Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14092/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre remotely by Skype for Business On 17 September 2020

Decision & Reasons Promulgated On 28 September 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

UBARAJ RAI

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Mr M Moriarty instructed by Everest Law Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal who was born on 28 November 1984.

2. On 25 April 2019, the appellant made an application for entry clearance to come to the UK as the adult dependent child of his mother, Parbati Rai who is the widow of his late father who was formerly a Ghurkha soldier.

3. On 10 July 2019, the Secretary of State refused the appellant's application for entry clearance. On 6 January 2020, the Entry Clearance Manager maintained that decision.

4. The appellant appealed to the First-tier Tribunal. In a decision sent on 13 March 2020, Judge Mill dismissed the appellant's appeal. In para 37 of his determination, he concluded that Art 8.1 of the ECHR was not engaged as the evidence before him did not establish that the support between the appellant and his mother was such that family life existed between them.

5. The appellant sought permission to appeal to the Upper Tribunal. On 27 April 2020, the First-tier Tribunal (Judge Ford) granted the appellant permission to appeal.

6. As a result of the COVID-19 crisis, the appeal was listed for hearing in the Upper Tribunal to take place remotely by Skype for Business. Neither party raised any objection to this and, on 17 September 2020, the appeal was listed before me. I was based in the Cardiff Civil Justice Centre and Mr Moriarty, who represented the appellant, and Mr Howells, who represented the respondent, joined the hearing through Skype for Business.

Background

7. The appellant is the son of a former Ghurkha soldier. His father served in the Brigade of Ghurkhas between 1974 and 1989 when he retired after 15 years' service. His father died on 1 November 1990 in Brunei. Along with other Ghurkhas, the appellant's father was denied any opportunity to settle in the UK following his discharge from the army in 1989.

8. As is well-known, the 'historic injustice' experienced by former Ghurkha soldiers and their families was rectified, over time, by changes in government policy and the Immigration Rules. The appellant's father died before settlement in the UK became possible. However, in March 2010, the appellant's mother was granted indefinite leave to enter the UK and she came to the UK on 21 November 2013. However, by that time the appellant was 18 and so the relevant policy did not apply to him or, indeed, to his siblings.

9. In 2014, the appellant unsuccessfully applied for a visit visa. That application was refused on the basis that the ECO was not satisfied that the appellant was, as he claimed, employed and in receipt of income.

10. In 2015, the appellant and his older sister applied for entry clearance to settle in the UK as the adult dependants of their mother. (The appellant's elder sister lives in the UK with her husband). On 2 April 2015, those applications were refused and the appeals of the appellant and his sister were dismissed by Judge Carroll. Judge Carroll was not satisfied, inter alia, that the appellant had established "family life" with his mother under Art 8 of the ECHR.

11. Subsequently, the appellant's sister (with whom he lives in Nepal) unsuccessfully made an application for entry clearance to join their mother in the UK. The appellant's sister appealed the refusal decision of 22 March 2019. The First-tier Tribunal subsequently dismissed her appeal in early 2020.

12. The appellant made a further application for entry clearance to join his mother in the UK on 25 April 2019 which was refused on 10 July 2019 and is the subject of the present appeal.

The Judge's Decision

13. Before the judge, the appellant's case was that he lived in the family home in Nepal with his older sister. He was financially supported by his mother from the UK. He was unmarried and had not formed his own family unit. He remained in close contact with his mother who had returned to Nepal, most recently living with him and his sister from January 2018 to August 2019. His case was that his mother provided him with "real, or effective or committed support" such that family life existed so as to engage Art 8.1 of the ECHR. He contended that, given the 'historic injustice' which was engaged in his circumstances as a result of the treatment of former Ghurkha soldiers and their families in seeking settlement in the UK, it was a disproportionate interference with his "family life" to refuse him entry clearance to the UK.

