



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006545

FtT No: HU/54411/2021

IA/11236/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th May 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

SUROJ RANA

(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Heard at Field House on 15 May 2024

Representation:

For the appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors

For the respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, a claim which had been made through an application for entry clearance to settle in the United Kingdom on the basis that he is the adult child of a former Gurkha soldier ("the sponsor") with whom he has continued to enjoy family life under Article 8 ECHR.
2. The appellant's appeal to the First-tier Tribunal had been dismissed by a decision issued on 15 May 2022. In the onward appeal, the Upper Tribunal (Upper Tribunal Judge Norton-Taylor) concluded that the First-tier Tribunal had erred in law by misdirecting itself as to the appropriate test to be applied when considering family life between a parent and an adult child: [7]-[9] of the error of law decision, annexed to this re-making decision.
3. The First-tier Tribunal's decision was set aside. However, certain findings of fact were expressly preserved, as they had not been challenged and in any event were not vitiated by any errors. The preserved findings are contained at [20]-[22] of the First-tier Tribunal's decision and it is appropriate to set those passages out in full here:

"20. At that time the sponsor came to the UK in 2017, the appellant was living in Qatar. I find that he was living there independently. There is no evidence beyond the sponsor's unsupported statement in evidence that there was any financial assistance at that stage. If there was financial support then I would have expected some form of documentary evidence to support that claim.

21. I find that the appellant was living and working in Qatar and living an independent adult life as would be entirely normal for a man in his late thirties. He decided to leave the family home in 2016 and go to another country for the purposes of work. I do not accept the sponsor's claim that he was supporting him for that entire period. As I have

said no evidence has been produced to support that claim, but secondly, it was a claim that had been developed at the hearing by the sponsor - there was no claim in his witness statement for example that he had been sending money to the appellant during that period of time.

22. I also found the sponsor's evidence to be inconsistent as to whether or not the appellant had actually been working in Qatar and earning his own money. I appreciate that the sponsor's memory may not be as it once was - and I gave him as much room for manoeuvre as possible, but I cannot ignore that fact that he had an opportunity with solicitors to produce a witness statement in his own time (one in which he relied on as his truthful evidence at the hearing). At the hearing he was very unclear and vague as to whether the appellant had done any work there. It may well be the case that he did not find suitable employment, but I think that on balance it is far more likely that he is working there, as otherwise it would not have been possible for him to stay there for such a long period of time. I am unable to find that the sponsor has been credible about what the appellant was doing in Qatar. I do not believe he would have stayed there without being able to support himself financially."

4. Case management directions were contained within the error of law hearing. There then followed two unfortunate adjournments of the resumed hearing: the first due to the Senior Presenting Officer not being aware of the stage of proceedings; the second was a result of the Nepalese interpreter failing to attend.
5. Following a discussion at the second adjourned hearing, further directions were issued. The directions notice, issued on 22 February 2024, is also annexed to this re-making decision because it provides useful context to the approach we have taken to the evidence at this stage. In summary, permission was given for the appellant to rely on a supplementary witness statement of the the sponsor, dated 6 May 2022, which may not have been considered by the First-tier Tribunal when making the findings at [20]-[22] of its decision, set out above. The reasons for this case management decision set out in the directions notice and need not be repeated here.

6. The appeal was re-listed and came before us on 15 May 2024.

The issues

7. The overarching issue in this appeal is whether the respondent's decision constitutes a disproportionate interference with the claimed family life under Article 8, as between the appellant and the sponsor (and indeed, as between the appellant and his mother).
8. Within that issue is the question of whether there is, as a matter of fact, family life.
9. There has been no meaningful suggestion by the respondent during these proceedings (specifically, on appeal before the First-tier Tribunal and the Upper Tribunal) that if family life were found to exist, the appellant's appeal would not then fall to be allowed on the basis that the respondent's decision was disproportionate, given the powerful weight attributable to the well-known "historic injustice" factor in Gurkha cases.

The evidence

10. The documentary evidence before us consists of the following:
 - (a) the appellant's consolidated bundle, indexed and paginated 1-223;
 - (b) an uncorrupted version of the appellant's witness statement, dated 28 December 2021;
 - (c) the sponsor's supplementary witness statement, dated 6 May 2022, referred to previously.
11. The sponsor, his wife Mrs Rana, and the appellant's sister, Ms Sujata Rana, all attended the hearing and gave evidence. That evidence was of course recorded and

in addition we took a full note thereof. We do not propose to recite that evidence here, but will address relevant aspects of it when setting out our findings and conclusions, below.

Procedural matters: late service of the appellant's skeleton argument

12. At the outset of the hearing, Mr Melvin informed us that the appellant's skeleton argument, dated 6 March 2024, and only been provided to him the day before and only then after he had chased the solicitors. When this was put to Mr Jesurum he could only somewhat tentatively suggest that the solicitors might have thought that uploading the skeleton argument on to CE-File been sufficient by way of service.

13. We make no criticism of Mr Jesurum, but if his suggestion was right, it does not reflect well on the solicitors. It is, or at the very least should be, clear to those practising in this field that service on the other party must be by way of email. Filing on CE-File is not sufficient.

