Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/30881/2011
OA/30884/2011
OA/30886/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 April 2013	**On 23 August 2013**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR KUSAL SING LIMBU
MS LAXMI LIMBU
MS FEMEE LIMBU

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellants: Mr R Jesurum, Counsel, instructed by Howe & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This matter came before me on 7 September 2012, following which I prepared a Note of Hearing. I set out below the chronology of this appeal, which repeats in substance what is contained within that Note of Hearing.

2. The appellants are all nationals of Nepal, and were born respectively on 5 May 1984, 19 February 1988 and 23 September 1989. They each applied for settlement in the UK as the dependent child of their father, who is a retired Ghurkha soldier who had been granted settlement in the UK in 2009. The applications were originally refused by the respondent on 4 August 2010, but on appeal, Immigration Judge Scott Baker found (on 15 August 2011) that the respondent's decision had not been in accordance with the law as she had failed to consider the correct policy in relation to the applications, and so the respondent reconsidered these applications.

3. Having reconsidered the applications, the respondent refused them again on 21 November 2011, having considered policy SET12, relating to family of former members of HM Forces. The refusal letters are dated the same date.

4. The appellants appealed against these decisions and their appeals were heard before First-tier Tribunal Judge Katharine Gordon, sitting at Hatton Cross on 27 April 2012.

5. In a determination promulgated on 4 May 2012, Judge Gordon dismissed the appeals.

6. The appellants have appealed against this decision and were granted permission to appeal by Designated First-tier Tribunal Judge Garratt on 18 June 2012.

7. At the hearing before me last September, I heard argument as to whether or not the determination of the First-tier Tribunal had contained a material error of law. Mr Avery, on behalf of the respondent, relied heavily on the recently reported decision of this Tribunal in *Ghising (Family life – adults – Ghurkha policy) [2012] UKUT 00160*; on behalf of the appellants, Mr Jesurum argued forcefully that *Ghising* had been wrongly decided and was in conflict with higher authority.

8. Mr Jesurum informed the court that *Ghising* was under appeal, and also that permission to appeal had been granted in another case, where the point at issue was similar. I reserved my decision.

9. Before reaching a final decision, I made enquiries and ascertained that permission to appeal had been granted in *Ghising* and that judgment would be given without there being a lengthy delay. In those circumstances, I considered that I should await that judgment before giving a final decision in this appeal.

10. Judgment having been given in *Ghising* and other associated cases (reported as *Gurung and Others, R(on the application of) v The Secretary of State for the Home Department [2013] EWCA Civ 8*), I considered that the parties ought to be allowed to make further submissions in light of this judgment, and I accordingly directed that this appeal be listed before me for further submissions in light of this decision, which it eventually was, on 19 April 2013.

The Hearing

11. I first heard submissions as to whether there had been an error of law in Judge Gordon's determination, following which I found that there had, for reasons which will appear below. Having deciding that I would have re-make the decision, I then heard evidence from the appellants' father, who is the sponsor, who gave evidence in Nepalese with the assistance of an interpreter. The sponsor was cross-examined and then re-examined, during which he gave some of his evidence in English. Although the appellants' mother had left the hearing because it was anticipated she might give oral evidence, at the conclusion of the sponsor's evidence, Mr Jarvis indicated that he did not wish to ask her any questions and so I then heard submissions on behalf of both parties.

12. I recorded all the evidence, and the submissions which were made contemporaneously, and as these are contained within the Record of Proceedings, I shall refer below only to such of the evidence and submissions as is necessary for the purposes of this determination. I have, however, taken account of everything which was said to me during the course of the hearing, and have also considered all the documents contained within the file, including in particular the witness statements of the appellants' parents, whether or not I have made specific reference to any individual document below.

Submissions as to Error of Law

13. At the outset, I expressed my provisional view that following the Court of Appeal decision in *Gurung*, it would need to be established on behalf of these appellants (and others in a similar position) first that there was still a family life and secondly that, but for what is referred to in the judgment as the "historic injustice", they would have been settled in the UK while they were still minors. If this was so, it would be a weighty factor in the appellants' favour when I came to consider whether the decision was proportionate.

14. On behalf of the appellants, Mr Jesurum agreed that it was a pre-condition to this appeal that the appellants would have to establish that there was still family life, in light of Sedley LJ's judgment in *Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17*, which was a BOC case. At paragraphs 14 and 15 of *Patel*, Sedley LJ stated as follows:

> "14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed

> right. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).
>
> 15. As the individual cases to which I now turn illustrate, the effect of this is to reverse the usual balance of art. 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of art. 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of art. 8(1), the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago."

