



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24446/2018
(V)**

THE IMMIGRATION ACTS

Heard at Field House (by remote means) On 9th March 2021 **Decision & Reasons Promulgated On 29th March 2021**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**DEVI GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Joseph of Counsel, instructed by Everest Law Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the documents primarily in paper format, with some documents available electronically.

2. In an error of law decision promulgated on 8 December 2020 and annexed to this decision, I found an error of law in the decision of First-tier Tribunal Judge Scolly promulgated on 16 July 2019 in which the Appellant's appeal against the decision to refuse her human rights claim was dismissed. That decision was set aside with preserved findings of fact.
3. The Appellant is a national of Nepal, born on 27 July 1969, who applied together with her mother for entry clearance to the United Kingdom as dependent family members of her late father, a Gurkha soldier, on 14 August 2018. The Appellant's mother's application was successful and she came to the United Kingdom on 2 December 2018.
4. The Appellant's application was refused on 29 October 2018 on the basis that the Appellant did not meet the requirements for a grant of leave to remain under the Immigration Rules, nor under the Gurkha policy. It was not accepted that the Appellant had family life with her mother for the purposes of Article 8(1) of the European Convention on Human rights and in any event, the refusal was proportionate. The Respondent relied upon the Appellant's mother's choice to settle in the United Kingdom in the knowledge that the Appellant would not qualify and that there were remaining siblings in Nepal. An Entry Clearance Manager maintained the decision on 12 March 2019.
5. The Appellant's appeal is to be remade on Article 8 grounds with the following preserved findings of fact:
 - the Appellant has lived all of her life in Nepal, living with one or both of her parents up until her mother came to the United Kingdom on 2 December 2018;
 - the Appellant's father served in the British Gurkha regiment from 23 December 1961 to 26 July 1976. The Appellant's father died on 24 February 2016 and at that time was married to the Appellant's mother, his second wife. The Appellant's father's first wife died on 6 January 2014 and his third wife, whom he married on 22 June 2015, survives him and is living in Nepal with her mother;
 - the Appellant's mother is in receipt of housing benefit and pension credit, from which she has provided financial support through remittances to the Appellant in Nepal;
 - the Appellant's mother has a savings account in Kathmandu and she has given the Appellant authority to operate this account and withdraw funds from it;
 - the Appellant's father did not and would not have applied for residence in the United Kingdom, even if he had the opportunity to do so prior to 2009 and he did not do so after that point up to his death (as such there is no historic injustice in the present case).

6. There was no further evidence submitted by the Respondent. The Appellant submitted an updated bundle, including further written statements and evidence updating the position since the hearing before the First-tier Tribunal.
7. The Appellant's written statements, dated 8 July 2019 and 22 December 2020, set out her family and her education/qualifications. The Appellant states that she has never been married, in any form of relationship nor has she ever had any employment. The Appellant's father wanted to settle in the United Kingdom but previously there was no route for the family to move together and in his later years he was too ill to apply.
8. The Appellant feels lonely and isolated in Nepal without her mother and worries about her living in the United Kingdom by herself and not being able to speak English. They continue to communicate using viber, with the assistance of the Appellant's mother's landlord as she is illiterate and would not be able to use a smartphone to communicate by herself. The Appellant has not celebrated any national festivals in Nepal since her mother left, feeling lonely, stressed and anxious, with difficulty sleeping and has lost weight.
9. The Appellant states that the her mother has pain in her legs, diabetes, gastric problems, high blood pressure and uric acid. The Appellant's mother has told her that life is more challenging in the United Kingdom and more stressful, as she must rely on others for shopping, cooking, making an appointment with the GP and household chores. There are no close family members in the United Kingdom. In Nepal, the Appellant would take care of her mother, cook for her, change her clothes, wash her and take her to the doctors.
10. The Appellant's mother's written statements, dated 5 March 2019 and 23 December 2020, set out her family relationships and personal circumstances. The Appellant's mother states that she is illiterate and had never been to school, only being able to count a small amount of money. She is unable to walk at all without assistance, feels tired quickly and has arthritis, diabetes, high blood pressure and cholesterol; for which she is on medication but sometimes forgets to take it. The Appellant's mother is unable to perform ordinary tasks and requires permanent care, which the Appellant used to give her in Nepal. Life in the United Kingdom is more stressful for her as she has to rely on the Nepalese community for small amounts of help. The Appellant's mother feels very lonely and misses the Appellant, constantly worrying about her safety and security in Nepal.
11. The Appellant's mother refers to being nervous and not quite understanding the previous court hearing; stating that her husband agreed that he would settle with her in the United Kingdom (having previously taken his first wife to Hong Kong with him). The Appellant's mother also confirms ongoing communication with and financial support to the Appellant.

