Chapter 15 Section 2A – Persons seeking settlement: HM Forces

This guidance is only relevant to applications for leave as a Gurkha discharged from service before 1 July 1997; a partner, child or widow of a Gurkha discharged from service before 1 July 1997; or a dependant of a foreign or Commonwealth member of HM forces applying for leave under the Transitional Arrangements set out in Paragraphs 276DI-276DL of the Immigration Rules. Guidance on applications from Adult Children of former Gurkhas is found in Annex K.

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1. Introduction

This section deals with applications from Gurkhas and foreign and Commonwealth nationals who seek settlement in the UK on discharge from HM Forces. It also explains the circumstances under which their dependants may apply for settlement.

On 25 October 2004 the Immigration Rules were amended to provide for all those with at least 4 years service with HM Armed Forces to apply for settlement in the UK after discharge. Paragraphs 276E to 276Q of the Immigration Rules refers.

Paragraphs 276E-K of the Immigration Rules relate to Gurkhas, who will continue to be recruited in Nepal; and paragraphs 276L-Q of the Immigration Rules relate to foreign and Commonwealth nationals who are normally recruited and discharged in the UK.

The Immigration Rules make provision in both parts for applications for settlement to be made either from overseas or from within the UK.

1.1 Caseworkers should ensure that they have read the information contained in Annex H (Changes to applications from overstayers) and Section 2B (Military Service Offences) when dealing with applications from those already discharged from HM Forces.

2. Gurkhas

For the purposes of the Immigration Rules (Paragraphs 276E-K) a Gurkha is a citizen or national of Nepal who has served in the Brigade of Gurkhas of the British Army under Brigade of Gurkhas’ terms and conditions of service.

On 30 September 2004 the Prime Minister and Home Secretary announced a change of policy in respect of Gurkhas. Gurkhas discharged from the British Army in Nepal, on or after 1 July 1997 and with at least 4 years service with the British Army would be able to apply for settlement in the UK.

The 1 July 1997 cut-off date reflected when the Brigade of Gurkhas moved its headquarters from Hong Kong to the UK, and Gurkhas discharged on or after that date would therefore have had more opportunity to develop close physical ties with the UK.

NB See Annex A for discretionary arrangements for former Gurkhas discharged before 1 July 1997.

2.1 Settlement pre/on entry

The requirements for indefinite leave to enter (paragraph 276F-G) as a Gurkha discharged from the British Army are:

(i) the applicant has completed at least four years service as a Gurkha with the British Army;

and

(ii) was discharged from the British Army in Nepal on completion of engagement on or after 1 July 1997. The requirement to have been discharged in Nepal is to be waived until the relevant paragraph in the Rules is amended; and

(iii) was not discharged from the British Army more than 2 years prior to the date on which the application is made; and
(iv) holds a valid United Kingdom entry clearance for entry in this capacity.

(v) does not fall for refusal under the general grounds for refusal

If requirements (i), (ii) (iii) and (v) above are met entry clearance for settlement may be issued, and if that entry clearance is presented to the Immigration Officer on arrival the applicant will be admitted to the UK for settlement.

2.2 Definition of “on completion of engagement”.

In (ii) above “on completion of engagement” means that a person was discharged from the armed forces in the normal course of events, after completing the agreed period of service and has been issued with a Certificate of Service.

2.3 Settlement after entry

Caseworkers should ensure that they have read the information contained in Annex H (Changes to applications from overstayers) and Section 2B (Military Service Offences) (Military Offences) when dealing with applications from those already discharged from HM Forces.

The requirements for indefinite leave to remain (settlement) (paragraphs 276I-J) as a Gurkha discharged from the British Army are that:

(i) the applicant has completed at least four years service as a Gurkha with the British Army; and

(ii) was discharged from the British Army on completion of engagement on or after 1 July 1997 (the requirement to have been discharged in Nepal is to be waived until the relevant paragraph in the Rules is amended); and

(iii) was not discharged from the British Army more than 2 years prior to the date on which the application is made; and

(iv) is not in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded.

(v) does not fall for refusal under the general grounds for refusal.

If all of the above requirements are met settlement may be granted.

2.3.1 Applicants refused settlement, but granted limited leave to remain.

If the applicant does not meet the requirements for indefinite leave to remain as a Gurkha discharged from HM Forces only because paragraph 322(1C)(iv) applies, the applicant will be granted further limited leave to remain for a period not exceeding 30 months. For further information on this provision, caseworkers should refer to Section 2B (Military Service Offences).
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2.4 Applications lodged in advance

To assist HM Armed Forces personnel in making the transition to civilian life, settlement applications may be lodged up to 10 weeks before the discharge date, although settlement cannot be granted until after exemption from control has ceased upon their discharge.

These applications should be examined as soon as they are received and any additional enquiries made in good time to ensure that the decision to grant or refuse can be implemented the day or day after discharge.

Where a decision in principle is made to grant settlement, an indicative letter based on the proforma at Annex B should be sent to the applicant to assist them in making appropriate arrangements for employment after discharge and for liaising with the relevant authorities for housing, healthcare and benefits.

2.5 Medical discharge

In cases involving discharge from the Brigade of Gurkhas on medical grounds after 1 July 1997, please refer to the guidance at section 10 below.

Note: section 10 and Annex D provide guidance for dealing with settlement applications from medically discharged Commonwealth & foreign nationals (including ex-Gurkhas medically discharged on or after 1 July 1997)

2.6 Verifying details of service

If the applicant’s original Certificate of Service (also called Army Form Book 108, Red Book or “Lal” Book) has not been submitted - or it has been submitted but verification of an applicant’s claim to the qualifying period of service or other information is required (for example, in relation to an award of a MoD disability pension or to find out more about why somebody’s service was terminated prematurely) - checks may be made with reference to information provided directly by the MoD.

