



**The Upper Tribunal
(Immigration and Asylum Chamber)
OA/03879/2014**

Appeal number:

OA/03884/2014

THE IMMIGRATION ACTS

Heard at Field House

Determination

Promulgated

On March 6, 2015

On March 9, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

**MISS RUPA THAPA
MASTER RANABIR THAPA
(NO ANONYMITY DIRECTION MADE)**

Respondents

Representation:

Appellant

Ms Everett (Home Office Presenting Officer)

Respondent

Ms Jafa, Counsel, instructed by Howe & Co

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellants are citizens of Nepal and applied for settlement as the dependant daughter and grandchild of the sponsor, an ex-Ghurkha soldier. The main appellant was thirty-five years of age at the date of application and her son was almost six years of age. The respondent considered their applications but refused their applications on January 24, 2014 because the first-named appellant did not meet the requirements of Section E-ECP of Appendix FM of

the Immigration Rules and the second appellant was refused under paragraphs 276X and 297 HC 395. The respondent further refused their claims under the discretionary policy as there were no exceptional circumstances.

3. The appellants appealed on March 17, 2014, under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. The matter came before Judge of the First-tier Tribunal Khan (hereinafter referred to as the "FtTJ") on November 5, 2014 and in a decision promulgated on November 21, 2014 he found the discretionary policy was not exercised properly in the appellants' favour and allowed the appeal on article 8 human rights grounds
5. The respondent lodged grounds of appeal on December 2, 2014 submitting:
 - a. The FtTJ erred by failing to remit the decision back to the Entry Clearance Officer as the Tribunal did not have the power to allow an appeal when the power was discretionary.
 - b. The FtTJ erred by dealing with the article 8 claim in light of the fact the substantive decision was found to be unlawful.
 - c. The FtTJ wrongly found there was family life and ultimately wrongly allowed the appeal under article 8 ECHR.
6. On January 14, 2015 Judge of the First-tier Tribunal Osborne gave permission to appeal finding there were arguable grounds that the FtTJ had erred on all grounds.
7. The matter came before me on the above date and the parties were represented as set out above. The sponsor and his wife were in attendance.

PRELIMINARY ISSUES

8. Both representatives agreed that when the FtTJ found the respondent had been in error in not exercising the discretionary policy in respect of adult dependants he should have remitted the matter back to her as it was not in accordance with the law. The FtTJ's decision was unclear and for the sake of clarity I confirm that the decision is remitted back to the respondent as not being in accordance with the law to enable her to consider the matter afresh in light of the findings made by the FtTJ at paragraphs [17] to [20] of the determination.
9. Ms Everett considered the decision of Pun & Ors [2011] UKUT 00377 and in particular paragraph [29] (Article 8 section). The Tribunal found-

“It may be that in a particular case the proper course is for the decision under article 8 to await a decision under the policy but that depends upon the facts of each individual case including whether there are sufficiently clear findings of fact on which a decision under article 8 can properly be made. It is a matter for the discretion for the Tribunal whether to deal separately with an article 8 appeal before the decision is made under the policy or whether the proper course is for both matters to be considered by the respondent and any delay which has already taken place and which may well take place pending a further decision can properly be taken into account. However, as a matter of principle an appellant is entitled to a decision on any appeal before the Tribunal and an appeal should not be adjourned or the decision sent back to be re-made by the respondent where this course is resisted by the appellant unless there is a compelling reason for doing so. In this context we note that in UR article 8 was not dealt with as a full case had not been put together on that ground and the appellant was content, probably wisely, for article 8 to be considered afresh by the respondent when reconsidering the decision under the policy. The position is similar in the second appeal before us.”

10. In light of this Ms Everett conceded the Tribunal did have discretion as to whether to consider article 8 in circumstances where the decision under the policy was being remitted back to the respondent for a decision. The Tribunal could make a decision on article 8 and the FtTJ did not err by considering the article 8 claims.
11. Ms Everett accepted that the remaining issue centred around whether the FtTJ had erred in finding there was family life.
12. I invited submissions on this issue.

