IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000753
UI-2022-000754

First-tier Tribunal No:
HU/08506/2020
HU/08507/2020

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 8 February 2023

Decision & Reasons Promulgated
On the 13 February 2023

Before

UPPER TRIBUNAL JUDGE L SMITH
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

Ms NIMA GURUNG (1)
and
Mr SUMAN GURUNG (2)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr R K Rai, Counsel
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nepal, born on 11 November 1983 and 6 May 1987 respectively. They are siblings and their appeals have therefore been consolidated and heard together. They appeal with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal F E Robinson ("the judge"), sitting at Hatton Cross, dismissing their appeals against decisions of the respondent dated 2 March 2020 refusing their applications for leave to enter the United Kingdom in order to settle with their mother, Ms Nandamaya Gurung ("the sponsor").

2. The appellants were aged 36 and 32 years respectively when they made their applications. They explained that their late father, Mr Minbahadur Gurung, had been a member of the Brigade of Gurkhas. He had died in Nepal in 2008. The sponsor had moved to the United Kingdom in 2011.

3. The respondent entry clearance officer refused both applications. Reasons were given in the notices of decision as to why the appellants could not fulfil the requirements of the Immigration Rules for entry as adult dependent relatives and why they could not meet the requirements of the respondent's discretionary policy to admit former Gurkhas and their family members. The appellants do not contest those parts of the decisions. The entry clearance officer also decided there was no extant family life between the appellants and the sponsor which would engage article 8 of the Human Rights Convention and, in the alternative, the decisions were proportionate. The appellants have challenged the respondent's decisions under article 8.

4. The appellants' appeals were heard on 26 October 2021 by CVP. The parties were represented, and the judge heard oral evidence from the sponsor. In a Decision and Reasons promulgated on 4 November 2021, the judge dismissed the appeals. Her findings were as follows:

> "32. I do not find that it has been established by the Appellants that there is the necessary real, committed or effective support in order to establish an extant family life under Article 8 ECHR. This is for the following reasons.
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> 33. I have seen evidence of eight money remittances from the Sponsor to the Appellants dating from various points between 2019 and 2021 for sums of between approximately £140 and £440. These were not challenged by the Respondent. The Sponsor's evidence was that she made more money transfers but that some of the receipts have been lost as she previously wasn't aware of the need to keep them. I accept that money is transferred by the Sponsor to the Appellants from time to time. It was also not disputed by the Respondent that the Appellants receive money from their late father's pension. I have seen the certificate of service for the late Mr Gurung and I accept this to be the case.

34. I have seen letters from the Ward Chairperson in Nepal which state that the Appellants are unmarried and unemployed. These are dated 15th October 2019, some 2 years ago, so I place limited weight on them. Furthermore, no credible explanation has been provided for why the Appellants need particular support and are unable to find employment whereas the Sponsor's 4 other children in Nepal are self-sufficient. The Sponsor stated in oral evidence that, the Appellants "*…are uneducated and uneducated people cannot find any jobs in the village*" but her evidence was that her other children who have found jobs are also uneducated. I have seen no evidence that the Appellants could not work if they chose to. In the absence of any other supporting evidence regarding the Appellants' employment status and lack of employment opportunities I do not find that they are unemployed as asserted.

35. With regard to the Appellants' accommodation, it is asserted that they have lived in rented accommodation paid for by the Sponsor since the earthquake in Nepal in 2015 when the family home was destroyed. Two "Room Rent Agreement Contracts" dated 19th May 2015 and 19th May 2020 respectively, each valid for 5 years, have been adduced in evidence. The Appellants are referred to as the tenants and no reference is made to the Sponsor. Whilst I accept that it is likely that at least some of the money which the Sponsor gives to the Appellants is put towards this rent, there is no evidence that the responsibility for the rent falls on the Sponsor.

36. I have seen passport stamps evidencing 4 visits to Nepal by the Sponsor since she settled in the United Kingdom in 2011, in particular in 2013, 2015, 2018 and 2020. This evidence has not been challenged by the Respondent and I find accordingly that the Sponsor has visited Nepal as asserted. I also accept that it is plausible that the Sponsor visited the Appellants when she was in Nepal and that she gave them some money whilst she was there. However, there is no corroborating evidence that the primary purpose of these visits is to support the Appellants rather than to see her wider family as a whole. The Sponsor referred to visits from her other children whilst she was staying with the Appellants in Nepal and it is also possible that these siblings who are employed could be a source of support for the Appellants.