Checks may be carried out with the MoD in the UK or by reference to Records Office at the Brigade of Gurkhas main Recruiting Depot in Pokhara, Nepal. The authorisation form at Annex E & F may be adapted for this but in most cases it should not be necessary to use this means to obtain this information. Where this is considered necessary, a faxed copy of the service record showing the length of service and date of discharge (including any other relevant information required) should be obtained and attached to the applicant’s file.

3. Dependants Of Gurkhas

For guidance on dealing with applications from dependants of Gurkhas, please refer to sections 11-13 below.

4. Grants And Refusals

4.1 Grant of Applications

Providing that an application meets the requirements of the rules or the requirements of the discretionary policy for Gurkhas discharged before 1 July 1997, settlement should be granted and documents processed in the normal way.
4.2 Refusal of Applications
If an applicant cannot satisfy the requirements of paragraph 276F of the Immigration Rules when applying for leave to enter, or paragraph 276I of the Rules when applying for leave to remain as a Gurkha discharged from the British Army, and the exercise of discretion is not considered appropriate, settlement should be refused.

Suggested refusal wording:

“You have applied for settlement in the United Kingdom as a Gurkha discharged from the British Army but your application has been refused.

In view of the fact that you have not completed at least four years service as a Gurkha with the British Army; [I am/the Secretary of State is] not satisfied that you meet the requirements of paragraph [276F/276I] of the Immigration Rules."

Paragraph reference 276F(i) or 276I(i)

In view of the fact that you were discharged from the British Army more than 2 years prior to the date on which the application is made; [I am/the Secretary of State is] not satisfied that you meet the requirements of paragraph [276F/276I] of the Immigration Rules.”

Paragraph reference 276F(iii) or 276I(iii)

In view of the fact that on the date of application you were in breach of UK immigration laws/had overstayed by a period of more than 28 days , [I am/the Secretary of State is] not satisfied that you meet the requirements of paragraph 276I of the Immigration Rules.”

Paragraph reference 276I(iv)

4.3 Case Information Database codes

The following stats categories should be used: Grant: 7DA
Refusal: X8

5. Appeal Rights

For information on rights of appeal please refer to IDI Chapter 12.

6. Foreign & Commonwealth Nationals (Non-Gurkhas)

Paragraphs 276L-Q of the Immigration Rules replace what was previously known as the “Armed Forces Concession” under which those without right of abode could apply for settlement on discharge in the UK from the Armed Forces, on the basis of 4 years approved employment.

6.1 Settlement pre/on entry

The requirements for indefinite leave to enter (paragraphs 276L-M) as a foreign or Commonwealth citizen discharged from HM Forces are:

(i) the applicant has completed at least four years service with HM Forces; and
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(ii) was discharged from HM Forces on completion of engagement; and

(iii) was not discharged from HM Forces more than 2 years prior to the date on which the application is made; and

(iv) holds a valid United Kingdom entry clearance for entry in this capacity.

(v) does not fall for refusal under the general grounds for refusal

If requirements (i) (ii) (iii) and (v) are met entry clearance for settlement may be issued, and if the entry clearance is presented to the Immigration Officer on arrival the applicant will be admitted to the UK for settlement.

6.2 Definition of “on completion of engagement”

In (ii) above “on completion of engagement” means that a person was discharged from the Armed Forces in the normal course of events, after completing the agreed period of service and has been issued with a Certificate of Service.

6.3 Settlement after entry

Caseworkers should ensure that they have read the information contained in Annex H (Changes to applications from Overstayers) and Section 2B (Military Service Offences) (Military Offences) when dealing with applications from those already discharged from HM Forces.

The requirements for indefinite leave to remain (paragraphs 276O-P) as a foreign or Commonwealth citizen discharged from HM Forces are:

(i) the applicant has completed at least four years service with HM Forces; and

(ii) was discharged from HM Forces on completion of engagement; and

(iii) was not discharged from HM Forces more than 2 years prior to the date on which the application is made; and

(iv) is not in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded.

(v) does not fall for refusal under the general grounds for refusal

If all the above requirements are met settlement may be granted.

6.3.1 Applicants refused settlement, but granted limited leave to remain.

If the applicant does not meet the requirements for indefinite leave to remain as a foreign and Commonwealth citizen discharged from HM Forces only because paragraph 322(1C)(iv) applies, the applicant will be granted further limited leave to remain for a period not exceeding 30 months. For further information on this provision, caseworkers should refer to Section 2B (Military Service Offences).
6.4 Applications lodged in advance

To assist HM Forces personnel in making the transition to civilian life, settlement applications may be lodged up to 10 weeks before the discharge date, although settlement cannot be granted until after exemption from control has ceased upon their discharge. These applications should be examined promptly as soon as they are received and any additional enquiries made in good time to ensure that the decision to grant/refuse can be implemented the day or day after discharge, as appropriate.

Where a decision in principle is made to grant settlement, an indicative letter based on the proforma at Annex B should be sent to the applicant to assist them in making appropriate arrangements for employment after discharge and for liaising with the relevant authorities for housing, healthcare and benefits.
6.5 Medical discharge

In cases involving discharge of foreign and Commonwealth service personnel on medical
grounds please refer to the guidance at section 10 below.

7 Dependants Of Foreign & Commonwealth Nationals (Non-Gurkhas)

For guidance on dealing with applications from dependants of foreign and Commonwealth
service personnel please refer to sections 11-13 below.

8. Grants And Refusals

8.1 Grant of Applications

Providing that an application meets the requirements of the rules, settlement should be
granted and documents processed in the normal way.

8.2 Refusal of Applications

Where an applicant does not satisfy the requirements of:

- paragraph 276L of the Rules if applying for leave to enter;, or
- paragraph 276O of the Rules if applying for leave to remain, as a foreign or
  Commonwealth citizen discharged from HM Forces; or
- other relevant Immigration Rules - e.g. paragraph 281 (spouses and civil partners),
  paragraph 297 (children), paragraph 317 (parent, grandparent, other
dependent relative);

and the exercise of discretion is not appropriate, settlement should be refused. The refusal
text should refer to any consideration given to the application both under and outside the
Immigration Rules.

