



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Numbers: IA/12333/2014**

**IA/12340/2014**

**IA/12352/2014**

**IA/12349/2014**

**THE IMMIGRATION ACTS**

**Heard at: Manchester  
On: 27<sup>th</sup> March 2015**

**Decision Promulgated  
On 21<sup>st</sup> May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Mr Gopal Adhikari  
Mina Kumari Adhikari  
Master Gorakh Adhikari  
Master Gopal Adhikari  
(no anonymity direction made)**

Appellants

**and**

**Secretary of State for the Home Department**

Respondents

Representation:

For the Appellant: Ms Solanki, Counsel instructed by Lawrence Lupin Solicitors

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellants are all nationals of Nepal. They are respectively a husband, wife and their two minor sons. They appeal against the decision of the First-tier Tribunal (Judge Mathews) to dismiss their

linked appeals to remove them from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999<sup>1</sup>.

2. The Appellants had no leave when on the 27<sup>th</sup> January 2014 they applied for leave to remain on human rights grounds. The applications particularly relied on the fact that Gorakh Adhikari had at that point been in the UK for over 7 years, and that Gopal Jnr had been in the UK since his birth on the 5<sup>th</sup> February 2009.
3. The applications were refused by way of letter dated 25<sup>th</sup> February 2014. The Respondent considered the position of the adults first. Neither adult applicant could qualify under the provisions in Appendix FM because neither had a 'partner' with any leave upon whom they could rely as a sponsor; as they are still together neither could rely on the provisions for 'parents' as success under that route depends upon the applicant being a single parent. It is further found that it would be reasonable for both children to leave the UK and go to Nepal. Consideration is then given to paragraph 276ADE of the Immigration Rules. The applications of the adults under this provision are rejected as they have not lived in the UK long enough; in respect of the children reference is made to 276ADE(1)(iv) and the Respondent concludes that there is no evidence to indicate that it would be unreasonable to expect the children to relocate.
4. When the matter came before the First-tier Tribunal Judge Mathews heard that neither Gorakh nor Gopal Jnr can read, write or speak fluent Nepalese. There are family members in Nepal, in particular grandparents, but the adult Appellants were concerned that it would be very difficult for the children to relocate now. They are used to life in the UK. Life in Nepal is very hard. The eldest child spent the first three years of his life there but has no memory of it. The children both have established private lives in the UK. They relied on a report by an independent social worker in this regard, and particular emphasis was placed on the outstanding educational achievement of Gorakh. Judge Mathews accepts that he has been offered a place at Liverpool Blue Coats School, and that both boys are bright and well behaved students. The Tribunal was not satisfied, having regard to this evidence, that it would be "unreasonable" for the children to leave the UK. The reasons given are as follows:
  - The adult Appellants have spent most of their lives in Nepal, were educated and worked there. They have further enhanced their skills and employment prospects during their time in the UK and would therefore be able to find work again;
  - The children have close family members in Nepal including

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<sup>1</sup> Decisions to remove dated 25<sup>th</sup> February 2014

grandparents;

- Nepali is the language used in the family home in the UK and the children do have some Nepali language skills;
- The children have had experiences with the immigration authorities which they found traumatic (the family were detained pursuant to an earlier attempt to remove them from the UK) which is exacerbated by their parents' anxiety, but this will not persist upon removal because they will be supported by their parents and wider family network in Nepal
- It is in their best interests to remain with their parents

5. The Tribunal weighs these factors in the balance before concluding, at paragraphs 35-36:

“35. Gorakh’s interests are primary, but not the sole determining factor in such assessments. I find that he will suffer upheaval and in the short term some distress in leaving his school and returning to Nepal. But I must balance to the position of all appellants, the fact that they have always known of their limited status in the UK, and the need for the fair application for immigration rules. I approach the question in light of all the evidence including my findings below as to the position of the other family members.

36. He would be returning with his complete family, to the country of his birth in which his father will be able to find employment, with the benefit of wider family support, and with education open to him. I recognise that he will have to develop his skills in Nepali. I find that he is still young and will be able to adapt rapidly. I do not find that asking a bright child, within a loving family, with financial support, to return to his country of birth in these circumstances would be unreasonable.”

The appeals were accordingly dismissed.

### **Error of Law**

6. Following a hearing on the 21<sup>st</sup> November 2014 I made the following findings in respect of the decision of the First-tier Tribunal. The Respondent was that day represented by Mr Diwnycz, a Senior Presenting Officer; the Appellants were represented by Ms King of Counsel.

