Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
UI -2022-001303 (HU/08294/2020)
UI- 2022-001302 (HU/08295/2020)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2022	**On 14 September 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

MR NIRMAL GURUNG
MR BUDDHA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Wilford, of Counsel instructed by Everest Law Solicitors
For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants appeal against the decision of First-tier Tribunal Judge Monson, promulgated on 7 November 2021, dismissing their appeals against the refusal of entry clearance as adult dependent children of a former Gurkha soldier.

2. Permission to appeal was refused by First - tier Tribunal Judge Curtis in a decision dated 5 March 2022 on the basis that none of the 7 Grounds of Appeal were arguable. Permission to appeal was subsequently granted by Upper Tribunal Judge Grubb on 14 June 2022 on the basis of Grounds 1,2, 4 and 6 of the Grounds of Appeal are arguable. Upper Tribunal Judge Grubb in the Grant of Permission stated:

   "… that the judge wrongly assessed the issue of 'family life' in a case of this sort following Rai. In particular, the judge's reference to financial dependency to meet the "essential needs" of the appellants reflects language relevant to EEA family (and extended family) members and not necessarily to the existence of 'family life' under Art 8."

3. Having found grounds 1,2,4 and 6 to be arguable, Upper Tribunal Judge Grubb granted permission on all grounds stating that the remaining grounds have less merit.

Anonymity

4. No anonymity direction was made by the First-tier Tribunal. There was no application before us for such a direction. Having considered the facts of the appeals including the circumstances of the appellants and their family, we see no reason for making a such direction.

Background

5. There is no dispute between the parties as to the factual matrix in these appeals which is set out briefly below.

6. The appellants are nationals of Nepal. The first appellant, Nirmal was born on 19 June 1972, and the second appellant, Buddha was born on 20 June 1984. They are brothers.

7. The appellants' father, Mr Ambar Bahadur Gurung (the sponsor) is married to their mother, Mrs Deo Kumari Gurung. They have three sons including the appellants. Nirmal (the first appellant) is their eldest son, they have a middle son Manoj who was born on 26 December 1980 and Buddha (the second appellant) is their youngest son. The family lived together in Nepal in a small hut in the middle of a jungle around 40-50 minutes on foot from the nearest town prior to their parents migrating to the UK in 2015 and Manoj moving to Portugal around 3 to 4 years ago.

8. Mr Ambar Bahadur Gurung, was born in Nepal on 4 March 1948. Mrs Deo Kumari Gurung was born in Nepal on 14 April 1948. Mr Ambar Bahadur Gurung served in the Brigade of Gurkhas for 4 years and 257 days before

being was discharged from service on 23 June 1971 with a “very good” record of military conduct.

9. Nirmal completed his school graduation and studied at an intermediate level but failed. Manoj graduated from school but did not undertake any further studies. Buddha failed at Grade 10 and did not continue his education. The appellants and Manoj worked as labourers when such work was available for a few months a year. They spend time helping villagers and people who need company or physical assistance.

10. The appellants’ parents came to settle in the UK on 2 February 2015 having been issued with a settlement visa on 19 November 2014 on the basis of Mr Ambar Bahadur Gurung’s service as a former Gurkha.

11. On 25 December 2019, the appellants applied for leave to enter the United Kingdom (UK) as the dependent sons of their father, a former Gurkha soldier. Nirmal was aged 47 years of age at the date of application and Buddha was 35 years of age at the date of application.

12. Around 3-4 years ago Manoj moved to Portugal where he found work as a butcher but he was struggling to make ends meet.

13. Both appellants are unemployed, unmarried and have no children of their own. They live in the home they shared as a family rent free. This accommodation is provided by their parents.

14. Having settled in the UK, the sponsor and his wife have travelled to Nepal regularly staying for about a month each time. The last time they travelled to Nepal was in March 2021, when due to the Covid 19 pandemic they were forced to remain for more than a month returning to the UK in September 2021.