12. In addition there was documentary evidence of financial remittances and communication between the Appellant and her mother, using viber. In the first appeal bundle, there was further documentary evidence in relation to the Appellant's family and evidence in relation to the Appellant's mother's health from the Area Welfare Centre Bagmati (part of the Gurkha welfare trust). The latter stated that she has diabetes, hypertension, osteoarthritis and an eye problem; she is taking medication, has difficulties with mobility and has needed a carer from February 2018 on a daily basis. The Appellant's daughter was trained to look after her mother. There is further evidence of test results, medication and assessment from the National Center for Rheumatic Diseases.

The hearing

13. The hearing proceeded by way of submissions only on behalf of the parties, with neither the Appellant or her mother being called to give oral evidence.
14. On behalf of the Respondent, Mr Melvin relied on his written submissions and opposed the appeal. Whilst family life for the purposes of Article 8(1) of the European Convention on Human Rights may have existed between the Appellant and her mother at the date of her mother's departure from Nepal in 2018, the Respondent does not accept that it still subsists at the date of hearing; even accepting that there is little evidence that the Appellant has formed an independent life in Nepal.
15. If family life is found to exist for the purposes of engaging Article 8(1) of the European Convention on Human Rights, Mr Melvin submitted that in any event the decision is proportionate because there is no applicable historic injustice to the Appellant or her family consequent upon the preserved findings of the First-tier Tribunal that the Appellant's father never had any intention to settle in the United Kingdom nor made any attempt to do so.
16. On behalf of the Appellant, Mr Joseph relied on his skeleton argument and submitted that family life for the purposes of engaging Article 8(1) of the European Convention on Human Rights was clearly established in this case, with ties over and above those in a normal adult family relationship. There are unchallenged findings that the Appellant had always lived with her family as a physical unit and evidence of the Appellant providing care to her mother in Nepal. The Appellant and her mother made their applications for entry clearance together, with no intention of being separated and the Appellant's mother was forced to travel alone when she did otherwise she would have lost the right to settle in the United Kingdom. The Appellant has been seeking to join her mother in the United Kingdom ever since.
17. The Appellant is financially dependent on her mother, even though dependency is not necessary to engage Article 8(1) family life. Although the Appellant has qualifications in Nepal, she has been unable to obtain

employment when she has applied for jobs in the past. The Appellant has not deliberately manipulated her financial or employment circumstances for the purposes of this application, she is simply of limited financial means and has not been able to secure employment. In any event, the Appellant is not socially or emotionally independent from her mother, in addition to financial dependence.

