Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17029/2019**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 21 January 2022 **On 09th March 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MR DIPAK BAHADUR RANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M. Moriarty, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Hussain promulgated on 14 June 2021. The judge dismissed an appeal brought by the appellant, a citizen of Nepal born 18 September 1979, against the refusal of his human rights claim for entry clearance to settle in the UK as the dependent son of his father, a former Gurkha soldier. The Entry Clearance Officer's decision was dated 23 August 2019. It was upheld on 23 November 2020 by the Entry Clearance Review Manager.

2. We approach our analysis as follows. First, we summarise the factual background, and the decisions of the Entry Clearance Officer and the First-tier Tribunal. Secondly, we outline the grounds of appeal and submissions. Thirdly,

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we address Mr Moriarty's submissions that the judge's findings of fact, properly understood, amounted to findings that "family life" (a term to which we shall return) exists between the appellant and his parents. Fourthly, we shall consider the territorial constraints of the European Convention on Human Rights, in the context of this entry clearance appeal, and, in light of that analysis, whether to set the decision of the First-tier Tribunal aside.

Factual background

3. The appellant's father served in the British Army as a Gurkha for 13 years. He, along with his wife, the appellant's mother, were granted indefinite leave to enter the United Kingdom in recognition of the father's military service, on 23 August 2019. The appellant's mother has since arrived here; she attended the hearing before the First-tier Tribunal on 5 May 2021. The appellant's father was in Nepal at the date of the hearing before the First-tier Tribunal, and has remained there ever since. The appellant's mother and father are aged 78 and 80 respectively. His father is in poor health, and has a number of medical conditions. Although he is married, the appellant continues to live in the family home in Nepal, along with his wife, and their daughter, born in 2008, and their son, born in December 2020.

4. Before the First-tier Tribunal, the appellant's case was that he enjoyed "family life" for the purposes of Article 8 of the European Convention on Human Rights ("the ECHR") with his parents. He is emotionally dependent upon them, and the ties they enjoy go beyond the normal emotional ties that would be expected between adult parents and their children. The state of his parents' health is such that they require the appellant's regular support, and depend on him accordingly. His father's health is so poor that he would be unable to endure the physical and medical challenges of flying to the United Kingdom without support from his son during the flight. According to the appellant's witness statement at [14], his father "has multiple diseases such as paralysis, cholesterol, high blood pressure, gastric [sic], heartbeat problem [sic]". At [18], the appellant said this in relation to his daily support for his father:

> "I take him out, give massage in the morning and evening, feed him, taking bath, change/unchanged his clothes, give him medicines as prescribed by doctor. I do shopping, cleaning, and daily household chores. I do exercise in the morning…"

5. For his part, the appellant claimed that he continued to depend on his parents. He had worked in Dubai and Qatar for lengthy periods, but earned very little, and remained reliant upon his parents for financial and emotional support while he was away. Since returning to Nepal in 2017, the appellant's dependence upon his parents has continued.

The decisions of the Entry Clearance Officer and the First-tier Tribunal

6. The Entry Clearance Officer refused the appellant's application for entry clearance because, under the relevant policy, the adult children of former Gurkhas should be aged between 18 and 30 years. The appellant was nearly 40 when he applied as the dependent son of his parents. His residence in Dubai and Qatar had been for longer than the permitted two years' absence from his parents' household. There are no medical conditions or other reasons why the appellant would be dependent upon his parents.

7. The entry clearance officer recognised that in some Gurkha cases the so-called "historic injustice" experienced by the past refusal of the Secretary of State to grant settlement to Gurkhas and their families would outweigh the public interest in the maintenance of effective immigration controls. However, in the appellant's case, the reasons for refusing the application outweighed the historical injustice. The appellant's parents had not applied for settlement visas until he was an adult, and did so in the knowledge that adult children do not automatically qualify for settlement visas. The appellant had not established that he enjoyed family life with his parents, and in any event refusal of entry clearance would be proportionate.

8. The judge directed himself that, pursuant to *Ghising and others* [2013] UKUT 567 (IAC), if the appellant was found to enjoy Article 8 family life with his parents, his exclusion from the United Kingdom would be disproportionate if the only reason for that exclusion was the public interest in the maintenance of effective immigration controls: see [22]. That led to the following self-direction at [23]:

> "I should make it plain at the outset that if I accept that the appellant enjoys family life with his parents, then I would have no hesitation in finding that his exclusion would be disproportionate since the respondent has advanced no other reason than immigration control to justify his exclusion."