14. We issued an oral direction for a written explanation from the solicitors, no later than 5pm on Friday 17 May 2024. That direction has been restated in writing at the end of this re-making decision.

The parties' submissions

15. Mr Melvin relied on the respondent's decision, the review, his skeleton argument, dated 9 February 2024, and the preserved findings set out previously. He asked us to make adverse credibility findings against, in particular, the sponsor. Mr Melvin submitted that there were a number of inconsistencies and, by way of implication, untruths, which had been provided either in writing or oral evidence. These included the question of whether there had been a car accident in Qatar, whether any funds had been sent from the sponsor to the appellant whilst in that country, the viability of the family farm in Nepal, and the absence of any visits by the sponsor since 2017. Mr Melvin effectively asked us to conclude that the appellant

was in fact working in Nepal. In short, it was submitted that there was no family life.

16. We pressed Mr Melvin to clarify whether he was submitting that any gap in family life whilst the appellant was in Qatar was, *as a matter of law*, fatal to the Article 8 claim. In other words, would any gap automatically preclude the ability of the appellant to demonstrate family life? With respect, we did not receive the clearest of responses. Mr Melvin emphasised the fact-sensitive nature of Article 8 family life cases. However, it was not entirely clear whether he was maintaining the proposition contained in the question we posed to him.
17. In light of the above, we deemed it appropriate to refer the parties to an unreported error of law decision of a panel of the Upper Tribunal (comprising Mr Justice Henshaw, sitting as a Judge of the Upper Tribunal, and Upper Tribunal Judge Norton-Taylor) in Sushma Shrestha v ECO UI-2022-006497, issued on 9 February 2024 (a resumed hearing has yet to take place). In that decision, the Upper Tribunal concluded that, as a matter of law, there was no requirement in an Article 8 case involving adults to demonstrate continuous (in the sense of unbroken) family life. A break in such family life would potentially be relevant in the factual assessment, but was not fatal: [30]-[38]. In addition, any suggestion that a higher threshold for establishing family life applied in Gurkha cases was rejected: [39].
18. Mr Melvin was aware of this unreported case (he had represented the respondent). He did not make the submission to us that Sushma Shrestha was wrong in law, but he purported to “maintain” his position.
19. Mr Melvin relied on a number of well-known authorities relating to family life between adults, including, Rai v ECO [2017] EWCA Civ 320, Gurung and Others v SSHD [2013] EWCA Civ 8, Uddin v SSHD [2020] EWCA Civ 338, Mobeen v SSHD [2021] EWCA Civ 886, and BritCits v SSHD [2017] EWCA Civ 368.

20. Mr Jesurum relied on his skeleton argument. He submitted that any break in family life was not fatal to an Article 8 claim, although it would potentially be relevant to the overall factual assessment. He accepted that there had been some discrepancies in the evidence, but urged us to find that these had been because of failures in memory or honest mistakes, rather than outright lies. The evidence of the appellant's sister had not been meaningfully challenged. The evidence suggested that whilst in Qatar, the appellant had sent money back to his parents in Nepal, thus indicating reciprocal support. Mr Jesurum submitted that there was no requirement for the appellant to show that he relied on financial support from the sponsor as a matter of necessity: choice or preference was sufficient. There was no need for any exceptional dependency. It was important, he submitted, that the appellant had returned from Qatar to live in accommodation owned by his parents funds have been received since soon after that return. The issue surrounding the family farm or something of a "red herring", as the financial support need not be borne out of necessity. There was evidence of credible emotional support as well.
21. Overall, it was submitted that there had been, and continued to be, real, effective, or committed support provided by the sponsor to the appellant, and that to an extent this had been reciprocated.
22. We did not ask Mr Jesurum for submissions on causation/interference, or proportionality, given the narrow basis on which these proceedings (and those before the First-tier Tribunal) has been concerned, namely whether family life exists the purposes of Article 8(1).
23. At the end of the hearing we reserved our decision.

The relevant legal approach

24. There is a plethora of case-law on the "historic injustice" issue and the question of family life in the context of adults. A number of the authorities have been cited when summarising Mr Melvin's submissions, above. We would add to those the

foundational case on family life between parents and adult children; Kugathas v SSHD [2003] EWCA Civ 31.

25. Focusing on the core issue before us, we direct ourselves as follows:

- (a) Whether family life exists between adults is a fact-sensitive exercise, to be undertaken in light of the evidence as a whole;
- (b) Real, committed, or effective support is an indicator of the existence of family life;
- (c) Cohabitation can be a strong indicator, although its absence is not, as far as we can tell from the authorities, a strong contraindication of the existence of family life;
- (d) There is no requirement to show exceptional dependency;
- (e) Normal emotional ties will not usually be sufficient;
- (f) Cultural traditions/norms may be relevant;
- (g) There is no requirement to show that any financial support is received out of necessity.

26. As to the point canvassed during the course of Mr Melvin's submissions, we direct ourselves that, as a matter of law, there is no requirement to show continuous (in the sense of unbroken) family life throughout in order for the appellant to succeed in his appeal. We adopt the conclusions stated in Sushma Shrestha (cited above), but make it clear that we would in any event have reached the same conclusions without the benefit of the analysis in that unreported decision. In summary, our reasoning is as follows.