18. The family life between the Appellant and her mother has not been broken since her mother has been in the United Kingdom. The emotional and financial bonds have been maintained, with regular contact and mutual emotional support and continuing financial support.
19. In relation to the proportionality balancing exercise, Mr Joseph acknowledged the preserved finding of fact that there was no historic injustice in this case such that there needed to be a normal balancing exercise. There is weight to be attached to the importance of maintaining immigration control, but it was submitted that there were no other factors adverse to the Appellant and nothing else in the public interest to be taken into account. For the Appellant, her mother's current position with support from her landlord is not tenable in the long term, she requires not only day to day care but also emotional care from a family member which goes beyond practical assistance. Mr Joseph accepted that there was only limited medical evidence available in relation to the Appellant's mother's conditions and no assessment of care needs or evidence of any approach to the NHS or social services for support. The Appellant would be able to find work in the United Kingdom as she speaks English and has qualifications and still be able to provide care for her mother. Overall it was submitted that there are exceptional circumstances in this appeal which outweigh the public interest.

Findings and reasons

20. The first issue in this case is whether family life exists between the Appellant and her mother to engage Article 8(1) of the European Convention on Human Rights. If so, the second issue is whether the refusal of entry clearance is a disproportionate interference with the Appellant's right to respect for such family life.
21. The legal position for cases such as these considering whether Article 8(1) is engaged, is summarised by the Court of Appeal in Rai v Entry Clearance Officer [2017] EWCA Civ 320, from paragraphs 17 onwards, as follows:

"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley LJ said (in paragraph 17 of his judgement) 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 LJ said (in paragraph 24 of her judgement)

that the “relevant factors... include identifying who are the 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 LJ said (in paragraph 14 of his judgement, with which Longmore and Aikens LJ. 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 circumstances 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 judgements in Kugathas had been “interpreted to restrictively in the past in order to be read in light of subsequent decisions of the domestic and Strasbourg courts”, and (in paragraph 60) that “some of the [Strasbourg] Courts decisions indicate that family life between adult children and parents will more 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 a child is still single 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 judgement in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):

“49. An examination of the Court case-law would tend to suggest that the applicant, a young adult 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. 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 careful consideration of all the relevant facts of the particular case”. In some instances “an adult child (particularly one who 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 his observation (at paragraph 62) that "[the] different outcomes in cases that have 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 judgement):*

"24. I do not think that the judgements to which I have referred contain 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 presumptions 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 would not of itself justify finding of a family life. There has to be something more. The 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 turned 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."

22. In essence, for family life to be established to engage Article 8(1) of the European Convention on Human Rights, there needs to be support between adult family members which is real, committed or effective and looking at the circumstances of the individuals involved. In this case, despite the Appellant's age (now in her fifties), it is not disputed that she has not formed an independent life away from her parents, particularly her mother since her father's death. The Appellant has, until her mother came to the United Kingdom in late 2018, always lived with one or both parents as a physical family unit; has not married; has never been employed and remains financially dependent on her mother. These findings were either preserved and/or are upon matters on which there was no real challenge or dispute to the evidence by the Respondent. There is support between the family members which is real, committed and effective; both emotional and financial. I find that family life for the purposes of Article 8(1) existed in Nepal and has not ceased to exist since December 2018 when the Appellant's mother moved to the United Kingdom. Other than no longer physically living together, the Appellant and her mother are still

in regular contact, providing mutual emotional support to each other and the Appellant is still financially supported by her mother. In these circumstances, Article 8(1) of the European Convention on Human Rights is engaged and following the five stage approach in Razgar v Secretary of State for the Home Department [2004] UKHL 27, there would be an interference with the Appellant's family life but it would be in accordance with the law and in pursuit of the legitimate aim of immigration control. The final question is whether the interference would be proportionate.

