IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004346
First-tier Tribunal No: HU/07775/2020

THE IMMIGRATION ACTS

Decision Issued:
On 27 March 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Santosh Limbu — Appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer — Respondent

Representation:
For the Appellant: Mr D Bhattarai of Gordon & Thompson Solicitors.
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 11 January 2023

DECISION

1. The appellant is a national of Nepal born on 29 January 1988. He appeals against a decision of Judge of the First-tier Tribunal Bart-Stewart (hereafter the "judge") who, in a decision promulgated on 25 February 2022 following a hearing on 10 February 2022, dismissed his appeal on human rights grounds (Article 8) against a decision of the respondent of 19 August 2020 to refuse his application of 2 March 2020 for entry clearance as a dependent adult child of a Gurkha veteran, Mr Maitai Hang Limbu (the "sponsor").

2. The sponsor is an ex-Gurkha soldier who was discharged from the British Army on 9 September 1971 by reason of redundancy, having enlisted on 16 October 1963. He and his wife entered the United Kingdom on 28 January 2017 with indefinite leave to enter. As at the date of his application for entry clearance, the appellant was 32 years

old. As at the date of the hearing before the judge, he was 34 years old. It was claimed before the judge that he was single, unemployed and fully dependent on his father, that he lived in the family home and that he has never worked.

3. Ground 2 of the three grounds of appeal relies upon the following words in emboldened text (my emphasis) in the following extracts from the decision letter:

> "**I accept that you may receive financial assistance from your father** but you have not demonstrated that you are genuinely dependent upon him…."

and

> "**Whilst I acknowledge that you may receive some financial support from your sponsor** and that you remain in contact with him, you have not demonstrated you are financially and emotionally dependent upon your father beyond normally expected [sic] between a parent and adult child…."

4. Also relevant to ground 2 is that the respondent was not represented before the judge.

5. The grounds may be summarised as follows:

(i) Ground 1: The judge misdirected herself on the correct legal test to be applied and applied an incorrect test and incorrect threshold. This ground relates to the first sentence of para 25 of the judge's decision where she said: *"The appellant was aged 32 [sic] the date of application and does not meet the [respondent's] policy on age grounds but must show exceptional circumstances."* Ground 1 contends that the judge incorrectly applied the test of "*exceptional circumstances*" in deciding whether the appellant enjoyed family life with the sponsor, whereas the correct test was whether there was ''real'' or ''committed'' or ''effective'' support between the appellant and the sponsor. Ground 1 states that the test in Kugathas v SSHD [2003] EWCA Civ 31 concerning the engagement of Article 8 (1) has been qualified by the case of Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC) where, at para 60, the Upper Tribunal stated "*some of the court's decision[s] indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependency…"*

(ii) Ground 2: The judge erred at para 28 where she said that *"None of the documentation before me to show financial dependency is prior to the date of application",* in that, she overlooked the fact that the respondent had conceded in the decision letter that the appellant may have received financial assistance from the sponsor, stating that *"... I accept that you may receive financial assistance from your father…"* This error was material. If the judge had accepted that there was financial support or assistance prior to the application as conceded by the respondent, it was more likely than not that the judge would have reached a conclusion that there was financial dependency as she had accepted that there was evidence in the form of the money transfer receipts in the appellant's bundle covering the period after the date the application. It is contended that the respondent had not withdrawn the concession as at the date of the hearing given that there was no such indication in the Entry Clearance

Manager's review of the decision and that the respondent was not represented at the hearing before the judge.

(iii) Ground 3: The judge considered irrelevant matters and failed to make a complete assessment of the available evidence: There are the following aspects to ground 3:

(a) Ground 3(a) (para 12 of the grounds) contends that, the judge erred at para 30 where she stated that "*At the date of the application the appellant was 32 years old. He is now 34. I find that he has failed to show that he is financially dependent on his parents",* in that, the appellant being 34 years old at the date of the hearing was not a relevant consideration because the relevant date is the date of the application. Furthermore, the judge failed to take into account that the delay of two years in the Tribunal before the hearing of the appeal took place was not the fault of the appellant and therefore should not be counted against him.

