did not have any relatives in Nepal.

41. In her second witness statement, dated 28 June 2013, the sponsor stated that prior to departure, she arranged for her children to live in rented accommodation which was also funded by her [5], that her children were dependent on her and that this had not changed [7], that without her support they were not able to deal with matters independently [8] and that they did not have any close relatives in Nepal [10]. She stated, "That they are left in Nepal under the most dire and vulnerable conditions which are beyond their capacity to endure." [10].

42. In addition, she stated [13] that if her late husband would have been granted ILR prior to 1 July 1997 she would have been settled in the United Kingdom with all her family but little about any discussions held or previous intention to come to the United Kingdom.

43. We are concerned that there are a number of discrepancies in the evidence of the sponsor and the appellants. The sponsor was asked if she had any close relatives in Nepal and said no. She then confirmed that answer, saying she was sure. She then said that she had two brothers and two sisters. Only when pressed did she accept that she did in fact have distant relatives of her husband living in the Kathmandu Valley, having stated that these were in effect neighbours.

44. We note with concern that the appellants mentioned only one aunt in their application forms whereas it now transpires that they have two aunts and two uncles, blood relations of their mother, living in Nepal. Further, the evidence of the sponsor was that they went to celebrate festivals with her brothers.

45. This issue is not peripheral. It forms part of the case that they have no-one else to turn to in Nepal and it is put forward as an indicator as to why the family life claimed to exist between the sponsor and the appellants is so strong.

46. We would note with concern also the sponsor's clear evidence that she was living in the family village before she left Nepal. She did, however, later correct this but did not explain adequately her earlier answer.

47. The sponsor's evidence is also that when she left Nepal, she arranged for the appellants to continue living in the house they had until then rented. She then said that in 2011 she arranged for them to move somewhere else, yet in their application forms the appellants stated that they had lived in the same place for approximately five years.

48. The appellants and the sponsor have consistently said that the appellants lived in hostel accommodation during term time, yet they also said that they had not lived separately from their mother before, which is inconsistent. We find that this is an indication that the appellants and the sponsor are seeking to exaggerate the strength of their relationship.

49. Mr Melvin submitted that the sponsor was vague when giving evidence about what she and her husband wished to do upon his discharge from the British Armed Forces. It would have been difficult at this distance in time to consider how they would have reacted to a hypothetical situation in which, on the basis of what they knew at the time, they would not be allowed to come to the United Kingdom. Nonetheless, what became clear from the sponsor's evidence was that she and her husband wished to go somewhere else abroad to improve their financial situation. We do not accept that this was a wish to go to the United Kingdom, rather it was a wish to go somewhere else where they would be more financially secure.

50. We consider that in her recent witness statement the sponsor has sought significantly to exaggerate the hardships in which the appellants find themselves [10]. Given that they are supported financially, to the extent that they do not have to work, and are supported through university, we consider that this is a significant exaggeration, casting doubt on the evidence of emotional dependence.

51. We consider that the above leads inevitably to a conclusion that the sponsor and the appellants have simply lied about which relatives they have in Nepal, and that the sponsor has lied about the circumstances in which her children live. There is, we find, a consistent pattern of seeking to show that the relationship between the sponsor and her adult children is stronger than it is by lying about the existence of other relatives in Nepal, thus emphasising their interdependence, and, in seeking to show that they have always lived in the same household, when they have not, not least as the appellants lived in hostel accommodation when studying.

52. We consider that this casts significant and substantial doubts on the claim that, as at the date of decision, over and above financial dependence, there existed ~~a~~ family life between the appellants and their mother. It is for the appellants to show that they have a family life with their mother, and we find that, on the balance of probabilities, they have not done so. We take the view that the financial assistance provided by the sponsor and such communication as has taken place between the sponsor and the appellants is evidence of no more than the usual emotional ties one would expect to find between a mother and her adult children, in circumstances where she has means and they do not.

53. We do not accept that there still existed at the date of decision ~~a~~ family life between the appellants who are 27 and 22 and their mother. Although the biological relationship is not in doubt, we do not accept that we have been told the truth about the emotional nature of their relationship.

54. Similarly, we do not accept given our concerns about the appellants' and sponsor's evidence, that it was ever her or her husband's wish to settle in the United Kingdom until the fortunate opportunity arose in 2007.

55. Accordingly, having had regard to the relevant case law, we consider that as no family life existed between the appellants and the sponsor while she has been in the United Kingdom, the refusal to grant them entry clearance to the United Kingdom

did not engage Article 8 of the Human Rights Convention. Accordingly, we dismiss the appeals on all grounds.

SUMMARY OF CONCLUSIONS

1. The determination of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We re-make the decision by dismissing the appeals on all grounds.

Signed Date 24th July 2013

Upper Tribunal Judge Rintoul