Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12285/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Teams	**On 2nd March 2022**
On 24th January 2022	

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR UTTAM GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his application for entry clearance, based on his human rights, as the adult dependant son of a former member of the Brigade of Gurkhas.

2. Both representatives, the sponsor and Upesh Gurung, the appellant's brother, attended the hearing via Teams, while I attended from Field House, which was accessible to members of the public. There was no objection to attending via Teams and I was satisfied that the

representatives and the sponsor were able to participate effectively in the hearing. The sponsor gave evidence via an interpreter in Nepalese. No difficulties were raised with the interpretation.

3. The background of the appeal is set out briefly in my decision promulgated on 3rd December 2020, in which I found there to have been an error of law in an earlier decision of the First-tier Tribunal promulgated on 1st June 2020. A copy of my decision is annexed to these reasons. There were no preserved findings of fact.

The contested legal issues in this appeal

4. The parties agree that there were two issues in this appeal: whether the appellant has family life with the sponsor, and whether it made any difference that such family life was not continuous up to the date of the respondent's decision or this hearing. As per the authority of R (Gurung & Ors) v SSHD [2013] EWCA Civ 8, the historic injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 ECHR consideration and while it may not be determinative,

> *"If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now". (§42)*

5. The representatives accepted that there were no public interest considerations to counter the applications (none having been raised). Were I to find that family life has been established and existed between the appellant and sponsor at the date of the hearing, refusal of entry clearance would be disproportionate. Ms Isherwood made clear that the respondent did not accept that family life existed at the date of the impugned decision, or this hearing. Equally, if family life did not exist, the appeal must fail.

6. The representatives also agreed that when considering whether family life existed, there was no requirement of exceptionality or necessity for adult dependent children. Instead, the test was whether there was real, effective or committed support (see Rai v The Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320).

Documents

7. The respondent provided a bundle containing the appellant's application. The appellant referred to an appellant's bundle before the First-tier Tribunal, which I refer to as "AB", and four supplemental bundles, which I refer to as ASB 1-4. As a result of the lack of a consolidated bundle, much time was wasted during the hearing and there was initially confusion about various witness statements, which were duplicated in various bundles and missing in others. In particular, Mr Jesurum did not have a complete copy of the bundle before the First-tier Tribunal and his copy was missing an initial statement from the appellant's brother, although both

representatives were agreed that no reliance needed to be placed upon that initial statement, which was generalised in nature. Partway through re-examination, the sponsor also sought to rely upon additional, undisclosed documentation (money transfer slips) which had, inexplicably, not been disclosed. Mr Jesurum asked for that evidence to be admitted after the end of the hearing, and for the respondent to be able to make any submissions in response, to which the appellant could then reply. Ms Isherwood objected. I did not regard Mr Jesurum's suggestion as either fair to the respondent, who would then be deprived of the opportunity of cross-examining the witness on evidence, or practical, as it would potentially result in a cycle of post-hearing evidence, challenge and rebuttal, which defeated the very purpose of the hearing. There was also no reason why the evidence had not been disclosed earlier. To ensure proportionality and the parties' ability to participate in the hearing, I decided that it was appropriate for the sponsor to identify what extra documents he wanted to rely on, to show them to the camera, (one transfer form was just about visible, which took some time before the sponsor to position in front of his mobile phone, with obvious difficulty, making it impracticable for him to do this for each transfer form), and for him to be cross-examined and the representatives have the opportunity to address the further evidence in submissions.

8. I set out below the submissions made by both parties, followed by my discussion and conclusions.

The appellant's submissions

9. I have considered appellant's skeleton argument in full, but I only refer to elements of it where necessary, together with Mr Jesurum's oral submissions.

