



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06331/2019
(V)**

THE IMMIGRATION ACTS

**Heard by Skype for business
On the 26 March 2021**

**Decision & Reasons Promulgated
On 20 April 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MR PREM RAJ SHAHI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Jaja, Counsel instructed on behalf of the appellant.

For the Respondent: Ms Pettersen, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Widdup (hereinafter referred to as the "FtTJ") promulgated on the 20th of December 2019.
2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 26 March 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face -to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended as did the appellant's sponsor remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

Background:

4. The appellant is a national of Nepal who was born on 31 July 1968.
5. The appellant is the son of a former Gurkha soldier. His father enlisted in the brigade in 1958 before his marriage. His father served in the brigade of Gurkhas between 1958 and November 1968 when he died in service after falling ill whilst in Singapore. He had been taken to the UK from Singapore for treatment and had died in the UK in November 1968.
6. In July 1991, the appellant married his wife and in 1993 their daughter was born followed by a second daughter in 1996.
7. In 2006 the appellant left Nepal to work in Macau as a security officer and supported his wife and children living in Nepal from his employment.
8. In 2009 the appellant's mother (the sponsor) had an accident in which she suffered a broken hip and an operation in Nepal was unsuccessful.
9. The "historic injustice" experienced by former Gurkha soldiers and their families were rectified over time by changes in government policy and the Immigration Rules.
10. On 11 December 2009, the sponsor applied for entry clearance to the UK and on 19 June 2010 the sponsor was granted indefinite leave to enter the UK.
11. At the time of the appellant's mother went to live in the UK, the appellant was still living outside of Nepal working in Macau.
12. The appellant remained outside of Nepal in Macau until September 2018 having lost his employment. It is said that the appellant came back to Nepal regularly once or twice a year, but the appellant's mother did not see him in Macau nor did his wife and children.
13. On 1 November 2018, the appellant made an application for entry clearance to come to the UK as the adult dependent child of his mother, Gyan Kumari Shahi who is the widow of his late father who was formerly a Gurkha soldier.

14. On 19 February 2019, the Secretary of State refused the appellant's application for entry clearance. The decision was later maintained by the entry clearance manager. The decision letter considered the application as a dependent relative under paragraph EC-DR 1.1 of Appendix FM and also under the policy outlined the eligibility requirements that adult dependent children of former Gurkhas as set out in the discretionary policy for Gurkha's discharge before 1 July 1997 and their family members, as amended on 5 January 2015.
15. The entry clearance officer was not satisfied that he could meet the provisions of Appendix FM on the basis that he provided no evidence that he had any disability or would be unable to care for himself. Whilst he had stated he was unemployed and he was supported by his mother, no details as to his financial commitments in Nepal had been provided. Even if financial assistance was received, the entry clearance officer was satisfied from the evidence he was a fit and capable adult who was able to look after himself. Furthermore he had not demonstrated that any financial assistance received could not continue.
16. As to the policy, it was noted that the former Gurkha sponsor must have settlement under the 2009 discretionary arrangements or be in the process of being granted settlement in the UK under the discretionary arrangement at the same time as the applicant. In this case the former Gurkha parent has not been and was not in the process of being granted settlement under the 2009 discretionary arrangements. There is no provision for adult children of an ex-Gurkha widow in the policy. The application was therefore refused because he did not meet the eligibility requirements for adult dependent children of former Gurkhas as set out in the discretionary policy.
17. The case was also considered on a discretionary basis to establish if there were any compassionate circumstances relating to his individual case. It was noted that he had other adult siblings living in Nepal and was the satisfied he had close family members for support. It was further noted that he had grown up in Nepal and that his mother had chosen to apply for settlement visas when he was already an adult in the full knowledge that adult children of the widow of a former Gurkha did not automatically qualify for settlement. The entry clearance officer considered that there was no bar to his mother returning to Nepal either permanently or temporarily. The entry clearance officer was not satisfied that it establish family life with his parents over and above that between an adult child and his parent or that he demonstrated "real" or "committed" or "effective" support from the parent and therefore article 8 was not engaged. In the alternative, if family life was engaged, there were reasons for refusing the application which outweighed any consideration of historic injustice noting that he had grown up in Nepal, his mother chose to apply for settlement Visa when he was already an adult in the full

knowledge that adult children did not automatically qualify for settlement. Thus the application was refused.

