



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/44277/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 24 July 2014**

**Determination**

**Promulgated**

**On 28<sup>th</sup> July 2014**

**Before**

**THE HONOURABLE MR JUSTICE LEWIS  
UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MISS RADHIKA THAPA**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Mr H Shoeb instructed by Howe & Co Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal against a decision of the First-tier Tribunal promulgated on 14 March 2014. By that decision the First-tier Tribunal allowed an appeal by Miss Radhika Thapa against the decision of the Secretary of State for the Home Department refusing her leave to remain in the United Kingdom. The basis of that decision was Article 8 of the European

Convention on Human Rights. The Secretary of State now appeals against that decision.

2. Ms Thapa, the respondent, is a citizen of Nepal and she was born on 1 August 1986. Her father was a Gurkha who served with distinction in the British Army in the Second World War. He was discharged from the British Army in 1953. He had always, as the First-tier Tribunal found, intended to settle in the United Kingdom and he did so in 2009 with his wife and younger daughter. Sadly, he died in July 2011. His wife, the respondent's mother, then moved in to live with the younger daughter and her husband in February 2013.
3. The respondent came to the United Kingdom on 23 March 2013 to visit her mother and her sister. She had previously always lived in Nepal. Her evidence was, and the First-tier Tribunal accepted it, that when she came to England the position in relation to her mother was sadly worse than she expected. Her mother was depressed after the death of her husband and had a number of medical problems as well. After less than one year in the United Kingdom Miss Thapa applied for leave to remain. The Secretary of State refused that application. So far as Miss Thapa's private life in the United Kingdom is concerned she did not satisfy paragraph 276ADE of the Immigration Rules. Miss Thapa did not have the requisite period of residence in the United Kingdom to qualify under that Rule.
4. The question then arose as to whether there were other compelling circumstances such as would exceptionally justify the grant of leave to remain outside the Immigration Rules. In relation to that the Secretary of State said this in her decision letter of 11 October 2013:

"It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. It has been decided that they do not, because although you have mentioned that your mother's health is deteriorating, no evidence has been provided to support this claim. In addition your mother has lived in the United Kingdom for two years on her own since your father died and managed to cope. Finally your sister lives in the United Kingdom and can provide care and assistance to your mother if and when it is needed. With reference to your financial and emotional dependence on your mother, this is not considered to be a compelling and compassionate reason to be granted as you are 27 years old and able to support yourself with a job. Lastly, it has been noted that your father was a Gurkha and granted leave to remain in the United Kingdom towards the end of his life. You state that if he was granted this right before then you yourself would have been born in Britain and a British citizen. However, this is a purely hypothetical argument and therefore not

considered exceptional. Your application for leave to remain in the United Kingdom is therefore refused.”

5. The respondent appealed to the First-tier Tribunal. She contended first that she was indeed enjoying family life with her mother and that family life fell within the scope of Article 8(1). Secondly, Miss Thapa contended that removal would be disproportionate under Article 8(2) of the European Convention on Human Rights. One of the facts upon which Miss Thapa sought to rely was this. Her father had been a Gurkha serving in the British Army. Unlike others who served in the British Army, Gurkhas were not allowed to settle in the United Kingdom following their discharge from the army. That policy changed in, we believe, about 1997. The respondent contended that Gurkhas had suffered an historic injustice in that if they had been allowed to settle in the United Kingdom before the change in the law permitting them to do so then her father would have come to the United Kingdom and settled here much earlier. As his then dependent daughter, Miss Thapa says she too would have been able to come here and settle. Miss Thapa contended that that amounts to an exceptional or compelling circumstance justifying the grant of leave to remain and submits that it would be disproportionate to refuse her leave to remain.
6. The First-tier Tribunal found that the respondent could not satisfy the requirement for leave under the Immigration Rules and there is no challenge to that finding. The First-tier Tribunal then turned to the question of Article 8.
7. First the Tribunal considered whether in fact the relationship between the respondent and her mother did amount to family life falling within the scope of Article 8(1). It considered that issue in accordance with the first decision of the Upper Tribunal in **Ghising [2012] UKUT 00160**. It considered whether the relationship between the respondent as an adult child and her mother did constitute family life within the meaning of Article 8(1). In very many instances of course the fact that there are emotional bonds between a parent and another child will not constitute the enjoyment of family life within the Article. There will however be cases where an adult child does have a relationship with a parent which does constitute the enjoyment of family life falling within Article 8(1). Applying that guidance the Tribunal considered the particular factors in the relationship between the respondent and her mother. It considered the mother’s health, it considered the extent to which the respondent provided assistance and care to her mother and they considered the bonds between the mother and the child. The Tribunal concluded that it was satisfied, just, that the respondent had established that family life existed between her and her mother for the purposes of Article 8 of the Convention. That finding is not challenged by the Secretary of State on appeal.
8. The Tribunal then turned to Article 8(2) to consider whether or not removal, which would involve an interference with that family life, was

justified. At paragraph 32 the Tribunal recognised that refusal of leave pursued a legitimate aim, in this case the economic well-being achieved through effective immigration control. The next question then is whether the refusal decision in this case was proportionate to that legitimate aim. The Tribunal referred to the well-known case of **Gurung & Others [2013] 1 WLR 2546**. That dealt with the position of family members of Gurkhas who had been unable to settle in the United Kingdom until a time at which their child was not eligible to settle in the United Kingdom.

