Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04159/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2018	**On 11 May 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DINESH RAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant/Secretary of State: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr N Dieu, Counsel instructed by N C Brothers & Co Solicitors

DECISION AND REASONS

1. I shall refer throughout this decision to the Respondent as the "Appellant" as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Nepal and his date of birth is 22 July 1988. He applied for entry clearance to join his father Harkapal Rai who is an ex-Ghurkha soldier in the British Army. His application was refused by the Entry Clearance Officer ("the ECO") in a decision dated 18 January 2016. The decision was maintained by an Entry Clearance Manager on review on 25 April 2016.

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3. The Appellant appealed against the decision of the ECO. His appeal was allowed by First-tier Tribunal Judge Heatherington in a determination dated 8 August 2017 following a hearing on 7 August 2017. Permission was granted to the Secretary of State by First-tier Tribunal Judge Keith on 30 January 2018.

The Findings of the First-tier Tribunal

4. The judge heard evidence from the Appellant's father. There was a witness statement from the Appellant's father which he adopted as his evidence-in-chief. The judge heard submissions from those representing the respective parties and made findings of fact as follows:

> "12. This appeal turns on its own unhappy facts. A family is divided. This case is about a single stranded child. The appellant lives alone outside the United Kingdom. The appellant's case has its genesis in historic injustices. The appellant's father and his family, including the appellant, have been victims of an 'Historic injustice'.
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> 13. The appellant's parents have leave to remain in the United Kingdom, leaving the appellant alone in his home country, except for the visits of one or both parents. The appellant has asked to come to the United Kingdom to be with his parents and has been refused.
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> 14. The appellant is a citizen of Nepal, whose date of birth is 22 July 1988. Since last year he has lived alone in rented rooms (page 27 in the appellant's bundle).
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> 15. The sponsor, the appellant's father is a former Gurkha solder. He served for seven years in the British Army. He enlisted in January 1979 and served until he was discharged on medical grounds in 1986. Gurkhas who had served in the British Army were not given the same rights to apply for settlement in the United Kingdom as other foreign and Commonwealth nationals serving in the British Armed Forces. Had the sponsor been able to choose to settle here in 1986 – as other British solders could do when they completed their service – the appellant may have been born in the United Kingdom. The sponsor was not given that opportunity to settle in the UK when he completed his military service. He was not permitted to do so, because of the policy that applied then. If the appellant's father had been permitted to settle in the United Kingdom in 1993, he would have been accompanied by his wife.
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> 16. From 2004 onwards, the British Government began to revise its stance towards Gurkha veterans. The sponsor and his wife were allowed to settle in the United Kingdom. They arrived in January 2010. The appellant would have accompanied them, but for

advice that he could not, because he was more than 18 years of age.

17. The appellant has no siblings. The appellant has no resources of his own. He is entirely dependent on his parents. He has always been financially and emotionally dependent upon them. His father supports him by paying for his maintenance and accommodation.

18. The appellant's parents have visited Nepal since their entry into the United Kingdom. They visited in May 2017. The sponsor alone visited the appellant in 2015. There have only been two visits because the sponsor and his wife did not have the means of paying for travel. After coming to the UK, they were unemployed for about three years (see paragraph 12 of the sponsor's statement, page 3 of the appellant's bundle).

19. I am satisfied on the evidence that the appellant has a close-knit family relationship with his parents. They communicate regularly. They value and enjoy each other's company. The appellant cannot find employment. The sponsor regularly sends money. The appellant depends upon his parents for financial, practical and emotional support and guidance. They support him as their only child still living in Nepal.

20. I considered the claim under *Article 8 of the European Convention on Human Rights*.

21. Section 117 of the *Nationality, Immigration and Asylum Act* 2002 is a factor to be considered in determining proportionality. Section 117A (2) requires me to have regard to the considerations listed in Sections 117B and 117C. Section 117A (3) imposes upon us the duty of carrying out a balancing exercise.

22. The appellant is in his 20s. He is not a minor. The authorities recognize that family life may potentially continue between parent and child after a child has attained his majority. The appellant's lack of education and the appellant's separation from his parents results in the appellant being dependent on his parents far more than is usual for an adult child. Here the appellant's family life is significantly more than the ordinary emotional ties between an adult child and parents. The appellant is economically and emotionally dependent on his parents. Thus, the refusal of entry clearance interferes with family life and thus Article 8 is engaged.

