**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/20578/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18th October 2021** | **On 16th November 2021** |

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MS MAN DEVI GURUNG**
**(NO ANONYMITY DIRECTIONS)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the appellant: *Mr R Solomon*, instructed by Chris Raja Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of her application for entry clearance to settle with her sponsoring father, a retired soldier of the Brigade of Gurkhas, now settled in the UK. The background to the appeal is set out my earlier decision on whether a previous First-tier Tribunal had erred in law, which is annexed to this decision.

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The issues in this appeal

2. Broadly speaking, it is accepted that the appellant is the adult daughter of the sponsor. The sole issue is whether family life exists for the purposes of Article 8 ECHR between the appellant and the sponsor as, if it does, the respondent accepts that refusal of entry clearance would be disproportionate. This was because, as per the authority of R (Gurung & Ors) v SSHD [2013] EWCA Civ 8, the historic injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be considered during the article 8 ECHR assessment and while it may not be determinative,

> "if a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now." (§42)

3. The parties accepted that there were no public interest considerations to counter the applications (none having been raised), so that were I to find that family life has been established between the appellant and sponsor, on these particular facts, refusal of entry clearance would be disproportionate.

4. The parties also agreed that when considering whether family life existed, there was no requirement of exceptionality or necessity of need for adult children. Instead, the test was whether there was real, effective or committed support (see Rai v The Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320).

5. Importantly, in the context of these agreed issues, there was no appeal based on claimed family life between the appellant and her adult siblings. Such an appeal would raise wider issues of proportionality, unconnected to the historic injustice relating to former members of the Brigade of Gurkhas. I discussed this issue with Mr Solomon, when he began, in closing submissions, to refer to support not only from the sponsor but the appellant's siblings. Mr Solomon pointed out that the existence of Article 8 family life between the appellant and her brothers did detract from the existence of family life between the appellant and her father, and might provide a context for that dependency. I accept that any analysis of the claimed family life between the appellant and sponsor needs to be within the context of wider familial relationships, but the relationship ultimately relied upon was the relationship between the appellant and the sponsor.

6. A second issue arose in closing submissions, considering the sponsor's evidence. The sponsor's honesty has not previously been questioned. There were several important inconsistencies in his oral evidence, not only in relation to dates, but also the sources of financial support to the appellant and her independence in Nepal. Mr Solomon, in re-examination, had asked the sponsor about his ability to recall dates and he had referred to a substantial difficulty with memory. Mr Solomon even went as far as to check the sponsor's awareness of his date of birth. When I discussed with Mr Solomon in his closing submissions whether the appellant had ever contended that the sponsor was a vulnerable adult, the reliability of whose evidence might be impaired, he accepted that the issue had not been raised and perhaps he should have

done. Mr Solomon also accepted that there was no evidence, other than the sponsor's comment in re-examination about his poor memory about dates, to support a contention that the sponsor's cognitive function might otherwise be impaired. Moreover, Mr Solomon did not suggest that Ms Isherwood's questioning of the sponsor was in any way inappropriate. I bore in mind the guidance of this Tribunal in SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC). No concerns about vulnerability, to which I was referred, were raised before earlier Tribunals.

Evidence

7. I heard witness evidence from three witnesses who adopted their written witness statements and who also gave oral evidence, on which they were cross-examined. The first witness, Chig Bahadur Gurung, the appellant's sponsoring father, adopted two witness statements at pages [9] of the main bundle and page [4] of the supplementary bundle. I summarise these as follows.

The sponsor's evidence

8. The sponsor referred to an earlier finding that the appellant was financially dependent on him. However, the earlier judge, Judge Birk had found that she remained independent because she was able to attend to her day-to-day needs such as shopping. However, this took out of context the appellant's situation as a divorced single woman who suffered ostracism in Nepalese society. She had married a few months before her 17th birthday on 29th April 1998 and the marriage had only substantively endured for two and a half years before the appellant returned to the parental home. During the marriage she had been the victim of domestic violence at the hands of her ex-husband. The sponsor had allowed the appellant to return to the parental home to ensure that she was properly fed. He had hoped that the relationship between the appellant and her parents-in-law would develop upon the birth of the appellant's twin sons in 2000 but this was not the case and eventually she returned full-time to the family home. She was not allowed to take her two sons with her but instead was allowed to visit the boys at their paternal grandparents' home.