37. In light of all the evidence and my findings regarding money provided by the Sponsor to the Appellants, the employment opportunities of the Appellants, their accommodation and contact with the wider family in Nepal, I do not find, on balance, that the Appellants are wholly financially dependent on the Sponsor as asserted.

38. It has not been disputed by the Respondent that the Sponsor speaks frequently to the Appellants on the phone when she is in the United Kingdom and I find this to be the case in light of the evidence of the calls adduced. However, little detail has been provided regarding the interaction between the Sponsor and the

Appellants during the Sponsor's visits to Nepal and their phone conversations and what has been provided does not, I find, establish a relationship which goes beyond the normal emotional ties which exist between a mother and her children.

39. I have not seen or heard anything to support the Appellants' and Sponsor's assertions of the Appellants' emotional dependence on the Sponsor. The Appellants refer to expressing their emotions to the Sponsor and in her witness statement the Sponsor said that the Appellants, *"...have always turned to me for support both emotionally and financially. They always tell me their concerns and I try to solve them"* and that on the calls they, "*...talk about each other [sic] health, what we have gotten up to during the day and how much we miss each other*". This evidence, in the absence of any further detail, does not indicate a relationship beyond normal emotional ties or indicate real, committed or effective support with regard to Rai and this was also the case in relation to the Sponsor's oral evidence. When I asked her what she did with the Appellants when she went to Nepal she said "*Nothing special, just I go there and stay with them, I talk with them and enjoy being with them...".* I also asked whether she gave them advice on anything and she replied, "*I have to give them advice because every time I ask them to take good care of each other*."

40. I have no doubt, with regard to the witness statements of the Appellants and of the Sponsor, that they miss each other very much and want to be with each other. When asked why she wanted the Appellants to come to the United Kingdom the Sponsor said "*I'm in old age and I'm expecting my children to be with me and if allowed to come here, they could support me and help me, they don't have any land in Nepal and no job there*." There is clearly a desire to be together so that the Appellants can help the Sponsor as she gets older whilst also improving their own opportunities. However, I have seen no evidence that the Appellants have particular needs in relation to which they have enjoyed support from the Sponsor - either whilst the Sponsor was staying in Nepal or at a distance - which is sufficient to meet the test in Rai. Nor is there any evidence of a particular dependency by the Sponsor on the Appellants.

41. When considering all the evidence it is relevant to take into account that the Appellants are now both in their mid thirties and have been living in a separate continent for approximately 10 years away from their mother who came to the United Kingdom in 2011. Whilst family life does not automatically cease the moment children become adults it is uncontroversial to observe that the older a person is the less likely it is that a family life engaging Article 8 ECHR will endure. In other words it is highly probable that a woman and man in their mid thirties living apart from their mother for about 10 years will have established independent lives.

> 42. Whilst it is clear that the Sponsor and Appellants are in regular contact, in all these circumstances I find that the evidence of visits, financial remittances and communication does not establish the necessary real, committed or effective support in order to establish an extant family life. I have regard to the uncontroversial fact that the diaspora from a country will often send money back to their home country and there is nothing to suggest that the ongoing money, visits and phone communication are anything more than the usual love and affection between adult children and their mother. As was made clear in Singh however, love and affection is not enough to justify a finding of a family life which engages Article 8 ECHR.
>
> 43. It appears to be an example of the type of situation described by Sedley LJ in Patel and others at [14]: "*You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase".* It is worthy of note that, in disposing of the case of Odedara Sedley LJ upheld as legitimate a factual finding that there was no family life which engaged Article 8 where there was "*only a bare financial dependency between the Appellants and their parents*".
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> 44. For all these reasons with regard to the totality of the evidence I find that on balance there is no family life between the Appellants and the Sponsor which engages Article 8 ECHR and therefore in answer to the first two questions posed in Razgar, that the Respondent's decision does not amount to an interference with the Appellants' family life which engages Article 8 ECHR. For the avoidance of doubt, I make clear that in view of the historic injustice, were the Respondent's decision to amount to such an interference, it would not be proportionate."

5. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Pitt on 7 November 2022. There were four grounds put forward in the renewed application (numbered 1, 2, 4 and 5), which were drafted by Mr S Jaisri, of counsel, who had represented the appellants in the First-tier Tribunal:

> "Ground 1
>
> 2.0 The FtTJ unlawfully fails to assess the evidence in relation to art 8(1) pursuant to the test for the existence of family life set out in Rai [2017] EWCA Civ 320, notwithstanding reference to the test in the determination at [§11, 12 and 18]. The FtTJ erred in particular in her assessment, as Lord Justice Lindblom confirmed that the Kugathas does not require more than real or committed or effective support. However, this evidence that pertains to dependency has to be considered in the terms 'real', 'committed' and 'effective' in order to assess the light of the strength of ties on departure and an assessment made in order to see if article 8 life has endured the separation still in those term, Rai states [§];

> [§42] 'Those circumstances of the Applicant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question **of whether, even though the Applicant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1)**. Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it.'

2.1 It is submitted there is no assessment in these terms made by the FtTJ, as she first makes no findings as to article 8 life at the time of the Sponsor's departure in January 2020 and then make an assessment as to whether such ties have endured any separation.

Ground 2

3.0 The FtTJ unlawfully erred in [§33-35] fails to give lawful reasons as to why the evidence of the sponsor is rejected of dependency having accepted evidence of remittances and availability of their late father's pension. The FtTJ relied on irrelevant factors, ie 'I have seen no evidence that the Appellants could not work if they chose to.' in making the assessment seeking to assess the facts on the evidence heard.

4.0 The FtTJ erred [§36] in failing to give reasons why the narrative of support is rejected whilst dismissing the account of the sponsor for lack of corroborative evidence.

Ground 4

5.0 The FtTJ erred in the applied test [§37]t and that the Applicants have to be wholly dependent on the Sponsor, it is submitted that the Applicants have only to demonstrate there exists real, committed, and effective support. It is accepted the FtTJ identifies the test earlier in the determination but crucially unlawfully fails to apply it.

Ground 5

6.0 The FtTJ unlawfully erred [§40] in setting the test too high in expecting the Applicants to have particular needs from the sponsor to demonstrate emotional support. It is submitted pursuant to Rai the Applicants have only to demonstrate support that is real, committed, and effective emotional support. Alternatively, [§42] the FtTJ falls to give reasons as to why the accepted evidence of visits, financial remittances and communications does not establish real, committed, and effective support.

Conclusion

> 7.0 The FtTJ determination is arguably unlawful, and permission is sought for permission to appeal to the UT on the above grounds."

6. In granting permission to appeal Upper Tribunal Judge Pitt said it was arguable that the judge may have erred in the assessment of the appellants' family life with their mother and in the application of the test from Rai v ECO, New Delhi [2017] EWCA Civ 320.

7. The respondent has filed a rule 24 response, dated 30 December 2022, maintaining that the judge's decision does not contain an error of law. She had properly directed herself as to the tests and the findings she made were open to her to make.

8. At the hearing before us, Mr Rai said that his broad submission was that the judge had placed too much emphasis on the need to show financial dependency and insufficient emphasis on the historic injustice suffered by ex-Gurkha families. He took us to the judgment of Lindblom LJ in Rai and particularly to paragraphs 16 to 20, which read as follows:

> "*Did the Upper Tribunal judge misdirect himself in considering whether article 8 was engaged?*
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> 16. The legal principles relevant to this issue are not controversial.
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> 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):

> "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.""

9. Mr Rai said that five principles could be drawn from the above:

    1. The irreducible minimum for family life was real or committed or effective support.

    2. Family life consists of more than normal emotional ties.

    3. Two examples of family life being shown between adult family members were set out at the end of paragraph 17 of Rai: where the appellant is dependent on his family or vice versa and where separation was the result of historic injustice.

    4. Kugathas had been interpreted too restrictively in the past and there was no requirement to show exceptional circumstances.

    5. Each case should be determined on its own particular facts.

10. In answer to our questions, Mr Rai clarified what he meant by the relevance of the historic injustice. It was not a factor which could determine family life, but it might explain how family life endured in the context of family separation.