…

24. To conclude:

i. There are good grounds for considering this appeal outside the Immigration Rules.

ii. Since the appellant's parents entered the United Kingdom:

a. They have kept in very regular close contact with the appellant by telephone.

b. When finances allowed, one or both appellant's parents have visited the appellant.

c. There is clear evidence of financial dependency in the appellant's bundle. The appellant has been financially supported, out of necessity by his father, who has sent money regularly from the United Kingdom.

iii. The appellant has always been and continues to be financially and emotionally dependent upon his father, his sponsor, a former Gurkha solider and his mother. Thus, there is family life between the appellant and his father and mother.

iv. The appellant has never been an over stayer, breached a condition attached to his leave, or an illegal entrant, or committed a crime."

At the hearing before me I heard submissions from both parties and Mr Rai relied on a skeleton argument which I have taken into account. Mr Dieu relied on the case of Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. He submitted that because there was total financial dependence there must by implication be emotional dependency.

The Grounds of Appeal

5. The grounds are essentially a challenge to the decision on the basis that it is inadequately reasoned with reference to the judge's decision that there is family life between the Appellant and his parents. It is further argued that the judge did not give proper account to Section 117B and failed to appreciate that an historic injustice was addressed within Annex K of the Immigration Rules, was introduced in 2015.

The Law

6. In Kugathas [2003] EWCA Civ 31 the Appellant resisted removal to Sri Lanka on the basis of his continuing family life with his mother, his brother and his married sister who all lived in Germany. He had lived with them for many years in Germany before coming to this country about three years prior to the decision under appeal. The leading judgment was given

by Sedley LJ. At paragraph 14 of his judgment he quoted the statement of the commission in S v United Kingdom that:

> "Generally the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily require protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the usual emotional ties."

7. Sedley LJ described that as setting out "a proper approach". As regards the meaning of dependency in that passage, paragraph 17 of his judgment he said:

> "Mr Gill QC says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense but 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 in my view the irreducible minimum of what family life implies."

8. It was held that the Appellant's relationship with his family did not at the time of the decision constitute family life for the purpose of Article 8 whatever might have been the position while they were in Germany. Sedley LJ said at paragraph 19:

> "Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life. Most of us have close relatives of whom we are extremely fond and whom we visit, or who visit us from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."

9. In Ghising v Secretary of State for the Home Department [2012] UKUT 00160 the Upper Tribunal (Lang L and Upper Tribunal Judge Jordan) was critical of the manner in which Kugathas had been interpreted by the courts. It observed at paragraph 56 of its determination that:

> "The judgment in Kugathas has been interpreted too restrictively in the past and ought to be read in the light of the subsequent decisions of the domestic and Strasbourg courts."

10. It continued at paragraph 57 to point out that several authorities had recognised that family life may continue between parent and child even after the child has reached the age of majority. The Tribunal concluded at paragraph 62:

> "The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying the blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings;
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> > 'We do not think that Advic is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life that is sought to establish it is that between adult siblings living together. In our judgment the recognition in Advic that, whilst some generalisations are possible, each case is fact-sensitive and places an obligation on both Adjudicators and the AIT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case.' Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950."

11. The approach of the Upper Tribunal in Ghising was approved in R (Gurung) v Secretary of State for the Home Department [2013] EWCA Civ 8. In Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 Sir Stanley Burnton with whom Richards and Christopher Clarke LJJ agreed concluded at paragraph 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 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."

12. Sedley LJ's statement of the applicable principles in Kugathas has not been in any sense disapproved. In ECO v Kopoi [2017] EWCA Civ 1511 at paragraph 19 Sales LJ said that Kugathas remains good law (see Secretary of State for the Home Department v Onuroah [2017] EWCA Civ 1757).

Error of Law

13. The date of the decision of the ECO is 18 January 2016. The appeal was heard on 7 August 2016. At the date of the decision the Appellant was

aged 27. His father was discharged from the British Army on medical grounds in 1986, before his birth. The Appellant has no siblings. The Appellant's parents arrived in the UK in January 2010.

