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Case No: C4/2012/1578, C5/2012/0795, C5/2012/1091, C5/2012/1199, C5/2012/0795, C5/2012/1264, C5/2012/1377 & C5/2012/1774

IN THE COURT OF APPEAL (CIVIL DIVISION)
(C4/2012/1578) ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE EADY
CO34632011
(C5/2012/0795, C5/2012/1091, C5/2012/1199, C5/2012/0795, C5/2012/1264, C5/2012/1377 & C5/2012/1774) ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER
THE UPPER TRIBUNAL
OA114142011, OA228742010, OA268882012OA2689020, IA183892011, OA146152010/14617, IA097542011, IA235152011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE PATTEN

- -

Between:

(C4/2012/1578)
THE QUEEN ON THE APPLICATION OF SHARMILLA GURUNG, RIJEN PUN, MOTI RAJ GURUNG & TIKA CHANDRA RAI — **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

(C5/2012/0795)
NR (NEPAL)
- and –
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(C5/2012/1091)
RG (NEPAL)
- and –
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(C5/2012/1199)

KR, YR & CR (NEPAL)
- and –
ENTRY CLEARANCE OFFICER, DELHI

(C5/2012/0975)
SG (NEPAL)
- and –
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(C5/2012/1264)
NL and SL (NEPAL)
- and –
ENTRY CLEARANCE OFFICER

(C5/2012/1377)
GR (NEPAL)
- and –
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(C5/2012/1774)
ROSHAN GHSING (NEPAL)
- and –
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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(C4/2012/1578)
Mr Richard Drabble QC and Mr Christian Howells (instructed by **Messrs N.C. Brothers & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/0795)
Mr Richard Drabble QC and Mr Christian Howells (instructed by **Messrs N.C. Brothers & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/1091)
Mr Richard Drabble QC and Mr Christian Howells (instructed by **Messrs N.C. Brothers & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/1199)
Raphael Jesurum (instructed by **Howe & Co)** for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/0975)
Mr Richard Drabble QC and Mr Christian Howells (instructed by **Messrs N.C. Brothers & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/1264)
Mr Zane Malik and **Mr Darryl Balroop (**instructed by **Bishop Lloyd Jackson)** for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/1377)
Mr Richard Drabble QC and **Mr Christian Howells** (instructed by **Messrs N.C. Brothers & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

(C5/2012/1774)
Mr Christopher Jacobs (instructed by **Howe & Co**) for the **Appellant**
Ms Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 11 & 12 December 2012

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Master of the Rolls: this is the judgment of the court.

1. These appeals concern the lawfulness of the refusal of entry clearance to the dependant adult children of veterans of the Gurkha Brigade who have settled in the UK. For the purpose of the Immigration Rules ("the Rules") and the policies issued by the Secretary of State for the Home Department ("SSHD"), a Gurkha is a national of Nepal who has served in the British Army under the Brigade of Gurkhas' terms and conditions.

Relevant Rules and Policies

2. For many years, Gurkha veterans were treated less favourably than other comparable non-British Commonwealth soldiers serving in the British army. Although Commonwealth citizens were subject to immigration control, the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British armed forces to obtain on their discharge indefinite leave to enter and remain in the UK. Gurkhas were not included in this policy. They were therefore not entitled to settle in the UK.

3. In 2004, the British Government agreed to change this policy. The SSHD issued a press release in 2004 which paid tribute to the bravery of the men of the Gurkha Brigade and their unquestioning loyalty to Her Majesty the Queen. He said:

> "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. That 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."

4. Accordingly, in October 2004, Immigration Rules 276E to K were introduced to enable Gurkha veterans with at least 4 years' service, who had been discharged from the armed services within the past 2 years, to apply for settlement in the UK. But only Gurkhas who had been discharged on completion of engagement on or 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, so that after that date Gurkhas would have had the opportunity to develop close physical ties with the UK.

