**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/18264/2018 (V)**

**THE IMMIGRATION ACTS**

| **Heard remotely by Skype for Business** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 February 2021** | **On 18 February 2021** |

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**ONGDI SHERPA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the appellant: Mr J Khalid, Counsel, instructed by Goulds Green Chambers
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is the re-making of the decision in this case following my previous conclusion that the First-tier Tribunal had erred in law when dismissing the appellant's appeal against the refusal of his human rights claim. My written decision and writing on that issue is appended to the present decision.

2. The appellant is a citizen of Nepal, born in 1985. He is the son of an ex-Gurkha soldier who served in the British Army for many years and died in 1996. The

appellant's mother ("the sponsor") applied for settlement in the United Kingdom at the same time as the appellant's application (deemed to constitute a human rights claim) was made in May 2018. Whilst the appellant's claim was refused, the sponsor was issued with entry clearance and she arrived here in September 2018, although it is accepted that she then returned to Nepal to be with the appellant before coming back to the United Kingdom in July 2019.

**The issues**

3. Both representatives agreed that the core question to be determined was whether there was extant family life between the appellant and the sponsor, having regard to the well-known case-law on this issue.

4. Mr Tufan conceded that if I were to find that family life did in fact exist, then, in light of the well-established "historic injustice" consideration applicable in Gurkha cases, the refusal of the appellant's human rights claim would be disproportionate and that the appeal should be allowed on that basis.

**The evidence**

5. I have considered the contents of two bundles filed and served on behalf of the appellant: the first (now marked AB1 and having been provided for the First-tier Tribunal hearing) is indexed and paginated 1-100; the second (now marked AB2) is indexed and paginated 1-13.

6. No oral evidence was called. The appellant continues to reside in Nepal and there was no application to have him give evidence from there. As confirmed by the appellant's representatives at the telephone case management hearing on 28 September 2020, the sponsor is living with the appellant in Nepal and again there was no request for her to give evidence from that country. It appears as though she went back there at some point after July 2019 and before March 2020.

7. AB1 and AB2 contain, amongst other items, witness statements for the appellant and the sponsor, together with documentary financial support provided by the latter to the former.

**Submissions**

8. Mr Khalid submitted that the evidence as a whole was reliable. It showed that the appellant had lived with the sponsor before the latter came to the United Kingdom in 2019 for settlement. The appellant had always been, and continues to be, financially dependent on the sponsor. His efforts to obtain work in Nepal had been unsuccessful. Documentary evidence proved that he was able to access the sponsor's bank account and he used these funds to support himself. His three surviving sisters

are married and living independent lives elsewhere in Nepal. It was also submitted that in addition to financial dependency, the appellant had provided emotional and practical support for his mother who is relatively elderly and in poor health. The need for this support was said to be the primary reason why the sponsor left United Kingdom and returned to Nepal. In light of the relevant case-law (including Kugathas [2003] EWCA Civ 31), there was family life. This being the case, Mr Khalid relied on the "historic injustice" factor, submitting that the appellant to succeed on Article 8 grounds.

9. Mr Tufan acknowledged the evidence, but did not accept that there was family life in this case. Relying on AAO [2011] EWCA Civ 840, he submitted that financial dependency by an adult child on a parent was insufficient to show the existence of family life. He raised the question of whether there was enough evidence to show that the appellant had lived in a single family household before his mother came to the United Kingdom for the first time.

10. In reply, Mr Khalid referred to Rai [2017] EWCA Civ 320 and submitted that there was "real" and support by the sponsor to the appellant. There was in this case both financial dependency and genuine emotional support. It was confirmed that the sponsor had always resided alone whilst in the United Kingdom.

**Findings of fact**

11. I have of course considered all of the evidence before me, applying the balance of probabilities. I have assessed the evidence as at the date of hearing, but have had regard to the overall background to the case.