(b) Ground 3(b) (para 13 of the grounds) is that the judge failed to provide adequate reasons as to why it was not accepted that the substantial remittances evidenced in the form of money transfer receipts in the appellant's bundle failed to establish the appellant's case of financial dependency. Although some of the receipts were not legible, several receipts with substantial amounts of money transfers were legible. The grounds list the following remittances:

i. Nepalese rupees 28, 913 (AB/29)

ii. Nepalese rupees 120,000 (AB/31)

iii. Nepalese rupees 128,201 (AB/33)

iv. Nepalese rupees 100,000 (AB/34)

v. Nepalese rupees 120,000 (AB/35)

vi. Nepalese rupees 128,200.56 (AB/36)

vii. Nepalese rupees 128,201 (AB/37)

viii. Nepalese rupees 64,048 (AB/41)

ix. Nepalese rupees 28,913 (AB/42)

(c) Ground 3(c): Finally, para 15 of the grounds contends that the judge's findings were arbitrary and not supported by evidence.

The judge's decision

6. The judge gave her reasons for her decision from para 22 onwards of her decision. As I will need to refer to her reasoning quite extensively, I now set out paras 22-32 of the judge's decision:

"FINDINGS AND REASONS

22. EC-DR.I.I. sets out the requirements to be met for entry clearance as an adult dependent relative. All of the requirements in paragraphs E-ECDR.2.1. to 3.2. must be met. At E-ECDR.2.4. The applicant … must as a result of age, illness or disability require long-term personal care to perform everyday tasks. There is no such claim or evidence in this appeal and therefore the application does not meet the requirements of the Immigration Rules, fails under the Rules and proceeds on the grounds that the decision to refuse entry clearance is a breach of the appellant's human rights.

23. The IDI chapter 5 section 2A para 13.2 states that dependents over the age of 18 of Foreign and Commonwealth forces members (including Gurkhas) not otherwise covered in the guidance would normally need to qualify for settlement UK *[sic]* under a specific provision of the Immigration Rules. **In exceptional circumstances discretion may be exercised in individual cases where the dependent is over the age of 18.**

24. Exercise of discretion is addressed at Annex K in respect of adult children of former Gurkhas. The policy applies to applications made after 5 January 2015.

    1. The former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements; and

    2. The applicant is the son or daughter of the former Gurkha; and

    3. The applicant is outside the UK; and

    4. The applicant is 18 years of age or over and 30 years of age or under on the date of application (including applicants who are 30 as at the date of application); and

    5. The applicant is financially and emotionally dependent on the former Gurkha; and

    6. The applicant was under 18 years of age at the time of the former Gurkha's discharge; (or if the applicant was born after discharge see guidance in paragraph 16 of Annex K of this guidance); and

    7. The Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available before 1 July 1997; and

    8. The applicant has not been living apart front the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away); and

    9. The applicant has not formed an independent family unit; and

    10. The applicant does not fall to be refused on grounds of suitability under paragraph 8 or of [sic] Appendix Armed Forces to the Immigration Rules or those provisions of Part 9 of the Immigration

Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces.

25. **The appellant was aged 32 *[sic]* the date of application and does not meet the policy on age grounds but must show exceptional circumstances.** He is required to show that he was and remains financially and emotionally dependent on the former Gurkha. The support received from the sponsor must be real, committed and effective. It is claimed that the appellant left school at grade 7 and has never left or looked for work. He has remained living in the family home with the sponsor and siblings until the sponsor's departure to the UK though it is said they lived in extreme poverty. I find the sponsors *[sic]* evidence with regards to the family circumstances prior to the date of departure and in particular income was vague. He says that he never received an army pension but did not give a clear response for how he and his wife and three children were able to survive without any form of income. He does not suggest that he or any of the children, all adults before he left Nepal, ever looked for work although he did eventually mention occasional portering.