23. On behalf of the Appellant and in light of the preserved finding of fact that the Appellant's father did not and would not have applied for residence in the United Kingdom at any time prior to his death; Mr Joseph accepted that although this is broadly a Gurkha case, this is not one which involved any historic injustice to the Appellant or her family. As such, this is not a case in which the public interest in immigration control, without more, would be outweighed by a historic injustice if Article 8(1) is engaged. In the present case, absent any historic injustice, a normal proportionality balancing exercise is required.
24. On the public interest side of the scales, there is a public interest in the maintenance of immigration control in circumstances where the Appellant does not meet the requirements of the Immigration Rules, or the Gurkha policy for a grant of entry clearance and where there is no reduction to the weight of the public interest caused by any historic injustice. It is not in dispute that the Appellant speaks English, which is at best a neutral factor. The Appellant is not currently financially independent, but dependent on her mother who herself is supported primarily by public funds (through housing benefit and pension credit) and by a widow's pension. Whilst the Appellant has some educational qualifications in Nepal, she has no work experience or employment history at all, such that it is at least questionable as to whether she would be able to obtain employment in the United Kingdom sufficient that she would not have recourse to public funds.
25. On the Appellant's side of the scales, there is strong family life with her mother which has subsisted for her entire life. That family life continues to subsist whilst living in separate countries and has not been severed by the physical separation of mother and daughter, who have, albeit to a more limited extent, continued to communicate and support each other, emotionally and financially. The interference with that family life is limited to the continued physical separation of the Appellant and her mother and is likely otherwise to continue as it has done since December 2018.
26. I have also taken into account the following matters. First, there is a lack of evidence of the Appellant's mother's current medical conditions or their impact on her and nothing to indicate that there has been any assessment of her care needs, or whether she is entitled to any more formal support in the United Kingdom beyond the assistance given by her landlord (from whom there is also no evidence as to the support currently given). The Appellant's evidence is that current support is not viable long-term, but

there is nothing to suggest any alternatives have been considered and nothing to suggest there are any needs are not currently being met. It is undoubtedly the preference of the Appellant and her mother that any care needed for the latter is given by the Appellant, but little if anything to support the claim that it can only be given by the Appellant as a family member in circumstances where there has, since the Appellant's mother's arrival in the United Kingdom, continued to be mutual emotional support and alternative practical support on a day to day basis.

27. Secondly, although the Appellant's mother has leave to remain in the United Kingdom, she also remains a national of Nepal entitled to reside there and there was no evidence before me at all as to whether she would choose to remain in the United Kingdom or return to Nepal to be with the Appellant if this appeal were unsuccessful. The evidence from the Appellant and her mother was both that life was hard in Nepal (financially and practically) but that life for the Appellant's mother was also hard and stressful in the United Kingdom because she could not speak English and needed to rely on others - albeit I accept that that may be eased with the Appellant's physical presence and support if she were here. Neither the Appellant nor her mother have identified any obstacles to family life continuing in Nepal, as it did prior to 2018. However it is reasonable to infer that the Appellant's mother's finances may be affected if she left the United Kingdom as public benefits would not be available as they are now.
28. Thirdly, there is no interference with the Appellant's right to respect for private life in the refusal; which she has undoubtedly developed having lived her whole life in Nepal.
29. Overall, taking into account all of the circumstances set out above, I do not find that the public interest is outweighed by the strength of family life between the Appellant and her mother, such that the Respondent's refusal is not a disproportionate interference with their right to respect for family life.

Notice of Decision

As set out in the decision annexed, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and re-make the appeal as follows:

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed G Jackson

Date

19th March 2021

Upper Tribunal Judge Jackson

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/24446/2018(P)

THE IMMIGRATION ACTS

Decided under rule 34

**Decision & Reasons
Promulgated**

On 30th November 2020

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**DEVI GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Directions were issued by the Upper Tribunal on 17 September 2020 indicating the provisional view, in light of the need to take precautions against the spread of Covid-19 and the overriding objective, that this case was suitable to determine whether there was an error of law in the First-tier Tribunal's decision and if so, whether that decision should be set aside, by a remote video hearing. The parties were given the opportunity to make representations as to the proposed means of hearing.