27. First, to the extent that Mr Melvin relies on [39] of Rai in support of a proposition that any break in family life concludes, as a matter of law, its re-establishment in order to succeed in an appeal, we reject his submission. That case concerned the adult son of a former Gurkha soldier and, as noted by the Court of Appeal in the first paragraph of its judgment, fell to be decided on principles of law “that are well established and familiar.” For present purposes, the central issue for the Court to determine was whether the judge below had directed himself correctly on the need to show “support” which was “real”, “committed”, or “effective” and to have applied that test to the evidence. Ultimately, the Court concluded that there had been an error in approach and the appeal was allowed on that basis: [43]-[44]. The particular passage upon which the respondent places so much significance in the present case reads as follows:

“39. The Upper Tribunal judge referred repeatedly to the appellant’s parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: “... not compulsory but ... voluntarily undertaken ...” (paragraph 20), “... having made the choice to come to the [United Kingdom]” (paragraph 21), “... the willingness of the parents to leave ...” (paragraph 23), and “... their voluntary leaving of Nepal and leaving the Appellant ...” (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”

28. This aspect of the judgment does not constitute part of the *ratio* and in any event does not support the proposition that family life must be continuous and cannot be broken and then re-established. It simply makes the point that an adult child must demonstrate that as a matter of fact the family life relied on had not ceased after the parents’ departure. It says nothing about post-departure family life needing to be continuous throughout a period of separation and up until an appeal hearing.

29. Secondly, [42] Rai offers no support to the proposition apparently being put forward. Nor does [61] of BritCits: that passage simply rejected an overly-broad submission made in that case and confirmed the fact-sensitive nature of family life assessments.
30. Thirdly, Mr Melvin has not directed us to any other authorities which are said to support the proposition upon which he appears to rely. Having considered the authorities cited in Rai itself at [17]-[20], including Kugathas, we conclude that there is no indication therein as to the need for unbroken continuity of family life in order for a case to succeed. A rule of law which precluded the engagement of Article 8(1) where there had been a gap in family life, but which had then been re-established by the time of a hearing would be wrong in principle: the authorities show that the assessment of family life under Article 8(1) is highly fact-sensitive. That approach would be significantly undermined if a temporary cessation of family life acted as an absolute bar to the engagement of Article 8(1).
31. Fourthly, being highly fact-sensitive, the assessment of family life is broad enough to cater for a variety of scenarios which could encompass a break in family life followed by its re-establishment due to, for example an accident or other significant life event.
32. . Fifthly, if there is a break in family life, it is likely to be relevant to the consideration of whether that life has been re-established subsequently. That is factual consideration, not a rule of law.

Findings and conclusions

33. We have considered all of the evidence before us with care and have made findings and conclusions based on that evidence in the round. We have applied the balance of probabilities to the consideration of the evidence. We have reminded ourselves

that whilst certain aspects of the evidence may be deemed unreliable, or even untruthful, it does not follow that everything else must therefore also be rejected.

34. There has been no apparent challenge to the evidence pertaining to the appellant's life before he left Nepal in 2014. In any event, the evidence before us indicates, at least by reasonable implication, that the appellant had been living with his parents as a family unit since birth. There is nothing in the evidence to suggest that he had lived away from the family home and/or been in employment and/or been married prior to 2014. We accept that he helped on the family farm, but that does not of itself indicate the absence of family life.
35. On the balance of probabilities, we find that there was family life between the appellant and the sponsor (and for that matter the appellant's mother) until he first went to the Middle East (specifically Qatar) in January 2014.
36. We accept that prior to the appellant's departure in early 2014, the family was relatively poor and relied on what in effect was subsistence farming. Notwithstanding certain concerns we have about the evidence relating to what happened to the farm in later years, we have no proper reason to doubt the sponsor's evidence that the crops grown had not been of sufficient volume and/or value to be able to sell any excess at market. This finding has some relevance to the reasons why the appellant left Nepal, the situation pertaining when he was in the Middle East, and his circumstances when he returned to Nepal in 2019 and thereafter.
37. We find that the appellant was in fact living independently over the course of his time away from Nepal between early 2014 and when he finally returned to Nepal for good in 2019. We also find that, in general terms, this period went to break the family life which had previously existed.

38. For reasons to which we will come in due course, we have concluded that the family life was re-established subsequently. For present purposes, our findings on the period 2014 to 2019 are based on the following analysis.
39. First, the preserved findings of fact at [20]-[22] of the First-tier Tribunal's decision are clear enough and do not need repeating here.
40. Second, as stated in the directions notice issued on 22 February 2024, we have considered the sponsor's supplementary witness statement of 6 May 2022 to evaluate whether this should lead us to revisit the preserved findings, but have concluded that the witness statement does not materially undermine the preserved findings. The supplementary witness statement is brief and simply asserts that because the appellant's work in the Middle East was not well-paid, the sponsor was continuing to financially support him "during those times". It goes on to state that money was allegedly sent, but receipts not kept. There is nothing in the statement which undermines the judge's overall findings, including his concerns as to the lack of supporting documentary evidence and other matters, all of which were clearly considered in the round.
41. There has been no challenge to the evidence that the appellant maintained regular contact with his parents whilst he was in the Middle East. Of itself, that does not undermine the preserved findings either.
42. Further, the assertion in the supplementary witness statement of regular financial support during the appellant's time away from Nepal is undermined by the sponsor's oral evidence before us. The sponsor told us that, aside from allegedly sending money to Qatar following a car accident, there was no financial support going to the appellant and indeed it was the appellant who had been sending money back to his parents, whilst at the same time seeking to repay a 70,000 rupee loan which are been taken out to facilitate the journey to the Middle Eastern in the first place. The sponsor expressly agreed with the proposition put to him by Mr