9. The sponsor had advised the appellant against issuing divorce proceedings as it would not reflect well upon the appellant. In any event, only the appellant's estranged husband could initiate divorce proceedings and he only returned to Nepal in 2011, working overseas in the meantime. She was only able to spend a few hours at a time when she visited her sons. The sponsor and his wife had advised the appellant to go back to her studies and supported her emotionally and financially to do so. She finally qualified as a dental hygienist and in the meantime the sponsor and his wife decided to take up the offer to settle in the UK. The sponsor settled at the beginning of 2009 and at that time invited the appellant to settle with him, but she wished to remain in Nepal for the sake of her two children. In terms of the appellant's other siblings, the sponsor's oldest son, Surya (who also gave evidence) settled in the UK and the sponsor's eldest daughter was also settled in the UK, having entered as the wife of a British national from Hong Kong. The sponsor's wife

initially remained in Nepal, opting to stay helping both the appellant and two younger sons. However, both those younger sons then also settled in the UK, with only one other son remaining in Nepal where he was married with children.

10. The appellant's situation was worse after her ex-husband returned to Nepal in 2011. He was apparently jealous of the bond that had developed between the appellant and her sons in the ex-husband's absence. This resulted in the ex-husband denying the appellant access to her sons. The appellant had not been able to live with her older sibling in Nepal because of the appellant's divorced status and so when the appellant's younger siblings had left the UK, she opted to rent a room in the house of a friend, but this had not lasted long because of her status as a divorcee. Instead, the appellant had moved into a property owned by Surya, gained a qualification as a dental nurse, but was unable to get a job because of her divorced status. In terms of the current relationship between the appellant and her sons, they were now 20 years old and had little time for their mother. Her life was limited to weekly grocery shopping and visits to the bank to get the money sent to her. The UK-based family had also made visits to Nepal. The sponsor or his wife or the appellant's siblings would also contact her frequently during the week to keep her spirits up. The sponsor described his own health as deteriorating and being less able to travel to Nepal. He felt guilty that the appellant had been abandoned.

11. The sponsor also referred to the appellant as having endured years of taunts and snide remarks in the streets and her inability to get work because of her divorced status. She had endured sleepless nights and headaches and had consulted doctors over her headaches and migraines. Her anxiety levels were very high, and she had had to obtain medication as a result.

12. In oral evidence, the sponsor gave evidence that directly contradicted several of his previous assertions. He accepted that it was his son rather than he himself who provided financial support to the appellant. When asked about why she only looked for jobs in 2018 and 2019, rather than earlier, when she had qualified as a hygienist in 2011, the sponsor said that the appellant had two young children, so did not have time and did not therefore look for work. The sponsor was asked when the appellant stopped living with her two sons. He replied that it was in 2020. He then added that she was occasionally allowed to see her sons. He clarified that she had stopped living with her sons before 2020 but did not know the precise date of when they stopped cohabiting. He accepted that the appellant was in an independent family unit with her sons up to 2020. He accepted that she was looking for work in 2018 and 2019, as by that stage her sons could look after themselves and she had her independence. He then clarified that the appellant's ex-husband took the sons away from the appellant's custody in 2017, after which time the appellant could see her sons occasionally. She had stopped seeing them after 2020.

13. In re-examination, the appellant was able to confirm his age but when asked whether he was good at remembering dates, he said that he had forgotten everything. He thought his written witness statements were more likely to be correct than his oral evidence. He also said that the appellant's sons had stayed with their father's family after 2001, when the appellant had returned to living with the sponsor. He also

confirmed, when the money transfers were pointed out in the main bundle by Mr Solomon, that those were his payments to his daughter. When asked why he had said in earlier cross-examination that it was his son who sent the money he said that the son had helped him send the money, but it was the sponsor's money. Occasionally the son would also supplement this with money of his own, but otherwise it was the sponsor's money.

Witness evidence of Surya Gurung

14. Surya Gurung also adopted his written witness statement, a copy of which was at pages [18] to [19] of the appellant's main bundle. He was the sponsor's oldest son. He was resident in the UK and he and his siblings were all concerned about their sister's welfare. He reiterated the stigma of divorced women in Nepalese society. The appellant lived in a property in Nepal owned by him without paying any rent and he met all the outgoings in relation to the property. No-one had been willing to hire the appellant despite her qualifications.

