



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

Appeal Number: HU/07414/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 20 December 2021**

**Decision & Reasons Promulgated
On 19 January 2022**

Before

**UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

Between

**Hem Prakash LIMBU
(Anonymity direction not made)**

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellant: Mr D Balroop of Counsel instructed by Everest Law

For the Respondents: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against a decision of First Tier Tribunal Judge Raymond promulgated on 12 May 2021. It is brought further to permission to appeal granted by First-tier Tribunal Judge Gumsley on 28 June 2021.

2. The Appellant is a citizen of Nepal born on 7 August 1983.
3. The Appellant's father was Ram Bahadur Limbu (d.o.b. 1 January 1951), who served in the Brigade of Gurkhas until his discharge in 1985 with the rank of Corporal and an exemplary military record. The Appellant's father died on 8 February 2016 in Nepal.
4. The Appellant's mother, who is also the 'Sponsor' herein, is Suk Maya Limbu (d.o.b. 1 September 1956). She was granted indefinite leave to remain in the UK on 15 October 2005.
5. On 28 January 2020 the Appellant made an application for entry clearance as the child of a former Gurkha discharged before 1997.
6. In the application form, amongst other things, the Appellant stated that he was single with no financial dependants, and that he lived in a property owned by the Sponsor. His travel history revealed a history of employment in Qatar and Uzbekistan between June 2006 and August 2018.
7. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 26 February 2020.
8. In the RFRL the Sponsor's status was seemingly acknowledged, as was the then circumstances of the Appellant's father:

"It has been noted that your mother was granted Indefinite Leave to Remain in the UK on the basis of being the spouse of a former Gurkha on 15/10/2005, however your father was not present in the UK at the time and he had also not made an application to remain in the UK himself."
9. The Respondent gave consideration to the application with reference to relevant policy in respect of the children of former Gurkha soldiers, with reference to the Immigration Rules for adult dependent relatives (Appendix FM, Section EC-DR), and more generally with regard to a wider discretion taking into account 'exceptional compassionate circumstances' and/or Article 8 of the ECHR. In this latter regard the RFRL cited **Gurung**

and others [2013] EWCA Civ 8, and Ghising and others (Ghurkhas / BOCs: historic wring; weight) [2013] UKUT 00567 (IAC).

10. With regard to the Respondent's policy in place for adult children of a Gurkha discharged prior to 1 July 1997, it was noted that such policy did not apply to the children of widows, and also that the eligibility criteria required that the former Gurkha soldier must have been already granted settlement or be in the process of applying for settlement. The Appellant did not come within the policy accordingly. It was also noted that he was too old for the policy which applied to those between 18 and 30. It was also considered that the Appellant had not demonstrated sufficient financial or emotional dependence in respect of his relationship with the Sponsor beyond that which might normally be expected between a parent and adult child.

11. The Respondent's decision-maker determined that the Appellant did not meet the requirements of the Immigration Rules because he was essentially "*a capable adult who is able to look after [him]self*". (It was also suggested that he had "*a number of adult siblings, residing in Nepal to whom [he] can turn for assistance if so required*". As subsequently noted by the First-tier Tribunal Judge (Decision at paragraph 5), this observation was in error - of the Appellant's 3 siblings, one lives in Hong Kong, one lives in the UK, and one is deceased. Nothing ultimately turns on this error of fact.)

12. In respect of consideration of the Article 8 case law that has developed in respect of Gurkha cases regarding 'historic injustice', the pertinent passages of the RFRL are in these terms:

"I am not satisfied that you have been affected by the Historical Injustice.

...

You have grown up in Nepal. I am mindful that the adult children of the widow of former Gurkha do not automatically qualify for settlement. There is no bar to your mother returning to Nepal either permanently or temporarily. Even if I am to accept that refusal may be an interference with private life, I am not satisfied that you have established family life with your parents over and above that between an adult child and his parent(s) or that you have demonstrated "real" or "committed" or "effective" support from your parent(s). I am not satisfied that you have demonstrated that Article 8 is engaged."

...

