



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

Appeal Number: HU/04449/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11 July 2018**

**Determination**

**Promulgated**

**On 22 August 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**MISS DIYA GURUNG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Layne, Counsel for Everest Law Solicitors, Ealing, London

For the Respondent: Mr Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal born on 16 April 1983. She appealed the Entry Clearance Officer's decision of 13 February 2017 refusing her application for entry clearance to settle in the United Kingdom as the adult dependent daughter of Bimala Gurung, widow of the appellant's late father who was an ex-Gurkha soldier. Her appeal was heard by Judge of the First-Tier Tribunal Miller on 9 November 2017 and was dismissed in a decision promulgated on 1 December 2017.

2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Buchanan on 25 May 2018. The permission states that it is arguable that the First-Tier Judge erred in his assessment of the claim made in terms of Article 8 of ECHR and applied the wrong test and rejected evidence at paragraph 15 without reasons. It states that it is arguable that there has been failure to give any reasons for finding the refusal proportionate. There is only one paragraph, paragraph 23, reciting the First-Tier Judge's conclusions, and there is no explanation given by the Judge for concluding "I do not believe that the appellant is dependent on her mother to the extent which has been alleged". The Judge also gave no reason for concluding that the case was not one where the historic injustice would justify the appellant being allowed to settle in the United Kingdom.
3. There is no Rule 24 response.

### **The Hearing**

4. Counsel for the appellant submitted that the Judge did not give proper reasons for finding that family life between the appellant and her mother was limited and so it would be proportionate to refuse the appellant's claim. He submitted that the Judge's findings are very brief and are at paragraph 23 of the decision and he submitted that they are inadequate and insufficient.
5. Counsel submitted that to find that family life is limited flies in the face of the evidence. He submitted that there is clearly emotional and financial dependency by the appellant on her mother. There is evidence of financial remittances over a two-year period and evidence of social media contact and visits to Nepal by the appellant's mother to see her. I was asked to take note of the appellant's mother's passport. She visited in 2013, 14, 15 and 16. Although she did not go in 2017 she again visited in April 2018. Counsel submitted therefore that there is annual contact between the appellant and her mother and therefore emotional dependency.
6. I was asked to consider paragraph 23 of the decision and find that the findings by the Judge are flawed. The appellant has not had very limited contact with her mother and it cannot be right for the Judge to state that he does not find that this is a case where the historic injustice would justify the appellant being allowed to settle in the United Kingdom.
7. Counsel submitted that there is clearly family life and it is clearly strong. I was asked to take note of the case law relating to ex-Gurkha's family members and the case law dealing with the historic injustice. The case law states that substantial weight should be given to historic injustice and that if the reason for dismissing the appeal was based on the United Kingdom requiring effective immigration control then this is not sufficient

for the appeal to be dismissed. The case law states that in most cases of this type, relating to adult dependent relatives of ex-Gurkhas, it is normal for the case to succeed in favour of the appellant unless there is criminality or the like, a bad immigration record or deception, none of which are relevant here. I was asked to consider the case of ***Ghising*** [2013] UKUT 00567 (IAC) which states that the historic wrong will ordinarily determine the proportionality assessment where the respondent only relies on fair immigration policy as a legitimate aim.