Melvin to the effect that the appellant had been living an independent life and supporting himself between 2014 and 2019.

43. We do accept that the appellant was engaged in low-paid work whilst in the Middle East. That is perhaps unsurprising, given his background in Nepal and the type of work he was undertaking whilst abroad (driving and labouring). We accept that the appellant did return to Nepal on three occasions during the period 2014 to 2019: that was not the subject of specific findings by the First-tier Tribunal, but there is nothing to suggest that this evidence was rejected. We are prepared to find that during the spells back in Nepal, the appellant was residing with his parents prior to their departure in 2017. That is of some limited relevance in the sense that he had returned to the family unit and did not go off and live independently elsewhere in Nepal.

44. In our judgment, the fact that there was a break in family life as at the point at which the sponsor left Nepal in 2017 in order to settle in the United Kingdom does not present an insuperable obstacle to the appellant's case. The First-tier Tribunal did not take a contrary view to this: [25] of its decision. We do not read [42] of Rai as constituting a proposition of law to the effect that family life *must* have existed as at the point of departure in order for any case to succeed on the facts. That passage was concerned with the facts of the case before the Court. In our judgment, the particular circumstances at the time of departure are part and parcel of the overall matrix in any given case, a position which is consistent with the fact-sensitive nature of family life. That family life did not exist as at 2017 is a relevant consideration for our assessment of whether family life was subsequently resurrected, but it is not decisive.

45. Our view is further supported (although this is not a necessary additional to what we have said in the preceding paragraph) by the point made by Mr Jesurum, with which we agree, that the question of causation in Gurkha cases is focused on the inability of ex-soldiers (discharged from the Army prior to 1 July 1997) to have

applied to settle in the United Kingdom in the past (and when relevant children would still have been minors), not simply whether there was family life in place when the choice was made to take up the belated opportunity to seek settlement in the United Kingdom.

46. On the evidence before us (specifically what is said by the sponsor in his witness statement of 28 December 2021), we are satisfied that the sponsor would have applied for settlement following his retirement from a long and exemplary service in the British Army in 1970. It is much more likely than not that he would have become a British citizen prior to the appellant's birth and it follows that the appellant would in all likelihood have been born British (he was born in 1982, prior to the coming into force of the British Nationality Act 1981). In any event, even if the appellant had not been born British for some reason, we are satisfied that the sponsor would have applied for him to settle in the United Kingdom before he reached his majority in 2000, if that avenue had been available.
47. A specific issue which took up a certain amount of time at the resumed hearing related to an alleged car accident in Qatar in 2019, in which the appellant was said to be involved and then required financial support from the sponsor. Mr Melvin submitted that this event had effectively been made up. We certainly have concerns over the evidence. It had not been mentioned by the appellant or sponsor in witness statements, until raised by the latter in his statement dated 10 November 2023. It does not appear to have been mentioned in evidence before the First-tier Tribunal. There is no corroborative documentary evidence to support this aspect of the claim.
48. Taking the evidence as a whole, we are prepared to accept that there was an incident in Qatar in 2019. It is not inherently implausible that such an event took place. It is not improbable that the appellant would have been required to pay money as result and that he would have required an injection of extra cash, as it were. Given what we accept were the lower earnings, it is more likely than not that the sponsor would have provided the funds. In our view, the fact that this was not

mentioned indicates that the event was not regarded as being of any particular significance, rather than it representing any untruthfulness. Even if we were to find that this aspect of the evidence was a lie, it would, we find, represent only an embellishment and, in the context of the evidence as a whole, would not render everything else said by the sponsor and/or the appellant and/or the mother and sister to be unreliable.

49. The reality is that the car accident takes the appellant's case no further. Even assuming that the sponsor did send some money through to the appellant in order to help out, that would not have demonstrated ongoing family life and does not undermine the preserved findings. It was nothing more than a specific means of assisting in respect of a one-off occurrence. We see this particular matter as something of a red herring and of no probative value.
50. Before moving on, we do note as being of some limited relevance the seemingly undisputed fact that the appellant did send some funds back to his parents whilst he was working in the Middle East. For the avoidance of any doubt, we find that this did in fact take place. To an extent, there was some merit in Mr Jesurum's submission that this indicated a degree of reciprocity in terms of support: the appellant was seeking to assist his parents out of his earnings, as they had supported him prior to his departure in 2014.
51. We turn to the question of whether family life was re-established following the appellant's final return to Nepal in 2019.
52. First and foremost, we take account of the fact that family life had ceased from 2014. That is clearly a relevant consideration and it makes the appellant's task of demonstrating the re-establishment of family life more difficult to achieve. That does not, however, introduce any sort of exceptionality threshold. The assessment remains highly fact-sensitive.

