



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25313/2018  
HU/25314/2018  
HU/25315/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 November 2020

Decision & Reasons Promulgated  
On 16 December 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) ASIM LIMBU  
(2) NISHA LIMBU  
(3) UPAMA LIMBU  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

**Representation:**

For the Appellant: Ms Jaja, instructed by Everest Law Solicitors  
For the Respondent: Mr Tufan, Senior Presenting Officer

**DECISION AND REASONS**

1. On 8 July 2020, I issued a decision in which I held that the First-tier Tribunal had erred materially in law in dismissing the appellants' appeals against the respondent's refusal of their applications for entry clearance. I ordered that the decision of the FtT would be set aside in full and that the appeal would be retained in the Upper Tribunal for rehearing *de novo*. My earlier decision is appended and should be read alongside this decision.

**Background**

2. The appellants are siblings who were born on 25 July 1988, 7 November 1989 and 8 May 1993 respectively. They are currently 32, 31 and 27 years old. They are Nepalese nationals who seek to join their mother in the United Kingdom. She is

Dil Maya Limbu, a Nepalese national who was born on 25 April 1967. Her late husband and the father of the appellants was Gyaneshor Limbu, a retired Gurkha soldier. Corporal Limbu served in the Brigade of Gurkhas for fifteen years, in locations across the world. The appellants were born in Hong Kong whilst he was deployed there. His Certificate of Service, issued on 13 September 1993, recorded his excellent service throughout.

3. Mr Limbu passed away on 1 January 2015. On 17 September 2018, the appellants and the sponsor applied to come to the United Kingdom together. They gave their permanent residential addresses as Dhankuta in the east of the country. They stated that they intended to settle in the United Kingdom as the spouse and children of a retired Gurkha soldier. The application forms completed by each of the appellants ended with a statement which provided some additional information about each of them. This is what was said on the first applicant's form:

I am son of late Gyaneshor Limbu, an ex-British Gurkha who served as a CPL. I live with my mother and I am still unmarried and unemployed. My mother is planning to go to the UK along with me, and my siblings on settlement visa. I wish to go to the UK along with my mother and siblings for better future. I kindly request you if you could grant me with required visa so that I can be with my family rather than live separately and have a better life. Although I had completed degree of Doctor of Medicine from Philippines, I am still not able to earn a living in Nepal. I had given examination for job at Public Service Commission which is very tough competition exam and unfortunately I had failed the examination last year. Even being a doctor by profession I am still unemployed in Nepal. I am financially and emotionally dependent on my mother.

4. The sponsor was granted entry clearance. The appellants' applications were refused on 6 December 2018. The ECO considered the Adult Dependent Relative provisions in the Immigration Rules first. She considered that the appellants were fit and well and that they could not meet those requirements. She considered Annex K to Chapter 15 of the Immigration Directorate Instructions. She held that this did not apply to the appellants, since they were not in the process of joining a retired Gurkha, and the Annex made no provision for those seeking to join the spouse of a late Gurkha. Consideration was then given to Article 8 ECHR. The respondent cited domestic and ECtHR authority and concluded that the appellants had failed to demonstrate real or committed or effective support from the sponsor. She was not satisfied that Article 8 ECHR was engaged in its family life aspect. Even if it was, the respondent concluded that the decision to refuse entry clearance was proportionate to the legitimate aim of maintaining immigration control in each case. On review, following the appeals being lodged, an Entry Clearance Manager was not persuaded to reverse the decisions.

### **Documentary Evidence**

5. In preparation for the hearing before the First-tier Tribunal, bundles were filed by each party. The respondent's bundle contains the applications forms, notices

of decision and documents relating to Mr Limbu's service. It also contains a note from the Pension Payments Office of the British Gurkhas in Nepal, which states that the sponsor was entitled to a pension of £210.71 per month (30,243.92 Nepalese rupees) as the spouse of her late husband.

