



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19209/2016  
HU/19212/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 25<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 11<sup>th</sup> June 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

BHUWAN RAI  
BHUPAL RAI  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T D C Jowett, instructed by N C Brothers & Co Solicitors  
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nepal born on 25 March 1990 and 30 November 1992 respectively. They appeal against the decision of First-tier Tribunal Judge Plumpton, dated 5 December 2017, dismissing their appeals against the refusal of entry clearance to settle as adult dependent children.
2. The Appellant's father was an ex-Gurkha soldier who died in March 2008. The Appellant's mother was granted a settlement visa in January 2014 and she came to the

UK in May 2014. The Appellants' applications for settlement visas were refused under Appendix FM and Annex K of the Immigration Rules

3. The First-tier Tribunal judge recorded the evidence of the Appellant's mother that her late husband would have opted to settle in the UK if such an option had been available [16]. The judge acknowledged that it was only as a consequence of the policy introduced in 2009 which provided for the first time an opportunity for adult children of veterans to apply. The exceptionality requirement was removed in 2015 [34].
4. The judge concluded at [35]: "I have some difficulty with accepting that the facts of this appeal fall within the many historic injustice cases because although it is stated that the appellants' father would have settled in the UK on his retirement from the British Army in 1977, this is now 40 years ago. I have no evidence or information before me as to what the appellants' late father did between retirement in 1977 and his death in March 2008, and more importantly no evidence as to what steps he took, if any, to settle in the UK in 2004 when the policy was found to be too restrictive. I find the submission that the appellants would have been British born but for the historic injustice to ex-Gurkha soldiers too speculative."
5. Permission to appeal was granted by Upper Tribunal Judge Chalkley on 12 March 2018 on the grounds that: "The judge does not appear to have made a clear finding on whether the appellants' father would have settled in the UK on retirement, despite that being the claim of the appellant's mother (see paragraph 16), but what she says at paragraph 35 is difficult to understand: there was little the appellants' father could do, hence the historic injustice."
6. Mr Jowett relied on his skeleton argument and submitted that the judge failed to properly apply Annex K which states:
  - "17. In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here). If a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement will normally have been met.
  18. Examples of countervailing evidence might include situations where:
    - the sponsor did not apply promptly when the discretionary policy was announced; or
    - the sponsor has a history of dishonesty; or
    - the former Gurkha did not return to his family in Nepal on discharge (e.g. because he went to work elsewhere)."
7. Mr Jowett submitted that the Appellants' father died before the Gurkha policy came into force. There was evidence from the Appellants' mother that he would have applied for settlement in the UK. There was no countervailing evidence and the requirement was satisfied. There was historic injustice in this case such that it would

ordinarily have decided the proportionality assessment in the Appellants' favour (R (Gurung) v SSHD [2013] EWCA Civ 8 and Ghising (Gurkhas/BOCs historic wrong: weight) [2013] UKUT 00567 IAC). The judge's approach to the historic injustice at paragraph 35 was incorrect.

8. Mr Walker conceded that the judge's failure to consider historic injustice in the assessment of proportionality was an error of law. The evidence of the Appellants' mother that their father would have settled was sufficient and the balance should fall in favour of the Appellants.

### **Discussion and conclusions**

9. I find that the judge erred in law in failing to have regard to paragraphs 17 and 18 of Annex K. Had the judge properly applied these paragraphs to the unchallenged evidence of the Appellant' mother, that their father would have settled in the UK on retirement from the army, then she would have concluded that there was historic injustice in this case. Her conclusions at paragraph 35 demonstrated a misapplication of Annex K or a failure to consider paragraphs 17 and 18. The judge did not doubt the credibility of the Appellants' mother. There was no countervailing evidence in this case.
10. I find that the judge erred in law in failing to consider the historic injustice in assessing proportionality. I set aside the decision to dismiss the appeal and remake the decision as follows.
11. The evidence of the Appellants' mother was sufficient to satisfy paragraph 17 of Annex K and there was no countervailing evidence. I find that the Appellants' father would have applied for settlement on retirement from the army had that option been available to him. The Appellants would have been born in the UK. Applying Gurung and Ghising to the facts of the Appellants' case, the refusal of entry clearance was disproportionate. I allow the Appellants' appeals on Article 8 grounds.

### **Notice of Decision**

The appeals are allowed on human rights grounds

No anonymity direction is made.

*J Frances*

Signed

Date: 25 May 2018

Upper Tribunal Judge Frances

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.

*J Frances*

Signed

Date: 25 May 2018

Upper Tribunal Judge Frances