7. The grounds of appeal were that the First-tier Tribunal erred in its approach to Gorakh’s application under 276ADE(1)(iv) in that there is an incomplete assessment of his best interests. Particular reliance was placed on the judgement of Baroness Hale in ZH (Tanzania) v SSHD [2011] UKSC 4 in which it was held that an assessment of ‘best interests’ encompasses consideration of “the level of the child’s

integration in this country and the length of absence from the other country...support, socially, culturally and medically...social and linguistic disruption of their childhood...loss of educational opportunities". The grounds further relied on the report of the independent social worker who concluded that the children's future would be adversely impacted by removal because of the strength of their links here (outside of their family): it is submitted that the determination failed to give adequate consideration to this evidence. In her oral submissions Ms King expanded on her written grounds to submit that 276ADE(1)(iv) contains a presumption that after a period of seven years in the UK a child will have set down roots to the extent that it would normally be contrary to his best interests to remove him: she submits that this presumption cannot be rebutted simply by pointing to the need to maintain immigration control, otherwise the provision would be "self defeating".

8. The Respondent submitted that the reasoning of Judge Mathews is entirely sound. Although he agreed that the 'seven-year' rule should be the starting point Mr Diwnycz contended that "reasonable" should be given its ordinary meaning, and in this case there was nothing to say it was unreasonable that these children should go to live in the country of their nationality. If the determination only dwelled briefly on the evidence of the social worker that was because she had only spent a brief time with the children and there was a limited weight that could be attached to her conclusions as to best interests. That was a matter that was to be assessed by the Tribunal with reference to all of the circumstances, including what might have awaited the children in Nepal.
9. The parties were in agreement that "reasonable" within the context of paragraph 276ADE (1)(iv) does not mean *Razgar* "proportionate". Both contend that it should be given its ordinary meaning, and that all factors relevant *to the child* should be taken into account. The First-tier Tribunal in this case considered a number of factors including the family, education and language skills of the children. Where then, if anywhere, did the Tribunal err?
10. The first error identified by Ms King is in the Tribunal's failure to make a complete ZH assessment of Gorakh's best interests. It was uncontroversial that his best interests lay in remaining with his parents but in this case that was only the starting point of the assessment. The holistic approach advocated in ZH and elsewhere requires the decision-maker to assess the entirety of the child's private, as well as family life. That encompasses his relationships with his teachers and friends, and crucially, in the context of this rule, the extent to which his private life is entrenched in the UK. Whilst the Tribunal has considered a number of different factors I find that in this case the determination has failed to give adequate attention to "the

level of the child's integration in this country and the length of absence from the other country": identified by Baroness Hale in ZH as a significant factor in and of itself.

11. That focus - on the established private life of the child - is what has underpinned this rule since its inception as a "concession" outside of the Rules in the form of DP5/96. That policy, and those which followed, created a "general presumption" that enforcement action would "not normally" proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated<sup>2</sup>. As the policy statement<sup>3</sup> which accompanied the introduction of paragraph 276ADE (1)(iv) put it: "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that *removal would normally not be in the best interests of the child*" [my emphasis]. The current guidance reaffirms that this is the starting point for consideration of the rule. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*' gives the following guidance:

'11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?'

The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.

The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.'

12. The IDI goes on to list a number of factors that should be taken into account. At paragraph 35 of this determination it is apparent that in

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<sup>2</sup> For a detailed history of the rule and its development see Dyson LH in Munir v SSHD [2012] UKSC 32 paras 9-13

<sup>3</sup> The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

this case the Tribunal has balanced all of those factors weighing in Gorakh's favour against the fact that his parents have no leave and have always known their status in the UK to be precarious. Nowhere has recognition been given to the Respondent's own stated policy that after seven years removal will *normally* be contrary to the child's best interests. Beyond stating that it is in Gorakh's best interests to remain with his parents no express finding is made in respect of whether it would be contrary to his best interests to leave the UK. Nor is any consideration given to whether the "strong reasons" mentioned in the IDI as being capable of rebutting the presumption are present in this case.

13. For those reasons I found that the decision should be remade. Due to the passage of time and the potential significance of that for the children, the parties invited me to reconvene the hearing and hear further submissions, with evidence if necessary.