15. Tribunals should now focus on the causation and consequence, and the rectification of consequence, rather than weighing up the relative egregiousness of the respondent. Article 8 was not just a stick to beat the respondent with.

16. With regard to the evidential point, which was the second factor to which the Tribunal had referred, the undisputed evidence before the First-tier Tribunal, was that contained in the sponsor's statement, which is at page 3 of the appellants' bundle, where, at paragraph 14 he said as follows:

> "If I had had the opportunity to apply for settlement immediately after my discharge then I would have applied together with my family. Both of my children would have been under 18 at the time of my discharge."

17. The sponsor had been discharged from the army on 6 August 1987, and the reference to "both" was an error. At that time he only had one child; the other two were born later. However, as a matter of law, the fact that children were born after the date of service was not relevant. Had he applied for settlement shortly after his discharge, as he should have then been allowed, his existing children would have come with him, and any subsequently born children would also now be settled in this country.

18. What the Court of Appeal had accepted in *Gurung*, is that the BOC line of authority was binding. The differences were dealt with at paragraph 40 of *Gurung*. What the Court of Appeal said in *Gurung*, which disposes of the position as previously understood in *Ghising*, is that while the position of BOCs and Ghurkhas are not identical, unless there is either a suggestion that the settlement granted to the sponsor might be revoked, or there is serious adverse information, such as criminality, in respect of a relevant application, the difference between these categories carries "little weight". In this case, there is no such difference. There is no suggestion of criminality or that settlement would be revoked. Accordingly, the authorities relating to BOC family members should be applied in full.

19. With regard to the children who had been born after the sponsor had been discharged from the army, it was clear from paragraph 13 of *Patel*, that it was immaterial whether the children would have come with their father, or been born

here after their father had been settled. Any children he had would have been entitled to remain in this country. The approach in *Patel* is a compensatory one, which was clear from the heading above paragraph 11, which was "*righting the wrong*", the use of the word "compensate" at the start of paragraph 14 and the adoption of a "but for" test.

20. The issue here was whether or not the family came within the protection of Article 8(1). If they did not, then it was accepted that the BOC line of authority was clear and they would have no protection under *Gurung*.

21. It was accepted that the Tribunal would have to find an error of law in the finding of the First-tier Tribunal that there was no family life between the appellants and the sponsor, but with regard to whether or not, but for the historic injustice, these appellants would now be settled here, the Tribunal had to accept the unchallenged evidence of the sponsor. In this regard the appellants relied on the decision of the Court of Appeal in *MS (Sri Lanka) [2012] EWCA Civ 1548*, where, at paragraph 14, Maurice Kaye LJ had stated that where a witness had not been cross-examined, the respondent should be taken either to accept or not dispute the evidence which had been given.

22. With regard to the issue of whether or not there had been family life between the appellants and their father at the date of decision, on behalf of the respondent, Mr Jarvis very fairly accepted that there had been errors in the judge's approach to this issue, especially as to the student status of one of the appellants, such that the finding of the First-tier Tribunal that there was no family life was unsustainable, although Mr Jarvis made it absolutely clear that he did not concede that there had been family life. However, he accepted that this aspect of the decision would now have to be re-made by the Upper Tribunal. I agree and so find.

23. With regard to the second matter which I had identified earlier needed to be established, that is that but for the "historic injustice" (that is that people such as the sponsor had not been allowed to settle in this county earlier), the appellants would by now be settled, Mr Jarvis submitted that at the time of the original decision, this was not a live issue and so, if appropriate, the respondent should be admitted to challenge this aspect of the appellants' evidence.

24. In the circumstances, I considered that the respondent should be allowed to challenge the sponsor's evidence that he would have settled earlier if he could, and would have brought whatever children he then had with him, if Mr Jarvis considered that the sponsor's evidence on this point should be challenged.

The Re-Hearing

25. As already noted, I heard live evidence from the sponsor, who was cross-examined. He confirmed that his witness statements were true and was cross-examined.

26. In cross-examination, he said that he had entered the UK in 2009 to settle and that his wife had followed him in March 2010. The children had applied in November 2009. His wife had been granted indefinite leave to remain, but not the children.

27. The sponsor told the Tribunal that he had wanted to come to this country and sort out job prospects and housing and then bring his wife and children after this was all settled.

