



Upper Tribunal

(Immigration and Asylum Chamber)

**Appeal
Number:
OA/10419/2013

OA/10424/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On 9 July 2014 at On 10 July 2014
Determination
promulgated**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**Entry Clearance Officer,
New Delhi**

Appellant

and

**(1) Rishi Ram Thapa
(2) Hum Bahadur Thapa
(Anonymity direction not made)**

Respondents

Representation

For the Appellant: Ms. J. Isherwood, Home Office Presenting Officer.

For the Respondents: Mr. C. Howells of Counsel instructed by N.C. Brothers & Co..

DETERMINATION AND REASONS

DIRECTIONS IN RELATION TO AN APPLICATION FOR COSTS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Charlton-Brown promulgated on 14 April 2014, allowing the appeal of Mr Rishi Thapa and his brother Mr Hum Thapa against the Respondent's decisions dated 19 April 2013 to refuse to grant entry clearance as the adult dependants of their father Mr Tika Ram Thapa, who served as a Gurkha in the British Army from 1975 until 1989.

2. Although in the proceedings before me the Entry Clearance Officer ('ECO') is the appellant, and the Thapas are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Thapas as the Appellants and the ECO as the Respondent.

Background

3. The Appellants are nationals of Nepal born on 26 August 1983 and 8 November 1980 respectively. They made applications for entry clearance as the dependent sons of their ex-Gurkha father on 22 December 2011. The applications were initially refused on 7 March 2012 with reference to paragraph 317 of the Immigration Rules and policy relating to ex-Gurkha servicemen and their families, and Article 8 of the ECHR. Following appeal, pursuant to the determination of Immigration Judge Dineen promulgated on 10 October 2012 (ref: OA/06864/2012 and OA/06890/2012), the cases were remitted to the Respondent for consideration in accordance with the law. New decisions were made on 19 April 2013, which are the subject of the current proceedings: the Respondent again refused the applications with reference to paragraph 317 of the Rules, policy, and Article 8.

4. The Appellants appealed to the IAC. Their appeals were allowed for reasons set out in the First-tier Tribunal Judge's determination with reference to Article 8.

5. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 19 May 2014 by First-tier Tribunal Judge McDade.

6. No Rule 24 reply has been filed on behalf of the Appellants.

Consideration

7. The First-tier Tribunal Judge records in her determination at paragraph 3 that the Appellants conceded that they could not meet the requirements of the Immigration Rules. In context, this is clearly a reference to paragraph 317 of the Rules: the Judge identifies the relevant Immigration Rule as being paragraph 317 of HC 395 in the immediately preceding paragraph, and reference is also made to the similar concession made in the earlier appeal.

8. The Judge identified that the Appellants relied upon Article 8 of the ECHR (paragraphs 3 and 7); she then directed herself as to burden and standard of proof, and to the five **Razgar** questions (paragraphs 8 and 9). After analysing the evidence and the case law – and in particular case law in respect of Gurkha families with reference to **Ghising (Family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC)**, **UG (Nepal) [2012] EWCA Civ 58**, and **Gurung [2013] EWCA Civ 8**, as well as **Kugathas [2003] EWCA Civ 31**, and **MM [2013] EWHC 1900** - the Judge found that the Appellants had established family life with their UK based father, and that there would be interference with this family life by reason of the Respondent’s decisions (paragraphs 11–16).

9. The Judge identified the “*real issue*” to be proportionality (paragraph 17), and noted that the Respondent relied upon the public interest of “*exercise[ing] legitimate immigration control*” (paragraph 17). She considered the particular position of the Appellants and their family: she found that the Appellants’ father would have preferred to come to the UK upon completion of his service had that been an available option. In this regard (paragraph 17). The Judge observed, with reference to **Gurung** “*Lord Dyson MR makes it clear that the adult dependant child of a Gurkha veteran, who can establish an Article 8(1) right, has a strong claim to have that right vindicated, notwithstanding the power of the legitimate aim argument, if they can show they would have settled in the UK years before had that been possible*” (paragraph 18). The Judge also had regard to **Ghising (Gurkhas/BOCs - historic wrong: weight) [2013] UKUT 00567 (IAC)**: “*it was held that the historic wrong will ordinarily determine the proportionality assessment where the Respondent only relies on fair immigration policy as the legitimate aim*” (paragraph 19).