10. By way of general principles, it was trite that in a case involving the historic injustice relating to former Gurkha soldiers, absent any adverse factors, the sole issue was ordinarily the existence of family life for the purposes of Article 8 between the sponsor and an adult child. There was no test of exceptionality and there were also positive obligations to foster the development of that family life so that it was appropriate to consider the extent to which family life already existed. Moreover, the fact that the sponsor may have voluntarily left the appellant when the sponsor settled in the UK did not end family life. I was also urged to consider strong indications of the existence of family life where, as here, the appellant continued to live in the family home and had not established their own independent family life.

11. The existence of a family life did not require dependency and also the nature of real or effective or committed support could be out of choice rather than out of need.

12. Turning to the specific circumstances of this case, I was asked to consider the sponsor's good character and in particular his exemplary service record with the Brigade of Gurkhas; his position of responsibility working

within the security industry and that of his younger son, Upesh Gurung, who was similarly working in the UK in a position of responsibility. This was relevant in relation to both witnesses as to their general credibility.

13. Any points that the respondent may wish to take in respect of the witnesses' credibility were not sustainable. The absence of telephone records prior to 2016, which would otherwise show contact between the appellant and the sponsor, was explicable where the sponsor's telephone had changed and so he no longer had access to his telephone records. The mistake by the sponsor in his original witness statement to the First-tier Tribunal, in which he had erroneously asserted that the appellant had never managed to obtain employment outside Nepal was just that, a mistake. It was explicable as a mistake in circumstances where the appellant's former solicitor had produced a draft which had not been sent to the sponsor in a hard copy format. The sponsor had expected and understood the statement prepared for him to be correct and had told the instructing solicitor the correct facts, but these had not been recorded in the witness statement. The sponsor had since sought to demonstrate that this was the mistake of his former solicitor, and I was referred to the emails in relation to this. Mr Jesurum also relied upon the authority of BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311. Moreover, the sponsor did not have a motive for trying to mislead the respondent or the First-tier Tribunal. In his covering letter in support of the appellant's application for entry clearance, the sponsor had made clear that the appellant had travelled to the UAE to work but had not been able to support himself without the sponsor's assistance. It therefore made no sense for the sponsor then to have intentionally been untruthful in his later written witness statement. Moreover, the sponsor had provided details of regular remittances up until July 2021. This Tribunal had then permitted him to show the remittance for January 2022, given the constraints of time within the hearing, and he had provided an oral assurance that he had continued to make financial remittances up to the present date. In these circumstances, regular financial support, coupled with an ordinary emotional relationship between father and son, was sufficient to prove family life.

14. To prove family life in an Article 8 sense, there was no need to show an emotional relationship which was somehow more dependent or unusual, particularly where, as here, there was committed financial support. Mr Jesurum added that culturally, former members of the Brigade of Gurkhas were not noted for their displays of emotion, and it was therefore not surprising that any communications between the appellant and the sponsor focussed on the immigration appeal. No adverse inferences should be drawn from the prime, if not sole, focus on immigration matters in the exchanges between the two.

15. Mr Jesurum also addressed the issue of any potential inconsistency about where the appellant lived in Nepal or the gaps in communication between the sponsor and the appellant, identified in cross-examination. The sponsor had been clear that during the two periods identified by Ms

Isherwood (10th to 23rd May 2020 and 27th August to 8th September 2020), when the appellant and the sponsor were not in contact, the appellant had gone to Khandbari, away from his normal home and there was not sufficient mobile signal for the two to speak. This was entirely explicable and even where, as here, the sponsor had referred to the appellant having "relatives" in Khandbari, first, "relatives" could mean friends, as the sponsor later attempted to clarify his evidence or, alternatively, it mattered not whether the appellant also had additional relatives within Nepal, as emotional and financial support from the sponsor was enough.

16. In relation to any suggestion that family life needed to be continuous, this ignored the historic injustice. All that was necessary in this case was an application of the so-called "but for" test from the case of Patel & others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17, where, but for the failure by the respondent to permit members of the Brigade of Gurkhas to settle in the UK years earlier, the sponsor would have settled with the appellant in the UK when the appellant was a minor. That was sufficient, even with a gap, provided that family life was subsequently re-established. Provided that family life existed at the date of the respondent's decision or, if later, at the date of this hearing, that was sufficient for the appellant to succeed in his appeal.

