Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22103/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th November 2019	**On 12th December 2019**

Before

HIS HONOUR JUDGE BIRD
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE JACKSON

Between

MISS THAPA MANMAYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Jesurum of Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Lucas who dismissed her appeal on Article 8 grounds against the respondent's decision to refuse her application for entry clearance for family was against the reunification as a family member of a former Gurkha soldier dated 17 September 2018, which was upheld on review by the Entry Clearance Manager on 5 March 2019. The findings of the First-tier Tribunal are not entirely clear and are limited to a few short

paragraphs about the applicant's circumstances, her family situation and the situation of the sponsors in the United Kingdom.

2. The grounds of appeal against the decision are essentially that the First-tier Tribunal failed to apply the correct test to determine whether there was family life for the purposes of Article 8 of the European Convention on Human Rights and in particular that there was a failure to apply the correct test from Lord Justice Sedley in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, as to whether there is real effective and committed support between the family members. The grounds are also on the basis that the findings conflate the issues under Article 8(1) and 8(2) between whether there is family life at all or whether there is a disproportionate interference with it.

3. The second ground of appeal is broadly that the findings of the First-tier Tribunal were contradictory, in one paragraph finding that family life has been maintained through visits between the parents and the appellant and in a later paragraph finding that no family life exists because of the nature of the relationship between parents and an adult child. Further, that the First-tier Tribunal had not expressly applied the five-stage approach in Razgar v Secretary of State for the Home Department [2004] UKHL 27.

4. Thirdly, that the First-tier Tribunal has failed to apply the decision in Rai v Entry Clearance Officer [2017] EWCA Civ 320, in particular paragraph 38 of that decision where the correct question is identified as whether family life existed in Nepal and had endured notwithstanding the separation of the family when the parents as sponsors moved here in 2010 and 2011 respectively.

5. The final ground of appeal is that the First-tier Tribunal has failed to consider proportionality in the right context of this case without considering the historic injustice to Gurkhas and their families in relation to settlement and that the standard position is that if there has been a historic injustice and family life is engaged, there would normally be required a decision in the appellant's favour.

6. During the course of submissions from the parties in this case, it became clear that the parties were in agreement that the First-tier Tribunal had failed to make an express decision as to whether family life existed to engage Article 8(1) in this case or not. In paragraph 19 of the decision there is a reference to the appellant and her siblings having lived apart from their parents and that family life has quite clearly been maintained through frequent visits. However, in paragraph 22 there is a statement that there is nothing apparent in this case that leads to the view that the bond between this appellant and her parents is beyond that of the usual paternal/adult child relationship. That somewhat paraphrases the test in Kugathas but contradicts the earlier statement in paragraph 19.

7. At no point in the decision of the First-tier Tribunal is there any clear statement of the law that is being applied nor is there any clear finding on

family life and it is impossible to reconcile the two statements in paragraphs 19 and 22 as dealing conclusively either way with this issue. The absence of a finding specifically on whether family life is engaged at all, is a clear material error of law which infects the later findings on proportionality, such that the rather brief decision at the end of the decision can be said to deal with the question of proportionality at all.

8. For these reasons, the decision of the First-tier Tribunal contains a material error of law and must be set aside. There are no findings of fact which can be preserved, the error of law primarily being the lack of any adequate findings at all. It is therefore appropriate to remit the appeal to the First-tier Tribunal for a de novo hearing to address that first fundamental question of whether Article 8 is engaged and then go on to apply the usual tests in relation to Article 8 and proportionality thereafter.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

We set aside the decision of the First-tier Tribunal and remit it to the First-tier Tribunal for a de novo hearing to be heard by any Judge except Judge Lucas.

No anonymity direction is made.

Signed  Date 9th December 2019

Upper Tribunal Judge Jackson