As stated above, your mother chose to apply for settlement visa (which is her right) in the full knowledge that you did not automatically qualify for settlement. I am not satisfied that you have established family life with your mother over and above that between an adult child and parent or that Article 8 is engaged and thus consideration as outlined in Ghising applies to you.

However, in the alternative if it is considered that Article 8 is engaged, I must take into consideration how the historical injustice has affected you individually. Given the above I consider that the effect of the historical injustice has not been such that you have been prevented in leading a normal life. Therefore, it does not outweigh the proportionality assessment under Article 8 and I consider that refusing this application is justified and proportionate in order to protect the rights and freedoms of others and the economic well-being of the country.”

13. The Appellant appealed to the IAC.
14. The appeal was heard on 21 April 2021 using the Cloud Video Platform ('CVP'). The sponsor and her daughter (the Appellant's sister) participated in the hearing by way of video connection, as did the Appellant's representative. The Appellant did not join the video hearing. There was no representative for the Respondent.
15. It is apparent from the Skeleton Argument before the First-tier Tribunal (settled by Counsel who appeared on behalf of the Appellant before the First-tier Tribunal), that it was not disputed that the Appellant could not succeed under the terms of the Respondent's policy, or otherwise under the Immigration Rules. The case was put on behalf of the Appellant against the framework of **Ghising**: that Article 8(1) was engaged, and that in consequence of the historic injustice the proportionality assessment should be determined in the Appellant's favour. (This limited basis upon which the appeal was presented was recognised by the First-tier Tribunal Judge – see paragraph 19.)
16. The appeal was dismissed on human rights grounds for reasons set out in the 'Determination and Reasons' of Judge Raymond promulgated on 12 May 2021.

17. The Appellant made an application for permission to appeal to the Upper Tribunal.

18. As noted in the grant of permission to appeal, the Grounds of Appeal do not make for easy reading. Be that as it may we note in particular that amongst other things it is pleaded:

“The evidence was credible and there are no adverse credibility findings in this matter” (Ground (b), paragraph 11).

“The FTJ should have allowed the appeal on the basis of the historic injustice” (Ground (e), paragraph 18).

“The FTJ concluded that there is no evidence that the Appellant suffered an historic injustice. This is contrary to settled case law. Further, it was not possible for the Appellant’s late father to come and settle in the UK before his death with the Appellant because it is well settled that there was not and to date there is not any policy for individuals like the Appellant to settle in the UK. Because of his age. He was over the age of 18 when the 2009 policy was introduced and he was over the age of 30 when the 2015 policy was announced.” (Ground (g), paragraph 25).

19. Permission to appeal was granted in material part in the following terms:

“2. ... The Grounds, whilst repetitive and somewhat confusing in places, effectively criticise the way the FtT Judge approached the assessment of the Article 8 claim, particularly in her treatment of the issue of historic injustice and/or provided inadequate reasons for the findings made.

3. Whilst the Judge recites the evidence given in some detail I am satisfied that it is arguable that the approach taken to the question of Article 8 was flawed. In particular, given the FtT Judge’s finding that there was family life [26] between the Appellant and the Sponsor, it is arguable that the Judge failed to provide adequate reasons as to why Article 8 was therefore not engaged, and/or failed to carry out a full and proper proportionality assessment, and/or failed to provide adequate reasons for conclusions ultimately reached. In the circumstances I am satisfied that it is arguable that the Judge made a material error/s in law.

4. Permission to appeal is therefore granted. No restriction is placed upon the grounds that may be argued.”

20. The Respondent filed a Rule 24 response dated 13 October 2021 resisting the challenge to the decision of the First-tier Tribunal.

Consideration of ‘Error of Law’

21. Consistent with the manner in which the Appellant’s case was put before the First-tier Tribunal pursuant to the principles and guidance set out in **Ghising**, the challenge to the First-tier Tribunal’s decision focused on the two elements of ‘historic injustice’ and Article 8(1).
22. Mr Tufan, in helpful and realistic submissions, acknowledged that the First-tier Tribunal had erred in respect of ‘historic injustice’, and accepted that there was sufficient uncertainty in the Judge’s reasoning in respect of Article 8 to amount to an error of law. However, he sought to persuade us that the Article 8 error was not material to an extent that the decision could be upheld. We disagree with this latter aspect of Mr Tufan’s submissions.

