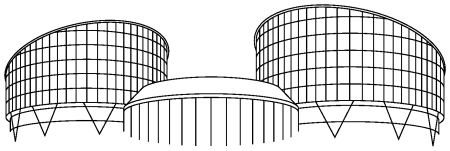

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BRITISH GURKHA WELFARE SOCIETY AND OTHERS v. THE UNITED KINGDOM

(Application no. 44818/11)

JUDGMENT

STRASBOURG

15 September 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of British Gurkha Welfare Society and Others v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano,
Pauliine Koskelo, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 23 August 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44818/11) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 10 June 2011 by the British Gurkha Welfare Society, a non-governmental unincorporated association which acts on behalf of 399 Gurkha veterans, Mr Tikendra Dewan, a joint Nepalese and British national born in 1953, and Mr Subarna Adhikari, a Nepalese national born in 1960 ("the applicants").

2. The applicants were represented by Mr E. Cooper of Slater and Gordon (UK) LLP (formerly Russell Jones & Walker Solicitors), a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. McLeod of the Foreign and Commonwealth Office.

3. On 16 January 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The historical background

5. Nepalese Gurkha soldiers have served the Crown since 1815, initially as soldiers in the (British) Indian Army. Following Indian independence in 1947, six Gurkha regiments were transferred to the Indian Army, while four regiments became an integral part of the British Army. More than 200,000 Gurkha soldiers fought in the two world wars, and in the past fifty years they have served in Hong Kong, Malaysia, Borneo, Cyprus, the Falklands, Kosovo, Iraq and Afghanistan. They have served in a variety of roles, mainly in the infantry but also as engineers and in signals and logistics units.

6. Today, they form the Brigade of Gurkhas ("the Brigade"), in which only Nepali nationals are eligible for service. The Brigade is not an operational brigade in the conventional sense; rather, it is an administrative entity which ensures that Gurkha units, into which all Gurkha soldiers are recruited and serve, are able to be integrated into – and form part of – other operational brigades in the British Army.

7. The Brigade was originally based in the Far East, in the region formerly known as Malaya. In 1971 the Brigade's base moved to Hong Kong. On completion of the handover of Hong Kong to China in July 1997, the home base moved to the United Kingdom. Consequently, the majority of Gurkhas are currently stationed in the United Kingdom, although since 1962 a section of the Brigade has been stationed in Brunei.

B. The Gurkhas Terms and Conditions of Service (or "TACOS")

1. Salary

8. Pursuant to a memorandum of understanding of 9 November 1947 ("the Tripartite Agreement"), the Governments of the United Kingdom, India and Nepal agreed that the salary of Gurkhas serving in the British Army would be set by reference to rates applied by India in respect of Indian soldiers so as to avoid competition between the Indian and British armies for Gurkha recruits. The Brigade's basic pay was therefore set in accordance with the Indian Pay Code, although cost-of-living allowances were paid for service outside Nepal. These allowances used to be calculated by reference to local living expenses (for example, in Hong Kong or Brunei), but in 1997, when the Brigade's home base moved to the United Kingdom, a "universal addition" was introduced to ensure that, whenever a Gurkha soldier was serving outside Nepal, his take-home pay would be similar to that of a non-Gurkha soldier in the British Army of comparable rank and experience. However, the "universal addition" was not treated as pensionable pay.

2. Accompanied service

9. Prior to 1 April 2006, Married Accompanied Service entitlement (that is, an entitlement for the soldier to be accompanied by wife and children) was for one married accompanied tour of between two and three years in the first fifteen years of service and for permanent accompanied service for Gurkhas ranked Colour Sergeant and above. However, with effect from 1 April 2006, those who had served for three years or more in the Brigade were entitled to Married Accompanied Service (in other words, they were entitled to be joined in the United Kingdom by their wives and children).

3. Retirement age

10. Gurkha soldiers are required to retire after fifteen years' service, subject to the possibility, dependent on rank, of one or more yearly extensions.

11. In comparison, other soldiers in the British Army are entitled to serve for twenty-two years.

4. Eligibility for settlement in the United Kingdom

12. Historically, Gurkha soldiers were discharged to Nepal and it was presumed that they would remain there during retirement.