The respondent's submissions

17. Ms Isherwood submitted that the sponsor was not credible. In relation to the most recent money transfers, there had been no explanation for the failure to disclose them. The sponsor had simply referred to the fact of the transfer and matters were left at that. In relation to the reliability of his evidence and its inconsistency in his original witness statement, which was adopted before the First-tier Tribunal, there was no suggestion that he was somehow medically unfit or did not understand his evidence. A draft of the witness statement that he later adopted in evidence had been provided by his lawyer and in that email, which was sent to him directly, it made clear that he should check through it carefully to see if there were any errors in it. Whilst he had suggested in his subsequent clarification statement that he had not been provided with a hard copy directly, in fact, as Upesh Gurung, his son, now confirmed, the son had printed out a copy for him and had read it to him. In essence, the sponsor was seeking to blame others when it was clear that it was his fault and his evidence had changed as it went along.

18. Moreover, the evidence about remittances was relatively limited. In the original statement the sponsor had spoken about paying for the appellant to return from the UAE to Nepal but not in relation to ongoing household expenses within Nepal. In terms of any regular communication, there were gaps in electronic communications for over a week at a time and even then, the vast majority of the evidence about communications was not in English but in Nepalese. Even the limited evidence in English dealt solely with the immigration appeal. There was also the issue of the inconsistency in the appellant's address. Family life did not exist at the date of the respondent's decision and did not exist now.

Evidence, discussion and conclusions

19. The sponsor served in the Brigade of Gurkhas from 1980 until his discharge, with an exemplary service record, in 1994. The appellant was born in Nepal whilst his younger brother was born in Hong Kong. The appellant lived with his father for around two years before his father's discharge, following which the sponsor then worked overseas in various roles, applying for entry clearance to settle with his second wife, the appellant's stepmother, and the appellant's younger sister in 2011. When applying for entry clearance, the sponsor did not do so on the appellant's behalf as he was then over the age of 18. In his original witness statement dated 15th March 2020, at §3, page [2] AB, as to which there was considerable controversy, the sponsor stated:

> "…Because of this problem I asked him to go to the Middle East with a view to seek employment. He remained there for a considerable period until 2018 but he couldn't find any employment. He failed in all attempts. I had to send him money to maintain and return flights to Nepal. He remained fully dependent financially and otherwise on me. He has no source of income of his own, he does not have any savings, property or investment.…He is completely dependent on me"

20. The appellant was represented at the First-tier Tribunal hearing by Counsel, Ronald Layne, who provided a witness statement for the purposes of the appeal to this Tribunal. Mr Layne confirms in his statement that the sponsor adopted his witness statement, which included the above passage, before the First-tier Tribunal. He had the benefit of an interpreter, about whom there is no complaint. There is no suggestion that the sponsor was or is a vulnerable witness. In his witness evidence to the First-tier Tribunal, he corrected earlier parts of the above paragraph, which were annotated in hand, but not the above passage. One of the complaints to this Tribunal was that the sponsor's credibility had not been impugned in the First-tier Tribunal, so that it was unfair of the First-tier Tribunal not to accept his evidence (including the above statement) as reliable. As all parties now accept, the sponsor's evidence, namely that the appellant could not find any employment in the UAE and had failed in all attempts, was incorrect.

21. In his second witness statement, for the purpose of this Tribunal, at pages [7] to [9] ASB1 , the sponsor no longer asserted that the appellant was entirely dependent on him financially but maintained that the appellant was not independent and in particular, he was not earning enough money to meet his needs.

22. The sponsor said that he was "adding some details" that he was "not able to explain properly in Court properly since it was not asked of me before" (§2).