ERROR OF LAW SUBMISSIONS

13. Ms Everett submitted the FtTJ had erred in finding there was family life. The main appellant left home in 2008 and married Rajiv. She believed her family would not accept the marriage, as it had not been arranged, but after three months living apart from her parents she contacted them. In time the main appellant’s parents accepted her marriage but within 12 months of marriage her husband left and went to live and work in India but neither the appellant nor his father have ever heard from him. Her father-in-law provided support because she felt unable to tell her mother. Four months after he left her she discovered she was pregnant. Ms Everett submitted that the main appellant had left the family home and was living her own life independently of her family. Although financial support was provided Ms Everett submitted that the FtTJ erred because he did not consider the fact she left home, married and

intended to live her own life. She argued that unless there was family life the appellants failed the first question set out by Lord Bingham in Razgar [2004] UKHL 00027.

14. Ms Jafa submitted the FtTJ's decision was not perverse and he was entitled to find there was family life. There was clear dependence:
 - a. Regular telephone contact.
 - b. The sponsor had supported the main appellant since her father-in-law died in 2010.
 - c. The sponsor had transferred his Ghurkha pension in 2010 to his daughter to enable her to survive and also sent other monies, if needed.
 - d. Regular trips by the sponsor to Nepal to ensure his daughter and grandson were all right.

Ms Jafa placed reliance on the comments of Lady Arden and Lord Justice Sedley as set out in Ghising (family life-adults-Ghurkha policy) [2012] UKUT 001560 and in particular paragraphs [54] and [55]. Lord Justice Sedley made clear that dependency should be read as real or committed support in the personal sense and Ms Jafa submitted this was exactly what the sponsor was offering. Lady Arden stated that family life between adult dependants could exist as long as it was more than emotional ties and such a circumstance could include a situation where an appellant was dependent on a family. Ms Jafa submitted this was clearly the case.

She submitted the FtTJ's finding there was family life was not perverse and there was no error in law.

15. Ms Everett in response accepted the test set out in Kugathas v SSHD [2003] EWCA Civ 31 was too restrictive. She concluded her submissions that if the FtTJ had stated what Ms Jafa had argued then there would not have been an error. _
16. I reserved my decision after hearing these submissions.

ERROR OF LAW ASSESSMENT

17. As a result of what was discussed at the outset of this case I am left with one issue to be decided namely did the FtTJ err when finding there was family life. Ms Everett concedes that if the FtTJ did not err in this assessment then there would be no error in law.
18. It is clear the FtTJ was helped greatly by a large bundle of case law and well-prepared subjective bundle.
19. From paragraph [25] of his determination the FtTJ considered the appellants' article 8 claims. It is agreed that if the main appellant succeeds under article 8 then her son must also succeed.

20. The FtTJ had regard to what is referred to as the historic injustice in Ghurkha cases and in paragraph [25] the FtTJ found the appellant was dependent on the sponsor and that she had a strong claim under article 8 ECHR. The FtTJ considered the original case of Ghising and Ghising & others (Ghurkhas/BOCs: Historic Wrong; Weight) [2013] UKUT 567 (IAC). He also had regard to R (Gurung) v SSHD [2013] 1 WLR 2546. He considered the background in paragraph [26] and made credibility findings on the evidence in that paragraph as well. The FtTJ had already dealt with the level of support offered and had recorded the oral evidence of the sponsor and his wife.
21. Ms Everett invited me to find the FtTJ had wrongly found there was no family life but to do so I would have to find the FtTJ's decision was perverse. Ms Jafa reminded me what the courts had said about family life and dependency especially in Ghurkha cases and I am satisfied the finding on family life was open to him.
22. There is no error in law on this issue and I uphold the FtTJ's decision on article 8 in respect of both appellants.

DECISION

23. There was no material error. I uphold the original decision save as clarified above in paragraph [8].
24. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.



Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT FEE AWARD

I make no amendment to the order made in the First-tier.



Signed:

Dated:

Deputy Upper Tribunal Judge Alis

