



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

**Case No: UI-2022-003538
First-tier Tribunal No: HU/56252/2021
IA/14999/2021**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 19 March 2023**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer

Appellant

And

**Padam Dura
(no anonymity direction made)**

Respondent

**For the Appellant: Ms Young, Senior Home Office Presenting Officer
For the Respondent: Ms Chaudhry, Gull Law Chambers**

Heard at Phoenix House (Bradford) on 25 November 2022

DECISION AND REASONS

1. The Respondent Mr Dura is a national of Nepal born on the 24th October 1993. On the 1st July 2022 the First-tier Tribunal (Judge Nazir) allowed his appeal against a refusal of entry clearance on human rights grounds. The Secretary of State now has permission to appeal against that decision

Background and Matters in Issue

2. Mr Dura is the son of a former Gurkha. His father served in the regiment between 1960 and 1975, when he received an honourable discharge. Mr Dura himself was not born until 1993. He lived in Nepal with his parents and siblings until, in 2015, his father passed away. Six years later he and his mother made applications to come to the UK.
3. His mother, as the widow of a former Gurkha, succeeded. He was refused. In a letter dated the 13th August 2021 the Entry Clearance Officer (ECO) explained that there was no provision under immigration rule or policy that benefitted the “children of widows of former Gurkhas”. It was not accepted that there were any particular bonds between him and his mother, or that any historic injustice had occurred here. The ECO noted in this regard that

“In order to qualify under this concession the Secretary of State must be satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available. I note that your father passed away on 09/01/15 and despite having the option to do so, made no applications for settlement in the UK. You have not demonstrated that your father would have made an application for settlement before 2009 had the option to do so been available”

It was consequently not accepted that the refusal of entry clearance constituted a disproportionate interference with Mr Dura’s Article 8 family life.

4. An appeal was brought to the First-tier Tribunal. Having heard submissions Judge Nazir started, and ended, his decision with an assessment of the *Razgar* questions. He accepted that Mr Dura was financially dependent upon his mother, and that the two shared emotional bonds. Applying the *ratio* in Jitendra Raj v Secretary of State for the Home Department [2017] EWCA Civ 320 they therefore shared a family life. The Judge found the refusal to amount to an interference with that family life, and having regard to the historic injustice visited upon the Gurkhas, as set out in Ghising [2013] UKUT 567 (IAC), he allowed the appeal on Article 8 grounds.
5. The Entry Clearance contends that in doing so the Judge erred.
6. Ground 1 is that the decision is flawed for misdirection. It is submitted that Ghising has no application to this kind of case. Ghising concerned a dependent child seeking to join his Gurkha father. Here the Gurkha father is deceased, and it his *widow* that Mr Dura seeks to join.
7. Properly analysed this ground makes little sense. For Article 8 purposes the sponsor in the UK does not need to have been a soldier. Whilst the Immigration Rules might confine themselves to the family relationships enjoyed by the Gurkha himself, Article 8 does not.

Ghising is concerned primarily with the historic injustice perpetrated on members of the Gurkha regiment, and by extension their families. That is the very case that Mr Dura makes, and it was entirely appropriate that Judge Nazir take it into account. The fact that the Secretary of State's policy does not cover the family relationship here in question was not capable of being determinative of this matter.

8. The second ground is a reasons based challenge. The Entry Clearance Officer submits that the Tribunal did not explain why it was satisfied that there was a *Kugathas* family life between the adult Appellant and his mother.
9. There is no merit in that submission. As the Court of Appeal make clear in Jitendra Rai, there is no requirement of exceptionality or unusual ties here. The question of whether there is a subsisting family life between a mother and her adult son is simply one of fact. Relevant to the assessment were the fact that the two are emotionally close, and that she supports him financially. That was an assessment that the judge was entitled to make, and his conclusion is not inconsistent with the caselaw.
10. The final ground is that in allowing the appeal under Article 8 the Judge did not have any regard to the fact that the Appellant before him could not meet the requirements of the Immigration Rules, relating to Gurkha dependents or adult dependent relatives.
11. It is right to say that the Tribunal should properly have began its assessment with the Rules, only moving on to a *Razgar* assessment if those rules could not be satisfied. That did not happen. I think it likely that Judge Nazir omitted this stage simply because everybody accepted that Mr Dura could not meet those rules, so there seemed little point in setting them out. The difficulty, generally, with such an approach is that in leaving that stage out there is then a danger that the Tribunal might fail to give appropriate weight to the need to maintain immigration control, in accordance with s117B(1) Nationality, Immigration and Asylum Act 2002. That is why this Tribunal, and the higher courts, have consistently recommended such a methodical approach to decision makers. Here however I am far from satisfied that the omission can be material. The judge accepted that this was a family unit who would have settled in the UK long ago had it not been for the failure of the British government to provide a legal route for them to do so. Applying the principles in Jitendra Rai and associated cases, the final balancing exercise was almost certain, absence some particular feature, to fall in the applicant's favour.

Decisions

12. The decision of the First-tier Tribunal is upheld, and this appeal dismissed.
13. There is no order for anonymity. No application was made for such an order and on the facts I see no reason for one to be made.

CBE

Upper Tribunal Judge Bruce
15th December 2022