



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/15860/2012

THE IMMIGRATION ACTS

Heard at Field House  
On 21 August 2013

Determination Promulgated  
On 3<sup>rd</sup> September 2013

Before

UPPER TRIBUNAL JUDGE MURRAY

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MS SALINA GURUNG  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Bramble, Home Office Presenting Officer  
For the Respondent: Ms Thomas, Counsel for SAM Solicitors, Sutton, Surrey

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer but for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Nepal born on 25 August 1999. She appealed the decision of the respondent dated 6 August 2012 refusing her entry clearance to the United Kingdom with a view to settlement as the child of a parent, in this case, her mother Mrs Kasi Ghale, who is present and settled in the United Kingdom, under paragraph 297 of HC395 as amended. The appeal was heard by First-tier Tribunal Judge Moore on 3 April 2013 and dismissed under the Immigration Rules and on human rights grounds in a determination promulgated on 9 April 2013.

3. Permission to appeal was granted and there was an error of law hearing before me on 23 June 2013 at Field House. I found that there was a material error of law in the determination and directed that the appeal be reheard on all issues. My determination to this effect is dated on 10 July 2013.
4. This is the 2nd stage hearing of the appeal on all issues.
5. The Presenting Officer referred to the Article 8 issue relating to the appellant's grandmother who presently cares for the appellant in Nepal. She has been issued with a visa entitling her to come to reside in the United Kingdom as the widow of a Gurkha soldier. The Presenting Officer submitted that the relevant date in this case is the date of the decision so this issue may not be relevant, although it could be relevant in a future application. At the hearing on 23 June 2013 I had asked for further evidence about this to be produced for this hearing.
6. This matter has been referred to in the appellant's skeleton argument and I asked when the visa application had been granted to the appellant's grandmother. I was told it had been granted between the date of the application and the date of the decision. Ms Thomas for the appellant submitted that this matter was raised in the application and the sponsor's witness statement, which is in the respondent's bundle, also referred to this and so it was a live issue before the First-tier Judge. Ms Thomas submitted that more evidence has now been provided so that the full picture can be assessed at this hearing. She submitted that this evidence is pertinent as it was foreseeable at the date of the decision. She submitted that this might have been different, if subsequent to the application, this issue had been raised but that is not the case.
7. The appellant's representative referred to her skeleton argument which refers to 2 cases being TD, Yemen [2006] UKAIT 00049 and Mundeba, DRC [2013] UKUT 88 (IAC). She apologised for forgetting to bring these cases to the court with her.
8. I was handed up to date evidence of remittances since the date of the decision along with original phone cards.
9. The sponsor took the stand and adopted her 3 witness statements, being her statement which was provided with the application, which is in the respondent's bundle, her statement dated 25 March 2013 and her statement dated 12 August 2013.
10. Ms Thomas asked the sponsor Kasi Ghale, the mother of the appellant, about her mother-in-law, (the grandmother the appellant is staying with in Nepal), coming to the United Kingdom. She asked what arrangements had been made for Salina's care when this happens and the witness said she has not found anyone to look after Salina. Mrs Ghale was referred to her second witness statement in which she mentions Laxmi Gurung and Chandra Kala, in Nepal. She was asked who they are and she said they are her cousins and are distantly related to her but they are not close. She was asked if she has asked them to look after the appellant and she said she has not, as they both have a lot of children, some around Salina's age. She was

asked why they could not look after Salina. She said that their financial situations are not strong and she does not think Salina would like to live with them.

