IAC-FH-KH-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Pun and others (Gurkhas – policy - article 8) Nepal [2011] UKUT 00377 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 April 2011 & 1 July 2011	**On 8 September 2011**
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Before

SENIOR IMMIGRATION JUDGE LATTER

SENIOR IMMIGRATION JUDGE JARVIS

DESIGNATED IMMIGRATION JUDGE DIGNEY

Between

(1) ENTRY CLEARANCE OFFICER - KATHMANDU

Appellant

and

DIK PRASAD PUN

TEJ KUMARI PUN

Respondents

HEM RAJ GURUNG

Appellant

and

(2) ENTRY CLEARANCE OFFICER – KATHMANDU

Respondent

(3) ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

KUL PRASAD GURUNG

NABIN GARANG

Respondents

(4) ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

JANAKI RANA

Respondent

Representation :

For the Appellants: Mr J Eadie, QC (on 13 April 2011) and Mr M Blundell instructed by the Treasury Solicitor (first, third and fourth appeal)

Ms R Stickler instructed by N C Brothers & Co. (second appeal)

For the Respondent: Ms R Stickler instructed by N C Brothers & Co (first appeal)

Mr C Jacobs instructed by Howe & Co (third and fourth appeals)

Mr J Eadie, QC (on 13 April 2011) and Mr M Blundell instructed by the Treasury Solicitor (second appeal)

(i) The policy in Chapter 29(4) of the DSP (subsequently replaced by the provisions of SET 12) relating to applications for settlement by adult dependants of former members of HM Forces sets out a true discretion to be exercised outside the Rules by the respondent and cannot reasonably be interpreted as setting out a number of different requirements where the fulfilment of one or more leads to an entitlement to a grant of entry clearance.

(ii) The policy creates a broad discretion to be exercised by the decision taker in the light of the individual facts and circumstances of each case taking into account but not limited to the identified bullet points. These serve to identify some factors which may be relevant whilst not excluding other factors which may depending on the facts of the case be equally relevant.

(iii) As a matter of principle an appellant is entitled to a decision on any appeal before the Tribunal and an article 8 appeal should not be adjourned or sent back to be re-made by the respondent where this course is resisted by the appellant unless there is a compelling reason for doing so. Where as in the present cases a human rights appeal is set in the context of the amendments to the Rules to deal with a particular historical issue and with specific published policies dealing with the approach to be taken in the case of adult dependants not falling within the Rules, a decision under article 8 will inevitably be informed by the provisions of the Rules and the policy.

(iv) If the Tribunal does determine an article 8 appeal when a decision under the policy is or would otherwise be sent back to the respondent, that appeal cannot be treated as a way for the Tribunal to exercise a discretion which under the policy is a matter for the respondent but must be determined in accordance with the guidelines set out by the House of Lords and the Supreme Court .

DETERMINATION AND REASONS

1. These appeals all concern applications for entry clearance made by adult dependent relatives of former members of the British Brigade of Gurkhas who have taken up their rights to settle in the UK. In this determination we will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and Entry Clearance Officers as the respondents.

2. These appeals have been heard together as they raise common issues on the interpretation of the policy set out in Chapter 29(4) of the DSP referred to below subsequently replaced by the provisions of SET 12. On 13 April 2011 the Tribunal heard submissions on these issues and with the agreement

of the parties we decided that the appropriate course would be to deal with those matters as a preliminary issue, send out our decision and then hear further submissions on the individual appeals.

The Preliminary Issue

3. Our decision on the preliminary issue was issued on 22 June 2011 and is as follows:

“1. These appeals raise issues on the meaning and interpretation of the respondent’s policy set out firstly in chapter 29.14 of the Diplomatic Service Procedures (DSP): Entry Clearance, Volume 1 General Instructions and the identically worded provisions of SET 12: Settlement Entry for Former Members of HM Forces and Their Dependants (SET 12). In this decision we will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and the entry clearance officers as the respondent.

2. The background to these policies lies in the changes to the Immigration Rules introduced in October 2004 providing for the grant of settlement to Gurkha soldiers with four years’ service who retired from the British Army on or after 1 July 1997. DSP chapter 29 was issued at the same time to provide operational instructions to Entry Clearance Officers and to set out the policy to be followed in relation to dependants over the age of 18. Chapter 29 ceased to have effect in around February 2009 but a further policy (SET 12) was published in the same terms

3. The core legal issue which arises in the present appeals is whether in circumstances where an Immigration Judge has made a finding that the respondent's decision under the policy was not in accordance with the law, he should direct the grant of entry clearance or remit the application to the respondent for a further decision. The issue put at its simplest is whether as the respondent argues para 29.14 creates a broad discretion which, as it is a discretion exercised outside the Immigration Rules, is one which must be exercised by the respondent and accordingly, when it is found that the decision is not in accordance with the law, the application must be remitted to the respondent for a lawful decision to be made or whether, as argued by the appellants, the terms of the policy create a presumption that leave will be granted if one or more of the bullet points set out in para 29.14 is met, when, if so, and if there is nothing to displace that presumption and nothing further to be considered, the appeal should be allowed in accordance with AG and others (Policies; executive discretions; Tribunal’s powers) (Kosovo) [2007] UKAIT 82.

4. Para 29.14 provides as follows:

“It is not the intention to split a family unit solely because the dependant is 18 years of age or over. Applications for settlement from dependants who are 18 years of age or over will be considered and discretion to grant settlement outside the rules may be exercised in individual cases. Dependants over the age of 18 need to make separate individual applications and pay the appropriate fee. In assessing whether the settlement in the UK is appropriate the ECO should consider the following factors:

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one parent or a relative of the applicant is present and settled, or being admitted for, or being granted, settlement in the UK under the HM Forces Rule;

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the applicant has previously been granted limited leave as a dependant of a member of HM Forces;

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the applicant has been, and wishes to continue, pursuing a full-time course of studies in the UK;

- refusal of the application would mean that the applicant would be living alone outside the UK and is financially dependent on the parent or relative present and settled, or being granted settlement in the UK under the HM Forces Rule;

- the applicant would find it very difficult to function because of illness or disability without the help and support of their parent or close relative in the UK.

If one or more of the factors listed above are present, the ECO may exercise discretion to grant entry clearance for settlement in the UK."

Summary of Mr Eadie's Submission

5. Mr Eadie submitted that para 29.14 is plainly intended to create a broad discretion to be exercised by the respondent. It sets out a policy operating outside the Immigration Rules. The correct approach to ascertaining its effect was, he submitted, set out by the Tribunal in UR & Others (Policy; executive discretion; remittal) Nepal [2010] UKUT 480 (IAC). The core purpose of the policy was considered and the Tribunal held that it did not create a presumption of the kind that would make it appropriate for an immigration judge to allow the appeal outright and that the proper course was to remit for a fresh decision to be taken. He also referred to and relied on the Tribunal determinations in CT (Gurkhas: policy) Nepal [2011] UKUT 53 (IAC) and KG (Gurkhas – overage dependants – policy) Nepal [2011] UKUT 00117 (IAC). These authorities supported the proposition that no presumption was created simply by the fact that one or more of the bullet points was fulfilled. The fact that there remained a discretion was indicated by the wording of the policy itself i.e. the use of "may" in the paragraph before the bullet points and in the final sentence.

6. He argued that the content of the bullet points themselves indicated that there could be no such presumption. Each point covered a variety of possible factual scenarios. The first bullet point would include every single relative of persons present or settled or being granted or being admitted to settlement under the HM Forces Rule. It could not have been intended that the policy was to create a presumption on crossing this threshold. Bullet points 2 to 5 simply identified matters properly to be taken into account and the respondent could lawfully and rationally make a decision to refuse an application even if one or more of these conditions were met. If an ability to meet one or more of the bullet points led to the presumption of grant within AG (Kosovo **),** there would be no scope for the respondent to take into account the kind of matters set out in Part 9 of the Rules such as an individual's dishonesty and criminal record.

7. He submitted that as with any policy a balance had to be struck between flexibility and the need to identify matters properly to be taken into account. This allowed the decision-maker to respond to the individual circumstances of each application. This flexibility did not make the policy unlawful: it was sufficiently prescriptive and set out an adequate framework in which rational and lawful decisions could properly be made. The purpose of the policy had been fairly set out in UR and the policy was consistent with and put into effect the ministerial statements set out in the Parliamentary materials relied on by the appellants. The Military Covenant was being adhered to as the policy set out the special treatment to be given to adult dependants of members of the armed forces.

8. He submitted that it was not open to the appellants to rely on the record of Mr Kovats' submissions in R (on the application of Limbu) [2008] EWHC 2261 (Admin) recorded in para 58(iv) of the judgment where the issues being addressed were fundamentally different, whether discretion should be

exercised under para 29.4. The submission had been addressed to a different point. When giving judgment, Blake J had not ruled on the correctness or otherwise of the issue of whether a presumption arose but in any event he had been dealing with a different policy and there were marked differences between para 29.4 and 29.14. In such circumstances no weight should be attached to the submissions made by Mr Kovats in Limbu .