18. The appellant's appeal against the respondent's decision to refuse entry clearance came before the First-tier Tribunal (Judge Widdup) on the 12 December 2019.
19. In a determination promulgated on the 20th of December 2019, the FtTJ dismissed the appeal concluding at [53] that family life was not engaged and that the remaining Razgar questions were therefore not relevant. The FtTJ therefore dismissed the appeal.
20. Permission to appeal was issued and permission to appeal was refused but on further application permission to appeal was granted by UTJ Sheridan on 25 July 2020 stating:-

“Given the judge's finding that family life existed between the appellant and sponsor when the sponsor left Nepal in 2010 and that there has been ongoing financial support, it is arguable that the significance the judge attached to the sponsor choosing to settle permanently in the UK without the appellant was inconsistent with Rai v ECO [2017] EWCA Civ 320 where at paragraph 38 concentration on the parent's decision to leave Nepal without focusing on the practical and financial realities was described as a mistaken approach.”

The hearing before the Upper Tribunal:

21. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 25 July 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face -to -face hearing. Following submissions sent on behalf of the respondent dated 11 September 2020, and further directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.
22. Ms Jaja appeared on behalf of the appellant relied upon the written grounds of appeal. There was a Rule 24 response filed on behalf of the respondent dated 11 September 2020.
23. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear and helpful oral submissions during the hearing.

The submissions:

24. There are three grounds advanced on behalf of the appellant;
 - (1) failure to apply the law;
 - (2) adopting the wrong approach;

- (3) failing to consider material evidence.
25. Dealing with ground 1, Ms Jaja submitted that this was the most important ground. She submitted that the FtTJ cited the decision of Rai [2017] EWCA Civ 320 in the decision ("Rai") and at [40] made reference to the test of "real", or "committed" or "effective" support. However after referring to the decision the judge failed to apply the test.
 26. Ms Jaja referred to paragraph 28 of Rai where it was stated that the question that should have been asked was "whether "real" or "committed" or "effective" support was shown to exist in this case, but that the judge failed to do this. Ms Jaja submitted that this was an error of law on its own.
 27. She referred to the written grounds at section L where the misdirection in law was set out in full. At [26] the judge set out that "I find the fact that the appellant and his family live in the mother's home in Nepal and that she sends the money for their support" and at (42) the judge stated, "I find that family life existed in 2010 when the mother came into the UK and at [51] stated "I find that even if family life continued after the mother's departure from Nepal, it weakened as time went by.." However following those findings at [54] the FtTJ stated that he did not need to go on to consider the remaining Razgar questions and did not take into account the "historic injustice issue because that is relevant only to proportionality". Thus Ms Jaja submitted that the judge was in error as the appellant is the son of a Gurkha and that the only reason his mother was in the United Kingdom was because the respondent had recognised the service of the appellant's father and by recognising the historic injustice in terms of settlement. She submitted that once the FtTJ made finding that there was family life the FtTJ was duty-bound to consider the question of historic injustice but failed to do so.
 28. In summary she submitted the judge dismissed the appeal without applying the legal test for family life and by misdirecting himself on the law by making a finding of family life but not considering the issue of proportionality by reference to the historic injustice point.
 29. Dealing with ground 1, Ms Jaja submitted that the judge adopted a mistaken approach and one which had been rejected by the Court of Appeal in the decision of Rai at [38] and [39] where there had been repeated references to the choice made by the parents to settle in the UK. The Court of Appeal rejected this as a mistaken approach. In this appeal the judge precisely did the same as can be seen at [42] where the judge found that family life existed in 2010 when the appellant's mother came to the UK and at [45] the judge again referred to this at [45] stated "in 2010 mother chose to come to the UK and settle down there". At [51] the judge stated "I find that even if family life continued after the mother's departure from Nepal it weakened as time went by. I find that her decision to live

permanently in the UK have the consequence that family life ceased and that the relationships which continue form part of the private lives of the mother and the appellant.” Therefore, the judge erroneously found the family life it ceased, and this is a mistaken approach and one that was rejected in the decision of Rai.

