

## **ANNEX K - Adult Children of Former Gurkhas**

1. For the purposes of this guidance, a former Gurkha is a Gurkha who completed their service in the Brigade of Gurkhas of the British Army between 1948 and 1 July 1997.

### **Definition of an adult child of a former Gurkha**

2. For the purposes of this policy, an adult child is the son or daughter of a former Gurkha. See further guidance on the relationship to the sponsor in paragraph 11 of Annex K of this guidance.

### **Who is not covered by this guidance.**

3. Other adult relatives aged 18 or over who might claim to be dependent on a former Gurkha such as parents, grandparents, grandchildren, siblings or wider family members of a former Gurkha are outside the remit of this policy. Any applications from parents, grandparents, siblings or adult children (who do not qualify under this policy) aged 18 or over of a former Gurkha, settled in the UK, must be made overseas under the adult dependent relative provisions of Appendix FM of the Immigration Rules, and considered under those Rules.

4. There are no specific Immigration Rules to cover wider family members such as the niece, nephew, aunt, uncle, cousin or grandchild of a former Gurkha and they are outside the scope of this policy. Those wider family members would have to qualify in their own right for leave to enter or remain in the UK under the Immigration Rules e.g. if they wish to study or work in the UK they would need to apply under the Points Based System rather than rely on a family relationship with a former Gurkha to seek to obtain leave.

5. Spouses, civil partners, unmarried or same sex partners, children under 18 and widows of former Gurkhas are covered by existing published guidance (see background to the policy in paragraphs 6-8 below) and are therefore outside the scope of this policy.

### **Background to this Policy**

6. The Home Office recognises the exemplary service that members of the Brigade of Gurkhas have given to the British Crown. Since May 2009, members of the Brigade of Gurkhas who were discharged before 1 July 1997 – the date the headquarters of the Brigade moved from Hong Kong to the UK – have been able to obtain settlement in the UK on a discretionary basis as a result of their service. The 2009 policy also covered their immediate families (spouses, civil partners, unmarried or same sex partners, children under 18 and widows). When the then Home Secretary announced the discretionary arrangements in the House of Commons on 21 May 2009, it was made clear that these only applied to children who were under 18 years of age at the time of application.

7. The Home Office has reviewed the 2009 policy, taking into account case law and evidence provided to the All Party Parliamentary Group on Gurkha Welfare. As a result of this review, the 2009 discretionary arrangements are being adjusted to allow adult children of former Gurkhas to be granted settlement in certain circumstances.

8. The new policy will apply to applications decided on or after 5 January 2015. This policy is only available to applicants outside the UK. Adult children of former Gurkhas who are already in the UK will be expected to leave the UK and make an application under this policy.

## **Settlement for adult children of former Gurkhas**

9. In order for settlement to be granted to the adult child of a former Gurkha under this policy, a valid application for entry clearance must be made in accordance with paragraphs 24-30 of the Immigration Rules and the applicant will normally have to meet the following conditions:

1. The former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements; and
2. The applicant is the son or daughter of the former Gurkha; and
3. The applicant is outside the UK; and
4. The applicant is 18 years of age or over and 30 years of age or under on the date of application (including applicants who are 30 as at the date of application); and
5. The applicant is financially and emotionally dependent on the former Gurkha; and
6. The applicant was under 18 years of age at the time of the former Gurkha's discharge; (or if the applicant was born after discharge see guidance in paragraph 16 of Annex K of this guidance) and
7. The Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available before 1 July 1997; and
8. The applicant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away); and
9. The applicant has not formed an independent family unit; and
10. The applicant does not fall to be refused on grounds of suitability under paragraph 8 or 9 of Appendix Armed Forces to the Immigration Rules or those provisions of Part 9 of the Immigration Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces.

## **Consideration of Applications from an Adult Child of a former Gurkha**

10. In considering applications Home Office decision makers must have regard to the following guidance.

### **Status of Sponsor**

11. The former Gurkha sponsor must have settlement under the 2009 discretionary arrangements, or be in the process of being granted settlement in the UK under the discretionary arrangements at the same time as the applicant. If this condition is not met the application must be refused on this basis.

### **Relationship to sponsor**

12. The applicant must be the child of the former Gurkha for which the former Gurkha assumed parental responsibility before the child was 18. Where a child is not a biological child the former Gurkha will be required to demonstrate that he was legally responsible for the child's welfare before the child reached 18 years of age. Where necessary, decision makers should carry out further checks with the Gurkha Records Office. Where the

relationship to the sponsor has not been adequately demonstrated, the application should be refused on this basis. Where the application is made on the basis of the sponsor being the applicant's biological father, the applicant may be required to provide, at their own expense, evidence of this relationship by means of a DNA test provided through the International Organisation for Migration (IOM) as specified by UKVI. Where a DNA test has been requested, the application will be refused if a sample has not been provided, without reasonable excuse, within 4 weeks of the request.

