



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

Appeal Number: HU/12567/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
via Microsoft Teams  
On 16 August 2021**

**Decision Promulgated  
On 27 August 2021**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Ms Tanka Maya Gurung  
**(ANONYMITY ORDER NOT MADE)**

Appellant

And

Entry Clearance Officer

Respondent

**Representation:**

For the Appellant: Mr M Moriarty, of Counsel, instructed by Everest Law Solicitors.

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Others present via Teams: The sponsor and his wife who were attended by Ms Angdali Sherpa of Everest Law Solicitors.

**DECISION AND REASONS**

1. The appellant, a national of Nepal born on 10 June 1984, appeals against a decision of Judge of the First-tier Tribunal Grey (hereafter the “judge”) promulgated on 29 December 2020 following a hearing on 14 December 2020 held remotely via Cloud Video Platform by which the judge dismissed her appeal on human rights grounds against a decision of the respondent of 12 June 2019 to refuse her application of 19 March 2019 for entry clearance in order to join her father, Mr Lal Bahadur Gurung (the “sponsor”) in the United Kingdom on the basis that she enjoyed family life with the sponsor and that the decision was disproportionate under Article 8 of the ECHR.

2. The sponsor is a retired Gurkha settled in the United Kingdom. He had served in the Gurkha Brigade for over 15 years. He was discharged in 1977. He settled in the United Kingdom in April 2016. In February 2017, his first wife, Gaumati Gurung, and his youngest daughter, Sharmila Gurung, joined him to settle in the United Kingdom.
3. The appellant had previously applied for entry clearance in 2017. That application was also refused. Her appeal against that decision was dismissed by Judge of the First-tier Tribunal Clemes by a decision promulgated on 13 December 2017.
4. At the hearing before the judge, the appellant was represented by Mr R Jesurum who also settled the grounds in support of the applications to the First-tier Tribunal and the Upper Tribunal for permission to appeal.
5. Four grounds were advanced in the appellant's application for permission to appeal, which may be summarised as follows:
  - (i) Ground 1 is that the judge erred in failing to engage with the submission advanced by Mr Jesurum that Judge Clemes had erred in law in reaching his finding that the appellant did not enjoy family life with the sponsor on the evidence before him, in that he had applied the wrong test in reaching his finding, and that, as a consequence, the guidance of the Upper Tribunal in Devaseelan v Secretary of State for the Home Department \* [2002] UKIAT 702 should not be applied to his finding that the appellant did not enjoy family life. The judge failed to resolve the appellant's submissions and as a result further erred in law by simply applying Devaseelan.
  - (ii) Ground 2 is that the judge erred in reaching her finding that the appellant had an alternative source of income. This issue had never been raised by the respondent in the decision or in the Entry Clearance Manager's review of the decision or by the respondent's representative in cross-examination or in submissions or at any time. Accordingly, the appellant had not had an opportunity to address the judge on the issue and, if she had been afforded the opportunity, further evidence would have been adduced.
  - (iii) Ground 3 is that the judge erred in reaching her finding that contact between the appellant and the sponsor had reduced to once a week and that this was due to a lessening of the emotional bonds between the sponsor and the appellant. The reasons given by the judge were inadequate and she took no account of and gave no reasons for rejecting other evidence that was clear and consistent as to the nature of the contact.
  - (iv) Ground 4 is that, whilst the judge correctly identified the test as to whether or not family life was being enjoyed between the appellant and the sponsor as being whether there was real, committed or effective support, she failed to apply it.
6. At the hearing, I heard submissions from Mr Moriarty who adopted the grounds in their entirety. In relation to ground 1, he referred me to the decision of Judge Clemes. At para 16(a) of his decision, Judge Clemes said that it was for the appellant to satisfy him "*that she [was] wholly emotionally dependent on the sponsor in terms of her emotional and financial positions*". Mr Moriarty submitted that, as this was the wrong test, the judge erred by taking the finding of Judge Clemes that the appellant did not enjoy family life with the sponsor on the evidence before him as her starting point pursuant to Devaseelan.