9. In summary, he submitted that the policy was designed to be applied flexibly, applying relatively but necessarily broadly defined sets of factors to a potentially wide range of different factual scenarios presented in individual cases. Excessive rigidity or circumscription would be a vice not a virtue. He argued that the policy expressed in para 29.14 struck a lawful and rational balance between rigidity and flexibility and did not prescribe how the discretion was to be exercised in all situations.

Summary of Ms Stickler's Submissions

10. Ms Stickler's submission was that para 29.14 created a presumption that entry clearance would be granted to dependants over the age of 18 if they satisfied one or more of the five bullet points listed and where so, entry clearance must be granted. She argued that this interpretation was supported by considering the content and purpose of the policy, its language and construction, the concession made by counsel in Limbu and the need for transparency and the avoidance of inconsistency. She argued that there were Parliamentary statements which assisted the Tribunal in determining the meaning and purpose of policy and in particular the statements by Mr Des Brown of 14 September 2004 and the press release issued by the Home Office in 2004, referred to in paras 11 and 12 of the judgment of Blake J in Limbu . The government had made it clear that it wished to acknowledge the role played by the Gurkhas in the history of the UK and had expressed the intention of putting together the best possible package to enable discharged Gurkhas to apply for settlement and citizenship. These statements were made with the Military Covenant in mind and the policy was designed to ensure that ex-Gurkha soldiers would be able to enjoy their right to remain in the UK with their family members including dependants over the age of 18.

11. She submitted that the first sentence of para 29.14 supported her argument by confirming that family unity was the respondent's objective in formulating the policy. The intention was clearly set out: not to split a family unit solely because a dependant was 18 years of age or over. The use of the words "may" and "discretion" within the paragraph did not preclude the policy from creating a presumption in favour of entry clearance. She submitted that in the context of this policy "may" did not indicate that there was a discretion to be exercised but set out a power to grant leave. She argued that if one of the bullet points was fulfilled the policy authorised the exercise by the respondent of a power not a discretion. She accepted that "may" needed to be read as "must" but this was the only way to achieve the purpose of the policy. [At the resumed hearing on 1 July 2011 Ms Stickler asked us to note she had not sought to argue simply that "may" should be read as "must" save in the context of her argument that "may" authorised the exercise of a power and we accordingly record that clarification of her argument].

12. She relied on the concession made on behalf of the respondent through her counsel, Mr Kovats, in the case of Limbu . Although the concession was made in the context of para 29.4, it was equally applicable, so she argued, to para 29.14. The respondent had confirmed that para 29.4 provided a discretion to Entry Clearance Officers in the absence of the specified factors but that when one or more of the identified factors existed entry clearance should be granted. The policy in para 29.14 was framed in exactly the same way as para 29.4: both used the phrase "discretion may be exercised", confirmed that the respondent should consider a list of factors, provided that list and then stated that

if one or more of the factors were present the respondent may exercise discretion and grant entry clearance. She argued that it would be irrational and arbitrary to use exactly the same structure and wording and yet apply different interpretations. There was no need for Blake J to consider the correctness of the submission as it was a concession and so there was nothing left to consider.

13. She submitted that if the policy was to be interpreted as genuinely discretionary, this would lead to inconsistent decision-making as one ECO might consider that the presence of one factor triggered entry clearance whereas another could decide that it should be refused despite that factor being present. Those seeking settlement with family members in the UK needed consistency, clarity, and fairness in their treatment. She submitted that the determination in CT was properly distinguishable as the policy wording being considered there was substantially different, the Tribunal focusing on the need for exceptional circumstances. She submitted that in UR the Tribunal had been wrong to rely simply on the argument that the aim behind the policy was to avoid the phenomenon of the "stranded sibling" whose parents and younger siblings had all gone to the UK leaving him alone in his home country. That interpretation was not consistent with the Parliamentary debates and press statements surrounding the policy. The fact that there may be two siblings in Nepal did not change the fact that both of them would be separated from their family members in the UK: they would remain stranded dependants as much as a single stranded dependant. She argued that the comment in UR that the first bullet point was a condition precedent was incorrect as it was clear that a list of factors had been introduced with no intention of regarding the first factor as such a condition. She submitted that KG was wrongly decided and that the decisions of IJ Connor in Gurung (OA/08774/2007) of IJ Craig in Gurung (OA/50741/2008) should be preferred. In these cases decisions were substituted allowing the appeal on the basis that the policy created a presumption.

The Submissions of Mr Jacobs

14. Mr Jacobs submitted that there was nothing in the policy in SET 12 to prevent a judge from directing that entry clearance is granted when the findings left open no other outcome. He argued that if two of the criteria identified in the policy were established, the appellant was entitled to succeed. The respondent could not reasonably submit that it was her intention to split up families of Gurkha servicemen in the light of the very wording of the policy. In light of the Military Covenant it was in the public interest that members of the Gurkhas and their dependent family members should be treated properly. He relied on the concession made in Limbu that where one or more factors set out in para 29.4 were met; discretion should be exercised in the applicant's favour. That concession must rationally extend to the identically worded provisions of para 29.14. The underlying rationale of the policy was predicated on a declaration of intent not to split a family unit solely because the dependant was 18 years or over.

15. He submitted that the judge was entitled to allow the appeal where at least two of the bullet points were met and there were no countervailing factors. If remitting the application for a fresh decision would inevitably lead to the same result, there was no reason why the Tribunal should not allow the appeal. He referred to the comments of Beatson J in R (on the application of K) v SSHD [2010] EWHC 3102 (Admin) that a policy should be interpreted in terms of what a reasonable and literate man would understand it to mean. The policy told Entry Clearance Officers what they should consider and where there were no countervailing factors there could only be one answer, the appeal should be allowed.

Parliamentary Statements

16. As we are dealing with a statement of executive policy we accept that the relevant ministerial and Parliamentary statements should properly be taken into account when interpreting its meaning: NF (Ghana) [2008] EWCA Civ 906. On 14 September 2004 in response to a question from Ann Widdicombe, Mr Des Brown, Minister of State (Citizenship, Immigration and Counter-Terrorism) said:

"I am well aware of the high regard in which the Gurkhas are held in this country, and of the valued contribution that they make during their service with the British Armed Forces … I am sure that the legend of honour of the Gurkhas could occupy the House for some time if we were to debate their heroism and service to British society and its armed forces.

The government recognise the enormous contribution that the Gurkhas have made, serving across the world with the UK's armed forces. I want to take this opportunity simply to thank them for their bravery and their loyalty. Ministers are sympathetic to concerns about their current situation, which, as the Right Hon. Lady reminded us, has applied for the past 50 years …

It is not by any stretch of the imagination as simple as identifying an apparent injustice and seeking to resolve it. As one would have expected, the review has identified complex legal issues, on which complex legal advice is being sought. We need to be sure that we understand what impact change may have in relation, for example, to ensuring that any future policy is not discriminatory, and that the Gurkhas obtain the best advantage from it.

I see that I am running out of time. Let me finally reassure the House that the current review is being conducted in the best interests of the Gurkhas. …"

17. We were also referred to the press release issued by the Home Office in 2004 cited by Blake J in Limbu explaining the reasons for the change in policy:

"The Ghurkhas have served this country with great skill, courage and dignity during some of the most testing times in our history. They have made an enormous contribution not just to our armed forces but to the life of this country, and it is important that their commitment and sacrifice is recognised."

Blake J also referred to what the Home Secretary David Blunkett said:

"Throughout their history, the men of the Gurkha Brigade have shown unquestioning loyalty to the Queen and the people of the United Kingdom. In battle they have distinguished themselves as brave and skilful soldiers in all conditions and all terrains. Their thirteen Victoria Crosses and numerous other bravery awards speak for themselves. I am very keen to ensure that we recognise their role in the history of our country and the part they have played in protecting us. This is why we have put together the best possible package to enable discharged Gurkhas to apply for settlement and citizenship. I hope that the decision I have made today will make our gratitude clear. Those high military standards have been mirrored in their demeanour in civilian life. Their families too have shown devotion and commitment by travelling across continents to support the brigade."

In Limbu Blake J also relied on the Military Covenant which states:

"Soldiers will be called upon to make personal sacrifices – including the ultimate sacrifice – in service of the nation. In putting the need of the nation and the army before their own, they forego some of the rights enjoyed by those outside the armed forces. In return, British soldiers must be able to always expect their treatment, to be valued and respected as individuals and that they (and their families) will be sustained and rewarded by commensurate terms and conditions of service."