Article 8(1)

23. The concluding paragraphs of the Decision of the First-tier Tribunal set out the key findings. They are particularly pertinent to the issue that has arisen for our consideration in respect of Article 8(1):

“26. I therefore conclude that whilst I accept there is a family life between the appellant and sponsor, which the sponsor has maintained since her 2005 obtaining of settlement in the UK, by regular visits to Nepal, to be with her husband whilst he was alive into 2016, and her son, and which it would seem she has found more difficult to maintain due to declining health in recent years.

*27. The appellant, and his two witnesses, have not established a dependency on his part upon his mother the sponsor, as was identified in **Jitendra RAI v ECO (New Delhi) [2017] EWCA Civ 320**, by Lindblom LJ at paragraphs 36-37, with whom Henderson and Beatson LJ agreed, as amounting to a threshold of “support” that is “real” or “committed” or “effective”, and in that way compatible with the approach established in **Kugathas** for family life between adults as being that “something more exists than normal emotional ties”, and without the need for any extraordinary or exceptional feature to be present.*

28. As a result, I find that Article 8 is not engaged on the basis that the personal circumstances of the appellant are rendered exceptional

by the historical injustice, and sufficient to outweigh the public interest in the maintenance of firm immigration controls."

24. As noted above, Mr Tufan accepts that there is a lack of clarity and reasoning in the Judge's decision across these paragraphs.
25. The Judge appears to make a finding at paragraph 26 that family life exists between the Appellant and the Sponsor. On its face this is in substance a finding that Article 8 is engaged. As identified in the grant of permission to appeal, it is not readily understandable by what process of reasoning the Judge concluded that notwithstanding the existence of family life Article 8 was not engaged.
26. Mr Tufan submitted that it should be inferred that the Judge had intended to conclude that Article 8 was not engaged, and that the use of 'family life' at paragraph 26 should be seen as informal or 'everyday' usage - for example, as no more than a recognition that there was a family relationship of mother and son - and should not be understood as a 'term of art' or in a strict legal sense. This inference could be made further to the Judge's analysis of financial dependency at paragraphs 22-24.
27. Whilst we acknowledge that the analysis at paragraphs 22-24 appears to inform paragraph 27, we are not persuaded without more that in a case where the core issue was 'family life', the Judge could have made an inappropriately informal use of the term.
28. In this context, and generally, it is to be acknowledged that any confidence in the clarity of the Judge's acceptance that "*there is a family life between the appellant and sponsor*" is undermined by the use of the word 'whilst' at the beginning of the single-sentenced paragraph 26. The phrase "*I therefore conclude that whilst I accept there is a family life...*" gives rise to anticipation of a further clause that does not seemingly materialise.
29. One possibility is that paragraph 27 was intended as the qualifying clause: in effect - '... whilst I accept there is a family life... the appellant... has not established a dependency'. But that would be to confuse the potential relevance of 'dependency' to the notion of 'family life'.

30. What the reader is presented with is an apparent finding at paragraph 26 that family life exists, followed by the Judge's seemingly separate finding at paragraph 27, against the framework of the case law in **Rai** and **Kugathas** that "a dependency" has not been established. On the assumption that the Judge understood the jurisprudence correctly, such a conclusion is not consistent with the finding in the preceding paragraph that family life exists.
31. In the circumstances we find that we are left with considerable uncertainty as to whether the Judge perhaps thought that there was some further requirement in the context of Gurkha cases with regard to real, committed, or effective support – rather than this being a component of the primary question of engagement of Article 8. The likelihood of such an erroneous approach is reinforced by the conclusion expressed at paragraph 28 to the effect that "*As a result... Article 8 is not engaged on the basis that the personal circumstances of the appellant are rendered exceptional by the historical injustice, and sufficient to outweigh the public interest in the maintenance of firm immigration control*" (our emphasis). The use of 'As a result' following on from the brief analysis at paragraph 27 seems to equate the possible availability of an historic injustice argument to dependency.
32. If, in the event, the Judge meant something quite different – this is not expressed.
33. The reader is unfortunately left with uncertainty as to the Judge's understanding of the principles and how they were applied in the instant case. For example, if it was the Judge's intention to conclude that there was no family life such as to engage Article 8, this is not reconcilable with paragraph 26; if, on the other hand, the Judge was indeed satisfied that family life existed, it is not apparent on what basis the Judge considered that Article 8 was not engaged or that it was otherwise appropriate to depart from the guidance in **Ghising**.
34. In our judgement the deficiency in clarity of reasoning is such that we do not accept Mr Tufan's invitation: no inference as to the Judge's intended findings and reasoning may reasonably or safely be made.

