



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24546/2018 (V)  
HU/24549/2018 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Working Remotely by Skype for Business  
On 4 February 2021

Decision & Reasons Promulgated  
On 1 March 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

BISHAL KUNWAR  
BIRAT KUNWAR

Appellants

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

**Representation:**

For the Appellants: Mr R Jesurum instructed by Everest Law Solicitors  
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellants (“A1” and “A2” respectively) are brothers and citizens of Nepal who were born respectively on 5 November 1989 and 25 January 1991.
2. On 11 September 2018, A1 and A2 each applied for entry clearance to settle in the United Kingdom with their father, Kusharai Kunwar, a retired Ghurkha soldier, and

their mother, Bindu Kunwar, who had arrived in the UK in 2009 and 2011 and were settled in the UK.

3. On 19 November 2018, the Entry Clearance Officer (“ECO”) refused each of the appellants’ applications. The decisions mirrored one another. The ECO was not satisfied that the appellants met the requirements of the Rules in order to enter the UK as an adult dependent child or the requirements of Annex K of IDI Chapter 15, Section 2A. The ECO was also not satisfied that the appellants were wholly financially or emotionally dependent upon the sponsor, their father. As regards Art 8 of the ECHR, the ECO was not satisfied that, as adult children of the sponsor, the appellants had established ‘family life’ by a demonstration of “real” or “committed” or “effective” support from their parents. In any event, even having regard to the ‘historic injustice’, the ECO concluded that any interference with their family and private life would be proportionate and, therefore, not a breach of Art 8 of the ECHR.

### **The Appeal to the First-tier Tribunal**

4. The appellants appealed to the First-tier Tribunal. Judge Bulpitt dismissed each of their appeals under Art 8. Judge Bulpitt was not satisfied that the appellants had each established that Art 8.1 was engaged because that they had failed to prove that there was ‘family life’ between each of them and the sponsor. The judge found that it was likely that both appellants, as adults, were living independently from their parents and had not established that there was support amounting to dependency by their parents.

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

5. The appellants sought permission to appeal to the Upper Tribunal. On 14 May 2020 the First-tier Tribunal (Judge Foudy) granted the appellants permission to appeal.
6. Following the issue of directions by the UT in the light of the COVID-19 crisis, the respondent filed submissions on 16 July 2020 seeking to uphold Judge Bulpitt’s decision.
7. Thereafter, the appeal was listed for hearing via Skype for Business on 4 February 2021 at Cardiff Civil Justice Centre. The court was working remotely and Mr Jesurum, who represented the appellants, and Mr Howells, who represented the respondent, joined the hearing remotely by Skype for Business.
8. At that hearing, Mr Jesurum sought permission to admit his witness statement dated 2 January 2020 setting out questions asked by the Presenting Officer and judge of the sponsor at the hearing in the First-tier Tribunal and the sponsor’s answers. Mr Jesurum relied upon this evidence in support of his grounds of appeal that included a challenge to the fairness of the proceedings due to matters being taken against the appellants by the judge which had not been raised at the hearing. Mr Howells did not object to this evidence being admitted which he accepted as accurate. I, therefore, admitted this evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2689 as amended). Given that the evidence

was not contested, there was, therefore, no objection to Mr Jesurum also acting as the appellants' advocate.

### **The Judge's Decision**

9. Before Judge Bulpitt, the parents of the appellants and their younger brother, Kushal gave oral evidence. In addition, the appellants relied upon two substantial bundles of documents.
10. The background to the appeals is that both appellants had previously been refused entry and had unsuccessfully appealed to the First-tier Tribunal. In an earlier appeal, Judge Hussain on 22 March 2017 had dismissed each of the appellants' appeals under Art 8 on the basis that he was not satisfied that there was 'family life' between the appellants and their parents in the UK. In his determination Judge Bulpitt, in accordance with Devaseelan, took Judge Hussain's findings as authoritative of the assessment of the appellants' status at the time of the decision but that he had to reach his own findings, taking into account all the evidence adduced before him.
11. Judge Bulpitt dealt first with A1's circumstances at paras 18–23. He set out A1's evidence in his statement dated 27 August 2019, in particular, that A1 had "never looked for work" and had "never lived an independent life". A1's evidence at the hearing was that he lived from his father's pension and later from money which his father had earned in the UK and sent to him. A1's case was, therefore, that he was not independent of his father and that he was financially dependent upon him and that that amounted to 'family life' for the purposes of Art 8.1.
12. At paras 19–21, Judge Bulpitt considered evidence, including medical evidence, concerning A1's health. At para 21, Judge Bulpitt said this:

"21. It is significant that there is no recent medical evidence about the first appellant's medical condition, no report setting out clearly the history of the first appellant's condition, his current position, his needs or his treatment. All the documents which had been provided pre-date the previous hearing and so would have been documents which could have been presented to Judge Hussain and either were not produced or were not given much weight by the Judge. The witnesses' evidence about the first appellant's medical condition was additionally extremely vague and non-specific, with the appellant's brother and father appearing to have little if any insight into what that medical condition was. As such, and in the glaring absence of any recent documentary evidence as to his condition I treat the evidence of the first appellant's medical condition with a great deal of circumspection. The indisputable fact is that despite any medical condition the first appellant may suffer from he has been living separately from his father for a decade and from his mother for eight years and there is no persuasive evidence of him suffering any medical problem as a consequence".

Then at paras 22–23, Judge Bulpitt reached the following conclusions:

"22. In the absence of any recent medical evidence, in the light of the very limited detail that any of the witnesses were able to give and in view of the plain fact that the appellant has been living separately from his parents for such a long time without

any adverse consequences I attach little weight to the claim that the first appellant requires or receives support from his parents to manage his medical condition.

23. I further attach little weight to the general assertion made that the first appellant has never worked and never lived an independent life. Given the inadequacy of the medical evidence identified above I find that the medical evidence does not support these bland assertions. The claim is contradicted in the second appellant's application from 2014 (discussed below). No detail is given by any of the witnesses about how the first appellant has occupied himself during a period of more than a decade since he left school. I find the suggestion the first appellant would make no attempt even to find work during that time inherently unlikely, particularly given his success at school and the family's work ethic as demonstrated by the appellant[s] father, mother and youngest brother. In the context of the evidence as a whole, I consider this suggestion is likely to be a conceit in order to try to make a successful application to settle in the United Kingdom having previously seen an application refused".

13. Consequently, Judge Bulpitt did not accept that the medical evidence – put forward to show that A1 suffered from mental health problems, including epilepsy, mood disorder and borderline personality disorder - established that A1 was unable to work (and therefore had not worked as he claimed) and also that there was some dependency (financial and emotional) upon his parents as a result.

14. Judge Bulpitt then turned to the circumstances of A2 at paras 24–28 of his determination. The evidence concerning A2 was somewhat different. In his earlier 2014 visit visa application, A2 had claimed that he was working. A2 now claimed that he had lied in that application and in the appeal heard by Judge Hussain in 2017 when he had claimed he was working. He also now claimed that he had been untruthful in his August 2019 statement, which was prepared for the appeal in the instant case some months before the eventual hearing in front of Judge Bulpitt, when he had said that he had not been asked questions about his employment in his interview in relation to his 2014 visa application.

15. Judge Bulpitt dealt with A2's evidence at paras 24–26 as follows:

"24. One of Judge Hussain's findings in 2017 was that in his 2014 application for leave to enter the United Kingdom in order to study, the second appellant had claimed that he was an accounts assistant with an income of 20,000 rupees. Judge Hussain refers in his decision to evidence to that effect in the refusal letter and to the fact that in his statement for that appeal the appellant had not commented on this allegation at all. Subsequent to Judge Hussain's decision being promulgated, and in anticipation of a substantive hearing of this appeal, in August 2019 the second appellant provided a new witness statement which began with a declaration that it was made *'knowing it to be true to the best of my knowledge and belief and knowing it will be placed before the Tribunal in support of my appeal'*. In that statement he said that there were no questions put to him about any employment during his interview in connection with the 2014 application. He went on to say that after Judge Hussain's decision was promulgated his father asked him where the information about the appellant earning 20,000 rupees had come from and that this *'came as a surprise to me'*. He states that he went to the visa agent who had completed his application and the agent told him that the agent had put this information into the application as something he regularly does. He said that although advised to report the agent to the police he had not done so because he

fears the police in Nepal. He also says in that statement that the money in his account for the application was provided by a friend called Jagat.