15. The sponsor and his wife speak to the appellants 2 to 3 times a week.

16. In refusing the applications, the Entry Clearance Officer (ECO), considered EC-DR 1.1 of Appendix FM and Article 8 of the European Convention on Human Rights (ECHR). The ECO issued separate refusal letters for each appellant dated 10 February 2020. The refusals for each appellant were to the same effect save for noting that Nirmal was 47 years of age and Buddha was 35 years of age at the date of application. The ECO noted that the appellants had not declared any medical conditions or disability and were able to care for themselves. Although the ECO does not specifically mention the respondent’s policy as outlined in Annex K of the Immigration Directorate Instructions Chapter 15, section 2A, it is clear that the policy was applied as having noted their respective ages, the ECO refused the appellants application noting that they were both over the age of 30 on the date of their applications and so did not meet all of the eligibility requirement for settlement as an adult child of a Gurkha discharged prior to 1 July 1997. Consideration was given to Article 8 of the ECHR and relevant case law. The ECO accepts the relationship between

the appellants and sponsor. The ECO also accepts that the appellants may receive some financial support from their sponsor and that they remain in contact with him. However the ECO considered the appellants had not demonstrated that they are financially and emotionally dependent on their father (the sponsor) beyond that normally expected between a parent and adult child. The ECO was not satisfied that the appellants had demonstrated they had family life with their parents over and above that between an adult children and their parent(s) as they had not demonstrated "real" or "committed" or "effective" support from their parent(s). The ECO refused the applications on the basis that Article 8(1) was not engaged.

The decision of the First-tier Tribunal

17. Mr Wilford appeared for the appellants at the First - tier Tribunal hearing. The Judge rightly considered the crucial issue in the appeals to be whether family life subsists between the appellants and their parents and he correctly directed himself that if it does, the refusal decisions constitute a disproportionate interference with their family life rights under Article 8 ECHR.

18. The Judge found that the appellants had not demonstrated that the relationship with their parents goes beyond normal emotional ties.

19. The Judge found that the appellants had not shown that family life had endured from the time of their parents' departure from Nepal in 2015 until the date of the First - tier Tribunal hearing on 28 October 2021, so they had not shown that the interference consequential upon the refusal decisions is of sufficient gravity to engage Article 8(1) ECHR. Accordingly, the Judge found the ECO decisions did not breach the appellants' Article 8 rights and dismissed the appeals.

The grounds of appeal to the Upper Tribunal

20. The grounds seeking permission to appeal are lengthy. For the purpose of this decision we set out the grounds in summary below.

21. Ground 1: The Judge failed to apply the correct test to the question of whether family life exists between the appellants and their parents by departing from the test set out in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31.

22. Ground 2: The Judge erred by requiring the appellants demonstrate that family life existed at the time of their parents' departure from Nepal in 2015 and endured beyond that to the date of the hearing in 2021.

23. Ground 3: The Judge erred by considering discrete elements and failed to consider whether the totality of all the material evidence disclosed the existence of family life.

24. Ground 4: The Judge erred by failing to consider material evidence indicative of the existence of family life between the appellants and their parents.

25. Ground 5: The Judge erred in attaching weight to irrelevant matters in particular:

    a. the fact the sponsor drew no distinction between his relationship with his son Manoj who lives independently in Portugal and his relationship with the appellants, and

    b. the existence of relatives living in the village as diminishing the bond between the appellants and their parents.

26. Ground 6: The Judge acted unfairly by going behind accepted evidence on the sponsor's financial support to the appellants.

27. Ground 7: The Judge erred by failing to take into account evidence of the sponsor's positive good character.

28. The respondent filed a Rule 24 response dated 6 July 2022, setting out the respondent's position which is basically that the appellants appeal is opposed as the Judge had directed himself appropriately, and provided a full and detailed assessment of the evidence. The respondent whilst accepting that the Judge's reference to "essential needs" may have been misplaced argues that this does not detract from the many other reasons given for finding that family life had not been sustained after the appellants' parents relocated to the UK. The respondent submits that the Judge took into account the financial and emotional aspects of family life between the appellants and their parents and has given adequate reasons for his findings.

