Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/11991/2013
OA/11990/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10th October 2014	**On 20th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

OM JYU GURUNG
DICHHYA GURUNG
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:

For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer
For the Respondents: Mr R Jesurum of Counsel instructed by Everest Law Solicitors

DETERMINATION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against a determination of Judge of the First-tier Tribunal A J Parker promulgated on 14th July 2014.

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2. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal. I will refer to them as the Claimants.

3. The Claimants, born 29th December 1990 and 12th October 1989 respectively, are citizens of Nepal and are brother and sister. They applied for entry clearance to enable them to settle in the United Kingdom with their parents and younger brother. The Claimants' father had served in the brigade of Ghurkhas.

4. The applications were made outside the Immigration Rules and refused on 1st May 2013. The ECO considered the applications under Appendix FM of the Immigration Rules, and the Secretary of State's policy for dependants over the age of 18 of foreign and commonwealth and other HM Forces' members, and with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

5. The Claimants appealed to the First-tier Tribunal, accepting that their applications could not succeed under the Immigration Rules, but relying upon Article 8.

6. Judge Parker heard evidence from the Claimants' parents and sibling and took into account the historic injustice in Ghurkha cases, and dismissed the appeals under the Immigration Rules but allowed them under Article 8 of the 1950 Convention.

7. The ECO applied for permission to appeal to the Upper Tribunal. In brief summary it was contended that Judge Parker had made a material misdirection of law and had failed to give adequate reasons as to why the appeals should be allowed under Article 8 outside the Immigration Rules. Reliance was placed upon MF Nigeria [2013] EWCA Civ 1192, Nagre [2013] EWHC 720 (Admin) and Gulshan [2013] UKUT 00640 (IAC). It was contended that Judge Parker had failed to provide adequate reasons why the Claimants' circumstances were either compelling or exceptional so as to mean that the appeal should be allowed outside the Immigration Rules under Article 8.

8. It was also contended that Judge Parker had failed to give adequate reasons for finding family life existed between the adult Claimants and their adult parents, and reliance was placed upon Kugathas [2003] EWCA Civ 31. It was also submitted that there was no evidence that the Claimants had suffered an "historical injustice" as there was no evidence that their father had intended to settle in the United Kingdom prior to them attaining their majority.

9. Permission to appeal was granted by Judge of the First-tier Tribunal T R P Hollingworth in the following terms:

   1. The Respondent seeks permission to appeal against a decision of the First-tier Tribunal (Judge Parker) who, in a determination promulgated on 25th August 2014, allowed the Appellants' appeals against the Respondent's decision to refuse to grant leave to enter the UK as dependant relatives.

2. The appeal was allowed purely on Article 8 grounds.

3. Some of the paragraphs from 3 onwards are more compelling than others, but it is arguable the 'historic injustice' test may have been inappropriately applied.

4. All the grounds are arguable.

10. Following the grant of permission directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside. The Appellants lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the First-tier Tribunal determination disclosed no material error of law.

The Upper Tribunal Hearing

Preliminary Issues

11. I made the parties aware that I did not have on the Tribunal file, the Appellants' complete bundle of documents. I only had pages 1-17, 25-27, and 70-112. In addition the rule 24 response referred to an Authorities bundle which was not on file, and there was also reference to a supplementary bundle which was not on file.

12. I was provided with the Authorities bundle and a copy of the supplementary bundle. I was also provided with a copy of the Claimants' skeleton argument that was before the First-tier Tribunal. Mr Jesurum indicated he was satisfied that I now had all the documentation necessary to consider the error of law issue.

Submissions

13. Both representatives addressed me at some length. I have recorded all the oral submissions in my Record of Proceedings and will not reiterate them in full here.

14. In summary Mr Parkinson relied upon the grounds contained within the application for permission to appeal and argued that the determination lacked adequate reasoning as to why family life existed between the Claimants and their parents, taking into account that in the second Claimant's case there had been a previous determination by Designated Judge of the First-tier Tribunal Wilson, promulgated on 16th August 2010, in which Judge Wilson found that family life did not exist. Mr Parkinson submitted that Judge Parker had not properly considered the principles in Devaseelan [2002] UKIAT 00702 and had not given adequate reasons as to why family life existed.

15. In relation to the point that the judge had not given adequate reasons for finding the appeal should be allowed under Article 8 outside the

Immigration Rules, Mr Parkinson relied upon the grounds contained within the application for permission to appeal.

16. Mr Jesurum relied upon the rule 24 response and in brief summary contended that Judge Parker had correctly considered Devaseelan, and was entitled to depart from the finding made by Judge Wilson that family life did not exist. I was asked to note the evidence given by the Claimants' parents and sibling before Judge Parker was not contested and paragraph 11 of the determination confirmed that the witnesses were not cross-examined "as the factual aspects of the case were not in dispute." I was asked to note that case law had evolved since the previous determination, and the decision in Ghising (family life – adults – Ghurka policy) Nepal [2012] UKUT 160 indicated that Kugathas had previously been too restrictively interpreted.

17. Mr Jesurum argued that the judge had been entitled on the uncontested evidence to find that family life existed, and was bound by the authority of higher courts, to consider Article 8 outside the Immigration Rules and the determination of the First-tier Tribunal should stand.

18. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

19. I firstly consider Devaseelan which was not specifically referred to in the Grounds of Appeal but which was referred to by Mr Parkinson without objection from Mr Jesurum. It is, in my view, relevant the findings made by Judge Parker in relation to family life.

20. Judge Parker did not err in his consideration of Devaseelan and correctly identified in paragraph 39 that there had been a previous appeal in relation to the second Claimant, and that the previous determination, in relation to the second Claimant was a starting point. The judge recorded that he had heard uncontested evidence from the Claimants' brother Birjyo which was not before Judge Wilson, and that he had the benefit of more recent authorities which were not before Judge Wilson.

21. One of those authorities is Ghising [2012] which considered Kugathas and accepted in paragraph 56 that the judgment in Kugathas had been interpreted too restrictively in the past, and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts. The Tribunal referred to authorities in paragraphs 57-59 which indicated that family life may continue between a parent and child even after the child had attained his or her majority. Reference was also made in paragraph 61 to AA v United Kingdom (application No 8000/08), in which it was found the significant factor will be whether or not the adult child had founded a family of his own.

22. I therefore do not accept that Judge Parker erred in his consideration of the Devaseelan principles.

23. In relation to the finding that family life existed I have to consider whether adequate reasons have been given. There are three recent decisions made by the Upper Tribunal on this point, the first in time being Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) and I set out below the first paragraph of the head note;

    (1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.

24. The second decision in time is MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC) the head note of which is set out below;

    (1) It is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision.
    (2) If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.

25. The third decision is on Budhathoki (reasons for decision) [2014] UKUT 341 (IAC) the head note of which is set out below;

    It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

26. It is important to note that the evidence before the First-tier Tribunal in this appeal was unchallenged and therefore accepted. Judge Parker considered the relevant case law and made reference to this in paragraph 31 of his determination, making specific reference to Ghising [2012] at paragraphs 48-60 noting that these paragraphs contained a review of how adult children should be treated for Article 8 purposes, and noting that the approach of the Upper Tribunal in Ghising had been endorsed by the Court of Appeal in paragraph 46 of R (Gurung) v SSHD [2013] 1 WLR. The judge went on in paragraph 32 to refer to [Netherlands 2003], which is a reference to Sen v Netherlands [2003] EHRR 7 and AA v The United Kingdom, both of which authorities are relevant in considering family life involving adult children.

27. In paragraph 33 Judge Parker briefly summarised the undisputed evidence, and in my view that undisputed evidence which is contained within witness statements and oral evidence, was sufficient to establish that family life was established between the adult Appellants, and their parents and brother in the United Kingdom. As was stated in Ghising [2012] a review of the jurisprudence discloses that there is no general proposition that Article 8 would never be engaged when the family it is sought to

establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists within the meaning of Article 8(1) and each case is fact sensitive.

28. Applying the authorities in relation to adequacy of reasons, and the authorities in relation to family life, and taking into account that evidence before Judge Parker was unchallenged, I conclude that although the reasoning given is not comprehensive, it is adequate and a reading of the determination discloses why the judge found that family life existed between the Claimants and their parents and sibling in the United Kingdom.

29. Turning to the consideration of Article 8 outside the Immigration Rules my view is that where the provisions in the Immigration Rules permit consideration of exceptional circumstances and other factors, then the Immigration Rules can be regarded as being a complete code and there will usually be no need to consider Article 8 directly. This is because the same outcome would derive from the application of the Immigration Rules as under Article 8. Where the Immigration Rules contain no such provisions, then they are not a complete code and Article 8 will need to be considered directly.

30. The Court of Appeal in MM [2014] EWCA Civ 985 considered the decision in Nagre. It stated in paragraph 129;

> Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rules then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.

31. I set out below paragraph 135 of MM which gives further guidance;

> 135. Where the relevant group of IRs (Immigration Rules), upon their proper construction, provide a “complete code” for dealing with a person’s Convention rights in the context of a particular IR or statutory provision, such as in the case of “foreign criminals” then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

32. Judge Parker had to take into account the historic injustice and did so, finding in paragraph 37 of his determination that the historic injustice is causative. This was not considered under the Immigration Rules. In my view, applying the guidance given in MM, I conclude that the judge did not err in law in considering Article 8 outside the Immigration Rules and in

paragraphs 40 and 41 of the determination is referring to paragraph 60 of Ghising and Others [2013] UKUT 567 and correctly noted that in this case the Respondent could not point to matters over and above the public interest in maintaining a firm immigration policy such as a bad immigration history and/or criminal behaviour. The final sentence in paragraph 60 reads as follows;

> But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour.

33. Therefore, although the decision of Judge Parker may be described as generous, as pointed out in Mr Jesurum's skeleton argument at paragraph 11 Mukarkar v SSHD [2006] EWCA Civ 1045 is authority stating that an unusually generous view of the facts of a case in an Article 8 determination is not grounds for finding an error of law.

34. I am satisfied that although the reasons given in the findings could have been more comprehensive, they are adequate, and reading the determination as a whole discloses why findings were made. I conclude that the determination discloses no material error of law.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision. The appeal of the Entry Clearance Officer is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date 13th October 2014

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The fee award made by the First-tier Tribunal in favour of the Claimants stands.

Signed Date 13th October 2014

Deputy Upper Tribunal Judge M A Hall