23. The sponsor's assertions are plainly unsustainable. First, he was not "adding" details that were missing – he was correcting an incorrect earlier statement. Second, with legal representation at the First-tier Tribunal, he adopted that incorrect statement, even correcting other parts of his

statement, but not this part. He cannot legitimately blame others for his error because he was not asked or challenged about it in the hearing.

24. The sponsor alternatively seeks to blame his former solicitor. I also regard that criticism as unsustainable. The sponsor relies on email correspondence dated 12th October 2021 between his current and former solicitors at page [3] ASB4. The current solicitors assert that the sponsor had informed the previous solicitor (and author of the original draft statement) that the appellant had worked in the UAE and his son, Upesh had confirmed that those were his instructions, to which there has been no response from the former lawyer. Mr Jesurum submits that this email, together with the lack of a response, sufficiently demonstrates the innocence of the error, as per BT. I do not accept that contention. First, it does not address the point that the sponsor went on to adopt his (incorrect) statement in witness evidence before the First-tier Tribunal, without correction. Second, it does not address the email from the former solicitor, exhibited at page [24], ASB3, as Exhibit "Upesh-2," whom it is unnecessary to name, to both the sponsor and Upesh at their individual addresses, on 15th March 2020:

> "Dear Amrit and Upesh
>
> Please find the attached draft witness statements of both of you. You will need to go through it in details [sic] and add the information required. Similarly **amend/edit any incorrect facts** [my emphasis] and sign and date it. I will send the bundle tomorrow so please make sure I will have your signed statement tomorrow morning.
>
> I look forward to receive [sic] your signed and dated statements."

25. The situation is not analogous to the claimed misconduct of the solicitors in BT. In that case, former solicitors were said to have gone on the record, then ceased acting shortly before the hearing, resulting in no one attending a First-tier Tribunal hearing. This Tribunal counselled against criticisms of professional representatives before they had had an opportunity to respond. It was important to do so in that case where there may be a number of proper reasons for which solicitors may cease to act, including that they are dis-instructed by a party. In contrast, in the appellant's case, the solicitor's actions could not have been clearer. He did no more than is perfectly standard, which is to take a draft statement and then ask the witness concerned to go through it in detail and to amend or edit any incorrect facts. The responsibly for the final statement lay with the appellant, and he was told this.

26. The sponsor says in another addendum statement at page [2] ASB3, §§2 to 6, that he had told the former solicitor that the appellant had worked in the UAE when his statement had been taken, adding that he didn't remember ever seeing a copy of the witness statement in the solicitor's office; that Upesh then received a copy by email (without any reference to he himself also receiving a copy by email) and that he had no memory of Upesh reading it to him, but he did not believe that Upesh would have done. Upesh, in his own witness statement at §8, page [5] ASB3, said that he did read it to his father, and had printed off a hard copy. The sponsor's

explanation that he did not receive a hard copy "directly" (presumably from his former solicitor), which might otherwise explain his oversight, is misleading. His evidence that his witness statement was not read to him before he adopted it is inconsistent with Upesh's own evidence. It also does not begin to explain why he corrected some parts of it but not others.

27. Whilst Upesh indicates that in his witness statement, he had assumed that the incorrect wording included in the sponsor's witness statement was a summary of events (§9, page [5] ASB), this does not explain the sponsor's willingness to attest to an incorrect statement. I conclude that no blame can be fairly attached to the appellant's former solicitor. Instead, a draft statement was produced; the appellant was asked to consider it in detail and to confirm that it was true; he did so; and he now seeks to depart from that statement.