26. The respondent in respect of dependency noted that when the sponsor applied for entry clearance he indicated on the application form that he had no dependants. The appellant's witness statement also lacked detail of his circumstances. He says that he finished school at 7th grade and stayed at home with his parents to help them with the household chores. He says that in 2016 the British army's welfare office informed his father about the opportunity to go to the UK. The sponsor claims that he was never asked about dependants. The office in Kathmandu has a great deal of experience in dealing with these applications. At the time that he said that his father was informed of the opportunity to go to the UK, this would have included dependents under 30 which the appellant was at that time. If the circumstances where *[sic]* as claimed, the family extremely close and the children all dependent on the sponsor, it seems unlikely that he would not have asked about the possibility of the children joining him or what would happen to them. I do not accept it as likely that the sponsor was not asked and find it undermines the claim of dependency.

27. A relationship certificate produced was issued on 4th January 2016. The appellant was added on 10th December 2015. A brother was added in 1996 and a daughter on a date which is not stated. The appellant also produced a "birth certificate" but the date of issue is not consistent with the date of issue stated on the relationship certificate. It is not just the omission from the Kindred Roll with no evidence before me of an approach to the Records Office to amend this but also the sponsors *[sic]* failure to declare the appellant as a dependent at the time he made his application for entry clearance. The burden of proof is on the appellant and I find that he has failed to discharge the burden that on the balance of probabilities he was dependent on the sponsor prior to the sponsor's departure from Nepal.

28. **The sponsor came to the UK with his wife in 2017. None of the documentation before me to show financial dependency is prior to the date of application.** Whilst it is claimed that the sponsor lost documents due to moving in the UK, this does not explain why the appellant, whose application this is, could not produce money transfer receipts from Kathmandu. **Those in the appellant's bundle are in fact remittance claim forms from Nepal. None predate the application.** There are also

no bank statements of the sponsor. **The requirement is to show financial and emotional dependency on the former Gurkha. The evidence falls significantly short in meeting that requirement.**

29. **The immigration rules and policy are the starting point in the Article 8 assessment.** Ghising and others (Gurkhas/BOCs: historical wrong; weight) [2013] UKUT 567 (IAC) held that *[sic]* when appellant has shown that there is family/ private life and a decision made by the respondent amounts to interference with it, the burden lies with the respondent to show that a decision to remove is proportionate (although appellant's *[sic]* will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the respondent may be unaware), the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight. **Where it is found Article 8 is engaged and, but for historic wrong, the appellant would have been settled in UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant's favour,** where the matters relied on by Secretary of State/ entry clearance officer consists solely of the public interest in maintaining a firm immigration policy.

30. **At the date of application, the appellant was 32 years old. He is now 34. I find that he has failed to show that he is financially dependent on his parents. There is little evidence of real committed and effective support emanating from the sponsor.** I note what is said about cultural factors and the expectation that parents support their children until the child's marriage however that in itself does not support the claim of dependency. The sponsor and his wife chose to come to the UK as they are entitled to do but in the knowledge that the appellant would not be joining them which I consider self-evident from not declaring him as a dependent. They are elderly but can access health care and the support services available in the UK as they have been doing to date.

31. I find that the appellant has failed to show that he does not have an independent life. There is no reliable evidence of how maintains himself. [E]ven though the sponsor has been sending money, the appellant has failed to show dependency over and above that normally to be expected between an adult child and their parent.

32. **I find that Article 8 (1) ECHR is not engaged. The decision to refuse entry clearance is lawful as the appellant does not meet the requirements of the Immigration Rules or the relevant policy and there is no interference with the Article 8 ECHR**."

(My emphasis)

ASSESSMENT

7. At the commencement of the hearing, Mr Bhattarai confirmed that it was accepted on the appellant's behalf before the judge that he could not satisfy the relevant requirements of the Immigration Rules.

8. Mr Bhattarai also accepted, in relation to ground 3(a) that the only ground of appeal before the judge was the human rights ground and that the Tribunal decides human

rights appeals on the basis of the circumstances and evidence as at the date of the hearing.

Ground 1

9. Mr Bhattarai informed me that the skeleton argument which he had submitted to the First-tier Tribunal ("FtT") referred the judge to the decisions in R (Gurung & others) v SSHD [2013] EWCA Civ 8, at para 42, and Rai v ECO, New Delhi [2017] EWCA Civ 320, at paras 17, 20, 39 and 48. These judgments gave relevant guidance. In Ghising, the Court said at para 56 that the judgments in Kugathas had been interpreted too restrictively and at para 60 that *"… some of the Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional circumstances*."