25. The transcript of the interview with the second appellant, conducted in 2014 was subsequently produced by the respondent. This showed that contrary to what the second appellant said in his August 2019 statement, he had been asked in that interview about employment and that he himself had replied that he had worked as an accounts assistant earning 20,000 rupees. He also stated in that interview that he had twice tried to join the Nepalese Army and that his father would pay for his studies *'and my big brother will also contribute'* later stating that his brother was one of the people who had lent him money and additionally that *'tuition fees from father and brother'*. In response to this transcript being adduced the appellant made another statement on 1 November 2019 which again started with a declaration as to truth, but this time said that not only had he lied in his 2014 application but also that he had lied in his August 2019 statement.
26. It is evident therefore that in 2014 when seeking entry to the United Kingdom the second appellant claimed that he was working and also that the first appellant was working or at least had an independent source of income from which he could contribute towards payment for the second appellant's tuition in the United Kingdom. By the time of the hearing before me however the second appellant had completely changed his account and was now claiming that neither he nor his brother, the first appellant had ever worked. I have no confidence that this latest version of events is true. Instead I find that he will say whatever he thinks will give him the best opportunity to succeed in his applications to come to the United Kingdom and will try to deceive the Tribunal and those considering his applications wherever he considers it advantageous to do so".
16. Before me, Mr Jesurum submitted that A2 had lied both in his 2014 application and also in his August 2019 statement. He acknowledged the difficulties that that presented for A2. Of course, it was for the judge to decide which version of A2's circumstances he accepted as true or, indeed, whether, given A2's contradictory evidence, he could accept either version now put forward by A2. A2's evidence was relevant to both his own circumstances and, given what he said about A1, also A1's circumstances.
17. A1 and A2 were not, of course, available to give oral evidence. The judge heard oral evidence, however, from the appellants' family on the UK: the appellants' father, their mother and younger brother. The judge dealt with their oral evidence at para 27 as follows:
  - "27. When the appellants' father gave evidence, I asked him about the second appellant's 2014 application and he answered that he did not know anything about the second appellant applying to come to the United Kingdom and that he only found out about the application later. Though he did not know when. In re-examination he was asked whether he meant that he did not know about the application or he did not know about the lie until later and replied that he did not know about the lie until later. I found the evidence from Kusharai Kunwar on this topic entirely unconvincing. Perhaps surprisingly given the deceit which had been practised he was at best vague and inconsistent about what he knew of the application and when he found out about it. When she gave evidence the appellants' mother said she knew about the 2014 application being refused but that she did not know much about the details. While the appellants' younger brother

Kushal said he did not know that the second appellant had had an application to come to the United Kingdom refused”.

18. Then at para 28, Judge Bulpitt reached the following conclusion:

“28. Overall the witnesses’ evidence about the second appellant was inconsistent, vague and contradictory. The second appellant admits that he had lied in a statement at the beginning of which he declared to the Tribunal the truth of its contents. I find that I can attach no weight to the second appellant’s latest evidence that he has not worked and that he enjoys the real, committed and effective support of his parents. Instead I find that this is likely to be the latest deceit designed with the intention of ensuring success for the application to come to the United Kingdom”.

19. At paras 29–33, Judge Bulpitt dealt with other parts of the evidence, in particular documentary evidence including text exchanges which also led him to doubt A2’s evidence concerning his circumstances. At para 32, the judge dealt with documentary evidence showing that the appellants received money from their parents in the United Kingdom. The judge concluded:

“32. On the basis of this evidence I am satisfied that money is sent from the appellants’ parents in the United Kingdom back to the appellant[s] in Nepal. What is done with that money however is far less clear. I am not satisfied by the generalised suggestion that the money is the only means the appellants have of living or that this practice indicates the real, committed and effective support of the appellants by the parents. Instead I find the provision of money earned by the parents in the United Kingdom to the appellants in Nepal where it is of far more value is no more than what most parents would do to share their good fortune with their adult children”.

20. Then at para 34 Judge Bulpitt reached the following conclusion:

“34. Bringing all this evidence together I find that the two appellants have sought to construct a narrative of dependence and an unusually close relationship with their parents which supports their application while the evidence points in the opposite direction. I find that the contradictory, vague, incomplete and at times outright dishonest evidence from the second appellant about what they have done since becoming adults points towards them being far more independent and established in their own right than they seek to present. When viewed holistically I find that the evidence suggests that they have independent relationships and adult lives in Nepal which are separate from their parents – much like most 28 or 30 year olds, but that they have sought to portray a different picture for the purposes of this appeal”.