15. In cross-examination, Surya added that his direct financial support by way of remittances were limited to occasions during the year such as New Year and Christmas and it was normally the sponsor who supported her. His brother, Jiban sent money for the sponsor but he was not sure whether Jiban also sent his own money. He was aware that the appellant was depressed because of her loneliness but that was the extent of his knowledge. When he was challenged as to whether he could really be that close if he was unaware of any further details, he added that he spoke to her even as recently as last week and she had told him of her depression. When asked what they spoke about he mentioned her loneliness and her poor health at the moment and that she was going to the hospital. He was unaware of the precise dates.

Witness statement of Jiban Gurung

16. Jiban Gurung, the younger brother of the appellant, adopted his two witness statements at pages [21] of the main bundle and page [8] of the supplementary bundle. The summary of the written witness statements is that Jiban now lives in the UK, having entered in September 2011 with his brother Prabin. He was aware of the difficulties that the appellant had encountered in her brief marriage and her ill-treatment by her former husband. She had returned to the family home and had been asked whether she wished to apply for settlement at the same time as her brothers, but she declined because she did not wish to lose contact with her two sons. The respondent had not recognised the extent of the marginalisation she would face due to being a young, divorced woman. After the appellant's mother left for the UK, Jiban and his brother found it difficult to cope. The appellant was too pre-occupied with her own problems and Jiban and his brother then resettled in the UK. When Jiban had visited his sister on the single occasion in April 2012 she was frequently crying and breaking down. He continued to support her financially and telephone her. Whenever any family member visited her, they all sent cash and gifts. She was totally dependent on the family and the whole family was concerned about her

wellbeing. He added that sadly his sister had referred to taking her own life as she had no reason to live.

Findings

17. I take as my starting point the decision of First-tier Tribunal Judge Birk, who, in a decision of 21st March 2019, had dismissed the appellant's appeal. In doing so, I accept that this is only a starting point and that I should not, as Mr Solomon reminded me, treat this in any way as a "straitjacket". That being said, where there were facts which could have been adduced but were not, the well-known authority of Devaseelan guidelines (Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702) apply. The starting point of Judge Birk's findings are that the appellant lives alone in Surya's house (§17 of Judge Birk's decision) and that the sponsor has been sending the appellant money to assist and support the appellant for many years and that it is not practical, realistic or feasible for him to have retained all the documentary evidence in proof of this. There is documentary evidence of money transfers for recent times since 2017 and Judge Birk accepted that these remittances are to support the appellant financially (§19). Judge Birk went on to further find that the sponsor and his wife had made trips to Nepal, in 2011 and 2012, 2015, 2017 and 2018. The length of time spent in Nepal on each occasion was between one to three months.

18. I was urged to consider that Judge Rae-Reeves, in his decision promulgated on 5th November 2019, referred at §§30 and 31, to the evidence of the witnesses being given in a clear and straightforward manner. However, it is also important to note that I did not preserve any findings in that decision that the witnesses were credible. The extent of the preserved findings was as set out in my error of law decision as follows:

> "32. I preserve the FtT's findings (as to which there appears to be no dispute) that the sponsor had provided, and at the date of the hearing continued to provide, financial support to the appellant (§25 of the decision) and at §34, that the appellant was 'mistreated … some twenty years ago.' The preserved findings do not go beyond those two limited points."

19. Despite the circumspection with which I am guided to treat new evidence of domestic violence and the lack of explanation for why it had not been adduced earlier, I am also conscious of the preserved finding that the appellant had suffered mistreatment by her husband. There is also the evidence of the couple's divorce in 2012; and the societal stigma towards divorced women, to which I refer later in this judgment.

20. I have considered the appellant's claims of support from the sponsor and the brevity of her substantive marriage (1998 to 2001). I find that she left the home which she shared with her husband and children in 2001. I prefer this date as more reliable, based on the evidence of the appellants' brothers, than the sponsor's oral evidence of co-residence with her sons until 2017 or 2020, which was contradictory. I make further comments on the reliability of the sponsor's oral evidence, later in these findings.

