Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25320/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2020	**On 28 April 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

DAMMAR BAHADUR RAJALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R. Jesurum, Counsel instructed by Everest Law
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal. His date of birth is 29 August 1976. On 7 September 2018, he made an application for entry clearance to the UK as the adult dependent child of his stepmother Gangi Rajali. Her date of birth is 14 February 1947. She is the widow of the Appellant's father, Tul Bahadur Thapa, who was formerly a Ghurkha solider. He died on 23 July 2012.

2. The Entry Clearance Officer refused the application on 26 November 2018. The Appellant appealed against this decision. His appeal was dismissed by Judge of the

First-tier Tribunal Lucas in a decision that was promulgated on 18 September following a hearing at Taylor House on 3 September 2019.

3. The Appellant was granted permission to appeal against the decision of Judge Lucas by Judge of the First-tier Tribunal Landes on 28 January 2020. The matter came before me in order to determine whether the First-tier Tribunal had erred in law when dismissing the Appellant's appeal.

The Hearing Before the First-tier Tribunal

4. The Appellant was represented at the hearing. He relied on a bundle containing 142 pages. Counsel representing the Appellant relied on a skeleton argument.

5. The judge took into account the Appellant's witness statement of 16 August 2019. His case is that he is the son of a former Ghurkha soldier. He has four siblings. The Appellant was born after his father's discharge from the British Army. The Sponsor is his father's second wife. The Appellant's evidence was that she had raised him and his sister as her own children. He was not able to find employment in Nepal. His own biological mother had remained in Nepal because she did not wish to leave. The Appellant lives with his brother, Amar, in the parental home. They are single and unemployed. The Appellant is fully reliant financially on the Sponsor. She has authorised him to access her bank account in Nepal. They maintain contact. She is now aged 72. Prior to the Sponsor coming to the UK in 2016 the family lived together.

6. There was a statement from the Sponsor before the FtT. The judge noted that it added little to the Appellant's witness statement and replicated much of its content. She attended the hearing and adopted her witness statement as her evidence-in-chief. During cross-examination, she said that she had lived with the Appellant before coming to the UK. She said that Amar lived with his mother who is now aged 80. She said that the Appellant now lives alone in Nepal.

7. The Appellant's case was advanced on the basis that he could not meet the requirements of the Rules with regards to ex-Ghurkhas. It was submitted on the Appellant's behalf that the Sponsor should have been allowed to settle in the UK prior to 2016. The Appellant's case was that the Sponsor had raised him and he now lives in the parental home. Both the Appellant and his brother have access to the Sponsor's bank account.

8. The judge made findings at paragraphs 27 to 38 which can be summarised. It was accepted that the Appellant's father was an ex-Ghurkha soldier and that the Sponsor was his second wife and therefore the Appellant's stepmother. It was accepted that the Appellant was one of five siblings and that his biological mother and grandmother continue to live in Nepal.

9. The judge found that there was an inconsistency in the evidence insofar as the Appellant and the Sponsor in their witness statements stated that the Appellant lives with his brother in the "parental home" in Gulm. However, the judge found that

"the Sponsor appears to dispute this and stated that Amar, the brother of the Appellant lived with a biological mother"based on the evidence before the FtT.

10. The judge found that irrespective of where Amar lives there was an ongoing family unit within Nepal between the Appellant, Amar and their biological mother. The judge found that "it is not explained what financial provision was left to the biological mother of the Appellant and his sibling nor how she maintains herself in Nepal". The judge found at paragraph 31 that it "is not explained why the Sponsor did not bring him or any one of the other siblings to the UK in 2016".

11. The judge noted that there were no details in relation to the Appellant's other three siblings in Nepal and that there was no evidence other than that in the witness statements to show that the Sponsor lived in the family home with the Appellant or his other siblings prior to her migration to the UK or that the Appellant lived with her as opposed to his own mother. The judge found at paragraph 33 that "indeed, in evidence, the Sponsor appeared to suggest that the brother of the Appellant did live with his mother".

12. The judge at paragraph 34 said "it is not explained why the Appellant – on his own – would seek to leave his own biological mother in Nepal when she is of advanced years to come to the UK to look after his stepmother. The factual situation is implausible." The judge accepted that there were some remittances between the Sponsor and the Appellant in Nepal and that there is contact between them. However, the judge did not accept that the remittances "mostly recent – and a single visit to Nepal represent a 'real, effective and committed' relationship sufficient to engage Article 8 of the ECHR".

