Upper Tribunal
(Immigration and Asylum Chamber)

Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 March 2012	

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Before

MRS JUSTICE LANG DBE

UPPER TRIBUNAL JUDGE JORDAN

Between

ROSHAN GHISING

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Arkhurst, Counsel, instructed by Howe & Co.

For the Respondent: Mr Bramble, Home Office Presenting Officer

1. A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

2. The historic injustice and its consequences suffered by former members of the Brigade of Gurkhas are to be taken into account when assessing proportionality under Article 8(2) but the 'historical wrong' was not as severe as that perpetrated upon British Overseas Citizens and carries substantially less weight. Because of the exceptional position of Gurkha veterans, and their families, the Secretary of State has made special provision for their entry to the UK outside the Immigration Rules as an acknowledgment that it is in the public interest to remedy the injustice.

3. Given that the Gurkhas are Nepali nationals, it is not inherently unfair or in breach of their human rights to distinguish between Gurkha veterans, their wives and minor children on the one hand, who will generally be given leave to remain, and adult children on the other, who will only be

given leave to remain in exceptional circumstances. The scheme that the Secretary of State has developed is capable of addressing the historical wrong and contains within it a flexibility that, in most cases, will avoid conspicuous unfairness.

DETERMINATION AND REASONS

1.
The Appellant, who is a national of Nepal, has appealed against the decision of the First Tier Tribunal ('FTT') (Immigration Judge A.M. Black) which, on 14 September 2011, dismissed an appeal against the refusal of leave to remain as the dependant of a former member of the Brigade of Gurkhas.

2.
We heard this appeal on the same day as another appeal because it raised similar issues, and so our legal analysis is the same in both cases.

3.
The grounds of appeal were that the FTT failed to give proper consideration to the application of Article 8 ECHR to the circumstances of the Appellant's case. The Appellant, who is aged 25, lives with his parents in the UK. Since 2007, he has had leave to study in the UK. His parents both have Indefinite Leave to Remain ('ILR').

4.
Permission to appeal was given by FTT Judge Davey on 29 September 2011.

5.
The Respondent did not oppose a finding that the Judge erred in law in her assessment of Article 8.

6.
On 8 December 2011, Upper Tribunal Judge Kebede decided, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that the FTT had erred in law and therefore the decision should be set aside and re-made by the Upper Tribunal.

The decision of the Respondent

7.
The Appellant applied for ILR on 17 September 2010, as the dependant relative of his father, a person present and settled in the UK.

8.
The Respondent refused the application, in a letter dated 29 July 2011, on the following grounds:

a)
The Appellant was 25 years old, in good health, and had demonstrated that he could live independently from his parents, and support himself.

b)
The Appellant did not satisfy the requirements of paragraph 317(i)(f) and (iii) of the Immigration Rules as he had not established that he would be living alone outside the UK in the most exceptional compassionate circumstances and that he was financially wholly or mainly dependent on a relative present and settled in the UK.

c)

Leave may be granted outside the Immigration Rules, in exceptional circumstances, pursuant to Immigration Directorate Instructions, Chapter 15, Section 2A, paragraph 13.2. There were no grounds to exercise this discretion in favour of the Appellant.

d)
Removal to Nepal would not interfere with the Appellant's Article 8 rights. He had not established an interference with family life within the meaning of Article 8(1), as there was no dependency going beyond normal emotional ties in his relationship with his parents. Although he had established a private life, any interference could be justified in the circumstances of his case.

e)
The Appellant had failed to establish grounds for discretionary leave.

The decision of the FTT

9.
In a decision promulgated on 14 September 2011, Immigration Judge A.M. Black dismissed the Appellant's appeal on the following grounds:

a)
The Appellant rightly conceded that he did not fulfil the requirements of paragraph 317 of the Immigration Rules;

b)
The Appellant had not established an interference with family life within the meaning of Article 8, as his emotional ties were no more than the usual ties which a 25 year old student has with his parents. He had lived apart from them for over 2 years.

c)
The Appellant had established a private life in the UK which encompassed his relationship with his parents and sisters, as well as his social life and studies in the UK.

d)
Removal from the UK was proportionate to the aim of immigration control. The Appellant must have appreciated when he came to the UK that he could have no expectation of settlement here. He would be able to maintain his relationship with family and friends from Nepal through visits and modern means of communication. He would probably fulfil the criteria for leave to complete his studies in the UK.

e)
The applicable policy was the March 2010 version of the IDI, at Annex A and Section 13.2., which gave the Respondent a discretion to grant leave outside the Immigration Rules in 'exceptional circumstances'. It was for the Respondent to exercise this discretion, and it was not possible to make a finding that his decision in this case was not in accordance with the law.

Grounds of appeal

10.
The Appellant's grounds of appeal to the Upper Tribunal were:

a)

The Judge misapplied the relevant law in concluding that the Appellant did not have a family life with his parents, so as to engage Article 8(1);

b)
The Judge failed to consider whether the severity of any interference with the Appellant's family life would be such as to engage Article 8.

c)
Alternatively, the Judge misapplied the relevant law by overstating the degree of severity required for Article 8 to be engaged.

d)
In assessing proportionality, the Judge failed to take into account a significant factor, namely, the righting of an historic wrong towards the Gurkhas.