10. At the hearing, I asked Mr Bhattarai whether, in referring to "*exceptional circumstances*" in the first sentence of para 25 of her decision, the judge was referring to the respondent's policy which she set out immediately before para 25, at paras 22-24.

11. In response, Mr Bhattarai submitted that the judge's mind was clouded by the test of exceptional circumstances in reaching her finding as to whether family life was enjoyed between the appellant and the sponsor. He informed me that the respondent's policy was not argued before the judge. He submitted that, given that the respondent's policy was not in issue, the fact that the judge set out the policy shows that she misdirected herself into thinking that the appellant had to show that there were exceptional circumstances in order to establish that he enjoyed family life with the sponsor.

12. Mr Bhattarai submitted that this led her to find, at para 25, that the sponsor's evidence was vague. I asked Mr Bhattarai whether the judge explained her reasons for finding the sponsor's evidence vague in the final two sentences of para 25. He repeated that the judge was looking for exceptional circumstances.

13. I asked Mr Bhattarai to point to specific parts of the judge's decision that support his contention that the judge was looking for exceptional circumstances in order to assess whether the appellant enjoyed family life. Mr Bhattarai referred me to the words "*exceptional circumstances"* in the first sentence of para 25 and he also submitted that "*the way that the judge assessed the evidence of remittances and the finding itself was clouded by looking for exceptional circumstances*." He submitted that this was shown by the judge's reasoning at paras 26-28. However, when I asked him to explain precisely what aspects of paras 26-28 of the judge's decision show that she was looking for exceptional circumstances in order to decide whether the appellant enjoyed family life, Mr Bhattarai informed me that the wording of paras 26-28 was *"more of a dismissive attitude rather that finding in favour of the appellant"*. He confirmed that he was saying, in effect that the judge was minded to dismiss the appeal.

14. I reminded Mr Bhattarai that his grounds did not include a ground that the judge was minded to dismiss the appeal and again asked him to point me to specific aspects of the decision that show that she applied a higher test in reaching her finding that the appellant did not enjoy family life with the sponsor. He responded that

he could only say that *"the wording used by the judge shows that she was minded to dismiss the appeal and that is because her mind was clouded by the wrong test*".

15. Mr Bhattarai submitted that, if the judge had applied the correct test of whether there was real, committed or effective support, she would have reached a different conclusion.

16. I deal first with Mr Bhattarai's contention that the judge was minded to dismiss the appellant's appeal. The fact is that the appellant's case on ground 1 as lodged with the application for permission to appeal does not include a suggestion that she had prejudged the appellant's case or that she was biased against him or minded to dismiss his appeal. Mr Bhattarai therefore does no have permission to argue this point which he developed during the course of his submissions without making a formal application for permission to amend his grounds.

17. In any event, given that he was unable to point to anything specific in the decision that shows that the judge was minded to dismiss the appeal, the submission amounts to no more than a mere assertion based on speculation.

18. In essence and using Mr Bhattarai's words, ground 1 is that the judge had in her mind the incorrect test of "*exceptional circumstances*". Given that Mr Bhattarai was unable to point to anything specific in the judge's decision that shows that she applied the test of exceptional circumstances in deciding whether the appellant enjoyed family life with the sponsor, the appellant's case that she applied this incorrect test rests upon two matters, as follows:

    (a) firstly, that the judge referred to "*exceptional circumstances*" in the first sentence of para 25; and

    (b) secondly, that she referred to the respondent's policy when the policy was not in issue.

19. Mr Bhattarai relies upon the fact that the policy was not in issue before the judge to contend that the fact that she referred to it means that she incorrectly applied the test of exceptional circumstances in order to decide whether family life was being enjoyed.

20. However, the mere fact that it was accepted before the judge that the appellant could not satisfy the respondent's policy does not mean that she erred in setting out the requirements of the Immigration Rules and the policy. It does not mean that she applied the test of exceptional circumstances in deciding whether the appellant enjoyed family life. It is axiomatic that whether or not an individual meets any relevant requirements under the Immigration Rules or relevant policies is relevant when carrying out the proportionality balancing exercise in relation to the individual's Article 8 claim.