13. The judge found that there was a family unit in Nepal and none of the other siblings had chosen to relocate to the United Kingdom. Nor has the biological mother of the Appellant. The judge found that if there are ongoing financial contributions there is no reason to suggest why the arrangement could not continue.

14. The judge went on to find at paragraph 38 "it is not accepted therefore that this claim activates Article 8 of ECHR".

The Grounds of Appeal

15. The grounds argue that the judge failed to consider material evidence of family life. She did not take into account that the Appellant has access to the Sponsor's bank account. The judge did not take into account the Sponsor's oral evidence that the Appellant promised to look after her and that his brother had taken responsibility for looking after their biological mother. The Appellant's evidence was that they were very close since she had raised him. That the Appellant's biological mother lives in Nepal was not determinative of whether the Appellant has family life with the Sponsor.

The Law Relating to Ghurkhas and Adult Children

16. In the case of Ghising and others (Ghurkas/BOCs: historic wrong: weight) [2013] UKUT 567 the court made the following findings reflected in the headnote of the decision:-

> "(1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.
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> (2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).
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> (3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.
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> (4) 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.
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> (5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

17. In Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 the Court of Appeal identified the real issue under Article 8(1) is whether, as a matter of fact, an adult family member has demonstrated that he has a family life with his parents which existed at the time of their departure and has endured beyond it, notwithstanding their having left Nepal when they did. There is no test of "exceptionality". The Court of Appeal said as follows:-

"17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 Sedley L.J. said (in paragraph 17 of his judgment) 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 L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near 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 L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. 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 circumstance 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 judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will 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 he is still single and 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 judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 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. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances, "an adult

child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". 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 its observation (at paragraph 62) that "[the] different outcomes in cases with 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 judgment):

> "24. I do not think that the judgments to which I have referred lead to 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 presumption 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 will not of itself justify a finding of a family life. There must be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

18. The Court of Appeal in Entry Clearance Officer, Sierra Leone and Kopoi [2017] EWCA Civ 1511 Sales LJ with whom the other members of the court agreed said at [17] – [19]:-

> "17. The leading domestic authority on the ambit of 'family life' for the purposes of Article 8 is the well-known decision of this court in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31. The court found that a single man of 38 years old who had lived in the UK since 1999 did not enjoy 'family life' with his mother, brother and sister, who were living in Germany as refugees. At para. [14] Sedley LJ accepted as a proper approach the guidance given by the European Commission for Human Rights in its decision in S v United Kingdom [1984] 40 DR 196, at 198:
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> > 'Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention

without evidence of further elements of dependency, involving more than the normal emotional ties.'

He held that there is not an absolute requirement of dependency in an economic sense for 'family life' to exist, but that it is necessary for there to be real, committed or effective support between family members in order to show that 'family life' exists ([17]); 'neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together', sufficient ([19]); and the natural tie between a parent and an infant is probably a special case in which there is no need to show that there is a demonstrable measure of support ([18]).

18. The judgments of Arden LJ and Simon Brown LJ were to similar effect. Arden LJ also relied on S v United Kingdom as good authority and held that there is no presumption that a person has a family life, even with members of his immediate family ([24]) and that family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties, such as ties of dependency ([25]).

19. Kugathas remains good law: see e.g. R (Britcits) v Secretary of State for the Home Department [2017] EWCA Civ, [61] and [74] (Sir Terence Etherton MR), [82] (Davis LJ) and [86] (Sales LJ). As Sir Terence Etherton MR pithily summarised the position at [74], in order for family life within the meaning of Article 8(1) to be found to exist, 'There must be something more than normal emotional ties."

19. Before the FtT there was an Appellant's bundle containing 142 pages. There is an addendum bundle before me containing 75 pages.

The Evidence of the Appellant

20. The Appellant's witness statement is at pp 1-2 of the Appellant's bundle. It is dated 16 August 2019. His evidence can be summarised.

21. His father was married to his mother and they had five children together. He married his second wife, the Sponsor, before the Appellant was born. The Sponsor raised the Appellant and his sister.

22. In 2009 his parents heard about the new Immigration Rules for Ghurkhas. His father did not apply because of financial reasons. At that time the Appellant was over 18. His father wanted to raise his family in the United Kingdom; however, he could not afford to make the application.