The Law

29. As recognised by the Judge, the critical issue in these appeals is whether family life exists between the appellants and their parents such that Article 8(1) ECHR is engaged. The legal principles are well established and are clearly set out by the Upper Tribunal in its review of the relevant jurisprudence at paragraph 50 to 62 of Ghising (family life – adults – Gurkha policy) [2012] UKUT 00377 and by the Court of Appeal in Jitendra Rai v ECO, New Delhi [2017] EWCA Civ 320, at paragraphs 16- 20 as follows:

> "16. The legal principles relevant to this issue are not controversial.
>
> 17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "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 word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … 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 the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or vice versa", but it was "not … essential that the members of the family should be in the same country". In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

18. In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

> "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [AA v United Kingdom [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

> 20. To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):
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> > "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. 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 a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

The hearing

30. Mr Wilford adopted his grounds of appeal and argued that the Judge had misdirected himself in his assessment of the evidence in the appeals and had failed to adequately apply the principles in Kugathas and Rai.

31. Mr Wilford submitted that there is no dispute between the parties as to the following facts:

    a. that normal emotional ties exist between the appellants and their parents;

    b. the provision of funds and accommodation by the parents to the appellants;

    c. that the appellants maintain regular contact with their parents through telephone calls; and

    d. that the appellants' parents have made regular visits to Nepal.

32. Mr Wilford argued that the Judge, having accepted that financial support is provided to the appellants by their parents, looks for something more than normal emotional ties and applies a subtly elevated test at paragraphs 29 and 41.

33. Mr Kotas fairly and properly accepted that if it was established that there was family life between the appellants and their parents, on the facts the proportionality assessment would necessarily lead to the conclusion that the appeals should be allowed.

34. Mr Kotas made short submissions in line with the Rule 24 Response and argued that the decision of the Judge should be maintained as it did not involve the making of an error of law. He submitted that the Judge's self

direction on the law was unassailable as he refers to the cases of Rai and Kugathas, correctly identifies the key issue at paragraphs 33 and 41 of the decision setting out the relevant test which is whether the evidence demonstrates "real" or "committed" or "effective" support. Mr Kotas submitted that the Judge having correctly set out the legal principles applied them to the facts. He submitted that the grounds of appeal take an overly fine grained approach and amount to a disagreement with the findings of fact.

35. Whilst accepting that the Judge does refer to financial dependency to meet the "essential needs" of the appellants which reflects language relevant to EEA family (and extended family) members, Mr Kotas submitted that there is no suggestion that the Judge conducts an analysis under the Immigration (EEA) Regulations 2016. Mr Kotas argued that a reference to "essential needs" is not apposite to what is required to demonstrate family life as he points out that family life is more likely to exist where appellants are totally dependent on their parents as opposed to where they are dependent on their parents for luxuries.

36. Mr Kotas acknowledged that the Judge accepted that there had been remittances but he was not persuaded that the appellants were financially dependent (paragraph 39).

37. As to the disposal of the appeals in the event that we find there to be an error of law, Mr Wilford requested that the appeals be remitted to the First - tier Tribunal for a full rehearing whereas Mr Kotas considered the appeals could be retained in the Upper Tribunal.

38. At the end of the hearing we reserved our decision.

Decision on error of law

39. We appreciate that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that we should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

40. Although the wording of certain passages in the grounds of appeal suggest a irrationality or perversity challenge, none is before us. Even if it had been, there was no prospect of it succeeding. In light of the high threshold involved and the evidential basis on which the Judge based his conclusions, the decision was cannot be said to be irrational or perverse.

41. As stated above the law is "not controversial". In reaching a finding as to whether family life existed (and thus Article 8(1) was engaged) the Judge was required to consider whether, in addition to the normal emotional ties, there was "real", or "committed", or "effective" support.

42. The Judge correctly identifies the crucial issue to be determined is whether family life subsists between the appellants and their parents (paragraph 28) and that if it does the respondents decision constitute a disproportionate interference with family life under Article 8 ECHR.