21. After the appellant left her matrimonial home, the appellant's estranged husband moved to Dubai to work. In leaving her former matrimonial home, she left her two infant children with her parents-in-law but continued to visit them on a regular basis. The appellant's estranged husband did not return to Nepal until 2011 and it was during that period that the appellant continued to live in her parents' family home until 2011, when two of her younger brothers joined their parents in settling in the UK. It was around that time that she also studied for the qualification in dental hygiene. She was formally divorced in 2012, as confirmed in the divorce certificate at pages [56] to [58] of the main bundle. At the time of the sponsor's settlement in the UK in 2009, I accept that the appellant was living in the sponsor's home and was dependent solely upon him. However, as all the witnesses accept, the appellant's parents suggested that she apply for entry clearance with her brothers in 2011, but she declined this, to remain with her sons in Nepal. It was not until May 2018 that she applied for entry clearance, by which time it seems that relations with her former husband were deteriorating and her contact with her sons was becoming more limited.

22. The question is to what extent, by the date of her application for entry clearance in 2018, she had family life with her sponsoring father, in the context of the wider family unit. It is not disputed, and I find, that after 2011, she was living in a home owned by Surya, her oldest brother, and that he met all the financial outgoings in respect of that property. She was no longer living in her parent's former home, which she had previously shared with her parents and siblings. She moved into that new home, but it is not suggested that this was a home she had shared with the sponsor, or indeed Surya, who had settled in the UK on retirement from HM Armed Forces in 2003. She had chosen to remain in Nepal, rather than join her mother and siblings in settlement in the UK in 2011. After 2011, she lived alone, while continuing in her role as non-residential mother to her two children.

23. Surya and his younger brother Jiban send monies to the appellant, although their evidence was that most of the money is the sponsor's (although Surya was unsure what monies Jiban remitted). What is unclear from the evidence is what proportion of the appellant's living costs (accommodation and other living expenses) are met by Surya, and what proportion of the appellant's living costs are met by the sponsor, or Jiban. Judge Birk accepted that the sponsor made regular remittances. I accept Mr Solomon's submission that support for the purposes of Article 8 is not a "zero sum" game, in the sense that the appellant need not be supported only by the sponsor, but I have no sense whether the appellant's day-to-day living needs are in fact met by Surya and Jiban. Mr Solomon accepted the need for this line of enquiry, when he said that I would need to "unpick" the support from the sponsor, as opposed to the wider support from her siblings, while considering both in context. The difficulty is that there is insufficient evidence before me to make that assessment and Mr Solomon's submissions did not address this further. I am also conscious that the fact of financial remittances alone is not sufficient to constitute family life for the purposes of Article 8. While support need not be out of necessity, the appellant has not shown how any financial support from the sponsor fits in to wider support from her siblings, or the extent to which it has been real or effective or committed,

particularly in the context of the sponsor's evidence about the appellant having formed an independent family unit with her children, as to which I come on to comment.

24. In the context of the Country Policy and Information Note (version 1.0 August 2018), which had referred at §15 to societal stigma, ostracism and discrimination towards divorced women in Nepal, I am prepared to accept that the appellant will have faced isolation because of her divorce in 2012. There is also evidence in 2018 and 2019 of the appellant's attempt to apply for jobs. However, when questioned, the sponsor gave evidence that the appellant did not initially seek work because her children were young, and she did not have time to do so. This was in response to the issue identified by Ms Isherwood as to what steps, if any, had the appellant taken between 2011 when she qualified as a dental hygienist and the later evidence of job applications. In other words, there is a stark gap from 2012 until when the appellant applied for entry clearance in 2018 as to what steps, if any, she took to use her qualifications. The sponsor clearly answered this by indicating that the appellant took no steps because she was busy in her caring role for her sons, albeit on the appellant's account, as a non-resident mother. Critically, the sponsor also accepted that she formed part of an independent family unit with her children, in that role. There is not sufficient evidence that the appellant was unable to find work between 2012 and 2018. Rather, her focus was on her children, while they were still minors.

25. I have given careful consideration as to what reliability, if any, I can place on the sponsor's evidence. The sponsor himself made clear that his ability to recall dates was significantly impaired and I am prepared to accept that, for example, his evidence as to when the appellant ceased to be resident with her sons was explained by that inability to recall dates. However, that does not, in my view, explain or undermine the sponsor's evidence as to the lack of application for jobs between 2012 and 2017/2018 and the sponsor's comment that the appellant had an independent family life with her children, with whom she wished to maintain a relationship. His evidence was also consistent with the reason why she had remained in Nepal instead of joining her siblings to settle in the UK in 2011. The deterioration in her relationship with her sons, who are now adult, further explains and is consistent with her recent medical treatment for anxiety. The fact that her health worsened when her sons became adult and their relationship with their mother deteriorated, is consistent with her having formed an emotionally independent family unit with her sons in the period before 2018, and having them as her focus, rather than her focus being emotional support from the sponsor, with whom she had not lived since 2009. The sponsor's evidence, that the appellant was part of a separate, independent family unit with her sons before 2018, is consistent with the timeline of events and is plausible.