5. But at the same time, the SSHD introduced a policy outside the Rules under which Gurkhas were permitted to settle in the UK even if they had been discharged *before* 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 by reason of the individual's existing ties

with the UK. Entry clearance guidance was contained in the Diplomatic Service Procedures Chapter 29 para 14 ("DSP29.14"). This was replaced in January 2009 by the Settlement Entry Clearance Guidance, Chapter 12 para 16 ("SET12.16"). The two paragraphs were in identical terms and applied to the dependants of *all* former members of HM Forces (including Gurkhas). SET12.16 remained in force until September 2010, since when the only relevant policy document has been the Immigration Directorates' Instructions ("IDI") referred to at para 10 below.

6. Both of these earlier policies included the following:

> "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, consideration should be given to the following factors:
>
> - One parent or a relative of the applicant is present and settled or is 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 rule;
>
> - The applicant would find it very difficult to function because of illness or disability without the help and support of their parents or close relatives in the UIK.
>
> If one or more of the factors listed above are present, discretion may be exercised and settlement granted in the UK."

7. In June 2009, the SSHD announced that any Gurkha with more than 4 years' service who had been discharged before 1 July 1997 would be eligible for settlement in the UK under the terms of a discretionary policy set out in IDIs, Chapter 15, Section 2A, section 13.2, Annex A. Section 2A of Chapter 15

was entitled "Persons seeking settlement: HM Forces". It dealt with applications from both Gurkhas and foreign and Commonwealth nationals who were seeking settlement in the UK on discharge from HM Forces. It also contained provisions relating to the dependants of Gurkhas. Section 13.2 provided:

> "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.
>
> 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.
>
> In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18.
>
> - one parent or 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 dependent 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 and support of their parent or close relative in the UK.
>
> If one or more of the factors listed above are present, discretion may be exercised and settlement granted in the UK."

8. Annex A set out the discretionary arrangements outside the Rules for former Gurkhas discharged before 1 July 1997. It provided that settlement applications from former members of the Brigade of Gurkhas who were discharged before 1 July 1997 would "normally be approved, provided the former Gurkha served for at least 4 years". It also stated that "it is only where adverse information of a serious nature is received about the applicant – for example, evidence of any serious criminal activity – will the application normally be refused".

9. Annex A also made provision in relation to dependants in these terms:

> "**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. Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see Section 13.2."

10. The June 2009 policy was superseded in March 2010 by the policy with which the present appeals are concerned. The provisions of Annex A dealing with dependants are in identical terms to those of the June 2009 version set out above. As regards section 13.2 itself, the two versions are in almost identical terms, save that March 2010 version does not contain the list of five factors to which consideration should be given in assessing whether settlement in the UK is appropriate. No explanation has been given to the court as to why this list was omitted from the March 2010 version.

11. The policies should be considered against the background of the Rules. We have already referred to Rules 276E to K which are specific to Gurkhas. Rule 317 sets out the requirements for the grant of indefinite leave to enter or remain to *any* applicant as the parent, grandparent or other dependant relative of a person present and settled in the UK. These requirements include that the applicant "(i) is related to a person present and settled in the United Kingdom in one of the following ways:……..(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom".

The issues

12. This litigation raises issues as to the lawfulness of the policy contained in the current version of IDI Chapter 15 section 13.2 Annex A in so far as it concerns Gurkhas' dependent children over the age of 18. In particular, it is submitted on behalf of the appellants in the cases of Sharmila Gurung, Rijen Pun, Moti Raj Gurung and Tika Chandra Rai (all of whom appeal against decisions by Eady J handed down on 15 June 2012) that the policy is unlawful on the grounds that (i) it is uncertain since its scope is undefined, so that it is not accessible or foreseeable and leads to arbitrary decision-making; and (ii) it irrationally frustrates the purpose for which it was originally introduced in 2004. Eady J rejected these submissions and dismissed all four applications for judicial review of decisions by the SSHD to refuse the appellants leave to enter the UK.