30. Ms Jaja submitted that the strongest point in behalf of the appellant is that the significant or the sole reason for the dismissing appeal was based on the appellant’s mother’s choice to come to the UK and settle. Thus the mistaken approach is the main reason for dismissing the appeal and is a material error of law.
31. As to ground 2 it was submitted that the judge failed to apply the law in 2 ways:
 - (1) the test of whether there was “real”, “effective”, and “committed” support had not been applied by the judge which is what was the real issue in the case, but the judge had made an assessment based on the appellant’s mother’s choice to settle in the UK.
 - (2) Ms Jaja submitted that the decision was silent on whether the factual matrix and the evidence taken together amounted to family life of dependency with real effective and committed support.
32. Dealing with ground 3, this was a failure to consider material evidence which had it been considered a different decision may have been reached.
33. Ms Jaja submitted that in relation to the appellant’s mother, the appellant was the only child and as far as she had concerned her only family life. She had made four visits to the UK; she was 75 years of age with mobility difficulties and the only way that she could remain in contact with the family was to travel to Nepal. This had an effect upon her, and a relevant decision is that of the Beouku-Betts and to consider the effect on the sponsor of the refusal of entry clearance to the appellant and the effect of this which would be to extinguish her family life.
34. The second part of the submission related to the proceedings themselves. Ms Jaja submitted that no Home Office presenting was present at the hearing and the judge recorded that he had no questions for the sponsor and therefore the evidence of the appellant sponsor was unchallenged and undisputed. It refers to efforts made in 2011 and 2013 to apply for the appellant to come to the United Kingdom. It could have been a joint application because the financial realities meant that they could not make the application together at the time. Those were relevant factors that had not been taken into account.
35. It was further submitted by Ms Jaja that the appellant’s father died in operational service and all the policies of the Secretary of State made

reference to this. The ashes of her husband remained in the UK thus it is reasonable for her to remain in the UK. The appellant and his family have a “unique factual profile” and that should have been considered when coming to a decision in this case. The written grounds referred to the particular “historic injustice” by the sponsor not being permitted to accompany her injured husband to the UK for medical treatment and he subsequently died in the UK. Had she been permitted to accompany her injured husband to the UK where he subsequently died at a time when the appellant may well have been born in the UK as she was pregnant with him at the time. Thus the respondent’s refusal to permit her to accompany her husband to the UK may be a historic injustice that affected article 8 family life (loss of husband). The same refusal meant that the appellant could have been not born in the UK.

36. Ms Jaja again referred to the decision in Rai and that members of the family unit need not reside in the same country and therefore being in different countries is not inconsistent with the decision in Rai and that family life can still be continued in those circumstances.
37. In summary she submitted that the cumulative effects taken together demonstrate that the decision should be set aside, and a new decision made.
38. Ms Pettersen relied upon the rule 24 response. She made the following submissions:
 - (1) The facts were of importance. Before the judge Counsel accepted that the appellant could not meet the requirements of Annex K because he was not under 30 years of age and had formed a family unit of his own (at [31]). When the sponsor came to the UK in 2010 the appellant fell outside Annex K due to his age and because he had married in the early 90s and had two children born in 1993 and 1996. In 2010 the appellant was working outside of Nepal and was sending money home to his family (see witness statement; p12). The appellant did not give evidence but stated in his evidence since 2006 he had left Nepal and worked in Macau for employment purposes. These were relevant facts as to whether the appellant could qualify for settlement.
 - (2) Whilst it had been argued that the appellant could not apply to enter the United Kingdom with his mother due to financial reasons, the reality was the appellant was outside the scope of Annex K because he had formed an independent family life of his own. In 2010 he was already outside the scope of Annex K.
 - (3) Turning to the issue materiality and the argument that the judge misapplied the decision of Rai, she submitted that between 2010 – 2018 when the appellant returned to Nepal having finished employment there was no dependency on his mother because he was responsible for supporting his wife and children in Nepal and that any later dependence had arisen relatively recently.

