Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17837/2019**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 4 November 2021	**On 22 November 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MINADEVI RAI

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: The Sponsor (Mrs Padmamaya Rai)
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal who was born on 1 January 1978. The appellant's father served in the Brigade of Gurkhas for fifteen years before being discharged on 16 October 1964. He passed away on 1 March 1990. The appellant's mother, Mrs Padmamaya Rai (the sponsor) settled in the UK on 6 July 2013 as the widow of a former Gurkha soldier.

2. On 3 July 2019, the appellant applied for entry clearance as the adult dependent child of the sponsor. That application was refused by the Entry Clearance Officer ("ECO") on 23 September 2019. That refusal was maintained by the Entry Clearance Manager on 14 January 2020.

The Appeal to the First-Tier Tribunal

3. The appellant appealed to the First-tier Tribunal. In a decision sent on 20 October 2020, Judge Kinch dismissed the appellant's appeal under Art 8 of the ECHR. Before the judge, the appellant (who was represented by Counsel) accepted that the appellant could not succeed under the Immigration Rules or under the policy applicable to the admission of adult children of former Gurkha soldiers. The appellant relied solely upon Art 8 of the ECHR and her family life with the sponsor. In her determination, Judge Kinch did not accept that "family life" was established for the purposes of Art 8 and so did not accept that Art 8.1 was engaged. On that basis, the judge did not go on to consider whether the refusal of entry clearance was proportionate. The judge dismissed the appeal under Art 8.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal on three grounds. Grounds 1 and 2 are related. Both grounds contend that the judge acted unfairly in reaching adverse factual findings when the relevant evidence had not been challenged by cross-examination of the witnesses: first, as to the frequency of contact between the sponsor and appellant (ground 1); and secondly, as to the financial support provided by the sponsor to the appellant (ground 2). Ground 3 contended that the judge had erred in law by failing to consider the issue of proportionality under Art 8.2.

5. The First-tier Tribunal initially refused permission to appeal. However, the Upper Tribunal (UTJ Stephen Smith) in a decision dated 12 January 2021, granted the appellant permission to appeal on grounds 1 and 2 only. Permission to appeal was refused on ground 3 as it was not necessary for the judge to consider Art 8.2 given her finding that Art 8.1 was not engaged.

6. On 1 February 2021, the ECO filed a rule 24 notice seeking to uphold the judge's decision.

7. The appeal was listed before me at the Cardiff Civil Justice Centre on 4 November 2021. At that hearing the appellant was not legally represented. Present, however, was the sponsor and Mr Hom Rana, who is the sponsor's landlord, and who acted, in effect, as a *McKenzie* friend. A Tribunal appointed interpreter joined the hearing remotely by Microsoft Teams and translated the proceedings for the benefit of the sponsor; Mr Rana spoke English.

8. At the outset of the hearing, I explained the purpose of the hearing in the Upper Tribunal was, initially, to determine whether the judge had made an error of law based upon the two grounds upon which permission to appeal had been granted. I

indicated to the sponsor and Mr Rana that, in the absence of legal representation, it might be helpful to first hear submissions from Mr Howells who, in explaining the ECO's case, would give the sponsor an opportunity to consider what she wished to say, if anything, in response to the ECO's legal argument. Both the sponsor and Mr Rana agreed to this procedure. I also summarised the essence of the legal issues arising under grounds 1 and 2.

9. In the result, I heard oral submissions from Mr Howells on both grounds 1 and 2. At the conclusion of his submissions, the sponsor and Mr Rana both addressed me but, in substance, they both reiterated the factual basis upon which the appellant claimed to be entitled to enter the UK on the basis of her relationship with the sponsor.