11.
In the Upper Tribunal, the Appellant did not pursue the ground of appeal relied upon at the FTT, namely, that the Respondent had failed to apply its discretionary policy lawfully to the Appellant's case.

Findings of fact

12.
The Appellant, whose date of birth is 16 July 1986, is now aged 25. He was born in Hong Kong in the British Military Hospital, while his father was serving in the British Army.

13.
His father, Mr Lal Bahadur Ghising, is a national of Nepal, who was born on 23 November 1950. He enlisted in the Brigade of Gurkhas on 23 November 1968, serving in The Queen's Gurkha Engineers. He was posted to Singapore, Hong Kong, the UK, Brunei and Belize.

14.
Mr L. Ghising was discharged on 6 February 1992, after 23 years service, on completion of his engagement. His rank on discharge was Warrant Officer Class 1. Mr L. Ghising's evidence was that he had served Britain with dedication and loyalty. His commanding officer assessed his military conduct as 'Exemplary' and described him as 'extremely competent' and 'extremely hardworking, honest and loyal'.

15.
Mr L. Ghising's evidence, which was not challenged by the Respondent, was that he wished to settle in the UK soon after his discharge, but he was not permitted to do so, because at that time Gurkhas who had served in the British Army were not given the same rights to apply for settlement as other foreign and Commonwealth nationals serving in the British Armed Forces. If he had been permitted to settle in the UK in 1991, he would have been accompanied by his wife, his daughter, and the Appellant, who would have been 6 years old. It was accepted by the Respondent that, if the Appellant had accompanied his father to the UK whilst he was still a minor, he would have been given Indefinite Leave to Remain ('ILR').

16.
From 2004 onwards, the British Government began to revise its stance towards Gurkha veterans. It was only in 2009 that Mr L. Ghising became eligible to apply for entry. He did so, and was granted

indefinite leave to enter the UK on 4 August 2009. His wife was granted indefinite leave to enter the UK on 16 September 2009. They arrived in the UK on 25 September 2009.

17.
In the meantime, in 2007, the Appellant came to the UK from Nepal to study. He entered the UK on 14 January 2007 and was given leave to enter as a student until 31 December 2010. He has now completed two courses in Business Management at colleges in London. In January 2012, he enrolled on an MBA course at the University of East London which concludes in June 2013. If his parents had not settled in the UK, it is likely that, on completion of his studies, he would have returned to Nepal to live with his parents, as his sister did.

18.
The Appellant has always been financially dependant upon his parents. His father pays his tuition fees and supports him.

19.
Mr L. Ghising is self-employed, and owns a manpower consultancy business, which is now wholly based in the UK. He no longer has any business interests in Nepal.

20.
Since Mr and Mrs Ghising have been settled in the UK, the Appellant has been living with them. Mr and Mrs Ghising now own a house in Abbey Wood, London SE2.

21.
We are satisfied on the evidence that the Appellant has a close-knit family relationship with his parents. They value and enjoy each other's company on a daily basis.

22.
The Appellant depends upon them for financial, practical and emotional support and guidance. They depend upon him as their only child still living at home. Mr L. Ghising's evidence was that it is the custom among Nepalese people for the youngest son to remain living with his parents, even after marriage, to care for them when they become elderly. This evidence was not challenged by the Respondent.

23.
Mr L. Ghising would like the Appellant to join him in his business, once he has completed his studies. Mrs Ghising is frail, with serious health problems, and she relies on the Appellant to look after her, and take her to a specialist clinic on a regular basis, as her husband is away at work.

24.
The Appellant has one sister, Miss Jarina Ghising. She was born on 4 December 1978 in Nepal. She came to study in the UK and then returned to live in Nepal. She is now married to a British citizen, and she was given ILR in the UK in July 2010. She has two infant children, both of whom are British citizens. Because of her childcare responsibilities, she cannot care for her mother.

25.
The majority of the Appellant's family, on his father's side, is settled in the UK

26.

The Appellant has founded a life here, over the past 5 years, and has friends and a social network. He has passed the required English language test and the Life in the UK test. He has also passed his driving test.

27.
If the Appellant had to return to Nepal, his parents could not return with him. His father's business interests require him to remain in the UK. Furthermore, their daughter and grandchildren are permanently based here, as well as most other family members.

28.
The Appellant has only one close relative in Nepal: his 87 year old grandfather who lives in a rural village, where there are no suitable educational or professional opportunities for the Appellant. The Appellant would have to find accommodation on his own in Kathmandu, and build a life there for himself, apart from his nuclear family.

Immigration Rules

29.
Immigration Rules 276X – 276AC make provision for the children of Gurkha veterans, who are themselves eligible for settlement under Immigration Rules 276E – 276K, to apply for settlement in the UK, provided certain conditions are met:

a)
At least one parent (or exceptionally a relative) must be present and settled in the UK;

b)
The child is under the age of 18;

c)
The child is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit.

30.
Children aged 18 or over are expected to apply for ILR under Immigration Rule 317, which is of general application. The requirements include that they are "living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom".

31.
It was common ground that the Appellant could not bring himself within rule 317 because he could not establish "most exceptional compassionate circumstances".

