IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006497

First-tier Tribunal No:
HU/55697/2021
IA/14136/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15th October 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SHUSHMA THAPA SHRESTHA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Jaisri, Counsel, instructed by SAM Solicitors
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 8 October 2024

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of her human rights claim, a claim that was made through an application for entry clearance in order to join her father (the sponsor) and mother in the United Kingdom, she being their adult child and the sponsor being a former member of the Brigade of Ghurkhas. This remaking decision follows from a previous error of law decision made by a panel of the Upper Tribunal comprising Mr Justice Henshaw and myself, which was issued on 9 February 2024. That decision is annexed to this remaking decision and the two should be read together.

The error of law decision

2. In summary the First-tier Tribunal had concluded that there was family life between the appellant and her parents between the former's birth and 2006, at which point both of the parents had come to settle in the United Kingdom. In respect of the period 2000 to 2006, the judge found that although the appellant had got married in 2000, she and her husband had continued to live in the family home and that family life had not ceased. The judge then found that the family life did cease from 2006.

3. An important factual change in circumstances was the appellant's divorce from her husband in June 2020. The judge addressed this event by essentially concluding that family life needed to have continued unbroken in order for the appellant to be able to rely on Article 8(1) in her appeal. The core legal issue which the panel considered was whether this approach was correct.

4. For reasons set out in the error of law decision, the panel concluded that the judge had erred and that there was no requirement that family life had to continue in an unbroken form in order for an individual to rely on

that protected right in an appeal. It was possible, depending on the facts, for family life to be broken and then later re-established for the purposes of Article 8(1): see [31]–[38] of the error of law decision. The First-tier Tribunal's decision was set aside on that basis. However, the panel concluded that the judge had not erred in his finding that there had been no family life between the beginning of 2006 and the appellant's divorce in June 2020, and that finding was preserved: see [47] and [48].

The issues

5. The issues for me to consider are now agreed by the parties and can be stated as follows:

   Question 1. Was family life between the appellant and her parents in the United Kingdom re-established following the divorce in June 2020 and does it continue now?

   Question 2. If the answer to the first question is "no", that is effectively the end of the appellant's case.

   Question 3. If the answer to the first question is "yes" I must then go on and consider proportionality, adopting the usual balancing exercise required under Article 8(2).

6. As regards proportionality, there is an important point in this appeal which does not often arise in Ghurkha cases. It is common ground that the sponsor was discharged from the Brigade of Ghurkhas *after* 1 July 1997 and at the point of discharge the appellant was aged 24. This is significant because the well-known "historic injustice" factor, which ordinarily will be decisive of the proportionality exercise, does not apply here because of the date of the sponsor's discharge. That particular fact (the date of discharge) means that the "but for" causal chain applicable in most Gurkha cases does not arise here: when the sponsor was discharged he was not prevented from applying for settlement in the

United Kingdom and there was no question of an inability of the appellant herself to obtain settlement and/or British citizenship due to any "historic injustice".

7. Before moving on, the appellant accepts that she cannot meet any of the substantive Immigration Rules relating to either adult children of former Ghurkha soldiers, adult dependent relatives, or Appendix FM.

The evidence

8. I have considered the evidence contained in the appellant's composite bundle, indexed and paginated CB1–CB407. Much of the materials contained in the bundle relate to the proceedings in the First-tier Tribunal and at the error of law stage. However, I have in particular considered the new evidence contained at CB48–CB81 which consists of updated witness statements from the sponsor and the appellant's mother, together with relevant bank statements. In addition to the bundle, there are two items of medical evidence relating to the sponsor. The first is a letter from the Department of Neurosciences at Musgrove Park Hospital in Taunton, dated 1 March 2022. This provides a diagnosis of multiple system atrophy of cerebellar type (MSA-C) which is a neurodegenerative disorder. The second item of medical evidence is a letter from the Medway Maritime Hospital, dated 2 May 2024. This confirms the previous diagnosis and that relevant symptoms had gradually worsened since 2017.

9. The sponsor did not attend the hearing to give oral evidence on account of his health. Instead, the appellant's mother came and answered a number of questions with the assistance of a Nepalese interpreter. She relied on her latest witness statement together with that provided previously in relation to the First-tier Tribunal proceedings. In summary, she provided further information about family members living in Nepal and the contact with them, relatives living in the United Kingdom and the

support provided to the sponsor, visits made by relatives in this country to see the appellant in Nepal, and certain other matters relating to the sponsor's care needs and ability to travel to Nepal himself.