The Judge's Decision

10. The judge approached the principal issue of whether family life existed between the appellant (who is an adult) and the sponsor applying the approach set out in the leading decisions of Kugathas v SSHD [2003] EWCA Civ 31 and Rai v Entry Clearance Officer [2017] EWCA Civ 320. The judge said this at paras 20–22 of her decision:

> "20. As set out above, the central remaining issue in this case, is whether Article 8 is engaged. There is a considerable body of case law concerning whether an adult child shares a family life with their surviving parent. It is clear from the case law that there is no presumption of family life in these circumstances and that *'a family life is not established between an adult child and his surviving parent unless something more exists than normal family ties … Such ties might exist if the appellant were dependent on his family or vice versa. It is not, however, essential that the members of the family should be in the same country'* (Kugathas v Secretary of State for the Home Department (2003) EWCA Civ 31. Factors suggested by Arden LJ in Kugathas as relevant to this question at [24] include: *'Identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with other members of the family with whom he claims to have a family life'*.
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> 21. In the same case Sedley LJ set out the test at [17]: *'If dependency is read down as meaning support, in the personal sense, and if one adds echoing the Strasbourg jurisprudence, real or committed or effective to the words support, then it represents in my view the irreducible minimum of what family life implies'*. This passage was cited with approval in Rai v Entry Clearance Officer (2017) EWCA Civ 320. In Rai v Entry Clearance Officer the court went on to state that: *'The real issue under Article 8(1) in this case, was whether as a matter of fact the appellant has demonstrated he had a family life with his parents which had existed at the time of the departure to settle in the United Kingdom and endured beyond it notwithstanding their having left Nepal when they did'*.
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> 22. Finally the fact that the question is fact specific was repeated in Singh v Secretary of State for the Home Department (2015) EWCA Civ 630 where it was said that: *'In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life, there has to be something more'*."

11. It is not suggested that this was anything other than a correct legal self-direction and it is indeed in accordance with the legal principles set out by the Court of Appeal in Rai at [16]–[20] per Lindblom LJ (with whom Beatson and Henderson LJJ agreed).

12. The evidence before the judge was that the sponsor moved to the UK in 2013 and until such time the appellant had lived with the sponsor, was not married and had not formed her own independent household. The judge accepted that and acknowledged that it could be "considered to be a strong indicator of family life existing between the appellant and the sponsor at that time" (see para 25). The judge then went on to consider whether family life continued after 2013 when the sponsor moved to the UK.

13. There were two main issues that the judge addressed: financial support by the sponsor; and contact between the appellant and sponsor showing evidence of emotional support.

14. As regards financial support, the ECO concluded that there was limited documentation evidencing financial support. Before the judge, the sponsor gave oral evidence, as did Mr Rana, concerning claimed financial support. The judge dealt with this at paras 27–32 of her determination.

15. At para 27–28, the judge dealt with the oral evidence from the sponsor and by Mr Rana as follows:

> "27. In support of her claim, the appellant states that she has continued to receive real, effective and/or committed emotional, financial support from the sponsor. The appellant states that she is entirely financially dependent on the sponsor, having no source of income of her own. The appellant and sponsor both assert that the sponsor sends the appellant money from the UK. In her witness statement, the sponsor sates that: *'I have sent at least 25,000 NRP every other month to Nepal just for [the appellant] and [her sister]. I have sent £2,000 once for the application as well. The money is sent through the landlord because I don't know how to'*.
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> 28. Mr Rana confirmed this in his witness statement, which was adopted as his evidence-in-chief. I asked Mr Rana how he made the payments to Nepal, and he answered: '*She tells me how much to send, at festival times she will send more, she says how much, I drive her to the bank, and she gives it to me, and she puts it in my bank account, and I transfer it from my bank account'*. I note that Mr Rana has not adduced any of his own bank statements showing payments out from his account to the appellant. I also asked Mr Rana how much rent the sponsor paid to him, and he answered: '*She pays £420 per month'*. When I asked her how the sponsor paid the money to Mr Rana, he said: *'We go to the bank, she gives me cash, and she gives it to me'*."