14. Having set out the immigration history of the appellant and his family, together with the earlier appeal decisions to which I have already referred, Judge Mill considered the evidence, in particular of the sponsor who gave oral evidence before him. It is an understatement to say that he was unimpressed: he found the sponsor (and also the appellant) not to be credible and reliable sources of evidence (see para 21). The judge set out his reasons at paras 18–22 as follows:

> "18 ... I have heard only from the Appellant's Sponsor. I did not find her a credible and reliable source of evidence. I found her surprisingly vague in her knowledge about the Appellant. She was also evasive in answering simple questions.
>
> 19. The Sponsor was asked under cross-examination as to whether or not anything had materially changed since 2016 at the time of Judge Carroll's determination. She replied that there had been no material changes. Her frank admission does not assist me at all to depart from Judge Carroll's findings.
>
> 20. The Sponsor admitted in her oral evidence that she had, along with the now Appellant, misled the Authorities previously by stating that her son and now Appellant had been in employment in 2014 at the time of his visit visa application. The Appellant admits this in his witness statement. Such an acceptance does of course impair the Sponsor and the Appellant's general credibility. It was submitted on behalf of the Appellant that such acceptance is actually favourable to the Appellant as the fact that it is accepted that he was not in employment in 2014 supports the suggestion and reliance upon the fact that he has never been in employment and solely

reliant upon the Sponsor. I do not find that there is substance or merit in this submission.

21. I find that both the Appellant and his Sponsor are not credible and reliable sources of evidence. I cannot rely upon their statements. I find it equally likely that the Appellant was employed in 2014 but after having been refused a visit visa had since decided to claim that he was not working and therefore has been and is reliant upon the Sponsor in the alternative. It is neither more likely that the Appellant has been in employment in Nepal given the state of the evidence which is inherently unreliable. I cannot find that it is more likely than not that the Appellant has not worked in Nepal in the capacity which he claims in 2014.

22. Judge Carroll also relied upon question 54 of the relevant Visa Application Form giving rise to the decision under appeal before him in which the Appellant indicated that he was 'supported by spouse/partner/other'. It is noted that that was clearly not consistent with the evidence presented to the effect that the Appellant is wholly financially dependent upon his Sponsor".

15. At para 24, having cited the decision in Tanveer Ahmed [2002] UKIAT 00439, at para 24, the judge found the documents to be unreliable, being "self-serving" and he attached little weight to them.

16. At para 25, the judge referred to the earlier finding by Judge Carroll that "it appears that the Appellants are and have been for a substantial period of time living independent lives in Nepal" and concluded that:

> "As earlier referred to the Sponsor accepted in her oral evidence that nothing had changed since then".

17. Having made these adverse credibility findings, the judge went on in paras 26–29 to consider the evidence of the support, if any, from the sponsor:

> "26. The Appellant is currently 35 years of age. It is said that he has never had employment and works on an ad hoc basis playing music in a restaurant and bar once a month. He stated that he derives a small income which is described as pocket money. The Sponsor was asked whether the Appellant ever made any job application in Nepal to which [s]he replied that she is either unaware or that he hadn't and that on the basis that the entire focus had been upon seeking to arrange for the Appellant to enter the UK. The fact that the Appellant has not obtained employment, and therefore may require financial support from the Sponsor is irrelevant to the determination of this appeal. *The question is whether or not there is real, genuine and effective support, not the reasons as to why this has become necessary*. However, the important aspect of the Sponsor's evidence which impairs her credibility is her entire lack of understanding or knowledge about the Appellant's day-to-day lifestyle. She was unable to provide any detailed evidence regarding this lifestyle in her evidence. This is not set out in any of the written testimony with any degree of specification. I find it much more likely as Judge Carroll did that the Appellant being a healthy male in his 30's has worked and has supported himself at times in the past and

now. The Sponsor's lack of knowledge about the Appellant undermines the close family ties said to exist. This is perhaps even more so surprising given that the Sponsor returned to Nepal in January 2018 and says she remained with the Appellant and his sister, Anita, there until August 2019, a period of almost two years.

27. I can accept that the Appellant has some ongoing family ties with his Sponsor mother. There is evidence of ongoing indirect communication between them throughout the period of time the Sponsor has returned to the UK recently. The level of communication however is not at the level as claimed by the Sponsor in her oral evidence. She claimed that she is in contact with the Appellant two or three times a day and this is not evidenced. The Sponsor's desire to exaggerate is a further factor which undermines her credibility.