28. As at the date of decision, which was 21 November 2011, the sponsor was in contact with his children twice a week. However, he only spoke to one child, Laxmi (the second appellant). Although he did sometimes talk to the others, most of the time he only spoke to Laxmi. She was the more reliable child and she was the older daughter as well. He would talk to her about the money which he sent from the UK and tell her to spend it wisely. When asked if they spoke about anything else, he replied that they did not.

29. In November 2011, all of his children in Nepal were studying. Two of them were studying dental hygiene and the other was doing a bachelor's degree in business management. Both of his daughters had finished the studies that they were doing at that time, but they were now doing further studies. The third appellant was doing a Bachelor's degree in business management and Laxmi, his older daughter, was waiting to be enrolled in another course. If they had been allowed to come to the UK, they wanted to "study something". They would have then gone on to work wherever a job was available.

30. In re-examination, when he was shown the relevant documents, the appellant confirmed that he had in fact come to this country in 2010 and his wife had come in March 2011 (that is a year later than he had said earlier).

31. In November 2011, his two daughters were studying in Kathmandu, and his son lived in the family house. He lived with his mother (the sponsor's wife) until she came to the UK. He (the sponsor) had paid all the bills for the house in Kathmandu. His daughters had returned to that house during the periods when they were not studying.

32. I recorded that Mr Jarvis did not seek to put any questions to the sponsor's wife, nor did he make any challenge to the evidence which the sponsor had given in paragraph 14 of his first witness statement to the effect that, had he had the opportunity to apply for settlement immediately after his discharge, he would have applied together with his family.

33. None of the appellants submitted statements.

The Submissions

34. At the outset, before Mr Jarvis addressed the Tribunal on behalf of the respondent, Mr Jesurum accepted that he "would struggle" to argue that the refusal of the applications was not in accordance with the law. However, whether or not the

dismissal of the applications was in accordance with the government's policy was not relevant to the Tribunal's consideration of Article 8. Mr Jesurum relied on the decision of Blake J in *Mansoor [2010]* to this effect.

Submissions on Behalf of Respondent

35. On behalf of the respondent, Mr Jarvis reminded the Tribunal that the application of the government's policy was not challenged in this case, and this appeal was brought solely under Article 8. This being an out-of-country appeal the relevant date for assessing whether or not family life existed was the date of decision. Mr Jarvis relied on the House of Lords decision in *AS (Somalia) [2009]* to this effect.

36. At paragraph 46 of *Gurung* the Court of Appeal had referred to paragraphs 50 to 62 of the Upper Tribunal determination in *Ghising*, which, it was said "contains a useful review of some of the jurisprudence and the correct approach to be adopted". In particular, the Court of Appeal approved of the conclusion at paragraph 62 in *Ghising* that "the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive". The Court of Appeal specifically approved this statement, and endorsed it.

37. Mr Jarvis also placed reliance on the approach taken by the Court of Appeal in *Gurung* to the joined appeals of *NL and SL*. In these cases, the First-tier Tribunal had held that the applicants had not had a family life with their parents which was protected by Article 8(1). At paragraph 48, the Court of Appeal had laid out the First-tier Tribunal's approach to family life in those cases, which was that although there was evidence of financial support, this was to be expected in Nepalese culture and did not therefore suggest a bond over and above that to be expected in a relationship between adult parents and their children. The Court of Appeal had rejected the challenge to these findings at paragraph 50, and found that the First-tier Tribunal had been entitled to come to the conclusion that despite the financial support, "the requisite degree of emotional dependence was absent".

38. The Tribunal was asked to note in these appeals that there had been no detailed evidence from the appellants themselves about the effect of the separation on them, and the flavour of the sponsor's evidence relating to his contact with his children showed that this was a relationship which centered around the financial support which he provided and continues to provide. His evidence was that he talked mostly about money, and mostly to Laxmi, the second appellant, who was his oldest daughter in Nepal (he has another daughter in this country).

39. The respondent would submit that in the absence of any direct evidence from the parties themselves, and without any evidence as to the sponsor's alleged depression or depressive feelings as at the date of decision, the Tribunal should conclude that the relationship between the sponsor and his children did not have the necessary emotional dependence required.

40. The Tribunal should also note that the sponsor had come to the UK of his own volition in 2010. Although he was entitled to do this because he had been granted indefinite leave to remain, it was still his choice to remove himself from his family in Nepal and come to this country when there was no legitimate expectation that his adult children would automatically be allowed to enter. It was made clear at paragraph 26 of *Gurung* that there was not an automatic right of entry for adult dependent children.