13. The second group of cases that are before the court raise two principal issues. The appellants are Gyanendra Rana, Noresh Rai, Shani Gurung, Remesh Gurung, KR, NL, SL and Roshan Ghising. The first issue that is common to all of the appeals relates to what has been described as the "historic injustice" suffered by the Gurkhas to which we have referred at para 2 above. As we have already said, this injustice was addressed by the policies issued from 2004 and later. Where an applicant is able to show that he or she enjoys family life within the meaning of article 8(1) of the European Convention on Human Rights "(ECHR") and that the refusal of entry clearance would interfere with their right to respect for the right to family life, the question then arises whether the requirements of article 8(2) are satisfied. A particular question is how much weight should be given to the historic injustice when the proportionality exercise is conducted under article 8(2). This issue was considered in the case of Mr Rana by the Upper Tribunal ("UT") (Lang J and UT Judge Jordan) in a determination promulgated on 11 April 2012 where they repeated their earlier reasoning in *Ghising* [2012] UKUT 00161 (IAC) (the appeal in respect of this judgment is one of those before this court). In short, they decided that the impact of the historic wrong on the balancing exercise to be performed under article 8(2) was "limited" and carried "substantially less weight" than the impact of the historic wrong suffered by British Overseas Citizens ("BOCs"). The injustice suffered by BOCs was that they were denied the right to settle in the UK by legislation and policies which were racially and sexually discriminatory. The relevance of this injustice was considered in the cases to which we refer at paras 29 to 32 below. The result of the UT's approach would be that in most cases the public interest in having a firm and consistent immigration policy would outweigh the historic injustice suffered by the Gurkhas. The appellants say that the weight to be given to the injustice is substantially the same in the case of Gurkhas as in the case of BOCs. The SSHD seeks to defend the reasoning of the UT.

14. The second issue that is common to some of these appeals is the approach to be taken to the question of whether family life within the meaning of article 8(1) of the ECHR exists between adult children and their parents.

The four appeals from Eady J

Uncertainty of the policy

15. Mr Drabble QC submits that, by removing the list of factors that appeared in DSP29.14, SET12.16 and the June 2009 version of IDI Chapter 15, section 13.2, Annex A, the SSHD has deprived her policy of any workable criteria. It is no longer clear what amounts to exceptional circumstances. The policy is unclear. It is quite possible for different decision-makers to approach the application of the policy with different underlying objectives. One could be looking for exceptional compassionate circumstances (akin to the criteria in Rule 317(i) (f)) as the determinative criteria. Another might consider that the only relevant criteria are whether the applicant is a "stranded sibling" (ie the only sibling who has not settled in the UK). Yet another might consider that the critical factor is whether the applicant has a close connection with the UK. In short, there is an unacceptably wide range of possible responses as to what constitutes exceptional circumstances, any one of which would be legitimate in public law terms.

16. Mr Drabble accepts that many administrative policies state a basic rule and legitimately leave open the possibility of a decision outside that rule in exceptional circumstances. He accepts that such policies are not unlawful and that there is nothing objectionable in law in a policy which states a general rule and gives the decision-maker the discretion to depart from it in exceptional circumstances. The right of a decision-maker to depart from a rule in exceptional circumstances is found frequently in legislation. For example, under section 25 of the Criminal Justice and Public Order Act 1994, a court may in "exceptional circumstances" grant bail to an individual who is charged with murder, attempted murder or manslaughter; and under section 13 of the Criminal Appeal Act 1995, the Criminal Cases Review Commission may "in exceptional circumstances" make a reference to the Court of Appeal where the usual criteria for referral are not met. Neither of these statutes provides any guidance to the decision-maker as to the circumstances that may be regarded as exceptional. Mr Drabble rightly accepts that resort to the concept of exceptional circumstances is not unlawful in contexts such as these. Indeed, the ability to depart from a general policy may be *necessary*, since it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of the decision-maker: see, for example, *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at para 21.