9. The judge then directed himself concerning the threshold for finding that Article 8(1) ECHR is engaged on family life basis, in line with *Uddin v Secretary of State for the Home Department* [2020] EWCA Civ 338 (see [24]).

10. Against that background, the judge reached the following operative findings, which lie at the heart of the appellant's appeal before this tribunal:

> "25. From the totality of the evidence, I am prepared to accept that the appellant continues to remain in the same household as his father together with his wife and their child. I am also prepared to accept that the appellant plays a very important role in the care of his father and that given his advanced age and medical conditions, the father would be highly dependent on the appellant emotionally and of course practically. However, it has to be deduced from the circumstances that the appellant, although living in the same home, has developed an independent existence. Firstly, he is now a married man with his own family. That very fact must reduce his own emotional dependency on his parents; more so, given that they are advancing in age. However, the most significant point in my view in this case, that distinguishes this particular appellant's situation from the run-of-the-mill case of 30 plus Nepalese applicants that this tribunal comes across is this.
>
> 26. The appellant has had no less than two periods of employment overseas. The first was between 2005 and 2008 in Qatar. I do not accept the appellant's claim that he was there earning sufficiently only to be able to support himself. That simply would not make sense. If he was simply earning the cost of his sustenance, then why would be [sic] spend no less than three whole years of his life in a foreign country? The appellant's second period away from his country was in the UAE where he was between 2011 and 2017. In

this period, he claims that he managed to only initially send 15,000 Nepalese rupees a month and then ₹20,000 to his wife. That simply does not make sense because the amount in question is far less than the appellant's father's pension which is ₹65,000 a month. In my view, there is no plausible explanation as to why a person would live in a foreign country over some 8 years when his earnings were so meagre compare to what his father was receiving in pension. I note that in this period, the appellant made three return visits, suggesting that he found it profitable for him to repeatedly return to the UAE in order to continue his earnings. "

11. At [29] the judge reached the following global conclusions:

> "29. …the conclusion to which I have come is that it cannot be said, even to the lowest threshold, that any support the appellant relies on from his parents is real or effective or committed.
>
> 30. In view of the findings that I have made above, I have concluded that the appellant's exclusion from the UK is in accordance with the law in that he has not proven that he meets article 8 (1) of the human rights Convention."

12. The judge dismissed the appeal

Grounds of appeal

13. the appellant advances two grounds of appeal. First, the appellant contends that the judge erred by overlooking the dependence of the appellant's parents upon him. Secondly, that the judge erred by ascribing significance to the appellant's time spent working overseas, in light of the fact that he had returned to the family home, and resided there with his parents, for two years before making application for entry clearance.

14. Permission to appeal was granted by First-tier Tribunal Judge Andrew.

Submissions

15. Mr Moriarty submitted that the judge's findings at [25] entailed a finding that the appellant's father was dependent upon him in terms which, pursuant to *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, merited a finding that family life existed between the appellant and the father. That being so, the appellant met threshold for Article 8 to be engaged on a family life basis with his father, and, pursuant to the judge's self-direction at [23], the appeal should have been allowed.

16. In relation to the second round of appeal, Mr Moriarty relied on *Rai v Entry Clearance Officer* [2017] EWCA Civ 320, at [42]. The question was not whether family life had been broken by the appellant's work overseas from which he returned two years prior to applying for entry clearance. Rather, in those proceedings the judge should have assessed the position at the time of the application and the hearing before the First-tier Tribunal, and determined whether family life existed between the appellant and his parents at those points. The judge asked the wrong question and consequently arrived as an answer which was infected by an error of law.

17. In her oral submissions, Ms Everett accepted that there was force in Mr Moriarty's submissions concerning [25] but, properly understood, the judge did not arrive at perverse findings. The judge was properly influenced by the independent existence he found the appellant to have established, including through the relationship he enjoys with his wife and children.

