



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/19363/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 September 2014

Determination Promulgated
On 2 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SURAJ GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Allen
For the Respondent: Ms R. Stickler, Counsel

DETERMINATION AND REASONS

1. This is the respondent's appeal but I shall henceforth refer to the parties in the original terms detailed in the determination of Judge of the First-tier Tribunal A

Creswell following a hearing on 23 July 2014, after which the judge promulgated his determination on 29 July 2014.

2. No anonymity direction has been made hitherto in these proceedings and no reason has been put before me for such an order to be made.
3. The appellant appealed against a decision of the respondent to refuse entry clearance to the United Kingdom as the adult son of a person present and settled in the United Kingdom under Appendix FM of the Immigration Rules HC 305 (as amended). The decision was made by the respondent on 20 September 2013.
4. The appellant appealed and following a hearing at Newport the judge allowed the appellant's appeal on human rights grounds. It was not in dispute that the appellant could not meet the requirements of the relevant Immigration Rules. The judge went on to deal with the appeal under Article 8.
5. On 18 August 2014 Judge of the First-tier Tribunal Shimmin gave his reasons for concluding, having considered an application by the respondent for permission to appeal, that it should be granted. His reasons were:-
 - "1. The respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Creswell, who, in a determination promulgated on 29 July 2014, allowed the appellant's appeal against the Secretary of State's decision to refuse him entry as the adult son of a person present and settled in the UK under Appendix FM of the Immigration Rules.
 2. The grounds of appeal argue that the judge erred in:
 - (1) his approach to the Article 8 assessment of the case;
 - (2) taking into account matters that are immaterial to the assessment of Article 8;
 - (3) finding that there was an 'historic injustice' and then taking it into account.
 3. The grounds of appeal disclose an arguable error of law."
6. Thus the appeal came before me today.
7. Prior to the hearing the appellant's Counsel handed me the authorities of **Ghising (Family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC), R (on the application of Gurung and Others) [2013] EWCA Civ 8 and Ghising and Others (Gurkhas/BOCs: historic wrong: weight: Nepal) [2013] UKUT 567 (IAC).**
8. In making his submissions Mr Allen relied on the respondent's written grounds which state:

“Ground one: Making a material misdirection of law

1. It is respectfully submitted that the Tribunal has erred in law in its approach to the Article 8 assessment in this case.
2. **MF Nigeria [2013] EWCA Civ 1192** confirms that the Immigration Rules are a complete code that form the starting point for the decision-maker. Any Article 8 assessment should only be made after consideration under these Rules. That was not done in this case. It is submitted that the Tribunal erred in law by not having regard to the Rules and that the subsequent proportionality assessment is unsustainable because of this omission.
3. Furthermore, it was made clear in **Gulshan [2013] UKUT 000640 (IAC)** that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by these Rules. In this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.
4. **Gulshan** also makes clear that at this stage an appeal should only be allowed where there are exceptional circumstances. **Nagre [2013] EWHC 720 Admin** endorsed the Secretary of State’s guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome. In this case the Tribunal has not followed this approach and thereby has erred.
5. It is respectfully submitted that the Tribunal has failed to provide adequate reasons why the appellant’s circumstances are either compelling or exceptional. At paragraphs 15 the Tribunal has found that the appellant is emotionally and financially dependant upon his parents. It is respectfully submitted that relationships between adult siblings or adult children and their parents will not normally constitute family life unless there are special elements of dependency, beyond normal emotional ties.
6. The Court of Appeal in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 (21 January 2003)** held that *“a family life is established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties....Such ties might exist if the appellant were dependent on his family or vice versa”*. They also pointed out that *“neither blood ties nor the concern and affection that ordinarily go with them are ... enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit ... from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8”*.
7. In **Kugathas** the Court of Appeal felt that it was clearly necessary to confine Article 8 to situations where a genuine situation of mutual dependency exists – otherwise the mere fact of arrival in the United

Kingdom can be exploited to create a right to family life. The kind of dependency at issue in this case is not economic as such but an indicator as to the genuineness of the family bond; what Sedley LJ calls “the irreducible minimum” without which Article 8 cannot be said to be engaged. Strasbourg authorities support this approach.