The Authorities

18. Neither party has sought to argue that the principles set out in AG (Kosovo) were incorrect or should be supplemented or modified. The argument between the parties is whether the appellants are able to bring themselves within the unusual category of case identified in para 50 of the determination where the Tribunal following a finding that the respondent's decision is not in accordance with the law can make a substantive decision in the appellant's favour. Before setting out its findings on that issue, the Tribunal (Mr CMG Ockelton DP, SIJ King, SIJ Grubb) set out a number of principles in its analysis of the issues arising when a policy outside the Rules has to be taken into consideration in an appeal which, as in the present appeals, also raises human rights issues. These are set out in paras 27-32 of the determination and in so far as they are relevant to the present appeals can briefly be summarised as follows: A claim based on human rights even if it depends on the assessment of proportionality is different in nature from one based on an assertion that an appellant should have benefited from the exercise of discretion within a policy. The assessment of proportionality is a matter for the Tribunal but it does not follow that the exercise of a discretion within a policy is also a matter for the Tribunal in a case where an appellant has not shown that a decision adverse to him is incompatible with his Convention rights. The Tribunal is a creature of statute and only has the powers given to it by statute. There are some areas of discretionary judgment where an appellant’s search for a beneficial outcome is not an assertion of his human rights. Human rights claims should be assessed in priority to claims based on the hope of a favourable exercise of discretion. Within the category of rights, issues relating to the assessment of proportionality ought to yield priority to specific provisions of national law.

19. The Tribunal then considered a submission that where the respondent had published a policy incorporating a discretion which might be exercised in favour of a person who did not meet the requirements of the Immigration Rules, the Tribunal was not merely to decide whether the respondent had acted in accordance with the law but was to go on to make the discretionary decision for itself. It rejected this argument explaining why the observations made by the Court of Appeal in Baig v SSHD [2005] EWCA Civ 1246 and Tozlukaya v SSHD [2005] EWCA Civ 379 did not support such a broad proposition. In paragraph 43 of its determination it concluded that the Tribunal was not bound or entitled to consider or review the exercise of a discretion outside the Immigration Rules as both principle and statute were against it. But when assessing article 8 the Tribunal was bound to consider whether a particular decision was proportionate and in doing so should take into account any declared policy that incorporated a presumption that immigration control would not be enforced against persons of a category into which an appellant fell. The reason for taking such a policy into account was that it threw light on the need for immigration control and so helped to assess the proportionality of the decision. The Tribunal then said in para 44:

“If the claimant does not establish (whether by reference to a policy or otherwise) that his Convention rights prohibit his removal, then the Secretary of State has (whether by reference to a policy or otherwise) a discretion to allow him to stay: but, because of s.86(6), the exercise of that discretion is not reviewable by the Tribunal. Where, however, the Secretary of State has declared a policy in relation to a category into which the claimant falls, a decision that on its face fails to apply the policy may found a successful appeal on the ground that the decision ‘was not in accordance with the law’. In such a case (subject to an observation we make below) the effect of allowing the appeal would not be to grant the appellant the substantive relief he seeks but merely to set aside the unlawful decision so that a lawful decision (whether in favour or against the appellant) may in due course be made.”

20. The Tribunal's further observations on these issues are set out in paras 48-51 and they need to be set out in full:

“48. Our second additional point is in relation to cases where the policy does not incorporate a discretion, or where on the facts of the case there is no proper opportunity, by the application of the policy, to make a decision unfavourable to the claimant. This is not the usual position. In SS [2005] UKAIT 00167 the Tribunal said this:

“30. … . Most published policies are not in the absolute terms of the Immigration Rules. Most policies contain words like ‘ normally’ . Many policies do not declare that a particular relief will be granted: they provide that the Secretary of State will consider whether it should be. A claimant who has not obtained the substantive grant that he seeks can succeed on the policy only if he shows that the policy itself was not (or was not properly) applied. If the policy says that the Secretary of State ‘will consider’ his case on certain terms, he cannot succeed unless he can show that the Secretary of State did not consider his case on those terms. If the policy says that something will ‘ normally ’ be granted, he is likely to be in some difficulties if the Secretary of State refers to any consideration that shows that the case is less than normal.

31. In any event, unless the policy is expressed in terms that are absolute or have to be regarded as absolute in the individual facts of the case, the effect of a successful appeal will be merely that the decision is found to have been an unlawful one, so that there is outstanding an application before the Secretary of State. … .”

49. That decision, however, clearly envisages that where a policy is expressed in absolute terms, a claimant may be entitled to succeed substantively. IA [2006] UKAIT 00082 was such a case. The one reason given by the Secretary of State for refusing to apply a policy that would otherwise have operated in favour of the appellant was found by the Immigration Judge to be factually wrong. For procedural reasons the Tribunal was content, on reconsideration, to affirm the Immigration Judge’s decision to allow the appeal on human rights grounds; but it did so only after saying that, in the circumstances of the case, it would have been difficult to criticise him if he had allowed the appeal on the ground that, given the facts, the reason for the decision and the terms of the policy, an adverse decision was not “in accordance with the law”.

50. For ourselves we have little doubt that – contrary to the submissions on behalf of the Secretary of State before us – there are cases in which a finding that a decision is “not in accordance with the law” on the ground of failure to apply a policy should lead to a substantive decision in the claimant’s favour, with a direction that leave be granted. There will be no need to base such a decision on human rights grounds, because it is demanded by the more detailed provisions of the 2002 Act. But the cases in question are unusual. They are those in which (1) the claimant proves the precise terms of the policy, which (2) creates a presumption, on the facts of his case, in favour of granting leave, and (3) there is either nothing at all to displace the presumption, or nothing that, under the terms of the policy , falls for consideration. If all those factors apply to the case, the appeal should be allowed, with a direction as indicated.

51. If (2) or (3) do not apply, and if the Secretary of State has not yet considered the claim within the terms of his policy, the appeal should be allowed with a direction that he do so. But if the appellant fails to establish the terms of a policy, or if the Secretary of State has already properly considered the claim within the terms of any applicable policy, then (given that none of these considerations apply at all unless the appellant’s removal would not breach his Convention rights) the appeal should be dismissed.”

21. The polices we are considering in this appeal have been considered in a number of previous determinations. In CT , the Tribunal considered a similarly worded policy although qualified by a

requirement of exceptional circumstances. It was argued that where an individual fell within one or more of the categories identified in the bullet points there was an expectation that the discretion would be exercised in his or her favour in accordance with the principles set out in para 50 of AG . The Tribunal (Mr CMG Ockelton VP and SIJ Grubb) rejected this submission in the following terms:

“17. We are unable to see that the terms of para 13.2 begin to fulfil the criteria there set out. The IDIs simply do not indicate any presumption that leave will be granted to adult children. They indicate merely that it may be granted in exceptional circumstances, following the consideration of criteria including those set out. We therefore reject Mr Howell’s [counsel for the appellant] submission that this was a case in which the immigration judge should have allowed the appeal on the basis that the Secretary of State's guidance required a decision in the appellant's favour.”

22. The policy as currently worded has been considered by the Tribunal in UR . The immigration judge had allowed the appeals following a finding that the respondent's decision was not in accordance with the law. On appeal the Tribunal (Owen J and SIJ McKee) said:

“12. In seeking leave to appeal to the Upper Tribunal, the respondent made no complaint about the judge’s findings of fact. What was sought was simply the deletion from the determination of the direction for entry clearance, and its substitution with a direction that the Entry Clearance Officer consider his policy in the light of the facts as found. Before us, detailed and persuasive submissions were made by both representatives on the question whether, given that the appellants remain dependent upon their sponsor in the United Kingdom, who has been joined by their mother and younger sibling, the policy should be regarded as ‘absolute’, such that no other outcome is rationally possible but that entry clearance for settlement be granted.

13. The representatives will, we trust, forgive us if we do not set out their arguments in extenso here. It simply does not seem to us that, on the facts of the present appeals, the policy is ‘absolute’. It does indeed, as the judge below said, evince an intention “ not to split a family solely on the grounds of the majority of one family member .” The desire appears to be to avoid the phenomenon of the ‘stranded sibling’, whose parents and younger siblings have all gone to the United Kingdom, leaving him alone in his own country. That is somewhat different from several overage siblings living together in their own country, as is the case here. The fourth bullet point of SET 12.16 reinforces the impression that what might prompt the favourable exercise of discretion is the prospect of the applicant “ living alone outside the UK .”

14. We observed above that the first bullet point is listed as a free-standing factor, although it is really a condition precedent for any application to join a sponsor who is settled here under the HM Forces rule, whether the application falls for consideration within or outwith the Immigration Rules. As such, it is actually irrelevant to the exercise of discretion. The other factors listed under SET 12.16 clearly do add something to the basic requirement that the applicant should have a settled sponsor. An applicant who meets the requirements of the first bullet point, but none of the others, should not expect the discretion to be exercised in his favour, without more. Although the express wording of SET 12.16 might suggest otherwise, we remind ourselves of the distinction between rules and policies made by Lord Justice Sedley in Pankina [2010] EWCA Civ 719. The Immigration Rules have been “ elevated to a status akin to that of law ” and so must be construed more strictly than was the case in the past. Policies, on the other hand, are meant to be applied flexibly, and to allow the sensible exercise of discretion. Their wording does not have to be construed with all the strictness of a statute.

