



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/17722/2012

THE IMMIGRATION ACTS

Heard at Field House, London  
On 22 July 2013

Determination Promulgated  
On 15 August 2013

Before

Upper Tribunal Judge Latter  
Deputy Upper Tribunal Judge McCarthy

Between

DEEPA GURUNG

and

Appellant

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellant: Mr C Howells, Counsel instructed by N C Brothers & Co Solicitor,  
Reading

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 17 June 2013, the appellant was granted permission to appeal to the Upper Tribunal against the determination of First-tier Tribunal Judge R J N B Morris, promulgated on 7 May 2013. Judge Morris dismissed the appellant's appeal against the refusal of entry clearance dated 8 November 2012.
2. The appellant was born on 19 May 1982 and is a citizen of Nepal. She applied for entry clearance to join her father, who is settled in the United Kingdom because he was a former Gurkha soldier, on whom she is dependent. The entry clearance officer

decided that she was not dependent on him and therefore she did not benefit from the immigration rules, immigration policies or article 8 ECHR.

### **Error on a point of law**

3. Mr Howells conceded that Judge Morris did not make a legal error when determining the appeal in relation to para 317 of the Immigration Rules or when considering the immigration policies that applied. His arguments were that Judge Morris erred in a number of ways when determining the appeal in relation to article 8 ECHR. Mr Avery confirmed that the Entry Clearance Officer opposed the appeal.
4. Having heard from both Mr Howells and Mr Avery, and having considered the various arguments and documents, we are satisfied that Judge Morris made an error on a point of law when determining the appeal in relation to article 8. Our reasons are as follow.
5. In paragraph 27 of her determination, Judge Morris concludes that the appellant had failed to establish that she enjoyed family life with her parents in the sense of article 8(1). In reaching that conclusion she relied on the judgment in Konstatinov v the Netherlands (appl no 16351/03, [2007] ECHR 336), citing the following principle at the end of paragraph 25 of her determination:

“... according to its well-established case-law under Article 8, relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties.”
6. Mr Howells rightly pointed us to more recent case law that suggests that the jurisprudence on this issue has developed. He took us to Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) and reminded us that paragraphs 50 to 62, which examined the proper approach to article 8(1), received approval from the Court of Appeal in Gurung and others v SSHD [2013] EWCA Civ 8. It is clear that the approach has moved on from that expressed in Konstantinov to recognise that the issue under article 8(1) is “highly fact-sensitive” and each case must be analysed on its own facts.
7. We have considered whether Judge Morris’s finding in relation to article 8(1) can stand. It would appear that in paragraph 26 of her determination that she found that there was no evidence suggesting further elements of dependency beyond the normal emotional ties. Nevertheless, in paragraph 27 she described that the appellant enjoys a private life with her family. The fact that Judge Morris looked for elements of dependency beyond the normal emotional ties and sought to separate out private life elements from family life ones is an indication that she was not examining the case on its own facts. It is artificial to try to separate out family life and private life issues when those issues are all part of the assessment of the nature of the relationships between family members.
8. The failure to follow the correct approach to article 8(1) is clearly an error on a point of law. However, because Judge Morris went on to make alternative findings in paragraphs 28 to 35 of her determination, we would not have found this to be sufficient reason to set her determination aside. However, we have found one other

significant error, which does mean we have to set aside the determination of the article 8 aspects of the appeal and we will have to re-make the decision.

9. The issue we have identified relates to whether the judge failed to make findings on relevant evidence. The appellant's father said in paragraph 6 of his witness statement:

"If I had been allowed to settle in the UK when I retired from the Army, I would have done so, and would have been able to have all of my children settled here with me as they were all under eighteen years of age at that time. Deepa in particular was only five years old then."

Judge Morris refers to that statement in paragraph 6(ii)(a) of her determination.

10. In paragraphs 32 to 34 of her determination, Judge Morris cites various sections of Gurung and others. One of those extracts (from paragraph 42) states:

"... if a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now adult) child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."

11. The evidence given by the appellant's father in his witness statement clearly goes to this issue. Despite Judge Morris stating she was aware of the content of the witness statement, at no point in her determination does she make a finding as to the reliability of this evidence or what weight to give it.
12. The failure to make a finding on relevant evidence is an error on a point of law. As there is no finding on this material issue, we have no choice but to set the decision aside and remake it.

### **Remaking the decision**

13. Although we did not give our reasons in detail, we informed the parties at the hearing that we had found that Judge Morris's determination contained an error on a point of law and had to be set aside. We gave time to the representatives to prepare their cases, reminding them that the only issue before us relating to article 8(1).
14. The parties relied on the evidence submitted to the First-tier Tribunal. The appellant's father gave evidence through the Tribunal's Nepalese interpreter. He adopted his witness statement and answered a number of questions put by each representative, after which we heard their submissions.
15. We begin by assessing whether the appellant can benefit from article 8(1). It is for the appellant to show that it is more likely than not that at the date of decision she did so benefit. The evidence and arguments we heard that relate to article 8(1) is as follows.
16. The Entry Clearance Officer argues that the appellant is independent of her father and therefore she has established her own life. He relies on the fact that he was given no evidence to show that the appellant could not function as an adult without her parents. He identified the fact that the appellant had studied, had gained a nursing qualification and undertaken voluntary work. In addition, the Entry Clearance Officer was not satisfied the appellant was financially supported by her father as the evidence of funding was weak.