8. Whilst it is possible, as acknowledged by the Court of Appeal in **Kugathas**, for family life to continue, in Article 8 terms, between an adult and his parent, if there is an unusual degree of dependency the situation envisaged in **Kugathas**, is very different from the present case, where the appellant is living apart from his parents, in a different country. It is considered that financial remittances from his parents would not suffice to establish the requisite degree of dependency, which has to be more than financial.
9. The appellant is an adult who is educated to a high standard, it is submitted that whilst he relies on financial support from his parents this dependency is one of choice and not necessity. It is submitted that with his qualifications the appellant could find employment and support himself and there is no reason why financial support cannot continue from abroad as has been done thus far if he chooses to continue his studies rather than finding full time employment. Whilst the appellant may be suffering from mental health problems the evidence is unclear as to how he has suffered from this and therefore this could be a condition which was existing when his parents chose to relocate. Even if it was not it is submitted that the appellant is receiving medical treatment and there is no evidence that he requires the care of his parents to cope. His parents can continue to offer emotional support via modern methods of communication and visits as they have been doing thus far and should he need support he has family there in the form of 2 aunt’s and his parental grandfather who he can seek support from.
10. It seems that the Judge of the First-tier Tribunal has taken account of matters that are immaterial in the assessment of the Article 8 claim. The Judge of the First-tier Tribunal appears to have been adversely influenced in their assessment of the appellant’s Article 8 claim by giving undue weight to their finding that the appellant is dependant on his parents financially and emotionally even though he is 26 years of age. However, it is respectfully submitted that in failing to give sustainable reasons for finding that this parent-child relationship goes beyond normal emotional ties, the Judge of the First-tier Tribunal has erred in law.
11. As such it is submitted that there was no evidence before the Judge of the First-tier Tribunal to suggest that, at the date of decision, the **Kugathas** test could be met and therefore in finding there was and allowing the appeal under Article 8 of the ECHR the Judge of the First-tier Tribunal erred materially in law.

12. The Tribunal allowed this appeal on the basis of an “historic injustice” suffered by Gurkhas who were not allowed to settle in the UK with their families since 1997. However, it is respectfully submitted that in allowing this appeal the Tribunal misdirected itself in law by failing to apply the appropriate tests to the facts of this case.
 13. It is submitted that it is for the Gurkha to show that but for the historic injustice he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18, that would be strong but not a determinative feature in the appellant’s favour. Furthermore, the Tribunal should have considered the particular military service of the sponsor – **UG (Nepal) [2012] EWCA Civ 58** – and the relevance of that service to the circumstances of this case. Although the historic injustice is a relevant feature of the assessment, it is not determinative and it is just one of several factors to be weighed against the need to maintain a firm and fair immigration policy.
 14. It is submitted that there is no evidence that the appellant has suffered an “historical injustice” as there is no evidence his father had intended to settle in the UK prior to him turning 18 years of age. It is submitted that the appellant has not been the subject of an “historic injustice”.
 15. It is submitted that had the Tribunal taken these issues into consideration they would have found that the decision to refuse entry clearance is proportionate.
 16. Permission to appeal is respectfully sought.”
9. He also emphasised in his oral submissions that the issues of historical injustice in relation to Gurkha families is a complex one. In particular here the judge erred in having gone on to consider Article 8 not putting on the respondent’s side of the balance the fact that the appellant was unable to meet the requirements of the current Immigration Rules. Further that in coming to his conclusions the judge again erred in the making of no “hard and fast” finding in relation to the historical injustice pertinent to this particular appellant.
10. Ms Stickler, in her submissions relied upon her skeleton argument and in meeting Mr Allen’s oral submissions contended that there was an acceptance that the appellant could not meet the Immigration Rules. However, thereafter that issue has been fully taken into account by the judge when considering the issue of proportionality. In particular she referred me to paragraphs 21, 23, 24 and 25 which state:-
- “21. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the

interference will call for careful assessment at this stage. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.

23. In **EB (Kosovo)** [2008] UK HL 41, Lord Bingham reaffirmed the acknowledgement of the House of Lords in **Huang v Secretary of State for the Home Department**, that weight must be given to the general administrative desirability of applying known rules of immigration control that are workable, predictable, consistent and fair as between one applicant and another and the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory. He also emphasised, under this heading, the need to discourage fraud, deception and deliberate breaches of the law. Secondly, he reaffirmed the point made in **Huang** that the Strasbourg jurisprudence recognised that **Article 8** imposes on contracting states not only a negative duty to refrain from unjustified interference with a person's right to respect for his family but also a positive duty to show respect for it. Furthermore, he noted that the jurisprudence recognised what is perhaps obvious, i.e. that a person's ... *family or extended family is the group on which many people most heavily depend, socially, emotionally and often financially*". His quotation from the opinion of the judicial committee in **Huang** (which he had delivered), continues:

"There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant".