Submissions

10. Mr Melvin relied on his skeleton argument, dated 22 April 2024. He emphasised the number of relatives residing in Nepal and suggested that there was probably more contact than had been admitted. There was no apparent reason why the appellant could not obtain reasonable employment. It was clear that relatives in this country had been able to visit her and could do so in the future. There had been support for the sponsor in this country. In the circumstances, Mr Melvin submitted that there was no extant family life between the appellant and her parents. Alternatively, if there was family life, it was submitted that the respondent's decision was not disproportionate. Amongst other relevant factors, it was submitted that the appellant could not speak reasonable English and would probably be a financial burden on the public purse if she came to this country.

11. Mr Jaisri emphasised the fact that family life had existed up until 2006, as confirmed by the preserved finding. Although there had been no family life between 2006 and June 2020, Mr Jaisri submitted that subsequent financial support and emotional support had re-established the relevant family connection. Although there may be other sources of emotional support available to the appellant this did not preclude family life between her and her parents. The sponsor's circumstances in this country were deteriorating and would continue to do so. Overall, there were compelling circumstances in this case which would make the appellant's exclusion from the United Kingdom unjustifiably harsh.

12. At the end of the hearing I reserved my decision.

Findings and conclusions

13. I have considered all of the relevant evidence together with the submissions, both oral and in writing. It is for the appellant to establish the relevant factual basis on a claim on the balance of probabilities. I have of course reached my findings on a cumulative assessment, taking the evidence in the round.

Family life under Article 8(1)

14. I begin with the question of whether family life was re-established following the appellant's divorce in June 2020. On the evidence, I am prepared to accept that she has continued to live in accommodation effectively provided for by the sponsor. The combination of the documentary evidence and the witness statements also satisfies me that there has been ongoing financial support by the sponsor to the appellant. This is effectively in the form of the former allocating his pension payments to the latter. Some of the remittances may also include an element taken from the sponsor's benefits in this country.

15. Although there is no satisfactory explanation as to why the appellant has been unable to find reasonable employment, I am prepared to accept that she does not have alternative sources of income. Therefore, I am satisfied that she is financially dependent on the sponsor and probably has been since her divorce in 2020. Financial dependency is not, however, itself sufficient of itself to establish family life between an adult child and their parents.

16. Turning to the question of emotional support, it is probable that the appellant does receive elements of such support from her own adult daughter, who is now 23 years old and living in the same district within Kathmandu. Frankly, it would be remarkable if there was no reciprocal support between mother and daughter. Having said that, it is possible within the scope of Article 8(1) for there to be a number of sources of support. This state of affairs does not preclude family life as between the

appellant and her parents in this country. The evidence does bear out continued regular contact between them. I note an extended visit made by the appellant's mother to Nepal between August and November 2023. I accept that the appellant's mother spent significant time with her during that trip, albeit that there are also visits to the mother's sisters in Pokhara. Further, it is not implausible that the sponsor's health condition has resulted in an increased sense of emotional closeness between the appellant and her father over recent years.

17. Bringing all of the above together, I am prepared to accept that family life under Article 8(1) was re-established following the divorce in June 2020 and that it subsists as of today. Article 8(1) is therefore engaged.

Proportionality

18. I move straight on to the question of proportionality, it not being in dispute that the respondent's decision is in accordance with the law and pursues the legitimate aim of effective immigration control.

19. As weighing in the appellant's favour, I take the following considerations into account:

(a) The appellant's concern for her father's health and the pressures that the medical condition is probably placing on her mother;

(b) The genuine desire of all concerned for them to live together as a family unit in the United Kingdom;

(c) The fact that the sponsor's health will continue to deteriorate, that being the nature of the diagnosed condition. It is perfectly understandable that the appellant would wish to be able to practically assist her father and that the sponsor and mother would wish that to be so;

(d) Over time it is probable that that it will be more difficult for the sponsor to visit Nepal;

(e) The general importance of maintaining and promoting family life.

20. On a cumulative basis, these considerations attract a degree of weight, which is not insignificant. Having said that, none of the individual factors can properly be said to be compelling or of an exceptional nature and even viewed as a whole, the weight attributable to them is not, in my judgment very significant.