14. The judge concluded that the Appellant depends on his parents for financial, practical and emotional guidance. His lack of education and separation from his parents resulted, according to the judge, more than usual dependency. The judge concluded that the Appellant's family life with his parents is significantly more than ordinary and emotional ties between adult child and parents and that he was economically and emotionally dependent on his parents. The judge attached weight to the family having kept in very regular close contact with the Appellant by phone, clear financial dependency and where finances have allowed one or both parents have visited the Appellant in Nepal. The Appellant always has been and continued to be financially and emotionally dependent on his parents as found by the judge.

15. There was ample evidence that the Appellant was financially dependent on his parents. I accept that a degree of emotional dependency can be implied from financial dependence and the Appellant's circumstances generally. However, the judge does not properly identify the emotional dependency (which goes beyond that which is normal between adult child and parent) and the decision that it exists is inadequately reasoned. Whilst the Appellant and his parents are close and have frequent telephone contact and he is single and was at the date of the decision living in the family home in Nepal, this is not sufficient to engage Article 8. Further elements of dependency involving more than the usual emotional ties are not identified.

16. The love and affection between parents and adult children does not in itself justify a finding of family life. The judge attached weight to historic injustice in this case. Whilst it explained the circumstances leading to the separation of the family in 2010 and the position that this family now finds itself in, it does not in a vacuum support the existence of family life. It is a factor that properly weighed in the proportionality balancing exercise when family life is found.

17. The judge attached weight to the Appellant's lack of education. However, the Appellant had been educated to secondary school level and it is difficult to see how his level of education increased emotional dependency as distinct from financial. Whilst the judge cannot be criticised for having sympathy with the family in recognising that the Appellant's parents had not visited often because of their constrained financial circumstances, the reality of the situation; notwithstanding that they are not to blame, is that the Appellant at the date of the decision had been living apart from his parents since 2010. He had seen his father once since 2010 by the time of the decision when he visited in 2015 for about twenty days. Both parents visited him after the date of the decision in May 2017 again for about twenty days. I also note from the decision letter that the Appellant stated that his father had not visited him for five years because of his (his father's) health.

18. The Appellant is not financially dependent because he is pursuing studies. He is unemployed. His father in his witness statement refers to him having worked as a labourer, but that it was poorly paid.

17. The judge did not explain the substance of the emotional dependency between the Appellant and his parents. There was no evidence from the Appellant (other than the letter that he submitted with his application for entry clearance). There was no evidence from the Appellant's mother. There was a relatively brief statement from the Appellant's father who gave oral evidence at the hearing. There was no evidence identifying the emotional support that the Appellant received from his parents or the nature of the dependency generally over and above financial. There was no evidence before the judge relating to the Appellant's health or vulnerability. The decision is unreasoned. I set aside the decision to allow the Appellant's appeal.

18. Both parties agreed that the Upper Tribunal could go on and remake the decision on the evidence that was before the First-tier Tribunal. The Appellant has not submitted any further evidence.

Conclusions

19. I accept that at the date that the Appellant's parents left Nepal there was family life between the parties; notwithstanding that the Appellant was an adult. The circumstances of the case are that the Appellant is unemployed. He has worked, albeit it in low paid manual work. He is not studying. He is wholly financially dependent on his parents. There is no doubt love and affection between the Appellant and his parents as evidenced by visits and frequent phone calls and the evidence generally. However, there is no evidence of more than the usual emotional bonds between adult child and parent at the date of the decision. As a matter of fact, albeit not choice, the Appellant had not seen his mother since she left Nepal in 2010 (at the date of the decision) and had seen his father once for 20 or so days. There was no evidence from the Appellant or his parents that would support emotional bonds beyond those that are normal between an adult child and parents. There is no evidence explaining the substance of the asserted dependency and what it amounts to. The Sponsor's evidence is that he gives guidance to the Appellant, but this is not explained.

20. There is insufficient evidence before me that there is family life that would engage the ECHR. I have considered Rai. The case is of assistance and a reminder to me to take into account all material circumstances. This Appellant's family life is in no way undermined by the decision of his parents to come here in 2010 leaving him in Nepal. This came about following a historic injustice. However, I must consider the family life as it as at the date of the decision in 2016.

21. It is not necessary for me to go on to consider proportionality. I do not find that there is family life that would engage the Convention in the light of my findings.

22. The judge made a material error of law and the decision to allow the appeal is set aside. I remake the decision and dismiss the appeal under Article 8.

The Decision

23. The appeal is dismissed on Article 8 grounds.

Signed Joanna McWilliam Date 3 May 2018

Upper Tribunal Judge McWilliam