53. We take account of the fact that on return the sponsor and Mrs Rana had already come to settle in United Kingdom some two years earlier. That is a relevant factual consideration, although it is not, for the reasons set out previously, decisive. What it does mean is that the appellant did not return in 2019 to be reunited with his family unit in Nepal and what might have been a factor weighing in his favour is not present in this case. As it may be said to be connected to the point we have made in the preceding paragraph, it counts against the appellant's claim.
54. What has not been disputed is the evidence that the appellant returned to live in the family home/farm. The accommodation is not the appellant's, but that of his parents (described by the sponsor as "ancestral land": a land registration document is contained in the consolidated bundle). Whilst there has clearly been no cohabitation with the sponsor for many years, the fact that the appellant has, since 2019, resided in the same family home in which he grew up is relevant and weighs in favour of the re-establishment of family life. The provision of accommodation by a parent to their adult child is, in our judgment, clearly capable of attracting weight, depending on the facts of the particular case. Here, the appellant did not go and re-settle in, for example Kathmandu, in order to set up a new life for himself away from the family home.
55. The First-tier Tribunal accepted that money had been sent by the sponsor to the appellant, albeit that only relatively small sums were involved. Beyond that, the references to the evidence set out at paragraph 14 of Mr Jesurum's skeleton argument demonstrate to our satisfaction that there is consistent evidence from the appellant, the sponsor, and Sujata relating to the provision of funds to the appellant and his sister, Susma, with whom he lives in Nepal.
56. It is of some significance that the consolidated bundle contains a large number of money transfer receipts relating to remittances to the appellant and his sister, Susma. In respect of the appellant, these cover the period January 2020 to October

2023. Their reliability has not been challenged by the respondent and we find them to be both authentic and reliable as to their content.

57. Combining the subjective evidence with the corroborative evidence, we are satisfied that there has been meaningful financial support provided by the sponsor to the appellant from January 2020 to date (there is nothing to indicate that the provision of funds has ceased since the latter part of last year, and there has been no submission by the respondent to that effect).

58. We are also satisfied that money has been sent to support the appellant's sister, Susma. We are not specifically concerned with her circumstances in this appeal, but all of the evidence indicates that she appears to be in a similar position to that of the appellant in terms of her overall circumstances.

59. We find that the fact the appellant is living with his sister does not bear any real significance in terms of deciding whether there is family life between the former and the sponsor.

60. There is no evidence before us which expressly states that the appellant has other sources of income and/or savings of his own. That of itself does not preclude drawing of an inference that he does and Mr Melvin has, in effect, urged us to draw such a conclusion. Based on the following considerations, we have concluded that we should not accede to that.

61. First, we have found that the appellant earnings whilst in the Middle East were low and it is highly unlikely that he would have been able to accumulate any meaningful savings prior to returning to Nepal in 2019. Connected to this is the fact, as we find it to be, that there was a loan for funds to make the journey overseas which had to be repaid. It is likely that the appellant had to use some of his earnings to do so.

62. Secondly, there is no express evidence, nor any basis for inferring, that Susma has an income of her own, and even if she did, one which was in part for the appellant's use.
63. Thirdly, whilst we have concerns about the evidence relating to the farm, we find as a fact that the appellant is not working the land in order to sell produce.
64. There was inconsistent evidence relating to the state of the farm. Initially, the sponsor told us that the land was not being worked because of the absence of livestock and/or other people to undertake the tasks involved. He then said that much of the land had been washed away as a result of floods in 2018. The appellant's mother told us that the appellant and his sister did not know how to farm and that the younger generation simply did not want to work on the land at all. She only mentioned the flood when effectively prompted by Mr Melvin during cross-examination. As far as we can see, the loss of land to a flood had not been mentioned previously in anyone's witness statement.
65. On balance, we find that the sponsor has embellished his evidence in relation to the claimed flood and loss of land. There is no cogent reason as to why it had not been mentioned in writing previously and it was a potentially relevant issue going to the inability of the appellant to generate an income of his own in Nepal. We have considered whether this embellishment casts significant doubt on the rest of the sponsor's evidence and/or the evidence in its entirety. We have concluded that it does not. It is an untrue embellishment, but not one which fundamentally undermines everything that the sponsor has said and the same is true in respect of the appellant's mother and sister.
66. In our judgment, the truth of the matter lies in what the appellant's mother told us. The appellant does not want to work on the land, in keeping with what we consider to be the plausible position of very many young people in Nepal (and probably around the world). In that sense, the appellant's mother's evidence was candid, as

was certain aspects of the sponsor's: they confirmed that the appellant was effectively waiting in the hope that he would be able to come and settled in United Kingdom. In other words, he was exercising a choice not to try and carve out a living by way of agricultural endeavours.

67. We are just about prepared to accept that the appellant has tried to find alternative employment, but without success. However, it is likely that those efforts have been rather limited, given what has been said in the previous paragraph.