21. On the respondent's side of the scales I take account of the following considerations:

(a) The appellant is healthy and, on the face of it, able to find reasonable employment if she wished, or if it was necessary;

(b) She is living in a stable and secure environment at present and there is no reason to believe that this could not continue if she were not permitted to come to the United Kingdom;

(c) There are relatives living in Nepal who are able (in the absence of any evidence to the contrary) to provide practical and/or emotional support to her;

(d) There is no evidence to indicate that the appellant can speak English at a reasonable level and, on the materials before me, there is every reason to suppose that she would not be financially independent once she came to this country, which in turn is likely to place an additional burden on the public purse. These two factors are thus adverse to her case with reference to section 117B(2) and (3) of the 2002 Act;

(e) The "historic injustice" factor does *not* apply in this case;

(f) The appellant cannot satisfy any of the substantive Immigration Rules;

(g) There is nothing on the face of it preventing the appellant from applying to visit her parents in this country. As I understand it, she has done this in the past;

(h) The appellant's mother has visited Nepal in the recent past and there is, in my view, nothing to prevent her doing so again. On the evidence, when she went to Nepal for three months in 2023, family members in the United Kingdom (in particular the sponsor's brother and niece) provided sufficient care for him whilst the appellant's mother was away. Notwithstanding the passage of additional time, there is nothing to suggest that such arrangements could not be put in place again (potentially with the assistance of the sponsor's two sons who live in the West Country and who, it is acknowledged, have assisted with practical matters in the past);

(i) The sponsor's health condition, whilst serious and progressive, is not such that he is unable to remain living in the family home or in some other way requires the day-to-day assistance of the appellant herself. He is provided with relevant disability benefits. The appellant's mother provides day-to-day care. The sponsor's brother and niece (who live nearby) have in the past provided, and could continue to provide, practical assistance, as could the two sons. If necessary there is no reason to suppose that either the NHS or Social Services could not provide additional support for care needs. I do note that here is no care needs report in evidence;

(j) Effective immigration control is an important public interest consideration;

(k) Although I have found that family life exists, that must be seen in its proper context. The appellant's parents have not lived with her in Nepal since 2006. Thereafter, she has lived either with her husband (until 2020) or alone. It stands to reason, at least it is more probable than not, that she has acquired capabilities and skills which have allowed her to live a reasonable life in Nepal;

(l) There is a suggestion in the new witness statements that the appellant is facing hostility as a divorced woman. There is no detailed evidence about this and certainly no country information to indicate that this is a particular social issue in Nepal. It has not been raised in submissions before me. I conclude that this is not a factor which carries any material weight

22. Bringing all of these factors together, it is clear to me that the balance sheet approach results in an outcome favourable to the respondent. The cumulative weight attributable to the various factors weighing in her favour is very significant. Ultimately, I conclude that by some margin the respondent's refusal of the human rights claim does not represent a disproportionate interference with the appellant's protected family life. Accordingly, the appellant's appeal falls to be dismissed.

Notice of Decision

The decision of the First-tier Tribunal involve the making of an error of law and that decision has been set aside.

The decision in the appellant's appeal is re-made and her appeal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 14 October 2024

ANNEX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006497

FtT No: HU/55697/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
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Before

THE HONOURABLE MR JUSTICE HENSHAW
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SUSHMA THAPA SHRESTHA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S Jaisri, Counsel, instructed by Sam Solicitors
For the Respondent: Mr T Melvin, Senior Presenting Officer

Heard at Field House on 23 November 2023

DECISION AND REASONS

Introduction

1. The appellant, a citizen of Nepal born in October 1979, appeals against the decision of First-tier Tribunal Judge Loughridge ("the judge"), promulgated on 24 May 2022, following a hearing at the Newport hearing centre on 18 May of that year. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of her human rights claim made on 7 September 2021. That claim arose out of an application for entry clearance made on 5 July 2021 by which the appellant sought to join her father and mother in the United Kingdom.

2. The appellant's father ("the sponsor") is a former member of the Brigade of Gurkhas who served in the British Army between 1986 and his discharge on 15 November 2003. He had been granted indefinite leave to enter in December 2004 and has resided in United Kingdom since May 2005. The appellant's mother joined the sponsor in January 2006. In essence, the appellant's claim asserted that she had family life with the sponsor and that the well-known "historic injustice" consideration common to many cases involving former Gurkha soldiers applied in her case, rendering the respondent's refusal a disproportionate interference with her Article 8 rights.

3. Specifically, the appellant claimed that, following her marriage in 2000, she continued to live with her parents, in addition to her husband and, from 2001, the couple's daughter. Once the appellant's parents left Nepal, the appellant and her husband and child stayed in the same accommodation, until the appellant and her husband divorced in June 2020. At that point the appellant's daughter went to live with her ex-husband and the appellant resided in accommodation paid for by the sponsor. The appellant had never been employed and was financially dependent on the sponsor.