28. Even taking into account the fact that the Sponsor returned to Nepal for a lengthy period recently and taking together the modern indirect communications which are frequent, I do not find that such factors evidence anything other than normal emotional ties between the Appellant and his Sponsor. As Judge Carroll found in 2016 the Appellant by then had been living an independent life for some time. I have no credible or reliable evidence before me to depart from this finding.

29. I accept there is evidence of some degree of financial support in that the Appellant occupies, along with his sister, Anita, the home which is owned by the Sponsor. As such he does not pay towards the cost of his accommodation. Reliance is placed upon the Sponsor's pension in Nepal being directed for the benefit of the Appellant. In this respect her statements of account from Standard Chartered Bank are found in the Appellant's bundle. There is however no clear evidence contained within these statements that any of the monies have been directed specifically for the benefit of the Appellant. There is no corresponding letter from the bank for example stipulating that the Appellant is a beneficiary or holds any mandate to be a signatory on the account for example. There is a lack of clear specified credible and reliable documentary evidence to exhibit and vouch substantial financial support from his Sponsor which the Appellant relies upon". (my emphasis)

18. Having then set out at paras 30-34, a number of relevant cases dealing with family life and claims by members of the family of former Ghurkha soldiers and Art 8, the judge continued at para 35:

"35. It is well-established and settled that for an adult child to establish that Article 8 is engaged, that something more than normal emotional ties of those seen between adult children and their parents must exist. This approach has been approved domestically applying Strasbourg jurisprudence. The approach applies common-sense in that obvious relationships which engage Article 8 would be, for example, cohabiting dependants such as parents and their dependent, minor children. Relationships between adults and their parents do not automatically qualify for the protection available under Article 8 of the Convention without evidence of further elements of dependency involving more than normal emotional ties. There may be a number of different elements of

> dependency. *These should be of a committed, sustained and effective nature, not contrived and generally to be in existence by circumstance and not by choice*". (my emphasis)

19. At para 36, the judge added this:

> "36. Relevant factors to consider in identifying whether or not Article 8 is engaged between adult children and their parents, are factors such as their age, health, vulnerability and past and present contact between them and their parents. Family life for the purposes of Article 8 may have been lost or disengaged for a period but may have been regained. *There was clear family life in existence at the time that the Appellants' parents left Nepal. That family life has been preserved by the interaction between the Sponsor and his wife and the Appellant since they were forced to separate as a consequence of the discriminatory policy in place*". (my emphasis)

20. Finally, at para 37 the judge reached this conclusion:

> "37. Based upon the totality of the evidence before me I do not find that Article 8(1) is engaged. *I cannot find on the basis of the evidence before me that it is more likely that there is support between the Appellant and his Sponsor which is real, effective or committed*. I find that there is nothing beyond normal family ties seen between adult children and their parents". (my emphasis)

21. As a consequence, the judge went on to dismiss the appellant's appeal under Art 8 of the ECHR.

The Submissions

22. Drawing on his detailed grounds of appeal, Mr Moriarty submitted that the judge had erred in law in a number of respects.

23. First, he submitted that the judge had applied the wrong test in determining whether there was "family life" between the appellant and his mother. Mr Moriarty submitted, relying upon the decision of the Court of Appeal in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. Mr Moriarty submitted that at para 26 of his determination the judge had required the appellant to establish that there were "real, genuine and effective support". He submitted that the judge had read the three phrases as if they were conjunctive rather than, as the case law established, they are disjunctive. Mr Moriarty acknowledged that the judge had expressed the test, consistently with Rai, at para 37, but, he submitted, the wrong test had already been "folded in" to his earlier findings. Further, Mr Moriarty also submitted that the judge had wrongly expressed the test in para 35 when he had stated that the elements of dependency should be "of a committed, sustained and effective nature".

24. Secondly, Mr Moriarty submitted that the judge at para 35 had also erred by requiring that the support should, in the judge's words, be "not by choice". Mr Moriarty submitted that there was no requirement that the support necessary to establish family life should arise 'out of necessity' rather than 'out of choice'. He acknowledged that the judge had expressed the contrary position in para 26 when

having set out that the issue was whether the support was "real, genuine and effective" and "not the reason as to why this has become necessary". Again, Mr Moriarty submitted that it was unclear, therefore, whether the judge had applied the correct test.