12. I accept that both the appellant and the sponsor have provided truthful evidence as to their circumstances over the course of time and to date. It is of course right that neither of them has given oral evidence and have not in that sense been "tested". However, Mr Tufan did not take any specific credibility points against them; their evidence has in my view been consistent and entirely plausible; what they have said is to an extent is supported by independent documentary evidence; and there are no sound reasons why I should find them to have been lying.

13. I find that the appellant had always lived with the sponsor in Nepal and only found himself residing alone after the latter left for the United Kingdom in 2018. I accept that prior to this event the appellant had always been financially dependent on, first his father, and then the sponsor, who herself had to rely on her late husband's war pension. I accept the documentary evidence which shows that the family's home was destroyed by the earthquake in 2015 and that the appellant and the sponsor had to live in government-provided shelter thereafter. I find that this provision continues to date.

14. I find that the sponsor, once in the United Kingdom, resided alone and very soon found the separation from the appellant to be unbearable, as she recounts in her witness statement. It is clear that she has suffered from a variety of ailments, and

sought the emotional and practical assistance of the appellant prior to her arrival in this country. I accept that the separation was too much for her and that she went back to Nepal shortly after her arrival here. I find that she then returned to the United Kingdom in 2019. Whilst I do not have evidence as to precisely when she then returned once more to Nepal, I accept that this occurred sometime prior to March 2020 essentially for the same reason as she went back on the first occasion, namely her desire to live with the appellant and to have support from him again.

15. In light of the evidence as a whole, I conclude that there has been, and still is, a strong bond of emotional dependency as between the appellant and the sponsor. This dependency emanates mainly from the sponsor to her son, but that is immaterial.

16. In addition, I am satisfied that the appellant has been, and still is, financially dependent on the sponsor. That is the reliable evidence given by them both and it is supported by the letters from the Sunrise Bank contained in both bundles to the effect that the appellant has authorised access to the sponsor's account in order to support himself.

17. Whilst there is no specific documentary evidence as to the appellant's search for employment in Nepal, I accept his own evidence to this effect. In any event, the question of real and effective support is not necessarily concerned with whether an adult child could work, but whether there is in fact such support in existence which, alone or in combination with other factors, goes to show family life.

18. I also accept the sponsor's evidence that but for the historic injustice perpetrated against former Gurkha soldiers, the appellant's father would have sought to have settled in the United Kingdom many years ago and that it is more likely than not that the appellant would have been born in this country and now be a British citizen.

**Analysis and conclusions**

19. In light of my findings of fact above, I conclude that there is extant family life between the appellant and the sponsor. There is in this case a combination of financial dependency and a strong emotional bond between the protagonists. Article 8(1) is therefore engaged.

20. There is no issue as to the questions of interference, the decision being in accordance with the law, or whether it pursues a legitimate aim.

21. As stated earlier, Mr Tufan conceded that if family life did exist, the refusal of the appellant human rights claim would constitute a disproportionate interference with that life. That concession was in my judgment properly made.

22. The significance of the "historic injustice" factor has been recognised in the case-law for a considerable period of time now (see for example Gurung [2013] EWCA Civ 8 and Ghising and others (Gurkhas/BOCs - historic wrong - weight) [2013] UKUT 567 (IAC)). The continuing significance of what can properly be described as a "historic

injustice" was emphasised most recently in Patel (historic injustice; NIAA 2002 Part 5A) [2020] UKUT 351 (IAC).

23. I take full account of the relevant considerations under section 117B NIAA 2002. It is not clear whether the appellant can speak English to a reasonable degree, or that if he were in the United Kingdom he would be financially independent (although there is no particular reason to think that he would not wish to find employment as soon as possible). For the avoidance of doubt, I would assume that these two factors count against him. However, the weight attributable to the "historic injustice" factor remains very significant. It has the effect of greatly reducing the weight attributable to the public interest.

24. Ultimately, and in line with Mr Tufan's concession, I conclude that the refusal of the appellant's human rights claim was disproportionate and therefore unlawful under section 6 of the Human Rights Act 1998.