35. This error thus identified in respect of Article 8(1) is sufficient in itself to justify setting aside the decision of the First-tier Tribunal.
36. Be that as it may, we note that there is a further error in respect of the Judge's evaluation of family life. This arises in the context of the history of the Sponsor's movements.
37. For the avoidance of any doubt, we have not placed reliance on this matter in reaching our conclusion in respect of 'error of law'. Although this matter was the subject of some discussion at the hearing before us, it is not a matter explicitly raised in the Grounds of Appeal. However, we set out our consideration of it here because it is relevant to the remaking of the decision in the appeal.
38. It was uncontested that the Sponsor had been granted indefinite leave to remain in the UK on 15 October 2005. The Sponsor's application for settlement was made at a time when she was present in the UK having entered as a visitor earlier in 2005 to help her daughter as she approached a confinement. (We return below to the basis of this grant of leave.)
39. The written evidence before the First-tier Tribunal by way of the Sponsor's witness statement, and the witness statement of the Sponsor's daughter (the Appellant's sister) Ms Lalita Limbu (d.o.b. 8 June 1979) is clear and consistent in indicating that the Sponsor thereafter returned to Nepal, visiting the UK regularly - albeit occasionally and for limited periods - before her last entry in March 2021. See:

(i) Sponsor's witness statement of 8 April 2021, paragraph 6:

"In 2005, I went to visit my daughter, Lalita, and her family in the UK. My daughter was expecting her first child. I took care of her and her child after delivery. My daughter and son-in-law advised me to apply for settlement visa. I was granted settlement visa and 15.10.2005. I stayed with my daughter's family for around one year and returned to Nepal. I continued to visit them briefly in every one or two year."

(ii) Witness statement of Lalita Limbue of 8 April 2021, paragraph 4:

"In 2005, I was expecting our first child. As per our custom, my mother visited us in the UK to take care of me and my child. She stayed with us for nearly one year. We applied for her settlement visa. She was granted Indefinite Leave to Remain (ILR) on

15.10.2005. She visited us in 2006, 2007, 2011, 2015, 2016, 2017, 2019 and latest in March 2021. I have been taking care of her when she is with us. She lived with us for a couple of months only then returned to Nepal to take care of my brother, [the Appellant]."

40. The First-tier Tribunal Judge appears to acknowledge the substance of these statements at paragraph 8 of the Decision, and also notes supporting evidence by way of passport stamps. However, in the same paragraph the Judge then writes:

"The sponsor in oral evidence said that she had returned to Nepal some 15 months after having obtained leave to remain in 2005, and afterwards she would return to Nepal roughly every two years, having been 5-6 time since, her longest stay in Nepal having been one month, and otherwise for about two weeks. The purpose of the visits was to see [the Appellant]."