Suggested refusal wording:

“You have applied for settlement in the United Kingdom as a foreign or Commonwealth citizen
discharged from HM Forces but your application has been refused.

In view of the fact that you have not completed at least four years service with HM Forces, [I
am/the Secretary of State is] not satisfied that you meet the requirements of paragraph

Paragraph reference 276L(i) or 276O(i)

In view of the fact that you were not discharged from HM Forces on completion of
engagement, [I am/the Secretary of State is] not satisfied that you meet the requirements of

Paragraph reference 276L(ii) or 276(O)(ii)
In view of the fact that you were discharged from HM Forces more than 2 years prior to the date on which the application is made, [I am/the Secretary of State is] not satisfied that you meet the requirements of paragraph [276L/276O] of the Immigration Rules."

**Paragraph reference 276L(iii) or 276O(iii)**

In view of the fact that on the date of application you were in breach of UK immigration laws/had overstayed by a period of more than 28 days, [I am/the Secretary of State is] not satisfied that you meet the requirements of paragraph 276O of the Immigration Rules."

**Paragraph reference 276O(iv)**

### 8.3 Case Information Database codes

The following stats categories should be used:

- Grant: 7DA
- Refusal: X8

### 9. Appeal Rights

For information on rights of appeal please refer to IDI Chapter 12.

### 10. Medical Discharge Cases

This section provides guidance on the consideration to be given to settlement applications from medically discharged foreign and Commonwealth nationals, including ex-Gurkhas medically discharged on or after 1 July 1997. It explains the circumstances in which the normal requirement in the Immigration Rules to have completed four years" service may be waived.

#### 10.1 Medical grading codes

The following medical grading codes are used by the MoD when considering discharging personnel on medical grounds:

- P3 - fit for light/restrictive duties;
- P4 - pregnancy maternity;
- P7 - fit for limited/restricted duties in UK only;
- **P8 - medically unfit for any form of military service;**
- P0 – unfit for duty but under medical care [Not used by RN].

Individuals in the Army and RAF may be medically discharged under one the following Queen’s Regulations:

**Army**

QR 9.381 – “Defect in enlistment procedure” – where a pre-existing medical condition and/or pre-disposition to developing a certain condition only becomes apparent after enlistment.
QR 9.385 - for re-allocation or discharge. Possible re-enlistment after 6 months. Trainees must maintain entry standards.

QR 9.386 - unfit for any form of service. Discharge - possible re-enlistment after 6 months.

QR 9.387 - permanently unfit for service – possible re-enlistment only after 5 years.

RAF

QR 2905(4) Officers & QR 607(15)(a)(b) Ground Trades and NCA: Invaliding: Permanently below the medical standard required to conduct the full duties of their specialisation or unlikely to reach that standard with a reasonable time.

QR 2905(3) Officers and QR 607(22)(d)(ii): Medical – Non Invaliding: Permanently below the medical standard required to conduct the full duties of their specialisation for reasons within their control or where the condition/disability is unlikely to be lasting.

QR 2906(3) Officers and QR 607(15)(b): Election to Leave: Permanently below the medical standard required to conduct the full duties of their specialisation, unlikely to reach that standard within a reasonable time, declined an offer of suitable alternative employment in the RAF or feel their career prospects are unacceptable affected through circumstances beyond their control.

QR 2905(4) Officers and QR 607(15)(b) NCA: Aircrew Right to Elect Invaliding: Aircrew who cease to be appointable to flying duties because of a permanently reduced MES below A2, may as a once only option to elect to be invalided as an alternative to retention.

Royal Navy/Royal Marines

In the Naval Service, personnel are discharged in accordance with the regulations contained in the Board of Reference (BR) 1991 – Instructions for the Royal Naval Medical Service – Chapter 18 – Medical Boards. The circumstances of RN/RM medical discharge cases should be evident from the applicant’s F Med 133 and F Med 23 medical reports.

10.2 MoD disciplinary procedures

Mod disciplinary procedures take precedence over military discharge procedures, so if an applicant has been medically discharged the UK Border Agency may generally accept that no personal or disciplinary factors are involved. Any cases where, for example, there is evidence of criminal activity, will need to be investigated thoroughly and decided on a case-by-case basis. For further information on Military Offences, caseworkers should refer to Section 2B (Military Service Offences).

HM Armed Forces personnel are normally given 110 – 130 days notice of their medical discharge date. To assist the MoD and the medical dischargee in making the transition from service to civilian life as seamless as possible, applications for settlement from medical dischargees may be lodged up to 3 months before the discharge date. Although settlement cannot be granted until after discharge has taken place (due to exemption from control), these applications should be examined promptly as soon as they are received and any
additional enquiries made in good time to ensure that the decision to grant/refuse can be implemented on the day or day after discharge.

Where a decision in principle is made to grant settlement, an indicative letter based on the proforma at Annex B should be sent to the applicant to confirm to OGDs, local authorities and prospective employers that once settlement is granted, there will be no restriction to them accessing those public funds for which they may be eligible or from seeking employment.

10.3 Evidence

If they have not already done so, applicants should be asked to submit their F Med 133 their F Med 19 (Army & RAF) – Medical Board Proceedings or F Med 23 (RN) – Medical Board Proceedings report as official MoD evidence of the circumstances and nature of their injury or illness. These should provide confirmation that discharge was as a direct result of injury sustained in an operational theatre or an illness that has been deemed attributable to their service in HM Armed Forces.

If the evidence supplied by the individual is inconclusive, the UK Border Agency should contact the individual’s Unit if they are still serving or the Service Personnel and Veterans Agency (SPVA) if they have been discharged for further information using the details contained in Annex C.

The contact details for the SPVA are:

Ann Morton,
SPVA,
Room 6205, Norcross,
Blackpool, FY5 3WP
Tel: 01253 332862

10.4 Consideration

The guidance below should be read in conjunction with the indicative table at Annex D.

All decisions should be reviewed and approved by a senior caseworker.