26. I considered the appellant's claim of support in the Article 8 sense at the date of her application for entry clearance. In doing so, I noted the brevity of the appellant's substantive marriage; her subjection to domestic violence; her return to the sponsor's family home in 2001; and the ongoing cultural stigma to divorced woman in Nepal. I accept that although she was briefly married, it remained possible for the appellant

to become dependent on the sponsor once again after 2001. However, it is also important to note that her return to the sponsor's home in 2001 is not an end to the timeline of events. She cannot be blamed for wishing to remain with her sons when the sponsor emigrated, but it provides the context of an independent life, as the sponsor himself accepted, with her sons, as their non-resident mother. She did so where a proportion, if not the substantial proportion of her needs were met by her sibling, Surya, rather than the sponsor. Taking all of the evidence in the round, there is not in my view sufficient evidence of real, effective or committed financial or emotional support, in the Article 8 sense, from the sponsor. While there may be such support from the appellant's siblings, the sponsor's role in the wider family support since 2011 is unclear, on the evidence before me.

27. Since 2018 and the rejection of her application for entry clearance, I accept that there has been a deterioration in the appellant's relationship with her sons and I accept that she may have become more emotionally dependent on her siblings, which they themselves have accepted in oral evidence. Whilst I accept Mr Solomon's submission that support from siblings does not detract from support from the sponsor, I am not satisfied support between the appellant and the sponsor existed from 2011 to 2018, during which the appellant had an independent family life with her sons. I am not satisfied that since the recent deterioration in the appellant's health, there is evidence that this has resulted in increased support from the sponsor.

28. The representatives accepted at the beginning of the hearing that there were no countervailing factors and that the sole issue was whether family life existed between the appellant and the sponsor, not the wider family. If I answered the question by finding that there was no family life between the two, the representatives had accepted that the appeal would fail. I find that there is not sufficient evidence of family life between the appellant and the sponsor. Consequently, the appellant's appeal fails and must be dismissed.

Conclusions

29. On the facts established in this appeal, there are no grounds for believing that refusal of entry clearance breaches the appellant's rights under Article 8 of the ECHR. I conclude that there is not sufficient evidence of the existence of family life between the appellant and the sponsor. That is determinative of the Article 8 appeal.

Decision

30. The appellant's appeal on human rights grounds is dismissed.

Signed: *J Keith*

**Upper Tribunal Judge Keith**

Dated: **28th October 2021**

*TO THE RESPONDENT*
*FEE AWARD*

The appeal has failed and so there can be no fee award.

Signed: *J Keith*

**Upper Tribunal Judge Keith**

Dated: **28th October 2021**

**ANNEX: ERROR OF LAW DECISION**

IAC-AH-KRL-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/20578/2019 ('V')

**THE IMMIGRATION ACTS**

| | |
|---|---|
| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **And via Skype for Business** | |
| **On 16th March 2021** | **On** _____ |

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MS MAN DEVI GURUNG**
**(NO ANONYMITY DIRECTIONS)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the appellant: *Mr R Solomon*, instructed by Chris Raja Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 16th March 2021.

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2. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Rae-Reeves (the 'FtT'), promulgated on 5th November 2020, by which she dismissed the appellant's appeal against the respondent's refusal on 24th October 2019 of the appellant's application on 8th August 2019 for entry clearance at the adult dependent child of a retired Gurkha soldier.

4. In essence, the appellant's claims involved the following issue: whether the appellant, a 39-year-old, continued to have family life with her sponsoring father, now settled in the UK. Whilst the respondent accepted that the appellant may receive financial assistance from him, the respondent did not accept that the appellant was financially dependent on her father. The respondent considered a previous First-tier Tribunal decision which had been decided three months prior to the current application, which had rejected financial and emotional dependency. The respondent noted that the appellant had previously been married between 1998 and 2012 and had lived apart from the sponsor for more than two years other than by reason of education. She had in fact formed an independent family unit and a previous Tribunal had found that the appellant had established her own independent life. The respondent concluded that there were not exceptional compassionate circumstances relating to the appellant's case. The sponsor had applied for a settlement visa, which was his right, in the full knowledge that adult children did not automatically qualify for settlement.