6. There were two bundles filed by the appellants' solicitors. The first is properly indexed and paginated but it contains a number of documents which were irrelevant to the issues in the appeal. There were eight documents which went to the identities of the appellants and their relationship to their mother and father, although that biological relationship was never in issue. Also in this bundle of fifty pages, however, were records of the appellants' academic achievements. The first appellant graduated as a Doctor of Medicine on 28 March 2015, from Emilio Aguinaldo College in the Philippines. The second appellant had studied towards a medical qualification at Dhaka National Medical College in Bangladesh, starting in 2009. The third appellant had left school in the First Division, scoring an overall average of 70.13%.
7. There was also a second bundle, which was neither indexed nor paginated. This contained statements made by the appellants on 5 September 2019, further copies of identity documents, one money remittance slip dated 31 May 2019, one payslip in the sponsor's name showing net pay of £733 in the month of June 2019, several pages of printed messages from a mobile telephone (largely in Nepali); the sponsor's Lloyd's bank account statement (2 August 2019 to 3 September 2019); and the sponsor's Standard Chartered bank account statement (1 January 2019 to 21 September 2019).
8. No further documentary evidence was adduced before me. Mr Tufan had not received the second bundle and I gave him a little time to consider that bundle, after which he confirmed that he was ready to proceed.

### Oral Evidence

9. I should record that there was an application, between my decision of 8 July 2020 and this remaking hearing, for the appellants to give evidence from Nepal. Since the remaking hearing was initially to be remote, the appellants' solicitors sought permission for them to give evidence from Nepal via Skype. I asked the appellants' solicitors to address the considerations set out in Nare [2011] UKUT 443 (IAC) but they were unable to establish that the Nepalese government had no objection to live evidence being given from within its jurisdiction to a Tribunal in the UK: [21](d) of Nare refers. It was in those circumstances that I refused the application. It was not renewed by Ms Jaja before me. As a result, the only oral evidence I heard was from the sponsor.
10. The sponsor gave evidence through a Nepalese interpreter. They confirmed before she gave evidence that they were able to converse freely and it was not suggested at any point that there were any difficulties with interpretation. I do not propose to rehearse the oral evidence which was given. I shall refer to it insofar as it is necessary to explain the findings I have reached.

## Submissions

11. Mr Tufan submitted that the only issue to be resolved was whether Article 8(1) was engaged in its family life aspect. In the event that it was, it was clear from the authorities (Gurung [2013] EWCA Civ 8; [2013] 1 WLR 2546 and Ghising [2013] UKUT 567 (IAC)) that there could be only one outcome to the proportionality assessment, such was the weight to be attached to the 'historic wrong' against the Gurkhas and their family members. It was agreed between the parties that the correct test was as distilled by Lindblom LJ (with whom Beatson and Henderson LJ agreed) at [36] of Jitendra Rai [2017] EWCA Civ 320: whether there is real or effective or committed support. That was the litmus test by which it was to be decided whether the relationship between the appellants and the sponsor disclosed more than normal emotional ties.
12. Mr Tufan recalled that there had been a concern expressed by the First-tier Tribunal about the place in which the appellants were living: their home village of Dhankuta or Kathmandu. A fresh concern had arisen in the oral evidence given by the sponsor. She had stated that she had moved to Kathmandu with the children for the purpose of the application (for entry clearance) but her witness statement suggested that she had moved there in 2008. There were significant problems with the credibility of the evidence; it was inherently unlikely that the first appellant would be unable to find work, as a qualified doctor, for more than two years. Equally, it was not credible that the second appellant would have been unable to find any work whatsoever in Kathmandu. It was more probable than not, in Mr Tufan's submission, that the first and second appellants were working and were self-sufficient. Although it was accepted that the sponsor made her husband's pension available for the appellants' use, that did not amount to real, committed or effective support for the purposes of Article 8 if, as he maintained, the appellants were in work and independent.
13. Mr Jaja noted that it was accepted by the respondent that the sponsor made her pension available for the appellants' use. There was nothing persuasive adduced by the respondent to cast doubt on what was said by the appellants to be the truth of their circumstances. It was agreed between the parties that the test to be applied was that in Jitendra Rai. In order to consider whether there was real or committed or effective support, the proper approach was to consider all of the evidence in the round. It was noteworthy that the sponsor had been required to make four entry clearance applications at a cost of more than \$2000 each. That money had been raised by the community. The case had been dismissed in the FtT and the sponsor had funded the cost of an onward appeal to the Upper Tribunal. It was relevant that she had borne that cost as it showed an element of dependency or support. The sponsor received her pension into her Standard Chartered account and she made all of that money available to the children. It was now in the region of 36,000 rupees per month. The family home, in Dhankuta, was now occupied by the sponsor's brother-in-law and his family. It was notable that the sponsor had always tried to live with her children; wherever she was, the children were.
14. It had been submitted by Mr Tufan that there was a discrepancy between what was said in the witness statement and what was said orally as regards when the sponsor moved to Kathmandu. She had agreed that she moved to Kathmandu