41. Even if, notwithstanding the submissions made on behalf of the respondent, the Tribunal was to find that there was a family life between the sponsor and his children, *Gurung* should not be read as suggesting that historic injustice was determinative of proportionality under Article 8(2). If the Court of Appeal had wanted to say this, they would have; however, they restricted themselves to saying that it was an important factor. It was not determinative because each and every Article 8 case was different. Family life did not have a set value. Each and every relationship had to be considered on its merits. Other factors would also be relevant, such as whether a person would be a drain on resources or get a job. Although in paragraph 41 of *Gurung*, the Court had recognised that the "historic injustice" added weight to an applicant's claim, they did not say that the public interest was weakened. Courts must still have regard to the public interest in maintaining immigration control.

42. These appellants were students of whom at least two were living away from the family home, albeit with financial assistance from their father. They were in their twenties and clearly their day-to-day lives were in their own hands. This was different from someone unemployed living in the family house. Even if they enjoyed a family life with their father such as to engage Article 8(1), the decision was still not disproportionate. They were independent people who were successfully advancing their student careers.

Submissions on Behalf of Appellant

43. Mr Jesurum accepted that unless the Tribunal was to find that there was a family life at the relevant time between the appellant and the sponsor, their appeals must fail. With regard to the precise interpretation of the Court of Appeal decision in *Gurung*, there may be a difference between the appellants and the respondent.

44. As to whether or not there was family life, the historic injustice was not irrelevant because it needed to be considered as part of the factual matrix. It was settled law that a voluntary separation did not necessarily bring about an end to family life. The appellants would in this respect rely on *Sen v Netherlands*.

45. Although it was accepted that a Tribunal would have to look at the situation after the sponsor had come to the UK, and although the relevant date was November 2011, nonetheless the Tribunal should appreciate that the applications had been made in 2009. An unlawful decision had been taken in August 2010, which was found to be

not in accordance with the law. So it was relevant that the interference in family life had commenced in August 2010.

46. The sponsor's evidence was that he had travelled to the UK with the intention of uniting his family thereafter. He had taken up the long delayed honouring of a debt owed to him for his services to the Crown. This was not just an ordinary Article 8 application. The sponsor had a long delayed right to travel to this country. When considering whether there was family life in November 2011, the Tribunal should take account of what had gone before.

47. The Tribunal should take note that in *Patel*, a case in which the applicant's appeal was allowed, at paragraph 17 it was recorded that the applicant's father had come to this country ahead of his children, in anticipation of their joining him.

48. In this case, the evidence of the sponsor was that his children had been living in accommodation in Kathmandu paid for by him. The children who were at university returned home in holidays.

49. As was apparent from paragraph 49 of the European case of *AA v United Kingdom [2012] Imm AR 1*, one factor which a court must examine is whether there has been an independent life established, and the second is whether there has been co-habitation in the family home. It was the appellants' submission that none of the appellants had a family life of their own, which although not determinative was a relevant factor. Also, prior to the sponsor's voluntary departure, which did not bring their family life to an end, the children had normally co-habited with both their parents outside of term time. The son remained in the home and the daughters returned there outside term time.

50. As at August 2010, which was the date of the first, unlawful, decision, the appellants' mother had still been living in this house, as was established by the documentary evidence. The voluntary departure of the father had not terminated the family life, and nor, it was submitted, had the voluntary departure of the appellants' mother.

51. As to the quality of evidence advanced on behalf of the appellants, although it was correct that there had been no statement from any of the appellants, evidence had been submitted of an emotional bond. For example, at paragraph 28 of the sponsor's evidence, he had referred to a "very close bond" and at paragraph 35 he had stated that "we are a very close family". At paragraph 37 he had stated that "my wife and I are constantly worrying". The failure of the appellants to provide statements themselves, was not determinative of this appeal.

52. In the sponsor's second statement of paragraph 17, he had stated that his relationship with his children was not just financial, but was also emotional and parental – "our children are without our guidance" – and part of that guidance was that, as set out in his evidence, he encouraged his daughter Laxmi to spend wisely. He wanted to guide them until they were leading independent lives, and in their culture, as the family grew older, his children would become his support. As the House of Lords

noted at paragraph 18 of *Huang*, cultural factors were relevant to an assessment of Article 8.