2. The Appellant had no objections to the proposed remote hearing of the appeal, nor did the Respondent in her submissions. I have however considered that contrary to the initial view, this is a case which is on its facts suitable to determine the error of law issues without a hearing at all, specifically because the Respondent appropriately accepts that there is a material error of law in the decision of the First-tier Tribunal such that it must be set aside and a fresh all hearing listed to remake the appeal. In the circumstances it is most efficient and in the interests of justice to issue this decision without a hearing to save any further delay to the final determination of this appeal. In reaching this decision I have taken into account the Pilot Practice Direction issued by the Senior President of the Tribunals on 19 March 2020 and the decision of Fordham J in The Joint Council for the Welfare of Immigrants v President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin), including the benefits of an oral hearing and requirements of procedural fairness. On the basis that there is essentially no dispute as to an error of law in this case, not that the decision should be set aside, there is no need for a hearing and this decision is therefore made with the benefit of the full appeal file under rule 34.
3. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Scolly promulgated on 16 July 2019, in which the Appellant's appeal against the decision to refuse her human rights claim (in the context of an application for entry clearance as the adult dependent of the widow of an ex-Gurkha) dated 29 October 2018 was dismissed.
4. The Appellant is a national of Nepal born on 27 July 1969, who applied together with her mother for entry clearance to the United Kingdom as dependent family members of her late father who was a Gurkha soldier, on 14 August 2018. The Appellant's mother's application was granted and she came to the United Kingdom on 2 December 2018.
5. The Respondent refused the application the basis that the Appellant did not meet the requirements for a grant of leave to remain under the Immigration Rules, nor under the Gurkha policy. For the purposes of Article 8 of the European Convention on Human Rights, it was not accepted that the Appellant had established family life under Article 8(1) and in any event the refusal of entry clearance would be proportionate and any historical injustice outweighed. The Respondent relied upon the Appellant's mother's choice to settle in the United Kingdom in the knowledge that the Appellant would not qualify for settlement and that there were siblings remaining in Nepal. The decision was maintained on review by an Entry Clearance Manager on 12 March 2019.
6. Judge Scolly dismissed the appeal in a decision promulgated 16 July 2019 on all grounds. I return below to the detail of the decision, but in substance it was found that the Appellant was (within the Appellant's cultural context) emotionally dependent on her mother, but not financially dependent other than by choice; that the Appellant's mother chose to

relocate to the United Kingdom leaving the Appellant in Nepal and that the Appellant was not an adult dependent. The First-tier Tribunal also found that there was no historic injustice in this case because on the evidence the Appellant's father had no intention of settling in the United Kingdom, even if he had the opportunity to do so previously. Finally, and overall, the refusal was not a disproportionate interference with the Appellant's right to respect for private and family life under Article 8.

The appeal

7. The Appellant appeals on two grounds as follows. First, that the First-tier Tribunal had materially erred in law in failing to apply the correct test for whether family life existed between adults for the purposes of Article 8(1) of the European Convention on Human Rights, placing too high a threshold on the level of support required, which only needs to be support which is real, or committed, or effective and dependency, whether or not by choice, is not required. Secondly, that the First-tier Tribunal materially erred in law in concluding that the Appellant's father never had an intention to settle in the United Kingdom even if permitted to do so on the basis that in his later years, he had not made any such application. Although no further written submissions on the appeal were invited or received on behalf of the Appellant, the grounds of appeal are clear and detailed and in light of the Respondent's position on this appeal, I have not issued directions for any further written submissions.
8. In her rule 24 response, the Respondent does not oppose the Appellant's appeal and invites the Upper Tribunal to find an error of law on the first ground of appeal and list an oral hearing to remake the decision under appeal, specifically considering whether the Appellant has established family life with her mother for the purposes of Article 8(1) of the European Convention on Human Rights.
9. In relation to the second ground of appeal, the Respondent submits that it was open to the First-tier Tribunal to conclude on the evidence of the Appellant's mother, that her father never had any intention to settle in the United Kingdom, which is ultimately relevant to the proportionality balancing exercise which will need to be undertaken if family life is engaged.