25. Thirdly, Mr Moriarty submitted that para 36 the judge made a finding wholly inconsistent with his decision to dismiss the appeal. Mr Moriarty submitted that in para 36 it appeared that the judge had accepted that family life existed at the time that "the Appellants' parents left Nepal" and that that had been "preserved by the interaction between the Sponsor and his wife and the Appellant since they were forced to separate as a consequence of the discriminatory policy in place". Mr Moriarty submitted that these findings were inconsistent with the judge's ultimate conclusion that family life had not been established.

26. Finally, Mr Moriarty submitted that the judge had been wrong to take literally the sponsor's evidence that nothing had changed since Judge Carroll's determination. It was not in dispute that since Judge Carroll's determination, the sponsor had returned to Nepal in January 2018 and had remained there until August 2019 living in the family home with the appellant and his sister.

27. Mr Moriarty submitted that, despite the judge's adverse credibility findings in relation to the appellant and sponsor, there was evidence, including that and the financial evidence concerning the sponsor's bank account which showed withdrawals that could only have been made in Nepal by the appellant and his sister. They were also accommodated in the family home throughout. Mr Moriarty invited me to conclude that the judge had materially erred in law in misdirecting himself as to the appropriate legal test and in reaching inconsistent findings.

28. Mr Howells accepted that the correct test for establishing family life was whether the support was "real or effective or committed" read disjunctively. He accepted that at para 26 the judge had stated the test in a conjunctive form. He also accepted that the judge had used a slightly different phraseology in para 35 when he spoke of "committed, sustained and effective" support. However, Mr Howells submitted that there was nothing to suggest that the judge had misapplied the test. Indeed, in para 37 he had correctly stated the test when reaching his adverse finding in relation to family life.

29. Further, Mr Howells acknowledged that the judge had wrongly phrased the requirement to establish support as being "not by choice" in para 35. However, Mr Howells submitted the judge had correctly stated it in para 26 when he had said that the support need not have arisen because it was "necessary". Mr Howells submitted there was nothing in the determination that demonstrated that the judge had applied a requirement of "necessity".

30. Mr Howells submitted that the judge had not believed the sponsor or appellant and had given detailed reasons for that at paras 17–22 of his determination. Further, he had found that two Nepalese documents were "self-serving" and should be given

little weight as being unreliable at paras 23–24. Neither of these findings was challenged and, Mr Howells submitted, demonstrated that any error was not material.

31. Mr Howells accepted that para 36 of the judge's determination was at odds with his decision. He submitted it was a single sentence in that paragraph and it did not undermine the judge's overall reasoning and ultimate conclusion.

Discussion

32. It was common ground between the parties that 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 with 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.
>
> 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."

33. 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".

34. 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".
>
> (See also [40(i)].)

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

36. I accept Mr Moriarty's submission that the test of whether family life is established turns upon whether there is "real" or "effective" or "committed" "support" provided, in this case, by the sponsor to the appellant. Whilst the judge correctly set that test out at para 37 of his determination, it is clear that the judge misstated the test both in paras 26 and 35 of his determination. In both paragraphs the judge set out the nature of the support required with the three elements stated conjunctively. Also, in para 35, he substituted for the adjective "real" the adjective "sustained". Further, he inconsistently set out whether or not the need for the support must be by necessity and not by choice at paras 26 and 35. There is a very real danger that the judge required more be proved to establish "family life" to engage Art 8.1 than is required. The misdirection amounts to an error of law.

37. Given the judge's rejection of the evidence of the appellant and sponsor as not being credible, Mr Howells submits, in effect, that any error was immaterial. That submission is not without some merit but ultimately I am not able to accept it. The judge did not reject all ties or support, based upon the evidence, between the sponsor and the appellant. In para 27 he accepted that there was "some ongoing family ties" with the sponsor. He also accepted that there was evidence of "ongoing indirect communications" between them after the sponsor returned to the UK recently. However, he did not accept the level of communication claimed by the sponsor whom he considered had exaggerated that. The judge also accepted that there was "evidence of some degree of financial support", not least that he and his sister occupied a house owned by the sponsor and that the appellant did not pay towards the costs of that accommodation. The judge made that finding even though he went on not to accept the evidence that the sponsor's pension paid into her account in Nepal was drawn upon by the appellant.