### **The Re-Made Decision**

14. At the re-making I heard oral evidence from Gopal Adhikari and from Mrs Susan Evans, a teacher at Phoenix Primary School who currently teaches Goral and formerly taught Gorakh.
15. The parties were in agreement that the legal framework to be applied to these appeals was as follows. These were applications made on human rights grounds. The date of the application being 27<sup>th</sup> January 2014 these fell to be considered under the "new Rules". The Appellants conceded that none of them could succeed under Appendix FM (family life) and that neither adult Appellant, nor Goral, could succeed under paragraph 276ADE(1) (private life) since none have lived here for the requisite period. It is submitted that Gorakh should succeed under paragraph 276ADE(1)(iv); Mr Harrison agreed that this should be my first consideration, and that I should apply the guidance given in the IDI in determining whether he does. If Gorakh can show, on a balance of probabilities, that he met the requirements therein, it would be appropriate to consider the appeals of the remaining family members under Article 8 outside of the Rules, with particular regard to s117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Goral's Article 8 appeal falls to be determined in line with those of his parents and brother.
16. I therefore begin by consideration of Gorakh's appeal.

*Gorakh: Paragraph 276ADE(1)*

17. The provision in issue is sub-paragraph (iv) of paragraph 276ADE(1) of the Immigration Rules. At the date of this decision that required an applicant to show that he:

‘(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ‘

18. It is accepted that Gorakh has lived continually in the UK since December 2006. He has therefore lived here for some eight and a half years.

19. The second limb of the test requires him to show that it “would not be reasonable” to expect him to leave. As I set out above the IDI indicates that it remains the Secretary of State’s view that it will *normally* be contrary to a child’s best interests to expect him to leave after such a period of long residence and that *strong reasons* are required to refuse a case where the child had lived here for more than seven years. When the government introduced the “reasonableness test” in the context of the Immigration Act 2014 (inserting 117B (6) into NIAA 2002) Lord Wallace of Tankerness underlined that this remained the position:

“... we have acknowledged that if a child has reached the age of seven, he or she will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and may be developing social networks and connections beyond the parents and home. However, a child who has not spent seven years in the United Kingdom either will be relatively young and able to adapt, or if they are older, will be likely to have spent their earlier years in their country of origin or another country. When considering the best interests of the child, the fact of citizenship is important but so is the fact that the child has spent a large part of his or her childhood in the United Kingdom”<sup>4</sup>.

20. All of this guidance recognises that after a period of seven years residence a child will have forged strong links with the UK to the extent that he or she will have an established private life outside of the immediate embrace of his parents and siblings. The Upper Tribunal has emphasised that this is all the more so for children who are old enough to understand the value of those relationships: see Azimi-Moeyed [2013] UKUT 00197 (IAC). It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which in themselves attract weight. The fact that the child might be able to adapt to life elsewhere is a relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his “private life” in the UK is everything he knows. That is the starting point, and the task of the decision-maker is to then look to other factors to decide whether, on the particular facts of this case, these displace or outweigh the presumption that interference with that private life will normally be

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<sup>4</sup> At column 1383, Hansard 5<sup>th</sup> March 2014

contrary to the child's best interests. Those factors are wide-ranging and varied. The IDI gives several examples including, for instance, the child's health, whether his parents have leave, the extent of family connections to the country of proposed return. The assessment of what is "reasonable" will call for the Tribunal to weigh all of these matters into the balance and to see whether they constitute "strong reasons" to proceed with removal notwithstanding the established Article 8 rights of the child in the UK.

21. Against that background I make the following findings of fact.
22. Gorakh has an established private life in the UK. A large part of that centres on his education. Mrs Susan Evans adopted her witness statement dated 19<sup>th</sup> March 2015. She has been a teacher at Pheonix Primary School for 24 years. She has taught both boys. She described this family as "an asset to the community" who are "one of the nicest families known to the school". She has never attended a hearing like this before and nor, to her knowledge, had any other member of staff. The school agreed to send her because "every teacher would like a class full of Gorals and Gorakhs. They are hardworking and dedicated. Their parents are always there for them and the kids are delightful, pleasant and well-mannered". She told me that both children are well behaved, hard working and intelligent but that Gorakh in particular has really excelled. His SATS scores were 6 across the board when the highest the school would normally expect at the end of year 6 would be a 5. In gaining a place at Blue Coats he is only the third child that she could recall getting a place there in over twenty years teaching at Pheonix Primary. It is a real achievement. She was referred to a letter dated 13<sup>th</sup> March 2015 from Steven Cox, Deputy Headteacher of Blue Coats. Therein he states that at his present level of achievement Gorakh is on target for all A/A\* grades in his GCSEs. She agreed that this was a realistic assessment given Gorakh's performance so far, although one could never say with certainty what grades a child will get in exams.
23. The evidence of Mrs Evans was entirely consistent with all of the other documentary evidence about Gorakh's ability and dedication to his education. I find that he is an exceptional student who has an outstanding academic ability and approach to learning. He has made a substantial effort to integrate and to do well in the British education system. I am also satisfied, having regard to the evidence of Gorakh himself, his parents, Mrs Evans and Mr Cox that he is a popular boy who has a close group of friends. He enjoys Tae Kwan Do and swimming. All of these matters serve to illustrate the quality of the private life enjoyed by Gorakh in the UK. Mr Harrison submits that Gorakh would find a new school and make new friends in Nepal. No doubt that is true. Nevertheless I find it would be contrary to his best interests to disrupt his education and friendships by removing him



now. That is one relevant factor in determining whether his removal would be “reasonable”.

