Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14576/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Working Remotely by Skype	**Decision & Reasons Promulgated**
On 29 April 2021	**On 21 May 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

PRABIN GURUNG

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Mr S Jaisri instructed by Sam Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal who was born on 27 February 1980. His father, Mim Bahadur Gurung is a former Ghurkha soldier who settled in the UK on 6 October 2005 along with his wife, the appellant's mother.

2. The appellant's father enlisted in the Brigade of Ghurkhas on 27 October 1956 and served in the army for over fourteen years. He was discharged on 10 December 1970

when he was made redundant. The appellant's mother and father came to the UK to settle in October 2005. It is not contentious that that was the earliest time, given the immigration "historic injustice" perpetrated against former Ghurkha soldiers and their families, when the appellant's mother and father could come to the UK to settle. By that time, however, the appellant was too old to qualify under the Rules or policy to travel with them. In 2015, the position for family members changed but the appellant was still too old to come to the UK under those provisions. As a consequence, the appellant continued to live in the family home in Nepal.

3. On 30 April 2019, the appellant applied for entry clearance to settle in the UK as the dependent son of his father, the sponsor. That application was refused by the ECO on 23 July 2019. It was not accepted, for the purposes of Art 8, that the appellant and sponsor (including his mother) had established 'family life' for the purposes of Article 8.1.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal. In a decision sent on 16 December 2020, Judge Mailer dismissed the appellant's appeal under Art 8. He was not satisfied that the relationship between the appellant and his parents was such as to give rise to 'family life' so that Art 8.1 was engaged.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal on four grounds. Each ground challenged the judge's finding that Art 8.1 was not engaged.

6. On 25 January 2021, the First-tier Tribunal (RJ Zucker) granted the appellant permission to appeal.

7. The appeal was listed at the Cardiff Civil Justice Centre on 29 April 2021 working remotely. The appellant was represented by Mr Jaisri and the respondent by Mr Kotas both of whom joined the hearing by Skype.

The Judge's Decision

8. The judge had a bundle of documents filed on behalf of the appellant as well as the respondent's bundle. In addition, the appellant's father (the sponsor) gave oral evidence before the judge. The judge noted (at para 82) that there was no witness statement from the appellant although there was a typed letter dated 14 May 2019.

9. The judge made a number of uncontentious findings at paras 83-88. He accepted that the appellant was the son of a former Ghurkha soldier and that his parents had been granted settlement on 6 October 2005. The appellant was now 39 years of age and he had been separated from his parents for about fourteen years prior to the application. He was one of six children. Two of his siblings lived in different areas in Nepal and he had two married sisters currently settled in the UK and living independently. The judge accepted that the appellant lived with his parents in their family home prior to

them moving to the UK in 2005. He also accepted that the appellant continued to live in his family's home after his parents came to the UK in 2005. There was evidence that the appellant had been issued with two passports, one in December 2006 and another in March 2016. However, the judge declined to speculate about why the appellant possessed these passports.

10. At paras 89-92, the judge dealt with the issue of whether the appellant was unemployed in Nepal. He said this:

> "89. The appellant, as well as his parents, have contended that he cannot find a job as there are limited job opportunities in Nepal. It is also asserted that having regard to his low academic qualifications, the appellant remains unemployed.
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> 90. There is no evidence produced that since his parents left Nepal, the appellant has looked for jobs, including the odd labouring job. Indeed, the appellant did not even claim in his letter dated 14 May 2019 that he has looked for jobs, albeit unsuccessfully. He has simply asserted that his lower educational qualification has been an obstacle to his ability to support himself.
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> 91. Nor has any satisfactory explanation been given as to why such evidence could not have been produced. In the event, the assertions regarding the limited availability of employment for a person in the position of the appellant in Nepal remain unsubstantiated.
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> 92. In the absence of credible evidence regarding the employment situation in Nepal, I do not accept that the appellant is unable to obtain employment in Nepal."

11. I interpolate here that none of that reasoning is challenged in the grounds.

12. Then at paras 93-100 the judge dealt with the evidence, relevant to a claim that the appellant was dependent upon his father, concerning money transfers to him:

> "93. I have had regard to the evidence of money transfers set out at paragraph 31 of Mr Gurung's statement – A9-A10. According to the schedule, such transfers commenced in August 2015 with the last transfer being on 12 January 2020. There are substantial gaps in that period, sometimes in excess of three months between one transfer and another. The amount of £128 was sent on 31 August 2019. It was only some four months later that the further £200 was sent.
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> 94. Furthermore, although Mr Gurung stated that they have been supporting the appellant financially since 2005, no substantiating evidence has been produced for the period 2005 until 2015. There is merely an assertion that they have been sending money to him for his upkeep. No explanation has been given as to why satisfactory evidence substantiating that claim could not have been produced.
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> 95. I have had regard to a statement of account in the sponsor's name at Pokhara Finance Ltd for the period 22 September 2019 up to 29 January 2020, reflecting various credits for each month. These are apparently pension payments to which the sponsor is entitled. There are also apparently interest payments although it is difficult to read A92 as it is a very indistinct copy. It is stated in the account at A91 that the previous balance on 25 September 2019 was '0.00'. No explanation has been given for this. Nor have any further bank statements been produced for the period prior to September 2019.
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> 96. There is accordingly no explanation from the appellant or his sponsors as to how he has been able to maintain and support himself over the years, which includes the paying of bills with money and other occurring expenses. There is no evidence of any receipt of funds from any other family members, friend or any other source

in Nepal, or elsewhere. Nor has the appellant himself asserted in his letter that any person from the UK has ever visited him in Nepal and handed over to him money given to them by his sponsors in the UK.

97. The appellant's sponsor acknowledged under cross-examination that the appellant is not dependent on him, but they send him monies. He stated that they need his help instead as they are growing old.

98. As part of the evidence as a whole, I have had regard to the evidence produced of communications between the appellant and his parents in the Viber screenshots at A6-A7. These relate to the period from the middle of 2019 until 2 February 2020. I have also considered the evidence of the visits that his parents have made to Nepal from January 2006 until October 2019.

99. There is very little by way of evidence regarding the appellant's living arrangements and his day-to-day life in Nepal. As already noted, he has been afforded an opportunity to provide a full, clear and detailed history of his living arrangements and his day-to-day life in Nepal. This was pointed out by the Entry Clearance Manager on 15 January 2020.

100. There is accordingly a paucity of evidence presented by the appellant and his sponsors regarding his asserted dependency on them. There has thus been a failure to provide all the information necessary to enable a full assessment to be made of his actual situation."

13. Then at paras 101-102, the judge dealt with the appellant's circumstances in Nepal as follows:

"101. As at the date of the hearing, the appellant was 40 years old. He has been living away from his parents since 6 October 2015 some fifteen years to date.

102. There is no evidence concerning his relationship with his brothers, both of whom live in Nepal. There is no evidence of any remaining extended family in Nepal, no evidence of the appellant's own friends and relationships which may have developed over the years. There is no evidence that a network of contacts, friends and support systems are not in place in Nepal. Nor is it unusual that persons in the position of his sponsor send money to Nepal."

14. Then at paras 103-107, the judge made his findings in relation to whether the appellant had established family life under Art 8.1:

"103. I find that the evidence of visits and financial remittances do not in this case establish the necessary real, committed or effective support to establish an extant family life. I find that money transfers and visits relied on, amounting to circumstances is nothing more than the usual love and affection between an adult and his parents.

104. I accordingly find that the appellant is a fully mature adult living his own life in Nepal. Very little evidence has been presented as to what he has done during the past fifteen years since he became separated from his parents. Despite the financial remittances he has received from his parents, their visits to Nepal and their communication via video chat and telephone calls with him, he has continued to live his own life. I accordingly find that Article 8 of the Human Rights Convention is not engaged.

105. The love and commitment of his parents to him is not doubted. They have also shown persistence in seeking to secure his settlement in the UK.

106. In Patel, Modha and Odedara v ECO [2010] EWCA Civ 17 at [14], Lord Justice Sedley stated that you can set out to compensate for an historic wrong but you

> cannot reverse the passage of time. Many of these children are now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there and Article 8 will have no purchase. In disposing of the case of Odedara he upheld as legitimate a factual finding that there was no family life which engaged Article 8 where there was only a bear financial dependency upon the appellants and their parents.
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> 107. For the foregoing, I conclude that there is no family life between the appellant and his parents so as to engage Article 8 of the Human Rights Convention."

15. As a consequence, the judge dismissed the appeal under Art 8.

The Submissions

16. Drawing on the four grounds of appeal, Mr Jaisri submitted that the judge had erred in law in a number of respects.

17. Ground 1: Mr Jaisri submitted that the judge had failed to apply the approach set out in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 at [42]. When determining whether there was real or committed or effective support. the judge failed to consider whether there was family life at the time the appellant's parents left Nepal to settle in the UK and whether that subsisted and was still subsisting at the date of the hearing.

18. Additionally, Mr Jaisri submitted that the judge had failed to take into account as an aspect of financial dependency that the appellant was residing in the family home.

19. Ground 2: Mr Jaisri submitted that the judge had failed properly to take into account the extent and length of visits by the sponsor, which were unchallenged by the respondent, to Nepal between January 2006 and October 2019.