21. In other words, the judge rejected all the witnesses’ evidence (and that of A1 and A2) that the appellants were not working, were not independent of their parents and were dependent upon their parents in the UK and made positive findings against A1 and A2 on these issues.

22. Then at paras 35–39, the judge went on to apply his findings to the law, citing Kugathas v SSHD [2003] EWCA Civ 31 and Rai v Entry Clearance Officer [2017] EWCA Civ 320 and, in particular referring to Sedley LJ in Kugathas at [17], Judge Bulpitt (at para 36) noted that the support, in order to amount to ‘family life’ must be “real or committed or effective”. At para 38 Judge Bulpitt reached this conclusion:

“38. Here, for the reasons given I find that the appellants have not been honest in their portrayal of their lives in Nepal but have tried to create a narrative which meets the definition of a family life provided in the case law. Overall when the evidence is carefully analysed it most likely points towards two adults who have been living independently from their parents for a number of years and have established an independent life entirely in keeping with their ages. There is no doubt that the appellants and their parents show a mutual love and affection and equally there is no doubt that the appellants would like to benefit from the opportunities that living in the United Kingdom will provide. However I find, as Judge Hussain did in 2017, that there is no family life between the appellants and their parents which engages Article 8 of the Convention and that their attempts to suggest that there is such a family life is simply an indication of their desire to see their applications granted”.

23. As a consequence, Judge Bulpitt dismissed each of the appellants’ appeals under Art 8.

### **The Grounds of Appeal**

24. The appellants rely upon five grounds of appeal which were developed, in some detail, by Mr Jesurum in his oral submissions.

25. Ground 1 contends that the judge was unfair in reaching his adverse finding in relation to A1. It is submitted that it was unfair for the judge to doubt whether A1 worked given that that had not been raised in the refusal letter or in cross-examination at the hearing. In reaching that conclusion, the judge took into account, against A1, that he did not accept A1’s medical condition despite that condition never being disputed by the respondent.

26. The ground contends that it was improper and unfair for the judge to go behind the unchallenged evidence that A1 was unwell and had never worked. Reliance is placed upon the cases of Browne v Dunn (1893) 6 R 67 (HL) per Lord Herschell LC at p.70 and MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548 at [14] per Maurice Kay LJ that if a finder of fact is to be invited to disbelieve evidence, then fairness requires that the witness be made aware of the imputation that their evidence is untrue so that they may offer an explanation and where evidence is not challenged in cross-examination it is to be taken as accepted or not disputed by the opposing party.

27. Ground 2 contends that, despite A2’s acceptance that he had previously lied in his 2014 application and in his appeal statement prepared in August 2019, the sponsor’s evidence was not challenged in the decision letter or cross-examination that he was unaware of A2’s deceit. Nevertheless, without being given an opportunity to dispute any contention that he was aware of A2’s deceit, the judge concluded that the sponsor’s evidence as to A1 and A2’s circumstances could not be relied upon because he was aware of A2’s deceit.

28. Relying upon the evidence of questions put to the sponsor in cross-examination and by the judge, Mr Jesurum submitted that the respondent had specifically confirmed, at the conclusion of the questions put to the sponsor, that nothing new was being asserted. It had previously not been suggested that the sponsor was a party to A2’s

deceit. Reliance is again placed upon the case law such as Browne v Dunn and that fairness requires that a witness be made aware of an imputation as to the truthfulness of his evidence.

29. Ground 3 contends that the judge failed to take into account, when assessing the credibility of the sponsor, that he was a person of positive good character as a result of his military service and his “exemplary” record of conduct.
30. Ground 4 contends that the judge failed to take into account two supporting documents contained in the appellants’ bundle and addendum bundle supporting the appellants’ contention that they were unemployed and dependent on their parents: (1) a letter from the local authority in Nepal (at p.74 of the appellants’ bundle) and (2) a witness statement from Nagendra Kumar Dura (p.15 of the appellants’ addendum bundle). Whilst that evidence was not determinative of the question of whether the appellants worked, it is submitted that it was material and that, applying ‘anxious scrutiny’ the judge should have taken it into account.
31. Ground 5 contends that the judge failed to apply the proper approach to the existence of ‘family life’ under Art 8.1. It is contended that the judge misapplied Kugathas by requiring that there be “real, committed *and* effective” support (my emphasis). The correct test as identified in Kugathas at [17] and in Rai at [17] is that the support must be “real” or “committed” or “effective”. In other words, the requirements were to be read disjunctively rather than conjunctively. The judge, it is submitted, erred in law at paras 28 and 39 by stating the three elements conjunctively.
32. Further, under ground 5 it is contended that the judge failed to consider the issue of ‘family life’ from the perspective of the appellants’ parents, in particular their mother in respect of whom there was evidence that she suffered from bipolar disorder and that there was emotional dependency between her and the appellants.