11. The sponsor was asked what her worries for the appellant are and she said she has countless worries. Salina is 14 and if she has no-one looking after her she could be raped, she could become a drug addict or she could be kidnapped. She was asked if she has tried to persuade her mother-in-law to stay in Nepal to look after the appellant, but she said she has talked to her about this but her mother-in-law said that the appellant is a teenager and she is finding it difficult to look after her now. She said she cannot ask her to stay in Nepal to look after her daughter as she is entitled to come to the United Kingdom. She has a visa based on her now deceased husband having been a Gurkha.
12. The Presenting Officer questioned the witness asking her when she last visited her daughter in Nepal. She said that was in December 2012. It was put to her that she was granted Indefinite Leave to Remain (ILR) on 7 October 2010 so why had she not visited her daughter until then. She said she had not had a passport. She was asked why it took her 2 years to get a passport and she said she had not realised she could apply after one year of ILR, she had thought it was 2 years. She was asked why she had not visited her recently if she is concerned about her and she said she is planning to go to Nepal in October.
13. The sponsor was asked why she cannot go to Nepal to look after the appellant. She said that she can go back and give her love but that is all she can give her in Nepal. She said that if the appellant comes to the United Kingdom, she can give her financial support and a good education through the State.
14. Mrs Ghale was asked about the money transfers from her to her mother-in-law and why they are after the date of decision of August 2012. She was asked how she sent money before that and she said there are a lot of Nepalese people in the United Kingdom and she gave them money to take to the appellant. She said she had not known she needed proof of this.
15. The Presenting Officer asked the sponsor why none of these people are in court today to support her claim and confirm that they took money to her mother-in-law in Nepal. She said there were many people involved. She was asked where she got the money from that she sent through friends and if it was in her bank account but she said she used to do domestic work and get paid in cash so she gave these people cash.
16. The Presenting Officer was asked why there is no evidence of school reports or letters from the school about fees being paid before August 2012. The sponsor said she used to get reports on the telephone and her mother-in-law would go to the school in person to pay the fees.
17. The appellant's representative asked her about this asking where her mother-in-law got the money from to pay the fees and she said she sent it to her.

18. The Presenting Officer made his submissions relying on the refusal letter of 6 August 2012. He submitted that the issue in this case is sole responsibility and the problem is that there is a lack of evidence to prove the sponsor's claims. The Presenting Officer admitted that there was an error in the First-tier Tribunal Judge's determination but submitted that there is not sufficient evidence to prove sole responsibility to the required standard of the balance of probabilities.
19. Mr Bramble submitted that he does not dispute the payments and letters, subsequent to the date of the decision but he referred to the total lack of evidence before the date of the decision. He referred to there being no witnesses and no statements from anyone to say that they had taken money to the appellant from the sponsor and this is a second stage hearing so the sponsor could have arranged this. He referred to the sponsor stating that she gave cash to the couriers, as she had been paid in cash but this does not help, as no bank statement can be shown to confirm that she did this. It was submitted that there is no evidence at all to show that money was paid to the school or was sent to the appellant or her grandmother for the appellant's needs in Nepal.
20. I was referred to the letter from Siddharthanagar Municipality Office which states that the appellant's father has been living in India and has remarried there and the letter from Paschimanchle English High School in Nepal which states that the appellant's mother has been paying all the expenses for the appellant's studies. The Presenting Officer submitted that these are self-serving. The information in them has been provided by the appellant's mother-in-law. It was submitted there is no independent verification of either of these matters.
21. The sponsor has been to Nepal but there is still the question of sole responsibility and the shortage of reasons why she did not visit her daughter as soon as she was granted ILR in the UK. Today the sponsor has stated that she is concerned as her mother-in-law is coming to the United Kingdom and the appellant will be left with no-one in Nepal. It was submitted it is therefore strange that the sponsor has not gone out to Nepal to put things in place to help her daughter.
22. It was submitted that respondent is not satisfied on the balance of probabilities that Kasi Ghale has had sole responsibility for the appellant.
23. With regard to Article 8 and the evidence relating to the appellant's grandmother's visa entitling her to come to the United Kingdom, it was submitted that this was raised in the refusal letter and the visa was granted before the date of the decision. It was submitted however that the Article 8 case is based on the situation at the date of the decision and at that time the appellant's grandmother, who is responsible for her day to day care and has been since 2002, was still in Nepal with the appellant, in fact she is still there now. The sponsor has only visited briefly and on the face of it the only support she has given her daughter is financial support and there is even a lack of evidence about this. It was submitted that until the appellant's grandmother comes to the United Kingdom the status quo does not change.