20. Ground 3: Mr Jaisri submitted that the judge had taken into account an irrelevant consideration in para 102 of his determination by considering the relationships between the appellant and his siblings and family in Nepal. The focus should have been exclusively upon the relationship between the appellant and the sponsor in the UK.

21. Ground 4: Mr Jaisri submitted that the judge had failed to take into account, as an aspect of dependency, namely the emotional dependency of the sponsor, as set out in his evidence, upon the appellant.

22. Mr Kotas submitted that the judge had correctly directed himself on the requirements to establish "family life" citing the case of Kugathas v SSHD [2003] EWCA Civ 31 at paras 71-73 of his determination and the decision of Rai at para 74 of his determination.

23. Further, as regards the appellant being accommodated in the family home, Mr Kotas submitted that was self-evident and the judge was well aware that that was the case and it could not be said he did not have regard to it.

24. Secondly, as regards the visits by the sponsor to Nepal, Mr Kotas submitted that the judge clearly made reference to these visits. He set out the evidence at paras 35-36 and 49. The judge specifically stated that he took those visits into account in reaching his findings at paras 98 and 103. It could not be said, therefore, that he had failed to take those into account and the ground was no more than a disagreement with the weight that the judge gave that evidence.

25. Thirdly, the judge was entitled to take into account relationships with siblings and family members in Nepal at para 102.

26. Fourthly, Mr Kotas submitted that the judge, having correctly directed himself on the nature of "family life", fully took into account all the evidence including that he claimed not to have worked in Nepal, that the sponsor said in cross-examination that the appellant was not dependent upon him and that there was gaps in the supporting evidence of financial dependency together with the fact that the appellant had spent a considerable time on his own in Nepal. Mr Kotas submitted that the judge had properly taken into account emotional dependency between the appellant and sponsor.

27. In reply, Mr Jaisri reiterated under ground 1 that the judge had not adopted the approach set out in Rai at [42] by considering first whether family life existed at the time his parents came to the UK in 2005 and whether it had continued to subsist up to the date of hearing.

28. In relation to ground 3, Mr Jaisri accepted, in response to a point raised by me during his reply, that the judge in para 102 had not counted against the appellant that he had established relationships with his siblings and extended family in Nepal when finding that he had not established family life with the sponsor in the UK because, in fact, the judge had found that there was no evidence of any such relationships in Nepal.

Discussion

29. The relevant law in respect of establishing "family life" for the purposes of Art 8 was helpfully summarised in the Court of Appeal's decision in Rai. As in the present appeal, Rai involved a claim by an adult child of a former Ghurkha soldier who sought to join his family in the UK relying on Art 8. In that case, drawing on the earlier case law of the Court of Appeal, Lindblom LJ (with whom Beatson and Henderson LJJ agreed), said this at [16]-[20]:

> "16. The legal principles relevant to this issue are not controversial.
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> 17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided

in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

> "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did

> not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

30. As will be clear, the need to establish "family life" is a fact-sensitive issue. It will not be presumed to exist between adult siblings or between an adult child and parent. What must be established is "more than normal emotional ties". There must be "support" which is "real" or "committed" or "effective".

31. In Uddin v SSHD [2020] EWCA Civ 332, the Senior President of Tribunals (Sir Ernest Ryder, with whom Bean and King LJJ agreed), having set out extracts from the decision in Kugathas, said this at [31]:

> "Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed".
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> (See also [40(i)].)

32. Again, as in Rai, the test of "support" is expressed disjunctively as having to be "real" or "effective" or "committed".

33. In this appeal, there is no doubt, as Mr Kotas submitted, that the judge correctly directed himself in respect of this approach referring to, and citing from, Kugathas at paras 71-73 of his determination. Although, at times, the submissions made to the judge, and indeed in the grounds of appeal, refer to the test of real, committed *and* effective support, the judge correctly set out the disjunctive test at para 103 which I set out earlier.

34. Mr Jaisri made two points under ground 1.

35. First, he relied upon [42] of Lindblom LJ's judgment in Rai where he said this:

> "Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. *They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1).* Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it." (my emphasis)

36. What Lindblom LJ was saying in [42] was that, in order to succeed, an individual must show a continuum of "family life" beginning with the point in time when their

parents came to the UK to settle and ending with the hearing before the relevant Tribunal. I do not understand Lindblom LJ to be setting out a straight jacket approach that requires a judge to consider, in a particular order, the existence and establishment of family life over the relevant time period.