17. But Mr Drabble submits that a policy which permits departure from a general rule in "exceptional circumstances" is lawful only where the general rule itself is clearly defined, so that there is something certain against which to measure the exceptional circumstances. In his written note in reply, he said:

> "The vice of the present situation is that the language used in the policy can be used to pursue a range of different policy objectives. A decision-maker might consider that s/he should be looking for something akin to, but slightly more generous, than 'compelling compassionate circumstances'. Or s/he might consider that the policy was a suitable route to give effect to the historic injustice [suffered by the Gurkhas]…."

18. It can be seen that, expressed in this way, this is not an attack on recourse to the use of "exceptional circumstances" as a criterion for departure from a general rule. Rather, it is an attack on the clarity and certainty of the policy *as a whole*. It is for this reason that Mr Drabble submits that the policy offends the principles stated by Blake J in *R (Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin) para 69:

> "Transparency and clarity are significant requirements of instructions to immigration and entry clearance officers that are published to the world at large, generate expectations of fair treatment and bind appellate bodies in the performance of their statutory functions. The policy under challenge in this case either irrationally excluded material and potentially decisive considerations that the context and the stated purpose of the policy indicate should have been included; alternatively, it was so ambiguous as to the expression of its scope as to mislead applicants, entry clearance officers and immigration judges alike as to what was a sufficient reason to substantiate a discretionary claim to settlement here."

19. We discuss this authority at paras 23 to 25 below. Mr Drabble also relied by analogy on jurisprudence of the ECtHR . It is sufficient to refer to Lord Hope's summary in *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345 :

> "40. The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that is being applied in a way that is arbitrary ……
>
> 41. ……. [the word 'law'] has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable… The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law

> which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary."

20. We cannot accept Mr Drabble's submissions essentially for the reasons given by Ms McGahey. We do not accept the premise on which the submissions are founded. The general rule stated in the policy in relation to the dependant adult children of Gurkhas is not so ambiguous in its scope as to be misleading as to what would be a sufficient reason to substantiate a discretionary claim to settlement. On the contrary, the general rule is clearly stated in Annex A. It is that dependant adult children will not "normally qualify for the exercise of discretion in line with the main applicant". The normal position is that they are expected to apply for leave to enter or remain under the relevant provisions of the Rules (Rule 317(i)(f)) or under the provisions of article 8 of the ECHR. There is nothing ambiguous or unclear about this. That is the general position.

21. We should also deal with Mr Drabble's argument that the policy permits an unacceptably wide range of legitimate responses to the question of whether there are exceptional circumstances in any particular case. The difficulty with this argument is that, as Mr Drabble rightly accepts, there is nothing objectionable in law in a policy which states a general rule and gives the decision-maker the discretion to depart from it in exceptional circumstances. So how can the policy with which we are concerned be distinguished from a policy which Mr Drabble accepts is not objectionable in law? Take, for example, the statutory provision which empowers the court to grant bail in murder cases in exceptional circumstances. The general rule is clear and certain: bail will not generally be granted. The statute does not define the circumstances in which the court may grant bail in murder cases, save to say that they must be "exceptional". The range of legitimate responses to whether exceptional circumstances exist such as to warrant the grant of bail in any particular murder case may be wide. It is not obvious that the range of legitimate responses is markedly narrower in that context than it is in the context of the policy with which we are concerned. It is not surprising that Mr Drabble has been unable to draw a clear line between those cases where exceptional circumstances may lawfully be invoked as a criterion for departure from a general rule and those where they may not.

22. It is inherent in any policy which permits a departure from a general rule in exceptional circumstances that there may legitimately be scope for different views as to whether there are exceptional circumstances on the facts of a particular case. There is implicit in the exercise of any discretion the risk that different decision-makers can legitimately make different decisions on what appear to be indistinguishable facts. The range of reasonable (and therefore legitimate) responses may be wide. This is the inevitable consequence of giving a decision-maker a discretion. But that does not mean that a discretionary rule or policy is unlawful on grounds of uncertainty.