28. The fact of the error in the sponsor's witness statement alone, where both witnesses are of good standing, would not have pursued me to draw adverse inferences about the credibility of the sponsor and Upesh. However, the fact that the statement was adopted in evidence before the First-tier Tribunal and even initially relied on for the purposes of the appeal to this Tribunal, together with the unsustainable attempts by both witnesses, significantly impacts on their credibility. Put simply, the sponsor is willing to make generalised, inaccurate statements, confirm them as truthful, and then seek to blame others with misleading, partial comments (such as not receiving a physical copy of his statement "directly"), only correcting his error later upon the instruction of, and intervention from, new lawyers. It is this deflection of blame which weakens Mr Jesurum's argument that the sponsor can have had no motive in misleading, on the basis that the sponsor had made clear the true position in initial correspondence to the respondent. Instead, it supports the point that the inaccuracy in the sponsor's witness statement was one he knew he ought to have corrected, at the very least, when adopting his statement before the First-tier Tribunal.

29. In the above context, I do not accept the sponsor or Upesh as generally reliable witnesses. The question of whether the appellant was working during the period he lived in the UAE from 2011 to 2018 goes to the core of the appellant's case.

30. I accept, of course, that the fact that the sponsor and Upesh are willing to make misleading, partial, or inaccurate statements in some aspects of the claim does not mean that they are necessarily being untruthful in other areas. That being said, Upesh's other witness evidence is of limited assistance. As discussed, and summarised with the representatives (as Mr Jesurum did not have a copy), Upesh's first statement at pages [105] to [106] AB is a brief four-paragraph statement, which includes little detail beyond generalised assertions. We agreed that I should place no reliance on this statement (the lack of reliance assists the appellant, as it repeats the inaccurate statement that the appellant never worked in the UAE). His second statement deals with the appellant's former solicitor, which I have already discussed above. Upesh was unable to add any further detail

in oral evidence about the family life, as claimed, between the appellant and the sponsor. He claimed that the sponsor and the appellant communicated via "Viber", while Upesh and the appellant communicated via "Whatsapp." When challenged that no evidence about Whatsapp had been disclosed, he said that he could not remember. When asked, he did not know what the appellant was doing in Nepal. In summary, Upesh was unable to provide any evidence beyond his previous, brief generalisations; knew nothing of his brother's activities in Nepal; and could not explain why the evidence that did exist between his brother and him had not been disclosed. In summary, the evidence he had given about the sponsor damaged his credibility, and he was unable to add anything further of assistance. The lack of knowledge was not even explained on the basis he and his brother were estranged, as Upesh has offered to assist the appellant on entry to the UK.

31. The appellant's evidence was similarly lacking in detail and contained generalisations. His witness statement before the First-tier Tribunal about his support to the appellant is almost entirely contained in the brief passage already cited at §19, above. His addendum statement dated 20th August 2021 at pages [7] to [9] ASB1 discusses paying for the appellant's education abroad in 2006, in Hotel Management (§5), without further detail or evidential support. The narrative then jumps to the sponsor advising the appellant to learn computers and the appellant later learning music, which the sponsor helped with, on an unspecified date and without further detail (§9); and remittances for hospital bills and rent monies in 2013; 2016 and 2017, (§10), without further detail. The statement asserts that he made regular remittances of 15,000 Nepalese rupees, but without references to specific documents. While the appellant provides some more detail about some of the events described in his witness statement dated 18th November 2020 at pages [2] to [3] ASB2, he has not been tested on that evidence by way of cross-examination and taking his case at its highest, there are significant gaps in documentary evidence, such as evidence of money transfers between 2011 and 2017 (§22). The statement also notably omits any reference to regular visits to relatives or friends in Khandbari, which the sponsor only revealed in cross-examination.

32. Considering the remainder of the documentary evidence, (which I do not refer to in full, but have considered all of it), the strongest evidence is of the financial remittances from 2018 onwards, between the appellant and the sponsor, which are frequent, but sporadic, (for example, there is a gap between January and September 2019 (pages [35] to [36 AB)). The sporadic nature may be explained in part by remittances being significantly larger in some months than others (the January 2019 remittance was large), but there is an overall pattern of remittances. It is also not disputed that the sponsor returned to Nepal, for example, as evidenced in flight tickets between 23rd November and 14th December 2019.

