

**Upper Tribunal
(Immigration and Asylum
Chamber)**
OA/18315/2013



Appeal Number

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated**

Reasons

On 20th October 2014

On 12th November 2014

Before

**Deputy Upper Tribunal Judge Rimington
(Immigration and Asylum Chamber)**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**Bandana Rai
(Anonymity direction not made)**

Respondent

Representation:

For the Appellant: Mr G Duncan of instructed by NC Brothers & Co
For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this determination I shall refer to the parties as they were described before the First Tier Tribunal.
2. The appellant is a citizen of India and made an appeal against the decision of the respondent to refuse her entry clearance as

a dependant of her father Mr Prem Bahadur Rai a former Gurkha soldier.

3. The appeal was allowed by First Tier Tribunal Judge Pacey on 23rd July 2014. An application for permission to appeal was made by the respondent on the basis that the Judge allowed the appeal on the basis of Article 8 outside the Rules and that the appellant could not satisfy the rules (paragraph 276ADE), the Judge only made a cursory reference to Article 8 and there was no application of **Gulshan (Article 8 - new Rules-correct approach) [2013] UKUT 640 (IAC)**. The judge had given inadequate reasoning.
4. The determination was not challenged on the basis that the judge had not made a finding with reference to family life. As Mr Shilliday accepted in fact the only issue was whether Article 8 was engaged. Mr Shilliday acknowledged that he did not draft the grounds of appeal and he attempted to vary the grounds.
5. I refused to allow the Secretary of State to amend the grounds of appeal in such a fundamental manner. There was no challenge to the engagement of Article 8 in the permission to appeal and no reference to it in the grant of permission to appeal save for a general reference to the judge's approach on proportionality. Although the grant of permission states that the judge did not address why he should address the matter outside the rules, it is clear that the matter of the policies in respect of Gurkha's would give rise to a consideration outside the rules. Mr Shilliday accepted this was not relevant. Mr Shilliday argued that there had been no consideration of the first limb of Article 8 but he also accepted this was not a matter raised in the application for permission to appeal. Applications for permission to appeal should be made in writing and these grounds were settled on 31st July 2014 and there had been no indication of any amendment to be made prior to the day of the hearing before me. This would mean that any application was substantially out of time and would require permission to extend time which would be refused in the absence of special circumstances. I find there were none.
6. Even if I had granted permission to amend the grounds it was clear that the judge, having proceeded to a proportionality assessment, considered that there was family life between the appellant and her father and that Article 8 (1) was engaged as he referred to this albeit obliquely in a citation to adult dependent children. This is implicit in the determination. The judge's determination reflected that he was aware of the nature of the appeal and he referred to the relevant case law not least **Ghising & Oths** (Gurkhas/BOCs historic wrong: weight) {2013

UKUT 00567 (IAC). The judge found that the appellant was single with no protection and he gave considerable weight to the 'historic injustice'. The findings were open to him and although very brief were cogently argued and just sufficient.

7. It was for the judge to 'strike the balance in respect of the weight to be attached to the historic justice argument. He needed to make an assessment of proportionality in line with the last question of **Razgar v SSHD [2004] UKHL 27**, regarding proportionality, and in the circumstances attaching relevant weight to the historic injustice argument put forward. This was accomplished.

DECISION

The First Tier Tribunal did not make an error of law. The determination of the First-Tier Tribunal shall stand.

Signed

Date 10th November 2014

Deputy Judge of the Upper Tribunal Rimington