'for this process' but this was not to be taken too literally. Two properties had clearly been available to the family at the material times. If the appellants had not lived with the sponsor, it was because they were studying elsewhere, whether in Nepal or further afield. The fact that the first appellant had studied in the Philippines was not to be held against him, as he remained dependent upon his mother throughout: Pun [2011] UKUT 377 (IAC). There was some evidence of additional funds being sent by the sponsor to the appellants but in any event, if the sponsor was genuinely making available all of the funds she receives for her husband's pension, the test in Rai would be met. It was to be recalled that there was also contact by Viber or Whatsapp. The first appellant's efforts to secure work in Nepal had been set out in detail and it was apparent that he had only managed to secure a brief stint of part time medical work. There was no record that he had failed the Public Service examination but he had submitted all other evidence of academic achievements. Even if the first appellant did have a job, what was sent by way of funds sufficed to engage Article 8 ECHR. It was relevant, as explained in [17] of Rai to consider why the sponsor was in the UK; she had not voluntarily separate from the appellants and relocated to the UK; she had availed herself of the settlement to which she was rightfully entitled, in the hope that they could join her here. In considering that submission, it was also relevant that they had applied together for entry clearance. I was also invited to note that the appellants were all around the age of thirty.

15. I reserved my decision at the end of submissions.

### Analysis

16. As will be apparent from the above, there is a good deal of common ground on the law and the facts. It is agreed that I should apply the test in Jitendra Rai to the question of whether Article 8(1) is engaged in its family life aspect. It is not necessary, in those circumstances, to direct myself at length in accordance with the other authorities (from Advic v the United Kingdom (1995) 20 EHRR CD 125 to Pun v SSHD [2017] EWCA Civ 2106; [2018] 4 WLR) in which the nature of that assessment has been explored in depth. Nor is it in dispute that the engagement of Article 8(1) in its family life aspect would be determinative of the appeal. That concession has not uniformly been made before me in appeals of this nature but I regard it as absolutely correct in light of Ghising (No 2) and [55]-[57] of Jitendra Rai.
17. As for the facts, it is not in dispute that the appellants currently live together in Kathmandu and that the sponsor makes available to them the funds which enter her Standard Chartered bank account as a result of her husband's pension. As Ms Jaja noted in her submissions, the more recent bank statements show that the pension has increased beyond the level in the letter from the Brigade. The bank statements (all of which are from 2019) show that it had risen to more than 36,000 rupees per month, or around £225 per month.
18. It is not in dispute that the first appellant graduated as a medical doctor after eight years studying in the Philippines, between 2007 and 2015. Mr Tufan did not suggest that this course of study was not paid for by the sponsor and her late husband. Nor is it in dispute that the second appellant embarked upon medical

studies in Bangladesh and that the third appellant embarked upon a degree in law.

19. The nature of the relationship between the appellants and the sponsor is otherwise very much in dispute, both as regards the current position and (recalling what was said in Rai) the position when the sponsor came to the UK in early 2019. In her witness statement, the sponsor gave an account of how she and the children had moved around in the years preceding the applications for entry clearance. I need not set it out in full, encompassing as it does the travels of the first appellant to Manila and the second appellant to Bangladesh, as well as the time that the children spent in a hostel in Britnagar whilst they completed their schooling. The critical point is that the family home has remained in Dhankuta and the sponsor says in her statement that she lived in that family home until 2008 or 2009, at which point she moved in with the second appellant in Kathmandu.
  