- (4) Furthermore, the judge set out his findings on family life in paragraphs 43 - 53 at the decision and gave sustainable reasons why Article 8 (1) was not engaged in the circumstances at paragraph 53 and therefore did not need to conduct a proportionality assessment. As to the decision in Rai, whilst the grounds refer to paragraph 38, the judge's findings should be read in conjunction with paragraph 38 and also paragraph 39 and that the issue was not only whether family life that existed at the time of their departure to settle in the United Kingdom but whether it had enjoyed beyond it (see paragraph 39 of Rai). The judge directed his mind to the intervening period between when sponsor left Nepal and the hearing date finding at paragraph 51 - 52 that family life for the purposes of article 81 weakened as time went by and that the sponsor formed relationships and friendships within the Nepalese community in the UK.
 - (5) She submitted that even if the judge erred in not going through the proportionality assessments if they were applied and taking into account historic injustice it was relevant that the sponsor could not meet annex K.
 - (6) Whilst the grounds criticised the judge for making reference to the sponsor's choice it did not detract from the appellant circumstances whether it was a matter of choice because when his mother left the appellant was not living in Nepal, he could not meet the criteria in 2010 as he was already over 32 years of age. Thus, any errors were not material given the factual matrix of this particular appeal.
39. By way of reply, Ms Jaja submitted that the judge found at [42] that he found that family life existed in 2010 when the appellant's mother came to the UK and that whatever was said about his working in Macau the judge still found that there was family life four years later in 2010. The appellant had married in 1991 and had two children all of which had happened before 2010 and therefore against that background the judge still made the finding that there was family life. It is not possible to ignore that factual finding.
40. As to Annex K, this was not announced until 2015 after the Gurkha litigation and it was accepted that those over 18 could have family life with their parents.
41. At the conclusion of the submissions I reserve my decision which I now give.

Analysis:

42. I have considered with care the submissions made on behalf of the appellant and have done so in the context of the decision of the FtTJ and the particular factual matrix. Having done so, I have reached the conclusion that the decision of the FtTJ did not involve the making of a material error on a point of law. I shall set out my reasons for reaching that decision.

43. The judge set out his findings of fact and analysis of the appeal at paragraphs 20 - 54 of the determination.
44. The judge properly identified at [21] that this was a human rights appeal, and that the decision was also considered under the policy guidance contained in Appendix K of the Home Office policy IDI chapter 15 2A 13.2 and the decision had to be seen in this context (at [30]).
45. It had been accepted on behalf of the appellant by counsel that he could not meet the requirements of Annex K because the appellant was over 30 years of age (in fact at the date of the hearing he was 51 years of age) and the appellant's father had died (see [31-[32]). In addition, the judge found that the appellant had lived apart from his mother for nine years and in contrast Annex K allowed for a maximum period of two years separation. Importantly the judge noted that Annex K did not apply if the adult had formed an independent family life. On the facts which were not in dispute the appellant had married in 1991 and had adult children. He was working and supporting his family when he lived in Macau between 2006 and 2018. The judge therefore concluded that "the appellant fell substantially short of meeting the requirements of Annex K and his appeal could succeed, if at all, only outside of the rules" (at [35]).
46. The FtTJ then made a self-direction at [36] that notwithstanding the non-compliance with Annex K "I must consider whether family life continues to exist between the appellant and his parent."
47. The relevant law has been stated in a number of cases. The FtTJ directed himself to the decision of the Court of Appeal in Rai v ECO New Delhi [2017] EWCA Civ 320 at [37]-40]). Rai involved a claim by an adult child of a former Ghurkha soldier who sought to join his family in the UK relying on Art 8. In that case, drawing on the earlier case law of the Court of Appeal, Lindblom LJ (with whom Beatson and Henderson LJ agreed) set out the legal principles at [16-20].
48. In the case of Rai (as cited) the Court of Appeal set out the legal principles relevant to determining whether there is family life engaged in appeal such as this from paragraph 17 onwards. It observed that in the case of Kugathas v SSHD [2003] EWCA civ 31, Sedley LJ referred to dependency as "real" "committed" or "effective" support and that the Upper Tribunal had accepted in the case of Ghising (family life - adult - Gurkha policy) that the judgement in Kugathas "had been interpreted too restrictively in the past "and that it ought to be read in the light of the subsequent decisions of the domestic and Strasbourg courts" (see paragraph [18]).
49. At paragraph 19, the court cited Lord Dyson M.R who would emphasised when giving the judgement 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.”