Discretionary policies

32.
The current (March 2010) version of the Immigration Directorate's Instructions ('IDI') provides, at Chapter 15, Section 2A, Annex A:

" **Dependants**

Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same-sex partners and dependant children under the age of 18.

Children over the age of 18 and other dependant relatives will not normally qualify for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act. For more information on the exceptional circumstances in which discretion may be exercised see Section 13.2".

33.
Section 13.2 provides:

"Dependants over the age of 18

Dependants over the age of 18 of foreign and Commonwealth HM Forces members (including Gurkhas) who are not otherwise covered in this guidance would normally need to qualify for settlement in the UK under a specific provision of the Immigration Rules.

In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18.

However, settlement applications from dependants over the age of 18 who are the children of serving foreign and Commonwealth HM Forces members (including Gurkhas) who meet the requirements of a parent should normally be approved, provided the dependant has previously been granted limited leave to enter or remain in the UK as part of the family unit and they wish to continue to reside and be educated in the UK."

34.
Prior to March 2010, the discretion to admit over-18 dependants was set out in more detail. The June 2009 version of Section 13.2 stated:

"Dependants over the age of 18

In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18. In assessing whether settlement in the UK is appropriate consideration should be given to the following factors:

- 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;
- the applicant has previously been granted limited leave as a dependant of a member of HM Forces;
- the applicant has been, and wishes to continue, pursuing a full time course of study in the UK;
- refusal of the application would mean that the applicant would be living alone outside the UK and is financially dependant on the parent or relative present and settled, or being granted settlement in the UK under the HM Forces rules;
- the applicant would find it very difficult to function because of illness or disability without the help or support of their parent or close relative in the UK."

35.
We have also been shown earlier policies:

a)
Entry Clearance Guidance, Set 12, published on 25 June 2009; and

b)
Diplomatic Service Procedures – Entry Clearance, updated March 2006.

36.
The relevant provision in both policies stated:

“It is not the intention to split a family unit solely because a 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.... In assessing whether settlement in the UK is appropriate ECOs should consider the following factors:

- 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;
- the applicant has previously been granted limited leave as a dependant of a member of HM Forces;
- 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 and grant entry clearance for settlement in the UK.”

37.
The Court of Appeal considered these policies in UG (Nepal) & ors v Entry Clearance Officer [2012] EWCA Civ 58. Tomlinson LJ said ([22]):

“the opening sentence says no more than that the majority of a dependant is not of itself a bar to entry clearance. The thrust of the policy is not however that dependants over the age of 18 will be admitted. The thrust of the policy is that entry clearance may be granted to dependants over the age of 18 where settlement in the UK is appropriate.”

Tomlinson LJ agreed with the submission of the Secretary of State that the policy required a rounded evaluation of the circumstances in each case ([21]). The identified bullet points were “simply a guide to the decision-maker” ([23]); “the approach was not to be a mechanistic one of the “checklist” or “tick box” variety” ([21]).

38.
Confusingly, Set 12 continued to be accessible on the UKBA website long after it had been superseded by the June 2009 IDI. A letter from the UKBA to Howe & Co, the Appellant's solicitors, dated 4 April 2011 explains:

"The Set 12 document you refer to, which forms part of the Entry Clearance Guidance (ECG) was last revised and published on 25 June 2009. It is acknowledged that there was a period where the contents of the Set 12 document you have provided contradicted the June 2009 and March 2010 Immigration Directorate Instructions (IDI). The link to this Set 12 published on 25 June 2009 was deactivated on 24 July 2009 and users were directed to the correct guidance. An unfortunate administrative error meant that both an accurate and up to date version of the guidance and the Set 12 which you have provided and which contained outdated and incorrect guidance were simultaneously available. This problem was identified in September 2010 and the incorrect Set 12 document you refer to was no longer accessible publicly from 15 September 2010 onwards.... UKBA provided a link to the correct guidance on its website on 24 July 2009 which was readily available to all applicants, even though the historic version of the document remained available...Given this availability UKBA considers that it is reasonable that any applications submitted after 24 July 2009 should be considered in line with this correct guidance."

39.
In CT (Gurkhas: policy) Nepal [2011] UKUT 53 (IAC) the Upper Tribunal held that, on a proper construction, the policy known as Set 12 only applied to applicants applying from outside the United Kingdom.

40.
In our judgment, the policy applicable to the Appellant was the March 2010 IDI. The Appellant applied for indefinite leave to remain on 17 September 2010 and his application was refused on 29 July 2011. Both events post-date the introduction of the March 2010 IDI. The Appellant did not seek to argue before us that the Respondent's refusal to find 'exceptional circumstances' in the Appellant's case gave rise to a ground of appeal. We agree with the conclusion of the FTT that the Tribunal could not properly find that the Respondent's exercise of discretion was 'not in accordance with the law', pursuant to s.86(3) Nationality, Immigration and Asylum Act 2002.

Article 8 ECHR

41.
By virtue of s. 6(1) of the Human Rights Act 1998, it is unlawful for the Respondent to act in a way which is incompatible with a Convention right.

42.
Article 8 provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

43.

