



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

Appeal Number: OA/11093/2013
OA/11095/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

Determination

On 26th November 2014

Promulgated

On 5th December 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**TAKSHER RAI
YUBARAJ RAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Irwin Richards, Home Office Presenting Officer

For the Respondent: Mr Christian Howells, Counsel instructed by NC Brothers & Co

DETERMINATION AND REASONS

1. In this document I will refer to the parties in the style in which they appeared before the First-Tier Tribunal.
2. The appellants are brothers and nationals of Nepal. They were born 24 September 1984 and 12 August 1989 respectively, and are the sons of a former Gurkha who is now settled in the United Kingdom.

3. Both appellants applied for entry to the United Kingdom as adult dependent sons of the sponsor. The applications were refused the reasons set out in decisions dated 1 May 2013. The appellants appealed those decisions.
4. The linked appeals came before Judge of the First-Tier Tribunal Lawrence sitting at Hatton Cross on 30 June 2014. The sponsor attended the hearing and gave evidence. Both parties were represented.
5. In a determination promulgated on 15 July 2014, Judge Lawrence considered the appellant's appeal under the rules, under a stated Policy and in respect of Article 8.
6. Paragraph 12 of the determination found that the sponsor was not a "credible person". At paragraph 13 the judge found details of the first appellant's medical condition to be "manufactured" and it was conceded that the second appellant could not succeed under the Immigration Rules. At paragraphs 15 and 16 the judge found that there had been no misapplication of the policy. However the judge allowed the appeal of both appellants under Article 8 ECHR. The respondent sought leave to appeal. There was one ground alleging the making of a material misdirection of law. In support of that allegation it is suggested that the judge erred in taking into account immaterial matters in the assessment of the Article 8 claim, the failure to consider the guidance in **Kugathas v SSHD [2003] EWCA Civ 31** and that the judge had failed to explain why the "**Kugathas** test" could be met, and that there was no evidence that the appellants had suffered a "historical injustice".
7. In granting leave to appeal a Designated Judge of the First-Tier Tribunal gave the following as his reasons:

"1. By a determination promulgated on 15 July 2014 First-Tier Tribunal Judge NMK Lawrence allowed the appellant's appeals against the decision of the respondent to refuse each of them entry clearance to the UK as the adult dependent children of persons present and settled in the United Kingdom. The judge found that the appellants did not meet the requirements of the immigration rules and could not succeed under policy guidance. However the judge went on to find that Article 8 of the ECHR was engaged and that the appellant succeeded by reason thereof.

2. The grounds of the application seeking permission assert that:

- a) The judge failed to give adequate reasons for reaching the conclusions that he did.
- b) The appellants are adult offspring of persons settled in the United Kingdom. The judge failed to consider the guidance given in the case of **Kugathas v SSHD [2003] EWCA Civ 31** and failed to apply the principles therein set out.

- c) The judge failed to make findings as to whether there was sufficient dependency or other factors as to engage Article 8 in the circumstances alleged.
- d) The judge found that consistent with the case of **UG (Nepal) [2012] EWCA Civ 58** that there had been historical injustice and that in part was a reason for allowing the appeal. It is submitted that there had been no historical injustice in respect of these appellants.

3. It is clearly arguable that the judge failed to apply the guidance within the case law cited and by reason thereof has made a material error of law. The grounds maybe argued”.

- 8. Thus the matter came before me in the Upper Tribunal.
- 9. At the hearing it was acknowledge that the appellants had not produced a Rule 24 response, but Mr Howells submitted a skeleton argument to which I will refer later.
- 10. Mr Richards relied upon the grounds. The key to the situation is contained in paragraph 12 of the determination, wherein the judge found the sponsor not to be credible and that the judge had allowed the appeal under Article 8 by reason of the “historic injustice” point before taking a step-by-step approach via **Razgar**. Mr Richards referred to paragraph 27 of the determination as “extraordinary”. In that paragraph the judge had considered whether any interference (via **Razgar**) was necessary. In effect the judge had sought to apply a blanket policy for any family of a former Gurkha to be entitled to entry. No examples had been given as to how the decision had affected the family. There is evidence that parental responsibility had been abandoned by the sponsor. Accordingly the findings are material and the decision is in error and should be set aside.
- 11. Mr Howells adopted his skeleton argument. That document summarizes the respondent’s challenge, but then submits that there are exceptional and/or compelling circumstances allowing a freestanding Article 8 claim, and it submits that the judge had identified the historical injustice as an exceptional factor. The correct approach should have been adopted and the case of **Ghising (family life - adults - Gurkha policy) (Nepal) [2012] UKUT 160 (IAC)** had accepted that **Kugathas** had been interpreted too restrictively in the past. The critical question is has the adult child formed their own independent life or remained part of the parent’s family unit. The skeleton argument referred to paragraph 22 of the determination and to the findings made therein, and that such findings were open to the judge and he had not placed undue weight on financial dependency. Finally, reference was made to **Ghising (Gurkhas/BOC’s: historic wrong; weight) [2013] UKUT 567** which held that the historic wrong will ordinarily determine the proportionality assessment where the respondent relies on fair immigration policy as the legitimate aim.