4. In refusing the appellant's claim, the respondent concluded that she had failed to demonstrate dependency on the sponsor and that in turn she had failed to satisfy Appendix FM to the Immigration Rules. Nor had she shown that family life existed for the purposes of Article 8(1), with

reference to the guidance set out in Kugathas v SSHD [2003] EWCA Civ 31. In particular, the respondent relied on the fact that the appellant had been married between 2000 and her divorce in June 2020 and that the couple had had a child in 2001. This, it was said, indicated that the appellant had formed an independent life. Alternatively, if family life had existed, the respondent went on to consider whether the refusal of the claim was disproportionate. Despite the historic injustice consideration common to most cases involving adult children of former Gurkha soldiers, it was concluded that the refusal was justified.

5. During the course of the First-tier Tribunal's case management process, the appellant provided a skeleton argument, dated 22 February 2022. This contended that the appellant had continued to be financially and emotionally dependent on the sponsor and that "*the passage of time [had] not interfered with these ties*."

6. The respondent's pre-hearing review, dated 24 March 2022, confirmed that one of the issues in the appeal would be whether Article 8(1) was engaged. The review undertook a detailed analysis of evidence provided by the appellant and concluded that it was insufficient to demonstrate that family life existed.

Decision of the First-tier Tribunal

7. The judge began by setting out the relevant background before recording the parties' submissions at [14]-[18]. It was common ground that the Kugathas test applied: could the appellant show that there existed ties of dependency going beyond those normally expected between a parent and an adult child. For the appellant, Mr Jaisri had submitted that two dates were of importance: first, that of the sponsor's (or at the latest, the mother's) departure from Nepal; secondly, the date of the hearing: [17]. At [18], the judge stated that she had asked Mr Jaisri for his position on whether the authorities required any family life to have been "continuous" between the two dates described at [17]. It is recorded that Mr Jaisri acknowledged that they did, but that such continuity had been

established on the evidence. The Presenting Officer submitted that there "must be a continuity of family life and that once it ends it cannot be re-established for the purposes of an Article 8 claim…"

8. At [20], the judge accepted that between the appellant's marriage in May 2000 and the mother's departure in 2006, family life had existed.

9. The judge then undertook a careful consideration of the evidence going to the issue of whether family life had continued after 2006. At [24], she concluded that, "even if there has been emotional dependency since June 2020 of the type required for Article 8 family life, the appellant has not demonstrated any such dependency before then" (that conclusion must of course be read in conjunction with what the judge had said at [20]).

10. The issue of financial dependency was dealt with in detail at [25]-[29]. The judge deemed it to be "highly significant" that none of the appellant's bank statements pre-dated her divorce in June 2020: [26] It was "significant" that the appellant's bank balance, as of February 2020, was in excess of 400,000 rupees. It was, found the judge, difficult to understand how such a large balance had been accumulated if the sponsor's financial support (derived from his pension) had been for the appellant's essential living expenses: [28]. The judge regarded the bank statement evidence as a "clear indication" that the appellant had had access to other funds prior to June 2020 and she did not accept the assertion that the appellant's ex-husband had never worked: [28]. Ultimately, the judge concluded that the appellant had failed to demonstrate financial dependency on the sponsor prior to June 2020. She found that either the claimed financial support had not taken place, or, if it had, that it had not been for the appellant's essential living expenses: [29].

11. At [30], directed herself that the Kugathas test involved the existence of "real/committed/effective dependency". She went on to state that:

> "…It is conceded by the appellant that family life must have existed continuously and that if it ceased at any stage it cannot then form the

basis of an Article 8 claim such as that now pursued. By way of overall conclusion I do not find that there was family life between the appellant and her parents between January 2006 and her divorce in June 2020 meaning that Article 8 is not engaged. During that period she formed an independent family unit with her husband and daughter and whilst her parents have provided both financial and emotional support for her since her divorce, and prior to her mother leaving Nepal in January 2006, that does not render the decision under appeal in breach of Article 8."

12. In light of that conclusion, the judge did not deem it necessary to go on and consider proportionality. The appeal was accordingly dismissed.