33. Gaps and inconsistencies remain in other areas. The first is the social media evidence. It is almost entirely translated, and so is of very limited assistance, other than to confirm some kind of regular contact. What did arise as a result of cross-examination on the social media contact was the issue of where the appellant lives. The sponsor explains in his addendum statement (§14, page [9] ASB2) that the appellant has been living in Kathmandu for almost all of his life. The address in Khandbari in the appellant's passport and citizenship card was explained because at the time of the application, the appellant only rents small accommodation in Kathmandu, many hours travel away, but the sponsor must still present himself at civil offices in Khandbari. All this attempts to address the First-tier Tribunal's concerns about Khandbari being put as the address on the appellant's application form (page [9] RB, box 22).

34. However, in the sponsor's letter to the respondent, not before the First-tier Tribunal, but adduced to support the sponsor's contention that he was "upfront" about the appellant working in the UAE, it also makes clear, at page [19] ASB3, that as of 11th April 2019, the appellant "is staying at my old house in Khandbari…."

35. The very concern identified by the First-tier Tribunal is therefore compounded in the newly disclosed evidence. The reference in the letter to the current address as Khandbari is inconsistent with the contention that the appellant rents small accommodation in Kathmandu, paid for by the sponsor, 18 to 20 hours away by bus from Khandbari (on the sponsor's evidence). There is no reason why (not do I accept as plausible) that the sponsor would pay for separate rented accommodation, by way of real or effective or committed support, when there is still a family home in Khandbari, which he says the appellant lives in. As the sponsor claims that the remittances are used, in part, to pay for rent, it also undermines the claimed purpose of the remittances. The inconsistency also amplifies the issue of whether there are in fact other family relatives in Khandbari, and what their circumstances are on relation to the appellant.

36. Mr Jesurum seeks to argue that it matters not whether other family relatives support the appellant, and that financial remittances alone, when evidence of real or effective or committed support, are sufficient to establish family life. While both propositions, by themselves, may correct, they are not sustainable, when put in context. The context is of witnesses who are not reliable and are willing to make partial and misleading statements; a clear inconsistency of where the appellant is living and by implication of the sponsor's reference to relatives in Khandbari, with whom the appellant may be living. Regular remittances in that context show no more than the fact that the appellant is in receipt of remittances. They are not, without more, evidence for the purpose of the remittances or the capacity in which they are received. Where, as here, I have real concerns that I am not being provided with the full picture of the appellant's circumstances (as to which I make no criticism of the appellant's representatives), I am not prepared to accept that on these specific facts, the financial remittances are evidence of real or effective or committed

support, whether at the time of the impugned decision; or this hearing; and whether or not continuous. There is no other aspect of support which have any substance. For example, in relation to emotional support, the nature of the regular communications in virtually unknown.

37. Considering all of the evidence in the round, the appellant has not shown that family life, for the purposes of Article 8 ECHR, between the sponsor and him, existed at the date of the impugned decision, or exists now. As a consequence, the appellant's appeal must fail.

Conclusions

38. On the facts established in this appeal, there are no grounds for believing that the refusal of the appellant's application for entry clearance would breach his rights under Article 8 ECHR.

Decision

39. The appellant's appeal on human rights grounds is dismissed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **3rd February 2022**

TO THE RESPONDENT
FEE AWARD

The appeal has failed and so there can be no fee award.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **3rd February 2022**

ANNEX: ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12285/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th November 2020	**On**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR UTTAM GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Mr R Jesurum*, instructed by Everest Law Solicitors
For the respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 19th November 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing

being via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge L K Gibbs, (the 'FtT'), promulgated on 1st April 2020, by which she dismissed his appeal against the respondent's refusal on 27th June 2019 of his application for entry clearance to settle as the adult dependant son of a retired Gurkha soldier, his sponsor. The appeal was by reference to the appellant's right to respect of his family life, for the purposes of article 8 ECHR.