7. In relation to ground 2, Mr Moriarty helpfully referred me to paras 19 and 20 of the witness statement dated 9 March 2020 of the sponsor. At para 19, the sponsor had said that his pension was accumulating in Nepal; that when he was in Nepal for 1 ½ months in 2019, he took the money from his army pension and distributed it amongst his children. He also used the money to pay off any loans and credits that his children had taken. At para 20 of his statement, he said that none of his children in Nepal have independent income and that, without his pension, they would not be able to survive.
8. In relation to ground 3, the judge had taken into account the explanation given by the witness Mrs Indira Gurung at the hearing before her for the reduced frequency of calls by the appellant to the sponsor, being that as a result of the lockdown the appellant was confined to her remote village and unable to make the journey to purchase charge cards for her telephone. However, the judge stated that she could not understand how this would have prevented the sponsor making calls to the appellant (para 56 of the judge's decision).
9. Mr Jesurum contended in the grounds that Mrs Indira Gurung had given evidence that the appellant's inability to charge her card also meant that the sponsor could not make telephone calls to her. There was no witness statement from Mr Jesurum in support of the assertion in the grounds that the explanation given by Mrs Indira Gurung was relevant not only as evidence of the reason for the appellant not being able to call the sponsor but also as evidence of the reason why the sponsor had been unable to call the appellant.
10. Having examined the judge's record of the proceedings ("RoP"), I am satisfied that the questioning of Mrs Indira Gurung related to the reasons why the sponsor had been unable to call the appellant.
11. In relation to ground 4, Mr Moriarty submitted that the judge had not applied the correct test in reaching her finding as to whether the appellant enjoyed family life with the sponsor, partly because her finding in this regard was informed by Judge Clemes' finding on the same issue and partly because of the errors she had made herself, as contended in the other grounds.
12. In her submissions in response, Ms Everett did not accept that the judge had erred in law as contended in ground 1. She submitted that the judge was aware of the submissions of Mr Jesurum on the issue. She drew my attention to para 49 of the judge's decision from which it was clear, in her submission, that the judge had made her own finding that the appellant enjoyed family life with the sponsor as part of a family unit at the time of the sponsor's departure from Nepal in April 2016. Ms Everett submitted that it was clear from the judge's reasoning that she had made her own findings concerning the existence of family life as at the date of the hearing before her.
13. In relation to ground 2, Ms Everett accepted that the judge had not considered paras 19 and 20 of the sponsor's witness statement. It is fair to say that Ms Everett's position as to whether or not the error was material changed, from her initial position that the error was not material to her final position when she accepted that it was material to the judge's overall finding that family life did not exist between the appellant and the sponsor.

14. In relation to ground 3, Ms Everett submitted that it was not clear that there was an explanation before the judge as to why the sponsor's calls to the appellant had reduced.
15. Ms Everett then stated that what troubled her most was that the judge had found that there was family life between the appellant and the sponsor at the time of the sponsor's departure from Nepal and she had made a specific finding that the appellant had not established an independent family of her own (para 55) which taken together with any errors of law in relation to grounds 2 and 3 meant, in her view, that it was difficult to defend the judge's decision as a whole.
16. I then invited submissions as to the appropriate disposal in the event that I concluded that the judge had materially erred in law.
17. Mr Moriarty requested that the appeal be remitted to the First-tier Tribunal for a fresh hearing on the merits although he said that he was aware that many appeals were being retained in the Upper Tribunal for re-making.
18. However, as I pointed out to the parties, the judge had made an important finding at para 49, that the appellant enjoyed family life with the sponsor at the time of his departure from Nepal, the benefit of which the appellant should not be deprived lightly.
19. I then asked Ms Everett what her position was in relation to whether or not the appellant had been financially supported by the sponsor for the entire duration of his separation from the appellant following his departure from Nepal.
20. Ms Everett accepted that it is difficult to see how I could reach any finding other than that the appellant had been financially supported by the sponsor for the entirety of such period given that: (i) the judge had found the sponsor a credible witness; and (ii) her finding that the appellant had not formed an independent family. Ms Everett therefore accepted that I should re-make the decision on the appeal and allow the appeal.
21. I am very grateful to Ms Everett who adopted a very fair approach to the appeal.
22. It is now necessary for me to explain the reasons for my decision, especially given the very detailed assessment by the judge of the evidence before her.
23. In my judgment, there is no substance in ground 1. Whilst it is correct that the judge did state more than once (see, for example, para 45 of her decision) that it was not for her to consider submissions advanced to undermine the decision of Judge Clemes and whilst it is correct that the judge did state that the findings of Judge Clemes were her starting point, the reality is that she did in fact assess the evidence herself, applying the correct test (see para 45) and reaching her own finding on the question whether there was family life between the appellant and the sponsor at the time of the sponsor's departure from Nepal. This much is clear, for example, from para 49 of her decision which reads:
  - “49. I am satisfied that the appellant lived in the family home with her mother and father and siblings at the time of the sponsor's application for settlement. At this point the appellant was studying and would have presumably been supported by her father. The evidence from Sarmila is that the appellant fulfilled a role as carer to her parents, preparing their meals and washing their clothes. There appeared to be a relationship of