68. We regard the fact that the appellant has made a choice not to be fatal to the question of whether family life has been re-established. As stated previously in this decision, there is no requirement to show necessity for financial support, nor is there any requirement to show exceptionality in any sense. When applying the "beyond normal ties" test (which itself contains "real, effective, or committed support" as a good indicator), we find that the appellant's apparent unwillingness to do all that he might in order to become self-sufficient/independent is not a material contraindication to the existence of family life.

69. Bringing all of the above together, we find that there has been financial dependency by the appellant on the sponsor since the arrival of the former back in Nepal in October 2019. That dependency has been one of choice only to the extent that the appellant has not attempted to create a source of income from the farm. We accept that he has been unable to find other forms of work.

70. We have taken account of the fact that there have been no visits by the sponsor and his wife to the appellant since 2017. There are factors for and against the explanation provided for this. On the one hand, we accept that the following militated against the ability to make visits: the costs (the family in United Kingdom are clearly not well-off); the Covid-19 pandemic; the mother's heart attack in 2020; the sponsor's ill-health (he has a diagnosis of COPD); Sujata Rana's studies and work commitments. On the other hand, it is questionable why the appellant's

parents would require a family escort to make the journey to Nepal at a time when they were fit to fly and before or after the Covid-19 pandemic restrictions. There is a limited amount of medical evidence before us, but it does not state an inability to travel.

71. Weighing the above up, we find that it would have been possible for visits to have been made, albeit that these could only ever have been infrequent by virtue of the overall circumstances set out in the previous paragraph. The absence of any visits counts against the re-establishment of family life, but, on the facts of this case, only to a relatively limited extent.

72. We accept that there has always been, and continues to be, very regular indirect contact between the appellant and his parents. This has been by way of the usual form of communications; originally by telephone, and as time has gone on, through Internet platforms. We readily accept that the simple fact of maintaining regular contact between parents and adult children, does not, in and of itself, demonstrate family life on the Kugathas test. In the present case, we take account of the following features which arise from the evidence, none of which has been expressly challenged in respect of the consistency and nature of the contact.

73. First, the sponsor has stated that the primary reason for the appellant leaving Nepal in 2014 was because of the poor prospects of finding work in that country. In that regard, the sponsor was involved in arranging the loan for the appellant's journey to the Middle East and provided emotional support to the appellant during the period overseas, in respect of which we accept he experienced difficulties at times. Whilst, based on the preserved findings, there was no family life during this period, the communications were clearly of a supportive nature and that assessment is not inconsistent with those preserved findings.

74. Secondly, we accept the evidence expressed by the sponsor and Mrs Rana to the effect that they feel their lives remain "incomplete" without the appellant (and his

sister, Susma). We accept the sponsor's oral evidence that, on a personal level, he regarded financial support as being an aspect of emotional support as well. We accept the evidence provided in re-examination that the sponsor is excited to hear from the appellant and feels much happier following one of their conversations. In this respect, we see merit in Mr Jesurum's submission that there has been reciprocal emotional support and that is relevant to the overall consideration of whether family life exists.

75. Thirdly, whilst we acknowledge that the appellant's witness statement evidence has not been tested under cross-examination, for obvious reasons, we are none the less entitled to attach weight to it. In his December 2021 witness statement, the appellant states that this aspect of his emotional bond with his parents relates to the sacrifices they have made for him (and his sister). It is sufficiently clear to us that he has regarded, and continues to regard, their support as an important part of his life, despite him having lived independently overseas intermittently for some 5 years in the past.

76. Fourthly, we take account of the fact that the two-way emotional support has, even leaving aside that which existed during the period 2014-2019, now subsisted for some 3 ½ years since the appellant's arrival back in Nepal.

77. Having weighed up all relevant considerations going to the issue of emotional support, we find that it has been of a nature going beyond, albeit perhaps not by a wide margin, that which would be expected between a parent and their adult child.

78. In reaching an overall conclusion on the core question in this appeal, we find that notwithstanding the break in family life between 2014 and 2019, there has subsequently been support by the sponsor to the appellant which can properly be described as "real, effective, or committed" . It has been "real" in the sense of meaningful. It has been "effective" in providing financial support which has, as a matter of fact, been relied on for essential living costs (although necessity is not

required as a matter of law). The effectiveness extends to the provision of a home in which to live. Emotionally, its effectiveness is perhaps of lesser value, although certainly not minimal. However, the three components are disjunctive and the emotional support has clearly been both “real” and, at least, “committed”. The financial support has been “committed”. When this support is evaluated holistically and within the overall factual context of this case, it goes to demonstrate ties beyond what is normally expected in a relationship between a parent and their adult child. It follows that we are satisfied that family life was re-established following the appellant’s return to Nepal in 2019 and that it continues to this day. Article 8(1) is therefore engaged.

79. The remainder of our Article 8 assessment can be stated relatively briefly as there is no material dispute between the parties. As has been mentioned previously, no issue as to causation arises. There is no dispute as to whether, if family life exists, the respondent’s decision represents an interference with that life.