5. The appellant appealed against the most recent refusal on the basis that she had endured domestic violence at the hands of her former husband and former in-laws; had left the family home, leaving her two sons; and sought refuge in the home of a close relative. There had been a delay in formalising her divorce because of conservative societal attitudes in Nepal. She continued to rely emotionally and financially upon her parents which had never ceased, because the domestic violence had begun at an early stage. The grounds of appeal were further critical of the previous First-tier Tribunal decision.

**The FtT's decision**

6. The FtT took into account, as a starting point, the previous FtT decision, in accordance with the well-known authority of Devaseelan (Second Appeals - ECHR – Extra-Territorial Effect) Sri Lanka* (2002) UKIAT 00702. That earlier decision had dismissed a previous appeal on 21st March 2019, and it was only months later in early August 2019 that the appellant had a further application. The FtT noted that the appellant's representative was unable to explain why no reference had been made to the circumstances of claimed domestic violence before the recent appeal. The respondent invited the FtT to exercise circumspection in relation to the new facts, which could have been raised in the previous Tribunal appeal.

7. The FtT noted the previous finding that the appellant was financially supported by the sponsor (§25). At §27, the FtT noted that the appellant accepted that she lived in her brother's home in Nepal, and she claimed to be isolated. The appellant's affidavit was described as providing very little information explaining the claimed emotional dependency on her parents and provided no evidence that took their relationship over and above that which would be considered 'normal'. Whilst at §13, the FtT accepted the sponsor gave evidence in a clear and straightforward manner, at §33 the FtT concluded that there was no family life between the appellant and the sponsor. In doing so, the FtT considered relevant factors, including the appellant's two adult sons and one adult sibling living near to or with her; and the fact that any mistreatment that occurred some 20 years ago would not give rise to greater dependency now than would otherwise be expected and would amount to the basis of family life. At §35 and taking the previous First-tier Tribunal decision as a starting point, the appellant's age and the time she had lived an independent life, the FtT concluded that the appellant fell considerably short in establishing a family life between herself and her parents.

**The grounds of appeal and grant of permission**

8. The appellant lodged grounds of appeal which are essentially as follows:

   (a) Ground (1) - the FtT's conclusion about the absence of family life was perverse and/or irrational considering the acceptance of a biological relationship, co-residence until 2009, regular trips by the appellant's parents and continuing financial support, together with a history of domestic violence.

   (b) Ground (2) – the FtT's decision was inadequately reasoned as it was not enough to reason against the appellant based on her age, length of time and limited or no information about emotional dependency which could readily be inferred from the straightforward evidence given by the witnesses.

   (c) Ground (3) - the FtT erred in taking insufficient account of further elements of dependency including the history family life, regular trips and contact; and in particular the appellant's vulnerability and prevailing cultural traditions in Nepal (see the authority of BRITCITS v SSHD [2017] EWCA Civ 368).

   (d) Ground (4) - the FtT failed to consider whether there was real or effective or committed support and had impermissibly treated the previous FtT decision as a legal straitjacket.

9. Permission to appeal to this Tribunal was granted by Resident Judge Zucker on 15th December 2020. The grant of permission was not limited in its scope.

**The hearing before me**

**The appellant's oral submissions**

10. In oral submissions, Mr Solomon dealt with ground (4) and the impermissible application by the First-tier Judge of exceptional dependence. The test was that of real or effective or committed support as referred to in paragraph 1(d) of the grounds

and as referred to in the authority of Uddin v SSHD [2020] EWCA Civ 338. There was no need to show exceptional dependency but that was, in reality, precisely what the FtT had done. Mr Solomon referred to §§28 to 29 of the FtT's decision, where the FtT had stated:

> *"28. … she [the appellant] is glad that her parents and siblings have not abandoned her but provides no information as to the emotional connection which would be required to take her relationship over and above that which would be considered normal, [my emphasis].*
>
> *29. … the sponsor also describes how the [appellant] has no place in society due to her divorced status and the sponsor supporting her emotionally….. He explains how he feels his daughter is now abandoned…… He provides no other detail of the emotional dependency."*

11. The next example of the application of an exceptionality test was at §33. At §31, the FtT had referred to the evidence of the appellant's siblings as being clear and straightforward, but at §33 had found that there was:

> "*no new information or facts to establish an emotional dependency above the normal."*

12. Finally, at §34, the FtT accepted that the appellant had been mistreated based on her affidavit but noted it occurred some twenty years ago and the FtT did not accept:

> "*that it gives rise to greater dependency now than would otherwise be expected and that it would amount to the basis of family life."*

13. Dealing next with ground (1), (a challenge on grounds of perversity) the finding that there was no family life was perverse not only in the context of the accepted findings of regular trips by the sponsor to the appellant, remittances and regular contact between the trips, but also specifically the context of a history of domestic violence, ostracism, which involved being cut off from wider society due to her status as a divorced woman, as well as more specifically being cut off from her adult sons and one sibling living near to her.