23. The decision in *Limbu* does not compel a different conclusion on the issue of certainty. That case was concerned with a policy relating to the settlement in

the UK of Gurkha veterans. The policy was contained in the Diplomatic Service Procedures Chapter 29.4. It gave entry clearance officers a discretion to grant entry clearance where there were strong reasons why settlement in the UK was "appropriate" and gave examples of factors to which consideration should be given. Each of these factors was directed to what links (if any) the Gurkha applicant had with the UK.

24. The purpose of the policy was stated by the SSHD to be to remedy the historic denial to Gurkhas of a right to settle in the UK. He wanted to be as generous as possible to Gurkha veterans who had performed historic service to this country (para 57). Blake J addressed the issue of certainty at para 65:

> "65. Transparency, clarity, and the avoidance of results that are contrary to common sense or are arbitrary are aspects of the principle of legality to be applied by the courts in judicial review. They are well exemplified by the jurisprudence of the European Court on Human Rights on the term "in accordance with the law". Thus in Al Nashif (loc cit) the Court at [139] repeated its consistent case law that the phrase implies:
>
> > "the legal basis must be accessible and foreseeable. A rule's effects are foreseeable if it is formulated with sufficient precision to enable any individual– if need be with appropriate advice- to regulate his conduct…the law must indicate the scope of any such discretion with sufficient clarity to give the individual adequate protection against arbitrary interference"."

25. He then reached the conclusion on this issue to which we have already referred at para 18 above. As Ms McGahey says, the context of *Limbu* differed from that in the present cases. It was that the SSHD had a stated broad purpose to be as generous as possible to a group of individuals (the Gurkha veterans) who shared certain characteristics. The present appeals are not concerned with Gurkha veterans. They are concerned with their adult children dependants. The SSHD did not state that his purpose was to be as generous as possible to *this* group of individuals. Quite the contrary. He said that normally they would not be given the right to settle. The fact that Blake J was able to hold that the policy being considered in *Limbu* was uncertain does not lead to the conclusion that the policy under consideration in the present appeals is likewise uncertain. For the reasons already given, it is not.

Frustration of the purposes of the policy

26. The answer to the second issue has already largely been given. Mr Drabble submits that the purpose of the policy is to facilitate the settlement in the UK of the families of Gurkha veterans. But the purpose of the policy *as regards adult dependant children* is clearly stated on the face of the policy itself and it

is far narrower than this. It draws a clear distinction between dependant children who are under 18 and those who are over that age. The purpose of the policy is *not* to facilitate the settlement in the UK of adult dependant children. The policy recognises that such children may be granted leave to enter under rule 317(i)(f) and if article 8 requires it. Otherwise, they are not granted leave to enter unless there are exceptional circumstances. This policy objective is not inconsistent with any broader policy statement. We reject the submission that it is unlawful on the grounds that it frustrates the purposes of the policy.

The historic injustice and article 8(2) of the ECHR

27. It is not in dispute that the Gurkhas suffered the historic injustice to which we have referred at para 2 above. The history was set out by the UT in detail in their determinations in *Ghising* and *Rana.* In their determination in *Rana*, they said:

> "83. 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)).
>
> 84. 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 a 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.

28. Having considered the facts in the case of Mr Rana, the UT expressed its conclusion as follows:

> "Conclusion

112. Our conclusion is that the removal of the Appellant to Nepal will severely interfere with his family life, and the family life of his mother. It would not be reasonable to expect Mrs Rana to re-locate back to Nepal. The distance between the UK and Nepal means that the scope for family visits will be limited. Although his sister and other relatives are not part of his core family, for the purposes of Article 8, his separation from them will constitute an interference with his private life. He has been in the UK since 2008 and has developed friendships and a life here.