21. In addition, it is necessary to see the context in which the judge said what she said in the first sentence of para 25 of her decision. Para 25 follows paras 22-24 where the judge set out the requirements to be satisfied under the Immigration Rules. In the final sentence of para 23, she referred to the fact that the respondent's policy

provides for the exercise of discretion in exceptional circumstances where the dependant is over the age of 18.

22. Furthermore, in the third sentence of para 25, the judge referred to support that is "*real committed and effective*". Again, in the fourth sentence of para 30, she referred to there being little evidence of "*real committed and effective support*". The grounds do not suggest that there was any error in this aspect of the judge's reasoning.

23. Para 26 also makes it clear that the judge was considering the evidence of dependency. In this paragraph, she considered the fact that, when the sponsor applied for entry clearance, he indicated on his application form that he had no dependants. She rejected the sponsor's explanation, i.e. that he was not asked about dependants, and gave her reasons. At para 26, she also said that the appellant's witness statement lacked detail about his circumstances. At para 27, she considered the evidence that the appellant had been omitted from the Kindred Roll. At paras 28 and 29, she considered the documentary evidence submitted to show that the appellant was financially dependent on the sponsor. At the end of para 28, she referred to the requirement to show "*financial and emotional dependency on the former Gurkha".*

24. I reject Mr Bhattarai's submission that the judge found that the sponsor's evidence was vague because she had misdirected herself as to the applicable test for a finding of family life. It is clear that she gave her reasons for her finding at para 25 that the sponsor's evidence "*with regards to the family circumstances prior to the date of departure and in particular income was vague*" in the remainder of para 25. In view of the fact that she gave clear reasons for her finding that the sponsor's evidence in this regard was vague, there is no reason to suppose that the reason she found the sponsor's evidence vague was because she had applied an incorrect test. Mr Bhattarai's submission ignores the reasons given at para 25 and amounts to speculation.

25. Taking the whole of the judge's reasoning together with her summary of the position under the Immigration Rules, the policy and in relation to Article 8, I am satisfied that, at paras 22-24 and in the first sentence of para 25, the judge was merely setting out the requirements that need to be satisfied in order to meet the requirements under the Immigration Rules and the respondent's policy. I do not accept that the judge applied the test of exceptional circumstances in reaching her finding as to whether the appellant enjoyed family life with the sponsor.

26. Ground 1 is therefore not established.

Ground 2

27. Mr Bhattarai submitted that the words in the decision letter "*you may receive financial assistance*" and "*you may receive some financial assistance*" from the sponsor show that the respondent had conceded, in clear unequivocal and unambiguous terms, that the appellant was receiving financial assistance from his father. It seemed at one point that Mr Bhattarai was submitting that the concession was that the respondent had received documentary evidence of remittances that pre-dated the decision but when I attempted to confirm with Mr Bhattarai whether that was the case, he submitted that the respondent had conceded in the decision letter

that the appellant was financially assisted by the sponsor, which is not the same thing.

28. Mr Bhattarai submitted that the judge was mistaken in saying that there was no evidence of financial assistance that pre-dated the decision because it is clear from the decision letter that such evidence had been submitted to the respondent. That fact, taken together with the appellant's witness statement, supported the appellant's case (in Mr Bhattarai's submission) that he had received financial assistance from the sponsor prior to the decision as well as subsequently.

29. In the alternative, if the respondent had not conceded that the appellant had received financial assistance from the sponsor, Mr Bhattarai submitted that the judge erred by failing to take into account that the decision letter shows that the respondent had received evidence of financial assistance prior to the date of the decision. The appellant had also submitted evidence of remittances in the appeal; for example, those at AB/31-32 which post-date the decision and which support his case that he was dependent upon the sponsor even before the date of his application for entry clearance. Mr Bhattarai referred me to the list of remittances set out in the grounds and at para 5(iii)(b) above.

30. I accept that the decision letter shows that the respondent did receive evidence of remittances that pre-dated the decision. However, it is clear that the respondent did not accept that the evidence showed that the appellant was financially and emotionally dependent on the sponsor. That was in issue, whether or not the respondent acknowledged or accepted that the appellant had submitted evidence of remittances by the sponsor prior to the date of the decision.