50. At paragraph 20 the court also cited the observations of Sir Stanley Burnton in Singh v SSHD [2015] EWCA Civ 630 at [24]:

“24. I do not think that the judgement which I have referred leads to any difficulty in determining the correct approach to Article 8 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 the purposes of Article 8. I point out that the approach of the European Commission of Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more. 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 the purposes of Article 8.”

51. Lord Justice Lindblom made reference to the decision of the Upper Tribunal in Rai and observed that the single factor which seem to have weighed most heavily in the conclusion of the judge in that case was the Appellant’s parent’s willingness to leave Nepal to settle in the UK when they did without focusing on the practical and financial realities entailed in that decision. At [39] the real issue under Article 8 (1) 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 United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did (see [39]). The court made reference to the circumstances of the Appellant and his family and 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 together as a family unit had they been able to afford to do so. The court considered that this was a factor that had not been taken into account when it should have been. Thus the question of whether, even though the Appellant’s parents had chosen to leave Nepal to settle in United Kingdom when they did, his family life with his parents subsisted then, and was still subsisting at the time of the Upper Tribunal’s decision; this was “the critical question under Article 8 (1).”

52. As the decision in Rai makes plain, the critical question is whether as a matter of fact, the Appellant demonstrated that he had family life with his parents which had existed at the time of their departure to settle in the UK and that it endured beyond it (see paragraphs [39] [42] of Rai). This is of particular significance because of the particular factual matrix in this appeal.

53. As will be clear, the need to establish “family life” is a fact-sensitive issue. It will not be presumed to exist between adult siblings or between an adult child and parent. What must be established is “more than normal emotional ties”. There must be “support” which is “real” or “committed” or “effective”.
54. In Uddin v SSHD [2020] EWCA Civ 332, the Senior President of Tribunals (Sir Ernest Ryder, with whom Bean and King LJ agreed), having set out extracts from the decision in Kugathas, said this at [31]:

“Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact; a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed”.

(See also [40(i)].)

55. There is no dispute between the parties that the judge correctly cited relevant parts of the decision in Rai (I refer to paragraphs 37 – 39 of his decision. What is an issue is whether the judge applied the law to the factual matrix before him?
56. Whilst Ms Jaja has sought to identify parts of the decision in which the judge stated he found family life was established (reference is made to paragraph 42, where the FtJ stated “I find the family life existed in 2010 when the mother came to the UK.”), in my judgement that misreads the decision. When that paragraph is read in light of the later paragraphs at paragraphs 43, 50 and 51, it is plain that the judge did not make a finding that family life was established as at the date of the hearing as demonstrated at [43] where the judge stated, “in considering whether or not there is still (my emphasis) family life between the appellant and his mother I have taken into account the following circumstances..” At that paragraph, the judge took into account factual matters which are not in dispute, that the appellant married his wife in 1991 when he was 23 years of age, he and his wife have two adult children, in 2006 he left Nepal and went to work in Macau where he remained until 2018 during the time he supported the family. The judge concluded at [44] that the three factors “clearly indicate that the appellant formed his own family, and his present family life continues to be with that family (my emphasis).”
57. In my judgement the use of the phrase whether there is “still family life” at [43] is significant and is wholly consistent with the decision in Rai at [38] that it is not sufficient to establish family life at the date of the parties separation but whether it was still subsisting and that this is the “critical question”. Further significance in my view is attached to the factual finding made by the judge that the appellant’s “present family life continues to be with that family.” That was a finding open to the judge to make on the evidence before him which demonstrated that for a significant period of time, the appellant had formed an

independent family life of his own with his wife and children, which existed independently to that of the sponsor.