10.5 Medical discharge due to injury sustained on operations

Where a foreign or Commonwealth member of HM Armed Forces is medically discharged as a direct result of injury sustained during operations, the requirement for them to have completed four years’ service in order to qualify for settlement should normally be waived.

Any cases of discharged servicemen or women in these circumstances that have previously been refused settlement will be reviewed in line with the above guidance where these are brought to the UK Border Agency’s attention. The requirement to have been discharged no more than 2 years prior to the date of application would also be waived in re-consideration cases.
10.6 Medical discharge due to an injury or medical condition attributable to service in HM Armed Forces.

a. Cases where the exercise of discretion may be appropriate would include where discharge of a HM Armed Forces member who has completed initial training results directly from an injury sustained on duty but outside an operational theatre (e.g. during pre-deployment training) or from a medical condition attributable to their training or service. In such cases, it may be appropriate to exercise discretion to waive the 4 years’ service requirement under the settlement rules, especially where the injury is of a serious nature, the long-term prognosis is poor or where there will be an ongoing need for medical treatment not available in the individual’s country of origin.

b. Where the injury or medical condition leading to discharge is attributable to service but of a relatively minor nature or the period of service completed is relatively short, waiving the 4 years’ service requirement may not be appropriate.

All “non-operational, but attributable” cases should be considered sympathetically on their individual merits with reference to the indicative table at Annex D. Where cases lie somewhere in between the situations described in (a) and (b) above, caseworkers should use their judgment, giving weight to the following factors:

- the seriousness of the injury or condition;
- the need for any further medical treatment in the UK and the availability of medical treatment in the individual’s country of origin;
- the prognosis for recovery including whether the injury or illness will affect their ability to support themselves in their country of origin;
- the length of time already served at the point of discharge.

Where a substantial part of the required minimum four years’ service has been served prior to discharge, it would normally be appropriate for discretion to be exercised to grant settlement in cases, even where the injury or medical condition involved is less serious.

10.7 Discharge due to injury or medical condition sustained during initial training or due to a medical condition not attributable to HM Armed Forces service

Where discharge results from injury sustained during initial training or is due to a medical condition not attributable to service in HM Armed Forces, it would not normally be appropriate to waive the requirement to have completed four years’ service prior to discharge for the purposes of considering an application for settlement.

However, where a substantial part of the minimum four years’ service required has been served prior to discharge, discretion may be exercised to grant settlement. Please refer to indicative table at Annex D.
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This would also apply to an application from an individual medically discharged as a result of a pre-existing medical condition and/or if their pre-disposition to developing a certain condition only becomes apparent after enlistment.

10.8 Leave outside the immigration rules

Where the decision is made to refuse settlement but further medical treatment or a recovery period will be required before the applicant is able to return to their country of origin, a grant of Leave Outside the Rules (on code 1A - with permission to work and claim benefits) may be appropriate. The grant should be only as long as judged necessary and should not convey any expectation of further leave or eventual settlement. See IDI Ch.1, section 14 for more information on LOTR.

10.9 Dependents

Where settlement or leave outside the rules is granted, those previously treated as a dependent spouse, civil partner, unmarried partner, same-sex partner or child will normally qualify for leave in line.

11. Dependents of Foreign & Commonwealth Nationals (Including Gurkhas)

Applications for settlement from dependants of former foreign and Commonwealth HM Forces personnel (including discharged Gurkhas) are to be considered in line with an application for settlement submitted by the former HM Forces member.

On 1 January 2005 two new Rules took effect, which enable the spouse, civil partner or child dependants of those settled or seeking settlement under the HM Forces rule to apply for settlement in line. Further amendments to the Rules – effective from 31 March 2009 – extended this right to unmarried and same-sex partners.

New provisions were also introduced, from 31 March 2009, enabling spouses, civil partners, unmarried partners, same-sex partners and children of a member of HM Forces to apply for settlement if their spouse, civil partner, unmarried partner, same-sex partner or parent has completed at least 5 years’ continuous service. These provisions are set out in:

- **Paragraphs 276R to 276W - spouses, civil partners, unmarried and same-sex partners** of persons settled or seeking settlement in the United Kingdom in accordance with paragraphs 276E to 276Q (HM forces rules) or of members of HM forces who are exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and have at least 5 years’ continuous service – please see paragraph 12 below.

- **Paragraphs 276X to 276AC - children** of a parent, parents or a relative settled or seeking settlement in the United Kingdom under paragraphs 276E to 276Q (HM forces rules) or of members of HM forces who are exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and have at least 5 years’ continuous service – please see paragraph 13 below.
In addition to consideration under these provisions, applications for settlement from dependants should also be considered under the relevant provisions of the Immigration Rules - e.g. paragraph 281 (spouses and civil partners), paragraph 297 (children), paragraph 317 (parent, grandparent, other dependent relative) - before being considered under the discretionary arrangements set out below.

12. Spouses, Civil Partners, Unmarried And Same-Sex Partners

To qualify for indefinite leave to enter or indefinite leave to remain in the UK as the spouse, civil partner, unmarried or same-sex partner of a person settled or seeking settlement under the HM Forces rule or of a serving member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, the following requirements must be met:

- the applicant must be married to, or the civil partner, unmarried or same-sex partner of a person present and settled in the UK or who is being admitted for settlement or being granted settlement on the same occasion under the HM Forces rule;
- the parties to the marriage, civil partnership or relationship akin to marriage or civil partnership must have met;
- the marriage, civil partnership or relationship akin to marriage or civil partnership must have been formed at least 2 years ago;
- each of the parties must intend to live permanently with the other as their spouse, civil partner, unmarried or same-sex partner and the marriage, civil partnership or relationship akin to marriage or civil partnership must be subsisting;
- if seeking indefinite leave to enter, a valid entry clearance for entry in this capacity must be held;
- if seeking indefinite leave to remain, the applicant has leave to enter or remain in the UK.

Caseworkers should note the lack of any maintenance and accommodation requirements.