Findings and reasons

10. The Respondent's position not to oppose the appeal on the first ground and to accept that there was a material error of law in the decision of the First-tier Tribunal is entirely appropriate on the facts of this case and a position with which I agree. Whilst the First-tier Tribunal has set out much of the relevant legal position in relation to Gurkha families in paragraphs 15 to 17 of the decision, expressly including reference to the decision in Rai v Entry Clearance Officer [2017] EWCA Civ 320 as to family life for the purposes of Article 8(1) between adults; the latter has not been applied when findings of fact were made in this case or conclusions reached.

11. In paragraph 47 of the decision, there is further self-direction as to the question of whether Article 8(1) is engaged on the facts of this case, with express reference to the requirement that support be real, or committed, or effective and that a fact sensitive assessment is required. The conclusions are set out in paragraphs 49 and 50 as follows:

“49. Given my findings of facts on employment and despite the fact that the appellant is single and has lived with her parent(s) for most of her life, I find that the appellant is not an adult dependent. I accept that she made arrangements for her mother to have a home in the UK when her UK family asked her to leave, however although she intends to care for her mother in the UK this is not suggested to be an alternative to her working in the UK and I therefore find that there is only a limited need for the sponsor to have care.

50. I consider that Article 8 is not engaged as the appellant is currently able to enjoy family life with her mother should she return to Nepal. The sponsor is able to live in Nepal.”

12. The First-tier Tribunal’s decision on the engagement of Article 8(1) makes no actual reference to the legal test that has been properly set out and instead appears to conclude that family life is not engaged for these purposes because the Appellant is not an adult dependent (despite being single and having lived with her parents for most of her life) and because family life could be enjoyed in Nepal instead. With respect neither of those points are relevant to the correct test and on its face, there is a contradiction in paragraph 50 which appears to accept family life in Nepal but not generally for the purposes of Article 8(1).
13. The lack of relevant consideration of the correct test by the First-tier Tribunal in its conclusion above is not improved by a reading of the decision as a whole, which includes extensive findings of fact in paragraphs 18 to 43 of the decision but which similarly do not address the question of whether support is provided from the Appellant’s mother to her (or vice versa) which is real, or committed, or effective. The assessment of evidence and findings of fact focus heavily on the Appellant’s education, employment opportunities and that she is only financially dependent on her mother as a matter of choice; which is not strictly relevant, as dependency is not required and even if it was, the fact of dependency as opposed to whether it is by choice or not would be the central question. Further, there is no clear finding by the First-tier Tribunal as to whether there is emotional dependency between the Appellant and her mother as claimed, to the extent that emotional support is real, or effective, or committed and instead only a significantly qualified finding is made of emotional dependence within the cultural context, the significant of which is entirely unclear within the overall assessment.
14. Overall, the First-tier Tribunal materially erred in law in failing to apply the correct test on the facts of this case as to whether family life was established for the purposes of engaging Article 8(1) of the European

Convention on Human Rights. Although the First-tier Tribunal purported to go on to in any event to consider the proportionality of the decision for completeness, this assessment is infected by the same errors as in relation to whether family life is established for the purposes of Article 8(1) as shown by the reliance on the same findings of fact in paragraph 54 of the decision to conclude that there are reasons other than the public interest to justify refusal. For these reasons the error in the first ground of appeal is material to the outcome of the Appellant's appeal, such that the decision must be set aside and remade.