16. Then in paras 29–32 the judge dealt with the documents that had been submitted in the appeal to support the claimed financial dependency:

> "29. I have considered the limited financial documents included in the appellant's bundle with care. The sponsor has provided a single bank statement pertaining to her Lloyds Bank account, which relates to the period 19 April 2019 to 21 May 2019. It shows payment into the account of the sponsor's pension and housing benefit. There is a single payment out of £500 made on 9 May 2019. On the evidence of the

sponsor and Mr Rana, £420 of that sum would be used to pay the sponsor's rent. If the remaining £80 were used to transfer to the appellant, it would not amount to 25,000 NRP. While I note the sponsor's evidence is that she spends 25,000 NRP every other month, and that occasionally, she might send less than this, no documentary evidence has been provided to prove that any regular transfers have been made since the sponsor arrived in the UK in 2013. No documentary evidence has been provided showing the money being paid into and transferred out of Mr Rana's account as he described. Such evidence would, I find, be readily available in the form of bank statements, and I would have expected it to be adduced in evidence before me.

30. In addition to the sponsor's Lloyds Bank account statement, three remittance slips are relied on by the appellant. The first relates to a payment made on 15 September 2014 by Bom Prasad Rai to Gopal Rai. Gopal Rai is the name of the appellant's brother. The second and third are dated 8 November 2013 and 2 June 2014, and were sent from Bhakta Bahadur Rai to the appellant, in the sum of £1,500.00 and £800 respectively. While I accept these documents show payments of money have been made to the appellant in Nepal, and are for fairly substantial amounts, they also do not show the regular payments from the sponsor to the appellant the appellant claims to be dependent on.

31. The appellant states that she also withdraws the sponsor's widow's pension in Nepal. A statement from the Pension Office of the Brigade of Gurkhas dated 18 July 2013 shows that a pension payment was made of 21,230.00 for the month of July 2013, and was paid into the Standard Chartered Bank account in the sponsor's name. A corresponding statement from the Standard Chartered Bank account is also produced, showing the payment in of that sum. This evidence confirms that the sponsor was receiving a widow's pension until July 2013. However, no documentary evidence has been adduced to show that these payments continued to be made after July 2013, or that regular withdrawals have been made from the sponsor's Standard Chartered account in Nepal at any point since July 2013.

32. Although the documentary evidence adduced by the appellant does show that two payments were made to her in 2013 and 2014 respectively, the documents fall considerably short of showing the regular payments that the sponsor claims to have made since coming to the UK in 2013, or the regular withdrawals that the appellant claims to have made from the sponsor's Standard Chartered account. While I note that the financial dependency is not a prerequisite for finding that family life between the sponsor and the appellant continued after the sponsor moved to the UK. That is a considerable part of the factual basis on which the appellant makes her claim. I find that insufficient evidence has been adduced to prove that the sponsor has continued to financially support the appellant in the way claimed. I find that the documentary evidence that has been adduced shows no more than two ad hoc payments being made to the appellant in 2013 and 2014 respectively, and do not prove that there has been continuing real, committed and/or effective support from the sponsor to the appellant in this way since the sponsor came to the United Kingdom".

17. As can be seen, the judge concluded that there were "limited financial documents" supporting the oral evidence of the sponsor, the evidence of the appellant and of Mr Rana as to the transfer of money via Mr Rana or the withdrawal of the sponsor's widow's pension by the appellant from the sponsor's Standard Chartered Bank account.

18. Then, at paras 33–34 the judge dealt with the evidence, largely oral from the sponsor, as to the contact between her and the appellant which was relied on as showing emotional dependency for the purposes of establishing "family life". The judge said this:

> "33. The appellant and the sponsor say that they also rely on one another emotionally. The appellant states that she speaks to the sponsor almost every day and they discuss their worries and the sponsor's health, diet and medication. The appellant describes how the sponsor gets upset when she sees the appellant on video calls. To this end the appellant has adduced some screenshots of telephone and video calls made between 12 November and 20 February of unidentified years. While the screenshots appear to show calls having been made by the appellant, the screenshots do not show who the appellant is calling. The only other name on the screenshots, other than the appellant's, is that of Shanti Kalarai, who, the sponsor has confirmed in answers to questions from me, is the name of the sponsor's second daughter. In light of this, the screenshots have little evidential value when considering the question of how frequently the appellant and sponsor speak, and whether there is more than normal emotional attachment between them.
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> 34. In cross-examination, when asked how often she spoke to the appellant, the sponsor answered *'In the past I used to speak once a week, once in ten days, now I speak almost every day. I spoke yesterday and this morning as well'*. Evidence of very frequent telephone contact between the appellant and sponsor would be easy to obtain and adduced before me, and yet there is none. Insufficient evidence has been adduced to prove that the sponsor and appellant converse as frequently as they say they do, which would have gone some way to showing that the family life had continued notwithstanding the length of time the sponsor has been in the UK. Whilst I accept that the sponsor and appellant probably do continue to speak to one another on the telephone, this is entirely normal for adult children and their parents to keep in touch, especially when they do not live in the same country as one another. In the absence of any additional evidence, the telephone contact does not in and of itself prove that there are more than normal emotional ties between the appellant and the sponsor".

19. Again, the judge was not satisfied, in the absence of supporting documentary evidence, of the level of contact claimed.

20. Then, at paras 35 to 36, the judge dealt with the fact that the sponsor travelled back to Nepal on two occasions since 2013 and stayed with the appellant and the appellant's sister. The appellant and her sister live in the same flat and, in addition, the appellant's brother and his family also live in Kathmandu where the appellant lives. The judge noted that the sponsor's evidence was that the appellant still speaks to these family members. The judge noted that, as a result, the appellant was not isolated and she had emotional support available both from her sister and her brother in Kathmandu.

21. At para 27, the judge dealt with the evidence of Mr Rana that there was a closeness of relationship between the appellant and sponsor as he had witnessed when the sponsor and appellant were talking on the telephone.

22. Then at para 38, the judge dealt with the sponsor's health conditions: she has a past medical history of heart failure, atrial fibrillation, COPD, Type 2 diabetes and mitral

stenosis. The sponsor takes ten types of medication which Mr Rana puts in her medicine box for her and administers. The judge, however, noted that the appellant was not providing any of this care for the sponsor and that on the evidence before her, the judge said:

> "It would appear that Mr Rana is able to take care of the sponsor, albeit at an increasing level of burden".

23. The judge then reached her conclusion that Art 8.1 was not engaged as "family life" had not been established in para 39 as follows:

> "39. Applying my findings to the tests set out in the case law above, I find that although the appellant did enjoy family life with the sponsor when they lived together in Kathmandu, the appellant has not adduced sufficient evidence to prove on the balance of probabilities that that family life has endured after the sponsor moved to the UK. Whilst I accept there is love and affection between the appellant and sponsor, it has not been proven that there is, as there must be, 'something more'. The evidence adduced in this case has not proved that there is real, committed and/or effective support which goes beyond the normal emotional attachment that exists between parents and their adult children. I find that Article 8 is not engaged".

24. As a consequence, the judge dismissed the appeal under Art 8 of the ECHR.

Discussion

25. Grounds 1 and 2 (drafted by the appellant's then Counsel) contend that it was unfair for the judge to reject the sponsor's evidence as to the frequency of contact (at para 34) and as to the level of financial support (at para 32) and to disbelieve the two witnesses' evidence when the witnesses were not cross-examined by the Presenting Officer on the specific issues and, as a result, the appellant (through her legal representative) was not put on notice that the evidence was in dispute.

26. In support of that proposition, the grounds rely upon the case of Browne v Dunn (1893) 6 R 67 and SSHD v Maheshwaran [2002] EWCA Civ 173. The grounds contend that if it is contended that a witness is not speaking the truth, that must be put to the witness in cross-examination in order that the witness may provide an explanation.