15. What all this boils down to is that this is not one of those rare cases where, on its facts, no rational decision-maker could fail to exercise his discretion favourably under the relevant policy. There is even

some confusion as to what the relevant policy actually is. The treatment of dependants over the age of 18 at Chapter 15 of the IDIs is very brief, and simply insists upon exceptional circumstances. SET 12.16 deals with dependants over the age of 18 in much more detail, and does not use the term ‘exceptional circumstances’, although it may be that the factors listed in SET 12.16 are intended to encompass ‘exceptional circumstances’. It follows that the appropriate course is to remit these appeals to the ECO in New Delhi for him to apply the policy SET 12.16, in conjunction with Chapter 15 of the IDIs and in the light of the facts as found.

23. The issue was again considered in KG where the Tribunal (SIJ McKee) again set aside a decision by an immigration judge allowing an appeal following a finding that the respondent's decision under the policy was not in accordance with the law. SIJ McKee set out his reasons for finding that the judge erred in law by taking this course as follows:

“8. The first ground was, on the other hand, the focus of very lucid and persuasive submissions when the appeal came before me today. I shall not set out those submissions in extenso , but shall refer to them in giving my reasons for concluding that the policy contained in Chapter 29.14 of the Diplomatic Service Procedures/Entry Clearance Guidance (and more recently appearing in the document SET 12) is not of such a kind that an immigration judge can allow an appeal outright if he thinks that the appellant comes within the terms of the policy. Bullet points being a feature of this particular policy, I shall give my reasons also in bullet point form.

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Mr Howells sets great store by the fulsome praise bestowed upon the Gurkhas by both the Prime Minister and the Home Secretary when, in 2004, a new policy was announced which would permit settlement in the United Kingdom by Gurkhas discharged from the British Army after the handover of Hong Kong to China, provided that they had served for at least four years in the Brigade of Gurkhas and that they had been discharged not more than two years before the date of their application for indefinite leave. This policy entered the Immigration Rules on 25 October 2004 as paragraphs 276E-K of HC 395. It does not, of course, provide for the admission of Gurkhas who left the British Army before 1 July 1997, and the sponsor in the instant case left the Army in 1984. Mr Howells contends that the acknowledgment by the holders of two of the Great Offices of State that this country owes the Gurkhas a great debt of gratitude somehow invests the policy catering for Gurkhas who fall outside the Immigration Rules, and their family members, with a peculiar status, requiring its terms to be applied broadly and generously. I do not think, however, that Chapter 29 of the DSPs can be distinguished in this way from other policies.

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Mr Howells prays in aid the concession made on behalf of the Secretary of State in Limbu , when Steven Kovats of counsel suggested a way of exercising the discretion embodied by Chapter 29.4, dealing with Gurkhas who did not meet the requirements of paragraphs 276E-K of HC 395. If one or more of the factors listed at the four bullet points were present, then the guidance that “ ECOs **may** exercise discretion and grant entry clearance ” ought to be read as “ ECOs **should** exercise discretion .” In the same way, says Mr Howells, the identical phrase at Chapter 29.14 ~ “ If one or more of the factors listed above are present, the ECO may exercise discretion and grant entry clearance ” ~ ought to be read with ‘should’ being substituted for ‘may’. That cannot, in my view, be right. Chapter 29.14 was wholly outside the purview of the Limbu case, which was only concerned with the admission of Gurkhas, not with the admission of the overage dependants of Gurkhas. Besides, Chapter 29.14 concerns not just the dependants of Gurkhas, but the dependants of other foreign and Commonwealth nationals who were members of HM Forces.

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There is a stronger reason for not construing the terms of Chapter 29.14 as if they were contained in a statute or, given the elevation of the Immigration Rules – as held in Pankina [2010] EWCA Civ 719 – into quasi-law, in an immigration rule. Policies are, by their nature, intended to be implemented flexibly and sensibly. They may well be drafted more loosely that a rule or statute. That is certainly the case here. The first of the five bullet points requires the applicant to have a parent or a relative settled, or about to become settled, here under the HM Forces rule (i.e. paragraphs 276E-Q of HC 395, covering both Gurkhas and other foreign and Commonwealth nationals who have been discharged from HM forces). But that is also required by the minor children of former members of HM Forces, who have an entitlement to indefinite leave under paragraphs 276X-Z of HC 395. If the policy were to be read literally, and if its terms were mandatory, then entry clearance for settlement would have to be granted to overage dependants, since having a parent settled under the HM Forces rule is one of the five factors listed in the policy, and only one of the factors need be present for discretion to be exercised. That would eliminate any distinction between overage and minor children, and render the other four bullet points otiose. Indeed, the policy is not confined to overage children but embraces any relative over 18 of a former soldier. It would be astonishing if the policy envisaged the admission of all dependent relatives. The first bullet point does not even require dependency.

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A further example of how the policy is not to be construed with all the strictness of a statute comes at the fourth bullet point. Mr Parkinson is, I think, right when he says that the wording " refusal of the application would mean that the appellant would be living alone outside the UK " envisages a situation where the ex-soldier has obtained settlement in the UK and is calling his wife and children to join him. One of those children is over 18, and if the rest of the family depart for the UK, he will be left behind as a 'stranded sibling'. That is the kind of scenario which the fourth bullet point is intended to avoid, says Mr Parkinson. It is not intended to facilitate the admission of a middle-aged child who has not lived with his parents for many years. But on a literal reading, a child of any age would have to be admitted, if living alone and financially dependent.

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There is a problem with the interpretation of " living alone ". Mr Howells cites KC & ors [2007] EWCA Civ 327 as an aid to construction, but in that case the court was looking at the phrase as it occurs in paragraph 317(i)(e) of the Immigration Rules, and could not see what it added to the already high hurdle of " the most exceptional compassionate circumstances ." The court did not in fact venture to define what " living alone " meant, but thought that a mother who would have the support and companionship of two teenage children (the scenario in KC itself) could not be described as 'living alone'. In the instant case, the appellant is living at her father's house, which she shares with her uncle and his children. She is not without support and companionship from them.

24. SIJ McKee went on to remake the decision not purporting to exercise the discretion under the policy but by considering whether the decision refusing entry clearance would be in breach of Article 8. He found that it would be and in particular he took the policy into account in the context of a consideration of the weight to be given to the public interest in maintaining firm and fair immigration control saying on this issue:

"15… but in coming to the proportionality balancing exercise required by the fifth question, I think that the public interest in maintaining firm and fair immigration control is not as strong as usual.

16. There are two reasons for this. First, the existence of a policy outside the Rules, providing for the admission of overage relatives of former soldiers on much more generous terms than paragraph 317 of the Rules, makes the exclusion of this overage relative harder to justify, especially as she appears to meet criteria in the policy which would attract a favourable exercise of discretion. Secondly, if Gurkhas had not had to wait until 2004 before becoming able to settle in the United Kingdom, it would have been possible for the appellant to come to this country while she was still a minor. This may not be an 'historical wrong' as severe as that perpetrated upon female British Overseas citizens, which played a part in the Article 8 balancing exercise conducted by a Presidential panel of the Tribunal in NH (female BOCs, exceptionality, Art 8, para 317) India [2006] UKAIT 85, and subsequently approved in NH (India) [2007] EWCA Civ 1330. But it was acknowledged by same Home Secretary that it had been wrong to prevent Gurkhas from settling here with their families in the past. Mr Howells handed up the case of JB (India) [2009] EWCA Civ 234, in which Lord Justice Sullivan acknowledges that " where there is an interference with family life sufficient to engage Article 8(1), recognition that the family has been the victim of a 'historic injustice' may well be relevant, in some cases highly relevant, when the proportionality of the interference is considered under Article 8(2) ." In the present case, the long overdue recognition that Gurkhas should have had their service to this country rewarded by being allowed to settle here does reduce the weight to be put into the public interest side of the balance, even if not by very much. But the upshot is that the Article 8 balance comes down in the present case on the side of the appellant and her family in this country.

25. We were referred to two Upper Tribunal determinations in which it was held that an immigration judge has not erred in law by substituting a decision allowing an appeal following a finding that the respondent's decision was not in accordance with the law. In Gurung (OA/08774/2007) the Tribunal relied primarily on the concession said to be made by Mr Kovats in Limbu . In Gurung (OA/ 50741/2008) the Tribunal took a similar view, again relying on what had been said in Limbu but in this case the appeal was also allowed on Article 8 grounds.

Conclusions

26. We now set out our conclusions on the issue of whether when there is a finding that a decision under para 29.14 or SET 12 is not in accordance with the law, the proper course is to direct the grant of entry clearance or to remit the appeal for lawful decision. We accept that when construing this policy its wording does not have to be construed with the strictness of a statute and that policies are meant to be applied flexibly. We agree with and adopt the guidance given by the Tribunal in para 14 of UR as to the approach to construing the meaning of a policy. This approach is consistent with the guidance of Beatson J in K where he held that a policy was to be interpreted in terms of what a reasonable and literate man would understand it to mean.