15. The second ground of appeal remains relevant despite the findings above given that it relates to what (if any) findings of fact should be preserved in the remaking and also because the Respondent has opposed this ground of appeal. The second point concerns the First-tier Tribunal's conclusion that there was no historical injustice in this case because it was not accepted that the Appellant's father ever had any intention to settle in the United Kingdom, even had he had the opportunity to do so earlier. The appeal is on the basis that the First-tier Tribunal erred in failing to have adequate regard to the evidence before it of the personal circumstances of the Appellant's father, including his first wife, his son, his ill-health and that there may have been many reasons why he was unable to apply to settle in the United Kingdom prior to his death. The Appellant's mother's evidence was not that he did not want to settle in the United Kingdom, but merely that she did not know why he had not done so. Overall, the Appellant's case is that there was not a sufficient or reasonable basis for the First-tier Tribunal to make a positive finding that the Appellant's father made a positive decision not to apply for settlement.
16. I find no error of law in the second ground of appeal, which amounts only to disagreement with the findings made by the First-tier Tribunal on this issue. The Appellant's mother's statement asserted that her husband would have settled in the United Kingdom a long time ago with the family had he been given the opportunity after his retirement and that he had always mentioned to her about doing so. However, as recorded in the decision, in the Appellant's mother's oral evidence she could not say why no application had ever been made, she had told him to apply but he did not.
17. The grounds of appeal by reference to wider circumstances and possible reasons why no such application would be made, are not based on any evidence that was before the First-tier Tribunal, the only evidence which there was, was that the reason no application was made was not known to the Appellant's mother. On the basis of all the evidence before the First-tier Tribunal on this issue, it was rationally open to the Judge to find, in all the circumstances, that the Appellant's father did not and would not have applied for residence in the United Kingdom, even if he had the opportunity to do so prior to 2009 and he did not do so after that point up until his death. That finding of fact is therefore preserved for the purposes of remaking this appeal.

18. In addition, I also preserve the following findings of fact which are not infected by the error of law by the First-tier tribunal:
- the findings in paragraphs 20 and 40, that the Appellant has lived all of her life in Nepal, living with one or both of her parents up until her mother came to the United Kingdom on 2 December 2018;
 - the findings in paragraph 21 as to the Appellant's father's family and circumstances; and
 - the findings in paragraphs 23 and 24 as to the Appellant's mother's financial circumstances and financial support to the Appellant;
19. I do not preserve any of the findings in relation to the Appellant's employment or job seeking, nor about emotional or financial dependency given that no clear findings were made on these matters which can be separated from the errors of law identified above.
20. On the basis that only limited further findings of fact are required to consider the first issue in this appeal as to whether Article 8(1) is engaged in accordance with the correct test; and if so, go on to consider the proportionality of the decision to refuse entry clearance; the remaking of this appeal is retained in the Upper Tribunal with the listing directions as set out below.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

Listing Directions

Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, and having considered all the material on file, I have determined that the forthcoming hearing can and should be held remotely, by Skype.

1. No later than 7 days after these directions are sent by the Upper Tribunal:
 - (a) the parties may file and serve by email any objection to the hearing being a remote hearing, giving reasons; and
 - (b) without prejudice to the Tribunal's consideration of any such objections, each party shall also notify the Tribunal and the other party of the email address to which the electronic invitation to join the hearing should be sent.

2. If no email address is furnished under paragraph 3(b) above, the invitation to the party concerned will be sent to the email address to which these Directions are sent by way of service.
3. Any application to submit further written evidence must be accompanied by the proposed evidence and must be filed and served no later than 21 days after these directions are sent out by the Upper Tribunal.
4. Any application to call further oral evidence must be accompanied by a witness statement capable of standing as the evidence in chief and must be filed and served no later than 21 days after these directions are sent out by the Upper Tribunal and must indicate whether an interpreter would be needed for that evidence and if so in what language or dialect.
5. A composite bundle is to be filed and served by the Appellant in both electronic and hard copy format no later than 14 days prior to the relisted hearing.
6. The parties are at liberty to file a skeleton argument, no later than 7 days prior to the relisted hearing.
7. The appeal to be listed before any UTJ on the first available date from 4 January 2021, with a time estimate of 1.5 hours. A notice of hearing will follow in due course.
8. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents. Service on the Secretary of State may be to [email].

Signed G Jackson

Date 30th November 2020

Upper Tribunal Judge Jackson