### **Location of applicant**

13. The applicant must be outside the UK.

### **Age**

14. On the date of application, the adult child of a former Gurkha must be between 18 and 30 years of age (including applicants who are 30 as at the date of application). If the applicant is under 18 years of age, the application must be considered under the existing discretionary (2009) policy. If the applicant is over 30 years of age, the application under this policy must be refused on this basis. But where an applicant is over 30 decision makers must still consider if Article 8 otherwise applies.

### **Financial and emotional dependency on former Gurkha**

15. The applicant must be financially and emotionally dependent on the former Gurkha sponsor. Evidence of financial dependency may include the fact that the applicant has not been supporting him or herself and working but has been financially supported, out of necessity by his or her former Gurkha sponsor, who has sent money regularly from the UK.

### **Age at time of former Gurkha's discharge**

16. The applicant must have been under 18 years of age at the time of the former Gurkha's discharge. If this age condition is not met, the application must be refused under this policy on this basis. Please note that an adult child born after the sponsor's discharge will qualify under this policy if all other conditions are met.

### **Historical Injustice**

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 be considered to 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).

If the decision maker does not feel that this requirement is satisfied and they have referred the matter to a senior decision maker, they should normally propose refusal of the application on this ground.

## **Living Apart**

19. The applicant must not normally have lived apart from the Gurkha sponsor for more than two years on the date of application or at any time, unless the family unit was maintained albeit the applicant lived away, for example time spent at boarding school, college or university as part of their full-time education where the applicant lived at university or college during term time but resided in the family home during holidays. If these conditions are not met the application must be refused under this policy on this basis.

## **Living Independently**

20. The application must also be refused if the applicant is living independently in a different family unit (for example, the applicant is living with relatives who are acting in a parental capacity), or where the applicant has formed their own independent family unit by getting married or entering into a civil partnership or a relationship akin to marriage/civil partnership.

## **Suitability Requirements**

21. An applicant must meet the suitability criteria set out in paragraphs 8 and 9 of Appendix Armed Forces and the applicable provisions in Part 9 of the Immigration Rules (by which some, but not all, of the general grounds for refusal are applied to applications under Appendix Armed Forces- see paragraph 320(1) of the Rules).

## **Retrospective Application to Previous Cases**

22. This policy does not have retrospective effect on decisions already taken on applications made by the adult children of former Gurkhas before the publication of this policy in January 2015. If an applicant has previously been refused leave as the adult child of a former Gurkha and they want their case to be considered again under this new policy, the applicant will need to submit a new application with the appropriate fee.

23. However, with effect from 5 January 2015 all applications which have already been submitted but are yet to be decided will be considered under the revised policy. Where an application for leave to remain has already been submitted before 5 January 2015 by the adult child of a former Gurkha, the out of country requirement in this policy will not be applied.

24. Separate guidance has been issued to Caseworkers and Presenting Officers to detail how they should consider any cases which are part way through the immigration appeal.

## **Grant of Leave**

25. If all the above requirements are met, then decision makers should normally grant the applicant indefinite leave to enter the UK (or as appropriate in transitional cases, indefinite leave to remain). Entry Clearance Officers should note that there is no requirement to refer cases as a matter of routine.

## **Refusal Cases**

26. Where an application falls for refusal under this policy, the decision maker must consider whether Article 8 otherwise requires them to be granted leave on the basis of exceptional circumstances in accordance with the guidance contained in Appendix FM 1.0b: Family Life (as a Partner or Parent) and Private Life: 10- year Routes.

27. As part of any proportionality aspect of this consideration, decision makers must take account of the following relevant case law:

The Court of Appeal confirmed in *Gurung & Ors, R (on the application of) v Secretary of State for the Home Department* [2013] ECWA Civ 8 (21 January 2013) that the “normal position is that they (adult dependent relatives) are expected to apply for leave to enter or remain under the relevant provisions of the Rules or under the provisions of Article 8 of the European Convention on Human Rights”. The Court also found that the historical injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 consideration of the case but was not determinative. 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”.

The Upper Tier Tribunal found in *Ghising and others* [2013] UKUT 00567 (IAC) that where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the Appellant’s favour, where the matters relied upon by the Secretary of State/entry clearance officer (ECO) consist solely of the public interest in maintaining a firm immigration policy.

If the Secretary of State/ECO can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Secretary of State/ECO’s favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant’s side of the balance.

28. In all cases where it is proposed to refuse an application under this policy decision makers must ensure that the case is referred, prior to the decision being implemented, to the SCS level who will determine whether to authorise the decision or refer the case for ministerial decision.