24. The undisturbed findings of Judge Matthews are that Gorakh does speak some Nepali and that as a bright young man he would quickly gain further proficiency if he were to be removed. His paternal grandparents live there, albeit in a remote village, and although there was no evidence to this effect I accept that the Appellants are likely to have extended family members in Nepal. Gorakh has been brought up as a Hindu and has been taught some aspects of his cultural heritage. These are all matters that would aid his integration into Nepal. That said I accept that he has not been to that country since he was three years old and is unlikely to hold any substantial memories of life there. I accept what Mr Adhikari told me about how hard life is in Nepal. It is very different from Liverpool and the children do not have any significant contact with the Nepali “diaspora” in the UK. As such Gorakh’s understanding of what life is like in Nepal is very limited. His parents would obviously be able to help and support him, but his ignorance of the cultural norms of Nepal remain of significant concern.
25. The Appellant’s solicitor submitted some country background material to the effect that it can be difficult to register as a Nepali citizen. Ms Solanki sensibly chose not to pursue this submission. The article, from the BBC News website, was concerned primarily with children who have gained nationality through their mother only, who face discrimination in law and practice in having their citizenship registered. There was nothing in this article to support the contention that either Gorakh or Goral would face any problems in gaining recognition of their nationality in Nepal.
26. In his handwritten letter of the 15<sup>th</sup> May 2014 Gorakh himself expresses his concerns about possible removal from the UK. He describes his fears about how his education will suffer because he cannot read or write Nepali, and how he does not want to leave his friends here behind. He states that he was “devastated” at an earlier attempt to remove the family. In accordance with the guidance in ZH (Tanzania) I have attached some weight to Gorakh’s own opinions. I accept that he does not want to go to Nepal and that he would much prefer to stay here and continue his friendships and education as they are.
27. So far Gorakh has established that he has a very substantial private life in the UK, and only a limited understanding of what life would be like in Nepal. He has stated that he would like to be able to remain in the UK. There are no health issues for either child and I find that there would be no obstacles in them having their right to Nepali nationality recognised. I remind myself at this stage that the IDI

indicates that I should consider whether there are strong reasons why in this case, removal is reasonable notwithstanding the period of long residence.

28. Mr Harrison submits that what weighs heavily against Gorakh is that his parents have no leave, and have not had any leave for a very long time. His father was initially granted leave to remain as a student but has been an overstayer since 2009. Since then he has made a string of unmeritorious applications to be able to remain in the UK. In April 2010 he made an application on human rights grounds; that being rejected he made a claim for asylum which was roundly rejected all the way up to the Court of Appeal; a fresh claim was then attempted, a judicial review, detention, a further judicial review and then finally, the refusals against which these appeals are brought. What this sorry history illustrates is that a) this family have no current leave to remain, b) the adults have done everything that they possibly could to frustrate removal (bar, as Ms Solanki notes, going to ground) and c) that since November 2009 the private life of these children has been developed in the UK only because their parents chose to stay when they had no right to do so. I agree with Mr Harrison that the long residence of Gorakh has been facilitated purely by the actions of his parents in refusing to accept the decision of the Secretary of State that they needed to leave the UK. I also agree that this is a matter which should be weighed in the balance when assessing whether Gorakh's removal is "reasonable".
29. I have considered all of the relevant factors in the round. I find that if Gorakh were to be sent to Nepal he would be admitted and permitted to live there, with all the benefits that nationality of that country has to offer; he would have an education (albeit unlikely of the standard offered by Liverpool Blue Coats) and the benefit of getting to know his grandparents, learning his own culture and language. I heard evidence that the family are currently supported by Mr Adhikari's brother who sends them money from Japan; presumably he could just as easily remit money to Nepal and I therefore consider it safe to assume that Gorakh would not face any undue socio-economic hardship, at least in the short term. I am nevertheless satisfied that it would be very much to Gorakh's detriment if he were to be removed from the UK now. I accept entirely the evidence that he is an exemplary student who has worked hard to build a private life of real quality and that this has paid off by him gaining a place at a prestigious and high-achieving school. Stability is an important factor in the development of young children and I have therefore attached considerable weight to the fact that he has "put down roots" here. Against those findings weighs the fact that Gorakh's current predicament is entirely the fault of his parents, who could have taken him back to Nepal when he was only six years old and before he integrated into the UK to the extent that he has. This was a difficult