80. As to proportionality, we have considered the well-known authorities on the “historic injustice” issue. In so doing we have of course had regard to the mandatory considerations under section 117B of the Nationality, Immigration and Asylum Act 2002. The respondent has raised no issue as to English language and maintenance and we regard these as neutral factors. The most relevant consideration weighing in the respondent’s favour is the importance of effective immigration control. In many cases that would represent a very significant obstacle in an individual’s path to success. However, in the context of a Gurkha case, we are satisfied that in the absence of any relevant countervailing factors, the “historic injustice” consideration tips the balance in the appellant’s favour.

81. It follows that the appellant’s appeal is allowed on Article 8 grounds.

Anonymity

82. There is clearly no basis on which to make an anonymity direction. Indeed, no such direction has been sought. We make no direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed.

Direction to the appellant's solicitors

- (1) The oral direction given at the resumed hearing is hereby confirmed in writing;**

- (2) No later than 5pm on Friday 17 May 2024, the solicitor/caseworker with conduct of the case (failing which, the Principal of the firm) is to provide a written explanation as to why the appellant's skeleton argument of 6 March 2024 was not served on the respondent until 14 May 2024, contrary to the Tribunal's previous directions. The written explanation must be sent to the Field House Correspondence inbox, marked for the urgent attention of Upper Tribunal Judge Norton-Taylor and copying in the respondent.**

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 16 May 2024

ANNEX 1: THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006545

FtT Nos: HU/54411/2021

IA/11236/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SUROJ RANA

(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors

For the Respondent: Mr D Clarke, Senior Presenting Officer

Heard at Field House on 4 July 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Stedman (“the Judge”), dated 15 May 2022. By that decision the Judge dismissed the Appellant’s appeal against the Respondent’s refusal of his human rights claim.
2. The Appellant is a citizen of Nepal who is the adult son of an ex-Gurkha soldier (“the Sponsor”). The human rights claim was predicated on family life said to exist at all material times between the Appellant and the Sponsor, in combination with the well-known historic injustice issue relating to the position of the children of former Gurkha soldiers.

The Judge’s decision

3. In essence the Judge found as follows. At the time that the Sponsor came to the United Kingdom in 2017 to settle, the Appellant had been living in Qatar. The Judge found that the Appellant had been living there independently and rejected evidence that he (the Appellant) had in fact been supported by the Sponsor for most of the period in question. In respect of the period of time following the Appellant’s return to Nepal in 2019, the Judge accepted that there was evidence of financial support from the Sponsor together with communication and guidance. However, the Judge concluded at [25] that “the test for dependency” had not been met. That conclusion followed a self-direction at [23], in the following terms:

“I am mindful of family life needing to be real, effective and committed and I had no sense of that from the evidence”.

4. On the basis of his findings, the Judge dismissed the appeal.

The grounds of appeal

5. The focus of the grounds of appeal and in the submissions before me was whether the Judge had misdirected himself in law with reference to the passage quoted from [23]. Mr Jesurum submitted that he had and this was manifested by the use of the

word “and” between “effective” and “committed” in the self-direction, rather than the “or” which should have been stated in line with the correct legal test set out in Kugathas [2003] EWCA Civ 31; [2003] INLR 170, at [17]. He submitted that whilst the evidence in this case was not particularly compelling, it would have been open to the Judge to have found that family life existed as at the date of hearing if the correct test had been applied and notwithstanding the findings that the Appellant had lived independently whilst in Qatar for three years previously. Mr Jesurum submitted that if there were indeed a gap in the family life for those three years it was in no way fatal to the Appellant’s case.

6. Mr Clarke asked me to consider what the Judge had said at [5] and he posed the question of whether what he accepted was a misdirection at [23] was either a slip of the pen or was not material to the outcome.

Decision

7. I have considered the Judge’s decision with care and exercised appropriate judicial restraint before interfering with it. I do, however, conclude that the Judge materially misdirected himself in law and that that misdirection was, in the circumstances, material.
8. The appropriate test for family life as between parents and adult children is that set out in Kugathas, as agreed by the parties. The test is disjunctive, not conjunctive; in other words, an individual needs to demonstrate real, effective *or* committed support and the concept of dependency must be understood in that context. There is no requirement for necessity or exceptional circumstances.
9. It is right that at [5] the Judge set out the correct approach; but that was in fact only in respect of what the Respondent had stated in her refusal of the Appellant’s human rights claim. When it came to his own analysis and findings, the Judge did misstate the test at [23].
10. This is a case in which the evidence was not without its difficulties. The Judge was clearly entitled to find as he did in respect of the period spent by the Appellant in

Qatar, and indeed those findings have not been challenged. Having said that, as at the date of hearing before the Judge the evidence was capable of establishing family life. In my judgment, if the Judge had correctly directed himself to the appropriate legal test it could (not would) have led to a different outcome. In turn, if family life as at the date of hearing had been established, it appears not to have been in dispute that the Appellant's case probably would have been allowed with reference to the historic injustice issue.