14. In relation to ground (3), the FtT's reasoning had been limited to §35, which had taken the previous FtT's decision as her starting point and had found there to be no family life, based on the updated findings now made, in particular the appellant's age and length of time that she had been living an independent life, which ignored other relevant factors. For example, at §74 of BRITCITS, the Court had cited factors such as the age, health and vulnerability of an applicant, the closeness and previous history of a family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors, which may all be relevant. In the circumstances, the brevity of the reasoning at §35 displayed a lack of engagement with the wider factors relied on by the appellant relating to her particular vulnerability, within her family and cultural context.

15. The lack of reasoning (ground (3)) lead back to the error by the FtT in treating the previous findings of an earlier FtT as a legal straitjacket, against which Tribunals were warned by this Tribunal in the authority of R (MW) v SSHD (Fast track appeal:

Devaseelan guidelines) [2019] UKUT 00411 (IAC). I explored with Mr Solomon §40 of the Devaseelan guidelines, in particular facts personal to the appellant (in this case the circumstances of domestic violence) that were not brought to the attention of the first FtT, although they were relevant to the issues before him, and whether these should be treated, as the second FtT did, with the greatest circumspection. Mr Solomon's answer to that was simple – the rationale for that guidance was to caution about whether there might be concerns about a party's credibility or an attempt, untruthfully, to bolster a claim. Here, crucially, the FtT had found at §§30 and 31 that the evidence of the sponsor and the appellant's siblings had been given "in a clear and straightforward manner." In that context, referring back to the witness statements in the appellant's bundle before the FtT, at pages [2] to [7]; [8] to [14]; and [18] to [19]; and [21] to [23], they went into some detail not only about the circumstances of domestic violence but the social ostracism and the practical difficulties that would be faced by the appellant as a divorced woman estranged from her husband and sons. Examples were given, ranging from not being invited to family events, to the difficulty divorced women had in securing accommodation. The question in these circumstances was whether the FtT adequately assessed that evidence when considering the existence of family life. In summary, all of the witnessed had given evidence and there were positive findings about their credibility, which answered the concerns about not having raised these issues previously.

The respondent's submissions

16. Ms Isherwood argued that there was no material error of law, and the appeal amounted to rearguing a decision which the FtT was unarguably entitled to reach on the evidence before her. In relation to any concern that the FtT had impermissibly applied an exceptionality test, the FtT had quite correctly referred to the authority of Rai v Entry Clearance Officer [2017] EWCA Civ 320, at §21, as well as Kugathas, which had not been overruled in the authority of Uddin.

17. The FtT had referred at §9 to the appellant's detailed skeleton argument, which the FtT had noted referred to the appellant's divorce, domestic violence and separation from her children. The FtT had emphasised that she had considered all of the evidence before her and so this was not a case where the FtT had failed to acknowledge, consider, and analyse the evidence before her and had then impermissibly applied a straitjacket on her consideration of the evidence, based on the previous FtT's decision.

18. Ms Isherwood added that at §25, the FtT had made findings in the appellant's favour, including that she was financially supported by the sponsor, as well as noting the appellant's witness statement at §27. However, the FtT considered at §§27 and 34 the limited nature of that evidence. The FtT stated at §27 that the appellant's affidavit had provided:

> "*very little information or examples of her emotional dependency on her parents prior to Judge Birk's decision or since*".

19. Therefore, the question of claimed dependency was clearly engaged with and rejected, on the basis of the absence of evidence.

**Discussion and conclusions**

20. I am acutely conscious that the assessment of complex evidence by a First-tier Tribunal is one that I should not readily disturb, particularly where, as here, the FtT has expressly referred to that, for example the claims of ostracism and domestic violence, with resulting dependency. Ground (1) is a perversity challenge, and that is a high bar to meet. I am also conscious that the Court in Uddin applied Kugathas, rather than suggesting that it should no loner be relied upon, and the FtT had also reminded herself of Rai.