The grounds of appeal

13. Three grounds of appeal were put forward. First, it was said that the judge failed lawfully to assess the evidence in light of the appropriate test of real, committed, or effective support and did not determine whether the family life between the appellant and the sponsor had "endured". Secondly, it was said that the judge erred in her assessment of the evidence relating to claimed financial support, and that the sponsor's evidence was sufficient to have discharged the burden of proof. The third complaint was that the judge should have given the appellant and sponsor an opportunity to address concerns relating to the accumulated bank balance of 400,000 rupees.

The grant of permission

14. In granting permission, Upper Tribunal Judge Pickup deemed it arguable that the judge had erred when directing herself at [18] that family life had to be continuous and that any break thereof would preclude its re-establishment. He (in our view, justifiably) observed that

the grounds of appeal were not entirely clear, but was satisfied that the point was encompassed within ground 1.

The rule 24 response

15. The rule 24 response, dated 16 May 2023, opposed the appellant's appeal on all grounds. In respect of ground 1, it noted that the judge had referred herself to relevant authorities and had "checked" with the representatives as to the need for the continuity of family life for the purposes of Article 8. It had been open to the judge to conclude that family life had not been continuous. In respect of grounds 2 and 3, the judge had been entitled to conclude as she did.

Procedural issue: compliance with the Tribunal's standard directions

16. Following the grant of permission, the Tribunal issued standard directions requiring the appellant to provide a composite bundle containing specified materials by a certain date. That bundle was to have been uploaded onto CE-File and served separately on the respondent. In the event, the appellant entirely failed to comply with those directions. As a consequence, the Principal of Sam Solicitors was required to attend the Tribunal in person on a date following the error of law hearing.

17. We emphasise the importance of compliance with the standard directions. They are designed to ensure the efficient and fair preparation for, and consideration of, cases. Compliance is an integral aspect of the need for appropriate procedural rigour and the duty of the parties to assist the Tribunal.

The hearing

18. Having regard to ground 1 and the contents of the grant of permission, at the outset of the hearing we raised with the

representatives the question of whether the authorities required unbroken continuity of family life in order for Article 8(1) to be engaged.

19. Mr Jaisri submitted that what the judge said at [18] was "ambiguous". He relied on the three grounds of appeal, submitting that the judge had erred as alleged therein.

20. Mr Melvin submitted that the need for unbroken continuity was derived from [39] of Rai v ECO [2017] EWCA Civ 320 and that "hundreds of cases in the Upper Tribunal" had been decided on the basis that this was the correct approach. He submitted that an individual could not "dip in and out" of family life and that there must be "continuous dependency throughout". He noted the apparent concession made by Mr Jaisri before the judge. He suggested that "different criteria" applied to family life under Article 8(1) in Gurkha cases as opposed to others.

21. As regards grounds 2 and 3, Mr Melvin submitted that the judge had been entitled to reach the findings she did and that the complaints were nothing more than disagreements.

22. At the end of the hearing we were of the view that assistance on the question of continuity of family life could be provided by way of further written submissions from the parties. We issued relevant directions to that effect.

Post-hearing written submissions

23. In a note dated 7 December 2023, Mr Jaisri set out what he described as a "fundamental error in the assessment of the application", namely the fact that the sponsor had been discharged from the British Army in November 2003 and that Annex K "of the Immigration Rules" only related to former soldiers who had been discharged prior to 1 July 1997 because those discharged thereafter were able to apply for settlement in the United Kingdom. As result, the historic injustice consideration would not have applied to the appellant's case.

24. The historic injustice point will become relevant at a later stage of these proceedings, but, rather unfortunately, Mr Jaisri's note does not address the issue of continuity of family life with which we were concerned when directing the provision of written submissions.

25. Mr Melvin provided a position statement, dated 28 December 2023. In summary, the statement advanced the following points:

(a) the issues before the judge had been "whether family life between the appellant and the sponsor had been continuous between 2005 and the divorce in 2020 and whether Article 8(1) was engaged and there were exceptional circumstances with reference to "historical injustice"";

(b) it was "trite" that in light of Rai, family life must be continuous from a sponsor's departure from the country of origin onwards;

(c) the appellant had not relied on family life outside of the Immigration Rules in respect of the period between the entry clearance application in 2021 and the hearing before the judge;

(d) the starting point for the judge was whether the appellant could satisfy relevant Immigration Rules;

(e) it was not within the "remit" of the Upper Tribunal to consider anything outside of what was argued before the judge, with reference to Lata (FtT: principle controversial issues) India [2023] 00163 (IAC);

(f) the appellant had not applied to amend her grounds of appeal to include the continuity of family life issue;

(g) the fact that the historic injustice consideration did not apply in the appellant's case was effectively fatal to the success of the appeal; and

(h) the issue of whether family life existed following the appellant's divorce in 2020 was not a "Robinson obvious" point: R v SSHD ex parte Robinson [1998] QB 929.