Our task in this appeal is to decide whether the challenged decision is incompatible with Article 8, based on up-to-date facts. It is not limited to reviewing the lawfulness of the Secretary of State's assessment of the Appellant's Article 8 claim (Huang v Secretary of State for the Home Department [2007] 2 AC 167, per Lord Bingham at [11], [13]).

44.
The principles to be applied are well-established. In EB (Kosovo) v Secretary of State for the Home Department [2009] 1 AC 1159, at [7] Lord Bingham said:

"In R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 389, para 17, the House summarised ... the questions to be asked by an adjudicator hearing an appeal against removal on article 8 grounds. It said:

"In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or.. family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms and others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

In practice the fourth and fifth questions are usually, and unobjectionably taken together, but as expressed they reflect the approach of the Strasbourg court which is (see Boultif v Switzerland (2001) 33 EHRR 1179, para 46; Mokrani v France (2003) 40 EHRR 123, para 27; Sezen v The Netherlands (2006) 43 EHRR 621, para 41) that:

"decisions in this field, must, in so far as they may interfere with a right protected under article 8(1), be shown to be necessary in a democratic society, that is to say, justified by a pressing social need, and, in particular, proportionate to the legitimate aim pursued."

45.
In Razgar Lord Bingham explained, at [20], that the judgment on proportionality:

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

46.
When considering the factors to take into account under Article 8, Lord Bingham said in Huang v The Secretary of State for the Home Department [2007] 2 AC 167, at [18]:

"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 tradition and conditions in the country of origin and many other factors may all be relevant."

47.
Lord Bingham concluded, at [20]:

“the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8.”

Article 8(1)

Family life

48. The Appellant bears the burden of proof of establishing that Article 8 is engaged.

49. At the hearing before us, the Respondent’s representative conceded that the Appellant had established that he enjoyed family life with his parents, so as to engage Article 8.

50. The ECtHR has established that, from birth, a child has a bond with his parents which amounts to “family life”, which remains in existence despite voluntary separation (see Sen v Netherlands (2003) 36 EHRR 7; (1996) Gul v Switzerland 22 EHRR 93).

51. The question which arises in this case is at what stage does the child/parent bond of family life come to an end? When does an adult child cease to enjoy family life with his parents, for the purposes of Article 8?

52. The authority most frequently cited on this point is Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. We observe at the outset that the facts in Kugathas were strikingly different from the facts in this case. Mr Kugathas was a national of Sri Lanka, aged about 38, who had moved to Germany with his mother and siblings, as refugees, about 17 years earlier. Mr Kugathas had been living on his own in the UK for about 3 years, and the only contact he had had with his family was one visit of 3 weeks duration from his sister, her husband and child, and periodic telephone calls. The Court of Appeal held that he did not enjoy family life with his family in Germany, within the meaning of Article 8(1).

53. In Kugathas , at [14], Sedley LJ cited with approval the Commission’s observation in S v United Kingdom (1984) 40 DR 196:

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

54. Sedley LJ accepted the submission that ‘dependency’ was not limited to economic dependency, at [17]. He added:

“But if dependency is read down as meaning “support” in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, “real” or “committed” or “effective” to the word “support”, then it represents in my view the irreducible minimum of what family life implies.”

55. Arden LJ said , at [24] – [25]:

“24. There is no presumption that a person has a family life, even with the members of a person’s immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.

25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties... Such tie might exist if the appellant were dependent on his family or vice versa.”

56. We accepted the Appellant’s submission that the judgments in Kugathas had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts.

57. It has been recognised that family life may continue between parent and child even after the child has attained his majority: see Etti-Adegbola v Secretary of State for the Home Department [2009] EWCA Civ 1319, per Pill LJ at [23]; per Arden LJ at [35].

58. In Secretary of State for the Home Department v HK (Turkey) [2010] EWCA Civ 583, the Court of Appeal (which included Sedley LJ in its constitution) considered the judgments in Kugathas and Sir Scott Baker said, at [16]:

“In my judgment Mr Sachdeva is seeking to read more into these passages than is warranted ... it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority.”

59. In RP (Zimbabwe) & Anor v Secretary of State for the Home Department [2008] EWCA Civ 825, [6] Sedley LJ said it would be ‘unreal’ to dispute that the 23 year old appellant enjoyed family life with her parents when she “had lived pretty well continuously with her parents and siblings all her life”. The Court of Appeal also found the second appellant, who was 25 years old, enjoyed family life with his parents since he was “economically and emotionally .. a member of his immediate family, all of whom – that is his parents and his two sisters – are now lawfully resident here” (at [8]).

60. Academic commentators on Strasbourg judgments have observed that the Commission has been more cautious in its acceptance of family life between parents and adult children than the Court: Clayt on & Tomlinson: The Law of Human Rights 2 nd ed. (2009) paragraph 13.143 -144; Liddy: The concept of family life under the ECHR European Human Rights Law Review 1998,1, 15-25. Certainly, some of the Court’s decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence. For example:

a) Boughanemi v France (1996) 22 EHRR 228. The ECtHR held that the deportation of a 34 year old man was an interference with his family life with his parents and siblings although he no longer lived with them.

b) Bouchelkia v France (1998) 25 EHRR 686. The ECtHR held that a deportation order interfered with the family life of a 20 year old man living with his parents and siblings.

c) Kaya v Germany (Application no 31753/02). The ECtHR held that a young adult who had lived with his parents until he was sent to prison in 1999 still enjoyed family life with them on his deportation in 2001, as he had kept in touch with his family through visits and letters.

