



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006339  
UI-2022-006338  
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First-tier Tribunal No: HU/57681/2021  
HU/57672/2021  
HU/57671/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 14 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**DHAN MAYA LIMBU  
AND TWO CHILD DEPENDENTS**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**(NO ANONYMITY ORDER MADE)**

**Representation:**

For the Appellant: Ms K. McCarthy, instructed by Everest Law Solicitors Ltd.  
For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

**Heard at Field House on 06 April 2023**

**DECISION AND REASONS**

1. The first appellant is the mother of the second and third appellants. She appealed the respondent's decision dated 26 October 2021 to refuse entry clearance on human rights grounds as the dependent adult child of a former Gurkha. Her parents and her adult brother are settled in the UK.
2. First-tier Tribunal Judge C.A.S. O'Garro ('the judge') dismissed the appeal in a decision sent on 14 November 2022. It is not necessary to set out the judge's findings in detail because they are known to the parties and there is a level of agreement as to the outcome of the appeal before the Upper Tribunal.
3. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

- (i) The judge failed to give adequate consideration to relevant matters, including evidence relating to compassionate circumstances surrounding the appellant's history of domestic abuse before leaving her husband and becoming dependent on her family members once again.
- (ii) The judge erred in the assessment of the threshold required to show family life for the purpose of Article 8(1) of the European Convention.

## **Decision and reasons**

### *Error of law*

4. It is not necessary to give detailed reasons for finding that the First-tier Tribunal decision involved the making of an error of law because the parties agreed that it did. In particular, it was agreed that the judge failed to give adequate consideration to the evidence given by the appellant's family members, in particular her brother, about the nature and extent of the domestic abuse that she suffered in her marriage and the support that her family provided at the time and after the divorce. This support included male members of the family travelling to Singapore, where she was living with her husband in order to speak to him about his abusive and violent behaviour. It seemed that there was also a level of agreement that the judge's finding at [38] dismissing the support provided by the appellant's parents as merely being 'the bank of mum and dad' did not apply the correct test or take into account relevant cultural considerations. I agreed with the points that the parties had made.
5. For these reasons, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law and is set aside. After a break to consider whether it would be possible to remake the decision by way of submissions only, the parties agreed that it could.

### *Remaking*

6. For the purpose of the error of law discussion, Ms Lecointe agreed that the judge had failed to give adequate consideration to evidence showing that the appellant's family members had provided practical and emotional support during her marriage and after its breakdown. Having reviewed the evidence during a break, Ms Lecointe accepted that there was real, effective and committed support between the appellant and her parents and that family life was established between adult relatives for the purpose of Article 8(1) of the European Convention.
7. I agree that when the situation is considered in its proper cultural context, the appellant, as a divorced woman, had few options to her apart from becoming reliant on male family members for support. If her parents had still been living in Nepal, in all likelihood, she would have had no other option but to return to the family home. She is now entirely reliant on her father and other family members in the UK for emotional and financial support. In my assessment, this goes beyond occasional remittances. Although the appellant did establish an independent family life with her husband, which is one of the reasons why she did not apply to settle in the UK with her father in 2012, family life has been re-established following her divorce. For these reasons, I conclude that the decision to refuse entry clearance interfered with the appellant's family life in a sufficiently grave way as to engage Article 8(1) of the European Convention.

8. Ms Lecointe submitted that it was a matter for the Upper Tribunal to determine proportionality with reference to Article 8(2). The Court of Appeal in *Gurung* made clear that the weight to be given to the historic injustice to Gurkhas and their family members was not necessarily determinative of the proportionality assessment because there might be other factors to be weighed in the balance. However, the Upper Tribunal in *Ghising* (2013) made clear that, absent other factors that might weigh in favour of maintaining an effective system of immigration control, such as a bad immigration history or criminal behaviour, the historic wrong 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/entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.'
9. No additional factors over and above the maintenance of immigration control have been identified in this case. For this reason, I conclude that having established that family life is now re-engaged following her divorce, the historic wrong done to Gurkha families is a matter that outweighs the public interest in maintaining an effective system of immigration control. The decision to refuse entry clearance amounts to a disproportionate interference with the appellant's right to family life under Article 8(2) of the European Convention.
10. This is an unusual case because the appellant has young children. The evidence relating to the children only comes from the appellant's family. The appellant's witness statement suggests that she is unlikely to have any contact with her former husband. She says that after the divorce she heard that he moved to Portugal. In such circumstances, there is no reason to believe that the children have any regular contact with their father or that their relocation to the UK would affect any relationship that they might have, if any, with their father. I find that it is in the best interests of the children to remain with their mother. Any separation would amount to an interference with their right to family life for the purpose of Article 8(1). They are the grandchildren of a Gurkha. Any historic wrong relating to the denial of settlement at an earlier stage flows through the generations to them. For these reasons, I conclude that the decision to refuse entry clearance also amounts to a disproportionate interference with their rights to family life under Article 8(2).
11. I conclude that the decisions to refuse entry clearance are unlawful under section 6 of the Human Rights Act 1998.

### **Notice of Decision**

The First-tier Tribunal decision involved the making of an error on a point of law

The appeals are ALLOWED on human rights grounds

**M.Canavan**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

06 April 2023