27. We are satisfied from the wording of the policy that it sets out a true discretion to be exercised outside the Rules by the respondent and cannot reasonably be interpreted as setting out a number of different requirements where the fulfilment of one or more leads to an entitlement to a grant of entry clearance. The wording of the policy itself is inconsistent with a finding that an applicant need only fulfil one or perhaps two of the bullet points to qualify without more for entry clearance. The policy says that applications for settlement from dependants who are 18 years of age or over will be considered and the discretion to grant settlement outside the rules may be exercised in individual cases. The bullet points are preceded by the following: "In assessing whether settlement in the UK is appropriate the ECO should consider the following factors". The paragraph ends by saying if one or more of the factors listed above are present, the ECO may exercise discretion and grant entry clearance for settlement in the UK. In our judgment it is impossible to read this policy as creating a

presumption of the kind referred to within para 50 of AG or as requiring the grant of entry clearance if one or more of the bullet points are met and we do not think that a reasonable or literate man could read it in such a way.

28. In UR the Tribunal described the first bullet point as in effect a condition precedent. The point being made by the use of this phraseology was that bullet point 1 will apply in respect of any applicant as a dependant will inevitably be seeking to join a parent or relative present and settled or being admitted for settlement in the UK. This bullet point cannot be a stand-alone requirement permitting settlement. The other bullet points potentially cover a spectrum of factual circumstances. The fact that an appellant has previously been granted leave within bullet point 2 as a dependant of a member of HM Forces leaves open the question of when the leave was granted and for how long. Similarly bullet point 3 leaves open when the full-time course of studies was. Bullet points 4 and 5 raise factual issues which are broadly stated and will inevitably be case specific.

29. We are satisfied that the clear wording of para 29.14 is to create a broad discretion to be exercised in the light of the individual facts and circumstances of each case taking into account but not limited to the identified bullet points. These serve to identify some factors which may be relevant whilst not excluding other factors which may depending on the facts of the case be equally relevant.

30. We are satisfied that no particular significance is to be given to the opening sentence of the paragraph that it is not the intention to split a family unit solely because a dependant is 18 years of age or over. The policy must be read as a whole. The rest of the paragraph gives substance to the intention stated. This interpretation of the policy is consistent with the Parliamentary and ministerial statements which have been made and with the Military Covenant as this policy sets out an exceptional course outside the Rules being taken in respect of adult dependants of former members of HM Forces.

31. The appellants have sought to rely on the concession made in Limbu . We are not satisfied that Mr Kovats' comments were or were intended to be a formal concession as to how the policy should be operated and in any event what was said must be looked at in the context in which it was made. The issues being addressed were different and related to para 29.4 where the specific issue was whether there was a requirement to fulfil one or more of the specified examples. The submission as recorded in Blake J's judgment is that:

"(iv) The policy is a genuine discretionary one not trammelled by a mandatory requirement to fulfil one or more of the specified examples, whatever the individual's decision rejecting the claims might at first blush have indicated. The essence of the policy is whether 'there are strong reasons why settlement in the UK is appropriate'. This is a judgment formed by the individual ECO using the factors as a guide. If one or more of the identified factors existed discretion should be exercised favourably, but it could be so exercised if other unspecified conditions led to the same conclusion."

32. The submission makes no reference to and does not purport to address what approach should be taken if there are countervailing factors such as a criminal record or other features falling within Part 9 of the Immigration Rules. Further, the wording of this submission must be read as whole. The final sentence including the purported concession that "discretion should be exercised" must be read in the light of the preceding sentences and in particular "the policy is a genuine discretionary one not trammelled by a mandatory requirement to fulfil one or more of the specified examples" and "this is a judgment formed by the individual ECO using the factors as a guide". There is no justification for treating Mr Kovat's submissions as a formal, binding concession as to how the respondent's discretion

will be exercised. If that had been the intention, it would doubtless have been done with much greater clarity and certainty.

33. We do not accept that the policy is legally uncertain or not sufficiently transparent. A balance has to be struck between flexibility and uncertainty and the need to do justice in each individual case. The exercise of discretion will inevitably be fact specific and depend on the particular circumstances of each applicant. For these reasons we reject the argument that an appellant is entitled to a grant of leave if he is able to meet one or more of the bullet points set out in the policy. We agree with the decisions and the reasoning in CT UB and AG and find that the decisions in Gurung & Gurung are not to be followed on this issue.

34. When there is a finding that a decision made under a policy was not in accordance with the law the proper course is for the appeal to be allowed to the extent that the application is remitted to the respondent for a lawful decision. However, there will be cases albeit falling in a narrow category where even though there is a discretion within the policy an appeal can be allowed where on the facts of the case it would not be open to the respondent in applying the policy to make a decision unfavourable to the appellant. We agree with the determination in AG (Kosovo) in paras 48-50. To take any other course would be to exercise a discretion outside the Rules: a jurisdiction the Tribunal simply does not have.

35. A witness statement of David Enright, a solicitor at Howe & Co, dated 12 April 2011 was put in evidence before us. This statement sets out two examples of the way in which immigration applications of Gurkha dependent children have been dealt with by UKBA and in substance complains about extensive delays in dealing with them and in particular where further decisions have had to be made following successful applications for judicial review or a successful appeal where the decision was shown not to be in accordance with the law. However, these concerns do not relate directly to the issues being dealt with at this stage. As we have already indicated, it is not for the Tribunal to substitute its own decision or exercise its own discretion under a policy falling outside the Rules but there will normally be jurisdiction to consider an appeal on article 8 grounds. This was the course taken by the Tribunal in KG and we note that in UR article 8 was not dealt with as a full case had not been put together on that ground (para 18). We have not yet heard full submissions on the issues arising in the article 8 appeals and make no further comment on these matters save to draw the parties' attention to paras 27-32 of the determination in AG (Kosovo).

Summary of the Facts in the Appeals

First Appeal

4. The first appellant is a citizen of Nepal born on 18 November 1981 and the second appellant his sister, also a citizen of Nepal, born on 5 October 1983. On 28 March 2007 they and their sister applied for entry clearance to join their parents in the UK, who had been granted indefinite leave to enter based on their father's service as a Gurkha soldier with the British Army. Their applications were refused under the provisions of paras 276X and 317 of the Rules as the respondent was not satisfied that they were under the age of 18, living alone outside the UK in the most exceptional compassionate circumstances, mainly dependent financially on a relative settled in the UK or that they were not leading an independent life. They appealed against this decision on 8 June 2007. Their applications were reviewed in the light of the respondent's policy in relation to applications by adult dependants but on 3 May 2010 the respondent maintained his decision.

5. Their appeals were heard on 25 June 2010. An appeal by their sister (OA/27775/2007) was withdrawn as a result of her changed circumstances in Nepal following her marriage. The judge found that the appellants could not meet the requirements of the Rules but the appeal was allowed on the basis that the policy set out in Chapter 29 of the DSP created a presumption in favour of a grant within the meaning of para 50 of AG (Policy; the executive discretion; Tribunal's powers) Kosovo [2008] UKAIT 0082. On 17 August 2010 permission to appeal was granted to the respondent on the basis that the judge may have made an error in law by failing to give adequate reasons for his findings on material matters.

Second Appeal

6. The appellant is a citizen of Nepal born on 14 January 1979. He applied for entry clearance on 8 March 2007 to join his father, a former Gurkha soldier, in the UK. The appeal was refused under the Rules and the decision was maintained following a review on 4 February 2010. The judge found the appellant could not meet the requirements of the Rules or the relevant policy as he could not show that at the date of decision one or both of his parents were present and settled in the UK. The appeal was also dismissed on article 8 grounds. The judge could not be satisfied that the appellant had real, effective and existing family life with a family member settled in the UK as neither of his parents was settled in the UK at the date of decision. On 19 July 2010 the appellant was granted permission to appeal on the basis that it was arguable that the judge had erred in law both in respect of the application of the policy and in his assessment of article 8.

Third Appeal

7. The appellants are brothers born on 9 February 1987 and 14 April 1990 respectively. They applied for entry clearance on 23 September 2009 to join their father, a former Gurkha soldier, who had been granted settlement on 6 July 2009. Their applications were refused under the Rules and under the policy. The judge dismissed the appeals under the Rules but found that the decision under the policy was not in accordance with the law. He said that whilst the appropriate course would normally be for the appeal to be allowed with a direction that the respondent should consider the matter again under the policy, in the light of the facts as he found them that was not the appropriate outcome and the appeals should succeed on article 8 grounds. The respondent was granted permission to appeal.

Fourth Appeal

8. The appellant is a citizen of Nepal born on 10 January 1986. She applied for entry clearance (the date of application is not clear from the application form) to join her father in the UK. However, it was refused on 8 April 2010. The judge found that the respondent had not applied the policy correctly and that the appellant was entitled to a substantive decision on the merits in her favour rather than merely a remittal to apply the correct policy. He went on to consider in the alternative article 8 and found that the appeal should also be allowed on that ground. Permission to appeal was granted on 18 November 2010 to the respondent on the basis that it was arguable that the decision under the policy should have been sent back to the respondent for him to exercise the relevant discretion rather than the judge doing so for himself.