The requirement that the parties have been married, in a civil partnership or relationship akin to marriage or civil partnership for at least 2 years is consistent with the requirements of the general immigration rules for spouse/civil partners and PBS dependants applications. Chapter 8, Section 9 Annex Z provides further guidance for assessing unmarried and same-sex relationships, including what might be required as evidential proof. If the marriage, civil partnership or relationship akin to marriage or civil partnership has subsisted for less than 2 years the spouse, civil partner, unmarried or same-sex partner should be:

- (where the spouse has been granted settlement) granted a period of leave to enter or remain up to a maximum of 2 years on Code 1 in accordance with the requirements for spouses, civil partners, unmarried or same-sex partners of persons present and settled in the United Kingdom or being admitted on the same occasion for settlement (paragraphs 281-289 of the Immigration Rules); or
June 2015

- (where the spouse is still serving) granted leave up to a maximum of 2 years on Code 1 in accordance with the requirements for a dependant of an exempt armed forces member (paragraphs 276AD-276AF)

The applicant should be advised that they may apply **not earlier than one month** before the end of the probationary period, for indefinite leave to remain in the United Kingdom on the basis of the still subsisting marriage, civil partnership or relationship akin to marriage or civil partnership.

For definitions of “present and settled” in the UK, and “intention to live permanently with the other” please refer to Chapter 8 Section 1.

**Note:** See paragraph 13.3 about the importance of dependants observing the stated purpose of their settlement visa.

In cases where there is reason to doubt that the marriage is genuine please refer to Chapter 8 Section 1 ANNEX A.

### 12.1 Polygamous marriages

Only one wife may be permitted entry to the United Kingdom under the provisions of the immigration rules for spouses. See chapter 8, Section 1, Annex C Polygamous and potentially polygamous marriages.

### 12.2 Cid Codes

For statistical codes please see Chapter 8 Section 1 paragraphs 4.9 and 4.11.

For examples of refusal formulae and CID refusal codes please refer to Chapter 8 Section 1 Annex G.

### 12.3 Widows, widowers and bereaved civil partners, unmarried and same-sex partners

Where an application for settlement in the UK is received from the widow, widower, civil partner, unmarried or same-sex partner of a deceased foreign or Commonwealth HM Forces member (including Gurkhas) and where their spouse or partner’s death occurred in connection with operational service, discretion will normally be exercised to grant settlement. This would include foreign and Commonwealth HM Forces members (including Gurkhas) killed, for example, during hazardous pre-combat exercises and manoeuvres or travelling to, from or around the combat zone, in addition to those killed during combat itself. Any other spouse or partner of a deceased serving or former member of HM forces would not normally meet the criteria for settlement in the UK under this immigration discretion and would therefore need to qualify under a different provision of the Immigration Rules.

In exceptional circumstances discretion may be exercised in individual cases where the spouse’s death was not in connection with operational service but there are strong reasons why settlement in the UK is appropriate. In assessing whether or not this is appropriate consideration should be given to the presence of the following factors:
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• The applicant has spent a significant amount of time living in the UK accompanying their spouse during their service with HM Forces and has developed strong ties with the UK.
• There are close family living in the UK who are able to offer emotional and financial support.
• The applicant would find it difficult to function because of illness or disability without the help and support of relatives in the UK.
• The existence of a chronic medical condition where treatment in the UK would significantly improve the quality of life.

If one or more of these factors listed above are present, discretion may be exercised and settlement granted.

For the purpose of the guidance above where the serving soldier was legally married in their country of domicile to more than one wife UKBA will only allow one widow to come to the United Kingdom under the terms detailed above.

In the first instance this will apply to the wife the soldier married first.

Where there is proof that the first widow permanently waives her right, we will accept applications under this arrangement from the next married wife in turn.

For the purposes of this guidance UKBA would not regard anybody as a widow if they had remarried.

13. **Children (paragraphs 276X-276AC)**

To qualify for indefinite leave to enter or indefinite leave to remain as the child of a parent, parents or a relative present and settled, or seeking settlement in the UK under the HM Forces rule or of a serving member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, the following requirements must be met:

The applicant is seeking indefinite leave to join, or remain with, a parent, parents or a relative in one of the following circumstances:

- both parents are present and settled in the UK, or being admitted for, or being granted settlement on the same occasion; or
- one parent is present and settled in the UK or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, and the other is being admitted for, or being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service; or
- one parent is present and settled in the UK or being admitted for, or being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, and the other parent is dead; or
granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, and has had sole responsibility for the child’s upbringing; or

- one parent or a relative is present and settled in the UK or being admitted for, or being granted settlement on the same occasion under the HM Forces rule or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child’s care; and

  - the applicant is under the age of 18; and
  - the applicant is not leading an independent life, is unmarried, and has
  - not formed an independent family unit; and
  - does not fall for refusal under the general grounds for refusal; and
  - if seeking indefinite leave to enter holds a valid entry clearance for entry in this capacity; or
  - if seeking indefinite leave to remain has leave to enter or remain in the UK.

Caseworkers should note the lack of any maintenance or accommodation requirements.

For the definition of “parent” please refer to Chapter 8 Section 5.

For the definition of “present and settled” please refer to Chapter 8 Section 1.

13.1 Cid Codes

For statistical codes please see Chapter 8 Section 5 paragraphs 3.4 and 3.6.
For examples of refusal formulae please refer to Chapter 8 Section 5 Annex U.

13.2 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.

13.3 The importance for dependants of observing the stated purpose of their settlement visa
Firstly, where a settlement visa is issued to a dependant (including an overage dependant child or other adult relative), it should be made clear to them that the visa is only valid for travel to the UK:

- as the dependant of a main applicant already settled in the UK or who is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years’ continuous service, or
- when accompanying the main applicant who is at the same time being admitted for settlement in the UK, or
- when joining a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 year’s continuous service.

A person holding a dependant's visa but who is not joining or accompanying the main applicant (e.g. a former Gurkha) is liable to be refused entry under paragraph 321 of the Immigration Rules (false representations, deception, change of circumstances since visa issued, etc).