58. Whilst Ms Jaja submitted that the circumstances of the appellant's marriage and children and work history was the same in 2010 when the judge found family life to exist, that submission fails to take into account the judge's findings considered as a whole and that not only taken together indicated that he had formed an independent family life of his own but also importantly, that his present family life continued to be with that family.
59. Furthermore at [45] the FtTJ addressed the circumstances of the sponsor's departure from Nepal. At [46] the judge set out the reasons for the appellant's mother and sponsor coming to the UK which was to obtain surgery and that she had no family in the UK . It was open to the judge to place weight on the evidence in the appellant's witness statement at para [20] that the expectation was that his mother would return to Nepal and that her reasons for remaining and therefore living apart from her son was the choice made in this context. The judge also concluded at [51] that even if family life continued after his mother's departure, family life "weakened as time went by" and that "I find that her decision to live permanently in the UK had the consequence of family life ceased."
60. In my judgement the FtTJ was entitled to consider the pattern of dependency between a parent and child can change as here and that family life even if it had been established earlier had changed so that by the continuing establishment of his own family life with his wife and children which was formed independently of his mother, taken with the appellant's move to the United Kingdom in the particular factual circumstances was sufficient to demonstrate that whatever family life there had been before was no longer subsisting. This approach is entirely consistent with the decision in Rai (at [38]).
61. This leads to the point relied upon by Ms Jaja where she submits that the judge erred in his approach to the issue of separation and that the sole reason for dismissing the appeal was based on the appellant's mother's choice to settle in the UK (I refer to her oral submissions). She further submits that his approach is inconsistent with the decision in Rai.
62. I do not accept that submission. A careful reading of the decision demonstrates that the reason for dismissing the appeal was not solely based on the choice made by the appellant's mother to come to the UK but by considering the particular factual circumstances of the appellant that he was now age 51 years having lived apart from his mother since 2010 (although in fact they lived apart since 2006 when he left to work in Macau), he had established and was continuing to establish a firm an independent family life of his own, independent of his mother with a wife and children and that the financial support given to him by the sponsor was not unusual (at (49), and that whilst

he lived in the family home, the sponsor had no use of it herself (at [48]).

63. Furthermore, the judge was entitled to consider the issue of the separation between them based on the fact specific circumstances of the appeal. The judge set them out at [46] where reference is made to her having left Nepal and the main reason was for medical treatment. When she left in 2010 it could not have been the intention of the appellant to join her in the UK when he was married with two children. To do so would have meant severing that family life or making a choice to do so. Whilst Ms Jaja refers to the sponsor's witness statement at paragraph 29 - 32 which refers to attempts made for settlement but that it was not possible due to "financial reasons", that submission fails to engage with the reality of the factual circumstances that to do so would mean that he would leave his own independent family unit. There is no reference in the appellant's witness statement to any applications made and both witness statements are silent concerning the consequences of such an application made in the light of his own family in Nepal, if made in 2011 and 2013. Furthermore, the factual circumstances failed to explain the length of the delay from 2001 until 2018 when the application was made which is a significant period of time.
64. It is also advanced on behalf of the appellant that the judge failed to take account of material evidence in terms of support relevant to the issue family life.
65. At [41] the judge set out the appellant's case which included financial and emotional support; the financial support was the maintenance of the mother sent from the UK, and the fact that the appellant and his family lived in her old home. The FtJ considered those issues and made factual findings at [47] and [49] finding that whilst the appellant continued to live in the mother's home as she has no use of it herself, but that did not demonstrate any effective support at [49] whilst the judge accepted that she sent financial assistance to the appellant, the judge found that it was not unusual for such a UK-based parent to do so if they were financially able to do so and that the circumstances of the sponsor were more favourable than those of the appellant. As to the emotional support, the judge considered this at [50] but noted it in the context of the family history and the inference raised is that the parties lived apart for significant periods from 2006 - 2018, where the appellant's evidence was that he only returned to Nepal once or twice a year and that the emotional support was thus from the appellant's family.
66. Therefore, contrary to the grounds, the judge did address the material evidence and made factual findings upon it.
67. Dealing with the last point, it is submitted that the judge was wrong at [54] by his refusal to take account of the historic injustice point. That submission needs to be considered in the light of the decision

made where the judge found that even if family life was established in 2010, it was not subsisting as at the date of the hearing in the light of the particular factual circumstances identified. That being the case, Article 8 (1) is not engaged and the issue of historic injustice which was relevant to the issue of proportionality did not arise. Consequently, there is no error of approach identified.

68. Drawing together those issues, in my judgement the decision reached by the judge that family life was not established under Article 8(1) was a conclusion that was reasonably open to the judge to make on the particular factual matrix that he had before him. I am therefore satisfied that the judge did not make an error on a point of law and the decision stands. The appeal is dismissed.

Notice of Decision.

69. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision stands.

Signed Upper Tribunal Judge Reeds
Dated 8 April 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email