Further Submissions

First Appeal

9. Mr Blundell submitted that not only had the judge erred in law by allowing the appeal under the policy but also by failing to give adequate reasons for his finding that the appellants were financially

dependent on their sponsor. He argued that the documents submitted in support of the application all post-dated the date of decision. This issue had been specifically identified at para 3.7 of the review decision and the judge had failed to deal with this aspect of the evidence. He had also failed to engage with s.85 of the 2002 Act by not considering the position as at the date of decision. The judge had also erred, so he argued, by not dealing adequately with whether the appellants could properly be described as living alone, the respondent having found that they had extended family members in Nepal they could turn to for financial support. He argued that the proper course was for the appeal to be sent back for the decision to be re-made by the respondent in accordance with the policy.

10. Ms Stickler submitted that there was no reason to believe the judge had failed to deal with the evidence as a whole. He had found the sponsor to be a truthful witness and it was clear from his written statement, at page 19 of the bundle of documents and in particular paras 5, 6, 8 and 12, that his evidence was that he had always maintained the appellants. The judge was entitled to find that they were living alone outside the UK within the meaning of the policy. The judge had not dealt with article 8 in the light of his decision under the policy but it was open to the Tribunal to do so in line with the approach taken by the Tribunal in KG . She submitted that there was clear evidence of family life and referred to the judgment of the Court of Appeal in Kugathas v IAT [2003] EWCA Civ 31 as considered and applied in JB (India) v Entry Clearance Officer [2009] EWCA Civ 234, RP (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 825 and Secretary of State for the Home Department v HK (Turkey) [2010] EWCA Civ 583 and by the Upper Tribunal in RG v Secretary of State for the Home Department [2010] UKUT 273.

11. She argued that the appellants had always remained entirely financially dependent on their father and they had not left his family unit to form their own families having remained living in their parents' home. They had made applications promptly in anticipation that their family life would continue in the UK and had maintained strong mutual links with their parents. She argued that the legitimate aims within article 8(2) should not be interpreted narrowly. The assessment of proportionality should take into account the historic injustice to Gurkhas and their families which had been rectified by the UK Government in 2004 and again after the successful challenge to the respondent's policy in 2008. She argued that the approach taken by SIJ McKee in KG should be followed.

12. In reply Mr Blundell submitted that issues of financial dependency only took matters so far under article 8 and were not determinative particularly in circumstances where the appellants were aged 24 and 26 at the date of decision. He argued that something more was needed to demonstrate that article 8 was engaged. There was little, if any, evidence about continuing emotional support from the appellants' parents. He submitted that immigration control justified any interference and argued that any question of historical wrong had been put right by the current policy which put the children of Gurkha soldiers in a stronger position than other dependent adult children. He argued that the Tribunal in KG had overlooked the provisions of para 45 of AG (Kosovo) and had failed to examine article 8 as a distinct ground of appeal which should be considered without reference to policy considerations.

Second Appeal

13. Ms Stickler submitted that the judge had applied the wrong policy and had erred in law in this respect. She also argued that he had been wrong to find that article 8 was not engaged simply because the appellant's parents were not present and settled in the UK at the date of decision. This was merely one factor to be taken into account and was not determinative. She argued that the decision should be re-made by the Tribunal on article 8 grounds and relied on the witness statement

submitted in evidence before the judge. She argued that there was sufficient evidence to find that the appellant was dependent on the sponsor, that article 8 was engaged and that the refusal of entry clearance was disproportionate to a legitimate aim.

14. Mr Blundell accepted that the judge had erred in law in his consideration of the policy and that those errors had affected his decision on article 8. He argued that the decision should be set aside as a whole. The evidence before the judge did not adequately cover the issues arising on dependency and whether there was family life. Evidence had been produced which did not relate to the date of decision and there was no evidence about any emotional ties. He submitted that the proper course was for both the appeal in relation to the policy and article 8 to be sent back to the respondent for decision. In reply Ms Stickler indicated that if the Tribunal took the view that there was insufficient evidence for a decision properly to be made under article 8, she would have no objection to it being sent back to the respondent.

Third Appeal

15. Mr Blundell argued that the judge erred in law by not sending the article 8 appeal back to the respondent for decision so that it could be decided as the same time as the decision was re-made under the policy. He also argued that the judge had further erred in law by failing to consider whether the appellants' dependency was one of necessity. Although this was not specifically set out in the policy, authority established that this should be the case. He referred to Bibi v ECO, Dhaka [2000] Imm AR 385 and to para 11.136 of Macdonald's 8 th edition. In the grounds it had been also argued that any interference with the family life between the sponsor and the appellants had been caused by the sponsor's choice in joining the armed forces but Mr Blundell said that he did not now seek to pursue this ground in the light of the Tribunal jurisprudence on this issue.

16. He submitted that the judge had erred in law in his assessment of proportionality within article 8. He had referred in general terms to considerations weighing in favour of the refusal but it was not sufficient, so Mr Blundell argued, to deal with such an important matter in such general terms particularly when under the Rules an applicant between 18 and 65 generally had to show exceptional compassionate circumstances when seeking entry as a dependent relative. He also argued that the judge had impermissibly taken into account policy considerations in the assessment of proportionality. The adult dependency policy in respect of Gurkhas was not a policy generally telling in favour of a grant and for that reason it should have been left out of account. The fact that the judge had given undue weight to the question of the policy was indicated by his comment in para 49 of his determination that the appellants met at least two of the factors identified in the policy.

17. Mr Jacobs submitted that the judge had not erred in law. When considering proportionality he was entitled to take into account any relevant policies and it would have been in error to leave them out of account. The judge was entitled to find that article 8 was engaged having accepted that the relationship of the appellants with their parents extended beyond ordinary emotional ties. He was entitled to assess article 8 even though a decision under the policy itself would have had to be referred back to the respondent. His assessment of proportionality was consistent with the guidance given by the House of Lords in EB (Kosovo) [2008] UKHL 41 in paras 11 and 12. The judge had been entitled to have regard to the elements of public policy in favour of the reunification of Gurkha families when one or members were settled in the UK: R (Tozlukaya) v Secretary of State [2006] EWCA Civ 379. In substance the judge had reached a decision properly open to him on the evidence taking all relevant matters into account.

18. Mr Jacobs argued that the judge's findings on dependency were properly open to him and it would be wrong to impose a strict test of necessity. There was no reason why someone should not be financially dependent on their parents when studying. To a certain extent this could be said to be a dependency of choice but it would be unreasonable to require such a person to seek employment and so have to give up his education. So far as proportionality was concerned, the judge had reached a decision properly open to him.

19. In reply Mr Blundell repeated his argument that the judge had erred in law by bringing into the assessment of proportionality factors from the respondent's policy. That policy was itself more generous than the Rules and when assessing proportionality the judge should not have simply identified two factors relevant to the application of the policy. When considering dependency it was open to the Tribunal to consider whether it was genuine or a contrivance. He argued that the judge's assessment of family life and proportionality in paras 50 and 52 of the determination was inadequate and that he had failed to consider all relevant matters, whether in the appellants' or the respondent's favour. In so far as the statement of Mr Enright was relied on, the fact there had been difficulties in other cases did not have an impact on the present appeal.

Fourth Appeal

20. In the fourth appeal Mr Blundell submitted that the proper course was for this appeal to be sent back to the respondent for a decision to be made in accordance with the policy and that the judge's decision allowing the appeal under article 8 had been affected by the errors made in respect of the policy.

21. Mr Jacobs submitted the judge made it clear that he was dealing with article 8 on an alternative basis. He had taken a clear view on the nature of the dependency, both financial and emotional, between the appellant and her parents but in any event the respondent's grounds had not sought to challenge the article 8 decision: it was clear that permission was granted simply in relation to the policy. In response Mr Blundell said it could clearly be inferred from the grant of permission that there was a clear linkage between the policy and the article 8 appeal and if the judge's decision on article 8 had been affected by the way he approached the policy, the proper course would be for the matter to be sent back to the respondent for a fresh decision.

Issues arising under Article 8

22. Each of the appeals has raised issues under article 8. It is not necessary for us to refer to all the authorities cited at this hearing as the general principles have been set out in the well-known opinions of the House of Lords in Razgar [2004] UKHL 27, Huang [2007] UKHL 7and EB (Kosovo) where Lord Bingham emphasised that the search for a hard edged or bright line rule to be applied to the generality of cases was incompatible with the difficult evaluative exercise which article 8 required and that, in general, there was no alternative to making a careful and informed evaluation of the facts of the particular case keeping in mind the core value that article 8 existed to protect. On this issue Lord Bingham said:

"This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family,

the applicant's dependence on the financial and emotional support of the family, the prevailing cultural conditions in the country of origin and many other factors may all be relevant."