21. In relation to ground (1), I do not accept that the perversity challenge is made out, namely that in the context of a biological relationship, co-residence with a sibling, and ongoing contact, in the context of historic domestic violence, possible social ostracism and isolation, it was not open to the FtT on the evidence before her to nevertheless conclude that family life, in the legal sense, did not exist.

22. Where I do find that the FtT erred was in relation to grounds (2) to (4). On the one hand, I am conscious of not taking the FtT's reasoning out of context. On the other hand, the FtT does not explain why, at §34, she treats the new evidence with circumspection, or what that means to do so, when she has accepted the credibility of the sponsor and the appellant's siblings as to the specific reasons for the appellant's vulnerability and her consequential claimed dependency on her parents, including the sponsor. In relation to ground (4), I accept the force of the submission that in failing to explain what the consequences of circumspection were, the FtT impermissibly treated the previous FtT decision as a 'straight-jacket' and failed to explain why it was not appropriate to depart from that previous decision, in light of the new, apparently credible evidence.

23. While the FtT referred expressly to allegations of domestic violence and societal and familial ostracism, the FtT had, in reality, had either applied an exceptionality test or had failed to explain why the claimed practical consequences of violence and ostracism did not feed into a finding of dependency.

24. The FtT had referred to a lack of detail in relation to emotional dependency (§27), or emotional connection (§28); and then, in her conclusion at §35, referred to the appellant's age and length of time spent living an independent life. The FtT did not address the evidence of the sponsor and siblings, apparently accepted as clear and straightforward, which referred to the long periods in which the appellant had relied on her parents for all of her needs, even during the brief period when she had lived with her husband, because the violence had started at an early stage; the evidence that divorcees were shunned in Nepal; that the appellant cried all of the time; and that witnesses regarded her as severely depressed. This is not to substitute my view of the evidence for what the FtT decided; rather, the error is in the FtT's reasoning in not explaining why such evidence, apparently unchallenged, from truthful

witnesses, did not feed into an analysis of dependency, which required effective, real or committed support.

25. In summary, there was evidence before the FtT, at least capable of supporting a conclusion of dependency (even if that is not a conclusion that a Tribunal would eventually reach) where it is unclear why the FtT has rejected that evidence. The reference to the appellant's age and period leading an independent life, when the witness evidence asserted a contrary lack of independent life, does not meet the challenge in relation to claimed vulnerability based long-term isolation, historic violence and severe depression. It is that key issue with which the FtT failed to grapple, when she instead looked for some form of exceptional evidence.

26. For the reasons set out above, and whilst I emphasise the appellant may not eventually succeed in any remade appeal, I conclude that the FtT's analysis was regrettably flawed and her findings are unsafe and must be set aside.

27. In reaching that decision, I preserve the FtT's findings (as to which there appears to be no dispute) that the sponsor had provided, and at the date of the hearing continued to provide, financial support to the appellant (§25 of the decision) and at §34, that the appellant was "mistreated …..some twenty years ago." The preserved findings do not go beyond those two limited points.

**Decision on error of law**

28. In my view there are material errors here and I must set the FtT's decision aside, subject to the preserved findings at §25 of the FtT's decision that the appellant continued to receive financial support from the sponsor; and at §34, that she was mistreated and some twenty years' previously.

**Disposal**

29. With reference to paragraph 7.2 of the Senior President's Practice Statement; the preserved facts and the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

**Directions**

30. The following directions shall apply to the future conduct of this appeal:

    (a) The Resumed Hearing will be listed via Skye for Business before any Upper Tribunal Judge, **time estimate 2 hours**, with an interpreter in Nepalese, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    (b) The appellant shall no later than 4 pm, **14 days before the Hearing,** serve with the Upper Tribunal and on the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief

of the maker who shall be made available for the purposes of cross-examination and re-examination only.

(c) The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than **4 pm 7 days before the Hearing.**

**Notice of Decision**

**The decision of the First-tier Tribunal did involve the making of an error on a point of law and I set it aside, subject to the preserved findings about continuing financial support and the appellant previously having been mistreated.**

**The Upper Tribunal shall remake the appeal.**

**No anonymity directions apply.**

Signed *J Keith* Date: 22nd March 2021

Upper Tribunal Judge Keith