13.4 Dependants of HM Forces members who naturalise as a British citizen whilst still serving

The position of dependants of foreign and Commonwealth HM Forces members alters if their sponsor naturalises as a British citizen whilst still serving. Their dependants cease to be eligible for limited leave under paragraphs 276AD-276AF or 276AG-276AI (children) or for indefinite leave under paragraphs 276R-276W or paragraphs 276X-276AC (children).

Serving foreign and Commonwealth members of HM Forces who wish their dependants to benefit from the provisions for settlement on the basis of their 5 years continuous service will therefore need to ensure that they do not acquire British citizenship before their dependant’s applications for settlement have been decided.

Where the serving sponsor has been naturalised as a British citizen, their spouses, civil partners, unmarried and same-sex partners would need to apply for probationary leave to remain or enter (or indefinite leave, if they qualify) under paragraphs 277-289 (as spouses or civil partners) or paragraphs 295AA-295O (as unmarried and same-sex partners).

The position of dependent children of serving HM Forces members who have acquired British citizenship whilst serving, will depend on their age and place of birth.

Children born in the United Kingdom to a serving HM Forces member (parent) acquire British citizenship automatically at birth under section 1(1) of the BNA 1981 by virtue of being born to a parent who is settled in the United Kingdom for nationality purposes. A child born to a former HM Forces member who has been discharged from duty and who has acquired indefinite leave to remain in the United Kingdom will also acquire British citizenship automatically at birth under section 1(1) of the BNA 1981 by virtue of the parent being settled for nationality purposes.
Children born in the United Kingdom to a parent who, after their birth, becomes a serving HM Forces member are eligible to register as a British citizen whilst a minor under section 1(3) of the BNA 1981.

A person, including those over the age of 18 years, born in the UK whose parent does not become a member of the armed forces or settled before that child reaches the age of 18 and who is not therefore eligible for British citizenship under section 1 of the BNA 1981 may be registered under section 1(4) of the BNA 1981 if s/he meets the requirements of that section. (The applicant must not have been absent from the UK for more than 90 days in each of the first 10 years of their life).

Minors born outside of the United Kingdom who accompany a serving HM Forces member (parent) to the UK may be registered as a British citizen at the discretion of the Secretary of State under section 3(1) of the BNA 1981 if, and only if, their parent subsequently naturalises as a British citizen under section 6 of the BNA 1981.

However, there are no registration provisions for adult children over 18 years born outside the UK who accompany a serving HM Forces member (parent) to the UK. Such persons will first need to apply for indefinite leave to remain or enter under the immigration rules (e.g. paragraph 317, or for discretionary treatment under paragraphs 276X-276AC as described in paragraph 14.2 above) and then qualify for naturalisation under the normal route (e.g. fulfil the 3 or 5 years residence requirement as set out in section 6 of the BNA 1981).

13.5 Orphans

Orphans of foreign and Commonwealth members of HM Forces (including Gurkhas) who are under the age of 18 would normally need to qualify for settlement in the UK under a specific provision in the Immigration Rules.

However, should a child of a serving foreign and Commonwealth HM Forces member (including Gurkhas) become orphaned following the death of their parent in connection with operational service (see paragraph 12.3.), and compelling or other family considerations make it appropriate for the child to remain in the UK, then discretion may be exercised and settlement granted.

In exceptional circumstances discretion may be exercised in individual cases where the parent’s death was not in connection with operational circumstances. There should be strong reasons why settlement in the UK is appropriate and consideration should be given to the presence of the following factors:

- The applicant has spent a significant time living in the UK accompanying their parent during their parent’s service with HM Forces and has developed strong ties with the UK;
- There are close family living in the UK who are able to offer emotional and financial support;
- The applicant would find it difficult to function because of illness or disability without the help and support of relatives in the UK;
- The existence of a chronic medical condition where treatment in the UK would significantly improve the quality of life.
January 2015

- The applicant was, or is, pursuing a full time course of study in the UK and wishes to continue this study here.

If one or more of the factors are listed above discretion may be exercised and settlement granted.
Annex A

Discretionary Arrangements For Former Gurkhas Discharged Before 1 July 1997

In May 2009 the Home Secretary announced that any Gurkha with more than four years service who had been discharged from the Brigade of Gurkhas before 1 July 1997 would be eligible for settlement in the UK.

Applications from former members of the Brigade of Gurkhas discharged before 1 July 1997 should be considered for the exercise of discretion under this guidance. These discretionary arrangements are supplementary to the existing provisions of the Immigration Rules.

This scheme recognises the unique nature of the service given by the Brigade of Gurkhas and is offered to them alone on an exceptional basis. It applies to those who served in the Brigade of Gurkhas from January 1948 when it became part of the British Army. Applications from former Gurkhas who were discharged before January 1948 should be considered on a case by case basis.

Discretionary settlement criteria

Settlement applications from former members of the Brigade of Gurkhas who were discharged before 1 July 1997 will normally be approved, provided the former Gurkha served for at least 4 years in the Brigade.

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. In cases where there is evidence of serious criminal activity the normal threshold should be met in order for the case to be considered for refusal of settlement. That is a custodial sentence of at least 12 months if the offence was committed in the UK or, if committed outside the UK, the offence would have been punishable by a custodial sentence of at least 12 months if it had occurred within the UK. Cases where such information comes to light should be referred by caseworkers in the normal way.

Should an application be received from a former member of the Brigade of Gurkhas who is in receipt of a MoD disability pension, or who has a level 1 -3 award for gallantry but who has served less than 4 years” in the Brigade, discretion should normally be exercised and the settlement application approved.

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
Annex B

Discretionary Arrangements for former Gurkha widows whose husbands were discharged before 1 July 1997.

This scheme recognises the unique nature of the service given by the Brigade of Gurkhas and is offered to them and their widows alone on an exceptional basis.

Widows of former Gurkhas discharged prior to 1997 may apply for settlement. The applicant should qualify for settlement if it can be shown that her late husband and former Gurkha would have met the criteria set out at Annex A above.