9. At paragraph 34 the Tribunal said this:

“In **Ghising** the Upper Tribunal, following the Court of Appeal in **Gurung**, stated that where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have been settled in the United Kingdom long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant’s favour, where the matters relied on by the Secretary of State or Entry Clearance Officer consist solely of the public interest in maintaining a firm immigration policy. It can therefore be seen that the appellants in Gurkha and British Overseas Citizens cases will not necessarily succeed, even though their family life engages Article 8(1) and the evidence shows that they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the respondent can point to matters over and above the public interest in maintaining a firm immigration policy which argue in favour of removal of the refusal of leave to enter, these matters must be given appropriate weight in the balance in the respondent’s favour.”

10. The Tribunal then gave example of some of the factors that might outweigh the interests of the person in being allowed to remain here. It refers for example to the person having a bad immigration history or to criminal behaviour. There may well be other factors that may tip the balance. The Tribunal considered the respondent’s position carefully. It considered the fact that she had come as a visitor and then made this application for settlement rather than returning to Nepal. However the Tribunal was satisfied that that was because she had discovered that the mother was unwell and was much more ill and depressed than the respondent had thought. These are the findings of fact that the Tribunal made and which it was entitled to reach on the evidence before them. It therefore concluded this was not a case where the respondent was seeking to manipulate the immigration system or had a bad immigration history. It was a case where she came to this country and her mother’s condition was simply worse than she thought it was. The Tribunal therefore concluded that it was satisfied that the respondent’s father and his family were the victims of the injustice identified in the case of **Gurung**. In all those circumstances therefore the Tribunal considered that it would be a disproportionate interference with her right to a family life under Article 8 and with the rights of her mother to refuse permission to remain.

11. The Secretary of State challenges this decision on essentially one ground and says that the judge erred in law by failing to consider the decision in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)** and failing to consider whether there were good grounds for granting leave outside the Immigration Rules. We bear in mind the law generally in relation to Article 8(2) and assessment of proportionality. That is now settled by the decisions such as those in **The Queen (on the application of Nagre) v SSHD, MF (Nigeria) [2014 1 WLR 544]** and most recently confirmed again by the Court of Appeal in **Haleemudeen [2014] EWCA Civ 558**. There is no doubt that the maintenance of effective immigration control is a legitimate aim and the question is whether removal is proportionate. The starting point for that assessment is the Immigration Rules which set out the context whereby the interests of immigration control are balanced against the interests of those who wish to come to this country. The respondent, Miss Thapa, does not qualify under the Immigration Rules. There would therefore need to be compelling circumstances outside those Rules to justify the consideration of the grant of leave to remain. The compelling circumstances relied on here is the historic injustice which the Court of Appeal recognised in the case of **Gurung**. The Court of Appeal said in relation to that matter, at paragraph 38 that:

“The historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative”

and then, at paragraph 42, the Court of Appeal said this:

“If a Gurkha can show that, but for the historic injustice, he would have settled in the United Kingdom at a time when his dependent, now adult child, would have been able to accompany him as a dependent 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.”

12. Against that background we consider the position in the present case. First as we say we remind ourselves that the Tribunal found just that family life was established under Article 8(1) and therefore we are dealing with proportionality under Article 8(2). It is correct that the notice of appeal says that the Tribunal did not refer expressly to the decision in **Gulshan** but the question for us is whether or not the Tribunal did in substance address the question of whether there were compelling circumstances here, bearing in mind that the respondent did not satisfy the requirements of the Immigration Rules and whether it came to a response which was within the range of responses open to it. In our judgment it is clear that the First-tier Tribunal did in substance address the question of whether there were compelling circumstances justifying the grant of leave outside the Rules. Those circumstances were the strong factor that they found, that there had been an historic injustice here which

had prevented Miss Thapa's father and her entering the United Kingdom much earlier.

13. Ms Isherwood for the Secretary of State made a number of submissions about why removal might be proportionate, bearing in mind that the respondent had come on a visit visa, had been here for only one year and that the mother had a support network with her other daughter. Those factors were all factors that the Tribunal did take into account both in assessing family life and in assessing whether or not it was proportionate. In our judgment there was no error of law on the part of the Tribunal in its determination. It came to a decision which is within the range of responses open to it. It may well be that other Tribunals would have reached a decision that is different and it may well be that some might regard the decision of this Tribunal as a generous decision but we are satisfied that the Tribunal did correctly address itself in law. It considered whether there was a family relationship. It considered whether there were exceptional circumstances and it found that there were because of the strong interest in remedying the injustice to Gurkhas. It considered the relevant factors to see whether or not there was anything else to be added to the aim of fair and effective immigration and it ultimately concluded that it would be disproportionate to refuse leave to Miss Thapa. In our judgment there is no error of law in that decision and we therefore dismiss the Secretary of State's appeal.

Signed

Date

Mr Justice Lewis