mutual support between the parents and appellant at this time. Whether the sponsor considered the appellant to be a dependant of his at this point was a matter considered by Judge Clemes. [Judge Clemes] inferred from the sponsor's failure to declare the appellant as a dependant in his visa application and the failure to include her photograph on the 2013 kindred roll, that the appellant was not truly dependant on her father. I consider that [Judge Clemes] was entitled to draw inferences from these omissions that informed the decision, together with a number of other factors, on whether there was family life in 2017. However, if dependency is read down to mean real, committed or effective support, and particularly in view of the fact that the appellant and sponsor were cohabiting, I am satisfied, on balance, that despite the fact the appellant was 31 years old at the time she enjoyed family life with the sponsor as part of a family unit at the date of the sponsor's departure in April 2016. I must consider for the purposes of this appeal whether that family life has been severed by the separation of the appellant and sponsor for the last 3 years and 8 months whilst they have been living on separate continents.”

24. Ground 1 is therefore not established.

25. Ground 2 is established, for the following reasons:

- (i) At para 51 onwards of her decision, the judge considered the evidence of remittances from the sponsor to the appellant which, on the evidence, was shared by the appellant with her siblings with whom she resides in Nepal. The judge found, inter alia, that there was ample evidence of financial support having been given to the appellant by the sponsor and that the payments have remained consistent throughout almost the entire period since the sponsor settled in the United Kingdom (para 52).
- (ii) However, the judge found that, for a period of 8 months from late September 2018 until June 2019, the amount of the remittances was such that it was likely to be the case that there were other sources of income that may indicate that the appellant had established an independent life or at least was dependent upon her brothers for financial support (paras 52 and 54).
- (iii) I am satisfied, as Ms Everett accepted, that, in assessing the evidence of financial support during the period of 8 months in question, the judge overlooked considering the evidence of the sponsor at paras 19 and 20 of his witness statement, i.e. that, during his visit to Nepal in 2019, he distributed monies that accumulated from his army pension to his children in Nepal and settled credit that they had accumulated.
- (iv) The judge found the sponsor a credible witness. She found that there was ample evidence of the appellant being supported by her father and that the payments had remained consistent throughout almost the entire period since the sponsor settled in the United Kingdom. It was only in respect of the specific period of 8 months that she expressed any concerns in her assessment of whether there was financial support. For the reasons given at (i)-(iii) above, she erred in her assessment of the evidence of financial support in respect of this 8-month period.
- (vi) In these circumstances, I am driven to conclude that the judge erred in reaching her finding that the low level of remittances for the period of 8 months showed that the appellant may have had an alternative source of income, in that she failed to take into account relevant evidence in reaching that finding. In addition, I am driven to conclude that her error was material to the outcome. This is

because her finding concerning the 8-month period fed into her overall finding that evidence of the remittances before her and the fact that the appellant was living in the family home were not sufficient in themselves to demonstrate the level and quality of support necessary to establish family life (last sentence of para 54).

26. Ground 3 is established, for the following reasons:

- (i) The RoP shows that Mrs Indira Gurung was questioned by the judge about the frequency of calls by the sponsor to the appellant (page 5 of the RoP and the unnumbered page immediately before it). The RoP shows that Mrs Indira Gurung said, in answer to questions from the judge:

Qn: Contact parents + Tanka Maya – how often?

Ans: Mother used to call almost every day – especially festival time She'd be very upset.

Qn: Has that changed? (i.e. used to be really every day)

Ans: After lockdown began – does not call as often

Mr J:

Qn: Why doesn't call as much since lockdown?

Ans: They live in a village in rural area + can't by re-charge card when they want - that could be reason don't call so frequently.

- (ii) Given that the questioning concerned the sponsor calling the appellant, the explanation given by Mrs Indira Gurung related to the reduction in frequency of calls by the sponsor to the appellant. This was therefore evidence that should have been taken into account by the judge. It is clear from para 56 of her decision that the judge overlooked considering this evidence because she said, at para 56: *“Even accepting the practical difficulties that have been encountered across the globe as a result of restrictions due to the pandemic, I do not understand how this would have prevented the sponsor, with Sarmila's assistance, making calls to the appellant, although I appreciate it may impact on the appellant's ability to initiate the calls herself.”*
- (iii) The evidence of Mrs Indira Gurung was relevant to the judge's finding that the frequency of contact between the sponsor and the appellant had reduced.
- (iv) In deciding whether the error was material, I have noted that the judge said at para 60 as follows:

“60. Here I do not find that there is that 'something more' than the normal ties of love and affection between an adult child and a parent. Judge Clemes found that family life between the sponsor and appellant did not exist and that the appellant had family life with her remaining brothers in Nepal. I accept that family life with her brothers and family life with her parents and sister in the UK are not mutually exclusive. The sponsor accepted that nothing had changed since the 2017 decision. Although there is more witness evidence available to me than was before Judge Clemes, this could have been available in 2017 and, in any event, I find does not present a materially different [sic] position to that assessed in 2017. Considering the evidence in the round I find that the emotional ties between the appellant and her family in the UK are less now than they were in 2017, particularly with regard to the frequency of telephone contact between them. The appellant is now 36 years of age and has lived without her father for over three and a half years. During this time the telephone contact between them has reduced. Although regular remittances have been made, these have been for varying amounts and there have been gaps in payment which is suggestive of other sources of finances available to the appellant

and her brothers. I find that in the years since the sponsor settled in the UK the appellant has developed a life independent of him. In the years that have passed it appears that Sarmila has taken over the role as her parents' carer and the appellant would have social and emotional support from the siblings with whom she resides."

(My emphasis)

- (v) I have already said above that the error established by ground 2 was material to the outcome. It is also clear, from para 60, the error established by ground 3 is also material to the outcome.

27. For the reasons given above, I set aside the decision of the judge.

28. In view of the submissions of Ms Everett, I proceed to re-make the decision on the appeal.

29. In view of the fact that Ms Everett said that it was difficult to see how I would not re-make the decision by allowing the appellant's appeal, I can be brief in giving my reasons for allowing the appeal on human rights grounds. My reasons are as follows:

- (i) In relation to the factual issue that was the subject of ground 2, i.e. as to financial support, the sponsor was found credible by the judge. She accepted that there was ample evidence to show that the appellant has been financially supported by the sponsor for the entirety of the period since the sponsor settled in the UK save for the period of 8 months that I have already discussed above. Taking into account the evidence at paras 19 and 20 of the sponsor's witness statement, I am driven to find that the appellant has established that she has been financially supported by the sponsor at all times since he settled in the United Kingdom.
- (ii) Accordingly there is no reason to suppose that she had or has an alternative source of income and/or that she has been employed. Whilst I note that this was one of the reasons why the judge found that the appellant had established an independent life, it cannot feature as a reason for me to find that the appellant has established an independent life. There is no other basis upon which I could reach such a finding.
- (iii) In relation to the factual issue that was the subject of ground 3, the evidence of Mrs Indira Gurung explains why phone calls by the sponsor to the appellant have reduced in more recent times, following the imposition of the lockdown. The judge accepted the explanation in relation to the reduced frequency of calls by the appellant to the sponsor, as is clear from the sentence I have quoted above from para 56 of the judge's decision.
- (iv) I bear in mind that the judge found it significant that the sponsor knew very little about the appellant's education and studies and could not recall her health studies or degree course in education (para 57).
- (v) Nevertheless, taking into account the judge's finding that there was family life between the appellant and the sponsor when the sponsor settled in the United Kingdom and given my reasoning in relation to the financial support and contact between the appellant and the sponsor in the period since the sponsor's departure from Nepal and given, further, that the appellant continues to live in the family home which is in the name of her mother, there is no basis upon which I could reach any finding other than that the appellant has established, on the balance of probabilities, that she and the sponsor continue to enjoy family

life with each other and have done so at all times since the sponsor's departure from Nepal. There is no basis upon which I could reach any finding other than that the appellant has not established a life independent of the sponsor.

- (vii) In relation to proportionality, the respondent has not advanced any justification for the interference with the right to family life between the appellant and the sponsor other than the ordinary interests of immigration control. Applying the decision of the Upper Tribunal in Ghising and others (Gurkhas / British Overseas Citizens – historic wring – weight) [2013] UKUT 567 (IAC), I am therefore satisfied that the decision is disproportionate.
- (ix) For the reasons given above, I re-make the decision on the appellant's appeal by allowing the appeal on human rights grounds (Article 8).

### **Decision**

The making of the decision of the First-tier Tribunal did involve the making of any error of law sufficient to require it to be set aside.

The Upper Tribunal has proceeded to re-make the decision on the appellant's appeal. The decision on the appellant's appeal is re-made by allowing the appeal on human rights grounds (Article 8).

*Upper Tribunal Judge Gill*

Date: 17 August 2021

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#### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email