18. We raised with both parties whether, even if article 8 family life did, in principle, exist between the appellant and his father, it would be within the territorial jurisdiction of the United Kingdom's obligations under the ECHR, given the appellant and his father remain in Nepal. Mr Moriarty submitted that the appellant's mother is in the territorial jurisdiction of the UK, and stressed that the appellant had applied for entry clearance on the basis that family life existed between him and both of his parents. They had all suffered as a consequence of the "historical injustice" they experienced through the Secretary of State not granting the opportunity for the family to settle in this country at an earlier stage, and their case should be considered holistically. Ms Everett submitted that the premise behind the query we raised carried weight.

The law

19. Article 1 ECHR provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

20. Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Discussion

21. We accept Mr Moriarty's submission that dependence between adult family members need not be mutual in order to engage Article 8(1) ECHR. In the case of adult family members, the jurisprudence of the European Court of Human Rights, as applied authoritatively by *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, is that "family life" for the purposes of Article 8 is not engaged between parents and their adult children unless something more exists than normal emotional ties between them. There must be "dependency", which was held to include real, committed or effective support, flowing from one party to the other (see Sedley LJ at [17]). At [24] and [25] Arden LJ, as she then was, held, with emphasis added:

> "25. Because there is no presumption of family life, in my judgment 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: see *S v United Kingdom* (1984) 40 DR 196 and *Abdulaziz*, *Cabales* and *Balkandali v United Kingdom* [1985] 7 EHRR 471. **Such ties might exist if the appellant were dependent on his family or *vice versa*.** It is not, however, essential that the members of the family should be in the same country."

22. Arden LJ's use of the term "*vice versa*" demonstrates that Article 8 dependence need only be one directional: A may be dependent upon B, *or* B may be dependent upon A in order to engage Article 8. Of course, where A and B are mutually dependent, a situation of dependence will also be present. However, where there is reliance by one adult family member upon the "real", "committed" or "effective" support provided by another adult family member, that is, in principle, sufficient to engage Article 8(1) on a family life basis, even if the support provided is not mutual. Of course, dependence may be mutual, and in many cases it will be. But it must not necessarily be mutual.

23. It appears that the judge approached Article 8(1) on the basis that family life could only be present if the *appellant* were dependent upon his parents. We take that from the judge's operative and concluding findings at [29], in which the judge dismissed the appeal on the basis that it was the *appellant* who was not dependent upon his parents. The judge did not consider the Article 8(1) implications of his findings at [25] concerning the appellant's father's dependence upon him.

24. We accept that on the judge's unchallenged findings at [25], the judge reached findings of fact that, in *Kugathas* terms, amount to a finding of dependence by the appellant's father upon the appellant that is, in principle, sufficient to engage Article 8 ECHR. Bearing in mind the evidence before the judge concerning the appellant's father's claimed reliance upon the appellant for day to day practical and emotional support, the judge's finding that the father is "highly dependent on the appellant emotionally and of course practically" amounted to a finding that the father was dependent upon the appellant in terms sufficient to engage Article 8(1). We find that the judge's findings necessitated a conclusion that the appellant's father was dependent upon the appellant.

25. The judge's remaining analysis focussed on whether the appellant had demonstrated *Kugathas* dependence upon his parents. We reject Mr Moriarty's submission that the judge erred in relation to his broader consideration of the appellant's claimed dependence upon his parents.

26. Mr Moriarty's reliance on *Rai* is misplaced. *Rai* was a case where the sponsor had departed for the UK ahead of his adult family members, in relation to whom it was claimed there was dependence. Lindblom LJ held at [42]:

> "Those circumstances of the appellant and his family… 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."

27. Properly understood, *Rai* is not authority for the proposition that when assessing the presence of contemporary Article 8 family life, past overseas residence is of no potential relevance to that assessment. It was simply the case that, in *Rai*, the judge had asked the wrong question; rather than focussing on whether Article 8 was engaged at the relevant times, the Upper Tribunal had ascribed significance to the fact that appellant’s parents chose to leave Nepal for the United Kingdom, leaving the appellant behind. Nothing in *Rai* prevents a judge from looking back at the history of a person’s living arrangements in order to inform a broader assessment of claimed dependency.

28. Judge Hussain legitimately ascribed significance to the appellant’s choice to move to Qatar and Dubai in search of work, over a number of years: Qatar from 2005 to 2008, and Dubai from 2011 to 2017. Those were relevant considerations; pursuant to *Kugathas*, the past living arrangements of a putative dependent are a key feature of the analysis of claimed dependence. See Arden LJ at [24], with emphasis added:

> “There is no presumption that a person has a family life, even with the members of a person's immediate family. 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.”