## Discussion

33. Logically, ground 5 should be addressed first since it contends that the judge applied the wrong test to establish whether ‘family life’ existed between the appellants and their parents in the UK.

### *Ground 5*

34. The correct approach to establishing ‘family life’ under Art 8.1 was summarised by the Court of Appeal in Rai at [17]–[20]. The approach of the Court is particularly pertinent to these appeals as the Court was also concerned with an Art 8 claim by an adult child of a former Gurkha soldier. Lindblom LJ (with whom Beatson and Henderson LJJs agreed) said this:

“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 has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.”

35. As will be clear, Mr Jesurum (who also represented the appellant in Rai) correctly identifies the test: that there be support from the parents which is “real” or “committed” or “effective”. The test is disjunctive and not conjunctive or cumulative.
36. Mr Howells accepted that the judge had referred to the need for there to be “real, committed *and* effective support” at paras 28 and 32 of his determination. However, he submitted that, in the light of the judge’s correct self-direction in para 36, those should be seen as merely a slip and that the judge correctly applied the test as set out in Kugathas and Rai.
37. I accept that submission. In this appeal, Judge Bulpitt correctly cited passages from Kugathas and Rai at paras 35 and 36 of his determination which set out, inter alia, the test disjunctively expressed. I am wholly persuaded that the judge, having correctly directed himself in accordance with the case law, simply committed a ‘slip of the pen’ at paras 28 and 32 by substituting the word “and” for the word “or” found in the citations in the case law.
38. In any event, the judge found that both appellants were leading an independent life, were working and, in effect, were not materially supported by their parents. Although the judge accepted there was some financial support, he found that was no more than the type of support that might be expected from a parent who was, in his words, “shar[ing] their good fortune with their adult children”. Given his finding that both appellants were independent and working, they could not succeed on any basis in establishing that they had the necessary “support” to give rise to ‘family life’. Any error made by the judge in applying the test for ‘family life’, which of course I do not accept he fell into, was therefore immaterial to the outcome of his decision. Of course, that presupposes that the judge’s factual findings, which are challenged in the remaining grounds of appeal, are sustainable.
39. One final point under ground 5 concerns the contention that the judge failed to look at the ‘family life’ issue from the perspective of the appellants’ mother. The grounds contend that the judge made no findings on whether the appellants provide their mother with support given that it is not disputed that she suffers from bipolar disorder severe enough to have required hospitalisation in the UK and that the appellants previously looked after her in Nepal. Whilst this point was referred to in Counsel’s skeleton argument before the First-tier Tribunal (at paras 24(3) and (4)),

direct involvement with their mother dates back to 2013 when she last visited Nepal and A2 assisted her, it is said, by remaining at her bedside and cooking for her. The judge did not explicitly refer to this evidence, he did find, however, at para 38 that there is “mutual love and affection” between the appellants and their parents. It is not said that either appellant currently provides the direct support that A2 provided in 2013 given that the appellants and their parents live in different countries. The thrust of the appellants’ case before the judge was that they were dependent upon their parents (in particular their father) rather than the reverse. Standing alone, I am unpersuaded that the judge materially erred in law by failing to consider and find that ‘family life’ existed based upon any claim of support or dependency by the appellants’ mother upon them.

40. I turn now to consider the remaining grounds. As will become clear, the burden of succeeding in these appeals rests, in my view, upon grounds 1 and 2 in particular.

*Grounds 1 and 2*

41. These grounds rely upon unfairness in relation to the judge’s findings adverse to A1 and A2 in that the judge went behind the unchallenged evidence and, in particular, that A1 was working and was not independent of his parents and that the sponsor was a party to A2’s admitted deceit.
42. Mr Jesurum relied upon a number of authorities that developed two lines of argument.
43. First, fairness requires that a witness be made aware of any imputation that their evidence is untrue in order to have an opportunity to offer an explanation or deal with the alleged imputation of untruthfulness. That line of authority began with Browne v Dunn dating from 1893. Mr Jesurum also relied upon what was said in Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396 at [49]–[50].
44. Secondly, a party is to be taken to accept or not dispute evidence which is not challenged in cross-examination: MS (Sri Lanka) at [14].
45. In Browne v Dunn, Lord Herschell LC said this at p.70:

“It will not do to impeach the credibility of a witness upon a matter on which he has not had an opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted”.