53. Mr Jesurum urged the Tribunal to appreciate that the lack of many telephone calls did not necessarily mean that there was a lack of an emotional bond. This may be relevant to proportionality, but not as to whether there was a family life.

54. Although the Court of Appeal had said with regard to the other cases considered on *Gurung* that it had been open to the First-tier Tribunal to find that there had been no family life despite financial support, the Court of Appeal was applying the second appeals test, and not approving the conclusion which the First-tier Tribunal had reached in itself. All the Court of Appeal was saying in that case was that such a finding had been open to the First-tier Tribunal. The test was whether there were more than mere emotional ties. It was the appellants' case that this could be shown by financial support; each case was fact-sensitive. In this case there was more than mere financial dependence, because the appellants depended on the sponsor for the roof over their heads. Their ordinary home was a family home in which until recently they had cohabited.

55. Whether or not the family life was weak would go to proportionality, but in this case it was submitted that the threshold for Article 8(1) was passed.

56. When the Tribunal considered the second question, which was how the historic injustice affected consideration of proportionality, the ratio of *Gurung* was that the Tribunal should adopt the compensatory approach applied in the BOC line of authority. The court should adopt a "but for" test of causation. Although historic injustice was not determinative, what the cases of *Patel* and *Gurung* show was that the starting point was a reversal of the burden of proof with regard to proportionality. The historic injustice was a very important factor, such that it was one of the primary factors, and in the absence of countervailing factors beyond those already taken into account, the starting point should be that Article 8(1) rights should be vindicated. This was because the Tribunal should adopt a compensatory approach. The fact that there had been a historic injustice, absent of other factors, tilted the balance in favour of these appellants, even if their family life was weak. When one considered the purpose of refusing admission, which was to maintain immigration control, the righting of a wrong did not encourage people to lack confidence in immigration control.

Discussion

57. I am very grateful to both representatives for putting their respective arguments with such clarity. It is common ground first that unless as at the date of decision there was family life between the appellants and the sponsor, this appeal must fail. It is also common ground that if this Tribunal finds that there was family life at that date, the righting of a historic injustice would be a very important factor, although not necessarily determinative, when assessing whether or not the continued exclusion of

these appellants was proportionate. In this regard, it is only right that I should record that I entirely accept the evidence of the sponsor, which was in the event not challenged on behalf of the respondent, that had he been allowed to apply for settlement earlier, he would have done so, and that he would have brought his existing children with him at that time.

58. I agree with Mr Jesurum and Mr Jarvis that the appellants must first establish that as at the date of decision there was family life. What the Master of the Rolls, giving the judgment of the court, stated at paragraph 26 of *Gurung* is instructive:

> "*Frustration of the purposes of the policy*
>
> 26. The answer to the second issue has already largely been given. Mr Drabble [Counsel for most of the applicants] submits that the purpose of the policy is to facilitate the settlement in the UK of the families of Ghurkha veterans. But the purpose of the policy *as regards adult dependant children* is clearly stated on the face of the policy itself and it is far narrower than this. It draws a clear distinction between dependant children who are under 18 and those who are over that age. The purpose of the policy is *not* to facilitate the settlement in the UK of adult dependant children. The policy recognises that such children may be granted leave to enter under rule 317(i)(f) and if article 8 requires it. Otherwise, they are not granted leave to enter unless there are exceptional circumstances. This policy objective is not inconsistent with any broader policy statement. ..."

59. In other words, applicants such as these will only be granted leave to enter if Article 8 is in play. There is no general right of adult dependent children to enter because of the historic wrong done to their father. This is of course consistent with what was stated by Sedley LJ at paragraph 15 of *Patel* that if by the time the children come to seek entry clearance they are no longer part of the family life of the British overseas citizen (or in this case a Ghurkha veteran) who has finally secured British citizenship, they will have no entitlement to come.

60. As noted above, Mr Jarvis has relied upon the findings of the Court of Appeal in the appeal of *NL and SL* at paragraphs 47 to 50 of *Gurung*. I set these out below:

> "*The appeals of NL and SL*
>
> 47. The First-tier Tribunal ("the FTT") held that NL and SL do not have a family life with their parents that is protected by article 8(1). The UT found that the FTT's consideration of this issue was adequate and disclosed no error of law. That conclusion is challenged before this court. The appellants are now respectively 24 and 26 years of age. When their father was discharged from the Ghurkhas, he served with the Ghurkha Reserve Unit in Brunei for almost 10 years. During that time, the appellants were living with their mother in Nepal. Their father was granted leave to settle in the UK in 2009 and their mother followed him in August 2010. The appellants remained in Nepal. They were both students whose course fees were funded by their father.