23. The Appellant's father passed away on 23 July 2012. The Appellant told the Sponsor that he would take care of her in old age. In 2015 they became aware that Gurkha adult children were being allowed to join their parents. The Appellant 's biological mother did not want to leave Nepal because she was looking after her own mother. The Sponsor was granted Indefinite Leave to Remain. She arrived in the United Kingdom on 25 August 2016. Before she came the Appellant and the Sponsor were living together as a family unit. The Appellant lives with his brother Amar in the

"parental house" in Gulmi. He is not in touch with his other siblings. He is fully reliant on the Sponsor. He is close to her and she loves him as if he was her own son. She has visited Nepal once during the last three years. She is aged 72 and has health conditions. She does not have anyone here in the United Kingdom. They maintain close ties. The Appellant is unemployed.

The Evidence of the Sponsor

24. The Sponsor's witness statement is at pp 3-5 of the Appellant's bundle. It is dated 1 August 2019. Her evidence can be summarised. She gave oral evidence before the FtT.

25. Her husband was discharged from the British army on 25 April 1973. They married a year after his discharge. He had five children from his first marriage. They returned to his "ancestral home." The youngest two children (the Appellant is the youngest) were born after she moved into the family home. She raised them. She saves money from her pension to send to Nepal to support the Appellant and his brother, Amar. They live together in her house in Gulmi. They are single and unemployed. The Appellant is fully dependant on her financially and emotionally. The Sponsor and the Appellant's first wife share their late husband's pension. The Sponsor has opened a bank account and authorised the Appellant access to it. She remains in close contact with the Appellant and his brother. She sometimes cries when she talks to him. She has problems with her knee for which she takes medication.

Evidence of the Appellant's Biological Mother

26. There is a short letter of 12 September 2018 from the Appellant's biological mother. Her evidence is that the Sponsor has been looking after the Appellant since he was a child and that she has no objection to him joining her in the United Kingdom.

Submissions

27. Both representatives addressed me on the grounds and materiality.

28. In as far as the grounds were concerned, Mr Jerusum submitted that the judge did not consider the evidence of the relationship between the Appellant and the Sponsor. If he did, there are no reasons given for not accepting the evidence. In addition, he relied on the grounds with respect to economic support.

29. However, Mr Jesurum made very extensive oral submissions with reference to case law which strayed beyond the grounds of appeal.

30. He said that there was no issue taken in the decision letter that there being historic injustice and it is not an issue that the Respondent is now permitted to raise. In any event, the family might have settled long ago. The position is that the Appellant's father might have brought his second wife (the Sponsor) and the Appellant to the United Kingdom. He said that the issue was whether they would or might have

come to the United Kingdom but for the historic wrong. He relied [15] of the judgement in Patel v ECO, Mumbai [2010] EWCA Civ 17.

31. He said that there was no need to show that support was necessary. There was evidence of poverty that was not challenged. He said that there was no point taken about the failure of the Appellant to make an application for entry clearance in 2016. He said that it was not open to the Tribunal to make an adverse finding about this because of the difficult choices faced by such families. In any event, this was one of a number of matters about which the Appellant was not cross-examined. This was a matter not raised in the grounds.

32. He said that the evidence as set out in the Sponsor's witness statement was not challenged. He relied throughout on MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548 to support a submission that it was not open to the FtT to make adverse findings in the absence of the Sponsor having been cross-examined on matters. He specifically referred to the finding by the judge at [29] in respect of inconsistency in the evidence and those at [33], namely, that that there was insufficient evidence to show that the Sponsor lived with the Appellant prior to her coming to the United Kingdom or that the Appellant lived with the Sponsor as opposed to his own mother. This was a matter not raised in the grounds.

33. Mr Jesurum submitted that at [17] of Rai v ECO the Court of Appeal of relied on Kugathas, at [17] where the Court of Appeal set out the test. The test is disjunctive. Support has to be either real, effective or committed and not all three. Thus, the FtT erred at [35] when he applied the test of "real, effective and committed". This was a matter not raised in the grounds.

34. Mr Lindsay relied on the decision of the Entry Clearance Officer. He said that this identified what was in issue. It is clear from this that family life was the issue. The burden of proof was on the Appellant. There was cross-examination of the Sponsor. It can be inferred that she was cross-examined about family life as this was the issue in the case. She was not asked any questions in evidence in chief. The judge set out the evidence relating to access to the bank account and the relationship between the Appellant and the Sponsor. The judge was mindful of this evidence when making findings.