24. I have considered the provisions of Article 8 and I find that there does exist family life between the Appellant and his UK-based father and mother based on the facts I have found and the submissions of Ms Stickler. The refusal of entry clearance does interfere with family life for the purposes of Article 8(1) (**AG (Eritrea v SSHD)** (2007) EWCA, Sedley LJ; *"While an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one."*) for the reasons given in paragraph 15 above. That interference is in accordance with the law as the interference has legitimate aims to the extent that immigration control is in itself a legitimate aim; and it is necessary in a democratic society because implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. I have already determined that the Appellant cannot meet the requirements of Appendix FM of the Rules and my

reasons for so finding in paragraph 15 above (**Gulshan (Article 8 – new Rules – correct approach) Pakistan** (2013) UKUT 640). I have borne in mind the practical or compassionate considerations which underlie the Rules (**Patel v SSHD** (2013) UKSC 72).

25. Finally, I find that the interference is not proportionate in a democratic society to the legitimate aim to be achieved. I have considered the guidance on proportionality in **SS (Nigeria) v SSHD** (2013) EWCA Civ 550 when so deciding. I must balance the need to maintain firm yet fair immigration control with the Appellant's own circumstances. I have had regard to the guidance in **Gulshan (Article 8 – new Rules – correct approach) Pakistan** (2013) UKUT 640 and **MF (Nigeria) -v- SSHD** [2013] EWCA Civ 1192 and **Muse v ECO** (2012) EWCA Civ 10; the Appellant cannot meet the requirements of the Rules but there are circumstances here which suggest to me that this is a case where application of the Rules leads to a disproportionate outcome as I have detailed above in paragraph 15. I find that the refusal of leave to enter prejudices the family life of the Appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8."

She highlighted how the judge had then referred himself back to paragraph 15 of his determination wherein it states:-

"... Finally, in relation to proportionality, there are the dicta of Lord Dyson MR in **Gurung**, where he made it clear that the adult dependent child of a Gurkha veteran who can establish an Article 8(1) right has such a strong claim to have that right vindicated, notwithstanding the potency of the legitimate aim argument, if they can show that they would have settled in the UK years before, had that been possible. **Gurung** was applied by the Upper Tribunal in **Ghising (Gurkhas/BOCs: historic wrong: weight)** (2013) UKUT 00567 (IAC), which held that the historic wrong will ordinarily determine the proportionality assessment where the Respondent only relies on fair immigration policy as the legitimate aim, as in the case here."

11. Ms Stickler emphasised that within the written grounds seeking permission to appeal the respondent has wrongly applied only the authority of "**UG (Nepal) [2012] EWCA Civ 58** when the guiding authority should have been **Ghising and Others (Gurkhas/BOCs: historic wrong: weight)** (2013) UKUT 00567 (IAC).
12. Further that at paragraph 15(v) of the judge's determination the judge made the relevant finding as follows:-

"The sponsor told me that he would have come to settle in the UK in 1992 had he been able to do so because his family would have had a better life here as he could have found work and his children would have received a high standard education. It is significant that he did actually come to the UK to settle as soon as he had the opportunity to do so, commensurate

with honouring his work contract in Brunei. It would be rather cruel first to deny someone a right to settle and then to castigate him when he showed honour by fulfilling his contract in a foreign land, a contract taken to support his family.”

13. Moreover as can be gleaned from paragraph 15(iv) of his determination the judge concluded that he had “no reason to believe other than that I was given a truthful account by the sponsor”.
14. I find the judge clearly considered the appellant’s application under the Immigration Rules and in so doing, recognising that they could not be met, went on to factor this into the subsequent proportionality assessment under Article 8. The judge plainly sets out in his determination the importance of weight that needed to be attached to the maintenance of a fair and effective system of immigration control.
15. The judge then correctly followed the authority of **Gulshan [2013] UKUT 000640 (IAC)** and dealt with this appeal on the basis that after applying the requirements of the Immigration Rules only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. It was not incumbent upon the judge to find “exceptional circumstances”. The judge has gone on to correctly apply the authority of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** The judge has not erred in his approach to Article 8 and it was open to him to conclude that the appellant remains dependent emotionally, practically and financially on his UK-based parents which is to be set against a background of an intention at all material times to effect a reunion in the United Kingdom.
16. The judge has not taken into account erroneous factors in carrying out the balancing exercise. In so doing account has been taken of the Upper Tribunal approach and in particular where at paragraph 59 of **Ghising and Others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC)** which states:-

“That said, we accept Mr Jacobs’ submission that where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant’s favour. The explanation for this is to be found, not in any concept of new or additional “burdens” but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:

“were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and

why the applicant dependent child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy". [41]

In other words, the historic injustice issue will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described."

17. The respondent's grounds here are essentially an argument with the judge's findings and reasoning which are legally adequate and which take proper account of the material that was before him. The conclusions were open to be made in all the circumstances and I find that there is no error here as asserted by the respondent.
18. The making of the previous decision involves the making of no error on a point of law and I do not set aside the decision but order that it shall stand.

Signed

Date 1 October 2014.

Deputy Upper Tribunal Judge Appleyard