



**Upper Tribunal  
(Immigration and Asylum Chamber) Appeal Number: HU/18159/2019**

**THE IMMIGRATION ACTS**

**Decided at Field House  
On 8 September 2021**

**Decision & Reasons Promulgated  
On 09 September 2021**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**KRISHNA SARU  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr. A Rana, Solicitor, N.C. Brothers & Co Solicitors

For the Respondent: Ms. N Willocks-Briscoe, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Shepherd sent to the parties on 2 March 2021 by which the appellant's appeal against the decision of the respondent to refuse to grant him entry clearance was dismissed.
2. The appellant appeals with permission of Judge of the First-tier Tribunal Keane by a decision dated 12 May 2021.

### **Anonymity**

3. No anonymity direction was issued by the First-tier Tribunal and no application for such direction was made before me.

### **Background**

4. The appellant is a citizen of Nepal and presently aged 31.
5. The appellant's father served in the Brigade of Gurkhas for over 15 years before his discharge in 1994. His father was one of several former members of the Brigade of Gurkhas who were denied the opportunity to settle in this country until a change of policy in 2009. By this time, the appellant was aged over 18.
6. On 9 July 2019 the appellant applied for entry clearance as an adult dependant of a former Gurkha soldier. The application was refused by a decision dated 26 September 2019 which detailed, *inter alia*:

'The discretionary arrangements in place for adult children of a Gurkha discharged prior to 1 July 1997 do not apply to the children of widows. Children or other dependant relatives of former Gurkhas are required to meet the relevant Immigration Rules or other appropriate discretionary criteria.

...

You have submitted limited documentation and have not demonstrated that you are financially and emotionally dependent upon your mother beyond that normally expected between a parent and adult child.'

7. A little over a week later the appellant's mother was granted settlement on 3 October 2019 as the widow of former Gurkha soldier under a discretionary policy then contained in Annex K of Chapter 15 of the Immigration Directorate Instructions. She entered this country on 20 October 2019. Prior to her arrival in this country, she resided with the appellant in Nepal.
8. The appeal came before the Judge sitting in Birmingham on 17 February 2021 and was dismissed.

## **Grounds of Appeal**

9. By means of his notice of appeal, the appellant relies upon five grounds of challenge, authored by Ms. Laura Shepherd, Counsel, who appeared before the Judge:
- i) The First-tier Tribunal made contradictory findings in respect of article 8.
  - ii) The First-tier Tribunal erred in finding that family life would not be interfered with.
  - iii) The First-tier Tribunal failed to undertake the correct factual analysis of whether the appellant's father would have settled in the United Kingdom with his family upon discharge.
  - iv) The First-tier Tribunal failed to apply sufficient weight, if any, to the case of *Jitendra Rai v. Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320.
  - v) In reaching the conclusion that article 8 was not engaged the First-tier Tribunal misapplied the guidance provided in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31 and *Ghisling & Others (Ghurkas/BOCs: historic wrong: weight)* [2013] UKUT 567.
10. In granting permission to appeal on all grounds, Judge Keane reasoned, *inter alia*:

'... In particular, it being incumbent upon the judge to arrive at unequivocal findings of fact she arguably arrived at contradictory findings in respect of an issue as important as whether the appellant and his United Kingdom based sponsor enjoyed family life under article 8 with each other. At paragraph 55 of her decision the judge stated:

'As the appellant and sponsor lived together in Nepal up until she came to the UK in October 2019, I find that there was family life up to this point. I find that article 8 is engaged on this basis and because there is nothing to indicate anything about their relationship has changed other than the distance between them.'

However, at paragraph 20 of her decision and after prolonged analysis the judge found, 'I therefore find that there is not sufficient family life for the purposes of article 8.'

11. The respondent filed a rule 24 response dated 18 June 2021, authored by Ms. Willocks-Briscoe. The response details, *inter alia*:

‘2. The respondent does not oppose the appellant’s application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing.’

**Decision on error of law**

12. Upon reading the papers in this matter, the concession made by the respondent is appropriate. In the circumstances, I find that the First-tier Tribunal materially erred in law and its decision of 2 March 2021 is properly to be set aside.

**Remaking the decision**

13. This matter was listed for an error of law hearing at Field House on 13 September 2021. In light of the respondent’s position identified by her rule 24 response a Tribunal Lawyer, Mr. A Hussain, wrote to the parties on 6 September 2021 and conveyed my provisional view that rather than incur unwarranted expense to the parties, it would be appropriate to set aside the decision of the First-tier Tribunal consequent to a paper consideration and remit the matter back to the hearing centre in Birmingham. The parties were requested to express their view on the proposed step by 4pm on 9 September 2021.

14. The respondent agreed to the proposed course of action by an email sent by Ms. Willocks-Briscoe to the Tribunal at 10.22 on 7 September 2021. Mr. Rana confirmed the appellant’s agreement by an email sent to the Tribunal at 12.55 on 8 September 2021.

**Notice of Decision**

15. The decision of the First-tier Tribunal, dated 2 March 2021, involved the making of a material error on a point of law and is set aside.

16. No findings of fact are preserved.

17. The matter is remitted to the First-tier Tribunal sitting at Birmingham, to be listed before any judge other than Judge of the First-tier Tribunal Shepherd.

Signed: D O’Callaghan  
**Upper Tribunal Judge O’Callaghan**

Date: 8 September 2021