37. In this appeal, unless otherwise unsustainable, the judge found that there was "a paucity of evidence" concerning the issue of dependency, relied upon by the appellant, prior to 2015 – in other words, for the period 2005 until 2015. Read as a whole, that led the judge to find that family life had not been established throughout the relevant, and required period, between 2005 (when the appellant's parents came to the UK to settle) and 2020 (when the judge was hearing the appeal). That was, in my judgment, not a finding which was reached by an improper process of reasoning as proposed by Mr Jaisri relying upon the words of Lindblom LJ in Rai at [42].

38. The second point made by Mr Jaisri under ground 1 was that the judge failed to take into account, as an aspect of financial dependency, that the appellant was living in the family home. Of course, the judge accepted that the appellant had lived in the family home prior to his parents leaving in 2005 and subsequently had remained there after they left. The judge made that finding at para 85 of his determination. It cannot fairly be said, in my judgment, that the judge failed to take this into account in reaching his findings. It was a point specifically made by Mr Jaisri in para 10 of his skeleton argument. Of course, the weight of the argument made on behalf of the appellant concerned direct financial support – through monies paid by the sponsor – and also emotional dependency.

39. For these reasons, I reject ground 1.

40. As regards ground 2, I accept Mr Kotas' submission that the judge plainly took into account the visits made by the sponsor to Nepal. The judge made reference, as I have already pointed out, to the evidence in relation to those visits at paras 35-36 and 49. He referred at para 63 to Mr Jaisri's submission, relying on those visits, to support a finding that family life existed. In reaching his findings, the judge specifically stated at para 78 and again at para 103 that he took the visits into account. It is simply not arguable that he failed to have regard to this evidence. Taken as a whole, the only basis upon which an error of law could be established would be if the judge gave unreasonable or irrational weight to those visits, i.e. gave them such weight that no reasonable judge could do. I did not understand Mr Jaisri's submissions to place this ground firmly in that territory. In any event, I see no basis upon which, having regard to the whole of the evidence including that the sponsor has a number of other children living in Nepal, that the judge gave Wednesbury unreasonable or irrational weight to this evidence.

41. For these reasons, I reject ground 2.

42. As regards ground 3, I do not accept Mr Jaisri's premise that in assessing whether an individual has established "family life" with particular family members in the UK, it is irrelevant to take into account his links with any family members in his or her own

country. Clearly, the issue is whether the family life with the family members in the UK is established but close links with family members in their own country may impact upon that assessment and, of course, the absence of any close ties with family in their own country may support a claim of close ties with family in the UK. Although it is not crystal clear, that broad assessment is contemplated by Arden LJ (as she then was) in Kugathas at [24] where she said this:

> "The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life."

43. In any event, as I pointed out to Mr Jaisri during his reply, at para 102 the judge found that there was no evidence of close ties with his family in Nepal and, therefore, even if Mr Jaisri's premise was correct, the judge did not count against the appellant, in determining whether he had established family life with the sponsor, that he had close ties with relatives in Nepal. Ground 3 is, therefore, rejected.

44. As regards ground 4, the discrete point made by Mr Jaisri is that the judge failed to take into account not the dependency of the appellant upon the sponsor but rather the dependency of the sponsor (and indeed the appellant's mother) upon the appellant.

45. That rests upon the evidence sent out at para 43 of the determination where the sponsor said that the appellant was not dependent upon him but that he and his wife needed the appellant's help instead as they were getting old, they could not do a lot of things for their own and his wife's health was poorly. This issue does not appear to have featured in Mr Jaisri's skeleton argument or indeed in his oral submissions following the sponsor's evidence. The focus of the case was upon a claim that the appellant was dependent upon the sponsor rather than the other way around. It is, therefore, perhaps not surprising that the judge did not focus on that piece of evidence either. The evidence was very limited and, in considering the relationship between the appellant and sponsor, there is no reason to assume that the judge did not have that limited evidence well in mind. It would, in any event, not establish any existing dependency as the appellant does not provide support, of the nature sought by the sponsor, at present. If anything, it contemplates future dependency if the appellant were in the UK rather than current dependency whilst the appellant is in Nepal. In my judgment, the judge did not materially err in law in the way proposed by Mr Jaisri in ground 4.

46. Standing back, I accept Mr Kotas' submission that the judge, having properly directed himself in law, took into account all relevant factors and reached a reasonable and rational decision based upon the evidence available. The fact of the matter was that there were gaps in the evidence relevant to the issue of dependency and support and there was a paucity of evidence concerning the appellant's circumstances in Nepal, including a witness statement from him. In those circumstances, the judge's findings were ones which were properly open to him on

that evidence and his conclusion that the appellant had not established "family life" with the sponsor in the UK was one properly open to him and is legally sustainable.

Decision

47. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. The decision, therefore, stands.

48. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
7 May 2021

TO THE RESPONDENT
FEE AWARD

The judge made no fee award as the appeal was dismissed. That decision stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
7 May 2021