(a) The 2004 amendments to the Immigration Rules

13. On 25 October 2004 the Immigration Rules (HC 394) were changed to permit Gurkha soldiers with at least four years' service who retired on or after 1 July 1997 (the date that the Gurkha's home base relocated to the United Kingdom) to apply for settlement in the United Kingdom. Approximately 90 per cent of the 2,230 eligible Gurkha soldiers have since applied successfully to settle in the United Kingdom with their qualifying dependants.

(b) The 2009 amendments to the Immigration Rules

14. On 21 May 2009 the Secretary of State for the Home Department announced a new policy under which all former Gurkhas who had served in the British Army for at least four years would be eligible for settlement in the United Kingdom. Approximately thirty-five per cent of those eligible have since applied for resettlement in the United Kingdom.

5. Pension entitlement

15. The Tripartite Agreement provided that the pensions of Gurkhas serving in the British Army would also be set by reference to the rates applied by India to Indian soldiers.

(a) The Gurkha Pension Scheme

16. In 1949 the Gurkha Pension Scheme ("GPS") was established by Royal Warrant and applied the former Indian Army Pensions Code to Gurkhas serving in the Brigade. Pension entitlements under the GPS were index-linked to the cost of living in Nepal as it was presumed that the Gurkhas would retire there. Pensions were immediately payable upon retirement and could not be deferred. A Gurkha who retired without having served fifteen years would be entitled to no pension whatsoever.

17. In 1981 Gurkha pensions were reviewed and the rate payable was set at the highest rate applicable under the Indian Army pension arrangements.

18. In 1999, following a ministerial review, the rates applicable to the pensions of Gurkhas in the Brigade were increased by over 100 per cent, taking them over the scales set by the Indian Army. The rationale for the increase was that a Gurkha who retired from the Brigade to Nepal would not receive the benefit of various schemes which soldiers retiring from the Indian Army could access, such as the provision of certain medical facilities. The increase applied to all Gurkhas regardless of the date of discharge.

(b) The Armed Forces Pension Scheme

19. Non-Gurkha soldiers retiring from the British Army are entitled to pensions under either the Armed Forces Pensions Scheme 1975 ("AFPS 75") or the Armed Forces Pensions Scheme 2005 ("AFPS 05") depending on when they commenced service. Neither scheme is index-linked with the cost of living in the soldier's country of origin.

20. Under the AFPS, soldiers are eligible for deferred pensions, payable at the age of 60, provided that they have rendered at least two years' service before leaving the British Army. In order to receive an immediate pension officers are required to serve for sixteen years and all other ranks are required to serve for twenty-two years; however, in practice fewer than one fifth of non-Gurkha soldiers in the British Army serve for sufficiently long periods to be eligible for an immediate pension.

21. The annual pension entitlement under the GPS is broadly equivalent – taking into account the adjustments made in 1981 and 1999 – to one-third of that under the AFPS.

(c) Review of Gurkhas Terms and Conditions of Service

22. Following the 2004 amendment to the Immigration Rules (see paragraph 13 above), the Secretary of State for Defence announced a review of the Gurkhas' Terms and Conditions of Service. The review noted that the 2004 amendment to the Immigration Rules and the changes to Married Accompanied Service (see paragraph 9 above) had changed the traditional assumption that British Gurkhas would retire in Nepal, and pointed to a

future in which they could be expected increasingly to regard the United Kingdom, rather than Nepal, as their family base. The Review Team therefore concluded that, the affordability issues notwithstanding, the major differences in Gurkha terms and conditions of service could no longer be justified on legal or moral grounds and recommended that they be modernised by bringing them largely into line with those available to the wider Army.

23. With regard to pensions, the review concluded that on balance the GPS was more suitable than the AFPS to support the life-cycle of the great majority of Gurkhas up until July 1997. However, moving the Brigade's base to the United Kingdom and the subsequent change to the Immigration Rules had altered the previously valid assumption that Gurkhas would retire in Nepal. For a Gurkha retiring to a second career in the United Kingdom, the GPS profile was

> "clearly wrong, paying sums too small to be useful at a time when he does not need them and an inadequate pension at retirement age. As the life profile of the typical Gurkha approaches that of his UK/Commonwealth counterpart, there can be little to be said in favour of providing them with such different pension benefit profiles."

24. The report recommended that serving and retired members of the Brigade should be allowed to transfer from the GPS to either AFPS 75 or 05, depending on when they enlisted. Those who were already in the GPS and wished to remain in it could do so, but it would be closed with effect from April 2006.