29. The fact that the appellant had lived apart from his parents for such lengthy periods were relevant considerations to the overall factual matrix. Of course, had the judge ascribed determinative significance to the fact that, two years before the appellant claimed to enjoy family life with his parents, he returned from a number of years living overseas, that may have been an error. But that is not what the judge did. Consistent with *Kugathas*, he took account of the appellant’s past living circumstances, as he was entitled to do.

30. The appellant’s overseas residence was a legitimate consideration in an additional respect. The judge reached unchallenged findings of fact that the appellant had not revealed the full extent of his financial circumstances while he worked overseas, and that the claimed financial dependence upon his father during that time had not been established. Those were relevant considerations because part of the appellant’s case had been that he had been financially dependent upon his parents for many years. The judge was entitled to scrutinise those claims. These are findings of fact reached by a first instance judge, in light of the whole sea of evidence (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]); it cannot be said that they were findings that no reasonable judge could have reached. Alongside his earlier observations that the appellant is now married, with his own family, with reduced emotional dependency upon his parents, the judge was entirely justified in rejecting the appellant’s claim that he, a 39 year old man, married with two children, had been, and was, dependent upon his parents in the *Kugathas* sense at the relevant times.

31. We also consider that there is nothing in the judge’s decision to suggest that the judge had failed to ask the correct question, concerning the existence of the

appellant's claimed dependence on his parents, at the relevant times, which had been the error in *Rai* at [42]. The judge's operative conclusion in which he rejected the appellant's claimed dependence on his parents, at [29], was expressed in the present tense: "it cannot be said… that any support the appellant *relies on* from his parents is real or effective or committed."

32. Ground 2 is, therefore, without merit: the judge reached legitimate findings, on the basis of a proper self-direction, that the appellant was not dependent upon his parents, nor that there was any dependence from his mother. The judge's findings concerning the appellant's parents' dependency on the appellant were limited to a finding that the father was dependent upon his son. The judge did not find that the appellant's mother was dependent upon him. While the appellant's case before the judge had been that he enjoyed family life with both parents (see [22]), the judge did not find that the appellant's mother was dependent upon him. The judge has not challenged that aspect of the decision specifically, and to the extent that ground 2 encompassed a challenge on that basis, we have dismissed it.

33. Drawing this analysis together, we accept that ground 1 is made out. The judge reached findings that the appellant's father was dependent upon the appellant which, in *Kugathas* terms, entailed a finding that Article 8(1) was engaged in relation to the father/son relationship they engaged. The decision of the judge involved the making of an error of law to that extent.

Whether to set the decision aside

34. Mr Moriarty submits that, in light of the judge's finding that the appellant's father was dependent upon the appellant and that Article 8 "family life" therefore existed between the two, and given his self-direction at [23], it follows that this appeal should be remade by the Upper Tribunal by allowing the appellant's appeal.

35. We disagree. Although we have found that the decision of the First-tier Tribunal involved the making of an error of law, we do not consider that it would be appropriate to set the decision aside, for neither the appellant nor his father are presently in territory which engages the United Kingdom's ECHR obligations.

36. Pursuant to Article 1 ECHR, the obligations of the High Contracting Parties to the Convention are territorial; the obligation is to secure the rights and freedoms guaranteed by the Convention "to everyone within their jurisdiction". The appellant and his father are in Nepal, a non-ECHR state that is outside the jurisdiction of the United Kingdom.

37. In our judgment, there is no territorial nexus to the United Kingdom's obligations under the ECHR in relation to the appellant's relationship with his father. The appellant enjoys family life with his father, in the Article 8 sense, in a territory wholly outside that of the United Kingdom. The respondent's decision does not stop that family life from continuing; it may proceed in Nepal, as it had done for at least the two years before the entry clearance application was made to the Secretary of State.