8. I was asked to consider this claim in the round. I was asked to note the brevity of the findings at paragraph 23 and find that these are inadequate and find that there is family life between the appellant and the sponsor and when a proportionality assessment is carried out, because of the historic injustice this appeal should have been allowed under Article 8.
9. The Presenting Officer accepted that this is not a perfect decision and submitted that the Judge is concerned because there is not much evidence about contact between the appellant and her mother. The sponsor claims to have lost her phone which means there is little evidence of contact between the appellant and the sponsor and there is limited evidence of money transfers. He submitted that there is no additional evidence from the appellant to establish family life and I was asked to consider the case of ***KUGATHAS (2003) EWCA civ 3*** relating to the relationship between an adult child and a parent having to have more than normal family life between them.
10. The Presenting Officer submitted that the Judge finds that the appellant is not as dependent on her mother as the Tribunal is being told because of the lack of evidence before him and that perfectly good reasons are given for the Judge's conclusion. He submitted that the conclusion is short because of the limited evidence before the Judge, and it is not clear how family life between the appellant and the sponsor has continued since they were separated in 2010.
11. I put to the Presenting Officer that there is a considerable amount of evidence but the Presenting Officer submitted that a lot of the evidence relates to the sponsor's circumstances in the United Kingdom and is not particularly relevant to Article 8.
12. He submitted that there are some money receipts in the appellant's bundle and the Judge's conclusion was open to him because of the lack of evidence. Regular payments were not made by the appellant's mother to the appellant. The payments were sporadic and he submitted that for eight years there is very little evidence of financial support. He submitted also that the fact that the telephone has been lost by the sponsor means that there is little evidence about the calls between the appellant and her mother and these calls are only for a very limited period and although there are calling cards there are no dates on them.

13. Counsel submitted that there is financial dependency in this case. There are 11 receipts in the appellant's bundle in total and he submitted that the sponsor had not realised she would require to keep her receipts. It is clear that money was sent to the appellant by the sponsor and there is also evidence of contact between them on the calls logs on file and on social media. He submitted that the most important thing is face to face contact and the fact that the sponsor has been making annual visits to her daughter, the most recent of which was in April 2018 should have been given considerable weight by the judge. He submitted that the sponsor in this claim does not have a lot of money. She is a cleaner but still manages to visit her daughter once every year and keeps in touch with her in spite of the distance between them and still manages to send her funds.
14. Counsel submitted that the Judge should have found that the appellant is dependent on her mother and that there is family life under Article 8. He submitted that based on the case of ***Ghising & Others*** [2013] UKUT 00567 (IAC) where Article 8 is engaged and but for the historic wrong the appellant would have been settled in the United Kingdom long ago, this will determine the outcome of the Article 8 proportionality assessment in the appellant's favour where the matters relied on by the respondent consist solely of the public interest in maintaining a firm immigration policy.
15. Counsel asked me to allow the appeal.

### **Decision and Reasons**

16. This is a typical case of an adult dependent relative of an ex-Gurkha coming to the United Kingdom to join a parent.
17. There is a considerable amount of case law about this, in particular the said case of ***Ghising*** and the case of ***Gurung and others (2013) EWCA civ 8***.
18. The Judge finds that there is insufficient evidence of contact between the sponsor and the appellant but it is clear that the sponsor has visited the appellant on a yearly basis since she came to the United Kingdom. The judge has not explained his findings in the decision satisfactorily.
19. It is unlikely that the sponsor would have realised that she would require to keep the receipts for the remittances sent by her to her daughter since she arrived in the United Kingdom, or that she would have realised she should keep evidence of contact between her and her daughter. I find that the Judge's statement that there is only limited family life between the sponsor and her daughter to be a flawed statement. He has not given proper reasons for this finding. The appellant and her mother stayed together until her mother came to the United Kingdom and since she has been in the United Kingdom she has visited her daughter every year. I find that based on the evidence before the Judge and when the case law is

considered, the judge should have found that the historic injustice must succeed over the respondent's requirement for effective immigration control. In these ex-Gurkha cases the historic wrong will ordinarily determine the proportionality assessment where the respondent only relies on fair immigration policy as a legitimate aim and that because of the historic injustice underlying the appellant's case, considerations under Section 117A of the Nationality, Immigration and Asylum Act 2002 would have made no difference to the outcome and certainly no difference adverse to the appellant. The judge has not properly considered the relevant case law.

20. I find that when all the relevant factors and all the evidence before the judge are balanced against the only argument put forward by the respondent; - the need for firm immigration control, then this appellant's appeal should have succeeded under Article 8. I find that there are material errors of law in the judge's decision.

### **Notice of Decision**

21. I find that there is a material error of law in the First-Tier Judge's decision and I direct that that decision is set aside.



22. I am remaking that decision and I am allowing the appellant's appeal under Article 8.
23. Anonymity has not been directed.

Signed

Date 13 August 2018

Deputy Upper Tribunal Judge Murray