46. That approach, or “general rule” in adversarial proceedings was recognised in the Deepak Fertilizers case, to which Mr Jesurum referred me, where Latham LJ said this at ([49]–[50])

“49. The general rule in adversarial proceedings, as between the parties, is that one party should not be entitled to impugn the evidence of another party’s witness if he has not asked appropriate questions enabling the witness to deal with the criticisms that are

being made. This general rule is stated in Phipson on Evidence 15<sup>th</sup> Edition at paragraph 11-26 in the following terms:

“As a rule a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, eg if the witness has deposed a conversation, the opposing counsel should put to the witnesses any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness’s account and will not be permitted to attack it in his final speech. .... Failure to cross-examine will not, however, always amount to acceptance of the witness’s testimony, if for example the witness has had notice to the contrary beforehand, or the story itself is of an incredible or romancing character.”

50. The caveat in the last sentence that I have quoted, is important particularly in the context of the Civil Procedure Rules in which, by Part 32 r. 1(3) the court is given a power to limit cross-examination. Nonetheless, the general rule remains a valid rule of good practice and fairness. The judge of fact is, however, in a different position from the protagonists. So long as a matter remains clearly in issue, it is the judge’s task to determine the facts on which the issue is to be decided. However it seems to me that where, as in the present case, an issue has been identified, but then counsel asks no questions, the judge should be slow to conclude that it remains an issue which has to be determined on the basis of an assessment of reliability or credibility without enquiry of the parties as to their position. The judge should be particularly cautious of doing so if he or she has not given any indication of concern about the evidence so as to alert the witness or counsel acting on the side calling the witness, to the fact that it may be that further explanation should be given in relation to the issue in question.”

47. As will be apparent, therefore, as a “general rule” fairness requires that a witness be given an opportunity to deal with any imputation (in particular of untruthfulness) that the other party or the judge in reaching a decision on the facts intends to rely upon. I have no doubt that the approach applies equally to the essentially adversarial proceedings in the FtT or UT if re-making a decision.
48. The issue is, however, fact-sensitive and depends upon all the circumstances in the particular case. This was made clear in the judgment of the Privy Council in Chen v Ng (British Virgin Islands) [2017] UKPC 27 where, in the joint judgment of Lords Neuberger and Clarke, the Judicial Committee said this at [52]–[54]:

“52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.

53. Mr Parker relies on a general rule, namely that “it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving

an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted”, as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in *Markem Corpn v Zipher Ltd* [2005] RPC 31.

54. The Judge’s rejection of Mr Ng’s evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng’s evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng’s evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court’s decision whether to uphold a trial judge’s decision to reject a witness’s evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.”

49. The Privy Council’s approach, after citing Browne v Dunn, espouses a nuanced, fact-sensitive approach looking to the overall fairness of the proceedings whilst acknowledging a “general rule” that a witness, if their truthfulness is to be disputed by a party and/or found adversely by a judge, should usually be given an opportunity to deal with any allegation made. That may be through cross-examination of the witness but not necessarily so providing that the party has a fair opportunity to deal with the imputation by evidence or otherwise.
50. In MS (Sri Lanka) the Court of Appeal acknowledged, in the immigration context, that if the Secretary of State’s representative did not cross-examine an appellant (at [14] per Maurice Kay LJ):

“that has the necessary consequence that the Secretary of State must be taken to accept, or at least not to dispute, the appellant’s factual account”.
51. That comment must, in my judgment, take into account that even in the absence of cross-examination it may be clear that the truthfulness of a witness or the reliability of evidence is in issue. The fairness of the proceedings must be seen, as the Privy Council made clear in Chen v Ng, overall.
52. In this appeal, of course, there was no question of cross-examining either A1 or A2. They were abroad and not available to be cross-examined. That, obviously, was not the case in relation to the sponsor.
53. The background to these appeals was the decision of Judge Hussain in 2017 who had found that ‘family life’ did not exist between the appellants and their parents, not least because he found that they were independent and were working. In the respective decision letters for each of the appellants, the respondent did not

positively contend that each of the appellants was working. However, it was asserted that each was living independently from their parents and, although they had each asserted that they were “unemployed”, without conceding that was the case, the respondent was not satisfied, in the case of each appellant, that they had demonstrated that they were reliant upon their parents as claimed in the UK either financially or emotionally.