## Anonymity

25. The First-tier Tribunal did not make an anonymity direction and there is no reason for me to do so. I make no such direction.

## Notice of Decision

**26. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and I have set it aside.**

**27. I re-make the decision by allowing the appeal on Article 8 grounds.**

**Signed:** *H Norton-Taylor* **Date: 4 February 2021**

**Upper Tribunal Judge Norton-Taylor**

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00.

**Signed:** *H Norton-Taylor* **Date: 4 February 2021**

**Upper Tribunal Judge Norton-Taylor**

**APPENDIX: ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/18264/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 22 January 2020**
**Extempore**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR ONGDI SHERPA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD**

Respondent

**Representation:**
For the Appellant: Mr M Khalid, Solicitor from Goulds Green Chambers
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Andonian ("the judge"), promulgated on 14 August 2019, in which he dismissed the Appellant's appeal against the Entry Clearance Officer's decision of 10 August 2018 refusing entry clearance as the adult dependent relative of the Appellant's mother (the Sponsor). The Sponsor was the widow of a former Ghurkha soldier. The Appellant had asserted that he enjoyed family life with the Sponsor and that in light of the "historic injustice" relating to the position of former Ghurkha soldiers and their families, the refusal of entry clearance was a disproportionate interference with his family life rights under Article 8.

2. The judge concluded that the Appellant was not dependent upon the Sponsor and in turn that there was no family life between the two. He based this conclusion on a

lack of evidence in respect of certain matters of concern, but also on the ground, repeated frequently within his decision, that the Sponsor had apparently made "frequent" trips to Nepal, indicating that she was in receipt of additional income from some unknown source.

3. The grounds of appeal assert, amongst other matters, that the judge was simply wrong to have concluded that the Sponsor had been making frequent or regular trips back to Nepal since her admission into the United Kingdom for settlement in 2018. The grounds assert that the evidence before the judge showed that she had in fact only made a single trip to Nepal, that being between September 2018 and July 2019.

4. Permission was granted by Designated First-tier Tribunal Judge McClure on 10 December 2019.

5. At the hearing before me Mr Bramble accepted that the judge had materially erred in law on the basis that there was a fundamental misapprehension of the evidence relating to the Sponsor's movements between the United Kingdom and Nepal. He accepted that the evidence in fact showed that she had made the single visit alluded to in the grounds of appeal and not the frequent or regular trips found by the judge to have taken place.

6. Mr Bramble was entirely right to make this concession. It is unclear as to why the judge got the wrong end of the evidential stick, as it were, but that he did, and the error is repeated throughout his decision. It is quite clear that it played a material part in his overall consideration of the Appellant's case, including the existence of family life. Although the judge purported to reach an alternative conclusion on the issue of "historical injustice" at para 64, in light of the well-known case law on this issue I conclude it is clearly flawed.

7. In light of the above I set the judge's decision aside with no preserved findings of fact.

8. Whilst the Appellant's representative submitted that this appeal should be remitted to the First-tier Tribunal, I disagree. The matter will be retained in the Upper Tribunal and set down for a resumed hearing at which relevant evidence can be presented and findings of fact made. I will issue appropriate directions below.

9.

**Notice of Decision**

**The decision of the First-tier Tribunal contains an error of law and I set it aside.**

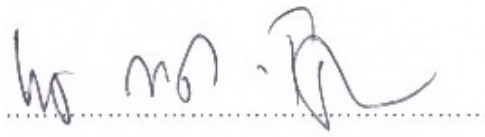
**This appeal is adjourned for a resumed hearing in the Upper Tribunal.**

**No anonymity direction is made.**

**Directions to the parties**

1) **Any further evidence from the Appellant shall be filed and served no later than 14 days before the resumed hearing. Such evidence shall be accompanied by an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008;**

2) **Oral evidence from the Sponsor will be permitted at the resumed hearing, but only if an updated witness statement is provided in compliance with direction 1, above.**



Signed Date: 28 January 2020

Upper Tribunal Judge Norton-Taylor