113. There is no evidence in this case that the Appellant's father would have settled in the UK after discharge from the Gurkha Brigade if he had been able to do so, although we accept it is a possibility.

114. 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.

115. 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 acknowledgement that it is in the public interest to remedy an historic injustice in the UK Government's previous treatment of Gurkha veterans.

116. 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.

117. In considering a claim of 'exceptional circumstances', the Respondent can, and should, take into account the fact that an adult dependant 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.
>
> 118. 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.
>
> 119. Notwithstanding this, the ambit of Article 8 is not circumscribed and, as stated in paragraphs 83 and 84 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 83 and 84 above, as well as what we have said in paragraph 112 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."

29. We should refer at this stage to two of the BOC cases mentioned by the UT in their determination. In *Entry Clearance Officer, Mumbai v NH (India)* [2007] EWCA Civ 1330, this court considered what weight should be given by a decision-maker to an historic immigration wrong suffered by a group when deciding under article 8(2) whether it is proportionate to interfere with the article 8(1) right to respect for family life of a member of that group. The wrong in that case was the inability of female heads of households to apply as BOCs to settle in the UK. The court said that, when conducting the article 8(2) proportionality exercise, the decision-maker was entitled to have regard to the fact that, but for the historic injustice, the mother would have been able as of right to bring her youngest son to the UK, since he would have been a dependant under the age of 18 at that time: see per Sedley LJ at para 37 and Pill LJ at para 45.

30. In *Patel v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley LJ summarised the relevant principles at paras 14 and 15 of his judgment. At para 11, he accepted the submission that individuals who were seeking family reunion after more than three decades in which lawful settlement here was improperly barred "constitute a special category in which the presumption

should be in favour of reconstituting families which ought to have had an unfettered right to settle here many years ago". At para 15, he said:

> "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. "

31. At para 24, he added:

> "…..there is a relevant distinction between settlement here as a foreign national by leave or by force of circumstances and settlement here by right as a British citizen. The imperatives which govern family reunion, and which therefore affect the proportionality of refusal, are likely to be very different: and so may be the effect of family members reaching their majority."

32. It is clear from this that the fact that the BOC parents had a right to settle in the UK as British citizens (and were not reliant on leave to settle here) was an important factor. Even in the case of BOCs, however, Sedley LJ went no further than to say that the historic injustice might "perhaps" be decisive. The approach stated in these BOC cases is accepted by the SSHD as correct. It is in any event binding on this court. The question is how it should be applied in the present appeals.

33. Senior Immigration Judge McKee was the first to deal with the question of how the historic injustice principle should be applied in the context of adult children of Gurkhas in *KG (Gurkhas—overage dependants—policies) Nepal* [2011] UKUT 117 (IAC). He said at para 15 that, in coming to the proportionality balancing exercise, the public interest in maintaining firm and fair immigration control was "not as strong as usual". One of the reasons that he gave for this was:

> 16. …….. 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."

34. This approach was followed in *Pun (Gurkhas—policy—article 8) Nepal* [2011] *UKUT* 377 (IAC).

35. It is accepted on behalf of the SSHD that the historic injustice is a relevant factor to be taken into account when the proportionality balancing exercise is undertaken. The question is what weight should be given to it. Normally, questions of weight are a matter for the decision-maker and the court does not intervene except on well-established public law grounds. But the present appeals raise the point of principle whether the historic injustice suffered by Gurkhas should be accorded limited or substantial weight in the article 8(2) balancing exercise.

36. The court should be wary in any context of attempting to give prescriptive guidance as to the weight to be given to particular factors when the article 8(2) balancing exercise is performed, and certainly in the context of an immigration decision. In *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167, the House of Lords was careful not to be overly prescriptive. It said:

> "16. 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."