17. Mr Avery reiterated these points, adding that it was relevant that the appellant had been left behind in Nepal because her father could not afford to bring her to the United Kingdom at the same time as her mother and younger brother. Mr Avery also identified that the appellant had lived on her own for ten months by the date of decision, which was a significant period. His view was that the application was based on nothing more than the undesirability of the appellant living alone.
18. Mr Avery also challenged the evidence insofar as he thought the strength of the appellant's relationship to her mother was being exaggerated because there was no evidence from her directly, only from the appellant's father. In addition, he submitted that the appellant's access to her relatives in Nepal was being downplayed. Mr Avery relied on inconsistencies between the appellant's statement and the oral evidence given by her father. Whilst the appellant indicated that her father provided intermittent financial support to her older brother whose shop was not doing very well, a situation that indicated a level of contact, the appellant's father stated in evidence that he had no contact with his eldest son and did not help him financially.
19. Mr Howells addressed the issue of inconsistency by asking us to compare paragraphs 2 and 13 of the appellant's statement. In paragraph 2, the appellant indicates that her father had provided some financial support to her father in the past and that this was evidence that her brother could not support her financially. In paragraph 13 the appellant indicates that her brother did not want to be unemployed and dependent on their father and that he was trying to make a living. Mr Howells argued that there was no inconsistency and in any event it was not fair to raise an allegation in closing submissions without giving the appellant's father an opportunity to respond.
20. Mr Howells argued that the appellant and her father had given consistent evidence that there was a close bond between the appellant and her mother. They had lived together from when the appellant was born until 2011 when her mother came to the United Kingdom. Mr Howells indicated that the case law indicated that a ten-month period of separation was not necessarily significant, particular where there was an intention to send for the relative. The evidence was consistent in showing that the appellant was financially reliant on her father as there was no other source of income.
21. Our attention was drawn by Mr Howells to the fact that the appellant was a young woman living alone in Nepal and that she suffered culturally as a result as she was regarded as being part of her father's family since she was not married. As indicated in paragraph 112(f) of Ghising the allegation that the appellant's family could re-migrate to Nepal was not reasonable given the historic injustice.
22. We have also had regard to the skeleton argument supplied to the First-tier Tribunal and the various grounds of appeal.
23. Although not mentioned by the Entry Clearance Officer or by Mr Avery, we are aware the appellant obtained her nursing qualifications after entry clearance was refused. In the documents that accompanied her application she wrote that she was awaiting her results, something she also confirmed in her interview. In that interview she confirmed that her course started in 2010 and it was a two year course. The educational certificates were all issued on 7 March 2013. It would appear that

the appellant was continuing her studies after her mother and younger brother left Nepal. We also take account of the appellant's evidence in her statement that indicates that after her parents had both gone to the United Kingdom, she had to be able to buy things for herself. There is no evidence that she was unable to do so.

### **Article 8(1) ECHR**

24. Having had regard to the evidence and the arguments we are satisfied that article 8(1) is engaged. We have reached this conclusion for the following reasons.
25. There is no definition of family life and it is necessary to examine the facts of a particular situation. In the appellant's case, it is not argued that the appellant has not enjoyed family life with her parents in the past; she is related as claimed and lived with her parents and siblings as she grew up. The question for us is whether she still enjoys family life with them. We remember that it is for the appellant to show that she enjoys family life with her parents.
26. There is nothing in law that says that a child ceases to enjoy family life with its parents simply on becoming an adult. However, as a child becomes more independent, so its role in the family changes and at some point, often when the child leaves the family home or starts its own family, the child can be regarded as no longer being part of the parents' family.
27. The appellant and her father have given consistent evidence about their relationship. They have both confirmed that the appellant's father throughout the period has provided financial support. The fact that the appellant had been studying and not working is confirmed by the documentary evidence and is corroborative of the fact that she will be receiving financial support from someone. In addition the appellant continues to live in the family home, which is owned by her father. She makes no contribution to its upkeep. We reject the Entry Clearance Officer's allegation that the evidence was not sufficient to establish that the appellant was supported financially by her father; we are satisfied that it shows that it is more likely than not that she was supported by him.
28. The reasons why the appellant is living alone is simply a consequence of the appellant's parents having to make difficult choices about establishing themselves in the United Kingdom, where they have permission to live and work. The evidence is equivocal about why the appellant was left behind. She accepts that someone had to remain because her father could not sponsor the whole family at once. The cost of migration from Nepal to the United Kingdom is high, given the visa application fees and the travel costs involved. This supports the appellant's and her father's evidence that she was not left behind because she was no longer regarded as part of the family.
29. However, we are aware that the appellant had another reason to stay behind, to finish her studies. As the oldest child, she was also possibly better able to care for herself on a day-to-day basis. But neither of these factors undermines the notion that the appellant and her parents regarded themselves to be part of the same family.
30. This is also borne out by the fact that the appellant made an application for entry clearance once her father could afford to make that application. The appellant's account of how she has been able to organise her life on her own is not an indication