Where the deceased former Gurkha was married to more than one wife under Nepalese law, UKBA will only recognise one widow of a former Gurkha to be eligible to apply for settlement in the UK under this concession and that will be the first wife recorded on the Kindred Roll (British Army records).

Where there is proof that the first widow permanently waives her right, we may accept applications under this arrangement from the next in turn according to date in which they were married which can be verified by the details on their Kindred Roll (British Army Records).

If a widow who would otherwise have qualified under these criteria has remarried they will not be eligible to apply to come to the UK under this Discretionary Arrangement.

This Discretionary Arrangement only applies to widows. Children or other dependant relatives of former Gurkhas will have to meet the relevant Immigration Rules or other appropriate discretionary criteria.

Widows and Orphans

Applications from widows and orphans of former Gurkhas post 1 July 1997 should be considered in line with the guidance set out in Chapter 15 Section 2A. Where an application for settlement in the UK is received from the widow, widower, civil partner, bereaved unmarried or same-sex partner or orphan of a deceased Gurkha and where the latter’s death occurred in connection with operational service, discretion will normally be exercised to grant settlement.

Where the former Gurkha’s death was not in connection with operational service their dependants would not normally qualify for entry under the terms of this guidance and would be expected to qualify under another category of the Immigration Rules (for example, paragraph 317 if they have close family in the UK). 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 12.3 and 13.5.

Under this guidance it will only be possible for one Gurkha widow to come to the UK.

Where the deceased former Gurkha was legally married to more than one wife under Nepalese law, this arrangement will apply to the first widow on the kindred role.
March 2010

Where there is proof that the first widow permanently waives her right, we will accept applications under this arrangement from the next in turn according to the order in which they were registered on the kindred roll.

For the purposes of this guidance UKBA would not regard anybody as a widow if they had remarried.
Annex C

Indicative letter to send to applicant whose application has been considered and
where an in principle decision has been made to grant settlement, subject to any
other factors coming to light. This letter is not to be used where, on the evidence
available, there is reason to believe that a grant of settlement in unlikely to be
appropriate.

To whom it may concern

Name: XXXX XXXX
DOB: dy/mn/yr
Nationality: Nationality
Service no: No.
Unit: Unit Name
Address: Full Address

This letter confirms that the above named is currently serving with [Unit name] and has
applied for indefinite leave to remain in the UK in anticipation of [his/her] discharge from H M
Armed Forces on [date of discharge].

As a member of HM Armed Forces (HMAF), XXXX is exempt from immigration control
under section 8(4)(a) of the Immigration Act 1971 and it will not therefore be possible to
complete processing of his/her application until after he/she is discharged from HM Armed
Forces. Although it is not possible to guarantee the outcome of an application before the
final decision, I can however confirm that preliminary consideration of the information and
evidence submitted in support of his/her application indicate that XXXX is likely to be
granted indefinite leave to remain (settlement) very shortly after their date of discharge. In
the event of indefinite leave being granted, this will be notified to XXXX by means of an
endorsement placed in their passport which will be returned to the applicant as soon as
possible after their discharge date.

So whilst not providing a guarantee, this letter serves to indicate that settlement is likely to
be granted and is issued to assist XXXX in making appropriate arrangements for
employment after discharge and for liaising with the relevant authorities for housing,
healthcare and benefits.

[ * I can also confirm that an application for settlement on behalf of his/her dependants has
also been submitted and if approved they would normally be granted settlement in line with
XXXX, subject to the proviso that his/her wife/husband/civil partner should have been
married/in a civil partnership with XXXX for the two years prior to his/her discharge. ]

Please do not hesitate to contact this office should further information be required.
Medical discharge proforma for completion by MoD discharging unit or SPVA (if discharged)

Dear [Applicant title /name]

In order that the UK Border Agency can consider your application for settlement in the light of all the relevant information about your case, I should be grateful if you would sign and forward this request for further information to your discharging unit or (if already discharged) to the Service Personnel and Veterans Agency (SPVA) who should return the completed form to the UK Border Agency at the address below. SPVA address: Service Personnel and Veterans Agency (SPVA), SPVA, Room 6205, Norcross, Blackpool, FY5 3WP

I agree to the MoD’s disclosure to the UK Border Agency of the information indicated below.

(Signature) (Date)

(Print name) (Unit) (Service number)

To: RN/Army/RAF discharging unit or SPVA. Please supply the following information to the UK Border Agency in relation to my case.

- date of enlistment, date of discharge, length of service at date of discharge
- terms of discharge and corresponding key to what the terms imply
- details of injury/injuries/medical condition
- circumstances of injury sustained/illness (in operational theatre, in training, off-duty)
- whether or not attributable to service
- enclose copy of F Med 133 and * F Med 19 (Army / RAF) or F Med 23 (RN) medical report or other independent medical report (*delete as applicable)
- available evidence of current condition and likely prognosis
- indication of availability of any further treatment required in country of origin
- any relevant personal conduct issues including any criminal activity
- any other (non-medical) factors involved in decision discharge
- Signature of Unit CO
- Unit contact details

Please return this form to: Caseworking Teams SET 1 – 3 (Armed Forces), UK Border Agency, 7th Floor, Lunar House, 40 Wellesley Road, Croydon, CR9 2BY
Table to assist consideration of HMAF „medically discharged“ cases (see section 11) according to:

- circumstances of injury/medical condition
- length of service completed at date of discharge

Annex E
Notes: table assumes applicant meets requirements for settlement (paragraphs 276F - 276Q) other than requirement to have completed 4 years' service.

A grant of limited Leave Outside the Rules on code 1A would give entitlement to work and claim benefits pending medical treatment, but not lead to settlement.