23. These matters are all relevant in considering of whether there is family life within article 8, but in Kugathas , the Court of Appeal held that such family life was not established between an adult child and his parent or other siblings unless something more existed than normal emotional ties, but such ties might exist if an applicant was dependent on his family or visa versa: Arden LJ at para 25. The other cases referred to in submissions such as JB (India) , RP (Zimbabwe) and HK (Turkey) are illustrations of the application of this broad principle to the facts of those particular cases. Ms Stickler argued that the principle which could be drawn from these authorities was that the further dependence necessary for family life to be engaged in respect of an adult child was a requirement of "real, effective and committed support" which could be demonstrated by a strong family bond and financial dependence. Where this is shown on the facts of a particular case, we accept that it will be a factor of some weight to be taken into account subject to any countervailing factors. However, it would be wrong in principle for such a formulation to be treated as a necessary requirement or as determinative of the issue of whether there is family life within article 8. To do so would be to put a gloss on the wording of the article.

24. The need for an evaluation of the facts of each particular case seems to us to provide the answer to Mr Blundell's submission that when assessing article 8 any financial dependence should be of necessity not choice by analogy with a similar requirement to the assessment of dependency under the Rules. Even if such an approach is required under the Rules, and it does seem to us that this may be an over- simplification of what the court was saying in Bibi , it would be wrong to impose such a limitation when assessing dependency within article 8. Each case must be looked at on its own facts. We certainly accept that a contrived dependency will carry little, if any, weight within article 8 either when deciding whether family life exists or when assessing proportionality, but if financial dependency is of choice to the extent that an applicant is dependent so that he or she can pursue further studies this should not without more mean that such a dependency cannot properly be taken into account.

25. Similar considerations apply to the argument that when a decision is pending on a policy outside the Rules, the terms of that policy should not be taken into account when assessing proportionality. We agree that article 8 cannot be used as a device to exercise a discretion outside the Rules which otherwise would not be open to the Tribunal, but where an assessment is being made of whether a decision is in breach of article 8, it would be artificial to leave out of account any relevant policy particularly when assessing proportionality. The Tribunal is entitled to take into account the provisions of the Rules and any relevant policies. When we dealt with the preliminary issue we summarised in paragraph 18 the principles set out in paras 27 to 32 of AG (Kosovo).

26. In the light of the further submissions on article 8 we will now set out those paragraphs in full. They read as follows:

"27. First, a claim based on the asserted human rights of the claimant is, even if it depends on an assessment of proportionality, different in nature from one based on an assertion that the claimant should have benefitted from an exercise of discretion in his favour. If authority is needed for this proposition it can be found in Edore v SSHD [2003] EWCA Civ 716 at [18].

28. Secondly, though as a result of the decision House of Lords in Razgar v SSHD [2004], UKHL 27 and SSHD v Huang [2007] UKHL 11, the assessment of proportionality in human rights claims is a matter for the Tribunal, it does not follow that the exercise of a discretion is a matter for the Tribunal

in a case where the claimant has not shown that a decision adverse to him is incompatible with his Convention rights.

29. Thirdly, the Tribunal is a creature of statute and has any of the powers given to it by statute. Like any other public authority its decision making is governed by the Human Rights Act 1998 but, subject to that, an immigration judge is bound to observe the statutory restrictions on jurisdiction. One of them is in s.86(6), which we have set out above. If any were needed, the existence of that sub-section in the appeals provisions of the 2002 Act is confirmation that there are areas of discretionary judgment where a claimant's search for a beneficial outcome is not an assertion of his human rights.

30. Fourthly, as a matter of principle and logic, claims based on human rights ought to be assessed in priority to claims based on the hope of a favourable exercise of a discretion. It makes little sense to consider whether the Secretary of State may (or indeed ought to) choose to give the claimant the benefit that he already has as a right. Having said that, there are of course cases where judicial economy allows a judge to go straight to the end of the process and missing earlier steps. And we recognise there are good grounds in legal theory for recognising the continued existence of a discretion even where, in the circumstances of the case, it can be exercised only in one way. The order must generally be: rights, first then possibilities.

31. Fifthly, within the category of rights issues relating to the assessment of proportionality ought to yield priority to specific provisions of national law. This is the thinking underlying Razgar and Huang . One looks first at the legal rules that appear to govern the case. It is only if those rules do not give the claimant the result that he seeks, that there is any need to consider whether his Convention rights are such that he is entitled to the result despite the rules. This is also the principle underlying the European Court of Human Rights jurisdiction under the Convention, as set out in article 33.1.

32. Sixthly, the phrase 'in accordance with the law' in article 8.2 of the ECHR does not import the whole of the national legal order into the assessment of proportionality (see MA [2005] UKIAT 00090). The phrase does not make disproportionate (and therefore a breach of article 8) every governmental Act that can be the subject of a successful legal challenge. Rather, the phrase requires that 'the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, and foreseeable as to its affects' (Silvenko v Latvia) 48321/99, [2003] EWHR 498 at (100), which is a summary of the position explored in greater details in earlier cases such as Class v Germany [1978] 2HRR 214, Silver v UK [1983] 5EHRR 347 at [86], and Sunday Times v UK [1979] 2EHRR 245 at [49])."

27. We emphasise the point made in para 27 of AG (Kosovo) that the assessment of an appeal under article 8 is a separate and distinct exercise from whether an appellant is able to meet the requirements of the Rules or whether the exercise of a policy outside the Rules has been carried out properly by the respondent even though there will be in most cases a common basis of primary fact and the existence and purpose of the Rules and any relevant policies can properly been taken into account when assessing issues of legitimate aim and proportionality. The fact that the respondent does not exercise discretion under a policy in an appellant's favour does not without more amount to a decision contravening his human rights any more than an adverse decision made under the Rules.

28. We agree with what is said at para 30 of AG (Kosovo) that it makes sense to deal with rights before possibilities but in the present appeals where the human rights claims are set in the context of the amendments to the Rules to deal with a particular historical issue, and with specific published policies dealing with the approach to be taken in the case of adult dependants not falling within the Rules, a decision under article 8 will inevitably be informed by the provisions of the Rules and the policy and

we are satisfied that in these cases the proper course to follow would be to consider issues under the Rules, then under the policy and then under article 8. If it is found that there has been an error of law in the way the decision under the policy has been made so that the decision needs to be re-made by the respondent, that sets the context for a decision on whether the article 8 appeal should be treated in the same way or whether the proper course is for the Tribunal to make its own determination.

29. It may be that in a particular case the proper course is for the decision under article 8 to await a decision under the policy but that depends upon the facts of each individual case including whether there are sufficiently clear findings of fact on which a decision under article 8 can properly be made. It is a matter for the discretion for the Tribunal whether to deal separately with an article 8 appeal before the decision is made under the policy or whether the proper course is for both matters to be considered by the respondent and any delay which has already taken place and which may well take place pending a further decision can properly be taken into account. However, as a matter of principle an appellant is entitled to a decision on any appeal before the Tribunal and an appeal should not be adjourned or the decision sent back to be re-made by the respondent where this course is resisted by the appellant unless there is a compelling reason for doing so. In this context we note that in UR article 8 was not dealt with as a full case had not been put together on that ground and the appellant was content, probably wisely, for article 8 to be considered afresh by the respondent when reconsidering the decision under the policy. The position is similar in the second appeal before us.

30. If the Tribunal does decide an article 8 appeal when a decision under the policy is sent back to the respondent, that appeal as we have already said cannot be treated as a way for the Tribunal to exercise a discretion under the policy but must be determined in accordance with the principles identified by the House of Lords in the cases we have already referred to. We now turn to deal with the issues arising in the individual appeals.

Assessment of the Appeals

The First Appeal

31. In the light of our findings set out in the preliminary issue, we are satisfied that the judge erred in law by allowing the appeal on the basis that the respondent’s decision was not in accordance with the relevant policy. He found that one of the factors identified in para 29.4 was met and that the stated intention of the policy effectively created a presumption that entry clearance for settlement should be granted in such a case unless there were good reasons not to do so. In taking this view he erred in law.

32. Mr Blundell also sought to argue that the judge erred in law in his assessment of whether the appellants were in fact dependent on their sponsor. In summary, he argued that the judge only considered post-decision evidence, failing to deal with the point taken by the respondent that there was no evidence of financial remittals in the period before the decision and that he therefore wrongly relied on evidence focusing on the date of hearing rather than the date of decision. We are not satisfied that this ground is made out for the following reasons.

33. In para 10 of his determination the judge reminded himself that the point in time at which he had to consider the relevant facts for both immigration and human rights issues was the date of decision. Having reminded himself of this we are not satisfied that he did not go on to apply that principle. When the judge referred to the funds sent via Western Union in para 38 of his determination he said that he had seen evidence of regular money transfers and he accepted that the appellants were still wholly reliant upon the sponsor. We are satisfied that the natural reading of what the judge is saying

is that not only is he satisfied at the date of decision, but also at the hearing, that the appellants were wholly reliant financially upon the sponsor.

34. We also take into account the fact that the judge found the sponsor to be a truthful witness: para 35. Although the judge did not summarise the sponsor's witness statement it is clear that he had this well in mind, referring in para 7 to the fact that he had heard evidence from the sponsor and had taken into account the documents including the bundle on behalf of the appellant. We are not satisfied that the judge's decision discloses any error of law such as to vitiate his findings or to give rise to any concern as to whether all relevant matters were taken into account.