11. Mr Rai took us to the judge's reasoning at paragraphs 32 to 37 of her Decision and Reasons. He pointed out the judge had accepted that money had been transferred from the sponsor and that the appellants received their late father's army pension. She noted the evidence of the Ward Chairperson that the appellants were unemployed but appeared to suggest the appellants were unemployed through choice. At the very least, it was unclear what she had found. She accepted the money had been used towards paying the appellants' rent. She accepted the sponsor had visited the appellants. She accepted the sponsor and the appellants spoke on the telephone. However, the judge's analysis lacked specific reference to the historic injustice and placed too great an emphasis on dependency.

12. Ms Ahmed indicated that she opposed the appeal. She argued the judge had directed herself correctly and that she had applied the correct law to her findings. She argued that the point about historic injustice did not go to the issue of whether family life was shown. There is no presumption of family life.

13. Ms Ahmed addressed the grounds seeking permission to appeal which had been filed, although Mr Rai had not expressly adopted them. We shall not set out her submissions here because we largely agree with them and we shall set out our reasons for rejecting the grounds below.

14. Ms Ahmed relied on paragraph 17 of the judgment of Sullivan LJ in JB (India) & Ors v ECO [2009] EWCA Civ 234:

> "Financial dependence "to some extent" on a parent does not demonstrate the existence of "strong family ties" between adult children and the parent nor are weekly telephone calls evidence of anything more than the normal ties of affection between a parent and her adult children. In summary, even on the most benevolent reading of the determination, there was no rational basis on which, had he applied the Kugathas approach, Immigration Judge Parker could have concluded that there was family life between these three adult appellants, who were living together in India, and their mother, who had been living in the United Kingdom since 2001."

15. Mr Rai did not wish to respond to Ms Ahmed's submissions.

16. We formally reserved our decision as to whether the judge made an error of law, although we were able to indicate at the end of the hearing that we would be dismissing the appellants' appeals because we found no material error in the judge's Decision and Reasons.

17. We agree with Mr Rai that the applicable legal tests for family life as between adult family members is fully set out in Rai. We further note that the judge clearly directed herself in terms of the test at paragraphs 11 to 14 of her Decision and Reasons, which included a specific reference to Rai in paragraph 12. She noted the test was one of real or effective or committed support. She then reminded herself of the test in paragraph 32 before setting out her reasons for finding the test was not met on the facts of the case.

18. We consider Mr Rai was also correct to point out that each case must be decided on its own particular facts, a point emphasised in paragraph 19 of Rai. We feel it necessary to emphasise that a finding as to whether family life exists or existed at a particular time is a finding of fact for the judge, as made clear by Lindblom LJ at paragraph 43 of Rai. Looking at the judge's Decision and Reasons as a whole, we consider she assessed the evidence before her with care and we consider that she was entitled to conclude as she did that family life was not subsisting. The grounds for the most part simply express disagreement with the judge's conclusion.

19. Ground 1 points out the judge did not make an express finding as to whether family life existed when the sponsor left Nepal, as well as whether it endured, as she should have done, applying the guidance in paragraph 42 of Rai. We consider this approach applies too rigid an

interpretation of Lindblom LJ's judgment. The context of the case was to consider the circumstances in which family life might arise as between adult family members and might endure despite family separation. Family separation was a necessary ingredient because the ex-Gurkha dependant cases would usually involve a sponsor parent leaving behind adult children in Nepal. However, it is not, in our judgement, necessarily an error of law to fail to follow a two-step approach to consider family life before and after separation.

20. In any case, even if we were wrong about that, we agree with Ms Ahmed that any error in the judge's failure to make an express finding about whether family life existed in 2011 (not 2020 as stated in paragraph 2.1 of the grounds) would be immaterial given her clear finding that it no longer existed. Either family life had not existed in 2011, in which case it had not been revived subsequently, or it had existed but had been extinguished over the passage of time. Either way, the appeals could not succeed unless there was current family life.