24. It was submitted that there is nothing to stop the sponsor going to Nepal to live with the appellant. She is not a refugee in the United Kingdom. The reason she states she does not want to do that, is because her and her daughter's quality of life will not be as good there as it will be in the United Kingdom.
25. With regard to proportionality, the balancing exercise has to be based on the appellant's family life, the relationship of the appellant with her grandmother and the relationship of the appellant with her mother. The Presenting Officer submitted that the parties cannot succeed in the balancing exercise because of the lack of evidence to support the appellant's claim. The balancing exercise must tip in favour of the respondent.
26. I was asked to dismiss the appeal under the Rules and on the Article 8 issues.
27. Ms Thomas for the appellant made her submissions referring to her skeleton argument. She submitted that with regard to the Rules she is relying on paragraph 297(i)(e) and paragraph 297(i)(f). These are the paragraphs relating to sole responsibility and serious and compelling family or other considerations making exclusion of a child undesirable.
28. The primary issue raised by the respondent is the absence of evidence. I was asked to find that the sponsor is very straightforward and I was asked to give weight to the letters from the school and the Municipality. Although some of the evidence post dates the decision it relates to the ongoing state of affairs.
29. It was submitted that it would be improper to find that the sponsor's influence over her child, the appellant, has only taken place after the date of the decision. I was asked to give weight to the sponsor's witness statements. It is clear from these that she has had sole responsibility for the appellant and I was referred to the said case of TD (Yemen). I was asked to find that the sponsor has had sole responsibility for the appellant and has been responsible for the continuing control and direction of the appellant relating to the important decisions about her upbringing. Clearly the appellant's grandmother has practically dealt with the day to day decision making for the appellant but her education, her health care and her social life have been dealt with by the sponsor.
30. With regard to the sponsor not immediately going to Nepal after she was granted ILR, it was submitted that she went 18 months later and that once she was granted ILR she then had to make arrangements, such as saving for flights, taking time off work and getting documents together. It was submitted that the sponsor has kept in touch with her daughter regularly and has kept in touch with her school. Recently she arranged for the appellant to get extra lessons, because she had been told she falling behind. It was submitted that the sponsor has been pro-active.
31. It was submitted that the sponsor has been very upset during this hearing and is generally very upset because her daughter is going to be left on her own in Nepal. It

was submitted that this is where paragraph 297(i)(f) comes in. It was foreseeable that the appellant's grandmother would be coming to the United Kingdom and this means the appellant will be left in Nepal without any guidance. It was submitted that she is only 14 years old and requires adult guidance and I was asked to find that the appellant's concern about her is justified. The sponsor has put no arrangements in place for the appellant and it is not clear how the appellant will manage if, for example, she takes ill or whether she will even go to school as she will have no emotional support. It was submitted that when all matters are considered cumulatively there are serious and compelling considerations and paragraph 297(i)(f) has been satisfied.

32. With regard to the Article 8 issue, it was submitted that these compelling and compassionate considerations form an important part of the Article 8 claim. I was again referred to the skeleton argument and the said case of *Mundeba*, relating to the best interests of the child. The scope of the section 55 duty extends only to children who are within the United Kingdom, but the Tribunal states in this case "The exercise of the duty by the Entry Clearance Officer to assess the application under the Immigration Rules, as to whether there are family or other considerations making the child's exclusion undesirable, inevitably involves an assessment of what the child's welfare and best interests require." It was submitted that for a 14 year old girl to be left with no support in a country like Nepal must be looked at sympathetically. Although she and her mother have been separated for some time, her mother and her grandmother are her family. She is now going to lose the physical presence of her grandmother. It was submitted that her grandmother has compensated to an extent for the fact that her mother has been in the United Kingdom. When her grandmother leaves Nepal there will be no physical presence with the appellant. All she will have will be visits and it was submitted that the impact of the appellant's grandmother leaving Nepal will be significant.
33. It was submitted that the respondent has conceded that if the appellant comes to the United Kingdom she will be maintained with no recourse to public funds. Ms Thomas submitted that this appeal should be allowed under the Immigration Rules but if not, Article 8 of ECHR must be engaged. I was asked to allow the appeal.