20. Mr Tufan submitted that the evidence given orally by the sponsor was materially different. He based that submission on the following questions and answers in cross-examination:
  - Q. Just before you arrived in the UK, where were you all living?
  
  - A. We were together as we were in the process of coming to the UK.
  
  - Q. Were you together just for that process?
  
  - A. We rented a house for this process. They are now in that rented house
  
21. Ms Jaja submitted that these answers should not be taken too literally and that the words 'for this process' did not necessarily mean that the sponsor was suggesting that she had only moved to Kathmandu for the purpose of making the application for entry clearance. Ms Jaja did not suggest what else the answer might be taken to mean and I am at something of a loss in that regard. I clearly understood the sponsor to mean that she had only moved to Kathmandu in preparation for the entry clearance applications. That evidence stands in stark contradiction of the suggestion in the sponsor's witness statement.
  
22. The sponsor was also unsure in respect of basic matters about the property which the appellants occupy in Kathmandu. I asked a few questions by way of clarification, during which I asked about the property and the rent which was paid for it. I asked whether it was a house or a flat. The sponsor paused. During the pause, a gentleman who was sitting at the back of the court spoke to the sponsor in Nepali, after which she gave her answer that the property was a 'normal house'. Ms Jaja told me that the man who had spoken was the sponsor's cousin, who had come to court to assist with translating the sponsor's witness statement to her. He had evidently decided to provide rather more assistance than that, however, and Ms Jaja decided that it was necessary to invite him to move further away from the sponsor to avoid any further incidents of this nature.

23. In response to my question about the rent on the property in Kathmandu, the sponsor was equally unsure. She said that she was not sure and that it might be in the region of 17,000 to 18,000 rupees. In view of the claim that the sponsor is said to be entirely financially responsible for the appellants, and that she herself lives on a modest income from working at a fast food restaurant, I found it a matter of concern that she was unsure about this. It tended to suggest to me that there was at least one other source of income and that the sponsor was not supporting all four adults as she claimed.
24. It is inherently unlikely, in any country, that a qualified doctor with an unblemished professional record should remain unemployed for an extended period of time. The first appellant graduated from medical school in Manila in 2015 and returned to Nepal thereafter. It is said that he has been unable to find paid employment in Nepal, with the exception of a brief part-time stint in Kathmandu which ended in September 2018. The particular reason that he is said to have found it difficult to secure employment in his chosen field is that he failed the Public Service Commission ("PSC") examination. I explored the evidence in support of that assertion with Ms Jaja. At pp 39-41 of the appellant's main bundle, there is a copy of an Admission Card, which was issued in preparation for a PSC examination on an unspecified date. It bears an 'advertisement number' and 'roll number'. There is no documentary evidence beyond that, however. There is no document showing that he failed this examination, or by what margin. There is nothing to show what efforts, if any, he has made since he took this examination to re-take it. And there is no documentary evidence at all to show that he has sought employment or that he has not been able to secure any employment, whether because he has failed the PSC exam or otherwise. The trail simply goes cold at the point that he took the PSC exam, and the evidence given orally and in the witness statements stands unsupported by evidence which should, on any proper view, have been readily available. Ms Jaja came close, at one point in her submissions, to suggesting that there would be no confirmation that an individual had failed an examination of this nature. Insofar as there was any such suggestion, I reject it. I recognise, of course, that Nepal is a poor country but I cannot accept that the first appellant is unable to provide documentary evidence of his assertions that he failed the PSC and that he has been unable to find work as a doctor in Kathmandu. The sponsor said in her own evidence that the children remained in Kathmandu because they were more likely to obtain work there and that they spent all their time searching for work. The absence of evidence that those efforts have been unsuccessful suggests the contrary, in my judgment.
25. The absence of evidence in this case extends beyond the concerns I have noted above. In a case which is based not exclusively but to a large extent on what is said to be the complete financial dependence of three adults on their mother, I have very little evidence of the finances of the family. I have a single bank statement from the UK. That is the Lloyd's Bank statement which covers the period between 2 August and 3 September 2019. This statement raises more questions than it answers. On two consecutive days in September 2019, the sponsor received £1000 from a J Limbu. On 3 September 2019, there was also a deposit of £800 made at the branch in South Harrow. Mr Tufan asked about the £1000 deposits. The sponsor said that they had been borrowed from a Mr Limbu in order to help her with the legal fees incurred in this case but there is nothing

from Mr Limbu to support that assertion, nor is there any evidence to explain where the deposit of £800 came from. In the context of a woman who earns in the region of £400 to £500 per week before tax, and claims to be entirely responsible for three other adults, these are sizeable sums which called for a properly evidenced explanation. The absence of a proper explanation also suggests that there are additional sources of income available to this family.