61. Recently, the ECtHR has reviewed the case law, in AA v United Kingdom (Application no 8000/08), finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. The Court said, at [46] – [49]:

"46. The Court recalls that in Bouchelkia v France , 29 January 1997, § 41 Reports of Judgments and Decisions 1997, when considering whether there was an interference with Article 8 rights in a deportation case, it found that "family life" existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In Boujlifa v France , 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was "family life" where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France, In Maslov , cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted "family life".

47. However, in two recent cases against the United Kingdom the Court has declined to find "family life" between an adult child and his parents. Thus in Onur v United Kingdom , no. 27319/07, § 43-45, 17 February 2009,the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional amount of dependence normally required to establish "family life" between adult parents and adult children. In A.W. Khan v United Kingdom , no. 47486/06, § 32, 12 January 2010. the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in Bousarra , cited above, § 38-39, the Court found "family life" to be established in a case concerning a 24 year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute "family life".

49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own can be regarded as having "family life". "

62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings:

“We do not think that Advic is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment, the recognition in Advic that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case.” (Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950).

63. The relevant facts in this case are that the Appellant is a national of Nepal who is now aged 25. He lived with his parents all his life in Hong Kong and Nepal until 14 January 2007 when he came to the UK from Nepal to study. He was given leave to enter as a student until 31 December 2010.

64. If his parents had not settled in the UK, it is likely that, on completion of his studies, he would have returned to Nepal to live with his parents, as his sister did.

65. Although the UK Government allowed some Gurkha veterans to settle in the UK from October 2004, it was only from May 2009 that Mr L. Ghising became eligible to apply for entry. He was granted indefinite leave to enter the UK on 4 August 2009. His wife was granted indefinite leave to enter the UK on 16 September 2009. They arrived in the UK on 25 September 2009.

66. Since Mr and Mrs Ghising arrived in the UK, the Appellant has been living with them.

67. We are satisfied on the evidence that the Appellant has a close knit family relationship with his parents. They value and enjoy each other’s company on a daily basis.

68. We have found that the Appellant depends upon his parents for financial, practical and emotional support and guidance. They depend upon him as their only child still living at home. Mr L. Ghising’s evidence was that it is the custom among Nepalese people for the youngest son to remain living with his parents, even after marriage, to care for them when they become elderly. This evidence was not challenged by the Respondent.

69. Mr L. Ghising would like the Appellant to join him in his business, once he has completed his studies.

70. Mrs Ghising is frail, with serious health problems, and she relies on the Appellant to look after her, and take her to a specialist clinic on a regular basis, as her husband is away at work.

71. The Appellant has always been financially dependant upon his parents. His father pays his tuition fees and supports him.

72. In our judgment, the evidence as at the date of the hearing establishes that the Appellant and his parents genuinely enjoy a close-knit family life, in which they value and depend upon each other, for mutual support and affection. On the basis of the authorities we have cited above, this is sufficient to engage Article 8. Although their family life was interrupted when the Appellant came to the UK to study, the Appellant remained financially and emotionally dependent upon his parents during that period, and their normal family life resumed as soon as his parents were able to settle in the UK.

Private life

73. The Judge found that the Appellant had a private life in the UK which encompassed his relationship with his parents, sister and extended family, as well as his social life and studies. Thus far, we agree with her findings.

74. The Judge then went on to conclude that the consequences of removal were not so grave as to engage Article 8. The Appellant submits that, at this stage, she misinterpreted the second question in Razgar , namely, “will such interference have consequences of such gravity as potentially to engage the operation of article 8?”

75. The Court of Appeal explained in AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 80, per Sedley LJ, at [28]:

“while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the “minimum level”) is not a specially high one.”

In R (Aguilar Quila) v Secretary of State for the Home Department [2011] 3 WLR 836, at [30], Lord Wilson cited this passage from AG (Eritrea) with approval.

76. In our judgment, the Judge did err in applying too high a threshold of engagement for Article 8. On a proper application of the legal test, the consequences of removal in this case were clearly sufficiently serious to engage Article 8, as the Appellant would be permanently separated from his family and friends, once he had completed his studies in the UK. The Respondent did not seek to defend the Judge’s conclusion on this issue.

Article 8(2)

77. Once the Appellant has established that Article 8 is engaged, the Respondent bears the burden of proving that the interference is justified under Article 8(2).

In accordance with the law

78. The Appellant does not dispute that the Respondent can lawfully refuse leave to remain, and therefore his decision is ‘in accordance with the law’, within the meaning of Article 8(2).

Legitimate aim

79. It is common ground that the Respondent’s policy of immigration control is “a legitimate aim ‘in the interests of the economic well being of the country’ ” (per Lady Hale in Razgar at [45]).

80. The public interest in a firm and fair system of immigration control is considerable. In EB (Kosovo) Lord Bingham said, at [10]:

“10. In Huang [2007] 2 AC 167, para 16, the House acknowledged the need, in almost any case, to give weight to the established regime of immigration control:

“The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.”