37. These wise words were carefully chosen. The language of "the authority will wish to consider" and "there will be certain general considerations to bear in mind" is measured and cautious. We also bear in mind the warning sounded

by Lord Bingham in *EB (Kosovo) v Home Secretary* [2008] UKHL 41, [2009] 1 AC 1159 at para 12:

> "…there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

38. We accept the submission of Ms McGahey that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative. If it were, the application of every adult child of a UK-settled Gurkha who establishes that he has a family life with his parent would be bound to succeed. Mr Drabble does not contend for this extreme position and it is not supported by the approach adopted in the BOC cases to which we have referred.

39. Ms McGahey submits that the BOC cases should be distinguished from the Gurkha cases for three reasons: (i) the BOC parents who suffered historical injustice were British citizens, whereas Gurkhas are nationals of Nepal (it is a condition of their service that they remain Nepalese citizens throughout their service in the British Army); (ii) the BOC parents had (or should have had) an absolute and indefeasible right, as British citizens, to settle in the UK, whereas Gurkhas are required to apply to settle here; and (iii) the injustice suffered by the BOC parents was particularly grave, involving racially and then sexually discriminatory schemes to their detriment, whereas no equivalent injustice has been suffered by the Gurkhas.

40. We accept that there are differences between the position of Gurkhas and that of BOCs. The first two points made by Ms McGahey amount to the same thing: as British citizens, BOCs have the indefeasible right to settle in the UK, whereas Gurkhas, as citizens of Nepal, will "normally" be allowed to settle here, but not if there is "adverse information of a serious nature" about them. Like Sedley LJ, we recognise the existence of this difference between the two groups. The position of Gurkhas is less secure than that of BOCs. But unless there is some evidence to suggest that there is a real risk that (i) the Gurkha's adult dependant child may not be given leave to enter, for example, because there is adverse information of a serious nature about him, or (ii) leave granted to the Gurkha or his child may be abrogated in the future, the difference between the two groups should be given little weight.

41. We do not consider that a judgment about the egregiousness of the injustice that was suffered by the Gurkhas as compared with that suffered by the BOCs should be a relevant factor in the balancing exercise. As submitted on behalf of NR, Ghising and KR, the crucial point is that there was an historic injustice in both cases, the consequence of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependant child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated,

notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy. There is no place in the balancing exercise for making fine judgments as to whether one injustice is more immoral or worthy of condemnation than another. Such judgments (which would in any event be difficult to weigh) may be relevant in the political plane. They are not relevant to the making of decisions as to whether it is proportionate to interfere with an individual's article 8(1) rights.

42. It follows that we do not accept the submission of Mr Drabble that the weight to be given to the historic injustice in the Gurkha cases is just as strong as the weight to be given to the injustice caused to the BOCs. The fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. But it also follows that we do not agree with the UT that the weight to be given is generally "substantially less" in the Gurkha cases. If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases.

43. We have referred to the reasons given at paras 83 and 84 of the UT determination in *Rana* for the conclusion that the historic injustice suffered by the Gurkhas carries substantially less weight than the injustice suffered by BOCs. But as we have seen at para 28 above, the UT also supported their conclusion as to the weight to be given to the historic injustice by the reasons given at paras 112 to 119 of their determination. We confess to having some difficulty in following the reasoning at paras 117 to 119 and in seeing, in particular, why the fact that an adult dependant child may be permitted to settle here in "exceptional circumstances" leads to the conclusion that the weight to be given to the historic injustice in conducting the article 8(2) balancing exercise is limited. The flexibility of the "exceptional circumstances" criterion is such that it does not *require* the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice, if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in article 8(2) itself, and it is ultimately for the court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependant child to settle here in exceptional circumstances. Accordingly, we reject this additional reason given by the UT for holding that the weight to be given to the historic injustice is limited.