26. We shall address the various points relied on by Mr Melvin in due course.

Conclusions

27. We have regard to the need for appropriate judicial restraint before interfering with a decision of the tribunal below, in line with numerous pronouncements from the Court of Appeal to that effect: see, for example, UT (Sri Lanka) v SSHD [2019] EWCA 1095, at [19]-[20] and KM v SSHD [2021] EWCA Civ 693, at [77].

Ground 1

28. The first point to address is whether we are entitled to even consider the question of whether family life had to be continuous (i.e. unbroken) between the departure of the appellant's parents from Nepal and the hearing before the judge.

29. For the following reasons, we conclude that the issue is properly before us. First, it is clear from the judge's decision that the appellant had argued that family life had existed at the point of the parents' departure and continuously until the hearing before the judge, contrary to the assertion contained in the respondent's position paper: [17]. Secondly, it is correct that Mr Jaisri has not applied to amend the grounds of appeal. However, whilst ground 1 could have been drafted in clearer terms, in granting permission Judge Pickup considered it to be arguable both that the judge had erred by requiring unbroken continuity of family life and, importantly, that the grounds of appeal encompassed a challenge to that approach. Thus, there was no need to amend the grounds of appeal and this is not a case in which the "Robinson obvious" issue arises.

30. The next point is for us to decide whether the judge was wrong in law to have required unbroken continuity in respect of the existence of family life.

31. The respondent submits that the need for continuity is "trite" and relies on [39] of Rai in support of that proposition. That case concerned the adult son of a former Gurkha soldier and, as noted by the Court of Appeal in the first paragraph of its judgment, fell to be decided on principles of law "that are well established and familiar." For present purposes, the central issue for the Court to determine was whether the judge below had directed himself correctly on the need to show "support" which was "real", "committed", or "effective" and to have applied that test to the evidence. Ultimately, the Court concluded that there had been an error in approach and the appeal was allowed on that basis: [43]-[44]. The particular passage upon which the respondent places so much significance in the present case reads as follows:

> "39. The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "… not compulsory but … voluntarily undertaken …" (paragraph 20), "… having made the choice to come to the [United Kingdom]" (paragraph 21), "… the willingness of the parents to leave …" (paragraph 23), and "… their voluntary leaving of Nepal and leaving the Appellant …" (paragraph 26). But that, in my view, was not to confront 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, notwithstanding their having left Nepal when they did."

32. This aspect of the judgment does not constitute part of the *ratio*. In any event, it does not support the proposition, said by the respondent to be "trite", that family life must be continuous and cannot be broken and then re-established. In truth, it simply makes the point that an adult child must demonstrate that as a matter of fact the family life relied on had not ceased after the parents' departure. It says nothing about post-

departure family life needing to be continuous throughout a period of separation and up until an appeal hearing.

33. What is said at [42] of Rai is instructive:

> "42. Those circumstances of the appellant 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 appellant'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."
>
> [Emphasis added]

34. This passage too offers no support for the respondent's position, and leaves open the possibility of family life ceasing post-departure and then being re-established.

35. The respondent has not directed us to any other authorities which are said to support the proposition upon which he relies. Having considered the authorities cited in Rai itself at [17]-[20], including Kugathas, we conclude that there is no indication therein as to the need for unbroken continuity of family life in order for a case to succeed. In our judgment, that is unsurprising. A rule of law which precluded the engagement of Article 8(1) where there had been a gap in family life, but which had then been re-established by the time of a hearing would be wrong in principle. A central thread running through the authorities is that the assessment of family life under Article 8(1) is highly fact-sensitive. That approach would be significantly undermined, if not often

rendered almost nugatory, if a temporary cessation of family life acted as an absolute bar to the engagement of Article 8(1).

36. It is not difficult to conceive of scenarios in which real, committed, or effective support might be provided by parents to an adult child, for it then to cease and later be re-established. For example, consider a child who has lived with her parents throughout her minority and continues to do so into young adulthood, remaining materially dependent. She then moves away and establishes her own independent life, at which point family life no longer exists. Some years later, she is involved in a car accident, which results in significant long-term disabilities. She is then forced to return to her parents' home and once again requires and receives real, committed, or effective support. On the fact-specific approach required by the authorities, it is very likely that family life under Article 8(1) will have been re-established. On the respondent's case before us, it could not be, by virtue of the intervening independent life led by the adult child prior to her accident.