41. We note that the manner in which the Sponsor's oral evidence is recorded in the latter part of paragraph 8 of the Decision is discrepant with the substance of the witness statements of the Sponsor and her daughter. The substance of the written evidence is that notwithstanding the grant of indefinite leave to remain, the Sponsor continued to live mainly in Nepal, making visits to the UK from time to time; the way in which the Sponsor's oral evidence is recorded in the Decision is to the effect that she lived mainly in the UK, making occasional short visits to Nepal.
42. The way in which the Sponsor's oral testimony is set out in the latter part of paragraph 8 is also seemingly inconsistent with the observation made by the Judge at paragraph 14 that *"There is evidence from the Nepal that in the last few years the sponsor has been followed in Nepal by medical doctors for her health issues focusing upon her diabetes, principally at the BP Koirala Institute of Health Sciences in Dhahran, between 2018 and 2020"*.
43. However, the Judge does not expressly identify that there is a discrepancy here, and in the absence of any express identification there does not appear to be any attempt to reconcile any such discrepancy. Yet at paragraph 26 the Judge appears to proceed on an understanding that direct contact between the Appellant and the Sponsor had been on the basis of the visits to Nepal, with such visits having been more difficult to maintain *"in recent years"*. This foundation for any consideration of family life is in stark contrast to the position set out in the witness statements to

the effect that from the period following the Appellant's return to live in Nepal after finishing working abroad in 2018, he and his mother were living together in the family home owned by her, save for a period when she visited the UK in 2019, up to and including the date of the Appellant's application and the date of the Respondent's decision, and beyond until she entered the UK in March 2021 (only a short period before the appeal hearing).

44. It seems to us that the Judge has either proceeded on the basis of a fundamental misconception of fact amounting to an error of law; or, alternatively, has proceeded on the basis of a finding that implicitly rejects aspects of the oral and supporting documentary evidence, without articulating any reason for such a finding.
45. Given the consistency of the witness statements, and the supporting evidence seemingly not queried by the Judge in respect of passport stamps and medical treatment in Nepal, and in the absence of any further exploration by the First-tier Tribunal Judge, we are minded to the view that the apparent statements of the Sponsor in this regard at the hearing are unreliable - whether that be arising from her own confusion, a translation error, or a misunderstanding on the part of the Judge.
46. Be that as it may, as stated above, although we have addressed the matter herein, it has not formed the basis upon which we have concluded that the decision of the First-tier Tribunal should be set aside.

'Historic Injustice'

47. The 'historic injustice' in Gurkha cases as identified in **Gurung** and applied in such cases as **Ghising** is that the scheme of immigration control previously prevented settlement in the UK. For example, see at paragraph 21 of **Ghising** - "*For many years Gurkha veterans were treated less favourably than other comparable non-British Commonwealth citizens serving in the British army. The Secretary of State had a concessionary policy outside the Immigration Rules which allowed Commonwealth citizens subject to immigration control who were serving and former members of the British Armed Forces to obtain, on their discharge, indefinite leave to enter and remain in the UK, but Gurkhas were not included in the policy*". It is that old, and now reformed, scheme that constitutes the historic injustice. The fact of an historic injustice is no longer up for debate in any particular case. However, what is relevant in the context of an Article 8 appeal is the weight to be accorded to the historic injustice. The particular formulation of paragraph (4) of the

headnote in **Ghising** is often – as it was here – the basis upon which an adult child of a former Gurkha soldier who cannot meet the requirements of current policy puts their case:

“Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant’s favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.”

48. At paragraph 11 of the Decision the Judge quotes from paragraph 12 of the Sponsor’s witness statement, which includes the following:

“My husband always wanted to settle in the UK, but that policy was not available during the time of his discharge. If the policy were available he would have happily accepted that. He would have raised our family in the UK. Our children, including [the Appellant], would have got much better opportunity for the education and employment in the UK. But that did not happen.”

49. That evidence stood unchallenged.

50. Moreover, we note that there is some contextual support for it, in that the Appellant’s father after discharge worked outside Nepal as a Security Officer at the Gurkha Reserve Unit in Brunei between 1986 and 1995 to support his family because his army pension was insufficient. His wife and children remained in Nepal at this time. This indicates that the Appellant’s father sought economic betterment outside Nepal – albeit at the cost of living apart from his family; it is no difficult inference that were the opportunity available to settle in the UK as a family, such an opportunity would have been taken.