that she is no longer part of her parents' family within the meaning of article 8(1) since all it shows is that she is able to look after herself. Children who are nearly 18 are likely to be able to look after themselves on a day to day basis but that does not mean they are no longer part of the family group in terms that they remain dependent on their parents.

31. As to whether the appellant and her father have told the truth regarding her interaction with other relatives in Nepal, we acknowledge that the evidence is muddled and therefore weak. However, we do not find that the extent to which the appellant might have contact with other relatives in Nepal is irrelevant to whether she is part of the same family as her parents. We have already found that the appellant is supported financially by her father and that she lives in a house he owns. Although we accept that if there was evidence to show that the appellant was reliant on other relatives, then there might be doubts as to whether she is part of the same family of her parents, the fact that there is no such evidence and the evidence we have does not admit of such a possibility being realistic, leads us to reject that part of Mr Avery's argument.
32. The other issues raised by the Entry Clearance Officer and Mr Avery do not impinge on whether there is family life between the appellant and her parents. They are factors that will be relevant to assessing whether the effect of the refusal of entry clearance is proportionate since it will have the effect of separating the appellant from her parents because of the distances involved.
33. We also recall that there is no high threshold for establishing the existence of family life, even between adults. As the case law indicates, the issue is what the evidence shows. It is not an exercise in assessing proportionality; it is simply a question of how the family members interrelate. For all these reasons we are satisfied that at the date of decision the appellant enjoys family life within the meaning of article 8(1) with her parents even though they live apart.

#### **Article 8(2)**

34. With regard to article 8(2), it is for the Entry Clearance Officer to show that the refusal of entry clearance is proportionate. We have reached the following conclusions.
35. There is no dispute that the Entry Clearance Officer had power in law to refuse entry clearance. However, the usual necessity in a democratic society of controlling migration is weakened in this case insofar as it is accepted that an historic injustice was perpetrated against former Gurkha soldiers.
36. There has been no challenge to the evidence given by the appellant's father that he would have settled in the United Kingdom when he retired from the British army had that been allowed or that he would have brought his family over at that time. It is not disputed that the appellant's father acquired skills when serving in the army that would have given him good employment opportunities in an economy such as the United Kingdom. It is clear that the appellant's father is someone who seeks to work in order to support himself and his family; after he left the army he spent many years working abroad because he could not find work in Nepal. The fact that the

appellant's father has sought to bring his wife and one son to the United Kingdom is evidence of his intention to enjoy family life here.

37. The fact that we find the appellant's father credible on this issue (even though the burden of proof is not on him), means there is a strong reason for finding that it is proportionate to permit the appellant to join his family now.
38. We have indicated above that the Entry Clearance Officer sought to justify that the immigration decision was proportionate because the appellant was an adult and was able to care for herself. In other words, as she did not need her parents with her in order to live her life, there was no need to admit her to the United Kingdom to join them. In addition, the Entry Clearance Officer argued that the appellant was not financial dependent on her father. These are the only arguments presented by the Entry Clearance Officer for saying that the immigration decision is proportionate.
39. We have already concluded that we find that the appellant was financially dependent on her father and we do not need to rehearse our reasons here. As a result, that part of the Entry Clearance Officer's arguments falls away.
40. Without the historic injustice argument we might have accepted the Entry Clearance Officer's argument on this issue. However, as we have found that the appellant remains a member of her parents family for the purposes of article 8(1) for the reasons we have given, and having accepted that the parents have suffered detriment because of the historic injustice, we can only conclude that this is a situation where on balance the refusal of entry clearance cannot be regarded as proportionate. If we accepted it was proportionate, we would be accepting that past interference in family life rights would have no relevance, which is clearly contrary to the law.
41. For these reasons we find against the Entry Clearance Officer and conclude that the refusal of entry clearance is contrary to the United Kingdom's obligations under article 8 of the human rights convention.

### **Decision**

The appeal to the Upper Tribunal is allowed.

The determination of Judge Morris contains an error on a point of law and we set it aside.

We remake the decision and allow the appeal against the refusal of entry clearance.

Signed \_\_\_\_\_ Date \_\_\_\_\_  
Deputy Judge of the Upper Tribunal

### **To the respondent: fee award**

As we have allowed the appeal we have to consider whether to make a fee award. No application was made for such an award and it is difficult to justify making an award of our own initiative. Therefore we make no award.

Signed \_\_\_\_\_ Date \_\_\_\_\_  
Deputy Judge of the Upper Tribunal