



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13711/2015  
HU/13719/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9<sup>th</sup> March 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

ENTRY CLEARANCE OFFICE (NEW DELHI)

Appellant

and

MR RAJIB RAI  
MR AJIB RAI  
(ANONYMITY DIRECTION NOT MADE)

Respondents

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondents: Mr O Manley, Counsel instructed by N C Brothers & Co Solicitors

**DECISION AND REASONS**

1. The respondents to this appeal (I shall refer to them as the Rai brothers), are citizens of Nepal whose dates of birth respectively are recorded as 15<sup>th</sup> April 1986 and 4<sup>th</sup> October 1987. They made application for entry clearance in order that they might join their parents in the United Kingdom. The application was made on the basis of human rights, having regard to the policy in relation to the "children" of ex-Gurkhas.

2. On 26<sup>th</sup> November 2015 decisions were made in each case to refuse the applications. There was an Entry Clearance Manager Review on 17<sup>th</sup> February 2016 when the decisions were maintained and they appealed and on 6<sup>th</sup> June 2017. Their appeals were heard by Judge of the First-tier Tribunal Burns sitting in Birmingham.
3. Judge Burns making reference to the leading cases of **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)**; **Ghising & others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC)**; and **Rai -v- Entry Clearance Officer New Delhi [2017] EWCA Civ 320** allowed the appeals. Judge Burns had regard to Section 117B of the 2002 Act (paragraphs 13 and 35 of the Decision and Reasons). The judge found family life existed and, working through the “Razgar” questions, found that the proportionality question, and in particular the historic wrong referred to at paragraph 34, weighed sufficiently heavily in the appellants’ favour such as to outweigh the public interests in effective immigration control.
4. Not content with that decision by Notice dated 26 June 2017 the Entry Clearance Officer made application for permission to appeal. The grounds run to eight paragraphs, but essentially it is the Secretary of State’s contention that there was no sufficient family life to enable properly the judge in the first instance to allow the appeal; reliance is placed on the case of **Kugathas**. Paragraph 3 of the grounds makes reference to the case of **AAO -v- Entry Clearance Officer [2011] EWCA Civ 840** in which at paragraph 35 it was said:

*“As for the position of parents and adult children, it is established that family life will not normally exist between them within the meaning of article 8 at all in the absence of further elements of dependency which go beyond normal emotional ties: see S -v- United Kingdom (1984) 40 DR 196, Abdulaziz, Cabales and Balkandali -v- United Kingdom [1985] 7 EHRR 741, Advic -v- United Kingdom [1995] EHRR 57, Kugathas -v- SSHD [2003] EWCA Civ 31, and JB (India) -v- ECO [2009] EWCA Civ 234. That is not to say that reliance on the further element of financial dependency will bring a breach of article 8: no case in which it has in the present context has been discovered.”*

5. I note that not only was the case of **AAO** decided prior to the change of policy by the Secretary of State towards Gurkhas but so too the various cases referred to. Those cases take no significant account of what has now being accepted generally as the “historical wrong” done towards certain Gurkha families.
6. I was very grateful to Ms Everett for the realistic approach she took in this case. Whilst not conceding that she ought not to succeed in the appeal, she recognised that if sufficient family life were established then the proportionality argument fell away in favour of the Rai brothers.
7. The issue as to whether or not there is family life which goes to the first “Razgar” question was not in issue. Indeed, the grounds themselves make the concession, but even if they had not done so Ms Everett was prepared to make it. She submitted in relation to the second “Razgar” question that although the historical wrong came into play still the “Kugathas test”, (that is something over and above normal emotional ties), had to be demonstrated. I disagree. The approach has to be seen through the

prism of the historical wrong, otherwise it would carry insufficient weight for the change in the policy towards Gurkha families to be meaningful.

8. I am helped by the guidance in paragraph 39 in the case **Rai** supra in which it was said:

*"The Upper Tribunal Judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "... not compulsory but ... voluntarily undertaken ..." (paragraph 20), "... having made the choice to come to the [United Kingdom]" (paragraph 21), "... the willingness of the parents to leave ..." "... but that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."*

9. The family life which was to have endured beyond this is not qualified or elevated to the "Kugathas" level. If it were so then the historical wrong would weigh against the appellants when in fact it is a factor that should weigh in their favour. Such is the point of recognising the injustice because ordinarily children who live with their parents eventually make their own lives. If these Rai brothers had been permitted to enter the United Kingdom when they had they were minors they would not be deprived of living in the same country, and so enjoy a better quality of family life with their parents. In any event Ms Everett quite properly recognised that the proportionality issue was to be resolved in the Rai brothers, were I to find "family life".
10. The issue for me solely is whether or not the second "Razgar" test is met. In my judgement it was open to the judge to find that it was and so I find that there was no material error. Had he come to a different view and if for any reason I would have needed to revisit the case, I would have found sufficient family life and allowed the Appellants the relief they sought. In all the circumstances the appeal of the Entry Clearance Officer is dismissed.

### **Notice of Decision**

The appeal of the Entry Clearance Officer is dismissed.

No anonymity direction is made.

Signed

Date: 16 July 2018



**Deputy Upper Tribunal Judge Zucker**