35. The judge properly identified that the Appellant's biological mother lived in Nepal and that there was no evidence he did not live with her. He relied upon Ortega (remittal); bias; parental relationship) [2018} UKUT 298. He accepted that the Appellant may have a strong private life but that there is no obligation to allow the Appellant to enter the United Kingdom to pursue a private life. In respect of the test to be applied, and in response to Mr Jesurum's submission, he said that support had to be real, committed and effective and if he was wrong about this that it is not material because read disjunctively or conjunctively there in no material difference. He said that the appeal was not capable of success because there is no family life. The Respondent relied on the decision letter. He accepted that the paragraph

concerning historic injustice was not crystal clear; however, in this it is not accepted that there is historic injustice and if there is the decision is proportionate.

36. Mr Jesurum in response said that the finding of the judge at [31] was not a material consideration. If there is family life, any delay is immaterial. He relied on Rai v Entry Clearance Officer at [37] – [39] to support a submission that the problems in making applications are common to all and it cannot be inferred from a delay that there is an absence of emotional bond. He repeated that it was not open to the Respondent to dispute that the Appellant and the Sponsor were living together in 2016.

37. The judge recorded the evidence in respect of the nature of the relationship and access to the Sponsor's bank account, but that does not mean that he applied anxious scrutiny to the evidence. The case of Ortega is not on point because it relates to section 117B (6) of the Nationality, Immigration and Asylum Act 2002. If the Appellant has a strong private life this must amount to having real, effective or committed support. The decision of the Entry Clearance Officer in respect of historic injustice is an attempt to gloss over the authorities.

38. He gave examples in support of his proposition that the Court of Appeal set out a disjunctive text at [17[of Kugathas.

Error of Law

39. I find that the judge erred in law. What is said at [34] indicates that he either did not take into account the Appellant's evidence about his relationship with the Sponsor or he did not accept it. If the latter, he did not give reasons. In respect of the Sponsor's bank account and the evidence that the Appellant had access to it, I am similarly persuaded that the judge, though having accurately recorded the evidence, did not take it into account, when assessing proportionality. The first error is material because I cannot be certain that had the judge engaged with the evidence, he would have reached the same conclusion. I set aside the decision of the judge. I heard full submissions from both parties and indicated that should I find a material error, I intended to go on to remake the decision.

40. Mr Jesurum said that he wanted to adduce further evidence that the Appellant and the Sponsor were in 2016 living together. If this was now an issue, he sought an adjournment to allow him to submit further evidence on the matter. He argued that this was not a matter on which the Respondent was entitled to rely, with reference to his submissions relying on MS.

Conclusions

41. I deal firstly with the application to adjourn. The decision of the Entry Clearance Officer was a response to the Appellant's application, in support of which there was no evidence or statements. A proper reading of that decision discloses that the Entry Clearance Officer did not accept that the Appellant had established family life with the Sponsor. There is a later decision of an Entry Clearance Manager of 26

November 2018. The Appellant had by then submitted further documents; however, it was not accepted by the Entry Clearance Manager that he and the Sponsor had lived together before the Sponsor came to the United Kingdom in 2016. The evidence of phone calls between the Appellant and the Sponsor were said to be recent and short in duration. There was no explanation for the delay in the Appellant having made an application. The Appellant's age (42) is noted by the Entry Clearance Manager who found it "likely that the appellant has enjoyed private life separate from the sponsor for a considerable time" and that she was not satisfied "that the appellant and the sponsor share emotional dependency, family or private life".

42. The evidence relied on by the Appellant after the decision of the Entry Clearance Manager was lacking in necessary detail. There was no further evidence of the Appellant and the Sponsor living together in 2016. There was a bare assertion by the Appellant that this was the case. The evidence in his witness statement is that he is fully reliant on the Sponsor. He is close to her and she treats him like a son. However, this was simply a restatement of the case that the Entry Clearance Manager engaged with and rejected. Mr Jesurum submitted that there was nothing to support the Sponsor having been cross-examined about matters that Mr Lindsay seeks to rely on and thus the Appellant's evidence that he was living with the Sponsor in 2016 must be accepted. I reject this.

43. The Sponsor was cross-examined. The judge recorded that during cross-examination she said that she lived with the Appellant in 2016. (She also said that the Appellant lived alone in Nepal giving rise to an inconsistency in the evidence). The Appellant in MS provided a detailed response to the RFRL relied on by the Secretary of State. He was not cross-examined on this. However, in this case the issue is and has always been whether there is family life between the Appellant and the Sponsor. The Respondent set out which parts of the Appellant's case which were not accepted including that he was living with the Sponsor in 2016. The witness statements and the Sponsor's evidence did not add anything further to the Appellant's case. I do not have a copy of the Record of Proceedings in order to identify the questions in cross-examination. The Appellant has not sought a copy of it. There is no challenge to the finding of the judge at [33] in the grounds on the basis that it was a finding that the judge was not entitled to reach or that there was a procedural irregularity. It was unarguably a live issue in the appeal before the FtT.