12. In his verbal submission Mr Howells argued that the respondent's first challenge must fail because paragraph 19 of the determination explained adequately why the appellant's circumstances were compelling or exceptional.
13. As to the second point, paragraph 22 explains the judge's findings and Mr Howells refers me to various parts of the witness statements that were before the judge, who obviously found such statements to be credible. The two appellants had always lived together and this had not been the first application, and Mr Howells emphasised paragraph 5 of the skeleton argument with regard to the out dated view on **Kugathas**. Mr Howells referred in detail to the head note contained in the 2013 case involving **Ghising**.
14. Mr Richards made no response.
15. At this stage I reserved my decision which I now give with reasons.
16. I find that Judge Lawrence made no error of law that was material to the outcome of the decision.
17. The grounds seeking leave emphasised the findings made by the judge with regard to certain credibility issues. The judge certainly did not find the sponsor credible with regard to his evidence and with regard to the suggested medical problems experienced by the first appellant. The determination shows why the judge considered that the Immigration Rules had not been met, although in respect of the second appellant this was by way of a concession made by the appellant's representative at the hearing. The determination then goes on to properly explain why the judge found against the appellants in respect of the respondents Policy. The judge allowed the appeal under Article 8 and paragraphs 17 to 29 deal with that aspect of the appeal, including the findings made by Judge Lawrence.
18. Mr Howells correctly directs me to the case of **MM (Lebanon) [2014] EWCA Civ 985** and to the Court of Appeal case of **MF (Nigeria) [2013] EWCA Civ 1192**. As a result I consider the judge was correct in embarking upon a stand alone Article 8 examination of the case of these two appellants. The judge properly explains this in the final part of paragraph 19, where he says this:

"In the instant appeal I find that the 'historic injustice' committed, in not permitted (sic) the sponsor in the UK at a time when the appellants were minors and therefore could have settled here long time ago (sic), allows me to find 'exceptional circumstances' and therefore I could assess these appeal under article 8 of the Convention (sic)".
19. Paragraph 22 of the determination then goes on to explain the financial evidence that the judge took into account, and accepted, to show family life between the appellants and the family in the United Kingdom. The 2012 decision of **Ghising** gives guidance which maybe taken as

suggesting that **Kugathas** had been to restrictively interpreted in the past. For the reasons set out in paragraph 22, Judge Lawrence concluded in the final sentence of paragraph 22 that family life existed. I consider he was entitled to reach that conclusion.

20. Having quite properly reached this point the judge then went on to consider **Razgar** and at paragraph 27 he reached the controversial conclusion that the respondent's decision was not in the interests of any legitimate aim. In the circumstances of this case I do not consider that conclusion to be extraordinary.
21. I have considered paragraph 27 (and indeed paragraph 28) in the light of the reported case of **Ghising v SSHD (Gurkhas/BOC's: historic wrong; weight) [2013] UKUT 00567**. I quote from paragraphs 4 and 5 of the head note to that case, which say as follows:

“(4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have been settled in the UK 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/Entry Clearance Officer consist solely of the public interest in maintaining a firm immigration policy.

(5) It can therefore be seen that appellants in Gurkha and (BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows 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 and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the appellant's side of the balance”.

22. I therefore conclude that the judge was entitled to reach the conclusions that he did. Despite credibility issues in respect of the sponsor and with regard to the medical condition of the first appellant, the judge had before him the statements of the two appellants with regard to financial matters and the immigration history of the appellants and the sponsor. He reached a conclusion that there was historic injustice which enabled him to proceed to a stand alone examination of Article 8. He accepted the financial evidence to show that family life existed, could be extended beyond **Kugathas** and that then applying **Razgar** he reached the conclusion that the appellants were entitled to win their appeals in respect of Article 8. He certainly was not giving a blanket acceptance of any family member of a former Gurkha.
23. For these reasons I find no material error of law and the Entry Clearance Officer's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Poole