4. In the refusal decision, the respondent disputed that the appellant was dependent on his parents. He was 34 years old at the date of the application, had no obvious health issues and while it was he asserted that he was currently unemployed, he had worked in the United Arab Emirates from 2011 to 2018. He asserted that he had returned to Nepal as he missed his family, but they had been resident in the UK since 2011. Whilst the appellant asserted that he was financially dependent on his parents, there was no reason that this financial support could not continue whilst his parents lived in the UK.

5. In essence, the issues before the FtT were whether the appellant had proven the existence of family life for the purposes of article 8 ECHR, noting the authority of Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC). The question of whether family life existed was in turn answered by whether there was real or effective or committed support (see Rai v ECO (New Delhi) [2012] EWCA Civ 320).

The FtT's decision

6. The FtT found that the appellant had lived independently of the sponsor between 2011 and 2018 (§11 of the decision) and there was no evidence to corroborate the sponsor's assertion that he sent money to the appellant whilst the appellant lived in the UAE or that there was contact between the two. At §12, the FtT did not accept that the appellant lived in accommodation paid for by the sponsor in Kathmandu and at §13, the FtT found that the real motivation for the appellant wishing to settle in the UK was because he required an operation for hearing difficulties and wished to have such treatment paid for by the NHS. At §14, the FTT found that any financial support was infrequent.

7. The FtT concluded that family life for the purposes of article 8 ECHR did not exist between the appellant and sponsor.

The grounds of appeal and grant of permission

8. The appellant lodged grounds of appeal, the gist of which is as follows:

   8.1 First, the FtT had unfairly made findings on issues which had never been in dispute or raised, in particular that there was no evidence the sponsor had sent money to the appellant whilst he was in the UAE; or

that the appellant lived in accommodation funded by the sponsor; or the new issue that the appellant had come to the UK to seek medical treatment.

8.2 Second, the FtT and impermissibly focused only on financial support when considering family life;

8.3 Third, the FtT should have applied the case law addressing the Military Covenant, referred to in the grant of permission for a judicial review application to proceed in R (Limbu) v SSHD [2008] EWHC 2261 (Admin).

9. First-tier Tribunal Judge G Wilson initially refused permission to appeal, but permission on ground (1) only was granted by Upper Tribunal Judge Blundell. He regarded it as arguable that the FtT was not entitled, given the terms of the respondent's decision and the scope of cross-examination in the FtT hearing, to reach the adverse findings regarding the sponsor's evidence, which was said to be largely undisputed. The general law on which the ground was based, as noted in Phipson on Evidence (19th Edition at 12–12) was considered in Deepak Fertilisers & Anor v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396.

The hearing before me

10. Mr Jesurum reiterated the context of the authority of Deepak, which was an application of the principle in Browne v Dunn (1894) 6 R. 67 HL to civil litigation that generally, a party coming to a hearing should be able to answer any areas of dispute or at least know what those areas of dispute were. There were some notable exceptions, for example whether the story was said to be of an incredible or "romancing character", (see §49 of Deepak), or where, for example, the parties had advance notice.

11. Neither of those exceptions applied in this case and the fact that the burden of proof in proving article 8 was on the appellant did not absolve the FtT, if he regarded that there may be an issue in dispute, of a responsibility to clearly identify that issue, before going on to make adverse findings. Mr Jesurum referred to a bundle of documents included with the application for permission to the Upper Tribunal, which included a witness statement of Counsel at the FtT hearing, Mr Ronald Layne, whose honesty and whose evidence I do not question, which confirmed that the sponsor had adopted his witness statement, was asked questions by the Presenting Officer, but there was no challenge to his evidence. At no point did the Presenting Officer suggest or imply that the sponsor's evidence was untrue or contradictory. Further, the questions asked by the Presenting Officer sought clarification, which the sponsor gave.