There was of course nothing novel in this. In R(Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, para 23, Laws LJ had recognised that “Firm immigration control

requires consistency of treatment between one aspiring immigrant and another". In a complex and overloaded system perfect equality of treatment between applicants similarly placed will be impossible to achieve, but startling differences of treatment between such applicants, or anything suggestive of randomness or caprice in decision-making must necessarily give grounds for concern."

Historic injustice

81. In this appeal, the Appellant submits that the importance of upholding a firm and consistent immigration policy carries less weight because it has to be balanced against the recognition that the Government's past immigration policy in respect of Gurkha veterans and their families was unjust. Mr L. Ghising should have been able to apply for settlement in the UK after discharge from the Gurkha Brigade in 1991, and the Appellant would have been entitled to enter the UK with him, as a 6 year old dependant child, and remained in the UK upon attaining his majority. Thus, settlement in the UK would not have resulted in the separation of the family.

82. The Appellant relies upon the decision of Upper Tribunal Judge McKee in Entry Clearance Officer, New Delhi v KG [2011] UKUT 117 (IAC), a case concerning an adult dependant of a Gurkha veteran, in which he held that the public interest in maintaining firm and fair immigration control was not as strong as usual because of the existence of a policy outside the Immigration Rules providing for admission of those such as the appellant, and because the appellant could have come to the UK as a minor if Gurkha veterans had not been wrongly prevented from settling here at an earlier date.

83. Judge McKee relied upon the judgment of the Court of Appeal in Entry Clearance Officer, Mumbai v NH (India) [2007] EWCA Civ 1330, which held that the refusal of entry clearance to the adult child of a Kenyan citizen of the United Kingdom and Colonies breached Article 8(2) as "but for a historic injustice which was now acknowledged, the mother would have been able as of right to bring her youngest son here with her years ago" (per Sedley LJ at [37]).

84. This principle was acknowledged in JB (India) & Ors v Entry Clearance Officer [2009] EWCA Civ 234, which concerned the same "historical wrong" which had deprived the sponsor of a right of abode in the UK by legislation which had been acknowledged to be racially discriminatory and then further discriminated against because married women were not eligible under the special quota voucher scheme unless their husbands were incapacitated. Sullivan LJ said, at [20]:

"The decisions in NH and RO are authority for the proposition 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 that interference is considered under Article 8(2)."

85. In Patel, Modha & Odedra v Entry Clearance Officer [2010] EWCA Civ 17, which also concerned the treatment of British Overseas Citizens, Sedley LJ distinguished between the position of adult children who no longer enjoyed family life with their parents, and those who did:

"14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstances but by long-delayed right. That is what gives the historical wrong a potential

relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).

15. ... the effect of this is to reverse the usual balance of art. 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of art. 8(1) will not be an issue. If, however, they come within the protection of art. 8(1), the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in NH (India) , the family would or might have settled here long ago."

86. In considering the position of Gurkhas and their families, we have drawn upon the account given by Blake J in R (Limbu & Ors) v Secretary of State for the Home Department & Ors [2008] EWHC 2261 (Admin), of the Respondent's immigration policies towards Gurkha veterans.

87. For many years, Gurkha veterans were treated less favourably than other comparable non-British soldiers serving in the British army i.e. Commonwealth citizens. Even though Commonwealth citizens were subject to immigration control, the Home Office had a concessionary policy outside the Immigration Rules which allowed serving and former members of the British armed forces to obtain indefinite leave to remain on discharge in the UK. Gurkhas were not included within this policy, and they had no entitlement to settle in the UK.

88. Eventually, the British Government bowed to pressure and acknowledged the need to change its policy. The Home Secretary issued a press release in 2004 which stated:

"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 13 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 by their demeanour in civilian life. Their families too have shown devotion and commitment by travelling across continents to support the Brigade."

89. From 22 October 2004, newly introduced Immigration Rules 276E – 276K enabled Gurkha veterans with at least 4 years service, and who had been discharged from the armed forces within the past two years, to apply for settlement in the UK. However, only Gurkhas discharged after 1 July 1997 were eligible to apply. The rationale for this restriction was that, in July 1997, the Brigade of Gurkhas moved its headquarters from Hong Kong to the UK, and so after that date Gurkhas would have had the opportunity to develop close physical ties with the UK.

90. At the same time, the Secretary of State adopted a discretionary policy under which Gurkhas would be permitted to settle in the UK even if they had been discharged prior to 1 July 1997 and/or more than 2 years prior to the date of application, if there were strong reasons why settlement in the UK was appropriate in the particular case, because of existing ties with the UK.

91. The restriction on entry for Gurkhas discharged prior to 1997 was the subject of the 2008 judicial review in Limbu , in which Blake J. criticised elements of the policy and the instructions to Entry Clearance Officers.

92. In May 2009, the Secretary of State announced that any Gurkha with more than 4 years service who had been discharged from the Brigade of Gurkhas before 1 July 1997 would be eligible for settlement in the UK, under the terms of a discretionary policy set out in the IDI, Chapter 15. Section 2A, Annex A. As set out above, the policy permitted the spouse and minor children of eligible Gurkhas to settle in the UK also, but only allowed adult children to settle on a discretionary basis.