26. The sponsor maintained in evidence before me that the first and second appellants have been unable to secure any employment in Kathmandu other than the first appellant's brief period of part-time employment. She also maintained that the third appellant continues to study law and that she foots the bill for that programme of studies. Oddly, however, there is no evidence to show that the third appellant is a law student, or that her mother pays for her course. In the event that either assertion was true, it would have been a simple matter to provide evidence in support of these claims. Given what has been said in cases such as Pun and Singh [2015] EWCA Civ 630; [2016] Imm AR 1, about the position of adult students whose studies are funded by their families, evidence in support of this assertion would have been provided if it was available.
27. Drawing these threads together, I find that the position of this family is more likely than not as follows. The first appellant is a qualified doctor who has been in employment in that field since he returned from the Philippines in 2015. He lives with his siblings in Kathmandu. They are also likely to be in employment. They live as a self-sufficient family unit in the capital city, paying their own rent and bills. It is accepted by the respondent – and I accept – that they have access to the sponsor's Standard Chartered bank account, into which their late father's pension is paid, but they do not require the money in that account. The sponsor has sent very little money (£600) since she has been in the UK, although she earns around £2000 per month and her rent and bills amount to under £500 per month. The sums which she has sent (I note the IME remittance slip and the IME payments in the bank statements) have not been required by the appellants to meet their needs and were sent purely to further the prospects of success of this appeal. I do not accept, in the circumstances of this particular case, that the funds which have been made available to the appellants amount to real or committed or effective support. The appellants would, I find, be perfectly able to support themselves without any support from their mother in the United Kingdom.
28. I do not accept that the sponsor lived with the appellants before she came to the United Kingdom. I consider that they had already established independent lives in Kathmandu and that she merely went to stay with them there whilst they applied for entry clearance to come to the United Kingdom. There is very limited evidence of contact between the appellants and the sponsor. There is a record of some telephone calls and messages between the appellant and the sponsor in the supplementary bundle. This provides very little assistance in establishing whether the appellants have more than normal emotional ties with the sponsor, or vice versa. Considering the difficulties with the evidence which I have highlighted above, I do not consider there to be any such ties. Nor do I consider that there were any such ties immediately before the sponsor left Nepal.



29. The sponsor wants the best for her adult children. Although I have no doubt that they are in work in Kathmandu, they plainly want to join her in the UK and to benefit from the higher standard of living in this country. I do not lose sight of the fact that she is aging and that she would prefer to have her adult children around her as she grows older, and that she would benefit from the financial support of her son (in particular) in the future. The family has expended considerable sums on the applications and legal fees for those reasons. But the law requires me to consider whether there was a family life in existence when she left Nepal and whether there is a family life in existence at today's date. For all of the reasons I have given, I do not find the appellants to have discharged the burden of establishing that to be the case. I find that Article 8(1) is not engaged in its family life aspect.
30. That conclusion is determinative of the appeal against the appellants, for the reasons given by the Court of Appeal in Pun. Even if there is a private life in existence between the appellants and the sponsor, it is only where family life continues to exist that great weight can be attached to the historic injustice against the Brigade of Gurkhas. Having found that there is no family life, I do not accept that the decision to refuse entry clearance is anything other than proportionate. The appellants fail to meet the Immigration Rules and the policy in Annex K and they are, on my findings, living an independent life in Kathmandu. There is nothing disproportionate about the refusal of entry in these particular circumstances.

### **Notice of Decision**

Having set aside the decision of the First-tier Tribunal, I remake the decision on the appeals by dismissing the appeals on human rights grounds.

No anonymity direction is made.