51. Be that as it may, in our judgement the First-tier Tribunal Judge was in fundamental error at paragraph 21:

“I find that there is no evidence that, as a matter of fact, the appellant suffered an historic injustice because his Gurkha soldier father was deprived of the chance of settling in the UK. The evidence is that the father of the appellant was never interested in doing so, after discharge from the Gurkha Brigade in 1985, despite being

advised he could do so, and not least by his son-in-law in the UK he chose rather to spend the rest of his life until 2016 in Nepal."

52. There was clear and unchallenged evidence that the Appellant's father would have wanted to settle in the UK at the time of his discharge if that had been an available opportunity. The Judge has erroneously focused upon circumstances at a considerably later date - from in or about 2005 when the Sponsor obtained settlement. By this time the Appellant's father was retired and living in Nepal. Further, as explained in the Sponsor's witness statement, he was not minded to apply under the subsequent policies because to do so would not avail his children who were then over 18. Indeed the Judge seemingly acknowledged that the evidence in respect of the Appellant's father's lack of interest was with regard to "*acquiring settlement in the UK under the Gurkha policy*" (paragraph 5); necessarily there was no such policy in 1985 - but this nuance does not find its way into the reasoning at paragraph 21. (This point is emphasised in the Grounds of Appeal to the Upper Tribunal at paragraph 25 - quoted above.) It seems to us that the fact that the Appellant's father in the latter stages of his life was not minded to relocate to the UK is not remotely inconsistent with the notion that he would have been so minded if such an opportunity was available to him at the age of 34 with a young family to support. His latter attitude does not contradict the evidence of the Sponsor - which, as we have already observed, stood unchallenged before the First-tier Tribunal - that he would have wanted to settle in the UK at the time of discharge if policy at the time had allowed it.

53. Mr Tufan acknowledged the First-tier Tribunal's error in this regard.

54. This is a convenient juncture to note that Mr Tufan also accepted that the Judge had proceeded on a factual misconception in respect of the basis of the Sponsor's grant of indefinite leave to remain.

55. As we have noted above, in the RFRL the Respondent expressly acknowledged that the Sponsor had been granted settlement "*on the basis of being the spouse of a former Gurkha*". For reasons that are entirely unclear, particularly bearing in mind that there was no representative for the Respondent before the First-tier Tribunal and as such nothing to indicate the Respondent sought to advance a different proposition, the Judge determined that the Sponsor's status was "*for reasons totally unconnected with the Gurkha policy*", and surmised that it was on the basis of being "*the elderly relative of her daughter already then residing in the UK*" (paragraph 1). Indeed, this matter - which was not

seemingly an issue between the parties – is referred to or discussed, at some length, at a number of points in the Decision; see paragraphs 1, 5, 9 and 21.

56. Mr Tufan had checked the Respondent's records – as, we think, it is reasonable to assume had the original decision-maker. He confirmed to us that the records were consistent with what was acknowledged in the RFRL: an application had been made as the dependent spouse of a husband who had been discharged from the Brigade of Gurkhas, and indefinite leave to remain granted on that basis. To that extent, as Mr Balroop observed, the Respondent had seemingly implicitly acknowledged that the element of 'historic injustice' sounded in favour of a dependant of the Appellant's father – and as such ought also to sound in favour of the Appellant. The grant of settlement to the Sponsor implied that the Respondent had accepted that but for the historic injustice she would have settled in the UK earlier.

Incidentally...

57. Although what follows are not matters that arise directly from the Decision of the First-tier Tribunal, and accordingly do not inform our conclusion on 'error of law', we consider it appropriate to make some comment on the reasoning of the RFRL in respect of the Sponsor obtaining settlement and in respect of the approach to 'historic injustice'.
58. The RFRL makes reference to the Sponsor's choice to apply for settlement "*in the full knowledge that [the Appellant] did not automatically qualify for settlement*". With respect, this is entirely to miss the point of the jurisprudence in respect of Article 8 and the historic injustice. The passage in the RFRL in this regard does little more than repeat the formulations that were the subject of criticism at paragraph 39 of **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**.
59. Further, we disapprove of the passage in the RFRL - "*the historical justice has not been such that you have been prevented in leading a normal life*". We are wholly unable to identify from where in the guidance that emerges from the case law the relevance of such a notion might be derived. Indeed in our judgement reliance upon such a formulation is in substance inconsistent with **Ghising** in so far as it relates to the question of whether an applicant / appellant would have settled in the UK long ago but for the historic wrong. That question does not require and does not invite embarkation on any sort of speculative comparative analysis of what the Appellant's life might have been, against what it is.