10. The Judge then concluded that the “*historic wrong in respect of the sponsor... carried more weight in the proportionality argument than the maintenance of fair immigration policy*” (paragraph 20), and allowed the appeal on Article 8 grounds (paragraph 21).

11. The Respondent's grounds of challenge upon which permission to appeal has been granted rely upon the decision in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)**. Criticism is made of the First-tier Tribunal Judge for undertaking a "*free standing Article 8 assessment... without making findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules*".

12. In my judgement the Grounds of challenge are misconceived.

(i) The grounds are wrongly premised on the suggestion that the Appellants had conceded that they could not satisfy the requirements of Appendix FM. No such concession had been made. The concession in respect of the Rules was with regard to the Rules that predated Appendix FM, the applications in these cases having been made in December 2011.

(ii) The Appellants' cases had not been decided by the ECO under the new Rules, and to that extent the guidance in **Gulshan** was not directly applicable.

(iii) In any event, the criticism made in the Grounds was largely a procedural criticism, and did not engage with the substantive decision made in respect of proportionality. It is said, in effect, that the Judge should not have considered Article 8 without first considering if there were 'arguably good grounds' for doing so; however, there is no specific criticism of the assessment itself and no specific criticism of the conclusion reached. In particular there is no attempt in the Grounds to engage with the possibility that the Judge's conclusion in respect of Article 8 in effect answered the 'procedural question' identified in the Grounds.

(iv) There is no challenge to the jurisprudence in respect of Gurkha cases, and no challenge to the way in which the Judge applied that jurisprudence to the facts of the Appellants' cases.

13. In this latter regard I observed to Ms Isherwood that unless it was being suggested that the effect of **Gulshan** was to 'undo' the established jurisprudence in respect of Gurkha cases, then on the face of it the very particular circumstances of those cases - including the aspect of 'historic wrong' - provided the compelling circumstances not sufficiently recognised under the Rules. Ms Isherwood acknowledged that the grounds did not seek to impugn

the Gurkha jurisprudence and indicated that she did not wish to pursue any such argument before me.

14. In the circumstances I considered it unnecessary to hear submissions from Mr Howells.

15. I dismiss the Respondent's challenge as being misconceived. The Judge properly directed herself to, and in accordance with, applicable case law and reached a conclusion consistent with that case law and consistent with the notion that the circumstances were sufficiently compelling to justify favourable decisions under Article 8. I find that there was no material error of law and that the decisions of the First-tier Tribunal are to stand.

16. After I indicated at the hearing today that I would be dismissing the Respondent's challenge, Mr Howells indicated that he wished to pursue an application for 'wasted' costs under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Ms Isherwood indicated that she was not in a position to deal with such an application without prior notice. In the circumstances after a brief discussion I agreed with the parties that the matter should be dealt with in accordance with the Directions set out below.

Decisions

17. The decisions of the First-tier Tribunal Judge contained no errors of law and stand.

Directions in respect of application for costs

(i) The Appellants are to file and serve written applications for costs with all supporting submissions and evidence upon which they wish to rely within 9 days of the date of the sending of this Determination.

(ii) The Respondent is to file and serve a written response to the application within 7 days thereafter.

(iii) The Appellants may file and serve any Reply within a further 7 days thereafter. (If the Appellants do not wish to make a reply this should be communicated to the Tribunal.)

(iv) Following the expiry of 23 days from the sending of this Determination the Tribunal will consider the Appellants' costs application 'on the papers'. The application is reserved to me.

Deputy Judge of the Upper Tribunal I. A. Lewis 9 July 2014