43. The Judge is clearly aware of the leading authorities as he refers to what he describes as “the Rai question” (paragraph 29) and the “Kugathas criteria” (paragraph 30).

Ground 1:

44. The question is whether the Judge in applying the “Kugathas criteria”, applied the correct test when determining the factual issue of whether family life exists between the appellants and their parents. The substance of the first ground is that the Judge applied an elevated test by requiring that the appellants show not only that “something more exists than normal emotional ties” but to also show “emotional support going beyond normal ties”.

45. In Kugathas, Sedley L.J. § 17 of his judgment said that “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 word “support”, then it represents … the irreducible minimum of what family life implies”.

46. The Judge when referring to the “Kugathas criteria” states “Moreover, it is not enough that there should be continuing financial dependence or financial support. There has to be a sufficient degree of emotional dependence or emotional support that goes beyond that which is inherent in normal emotional ties.” (paragraph 30).

47. In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. clarified at §14 of his judgment, that “what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right”.

48. It is clear that the Judge by requiring the appellants show “continuing financial dependence” and “a sufficient degree of emotional dependence” applies a subtly elevated test.

49. The error is also apparent as the Judge whilst accepting there is financial support finds the witness statement evidence does not disclose any emotional dependency as he states “While the financial support that is being provided to the appellants can be said to be real or effective or committed, the witness statement evidence does not disclose any emotional dependency on the part of the appellants on their parents, or of the parents providing emotional support to the appellants which can be

characterised as real or effective or committed so as to constitute the existence or continuation of family life.'(paragraph 41).

50. There is no dispute as to the existence of "normal emotional ties" between the appellants and their parents. There is evidence of the appellants' parents making regular visits to Nepal since arriving in the UK in 2015. It is accepted that the appellants live rent free in accommodation provided by their parents. There is also unchallenged evidence that the appellants speak with their parents 2 to 3 times a week. We acknowledge that telephone contact is not determinative, and there may be many reasons for visits to a former home country, equally such things may have multiple purposes, including maintenance of family ties. In her witness statement, the appellants mother states she misses the appellants (paragraph 5), and they want to come to the UK so they can be together, she also states that they contact the appellants to seek emotional and social support and they need the appellants to help them live a normal life (paragraph 6). We fail to see how on the basis of this unchallenged evidence the Judge finds that "…the witness statement evidence does not disclose any emotional dependency ".

51. We have looked with great care at the decision of the Judge. An error of law based on findings of fact is one which the Upper Tribunal should be slow to make but in our view it was not open to the Judge on the evidence to find that there was no family life. The Court of Appeal in Uddin -v- SSHD [2020] EWCA Civ 338 at paragraph [40] said that "continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life", both appellants should be treated as having continued to enjoy family life with their parents at the time of their departure for the UK in 2015. The Judge does find "Family life in the literal sense came to an abrupt end with the parents' departure because instead of residing together under the same roof, the parents were now residing in the UK thousands of miles away", so the Judge does accept that family life existed at the date of the appellants parents' departure to the UK.

52. In considering whether family life existed at the date of the hearing, the Judge does not explain why the accepted financial support, the provision of rent free accommodation along with the telephone calls and visits, is not real or committed or effective support and so we find the Judge applied a subtly elevated Kugathas test.

Ground 2:

53. The Judge refers to §42 of Rai where Lindblom LJ reiterates that the critical question under Article 8(1) was whether the appellant's family life subsisted at the time the appellant's parents chose to leave Nepal to settle in the UK , "and was still subsisting at the time of the Upper Tribunal's decision"(paragraph 29). Unfortunately this is prefaced by a reference to the obiter comments of Lindblom LJ at§ 39 of Rai, that the "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.…". It is apparent that the Judge having referred to the obiter comments of Lindblom LJ, conceived that the test to be met by the appellants was to show that family life existed at the date of their parents migration to the UK in 2015 and that it endured from that date until the date of the hearing in 2021. Upon examining the reasoning in the following paragraphs of the decision it is clear that the Judge applied a test which requires a continuous family life from 2015 until 2021:

a. "The first issue which arises is whether family life was subsisting between the appellants and their parents at the time they left for the UK" (paragraph 37);

b. "Family life in the literal sense came to an abrupt end with the parents' departure, because instead of residing together under the same roof, the parents were now residing in the UK thousands of miles away;" (paragraph 41) and

c. "For the reasons given above, I find that the appellants have not shown on the balance of probabilities that the Rai question should be answered in their favour. They have not shown that family life between themselves and their parents has endured from the time of the parents' departure in 2015 until the date of the hearing before me in 2021, so they have not shown that the interference consequential upon the refusal decision is of sufficient gravity as to engage Article 8 ECHR." (paragraph 46).

54. The requirement to be met by the appellants is to show that family life existed at the date of their parents migration to the UK in 2015 and that it endured such that it existed at the date of the hearing in 2021. There is no requirement to show the existence of a continuous family life throughout the period from the date of departure of the parents from Nepal until the date of the hearing.

Ground 3

55. This ground asserts that the Judge failed to consider the evidence of family life in totality. Judge Grubb considered there was less merit in this ground. Although we find the Judge failed to apply the correct test, it is clear on reading the decision as a whole the Judge did consider the totality of the evidence. We find that ground 3 is not made out.

Ground 4

56. It is argued that the Judge failed to adequately address the evidence.

57. The Judge finds that at the time of the appellants parents departure from Nepal there is likely to have been the continued bonds of effective, real or committed support that underpins family life (para 38). The Judge makes this finding on the basis that he accepts that although the appellants were

not young adults when their parents left Nepal, they were living under the same roof as their parents and had done so all their lives, in addition the appellants needed to engage in seasonal agricultural work in order to support themselves and their parents and due to their parents age and state of health it is likely that the appellants had to increasingly shoulder the burden of looking after their parents as opposed to the parents looking after the appellants.

58. The Judge is not persuaded that the appellants have been wholly or mainly financially dependent on the funds provided by their father to meet their essential living needs. The Judge's reasoning being that the funds provided by the sponsor to the appellants exceed the family's income prior to the migration to UK (paragraphs 39 & 40). Although this finding was open to the Judge on the evidence, the finding is not such that it negates or diminishes the support so that it does not amount to "real" or "committed" or "effective" support.

59. There is also a failure to engage with the following accepted facts in reaching the finding as to the existence of family life:

    a. The appellants are neither married nor do they have children and so have not established independent family units or a family life separate from that shared with their parents;

    b. The appellants' parents' regular visits to Nepal were frustrated by the Covid -19 pandemic;

    c. The appellants' parents' visits to Nepal were limited in duration because of the implications of longer absences to their receipt of benefits;

    d. Whether the provision by the sponsor of rent free accommodation amounts to "real", "effective" or "committed" support;

    e. The witness statement evidence that the appellants and their parents both receive and need emotional support from each other.

60. The decisions of the domestic and European Court of Human Rights indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence. In AA v United Kingdom [2012] Imm. A.R.1, having reviewed the authorities, the European Court of Human Rights found that a significant factor will be whether or not the adult child has founded a family of his own. "If he is still single and living with his parents, he is likely to enjoy family life with them. ....".

61. Furthermore there is no explanation for the failure to engage with this evidence. This ground is made out.

Ground 5

62. It is asserted that the Judge gave weight to irrelevant considerations as he describes a “notable feature of the sponsor’s evidence” to be the fact that the sponsor drew no distinction between his relationship with Manoj who lives independently in Portugal and his relationship with the appellants.

63. The issue to be determined was whether family life exists between the appellants and their parents and the sponsor’s relationship with Manoj is of relevance and the weight to be given to it is a matter for the Judge. We find this ground to have no merit.