What constitutes family life within the meaning of article 8(1)

44. In several of the appeals, the tribunal found that the applicant did not enjoy family life within the meaning of article 8(1). Save in the case of the appeals of NL and SL, we do not propose to examine the facts of any of the cases that are before us. Instead, we propose simply to say something about what is the correct approach.

45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of only limited assistance. She (rightly) accepts that, as a matter of law, in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts.

46. We think that the cases are of some assistance to decision-makers and tribunals who have to decide these issues. Paras 50 to 62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that "the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive". The correctness of the UT's review has not been doubted before us. We endorse it. We doubt whether any useful purpose is served by further general elaboration.

The appeals of NL and SL

47. The First-tier Tribunal ("the FTT") held that NL and SL do not have a family life with their parents that is protected by article 8(1). The UT found that the FTT's consideration of this issue was adequate and disclosed no error of law. That conclusion is challenged before this court. The appellants are now respectively 24 and 26 years of age. When their father was discharged from the Gurkhas, he served with the Gurkha Reserve Unit in Brunei for almost 10 years. During that time, the appellants were living with their mother in Nepal. Their father was granted leave to settle in the UK in 2009 and their mother followed him in August 2010. The appellants remained in Nepal. They were both students whose course fees were funded by their father.

48. The FTT considered whether, in these circumstances, the appellants enjoyed family life with their parents. The judge said (para 27) that there was very little evidence of family life between the appellants and their father (who was their sponsor). There was, however, evidence that he supported them financially, but this was expected in Nepalese culture. It did not, therefore, suggest a bond over and above that usually to be expected from the relationship between adult parents and their children. The judge said:

> "The sponsor stated that they have regular contact with each other, but there was no real evidence about how the Appellants related to their parents and the effect on them of being separated from their parents or what emotional sustenance they received from their parents."

49. The basis for the appeal is that the tribunals erred in law in failing to attach any (or any adequate) weight to the fact that the appellants had always lived with their parents as a family unit. Mr Malik says that the family unit, with a strong emotional bond and elements of financial dependency, enjoyed family life while the appellants were growing up and it was not suddenly cut off when they reached their majority.

50. We accept the submissions of Ms McGahey that the FTT did not make any error of law in reaching its conclusions. The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to determine. In our view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent.

51. Mr Malik also seeks to raise a point of law in relation to the appeals by NL and SL which has not been adopted by the other appellants. The FTT allowed the appeals on the ground that, in refusing the applications for leave to enter, the Entry Clearance Officer had failed to consider the SSHD's policy (contained in the IDIs to which we have earlier referred). Mr Malik submits that it follows that the interference with the appellants' article 8(1) rights was not "in accordance with the law" and that, for that reason, the decision cannot be justified under article 8(2), so that no questions of proportionality arise. In short, the enquiry stops at the stage of the third of the five questions identified by Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 24, [2004] 2 AC 389 at para 17.

52. This issue was touched on by Blake J in *SC (Article 8—in accordance with the law) Zimbabwe* [2012] UKUT 00056 (IAC) at para 14 where he said: "it is not necessary to explore further when a failure to apply a policy or practice to a claimant would make the decision not in accordance with the law for the purpose of Article 8". We did not have time to hear detailed argument on this point. In view of our decision in relation to the article 8(1) issue, this point does not arise. In these circumstances, we propose to say no more about it.

Conclusion

53. In order to render the conduct of these appeals manageable, we have concentrated in this judgment on resolving the issues of principle that have been raised. Save for the appeals of NL and SL, we have not applied these principles to the facts of the individual cases. We dismiss the appeals of NL and SL for the reasons that we have given. We hope that it may be possible to resolve some, if not all, of the remaining appeals by agreement in the light of this judgment. To the extent that this proves to be impossible, we invite the parties to make written submissions to the court in due course (i) identifying the outstanding issues, (ii) proposing directions for the conduct of the appeals in relation to the outstanding issues and (iii) stating whether (and if so why) it is necessary for these issues to be resolved by the present constitution of the court.