31. The judge was aware of the contents of the decision letter. She set out the respondent's reasons for refusing the appellant's application at paras 4-10 of her decision. Para 4 is relevant in relation to ground 2. Para 4 reads:

> "4. The appellant was 32 years of age at the date of application. He provided limited details of his personal circumstances, domestic arrangements or financial commitments in Nepal. **It is accepted he may receive financial assistance from his father** but he had not demonstrated that he is genuinely dependent upon him. The respondent considers the appellant is able to look after himself. **He had not demonstrated that any financial assistance that he currently receives cannot continue** or that he cannot continue to reside in Nepal. He had not submitted evidence that he requires due to either age, illness or disability, long term personal care to perform everyday tasks. The application was refused under paragraph EC - DR.1.1(d). of Appendix FM."

(my emphasis)

32. The judge was therefore plainly aware that the respondent was saying in the decision letter that the appellant had submitted some evidence of remittances by the sponsor prior to the decision being made.

33. The sentence that is the subject of ground 2 is the second sentence of para 28 of the judge's decision, which reads:

> "None of the documentation before me to show financial dependency is prior to the date of application".

34. It was clear from Mr Bhattarai's submissions that the remittances listed in the grounds and as set out at para 5(iii)(b) above were remittances that post-dated the respondent's decision. It therefore follows that the second sentence of para 28 of the judge's decision was factually correct. None of the documentation before the judge constituted evidence of remittances prior to the decision. This sentence therefore does not, of itself, show that the judge omitted taking into account that the respondent had had evidence of remittances prior to the date of the decision.

35. Given that the judge was aware of the contents of the decision letter, in particular, that the respondent had accepted that the appellant "*may receive financial assistance*" from the sponsor and that the decision letter stated that the appellant had not demonstrated that "*any financial assistance that he currently receives cannot continue"*, I do not accept that the judge overlooked taking into account that the appellant had submitted to the respondent some evidence of remittances, notwithstanding that her reasoning and assessment from para 22 onwards did not refer in terms to the respondent having received evidence of remittances prior to the decision. There was no need for her to repeat that fact.

36. Ground 2 is therefore not established.

Ground 3(b)

37. Having dealt with ground 2, this is a convenient point at which to deal with ground 3(b) which also concerns the evidence of remittances.

38. It appears to be suggested in ground 3(b) that the evidence of financial remittances should be taken in isolation and, when that is done, the evidence is adequate to establish financial dependence.

39. However, it is simply incorrect to suggest that evidence of financial remittances can or should be taken in isolation. The judge considered all of the relevant evidence as a whole, which is the correct approach.

40. It is simply not the case that the judge failed to give adequate reasons for finding that the evidence of remittances did not establish financial dependency. To the contrary, I am satisfied that she gave adequate reasons for her finding that the appellant had not shown that he was financially dependent on the sponsor. In summary, her reasons were:

> (i) at para 25, that the sponsor's evidence with regard to the family's circumstances prior to the date of his departure from Nepal and in particular income was vague;
>
> (ii) at para 26, that the sponsor had indicated in his application of entry clearance that he had no dependants; the judge rejected the sponsor's explanation and found that the explanation that the sponsor was not asked undermined the claim of dependency;

(iii) at para 26, that, if the circumstances of the family were as claimed, the family being extremely close and the children all dependent on the sponsor, "*it seemed unlikely that [the sponsor] would not have asked about the possibility of the children joining him or what would happen to them";*

(iv) at para 27, that when the relationship certificate was issued on 4 January 2016, the appellant's name was omitted; that there was no evidence of an approach to the Records Office to amend the certificate; and the sponsor's failure to mention the appellant as a dependant at the time he made his application of entry clearance; and

(v) at para 30, that the sponsor and his wife chose to come to the United Kingdom as they were entitled to do but in the knowledge that the appellant would not be joining them which the judge considered was self-evident from the sponsor not declaring him as a dependant.