*M.J.Blundell*

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

13 January 2021



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25313/2018  
HU/25314/2018  
HU/25315/2018

**THE IMMIGRATION ACTS**

Decided on the papers

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ASIM LIMBU  
ZUPAMA LIMBU  
NISHA LIMBU

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

**DECISION AND REASONS (P)**

1. The appellants are siblings who were born on 25 July 1988, 7 November 1989 and 8 May 1993. They are nationals of Nepal who appealed against decisions made by the respondent Entry Clearance Officer (ECO), refusing their applications for entry clearance as the adult dependents of their mother. The sponsor is Dil Maya Limbu. Her husband, and the late father of the appellants, was Gyaneshor Limbu, a retired Gurkha soldier.

**Background**

2. The appellants' applications for entry clearance were refused by the ECO on 8 December 2018. Those decisions were upheld by an Entry Clearance Manager on 22 March 2019. So it was that the appeals came before a judge of the First-tier Tribunal, sitting at Hatton Cross on 25 September 2019. In her subsequent decision, issued on 30 September 2019, the judge dismissed the appeals on Article 8 ECHR grounds, finding that the appellants did not enjoy family life with their mother for the purposes of Article 8 ECHR.

### **The Appeal to the Upper Tribunal**

3. The appellants were granted permission to appeal against the judge's decision by First-tier Tribunal Judge Shimmin, who considered it to be arguable that the judge had misdirected herself in law regarding the test for the engagement of Article 8 ECHR in such circumstances; that she had misunderstood the law which applied to periods of time spent living outside the family home; and that she had made findings which were not in accordance with the evidence.
4. This appeal was due to be heard at Field House on 26 March 2020. On 20 March 2020, however, Field House closed its doors to the public amidst the global Covid-19 pandemic and the appeal hearing was adjourned. I reviewed the file on 26 March 2020 and directed the parties to consider whether the appeal could properly be determined on the papers and, if so, to make submissions upon it. Due to the pressure on the reduced staff at Field House, my directions were only sent to the parties on 7 May 2020.
5. If submissions were made by the appellants' representatives in response to my directions, those submissions are not before me. What is before me, though, is a short response from Ian Jarvis, a Senior Presenting Officer, on behalf of the ECO, and an email from the appellant's solicitors (Messrs Everest). Those two documents show that it is agreed between the parties that there need be no hearing to decide whether the First-tier Tribunal erred in law. That accords with the view I had provisionally taken. In light of the agreement between the parties, I am content to proceed to resolve that question on the papers, as permitted by rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
6. It is also accepted by Mr Jarvis that the First-tier Tribunal erred materially in law, for the following reasons.
7. At [11]-[14] of her decision, the judge expressed a number of concerns about the credibility of the account presented to her by the appellants and the sponsor. She was concerned that the sponsor had given her permanent residential address as the village of Dhankuta, which she considered to contradict the evidence of the sponsor that she had been living in Kathmandu before she came to the UK. The judge found it difficult to accept that the first and second appellants were unable to find work and that the family were finding it difficult to make ends meet. Doubt was cast on these assertions by the medical qualifications of the first and second appellants and the partially completed legal studies of the third appellant. She did not accept that the appellants were receiving funds from their mother, whether via Hundi transfer or via her bank account. She was not satisfied that the sponsor was providing real, committed and effective support for the appellants. She doubted whether the appellants and the sponsor were even living together before the latter came to the UK, and she noted that the sponsor had chosen to leave her adult children in Nepal and had not seen them since she did so.
8. It is accepted by Mr Jarvis that the judge failed to take material evidence into account in reaching the findings of fact I have summarised above (that being the complaint advanced in the appellants' third ground of appeal). The evidence in question is the explanation, given in the sponsor's witness statement, of why she

gave her permanent residential address as the village of Dhankuta. There, she explains that she considers herself and her children to 'belong' to the village, which is her husband's ancestral home. She also states that they continue to own the family property in the village, whereas the address at which they lived in Kathmandu is a rented property. Mr Jarvis is correct, in my judgment, to concede that the judge cannot properly be said to have taken this evidence into account, since there is no reference to it in her decision. It might have been that the evidence would have made no difference to the judge's conclusion but she was necessarily required to take it into account before reaching the conclusions that she did.