93. On the basis of this history, we consider that we ought to apply the principle which the Court of Appeal has developed in the cases concerning British Overseas Citizens, namely, that the historic injustice and its consequences are to be taken into account when assessing proportionality under Article 8(2). Indeed, at the hearing of this appeal, the Respondent did not dispute that there had been an historic injustice perpetrated towards Gurkhas, which ought to be taken into account in the Article 8(2) assessment (although Mr Bramble did not concede that the outcome of the assessment would be that removal would be a breach of Article 8(2)).

94. However, it is important to bear in mind that there are significant differences between the position of Gurkhas and that of British Overseas Citizens. Gurkhas were citizens of Nepal, not the UK. They were not entitled as of right to live in the UK. Moreover, the exclusion of British Overseas Citizens has been formally recognised as racially and sexually discriminatory, unlike the policy excluding Gurkhas. We therefore agree with the conclusion of Judge McKee in KG that the ‘historical wrong’ perpetrated upon Gurkhas was not as severe as that perpetrated upon British Overseas Citizens. In our view, it carries substantially less weight.

The position of the Appellant

95. We consider that the following factors have to be weighed in the balance as part of the Article 8(2) assessment.

96. The Appellant’s links with the UK are that he was born on 16 July 1986 in the British Military Hospital in Hong Kong, at that time a British Colony, where his father was serving with the British Army. He has been educated in the UK since 2007, and his studies are due to continue until 2013.

97. He is a national of Nepal, and grew up in Nepal after his father’s discharge in 1991. He entered the UK on a student visa of limited duration, without the expectation of settling here permanently. He could probably obtain a further student visa to enable him to complete his current course in early 2013.

98. We have found that the Appellant has a close-knit family relationship with his parents. They value and enjoy each other’s company on a daily basis.

99. They have always lived together, apart from the period between January 2007 and September 2009, when the Appellant came to the UK to complete his studies. We have found that, if his parents had not come to the UK in 2009, it is probable that the Appellant would have returned to live with them in Nepal on completion of his studies. The undisputed evidence is that it is the custom in Nepal for the youngest son to remain at home to care for the parents.

100. The Appellant depends upon his parents for financial, practical and emotional support and guidance. His father pays his tuition fees and supports him.

101. Mr L. Ghising would like the Appellant to join him in his business, once he has completed his studies.

102. Mrs Ghising is frail, with serious health problems, and she relies on the Appellant to look after her, and take her to a specialist clinic on a regular basis, as her husband is away at work.

103. The Appellant has one sister, Miss Jarina Ghising. She was born on 4 December 1978 in Nepal. She came to study in the UK and then returned to live in Nepal. She is now married to a British citizen, and she was given ILR in the UK in July 2010. She has two infant children, both of whom are British citizens. Because of her childcare responsibilities, she cannot care for her mother.

104. The majority of the Appellant's family, on his father's side, is settled in the UK

105. The Appellant has founded a life here, over the past 5 years, and has friends and a social network. He has passed the required English language test and the Life in the UK test. He has also passed his driving test.

106. If the Appellant had to return to Nepal, his parents could not return with him. His father's business interests require him to remain in the UK. Furthermore, their daughter and grandchildren are permanently based here, as well as most other family members.

107. The Appellant has only one close relative in Nepal; his 87 year old grandfather who lives in a rural village, where there are no suitable educational or professional opportunities for the Appellant. The Appellant would have to find accommodation on his own in Kathmandu, and build a life there for himself on his own. The opportunities to visit his parents and his sister, and her children, would be limited because of the long distances involved.

The position of other family members

108. There is clear authority for the proposition that we must consider the family unit as a whole, and the impact of the Appellant's removal upon his parents.

109. In Beoku-Betts v Secretary of State for the Home Department [2009] AC 115, the House of Lords held that both the Secretary of State and the immigration appellate authorities had to consider the rights to respect for their family life of all the family members who might be affected by the decision and not just those of the claimant or appellant in question. Lord Brown said, at [20]:

"Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims."

110. In the same case Lady Hale said, at [4]:

"To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

111. In ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166, Lady Hale cited her judgment in the Privy Council case of Naidike v Attorney-General of Trinidad and Tobago [2005] 1 AC 538, where she said, at [75]:

“The decision-maker has to balance the reason for the expulsion against the impact upon other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or of being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported.”

112. Applying these principles to this case, we consider that the following factors have to be weighed in the balance:

a) The Appellant has a close- knit family relationship with his parents, and they value and enjoy each other’s company on a daily basis.

b) Mr and Mrs Ghising depend upon him as their only child still living at home. Their only other child is married with a husband and children to care for. Mr L. Ghising’s uncontested evidence was that it is the custom among Nepalese people for the youngest son to remain living with his parents, even after marriage, to care for them when they become elderly.

c) On the other hand, Mr and Mrs Ghising and the Appellant voluntarily lived apart, in different countries, for a period of 2 years 8 months when he left home in Nepal in 2007 to pursue his studies in the UK.

d) Mr L. Ghising would like the Appellant to join him in his business, once he has completed his studies.

e) Mrs Ghising is frail, with serious health problems, and she relies on the Appellant to look after her, and take her to a specialist clinic on a regular basis, as her husband is away at work.