41. Finally, in his closing submissions in response to Ms Ahmed, Mr Bhattarai submitted that the judge did not consider properly the post-decision evidence of remittances that was included in the appellant's bundle, in that, she overlooked taking into account the evidence of communication that had been submitted.

42. However, I reminded Mr Bhattarai that his grounds did not challenge the judge's decision on the ground that she had overlooked the evidence of communication at which point he informed me that, although the grounds do not mention the evidence of communication, it was intended to be mentioned. When I informed him that I was not assisted by his submission that he had intended to mention this ground in the grounds, Mr Bhattarai submitted that this ground came within the ambit of the last sentence of para 4 of the grounds. Para 4 of the grounds reads:

> "4. At para. 25 of the determination the FtJ stated that 'the appellant … but must show exceptional circumstances'. It is submitted that this was not the correct legal test in an appeal, as this appeal was, involving historic injustice. The test is whether or not there was ''real'' or ''committed'' or ''effective'' support between the adult child and sponsor. **That support can be vice versa as per Kugathas at para. 25."**

(my emphasis)

43. I reject Mr Bhattarai's submission that the ambit of the last sentence of para 4 of the grounds extends to include the ground that the judge overlooked taking into account the evidence of communication. Self-evidently it does not. Mr Bhattarai therefore does not have permission to argue this ground.

44. Ground 3(b) is therefore not established.

Ground 3(a)

45. Mr Bhattarai submitted that, whilst the circumstances as at the date of the hearing were relevant, the circumstances as at the date of application were not irrelevant. The appellant was only 32 years old at the date of his application for entry clearance. The respondent's policy covers applicants up to the age of 30 years. Therefore, in Mr Bhattarai's submission, the appellant was "*not too far off from the policy*". In addition,

the judge failed to take into account that the delay of two years in the Tribunal listing the appeal for hearing was not the fault of the appellant.

46. I asked Mr Bhattarai whether he was saying that the delay in the Tribunal listing the appeal for hearing was relevant in deciding whether the appellant enjoyed family life with his father. He said he would put the matter differently, i.e. that the judge was obliged to consider the age of the appellant as the date of application as well as at the date of the hearing. When the judge said that the appellant was aged 34 years as at the date of the hearing, she erred by not stating in addition that he was aged 32 years at the date of his application.

47. Mr Bhattarai submitted that the judge was obliged to look at the evidence concerning the existence of family life as at the date of application and the date of the hearing. The judge needed to consider all the circumstances including the circumstances as at the date of application. Age was one of the factors.

48. In my view, ground 3(a) is devoid of merit. In the first place, it is clear that the judge was aware that the appellant was aged 32 at the date of his application – see, for example, the first sentence of para 4 (quoted at para 31 above) and the first sentence of para 6, in her summary of the respondent's reasons for his decision, where she said as follows:

> "6. The application is refused as he was a *[sic]* 32 years of age at the date of application and applicants must be between 18 and 30 years of age…."

49. The judge again mentioned the appellant's age at the date of his application, in the first sentence of para 25 and, again, in the first sentence of para 30. Indeed, ground 3(b) takes issue with the second sentence of para 30 but ignores the sentence that immediately precedes it and which clearly shows that the judge was aware that the appellant was aged 30 years at the date of his application.

50. The "*near-miss*" argument advanced by Mr Bhattarai is likewise devoid of merit. Even leaving aside the fact that "*near-miss*" arguments do not avail an applicant, this was not a "*near-miss"* situation at all. It was a "*miss*" by some two years. On any reasonable view, this is not a "*near-miss*".

51. There is no authority for the proposition that a delay of two years in the Tribunal's listing of an appeal is relevant in deciding any issue in an appeal, let alone whether family life is being enjoyed.

52. Ground 3(b) is therefore not established.

Ground 3(c)

53. Ground 3(c) is that the judge's findings were arbitrary and not supported by the evidence.

54. This is a 'make-weight' ground.

55. I reject ground 3(c) for the reasons given at para 40 above.

56. For all of the reasons given above, I have concluded that the judge did not err in law.

57. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal stands.

This appeal to the Upper Tribunal is dismissed.

Signed
Upper Tribunal Judge Gill Date: 4 February 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**