21. Ground 2 argues the judge's assessment of financial dependency is erroneous because she relied on irrelevant factors and failed to give adequate reasons. We reject this. At paragraph 33 to 36 of her Decision and Reasons the judge gives sustainable reasons for not accepting she evidence of dependency was entirely reliable. Her reasons included the fact the letters from the Ward Chairperson were out of date and there was no explanation in the evidence for the inability of the appellants to find work, in contrast to their four siblings in Nepal, who were self-sufficient. She noted that the appellants said they were uneducated, but she observed that this had not prevented the siblings from finding employment. There was an absence of supporting evidence about the lack of employment opportunities. She noted the rent agreement did not show the sponsor was responsible for paying the rent.

22. As for Mr Rai's concern about the finding on unemployment, we regard paragraph 34 of the judge's Decision and Reasons as entirely clear. The judge rejected the claim that the appellants were unemployed. Her reasoning is sufficient.

23. The judge's consideration of the evidence of dependency feeds into her overall conclusion in paragraph 37 that she is not satisfied that the appellants are wholly financially dependent on the sponsor. This is picked up in Ground 4, which challenges the legality of requiring the appellants to show they are *wholly* financially dependent on the sponsor. The correct test is less onerous: is there real or effective or committed support.

24. We consider this ground misconceived. The judge was not applying a threshold test of complete financial dependence. She was pointing out that the evidence was insufficient to satisfy her that the assertions which were made to her by the sponsor in her evidence and by the appellants in their witness statements were accurate. The appellants'

case was that they were wholly dependent on the sponsor. The judge was entitled to find they were not wholly dependent, as claimed. She did make some positive findings and she accepted there was some financial support. However, it is clear why she did not consider that this amounted to real or effective or committed support. She made this clear at paragraph 42.

25. Ground 5 is also an overly semantic criticism of the judge's conclusions as expressed in her Decision and Reasons. It argues that she erred in paragraph 40 by applying a test of the appellants having *particular* needs requiring support from the sponsor. The judge detailed her findings on emotional support in paragraphs 38 to 41 of her Decision and Reasons. She noted the fact of the visits and the telephone calls but also the absence of any detail regarding those interactions. She regarded it as significant that the sponsor had been unable to describe in any detail what she did with the appellants when she visited Nepal. She accepted the appellants and the sponsor wanted to be together but the evidence, she found, did not justify a finding of emotional ties going beyond normal family ties. Her reference to the appellants not providing evidence of any particular dependency must be understood in that context.

26. We turn finally to Mr Rai's concern that the judge's application of the test of family life failed to incorporate recognition of the historic injustice.

27. We accept that, if the judge had gone on to consider proportionality, then it would have been an essential element of her reasoning to give weight to the historic injustice accorded to Gurkha veterans, which factor would ordinarily be determinative. This was made clear by the Court of Appeal in Gurung & Others [2013] EWCA Civ 8 (see also Rai at paragraph 11). The judge appears to have recognised this in paragraph 44 of her Decision and Reasons although, having found there was no extant family life, she did not need to go on to consider proportionality.

28. We do not read the final sentence of paragraph 17 of Rai as meaning that the judge must factor the historic injustice element into the assessment of whether family life exists. If that was what Mr Rai was intending to submit to us, then we respectfully disagree with him. As said, the historic injustice point is a weighty factor in the proportionality balancing exercise.

29. We do agree with Mr Rai's subsequent submission that the historic injustice will explain the context of family separation in ex-Gurkha dependant cases. However, it does no more than that. The courts have made clear in a number of cases that there is no presumption of family life, and the assessment is one of pure fact.

30. We read the last sentence of paragraph 17 of Rai as illustrating a factual context. The Patel case was concerned with another example of

historic injustice arising from discriminatory provisions in the Commonwealth Immigration Act 1968. The quotation from the judgment of Sedley LJ should be read in the context of the whole of paragraph 14 of his judgment:

> "You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – 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. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices *potentially relevant to the application of art. 8(2).*" (our emphasis)

31. It could not be clearer that Sedley LJ was referring to the historic injustice as a weighty and even decisive factor in the proportionality balancing exercise.

32. None of the grounds or submissions disclose any material error of law.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeals shall stand.

The appellants' appeals are dismissed.

No anonymity direction is made.

Signed Date 9 February 2023

Deputy Upper Tribunal Judge Froom