44. It is not necessary for the judge to set out all matters about which the Appellant is cross-examined. In any event, there was no concession made at the hearing. The further evidence generated by the Appellant since the Entry Clearance Manager's decision was a bare assertion that he and the Sponsor were living together. There was no further evidence on the issue about which the Respondent was obliged to cross-examine the Sponsor, having already made her position clear.

45. Fairness does not demand an adjournment to enable the Appellant to submit evidence to plug holes in his case before the FtT and to undermine a lawful and sustainable finding of the Tribunal which he has not sought to challenge in the grounds. The Appellant has had the opportunity to advance his case and provide

evidence in support and to engage with the issues identified by the Entry Clearance Manager. Moreover, the represented Appellant was directed to file and serve further evidence on which he seeks to rely for the purpose of the hearing on 18 March. He submitted an addendum bundle. He has not served further evidence on the issue relating to whether and the Sponsor were living together in 2016. No such evidence was drawn to my attention by Mr Jesurum.

46. The judge was entitled to conclude that there was insufficient evidence of cohabitation in 2016. This was a finding that was open to him. The finding is not challenged in the grounds. There is in my view no need to go behind that finding. It is not infected by the error of law; however, if I were to reconsider that issue, I would reach the same conclusion.

47. I find that the Appellant was raised by his biological mother and the Sponsor. It is reasonably likely that they all lived together as a family when the Appellant was a child and maybe beyond then. I do not accept that the Appellant was raised exclusively by the Sponsor. It is possible for him to have maternal relationships with both women that could engage Article 8. I accept that Ortega relates to a subsisting parental relationship in the context of s117B of the Nationality, Immigration and Asylum Act 2002. Furthermore, the circumstances in this case are different because they relate to a polygamous marriage. I find that it is reasonably likely that the Appellant was raised by both women in the same household.

48. I accept that the Appellant receives money from the Sponsor and that he has access to her account. However, the Appellant also lives with his biological mother in Nepal who is also in receipt of part of her husband's pension. It is likely that the Appellant and his brother are at least, in part, reliant on money from both women some of the time. I accept that he may have had a parental relationship with the Sponsor when he was a child. However, I find that in 2016 there was no longer a relationship between the Appellant and the Sponsor which would engage Article 8. Not only is there insufficient evidence of the Appellant and Sponsor living together; there is also very little evidence explaining what the Appellant has been doing since he reached adulthood, particularly considering that he was aged 42 at the date of the decision of the Entry Clearance Office. I have taken into account the evidence at page 26 of the Appellant's bundle from the ward chairperson who says that the Appellant has "no any services, business and employment and he has been fully cared financially and emotionally by his step mother … until now". However, the evidence is lacking in detail. I have taken into account the evidence of unsuccessful job applications in 2019. The evidence does not adequately account for the entire period of the Appellant's adult life which is not an insignificant period of time. All we know is that he did not get into the army (when he was aged 18) and that he lived at home "*most of the time*" (see the Sponsor's witness statement at [7]) and that in 2019 he applied for several jobs but was not successful. We also know that he left school in year 10. He is not highly educated, which supports what he says about having difficulty finding work.

49. The Appellant's age is not determinative of the issue dependency. However, in order to establish that the Appellant has not lived independently since reaching adulthood and was not living independently in 2016, I would reasonably expect there to be further evidence of this. In addition, the evidence of remittances and telephone calls relate to 2018 and 2019. I am not satisfied that the evidence establishes that the 42- year old Appellant, had not by at least 2016 severed parental ties with the Sponsor. I am not satisfied that this Appellant has remained dependent on the Sponsor during adulthood or that he has always lived in the family home with the Sponsor. The evidence is lacking about what the Appellant has been doing for the last 24 years. I am not satisfied that the evidence establishes that he has lost contact with all other siblings except the brother with whom he lives. There is no obvious reason why this should be the case and there is no evidence explaining this. I find that he still has a relationship with his biological mother with whom he lives. The Sponsor told the FtT that the Appellant lived alone but his evidence was that he lived with his brother. The evidence before the FtT was inconsistent, which undermines the credibility of the Appellant's case generally. This was not addressed in the grounds of appeal or by Mr Jesurum.