35. So far as the point about living alone outside the United Kingdom is concerned, the policy is clearly prefaced on the intention not to split a family unit solely because a dependant is over the age of 18. The fourth bullet point requires the respondent to consider whether the refusal of the application would mean that the applicant would be living alone outside the UK but the fact that there may be other adults or relatives in a household does not in itself disqualify an applicant from a positive decision under the policy. There may be a number of domestic or cultural reasons why another adult will be living in the same household but that is simply a factor to be taken into account in the exercise of discretion under the policy. We are not satisfied that there is any error of law undermining the judge's findings of fact as to the appellants' circumstances in Nepal and their dependency on the sponsor.

36. We were asked by Ms Stickler to determine the appeal on article 8 grounds. The judge had not done so in the light of his findings in respect of the policy. We do not think that it would be right for us to defer the decision under article 8 in circumstances where the appellants are asking for a decision in a pending appeal. We take into account the delay in the appeal process in this case. The decision was made on 14 May 2007. There has been a considerable delay while the decision was reviewed in the light of court judgments on the scope of the policy. Even though we must assess the matter as at 14 May 2007, we take into account the delay that has already occurred and the fact there will be further delay and find that it would not be right for us to defer the decision on the appeal on article 8 grounds or send it back to be re-made by the respondent.

37. We are satisfied that there was at the date of decision (and still is) family life within article 8(1) between the appellants and their sponsor. The appellants have been and still are financially dependent on their father. Neither have moved away from the father's family unit to form their own families or sought to live independently from their parents. Their applications to join their parents were made promptly following the grant of settlement to the sponsor and we accept that the family has maintained strong mutual links evidenced by the fact that the appellants' mother returned to live with them during June 2009. Although this is something taking place over two years after the date of decision, nonetheless it does cast light on the nature and quality of the family life. We are satisfied that the refusal of entry clearance does amount to an interference of sufficient substance to engage article 8. The decision is in accordance with the law and we find that the interference is necessary in a democratic society to the extent that the need to maintain an effective system of immigration control comes within a legitimate aim.

38. We have been referred to the decision of the Tribunal in RG and on this issue we agree with the reasons given in para 16 of the determination of SIJ McKee that in the particular cases of adult Gurkha dependants the public interest in the proper maintenance of immigration control does not carry the weight it would in other cases. In these circumstances we are satisfied that had the judge proceeded to consider article 8 he would, in the light of his findings, have allowed the appeal on

article 8 grounds and in any event assessing the matter for ourselves we are satisfied taking into account his findings of primary fact, that the refusal of entry clearance would be a disproportionate interference with the right to respect for the appellants' family life. Accordingly we allow the appeal on article 8 grounds.

The Second Appeal

39. So far as this appeal is concerned it is common ground that the judge erred in law in his assessment of the questions arising under the policy. He also erred in his assessment of article 8 by finding that it did not apply as the sponsors were not in the UK as at the date of decision. For the reasons argued by Ms Stickler and conceded by Mr Blundell, the article 8 decision is erroneous in point of law. We were not satisfied that there were sufficient findings of fact on which we could properly evaluate and balance the relevant issues under article 8 and in these circumstances Ms Stickler did not seek to argue that this was a case where the article 8 appeal should be dealt with at this stage. We therefore allow the appeal against the judge's decision to dismiss the appeals and substitute a decision to allow the appeal to the extent that the decision under the policy is to go back to the respondent for a further decision when, if appropriate, article 8 will also be considered.

The Third Appeal

40. These appeals were allowed on article 8 grounds and in these circumstances the judge made no direction for a further decision to be made under the policy. For the reasons we have already outlined at some length in our preliminary decision we are satisfied that the judge did not err in law in the way he dealt with the policy. In so far as Mr Blundell sought to argue that he should have remitted the case under article 8 to be determined by the respondent together with a further decision on the policy, we are satisfied that the judge was entitled to proceed to hear the article 8 appeal. There were clear findings of primary fact; the appellant was seeking a decision on article 8 and in these circumstances the judge was entitled to proceed.

41. We are not satisfied that he erred in law by failing to consider whether the appellants' dependency was one of necessity. It was for him to look at the circumstances as a whole to consider whether there was family life and assuming the other requirements of article 8 were met, whether the decision to refuse was proportionate to a legitimate aim. As at the date of the decision on 23 June 2010, the appellants were 22 and 19 years' respectively. Their father had been granted settlement on 6 July 2009 and their mother on 14 January 2010. The judge was satisfied that both appellants were students and that their father met the cost of their student fees and living expenses. He found there was no evidence that the respondents had any family in Nepal other than their mother and grandmother with whom they lived.

42. We do not accept that when assessing proportionality the judge did not take proper account of the public interest factors. He reminded himself in paragraph 45 that the decision pursued the legitimate aim of the maintenance of effective immigration control. He then went on to look at the matters relevant to the appellants and found the decision would in their particular circumstances be disproportionate to a legitimate aim. He took into account the fact that their mother was still in Nepal despite having been granted entry clearance, because they needed a parent with them as that was what they were used to and what in their view was needed. Their mother would settle in the UK in the event that their appeals were allowed. There was no question of the grandmother being able to take care of them. The judge took into account the comments of Blake J in Limbu and was fully entitled to take into account the fact that two of the factors specifically identified in the policy were met. That was not determinative but there was no reason why the general purpose of the policy or the specific

issues identified in it should not be taken into account provided the judge was not seeking to exercise the discretion under the policy as opposed to considering whether the decision to refuse entry clearance was proportionate.

43. In summary we are satisfied that the judge's findings and conclusions under article 8 were properly open to him for the reasons he gave. There was no reason for him to set out his findings on article 8 at any greater length having already set out the relevant facts in considerable detail when dealing with the issues arising under the policy. Accordingly, the respondent's appeal is dismissed.

The Fourth Appeal

44. We are satisfied that the judge erred in law by purporting to allow the appeal under the policy. We agree with Mr Blundell's submission that the judge's findings on this issue, set out in paras 12 and 14 were wrong in law for the reasons we have set out in our decision on the preliminary issue.

45. The judge went on to consider in the alternative whether the appeal should be allowed on article 8 grounds. We accept Mr Jacobs' submission that on the facts of this case the judge reached a decision properly open to him. The appellant was aged 23 at the date of decision. She had a younger sister who was granted settlement with her mother, as dependants of her father. Her sister returned to Nepal to complete her studies in Kathmandu and their mother remained in Nepal until May 2009 after the grant of her leave so as not to leave the appellant alone there. It was accepted that she continued to be maintained by her father. Taking into account the factors we have already referred to in relation to the other appeals, we are satisfied that as at the date of decision there was family life between the appellant, her mother, father and younger sister such as to engage article 8 and that the refusal of entry clearance was disproportionate.

46. In any event there is more basic reason why the respondent's appeal should be dismissed. The grounds of appeal do not seek to challenge the decision made on article 8 grounds but simply the decision under the policy. We are not satisfied that there is any necessary implication in the grounds that the decision on the policy and article 8 stood or fell together. No subsequent application has been made to amend the grounds and we are not satisfied that it was open to the respondent to raise article 8 issues on this appeal in the absence of an amendment to the grounds or at least a clear indication that he proposed to take that course. In any event for the reasons we have given, even if the matter was properly raised, we are satisfied the judge did not err in law. In these circumstances the respondent's appeal is allowed to the extent that the decision in relation to the policy outside the rules is allowed to the extent that it should have been sent back to the respondent for further decision, but in any event the judge's decision allowing the appeal on article 8 grounds stands.

47. At the conclusion of the hearing Mr Jacobs raised the issue of whether, if the decisions in the third and fourth appeals were sent back to the respondent to be re-made, they should be considered under the terms of SET 12 which we have been considering in this appeal or under the amended policy that discretion would only be exercised in exceptional circumstances. The policy was amended on 4 June 2009 but there is a dispute between the parties arising from the fact the previous policy continued to be accessible on the UK Visa website. We gave leave to the parties to file further evidence and submissions so that we could consider this issue subject to our findings on the article 8 appeals. As we have dismissed the appeals against those decisions, the issue is not material to the outcome of the present appeals and in these circumstances we will leave that matter to be resolved in an appeal where it does arise. However, we are grateful to the parties for their comprehensive submissions on this issue.

Summary of Decisions

48. In the first appeal the respondent's appeal is allowed in relation to the decision under the policy which would have to be re-made by the respondent but the Tribunal remakes the decision under article 8 and allows the appeals.

49. In the second appeal the respondent's appeal is allowed to the extent that the decision under the policy is sent back to the respondent to be re-made together with the decision on article 8 grounds.

50. In the third appeal, the appeal by the respondent against the decision to allow the appeal on article 8 grounds is dismissed.

51. In the fourth appeal, the respondent's appeal against the decision to allow the appeal under the policy is allowed. That appeal should have been sent back to the respondent for further decision but the appeal against the decision to allow the appeal on article 8 grounds is dismissed.

Signed

Senior Immigration Judge Latter

(Judge of the Upper Tribunal)