48. The FTT considered whether, in these circumstances, the appellants enjoyed family life with their parents. The judge said (para 27) that there was very little evidence of family life between the appellants and their father (who was their sponsor). There was, however, evidence that he supported them financially, but this was expected in Nepalese culture. It did not, therefore, suggest a bond over and above that usually to be expected from the relationship between adult parents and their children. The judge said:

> 'The sponsor stated that they have regular contact with each other, but there was no real evidence about how the Appellants related to their parents and the effect on them of being separated from their parents or what emotional sustenance they received from their parents.'

49. The basis for the appeal is that the tribunals erred in law in failing to attach any (or any adequate) weight to the fact that the appellants had always lived with their parents as a family unit. Mr Malik says that the family unit, with a strong emotional bond and elements of financial dependency, enjoyed family life while the appellants were growing up and it was not suddenly cut off when they reached their majority.

50. We accept the submissions of Ms McGahey that the FTT did not make any error of law in reaching its conclusions. The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to determine. In our view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent."

61. I have in mind this judgment when considering whether in this case, the appellants have established the "requisite degree of emotional dependence" such that I could properly find that the appellants still had a family life with their father as at the date of decision.

62. I consider first what the sponsor stated within his original statement. At paragraph 27, he stated that:

> "It is the duty of a father in our Ghurkha culture to support their child until such time they get married and become independent. In my children's case, they were and still are full-time students. They are unmarried and single. Therefore, I still maintain and support them."

63. Then, at paragraph 28, he stated that "my family and I share a very close bond", and at paragraph 29, that when he was "posted overseas for long stretched of period" he "missed my family immensely during those periods".

64. At paragraph 35, the sponsor stated that "we are a very close family" and that "the continued separation is causing suffering to us all and is breaking our tight family unit".

65. Then at paragraph 37, he stated that "my wife and I are constantly worrying about our children who are left living alone and apart from us".

66. In his wife's statement, she stated at paragraph 10 that "my children and I keep in regular touch by way of telephone" and that "my husband and I miss our children a lot and they miss us too".

67. As already noted, in his supplementary statement, the sponsor expanded on this by saying that "our children are without our guidance" at paragraph 17, that he wanted to guide them until they were leading independent lives (at paragraph 18) and that in his culture, as people grew older, they would require the emotional support of their children as the children became their support (at paragraph 19).

68. However, as also noted, there was no evidence before me from the appellants themselves.

69. I have in mind in particular the answers given by the sponsor in cross-examination before me. He told the Tribunal that he spoke to Laxmi about twice a week, and that although he did talk to the others, most of the time he only spoke to Laxmi. She was more reliable. When asked what sort of things he discussed with her, he said that he talked about the money which he sent from this country and told her to spend wisely. When asked specifically if he discussed anything else, he replied that he did not.

70. In light of this evidence, and in particular the answers given by the sponsor in evidence before me, I am not satisfied that the appellants have established that they have emotional ties which go beyond the financial support they receive from their father. In this connection, I have found the sponsor's evidence when given the opportunity to tell the Tribunal about anything he discussed with his children that he only discussed financial matters with them and only spoke to any of them twice a week, and even then mainly to Laxmi, particularly relevant. As the First-tier Tribunal found in *NL and SL*, (which finding was upheld by the Court of Appeal in *Gurung*), the requisite degree of emotional dependence would not necessarily be demonstrated by financial support alone. In this case, beyond the statements of the sponsor and his wife that they are a close family which shares an emotional bond, and that the sponsor wishes to guide his children until they are leading independent lives, there was no evidence put before me that he has been giving them any guidance since he came to the UK, some time before the date of the respondent's decision now being appealed. Indeed, it seems apparent from his evidence before the Tribunal that he has not. While I accept that each case is fact specific, in this case I am unable to find the requisite degree of emotional dependence. The children all appear to be leading independent lives, albeit with the financial support of their father, as is common within Nepalese culture, but without any guidance or other emotional support. That, in the circumstances of this case, is not, in my judgment, sufficient.

71. Accordingly, and not without regret, I am unable to allow these appeals, and they must be dismissed.

Decision

I set aside the determination of the First-tier Tribunal and substitute the following decision:

The appeal of these appellants is dismissed, on all grounds.

Signed: Date: 21 August 2013

Upper Tribunal Judge Craig