9. Nor, it seems, did the judge take into account evidence which appeared to show a remittance of funds from the sponsor's Lloyd's bank account to the appellants on 13 August 2019 before concluding as she did in relation to financial support. These errors suffice to undermine the judge's conclusions as a whole. It is apparent that she was very concerned about the sponsor's address and that she was equally concerned about the absence of documentary evidence of financial support. Having failed to take relevant evidence into account in both respects, I am satisfied that the judge erred materially in law and that her decision must be set aside.
10. Mr Jarvis also accepts that the judge 'misdirected herself in respect of the test in Rai', which is a reference to the decision of the Court of Appeal in Rai v ECO [2017] EWCA Civ 320. This is the complaint made, at length, over the course of the appellants' first and second grounds of appeal. I am bound to observe that I am rather more circumspect about accepting that this experienced judge erred in this respect. At [10], she directed herself not only to Rai but also to Kugathas v SSHD [2003] EWCA Civ 31 and to Lang J's analysis in Ghising v ECO [2012] UKUT 160 (IAC). She was plainly well aware that the material question before her was whether there was a family life in existence between the adult appellants and their mother and she noted that the dominant question in that analysis was whether there were 'more than the usual emotional ties'. There is reference to that test at the start and end of the judge's analysis, at [10] and [16] of her analysis.
11. What is said by the appellants, however, is that the judge misunderstood or misapplied what was said by Lindblom LJ in Rai. At [17] of his judgement, Lindblom LJ recalled what had been said by Sedley LJ at [17] of Kugathas, that 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". That formulation appears at [28] and at [36] of Lindblom LJ's judgement, in which there is repeated reference to real or committed or effective support. It was accepted by the Court of Appeal in that case that the judge in the FtT had elevated the test for the engagement of Article 8 ECHR beyond that threshold. The same complaint is made in this case. The author of the grounds of appeal notes that the judge in the FtT made reference at [10] to the test being whether there was 'committed and real dependency' and, at [14], she concluded that the sponsor was not 'providing real, committed and effective support' to the appellants.

12. Had it not been for the respondent's concession, I might well have found that the judge's mode of expression at [10] and [14] was merely infelicitous, given that she plainly had the relevant authorities at the forefront of her mind. Since the point has been conceded, however, I am prepared to accept that the judge misunderstood the test, which is expressed throughout Kugathas and Rai as being 'real or committed or effective support'.
13. In the circumstances, I accept that the judge materially erred in law in overlooking relevant evidence and in misdirecting herself in law as to the test for the engagement of Article 8 ECHR in its family life aspect. The decision on the appeal will be set aside and will have to be remade *de novo*.

### **Relief**

14. The appellant and the respondent have also agreed in writing that the appeal should be remitted to be re-heard by the FtT. I do not consider that to be the appropriate course. The appeals are already 18 months old. The Immigration and Asylum Chamber is coming to grips with new ways of working as a result of social distancing measures. I have reason to believe that the appeals can be re-heard more expeditiously in the Upper Tribunal and I will direct that they be retained so that the decision on the appeal can be remade by UTIAC, under s12(2)(b)(ii) of the TCEA 2007.
15. There will be a case management hearing before me in advance of the substantive hearing. That hearing will be by way of telephone conferencing. I will expect the parties to consider, and if possible to agree, how the next hearing should be conducted. I do not know whether the sponsor or the advocates are able to attend Field House for a fully attended or a hybrid hearing, or whether a hearing conducted by video conferencing would be preferable. I will give consideration to these questions with the assistance of the advocates at the case management hearing. They would be well advised to consider the President of the Family Division's publication entitled *The Road Ahead* in advance of that hearing, and to consider carefully the means by which these appeals might be resolved fairly and justly whilst ensuring that the wellbeing of all participants is safeguarded appropriately.

### **Notice of Decision**

The decision of the FtT is set aside and the decision on the appeal will be remade, *de novo*, in the Upper Tribunal.

No anonymity direction is made.

*M.J. Blundell*  
Judge of the Upper Tribunal (IAC)

2 July 2020