12. Moreover, considering the sponsor's witness evidence before the FtT, (§3 of his witness statement), the sponsor had not claimed that the appellant was dependent on him throughout the period up to his application for entry clearance. Instead, the sponsor had stated: follows:

> *"Although Uttam [the appellant] was dependent he was over 18 therefore I did not apply for him because of the Immigration Rules. Because of this problem I asked him to go to the Middle East with a view to seek employment. He remained there for a considerable period until 2018 but he could not find any employment. He failed all attempts. I had to send him money to maintain him and pay for return flights to Nepal. He remains fully dependent financially and otherwise on me. He has no source of income of his own, he does not have any savings, property or investments. He turned out to be not good academically as he failed to complete his studies. He wasted a lot of my money. He is completely dependent on me."*

13. As the notes of Mr Layne record, in answer to the question, "*Is there any evidence that you are currently paying his rent*?" the sponsor answered, "*I have submitted all evidence*". Whilst the sponsor was asked and it was suggested that the appellant may be seeking to enter the UK for the purposes of receiving NHS treatment, his response was that this was not the case. Even if that specific part of the allegation concerning NHS treatment had been put to the sponsor, there was no follow-up and indeed, had there been, Mr Jesuram pointed out that the Service Record of the sponsor in the Brigade of Gurkhas, which was before the FtT and which referred to the sponsor's honesty and loyalty, would have been referred to as testament to the sponsor's honesty.

14. In essence, the sponsor had given specific evidence on financial support to the appellant whilst the appellant was in the UAE and also continuing payment of rent. The findings by the FtT, which did not accept that evidence, were in circumstances where the sponsor's evidence was undisputed and his honesty unchallenged. In relation to the issue of the NHS operation, even if, which was not accepted, that were a motive for applying for entry clearance, the FtT had erred in finding it relevant - that was to confuse the proportionality of refusal with the existence of family life. Where family life existed in a Gurkha dependant case such as this, refusal of leave was disproportionate, because of the historic injustice. It was also perfectly possible, as Mr Jesurum pointed out, to have a number of motives for wishing a family reunion.

15. Without, I hope, doing any disservice in summarising Mr Jesurum's clear and powerful submissions, in response, on behalf of the respondent Mr Walker formally conceded that the FtT had fallen into error in his findings, as the Presenting Officer at the hearing had not challenged any of the evidence of the sponsor and Mr Walker also formally confirmed that the error was material. I am grateful for Mr Walker's pragmatic approach in the circumstances of this appeal and I accept and regard as realistic the concession made, noting that in this case the credibility of the sponsor had never been challenged and that the points raised in the grounds as to the nature of the support do indeed go to the question of real or effective or committed support and therefore are clearly and unarguably material in this case.

16. In the circumstances therefore, the decision of the FtT is unsafe and cannot stand and I set it aside.

Decision on error of law

In my view there are material errors here and I must set the FtT's decision aside.

Disposal

17. With reference to paragraph 7.2 of the Practice Direction, given the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

18. The following directions shall apply to the future conduct of this appeal:

    18.1 The Resumed Hearing will be listed before Upper Tribunal Judge Keith sitting at Field House, with the representatives attending via **Skype for Business**, on the first available date, to be listed to take into account the availability of the appellant's Counsel, Mr Jesuram, **time estimate 2 hours**, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal, with a Nepalese interpreter.

    18.2 The appellant shall no later than 4 PM **14 days before the Hearing**, file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only. The evidence is prepared on the basis that the respondent's position is that the honesty of the sponsor is unchallenged (as confirmed by Mr Walker). If the respondent seeks to change her position, that must be communicated in good time before the hearing.

    18.3 The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4 PM **7 days before the Hearing.**

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

No anonymity direction is made.

Signed J Keith Date: 27th November 2020

Upper Tribunal Judge Keith