Conclusion on Error of Law

60. For the reasons given, we conclude that the Decision of the First-tier Tribunal contains material errors of law in respect of the issue of the engagement of Article 8, and in respect of the question of whether the Appellant would have been settled in the UK long ago but for the historic wrong. The errors are such that the Decision requires to be set aside.

Re-making the Decision in the Appeal

61. In arguing that the error in respect of the engagement of Article 8(1) was not material, Mr Tufan addressed us on the substance of the issue of family life. He confirmed that in the event that we were to set aside the Decision of the First-tier Tribunal he would not seek to advance any further arguments in respect of remaking the decision, but would rest upon the same submissions. Mr Balroop similarly confirmed that in the event that we were to find a material error of law requiring the Decision of the First-tier Tribunal to be set aside, he would be content for the decision in the appeal to be remade on the basis of the available evidence and further to the arguments and submissions entertained in the course of considering 'error of law'.
62. After deliberation, at the conclusion of the hearing we informed the parties that we had concluded that there was a material error of law requiring the Decision to be set aside, and that we would remake the decision in the Appellant's favour.
63. We have explored above the evidence in respect of the Sponsor's movements. We are satisfied on a balance of probabilities that notwithstanding the grant of settlement in 2005, the Sponsor continued to base her life in Nepal. We acknowledge that the focus of that life would have been around her husband up until his death in 2016, and also acknowledge that throughout this period from 2005 to 2016 the Appellant was essentially living and working outside Nepal.
64. It has been the consistent assertion of the Appellant and his witnesses that he gave up working abroad in 2018 in order to look after his mother. It seems to us that there is no real challenge that the Appellant did indeed resume living in the family home, owned by his mother, from 2018 to the present. Nor do we consider that there is any real challenge to the

evidence that he assisted his mother with her medical care (including paying bills), and administering her diabetic medication.

65. This is not to deny that aspects of the evidence were doubted by the First-tier Tribunal Judge, in particular the Appellant's exact financial circumstances. However, even if it were the case that the Appellant had retained some savings from his work abroad, this does not detract from the claim that he had met his mother's medical bills, and was living with her and caring for her in a house owned by her between 2018 and her departure for the UK in March 2021. We accept on a balance of probabilities that the evidence demonstrates a material and emotional inter-dependence sufficient to amount to family life within the meaning of Article 8(1) as contemplated in **Kugathas**.
66. We find that Article 8 is engaged accordingly.
67. We accept the Sponsor's unchallenged evidence to the effect that her husband would have sought to settle in the UK upon discharge from the Brigade of Gurkhas in 1985 if that option had been available to him, and that he would have liked to have brought his wife and young family to live here to avail them of the economic and educational opportunities that were perceived to be better than those in Nepal.
68. The Respondent has not raised any countervailing factors beyond the imperative of maintaining effective immigration control.
69. In all such circumstances, and in accordance with the guidance in **Ghising**, we conclude that the Article 8 proportionality assessment is to be determined in the Appellant's favour. The refusal of entry clearance constitutes a disproportionate interference with the Appellant's Article 8 rights.
70. The appeal succeeds on human rights grounds accordingly.

Notice of Decision

71. The decision of the First-tier Tribunal contained material errors of law and is set aside.

72. The decision in the appeal is remade. The appeal of Mr Hem Prakash Limbu is allowed.

73. No anonymity direction is sought or made.

Signed:

Date: **3 January 2022**

Deputy Upper Tribunal Judge I A Lewis

To the Respondent

Fee Award (*This is not part of the determination*)

The appeal has now been allowed and in all the circumstances a full fee award is made.

Signed:

Date: **3 January 2022**

Deputy Upper Tribunal Judge I A Lewis

(*qua* a Judge of the First Tier Tribunal)

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