27. In Browne v Dunn, Lord Herschell said this at page 70:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct

> of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

28. That approach, or 'general rule' in adversarial proceedings was recognised in Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396 where Latham LJ said this at [49]–[50]:

> "49. The general rule in adversarial proceedings, as between the parties, is that one party should not be entitled to impugn the evidence of another party's witness if he has not asked appropriate questions enabling the witness to deal with the criticisms that are being made. This general rule is stated in Phipson on Evidence 15 th Edition at paragraph 11-26 in the following terms:
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> > "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, eg if the witness has deposed a conversation, the opposing counsel should put to the witnesses any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech. ..... Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, if for example the witness has had notice to the contrary beforehand, or the story itself is of an incredible or romancing character."
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> 50. The caveat in the last sentence that I have quoted, is important particularly in the context of the Civil Procure Rules in which, by Part 32 r. 1(3) the court is given a power to limit cross-examination. Nonetheless, the general rule remains a valid rule of good practice and fairness. The judge of fact is, however, in a different position from the protagonists. So long as a matter remains clearly in issue, it is the judge's task to determine the facts on which the issue is to be decided. However it seems to me that where, as in the present case, an issue has been identified, but then counsel asks no questions, the judge should be slow to conclude that it remains an issue which has to be determined on the basis of an assessment of reliability or credibility without enquiry of the parties as to their position. The judge should be particularly cautious of doing so if he or she has not given any indication of concern about the evidence so as to alert the witness or counsel acting on the side calling the witness, to the fact that it may be that further explanation should be given in relation to the issue in question."

29. Likewise, in the context of immigration proceedings, in Maheshwaran, Schiemann LJ said this at [4]:

> "Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind".

30. Much the same was said in MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548 at [14] per Maurice Kay LJ.

31. As will be apparent, therefore, as a "general rule" fairness requires that a witness be given an opportunity to deal with any imputation (in particular of untruthfulness) that the other party or the judge in reaching a decision intends to rely upon.

32. The issue is, however, fact-sensitive and depends upon all the circumstances in the particular case. This was made clear in the Privy Council case of Chen v Ng (British Virgin Islands) [2017] UKPC 27 in the joint judgment of Lords Neuberger and Clarke at [52]–[54] as follows:

> "52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.
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> 53. Mr Parker relies on a general rule, namely that "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted", as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in *Markem Corpn v Zipher Ltd* [2005] RPC 31 .
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> 54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the

> relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him."

33. The Privy Council's approach, after citing Browne v Dunn espouses a nuanced, fact-sensitive approach looking to the overall fairness of the proceedings whilst acknowledging a "general rule" that a witness, if their truthfulness is to be disputed by a party and/or an adverse finding is made by a judge, should usually be given an opportunity to deal with any allegation made. That may be through cross-examination of the witness but not necessarily so providing that the party has a fair opportunity to deal with the imputation by evidence or otherwise. In my judgment, the observations of the general approach in cases such as MS (Sri Lanka) and Maheshwaran must be seen in that context of whether, in fact, the proceedings are fair overall.

34. Much the same approach was taken by a majority of the Court of Appeal (Asplin and Nugee LJJ) in Peter Griffiths v TUI (UK) Ltd [2021] EWCA Civ 1442. In that case, an expert witness's evidence was not challenged during the course of the evidence but was only challenged in Counsel's closing submissions. Having cited Browne v Dunn and Chen v Ng, Asplin LJ recognised that the issue was one of "fairness", although in general, if a witness's credibility was to be impeached he or she should be given an opportunity to explain that each case must necessarily depend upon all the circumstances of the case in question. At [62]–[63], Asplin LJ said this:

> "62. In my judgment, neither *Browne* nor the subsequent cases which reiterate the same principle are relevant here. They are concerned with the circumstances in which a significant aspect of the evidence of a witness is challenged on the basis that it is untrue. If the credibility of a witness is to be impeached as a matter of fairness, he should be given the opportunity of giving an explanation. If he has not been given the opportunity, in the absence of further relevant facts, generally it is not appropriate to challenge the evidence in closing speeches.
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> 63. Lords Neuberger and Mance, sitting in the Privy Council in *Chen*, decided however, that the "decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him." [54]"