38. In other words, the judge accepted some emotional and economic support was provided by the sponsor. Those were, as Mr Moriarty submitted, findings which could potentially have met the disjunctive test of "effective" or "real" or

"committed" "support" provided by the sponsor. There is no requirement that there be "exceptional dependency" for family life to exist between an adult child and parent (see, e.g., Uddin at [32]). The context of separation "by long-delayed right" arising from the "historic injustice" experienced by Ghurkha families may be a relevant factor (see Patel v ECO [2010] EWCA Civ 17 at [14] and Rai at [17]). Despite Judge Carroll's earlier adverse decision, Devaseelan [2002] UKIAT 000720 did not preclude Judge Mill from reaching a different finding(s) on the evidence before him. Contrary to what the sponsor said, there were "changes" or additional matters that had arisen since Judge Carroll's decision, in particular the sponsor's visit and stay in Nepal in 2018-2019. In setting out the required support conjunctively (and with one misdescription in para 35) in his determination, the judge both misdirected himself in law and placed a potentially higher burden upon the appellant to establish "family life" which I am not confident, given the support provide by the sponsor that the judge accepted at [27]–[29], that the errors were immaterial to his ultimate finding that "family life" was not established. The judge's decision cannot stand and is set aside.

39. Two further matters reinforce my conclusion.

40. First, whilst the judge was aware that the sponsor had visited (and indeed lived with) the appellant between January 2018 and August 2019 (see para 26), it is unclear whether he accepted that was evidence of continuing ties and "support" relevant to assessing the issue of "family life". It clearly was relevant, if accepted as evidence of effective or real or committed support.

41. Secondly, para 36 of the judge's determination is problematic as Mr Howells acknowledged. There, quite inconsistently with the judge's ultimate decision, he appears to have found that family life existed when the sponsor lived in Nepal and was "preserved" since the appellant and sponsor have been separated. Read at face value, para 36 contains a finding which is, in effect, that Art 8.1 is engaged.

42. It is unclear how para 36 came to be part of the judge's determination. One possibility is that it is an accidental insertion not dealing with the appellant's case at all. That might follow from the fact that the judge refers to two matters that are not part of the appellant's claim. First, he refers to it being clear that family life existed at the time that "the Appellants' parents left Nepal". Of course, in this case the appellant's father passed away in Brunei in November 1990 and his mother left Nepal, after his death to come to the UK, in November 2013. This is not a case where, as the judge's reference to the facts implies, the appellant's parents both left Nepal to come to the UK. Secondly, the judge refers to family life being preserved between "the Sponsor and his wife". That, of course, makes no sense as the sponsor is the appellant's mother and the preserved family life, if any, is between the appellant and his only living parent, his mother. Nevertheless, para 36 is placed immediately following the judge's assessment of the appellant's case and para 37 where the judge dismisses the appeal on the basis that "family life" is *not* established. Its insertion leads to a necessary contradiction, on the face of it, both in the judge's reasoning and his findings. The findings in para 36 cannot stand with the findings in

para 37 and vis á versa. It is not, in my judgment, an answer to this simply to 'blue pencil' out para 36 on the basis that it should not be there as it is inconsistent with what came before and after it. A judge must reach sustainable, consistent findings otherwise they will fall into legal error. Likewise, the reasons read as a whole should be both cogent and clear and not irrational to sustain a judge's findings. The inconsistency between paras 36 and 37, in my judgment, discloses both a material error of law and also evidences the inference that the judge misdirected himself in assessing the evidence. I cannot be confident that his reasons, read as a whole, sustain his ultimate finding.

43. For these reasons, the judge materially erred in law in dismissing the appellant's appeal.

Decision

44. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. That decision cannot stand and is set aside.

45. Both representatives accepted that if the appellant succeeded in his appeal before this Tribunal, the proper disposal of the appeal was that there should be a *de novo* rehearing in the First-tier Tribunal. I agree with that position.

46. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Statement, the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Mill.

Signed

Andrew Grubb

Judge of the Upper Tribunal
24 September 2020