37. That is a factually strong example. However, the fact-specific approach caters for a wide variety of scenarios, of which the appellant's is capable of being one. Depending on the evidence, it may be that an adult child who previously enjoyed family life with their parents and then established an independent family unit with a spouse and child, could demonstrate the re-establishment of the previous family life with the parents following a divorce. The task of proving this might be more difficult than in the first example we have set out, but it remains a question of fact. Gaps in the existence of family life will be a relevant consideration when addressing that question, but will not be determinative. Similarly, such gaps are likely to be a relevant consideration if there is a need to go on and conduct a proportionality exercise.

38. In light of the foregoing, we conclude that there is no requirement under Article 8(1) for pre-existing family life between an adult child of a former Gurkha soldier and their parents to be continuous (in the sense of

unbroken) from the departure of the latter through to a hearing of an appeal brought by the former against the refusal of human rights claim.

39. For the avoidance of any doubt, we unhesitatingly reject the somewhat tentative apparent suggestion by Mr Melvin that different criteria apply to the assessment of family life in cases concerning adult children of former Gurkha soldiers than in others, in the sense that a higher threshold exists. There is no support for that in any of the authorities. It would be contrary to the fair application of Article 8(1) and would very probably be discriminatory. Finally, it would seem to impose an exceptionality test, which was essentially rejected in Rai: [36]-[37].

40. Given our conclusion on the question of law, it follows that the judge misdirected herself when adopting the approach that unbroken continuity was a requirement of family life under Article 8(1).

41. The final matter for us to address is whether Mr Jaisri's apparent concession before the judge has the effect that her misdirection cannot be relied on to show an error of law.

42. We are satisfied that Mr Jaisri's position before the judge did not constitute a concession of fact. It is clear that he had submitted that, on the evidence, family life had existed throughout the period from 2006 until the hearing: [17]-[18].

43. It does appear that Mr Jaisri had made a concession as to the law, namely that family life under Article 8(1) required unbroken continuity: [18] and [30]. Before us, Mr Jaisri suggested that what had been recorded was "ambiguous". However, there is no witness statement from him asserting that the judge had in some way misrepresented his position and the words used are clear enough.

44. Proceeding on the basis that a concession on a pure question of law was made, we conclude that we are not precluded from finding that the judge did indeed commit an error. The complaint encompassed by ground 1 effectively constituted an application to withdraw the concession. Although neither party assisted us with any references to

relevant authority, we have had regard to the principles referred to by the Supreme Court in Test Claimants in the Franked Investment Income Group Litigation v HMRC [2020] UKSC 47, at [85]-[90]:

(a) It is more likely that an appellate court will permit a new pure point of law to be taken than where a concession below related to questions of fact;

(b) Has the other party had adequate time to deal with the point?

(c) Has the other party acted to their detriment on the basis of the previous concession or omission?

(The principle relating to the adequacy of costs protection is irrelevant in the current proceedings.)

45. Here, as we have already found, the concession relates to a pure point of law. The respondent had been able to state his position before the judge by way of submissions: [14] and [18]. Mr Melvin was clearly able to deal with the continuity of family life issue at the hearing before us and in his post-hearing position paper. Nor can we see that the respondent has acted to his detriment. There was, for example, no prospect of calling further evidence.

46. In all the circumstances, it is appropriate to permit the appellant to rely on the complaint raised in ground 1, notwithstanding the concession made before the judge. It follows from this and our conclusions on the correct approach to family life under Article 8(1) that the judge's misdirection constituted an error of law.

Grounds 2 and 3

47. We can deal with grounds 2 and 3 relatively briefly. On the evidence before her, we are satisfied that the judge was entitled to find that the appellant had failed to demonstrate relevant emotional and financial dependency between January 2006 and the divorce in June 2020, with reference to what is contained at [22]-[29] of her decision. The findings are clear and supported by legally adequate reasons.

48. In respect of any suggestion in ground 3 that there was procedural unfairness on the judge's part by a failure to specifically raise a concern about the circumstances of the 400,000 rupees, we reject it. Aside from Mr Jaisri's inability to recall whether or not the point had in fact been canvassed at the hearing, we are satisfied that the judge was not obliged to raise each and every potential issue of concern. The figure of 400,000 rupees was clearly very significant in the context of Nepal and it should have been relatively obvious to the appellant (who bore the burden of proof) as to the need for an explanation in writing or by way of examination-in-chief. In any event, this particular concern was only one of a number going to the issue of financial dependency between 2006 and 2020 and, in the context of the judge's findings as a whole, his overall conclusion on financial dependency during that period is eminently sustainable.