35. In that case, the majority of the Court of Appeal (Bean LJ dissenting) did not consider that it was unfair to raise, for the first time, challenges to the expert evidence in closing submissions. In particular, the Court of Appeal noted that the challenge was not essentially to the "truthfulness" of the expert's evidence (see [64]) but rather (at [67[):

> "that the Professor's report was insufficient to enable [the claimant] to prove on a balance of probabilities that his illness had been caused by contaminated food or drink at the hotel."

36. At no point in her decision did Judge Kinch expressly disbelieve or find to be untruthful either the sponsor or Mr Rana. Rather, somewhat akin to the approach of

the majority of the Court of Appeal in the TUI case, the judge was not satisfied on a balance of probabilities of the financial or emotional support claimed because of the absence of supporting evidence. Of course, the absence of supporting evidence which it would be reasonable to provide is a matter which a judge can take into account in determining whether an individual has established their case (see TK (Burundi) v SSHD [2009] EWCA Civ 40 at [20]–[21] per Thomas LJ). I have considerable doubt, therefore, whether the appellant's grounds properly characterise the reasoning of the judge as being based upon findings that the credibility or truthfulness of the witnesses was doubted by the judge and that they were disbelieved. The premise of the grounds, and the reliance upon Browne v Dunn, is, in my judgment, unfounded.

37. However, even if that is not the case, whether the evidence (oral and documentary) was sufficient to establish the required relationship to found "family life" was in issue before the judge as it was at the time of the ECO's decision. The ECO's decision was, itself, based upon in part, the "limited documentation" which had been produced to demonstrate that there was financial or emotional dependency between the sponsor and appellant. That "limited evidence" essentially stood as the documentary evidence at the hearing before Judge Kinch. There could have been no doubt that the live issue before Judge Kinch was whether, taken cumulatively, the oral evidence of the witnesses together with any supporting documentary evidence was sufficient for the appellant to establish on a balance of probabilities the financial and emotional dependency upon which she relied as a central part of her claim to have "family life" with her mother, the sponsor in the UK.

38. As the case law clearly identifies, it is not always necessary to cross-examine a witness about each and every issue that is in dispute. The witness (and essentially the party upon whose behalf he or she is called) must have a fair opportunity to deal with any points that are in issue and which may be relied upon, in particular, by the judge in reaching a decision. The Presenting Officer made no concession that the appellant's case was accepted in relation to financial and emotional dependency. The judge was being asked to assess whether, on the totality of the evidence, the appellant's case was made out. Here, it must have been plain and obvious to Counsel for the appellant what the issue was in relation to the oral and documentary evidence. Counsel could have dealt with, by raising it directly with them or otherwise, the lack of supporting evidence to substantiate the witnesses' evidence. The judge's reasoning reflected that stance and she gave detailed reasons for concluding that, despite the oral evidence of the witnesses, the appellant failed to prove her case because she had "not adduced sufficient evidence".

39. I do not accept the contention made on the appellant's behalf in the grounds that the proceedings were unfair and that the appellant (through her then Counsel) did not have a fair opportunity to put her case on the evidence and whether she had established "family life" between herself and the sponsor. In my judgment, the judge was entitled to find, for the reasons she gave, that the financial and emotional dependency claimed had not been established and that, as a consequence, the

appellant had failed to establish the real, committed or effective support sufficient to establish family life with the sponsor.

40. In my judgment, the judge did not err in law in reaching her finding that Art 8.1 was not engaged.

Decision

41. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands.

42. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
12 November 2021

TO THE RESPONDENT
FEE AWARD

Judge Kinch made no fee award as she had dismissed the appeal. In the light of my decision, that decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
12 November 2021