Ground 6

64. It is an established principle in law that if the evidence of a witness is to be rejected, then fairness requires that the witness be made aware that the imputation that the evidence is untrue will be made, and be offered the chance to give an explanation: Browne v Dunn (1893) 6 R. 67 (HL) per Lord Herschell L.C. at §70, as explained in Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396 per Latham LJ at §49-§50) The financial support provided to the appellants by the sponsor was not disputed by the ECO in the refusal decisions and the sponsor was not cross-examined or questioned on the issue at the hearing. The Judge erred in going behind accepted evidence.

65. The Judge also fell into error by making inconsistent findings by concluding on the one hand that he was not persuaded the appellants “were financially dependent upon their father at the time that he and Mrs Gurung came to the UK …”(paragraph 39) whilst also finding that “… the financial support that is being provided to the appellants can be said to be real or effective or committed …” (paragraph 41).

Ground 7

66. This ground asserts that the Judge failed to consider the evidence of good character. There is less merit in this ground as although the record in the sponsor’s certificate of service is relevant, as Mr Wilford acknowledged at the hearing before us, it is not determinative of the credibility of the sponsor or his evidence and although the Judge is not persuaded by some of the evidence he does not make any findings as to the sponsor’s character.

67. Taking all of the above factors into account, we consider grounds 1,2,4 and 6 are made out, and thus, the decision involved the making of an error of law and must be set aside.

68. As to disposal, having taken into account the submissions from the representatives as to whether the appeals should be remitted to the First - tier Tribunal, we consider there is sufficient undisputed evidence before us such that the decision can be remade in the Upper Tribunal without a rehearing. Accordingly, we see, no reason to remit appeals to the First-tier

Tribunal. We retain the appeals in the Upper Tribunal and proceed to remake the decisions.

Remaking

69. In remaking these decisions, we have taken into consideration all the evidence before us.

70. It is common ground that the appellants do not meet the requirements of the Immigration Rules at the date of the decisions and do not fall within applicable Home Office policy on adult dependants of ex-Ghurkha soldiers found in Annex K.

71. We note that the evidence of the appellants' parents went unchallenged to a large extent by the respondent's representative.

72. We have considered what was said in Gurung, at [45]: "Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case."

73. We accept that the appellants are financially supported by the sponsor, and that this support is effective to take care of their financial needs. We also accept that there is frequent and regular telephone contact as well as regular visits by the parents to Nepal. We accept the appellants live rent free in accommodation provided by their parents. We accept that the appellants are not married and do not have any children, so they have not formed a separate and independent life of their own. We find these factors taken together demonstrate emotional ties beyond that which could be expected in a normal loving family between parents and their adult children.

74. We therefore find that the appellants enjoy a family life with their parents. The refusals to permit the appellants to join their parents in the UK is an interference with sufficiently serious consequences such as to engage Article 8(1) ECHR.

The Proportionality Assessment

75. Mr Kotas rightly accepted that if it was established that there was family life between the appellants and their parents, on the facts the proportionality assessment would necessarily lead to the conclusion that the appeals should be allowed.

76. The refusals are in accordance with the law as expressed in Annex K and in the immigration rules and necessary for the public interest, namely the maintenance of effective immigration control.

77. In considering the issue of proportionality, we are required to have regard to the matters set out in section 117B of the 2002 Act, as amended. Those matters being that the maintenance of effective immigration control is in

the public interest. In this case, the appellants do not speak English and they are currently financially dependent on the sponsor and are accommodated by the sponsor.

78. The assessment requires a balancing of the extent of the interference with the rights of the appellants against the public interest. In assessing the public interest the only factor identified by the respondent is the need to maintain effective immigration control.

79. We find in accordance with Gurung that the historic injustice outweighs the public interest in a firm immigration policy and therefore conclude in line with the respondent's concession that the decision to deny entry is a disproportionate interference with the right to respect for the appellant's family life and unlawful under Section 6 of the Human Rights Act 1999.

Decision and Remaking

80. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

81. We set aside the decision to be re-made.

82. The appeals are remade and allowed under Article 8 ECHR.

83. No anonymity direction is made.

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The appeal was allowed on the basis of the same evidence as was before the respondent.

Signed N Haria Date: 8 August 2022

Deputy Upper Tribunal Judge Haria

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The

appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.