38. The engagement of Article 8 in entry clearance cases is, it is now well established, limited to the "family life" situations. The position was

authoritatively considered by the Court of Appeal in *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393, at [17] per Burnett LJ (as he then was), with emphasis added:

> "The underlying basis on which the family life aspect of article 8 falls within the jurisdiction of the ECHR in an immigration case, even though the person seeking entry is not in an ECHR state, was explained in *Khan v United Kingdom* (2014) 58 EHRR SE15. It concerned a Pakistani national whose leave to remain in the United Kingdom was cancelled on national security grounds whilst he was in Pakistan. He argued that he was at risk of treatment contrary to article 3 ECHR if he remained in Pakistan and was not allowed to return to the United Kingdom:
>
> > 'There is support in the Court's case law for the proposition that the Contracting State's obligation under art.8 may, in certain circumstances, require family members to be reunified with their relatives living in the Contracting State. **However, that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in the Contracting State and being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the Contracting State**…'"

The quote from *Khan v United Kingdom* was at paragraph 27.

39. Burnett LJ then specifically addressed the jurisdictional basis upon which Article 8 claims involving family life where one party is outside the territory of the United Kingdom are justiciable in a human rights appeal:

> "24. The consistent approach of the Strasbourg Court to the question whether someone is within the jurisdiction of a Contracting State for the purpose of article 1 is to emphasise that it is primarily territorial. However, in exceptional circumstances acts producing effects outside the territory of a Contracting State may constitute an exercise of jurisdiction: see *Al-Skeini v United Kingdom* (55721/07) (2011) 53 EHRR 18 at paragraph 131. None of the exceptions thereafter identified by the Strasbourg Court has any bearing on the facts of this case.
>
> 25. **In article 8 cases involving family life, even though the spouse or child seeking entry to the territory of a Contracting Party will be outside that territory, members of the family whose rights are affected are undoubtedly within it. That provides the jurisdictional peg…** No other argument to suggest that the respondent and his family were within the jurisdiction of the United Kingdom when making the application for entry clearance could prosper in the face of the decisions of the Grand Chamber of the Strasbourg Court in *Bankovic v Belgium (Admissibility) (52207/99)* (2007) 44 EHRR SE5 and *Al Skeini*." (Emphasis added)

40. To adopt the terminology of Burnett LJ, the "jurisdictional peg" upon which a putative breach of the ECHR may be hung in an Article 8 family life case is the presence of one party in the territory of the UK, provided "family life" exists between an applicant and that person. In these proceedings, neither the appellant nor his father are in the territory of the United Kingdom, and the judge's family life findings relate to their relationship alone. The refusal of the appellant's entry clearance application and the associated human rights claim is incapable of amounting to an interference with the Article 8 rights of any person within the United Kingdom, on the findings of the judge. The refusal of the appellant's human rights claim was therefore not unlawful under section 6 of the Human Rights Act 1998, with the effect that the judge's failure to identify the consequences of his finding of dependence from the appellant's father upon the appellant was immaterial, and it is not necessary to set the decision aside.

41. We close by addressing the position of the appellant's mother. While she is in the United Kingdom and had attended the hearing before the First-tier Tribunal, there is no finding that the appellant enjoys Article 8 family life with her. As we have found, the judge reached legitimate findings of fact rejecting the appellant's claimed dependence upon his parents (which included his mother), and the only basis upon which "family life" is engaged between the appellant and his father is the latter's extensive dependence upon the former. The appellant's mother was not found to have the same levels of dependency upon the appellant as the appellant's father, and there have been no challenges to those findings of the judge. However, Mr Moriarty submits that the entire family experienced the "historic injustice" to which former Gurkhas were subjected over many years; the entire family lost the opportunity to relocate to the United Kingdom at a much earlier stage, and a holistic view needs to be taken of the family as a whole: the mother enjoys family life with the father; and the father additionally enjoys family life with the son.

42. While we accept that the father and mother may well enjoy family life with each other, we consider that that relationship is too far removed from the primary Article 8 relationship that was before the First-tier Tribunal to have been capable of overcoming the territorial barriers to the UK's ECHR jurisdiction as outlined above. There will be no interference with the Article 8 relationship between the appellant and his father by the refusal of entry clearance, and that was the only relationship involving this appellant that was found by the judge to engage Article 8.

43. For those reasons, any error of law by the judge in relation to the implications of his findings of dependence at [25] was immaterial. We do not set the decision of Judge Hussain aside. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Hussain did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 28 January 2022

Upper Tribunal Judge Stephen Smith