11. For the sake of completeness, I agree with what appeared to be the common position of the parties before me that a gap in the existence of family life whilst the Appellant was in Qatar was not fatal to the Article 8 claim on appeal. What was said at [39] of Rai [2017] EWCA Civ 320 did not constitute the *ratio* of the Court of Appeal's judgment and was rather a reference to the facts of that particular case. There has been no suggestion by the Respondent in this case that there exists a requirement for family life to have existed on a continuous basis from an adult child's birth all the way through until the date of a hearing.

12. In the circumstances of this case, the Judge's decision must be set aside.

Disposal

13. Having discussed matters with the parties at the hearing, I am satisfied that it is appropriate to retain this matter in the Upper Tribunal for a resumed hearing in due course. The Judge's findings at [20]-[22] in respect of the Appellant's time in Qatar are preserved. They have not been challenged and do not render a consideration of up-to-date evidence on the issue of family life, artificial or academic.

14. Directions are issued, below.

Anonymity

15. There is no basis on which to make a direction in this case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and that decision is set aside.

This appeal is retained in the Upper Tribunal and the decision will be re-made in due course.

Directions to the parties

- (1) No later than 14 days from this Decision being sent out, the Appellant shall file and serve in electronic form a consolidated bundle of all evidence relied on. Every effort shall be made to compress the file containing the bundle to ensure that it can be received by the Tribunal as a single attachment;
- (2) If the Sponsor is to be called to give oral evidence at the resumed hearing, the Tribunal must be informed of the need for an interpreter at the time of serving the consolidated bundle;
- (3) Any further evidence relied on by the Respondent shall be filed and served in electronic form no later than 21 days from this Decision being sent out;
- (4) With liberty to apply.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 17 July 2023

ANNEX 2: DIRECTIONS NOTICE 22 FEBRUARY 2024

IN THE UPPER TRIBUNAL

Case No: UI-2022-006545

IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No: HU/54411/2021

THE IMMIGRATION ACTS

Directions Issued:

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

SUROJ RANA

(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

ADJOURNMENT DECISION AND DIRECTIONS

1. This resumed hearing unfortunately had to be adjourned once again. On the previous occasion in November 2023, the Senior Presenting Officer had not been informed that this case was at the re-making stage. In addition, the appellant's

previous representatives had failed to provide a consolidated bundle of all evidence relied on.

2. The reason why the hearing on 13 February 2024 had to be adjourned was as a result of the Nepalese interpreter failing to attend and it proving impossible to arrange an alternative interpreter.
3. This case will be re-listed for a resumed hearing before Judge Norton-Taylor, with a time estimate of three hours.
4. In terms of the evidence, the Tribunal will consider the following:
 - (a) the appellant's consolidated bundle, indexed and paginated 1-223;
 - (b) the appellant's witness statement, dated 28 December 2021 and contained at pages 1-3A of the First-tier Tribunal bundle (this is the uncorrupted version of the same witness statement contained in the consolidated bundle);
 - (c) the sponsor's supplementary witness statement, dated 6 May 2022;
 - (d) the respondent's reasons for refusal letter, dated 25 May 2021.
5. The Tribunal has a skeleton argument provided by Mr Melvin, dated 9 February 2024.
6. An additional matter arose during the adjourned hearing. Mr Jesurum, Counsel for the appellant, contended that the sponsor's supplementary witness statement appeared to have been before the First-tier Tribunal, yet was not apparently considered. The evidence contained in that supplementary witness statement

indicated that the sponsor had provided funds to the appellant whilst the latter was in Qatar. It was submitted that this evidence might undermine the First-tier Tribunal's findings at [20]-[22] of its decision. Those findings were expressly preserved in the error of law decision, promulgated on 15 August 2023. Mr Jesurum effectively submitted that, in light of the supplementary witness statement, the appellant should be given the opportunity to address the issue of financial support during the appellant's time in Qatar.

7. We noted Mr Melvin's objection to that course of action. He submitted that the grounds of appeal had made no reference to the supplementary witness statement and, in Mr Melvin's words, that evidence could not have made any difference to the First-tier Tribunal's adverse credibility findings in respect of the sponsor's oral evidence.
8. We appreciate Mr Melvin's position, but have concluded that it is appropriate for the sponsor's supplementary witness statement to be considered at the next hearing. It appears to have been overlooked by the First-tier Tribunal and is potentially relevant to the issue of whether the appellant was being financially supported whilst he was in Qatar. In saying this, we are by no means expressing a view as to whether family life existed at that point in time. That is a question which will have to be answered following the receipt of evidence and submissions in due course. We see nothing in this approach which offends against the authorities, such as *Sarkar v SSHD* [2014] EWCA Civ 195 and/or procedural fairness: we have raised the issue at this stage and the respondent is on notice.
9. Mr Jesurum sought to make further submissions to us at the adjourned hearing, but we took the view that these could and should wait. He would be entitled to make submissions on, for example, the judgment in Rai, at the next hearing.

Directions

- (1) No later than 14 days after this adjournment and directions notice is sent out, the appellant shall file and serve a concise skeleton argument. Amongst other matters, that skeleton argument shall address the question of whether the appellant must show that family life under Article 8(1) existed at the point at which the sponsor left Nepal to settle in the United Kingdom (2017);

- (2) No later than 10 days thereafter, the respondent may file and serve a supplementary skeleton argument.

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 13 February 2024