54. By the time of the hearing, the position, at least for A2, had changed. He now claimed that he had lied in his 2014 application when he had said that he was working. He also claimed that he had lied in his August 2019 statement that he had not been asked about this in his earlier interview. A2’s case was now that he was unemployed contrary to what he had previously said. In those circumstances, it is quite impossible to conceive that the underlying factual issues relevant to whether A2 had established ‘family life’ – namely, whether he was independent and/or working – were not live issues at the hearing. They plainly were. But, that was also the case in relation to A1. The respondent may not have directly challenged those matters in the decision letter but now, as a result of A2’s assertion that he had previously lied, his evidence concerning his and A1’s circumstances were now undoubtedly live issues. It was, after all, part of A2’s earlier evidence (in his interview) that A1 would be in a position to contribute to his tuition fees if he had come to the UK following his 2014 student visa application. Of course, the respondent’s representative could not put these matters to A2 or A1 in cross-examination since they were not called as witnesses. It cannot be said, however, that both appellants (through their legal representatives) could not reasonably be aware that the underlying issues for A1 and A2 as to their employment and/or independence from their parents was very much in issue. Indeed, the sponsor’s evidence was directed to both of those issues presumably because they were relevant and considered to be in dispute.
55. I do not, therefore, accept Mr Jesurum’s submission that the proceedings were unfair to the extent that the judge considered that the issues of whether A1 and A2 were employed and/or independent of their parents were contested issues upon which he had to reach factual determinations. In reality, A2’s evidence inevitably changed the focus of the respondent’s case.
56. In relation to the remaining point made in ground 1, I am unpersuaded that the judge unfairly took into account his view that the medical evidence did not establish that A1 was unable to work. As I have made clear above, whether or not A1 was working was a live issue which had not been conceded by the respondent. The judge was entitled to take into account his view as to whether the medical evidence supported a conclusion that A1 was not working because he was unable to do so. The medical evidence, as the judge noted in para 21, was largely available at the time of Judge Hussain’s decision in 2017. That A1’s medical condition was a live issue at the hearing, is clear from the fact that both of A1’s parents were asked about his treatment in cross-examination. Ground 1 does not in any significant way challenge the judge’s assessment of the evidence but rather contends that there was never any dispute concerning the medical evidence. I am unpersuaded of that argument given,

and not least because of, the cross-examination of A1's parents about his medical condition.

57. Where, however, I consider that the judge did fall into error is, as set out in ground 2, in his assessment of the sponsor's evidence.
58. Plainly, the sponsor gave supporting evidence, relevant to the assessment of whether the underlying issues I have identified were established. The judge had to assess the credibility and reliability of the sponsor's evidence. However, the judge discounted the sponsor's evidence, in significant part, because he concluded that the sponsor was in some way implicated (through knowledge or otherwise) in A2's deceitful application in 2014. However, that was not a matter upon which the judge was entitled to rely given the cross-examination by the HOPO of the sponsor, the questions asked by the judge of the sponsor and the HOPO's response to an enquiry from counsel for the appellants following those questions.
59. Those matters are, contentiously, set out in the statement of Mr Jesurum which Mr Howells accepted. In cross-examination, the sponsor was asked whether he accepted that A2 was lying about statements he previously made about his circumstances in Nepal and the sponsor answered "yes". He was asked whether he knew whether A2 was lying and replied "no - I didn't know, came to light later". When it was suggested to him that that indicated he was not emotionally connected to A2, the sponsor replied "we have a close relationship". The judge then asked a number of questions by way of clarification. The sponsor repeated that his relationship with A2 was a close one and that "he didn't tell me for some time, and later told me". The judge then asked who arranged the agent for A2's application in 2014 and the sponsor replied "I only came to know later". The judge then asked whether the sponsor knew that A2 was applying to come to the UK in 2014 to which the sponsor replied "I don't know about anything before the application". He was then asked by the judge when had he found out about the application and he replied "he only told later". He said that he did not remember when.
60. Importantly, at the end of those questions, counsel for the appellants asked the judge whether there were any concerns that the sponsor had played any part in A2's deception and the respondent's representative replied "nothing new is being asserted".
61. A fair reading of that questioning would not lead a reasonable observer to conclude that the respondent was putting forward, or the judge was contemplating, a positive case that the sponsor was implicated in A2's deceit and that, therefore, that issue could be relevant to the sponsor's credibility and reliability as a witness. Indeed, the HOPO's specific confirmation that nothing new was being asserted, could only lead to the conclusion that the sponsor's knowing involvement in the deceit was not being relied upon. Yet, in his determination, the judge did reach such a view, in particular in para 27 of his determination. In those circumstances, the judge went on to discount the otherwise supportive evidence of the sponsor relevant to the live issues in the appeal concerning A1's and A2's circumstances in Nepal. That was, in my