and finely balanced decision but having had regard to all of the factors set out in the IDI I am satisfied that there are not sufficiently strong countervailing reasons to justify interference with Gorakh's private life in the UK. Although I have attached considerable weight to Mr Harrison's submissions I bear in mind that Gorakh was never the decision maker about where he should live, and that as a minor he cannot be blamed for the fact that for six of the eight and half years he has spent here he has had no valid leave. I therefore find, on balance, that it would not be reasonable to expect Gorakh to leave the UK now. He therefore meets the requirements of 276ADE(1)(iv) and his appeal is allowed under the Rules.

*Mr and Mrs Adhikari: Article 8*

30. I accept that the adult Appellants have established a private life in the UK where they have worked, worshipped, made friends and studied. I further accept that they share a family life with their sons. There would be an interference with those Article 8(1) rights if they were to be removed.
31. The decision to remove persons with no leave to remain is rationally connected to the legitimate Article 8(2) aim of protecting the economy and I accept that it is a decision that was lawfully open to the Respondent at the date she took it.
32. In assessing proportionality I have had regard to s117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). The maintenance of effective immigration controls is in the public interest and the adult Appellants have shown a consistent disregard for the Secretary of State's attempts at enforcing it. I heard oral evidence in English from Mr Adhikari and I accept that his sons speak it effectively as a first language, but it was clear that Mrs Adhikari has only limited English language skills, since she declined to give evidence when no interpreter was available at the hearing before me. There is no evidence that the family have ever claimed benefits and I accept that if Mr Adhikari were given the opportunity to work lawfully he would do so; I also bear in mind that he has been caught working illegally and that since 2009 his sons have been accessing state funded education to which they are not entitled. The private lives of each individual Appellant have all been established whilst their status in the UK has been either precarious or unlawful and as such I attach little weight to it in the context of Article 8 outside of the Rules. I have taken all of that into account, as I am mandated to do by the statute: Dube (ss.117A-117D) [2015] UKUT 90 (IAC). Ms Solanki concentrates her submissions on the final subparagraph of s117B:

'(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

33. It is not in dispute that Gorakh is a qualifying child, or that his parents have a genuine and subsisting parental relationship with him. Since I have found that it would not be reasonable to expect the child to leave the United Kingdom it follows that the public interest does not require the removal of his parents. Their appeals under Article 8 must therefore succeed.

*Gopal: Article 8*

34. I can be brief, since Mr Harrison realistically conceded that if his brother and parents succeeded then so too should he. Gopal was born in the UK on the 5<sup>th</sup> February 2009. He has known no other home. He attends school here and I have already set out the evidence of Mrs Evans to the effect that he is a valued member of the school community who has many friends and enjoys a warm relationship with teaching staff. His removal from the UK would be an interference with that private life. In respect of proportionality I must consider all of the factors listed in s117N(1)-(5) although I am bound to say that since he is a young child the effect of these must rationally be thought to be minimal. I do not understand it to be the Respondent's case, for instance, that it should be weighed against Gopal the fact that he is not financially independent. Having had regard to all of those factors, and placing significant weight on the fact that the control of our borders is in the public interest, I find that in the particular circumstances the Respondent cannot show the removal of this child to be proportionate.

**Decisions**

35. The determination of the First-tier Tribunal contains an error of law and it is set aside.

36. I was not asked to make a direction for anonymity and on the facts I see no reason to do so.

37. I re-make the decision in the appeals as follows:

"The appeal of Gorakh Adhikari is allowed under the Immigration Rules.

The appeals of each Appellant is allowed on human rights grounds."

Appeal Numbers: IA/12333/2014  
IA/12340/2014  
IA/12352/2014  
IA/12349/2014

Deputy Upper Tribunal Judge Bruce

15<sup>th</sup> April 2015

Post-script:

It will be noted that this determination was written on the 15<sup>th</sup> April. It was not typed and ready for promulgation until today. I apologise for that delay. I would also like to make it clear that in reaching my decision I gave no consideration to the earthquake that devastated parts of Nepal on the 25<sup>th</sup> April (and its aftershocks). That is no doubt a matter which the Respondent will nevertheless take into account when considering my findings.

Deputy Upper Tribunal Judge Bruce

19<sup>th</sup> May 2015