50. I am satisfied that the Sponsor has been sending money to the Appellant at least since 2018. This is supported by copies of remittances. There is an element of financial dependency between the Appellant and the Sponsor. The evidence is not sufficient to establish that it existed at the time the Sponsor left Nepal. I agree with Mr Jesurum that the reason for such dependency whether choice or necessity is not relevant in itself; however, it may in my view undermine the overall strength of the relationship if the Appellant has another source of income or means. In any event, the evidence does not establish economic dependency in 2016. There is no evidence explaining the lack of evidence of remittances or phone calls before 2018.

51. The evidence of emotional dependency or support in 2016 or at any time is similarly lacking. At [17] of Kugathas the Court of Appeal was not seeking to set out a disjunctive test. It is clear from a proper reading of [16] and [17] of the decision that the Court was assessing what level of support is necessary and observed that any three of the adjectives used by Strasbourg jurisprudence represents the minimum of what family life implies. The Court was not setting out a test of three discrete types of support that could amount to family life. There was no distinction made between real, committed or effective support. Mr Jesurum was attempting to interpret a case as though a statute. The test to be applied is that set out at [14] of the decision:-

> "14. Mr Tam relies in particular on the Commission's decision in S v United Kingdom (1984) 40 DR 196 At page 198 of the report, the Commission said:
>
> > "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

52. There is no evidence capable of establishing that there are further elements of dependency between the Appellant and the Sponsor. Mr Jesurum's submissions focused on the legal authorities, but he was unable to identify any features of this case which would establish family life. The evidence relied on was that of financial support including access to the Sponsor's bank account. I accept that the evidence supports some recent economic dependency and that the Appellant has access to the Sponsor's account in 2018 and 2019. The Appellant relies on having lived with the Sponsor in 2016. I am not satisfied that the evidence establishes this. Furthermore, the evidence does not support that the Appellant has not lived independently at any time during his adult years including in 2016. In respect of the details of the relationship, I accept that there is a genuine parental relationship. The Appellant and the Sponsor have a loving relationship akin to that of adult child and a biological mother, but there is nothing more that would engage Article 8. There is no evidence of further elements of dependency, involving more than the normal emotional ties.

53. I appreciate that the Sponsor would like the Appellant to help her in the United Kingdom. She has some health problems and obviously feels very isolated without any family here. However, the decision does not breach the Appellant's rights under Article 8.

54. There was evidence that economic pressure prevented the Appellant's father making an application after discharge. However, there was no evidence explaining why the Appellant did not make an application in 2016. The proposition that Rai established that it is not necessary to adduce evidence that the Appellant could not afford to pay for an application is not made out. There was evidence in Rai that the family could not afford to make applications at the same time. The evidence in this case was that the family was poor and it may have been open to the judge to draw an inference from this that the Appellant could not in 2016 afford along with the Sponsor to make an application, but that he did not do does not amount to an error of law. In any event, nothing turns on this.

55. Throughout submissions Mr Jesurum focussed on the legal authorities to advance the Appellant's case; however, the assessment of whether Article 8 is engaged is fact sensitive depending on the circumstances of the particular case. The evidence in this case was insufficient to establish family life. The authorities relied on could not help the Appellant in the absence of sufficient evidence of family life. The Appellant has been represented throughout and given able to time to advance his case. The burden of proof rests on him. In submissions Mr Jesurum strayed beyond the grounds, raising issues that were not only without substance, but that he was not permitted to argue.

56. The refusal letter is not clear about the Respondent's position about historic injustice. Nothing turns on this. The appeal cannot succeed in the absence of family life. However, I make the following observations. It is credible that the Appellant's father would have wished to come to the United Kingdom after discharge from the army. However, this case is complicated because by the time that the Appellant was born, his father had two wives. He may have been able to bring his children here but not both wives. Had he come to the United Kingdom after discharge with the Sponsor, the

Appellant may not have been born. Had he made an application whilst the Appellant was a child, enabling the Appellant to come here, this may have meant that he would have been separated from his biological mother. Had he, in 2009, been able to afford to make an application, the Appellant would at that time have been an adult. The issue is not straight forward. Had the Respondent properly advanced his case that there is no nexus in this case, the issue may not have been straight forward. In any event, it was not an issue properly raised by the Entry Clearance Officer or Entry Clearance Manager or indeed the Home Office Presenting Officer at the hearing before the FtT. It was not open to Mr Lindsay to now rely on it.

Notice of Decision

The appeal is dismissed under Article 8 of the ECHR.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 26 March 2020

Upper Tribunal Judge McWilliam