Materiality

49. Finally, we turn to the question of materiality. Once an error of law has been identified, the Tribunal has a broad discretion to set aside the decision of the First-tier Tribunal: section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

50. As to whether that discretion should be exercised by setting aside the judge's decision in the present case - in other words, whether the error of law we have identified was material – we have regard to the observations of Henderson LJ (with whom Longmore and Thirwell LJJ agreed) in Degorce v HMRC [2017] EWCA Civ 1427, at [95]:

> "95… I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision."

51. In light of the above, and for the following three reasons, we conclude that the error of law committed by the judge was material.

52. First, there is no clear finding by the judge that family life had not existed from the time of the appellant's divorce in June 2020 until the date of the hearing before her. Indeed, one might reasonably infer from what was said at [22]-[24] and [29]-[30] that the judge accepted the re-establishment of family life having during that latter period. At the very least, the position remained undetermined, but was capable of being determined in the appellant's favour.

53. Secondly, the judge did not go on to make any "belt and braces" findings on proportionality against the appellant's case.

54. Thirdly, Mr Jaisri's acknowledgement that Annex K did not apply to the appellant's case is not necessarily fatal to the prospects of her Article 8 claim succeeding. Without recounting the entire history of the respondent's position in respect of former Gurkha soldiers and their dependents, it is pertinent to point out the following considerations. Annex K was not in fact part of the Immigration Rules, but a concessionary policy which did indeed relate to the adult children of former Gurkha soldiers who had been discharged prior to 1 July 1997. However, that policy itself recognised that a failure to fall within it required caseworkers to go on and assess whether Article 8 might otherwise require entry clearance to be granted on the basis of exceptional circumstances. In other words, if family life could be demonstrated, all factors relevant to proportionality would then have to be considered. In respect of the present case, if family life is found to exist, the Tribunal will need to undertake a proportionality exercise.

55. It may well be that the historic injustice consideration carries little or no weight in this case, but that is a matter which should be properly addressed at a resumed hearing. Pertinent to that is the fact that the appellant was 24 years old at the time of the sponsor's discharge from the British Army and 26 years old when he applied for settlement under what was then the relevant provisions of the Immigration Rules.

56. Finally, it is well-established that the inability to satisfy any of the Immigration Rules represents a factor weighing in the respondent's side

of the proportionality scales. It is not, of itself, fatal to the success of an Article 8 claim.

57. Given what we have said about materiality, the judge's decision is set aside.

Disposal

58. There is clearly no proper basis for remitting this case to the First-tier Tribunal. In light of our conclusions on the issue of law in this case and the judge's sustainable findings in respect of the period between January 2006 and June 2020, any additional fact-finding will be limited in scope.

59. For the avoidance of any doubt, the re-making of the decision in this case will be undertaken on the basis of the following:

(a) family life between the appellant and her parents existed until January 2006;

(b) the judge's findings at [22]-[29] are preserved and family life ceased to exist from January 2006 until the appellant's divorce in June 2020;

(c) the question of whether family life was re-established following the divorce is one of fact and will be for the Tribunal to determine in due course; and

(d) in terms of proportionality, the fact the sponsor was discharged from the British Army after 1 July 1997 is a material factor when assessing whether the historic injustice consideration carries any weight in this case. So too is the fact that the appellant cannot satisfy any of the Immigration Rules.

Anonymity

60. There is no basis on which to make an anonymity direction in this case and we do not do so.

Notice of Decision

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

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

The decision in the appellant's case will be re-made by the Upper Tribunal following a resumed hearing in due course.

Directions to the parties

1. No later than 21 days after this decision is sent out, the appellant shall file and serve a consolidated bundle containing all evidence relied on. That bundle must be uploaded onto the CE-File system and served on the respondent by email;
2. At the same time, the appellant must inform the Tribunal whether oral evidence will be called at the resumed hearing and, if it is, whether a Nepali interpreter will be required;
3. No later than 28 days after this decision is sent out, the respondent shall file and serve any further evidence relied on. Any such evidence must be uploaded onto the CE-File system and served on the appellant by email;
4. Any application to vary these directions must be made promptly, copying in the other party.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 6 February 2024