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### **Determination**

34. The burden of proof is on the appellant and the standard of proof is the balance of probabilities.
35. I have considered all the evidence on file, the oral evidence given at the hearing, the submissions of both parties and the skeleton argument of the Appellant's representative.
36. The relevant issues under the Rules are whether the sponsoring parent has sole responsibility for the appellant and whether there are serious or compelling family or other considerations which make exclusion of the child undesirable.

37. In this case sole responsibility is extremely difficult to assess because of the lack of evidence provided. I believe that the sponsor and the appellant are in touch with each other and that the sponsor is also in touch with her mother-in-law who cares for the appellant in Nepal. The letter from the school and the letter from the Municipality are however self-serving. They relate what they have been told by the appellant's grandmother. The appellant has been separated from her mother since 2002. The sponsor states that she sends money to the appellant and her mother-in-law but the evidence about this is lacking. It was clear what was required to support this claim but the sponsor has not even produced witness statements from people who she states took money from her to the appellant in Nepal. The evidence that has been provided post dates the decision. Sole responsibility is difficult to prove and in this case it has not been proven. I find the sponsor to be credible but her witness statements are the only evidence of what she does for her daughter.
38. Paragraph 297 of the Rules has not been satisfied in all its aspects.
39. With regard to the serious and compelling family or other considerations, I have noted the said case of Mundeba. When the child's welfare and best interests are considered it is clearly not in the appellant's best interests that her grandmother leaves Nepal to come to the United Kingdom leaving her in Nepal with no-one to take care of her but at the date of the decision and at today's date, her grandmother is in Nepal taking care of the appellant. The date of the decision is the applicable date. The appellant's mother has stated that she feels unable to ask her mother-in-law to continue to stay in Nepal to look after the appellant. That is understandable. When her grandmother leaves Nepal the appellant will be left without family support but at present she is still being looked after by her grandmother and at present this is what is in her best interests. She can remain there and her grandmother can continue to look after her. If her grandmother leaves Nepal then the situation will be different as the appellant will then be left in a situation of both emotional and physical vulnerability.
40. The sponsor states that she intends to go to Nepal in October to visit her daughter. It is in October that her grandmother states she will be leaving Nepal. At that time the appellant's mother can either remain in Nepal with her daughter or the appellant can make a new application in the new circumstances in which she will find herself. At present the appellant's family life is with her grandmother. She does have a bond with her mother but they have been apart for 11 years.
41. I have considered the 5 steps narrated in the case of Razgar [2004] UKHL 27. Proportionality has to be dealt with. At present the appellant is living in Nepal with her grandmother and attending school. She is being properly cared for. When the best interests of the child are considered, her best interests are for her to remain in Nepal with her grandmother. If she remains in Nepal there will be no interference with her family and private life. It is only if her situation changes, which it is likely to do but may not, that it could be disproportionate for her to remain there. Her mother's evidence is that she will be in the United Kingdom and her grandmother will also be in the United Kingdom.

42. Based on the appellant's situation I find that the application does not meet the terms of the Immigration Rules and I find that Article 8 of ECHR is not engaged.

**DECISION**

43. I dismiss the appeal under the Immigration Rules.
44. I dismiss the human rights appeal.
45. Anonymity has not been directed.

Signed

Date 3<sup>rd</sup> September 2013

Judge Murray  
Judge of the Upper Tribunal