f) It would not be reasonable to expect Mr and Mrs Ghising to resume family life with the Appellant in Nepal because:

i) they have been granted ILR in the UK, on the basis of Mr Ghising’s service in the Gurkha Brigade, and the Secretary of State has therefore accepted that their future life will be in this country;

ii) they have wanted to settle here since Mr L. Ghising’s discharge from the Gurkhas in 1991;

iii) they have bought a home here and no longer have a home in Nepal;

iv) Mr Ghising has transferred all his business operations to the UK and no longer has any business interests in Nepal;

v) their daughter is settled in the UK and has two small infants who are British citizens; naturally, Mr and Mrs Ghising do not want to leave their grandchildren;

vi) most of Mr Ghising’s family members are settled in the UK.

g) At the time Mr and Mrs Ghising decided to move to the UK, the position was that the Respondent had a discretion to grant their son ILR under the relevant policy, and he fulfilled three of the factors listed in the June 2009 IDI guidance. These were (1) his parents had been admitted for settlement; (2)

he has been, and wishes to continue, pursuing a full time course of study in the UK; (3) refusal of the application would mean that the applicant would be living alone outside the UK and was financially dependent on the parents settled in the UK. The previous guidance (Diplomatic Service Procedures and Entry Clearance Guidance, Set 12) was in similar terms, but began with the reassuring words “It is not the intention to split a family solely because a dependant is 18 years of age or over.”

h) On the basis of this information, Mr and Mrs Ghising would have had a reasonable expectation that the Appellant would be granted leave to remain, but equally they should have been aware that there was no guarantee that his application would be successful.

Conclusion

113. Our conclusion is that the removal of the Appellant to Nepal will severely interfere with his family life, and the family life of his parents, Mr and Mrs Ghising. It is not reasonable to expect Mr and Mrs Ghising to return to Nepal. The distance between the UK and Nepal means that the scope for family visits will be limited. Although his sister and her family are no longer part of his family unit, for the purposes of Article 8, his separation from them will constitute an interference with his private life.

114. We have found that Mr L. Ghising wished to settle in the UK after discharge from the Gurkha Brigade in 1991. If the same approach had been taken to Gurkha veterans as to other non-British members of the armed forces, leave to remain would probably have been granted. The Appellant would have been entitled to enter the UK with him, as a dependant child been granted ILR. In these circumstances, settlement in the UK by Mr and Mrs Ghising would not have resulted in the separation of the family and there would have been no interference with the right to family and private life under Article 8.

115. In the light of these findings, we have asked ourselves whether the removal of the Appellant is necessary in a democratic society, that is to say, whether it is justified by a pressing social need and proportionate to the legitimate aim pursued.

116. In our judgment, removal is justified and proportionate because of the public interest in a firm and consistent immigration policy. Because of the exceptional position of Gurkha veterans, and their families, the Respondent has made special provision for their entry to the UK outside the Immigration Rules, long after the date of their discharge from the armed forces. This is an acknowledgment that it is in the public interest to remedy an historic injustice in the UK Government’s previous treatment of Gurkha veterans.

117. The Respondent has distinguished between Gurkha veterans, their wives and minor children on the one hand, who will generally be given leave to remain, and adult children on the other, who will only be given leave to remain in exceptional circumstances. Given that the Gurkhas are Nepali nationals, this is not inherently unfair or in breach of human rights. As Lord Bingham said in Huang , at [6], a line has to be drawn somewhere.

118. In considering a claim of ‘exceptional circumstances’, the Respondent can, and should, take into account the fact that an adult dependant, such as the Appellant, would have been able to enter the UK as a minor if his father had been given leave to enter at the appropriate time, shortly after discharge.

119. The scheme that the Respondent has developed is, therefore, capable of addressing the historical wrong and contains within it a flexibility that, in most cases, will avoid conspicuous unfairness. Furthermore, although not an Immigration Rule, the Respondent could not properly fail to

adopt the obligation set out in paragraph 2 of the rules, namely, that decision-makers within the Home Office and UKBA should perform their duties so as to comply with the provisions of the Human Rights Act 1998, in particular, the judicious recognition of exceptional circumstances in the case of an adult dependant.

120. Notwithstanding this, the ambit of Article 8 is not circumscribed and, as stated in paragraphs 93 and 94 above, the historic injustice and its consequences must be taken into account when assessing proportionality as reducing the importance normally attached to immigration control. Nevertheless, for the reasons we have given in paragraphs 93 and 94, as well as what we have said in paragraph 113 and following, its impact is limited. In the circumstances of the present case, taken together, it does not cause the balance to operate in favour of this Appellant leading us to conclude that removal is disproportionate.

121. Since the Respondent has provided a scheme for remedying the historic injustice in appropriate cases, there is a strong public interest in ensuring that the entry of Gurkha veterans and their families is decided fairly and consistently in accordance with the scheme.

122. We find, therefore, that the Respondent's refusal of leave to remain is not a breach of the Appellant's right to family life under Article 8.

DECISION

123. The Immigration Judge made an error on a point of law and we re-make the decision and dismiss the appeal.

Signed

MRS JUSTICE LANG

5 April 2012