judgment, unfair. The sponsor was denied an opportunity to engage fully with such an adverse imputation being drawn about his involvement. It may well be that A2's case presented considerable difficulties given his claim that he had lied both in his 2014 application and also in his August 2019 statement prepared for the appeal hearing before the First-tier Tribunal. A1's case was, however, not necessarily tainted in the same way. However, both appellants were entitled to have the sponsor's evidence fairly assessed. In my judgment, and for the reasons I have given, the judge did not do so and that was material to his adverse findings not only in relation to A1 but also A2.

62. In those circumstances, based upon ground 2, I am satisfied that the judge materially erred in law and his findings and decision cannot be sustained.
63. It is strictly, therefore, unnecessary for me to reach conclusions on the remaining grounds. I would, however, say this about grounds 3 and 4.

#### *Ground 3*

64. As regards ground 3, it is no doubt a relevant factor in assessing the credibility (or truthfulness) of a witness that they have an exemplary good character. That is well recognised in the criminal context (see R v Hunter & Ors [2015] EWCA Crim 631) and no doubt holds good also in the civil context. Whilst relevant, its weight is essentially a matter for the fact-finder having regard to the evidence as a whole. Had the findings in relation to the sponsor's evidence been otherwise sustainable, I would not be persuaded that the judge erred by failing to take into account, in assessing the sponsor's credibility, his previous good character reflected in his exemplary military service. The judge refers to it in his "preliminary findings of fact" at para 4(c). There is no reason to doubt that the judge had this in mind when assessing the sponsor's evidence. What weight was to be given to it was quintessentially for the judge when reaching his factual findings in the light of all the evidence. I do not, therefore, accept Mr Jesurum's submission that the judge erred in law by failing to have regard to the good character of the sponsor.

#### *Ground 4*

65. In relation to ground 4, I accept that there was supporting evidence in the form of a local authority letter and witness statement relating to whether the appellants were employed and/or dependent upon their parents. However, it is not clear whether this evidence was specifically drawn to the attention of the judge and explicit reliance placed upon it. Whilst the judge was (as a generality) required to take into account all relevant evidence as reflected in the well-travelled requirement to give the case "anxious scrutiny" (see R(YH) v SSHD [2010] EWCA Civ 116 at [24] per Carnwath LJ), it cannot suffice that an appellant places before a judge a substantial bundle of evidence (in this case running to over 1,000 pages in total) without indicating what parts of the evidence are relied upon and then, in hindsight, and then successfully challenge a judge's decision based upon a failure to consider a document or piece of evidence buried (but unidentified) deep in a substantial bundle. That is an unattractive argument to make to an appellant Court or Tribunal. As I have said, it is



unclear to me whether this material was drawn to the judge's attention and specifically relied upon at the hearing. In the absence of clarity on that issue, and given that the appellants do not need to establish this point in order to succeed in this appeal, I prefer not to express a view as to whether the judge's failure to take that evidence into account was a material error of law in itself.

### Decision

66. For the above reasons, the decision of the First-tier Tribunal to dismiss each of the appellants' appeals under Art 8 involved the making of a material error of law. The decision cannot stand and is set aside.
67. It was accepted by both representatives that if the First-tier Tribunal's decision could not stand then the proper disposal of the appeal was to remit it to the First-tier Tribunal for a *de novo* rehearing and I was invited to do so. I agree.
68. Having regard to the nature and extend of fact-finding required, and to para 7.2 of the Senior President's Practice Statement, the appeal is remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Bulpitt.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
12 February 2021