<table>
<thead>
<tr>
<th>Source Of Injury/Medical Condition</th>
<th>Period Of Service Period Completed At Date Of Discharge</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>before completion of initial training</td>
</tr>
<tr>
<td><strong>within operational theatre</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>outside operational theatre</strong></td>
<td>Settlement normally inappropriate unless very serious or catastrophic injury involved</td>
</tr>
<tr>
<td><strong>attributable to service in HMAF</strong></td>
<td>Possible grant of limited leave outside the rules to complete treatment</td>
</tr>
<tr>
<td><strong>outside operational theatre</strong></td>
<td>Settlement normally inappropriate</td>
</tr>
<tr>
<td><strong>non-attributable to service in HMAF</strong></td>
<td>Possible grant of limited leave outside the rules to complete treatment</td>
</tr>
</tbody>
</table>
Authorisation Form to be completed by a former Gurkha seeking indefinite leave

Application Reference (if known):

Dear Applicant title
/name

In order that the UK Border Agency can consider your application for settlement in the light of all relevant information about your case, I would be grateful if you would sign and return this form as quickly as possible. It authorises the UK Border Agency to obtain a copy of documentary material held by the Ministry of Defence that relates to your length of service in the Brigade of Gurkhas. This information will be used solely in relation to your application for indefinite leave to enter or remain in the United Kingdom.

I have understood the above and agree to the MoD Record Office’s disclosure to the UK Border Agency (UKBA) of information requested by UKBA in connection with my application for indefinite leave to remain or enter, as indicated below.

(Applicant signature)  (Date)  (Service number)

(Print name)  (Date of Birth)  (former Gurkha unit)

Please return this completed form

to: EC Post Address

Or

SET 1-3 (Armed Forces) UK Border Agency, 7th Floor, Lunar House, 40 Wellesley Road, Croydon, CR9 2BY United Kingdom
Annex G

Information Request To Gurkha Records Office, Pokhara

To: Gurkha Records Office.

From: UK Border Agency Officer (tel: )

Applicant name: XXXXXXXXX

Date of Birth: XXXXXXXXX

Service number: XXXXXXXXX

Former Unit(s): XXXXXXXXX

1. I attach a signed letter, authorising disclosure of information held by the Gurkha Records Office, relating to the above named.

2. I would be grateful if you would supply by secure post to the address below* the following information required by the UK Border Agency:

   * a copy of information and documents held relating to the above named’s service record showing the length of service and date of, and reason for, discharge

3. Please complete, sign and date below.

   To be completed by records officer

   I hereby attach a copy of information requested by the UK Border Agency relating to the above named comprising sheets in total.

   Signature
   Print full name

   Position
   Date

4. Please return this completed form and information requested to: EC Post Address or

SET 1-3 (Armed Forces) UK Border Agency,
7th Floor, Lunar House, 40 Wellesley Road, Croydon, CR9 2BY, United Kingdom
Annex H

Changes to applications from overstayers - Consideration of a period of overstaying of 28 days

Applications from foreign and Commonwealth (including Gurkhas) service personnel applying for indefinite leave to remain on discharge from HM Forces

From 1 October 2012 all applications for indefinite leave to remain made since 8 July 2012 will fall for refusal if the applicant has overstayed by more than 28 days on the date of application. The 28 day period of overstaying is calculated from the latest of:

- the end of the last period of leave to enter or remain after their discharge from HM Forces,
- the end of any extension of leave under sections 3C or 3D of the Immigration Act 1971, or
- the point that a migrant is deemed to have received a written notice of invalidity, in accordance with paragraph 34C or 34CA of the Immigration Rules, in relation to an in-time application for further leave to remain.

Case workers should note that the 28 days runs from the last date of leave after a service person’s discharge. UK Border Agency policy is that foreign and Commonwealth HM Forces personnel (including Gurkhas) are granted 28 days leave to remain from the date of their discharge to regularise their status in the UK. However this does not always happen and the leave to remain is not granted automatically. Caseworkers must not assume that last date of leave will be 28 days after their discharge from HM Forces.

When refusing an application on the grounds that it was made by an applicant who has overstayed by more than 28 days the caseworker must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying. The threshold for what constitutes „exceptional circumstances” is high, but could include delays resulting from unexpected or unforeseeable:

- serious illness which meant that the migrant or their representative was unable to submit the application in time (where supported by appropriate medical documentation)
- travel or postal delays which meant that the migrant or their representative was unable to submit the application in time.
- inability to provide necessary documents. This would only apply to exceptional or unavoidable circumstances beyond the applicant's control, such as UK Border Agency being at fault in the loss of, or delay in returning, travel documents, or delay in the migrant being unable to replace documents following loss as a result of theft, fire or flood (where supported by evidence of the date of loss and the date replacement documents were sought).
- inability to provide information for a reason which is directly attributable to the individual's armed forces service. This could include deployment abroad at short notice or the fact that the commanding unit may have retained or lost the service personnel's documents, thereby delaying application. This would also apply to dependants such as spouses and children who are unable to make an application under the armed forces rules in time because their military sponsor is unable to submit his/her documents in light of of service related reasons.

Any decision to exercise discretion and not refuse the application on these grounds must be authorised by a senior caseworker (at SEO grade or above). When granting leave in these circumstances the migrant must be granted leave outside the rules which has the same duration and conditions attached that would have applied had they been granted leave under the rules.
Armed Forces Rules that remain unaffected by this guidance

The approach to those persons making applications who have overstayed for 28 days set out above will not affect the following Armed Forces routes:

☐ Paragraph 276U - Requirement for indefinite leave to remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom under paragraphs 276E to 276Q or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service

☐ Paragraph 276AA - Requirements for indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service

☐ Paragraph 276AD - Requirements for leave to enter or remain as the spouse, civil partner, unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971

☐ Paragraph 276AG - Requirements for leave to enter or remain as the child of an armed forces member exempt from immigration control under section 8(4) of the Immigration Act 1971

☐ Those applying under an Armed Forces concession e.g. applications from Gurkhas discharged before July 1997 applying under the special discretionary arrangements.
Annex J

Annex J has been replaced by ‘HM Forces: Partners and Children: Transitional arrangements’ guidance which can be found in the modernised guidance section of Horizon.

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.