(d) The Gurkha Offer to Transfer

25. In March 2007 the United Kingdom formulated the Gurkha Offer to Transfer ("GOTT") and this was given effect in the Armed Forces (Gurkha Pension) Order 2007 ("the 2007 Order"). Gurkhas who retired before 1 July 1997 did not qualify for the GOTT. However, the GOTT enabled Gurkha soldiers who retired on or after 1 July 1997 to transfer from the GPS to either AFPS 75 or AFPS 05 depending on when they first enlisted in the British Army. The terms of any transfer were such that the accrued rights to a pension for service after 1 July 1997 would transfer into the AFPS scheme on a year-for-year basis.

26. In respect of service rendered before 1 July 1997 the Explanatory Memorandum to the 2007 Order explained that

> "although Gurkha service from 1 July 1997 is transferable on a one-for-one basis, Article 2 L4 provides that pre-1997 Gurkha service counts proportionately depending upon the rank of the transferee. This proportion is not arbitrary: it has been arrived at after careful calculation by the Government Actuary's Department. It represents broadly the value of the pre-1997 benefits accrued in the GPS. A Gurkha transferring to either AFPS will be given fair pension value for his GPS service."

27. Under the actuarial calculation adopted by the Government, a year's service before 1 July 1997 translated – in terms of pension entitlement – to the equivalent of between 23 and 36 per cent of the value of a year's service of a non-Gurkha soldier of equivalent rank.

28. The transition from the GPS to the AFPS for those opting to transfer who were already in receipt of a pension under the GPS did not deprive them of their existing GPS pension, which would continue to be paid. Transfer to the relevant AFPS occurred at 60 or 65, when they received the preserved pension. However, as they had been in receipt of the GPS pension from around the age of thirty-three, the capital value of the pension pot at retirement age would be reduced by the payments received under the GPS up to that date.

29. Nearly all serving Gurkhas elected to transfer to the AFPS (only 0.3 per cent elected to remain in the GPS). Of those who had retired, but remained eligible for transfer, approximately three per cent elected to remain in the GPS.

C. The applicants

30. The first applicant is a non-governmental unincorporated association that acts on behalf of 399 former members of the Brigade.

31. The second applicant is a former Gurkha soldier who retired from the Brigade on 8 February 1997 after having accumulated fifteen years' service. As he completed his service prior to 1 July 1997, he is ineligible to transfer any of his pensionable years to one of the AFPSs. His pension continues to be governed by the GPS and, as such, is valued at approximately fifty per cent of that which a British soldier of equivalent rank would receive for the same period and type of service.

32. The third applicant is a former Gurkha soldier who retired from the Brigade on 31 July 2002 after having accumulated almost thirty-one years' service. The last five years of service were transferred into the AFPS on a year-for-year basis. The preceding twenty-six years of service were transferred under an actuarial calculation pursuant to the 2007 Order. Under that calculation the pensionable value of each of his years of service was regarded as equivalent to approximately twenty-seven per cent of a pensionable year served by a British soldier of equivalent rank engaged in the same type of service.

D. Domestic proceedings

33. On 7 March 2008 the applicants issued an application for judicial review in the High Court challenging the legality of both (a) the decision that Gurkhas who retired prior to 1 July 1997 were not entitled to transfer their pension rights under the GPS into the AFPS and (b) the decision that,

for those Gurkhas who retired after 1 July 1997, service before that date did not rank on a year-for-year basis. The challenge was advanced on three grounds: under the Race Relations Act 1976 (namely, that there had been a breach of a procedural duty to promote equality of opportunity); on grounds of irrationality; and under Article 1 of Protocol No. 1 read together with Article 14. In relation to the third ground, the applicants alleged that they were discriminated against in their entitlement to an army pension on the basis of their age and/or nationality. In particular, they argued that they were treated differently both from younger Gurkha soldiers who had (more) years of service after 1 July 1997 and from regular British Army soldiers.

34. The applicants were granted permission to pursue their judicial review application. A hearing took place in October 2009. At the hearing the parties agreed that the 2009 change to the Immigration Rules (see paragraph 14 above) was irrelevant for the purpose of the proceedings.

35. On 11 January 2010 the High Court dismissed the application on all three grounds. In respect of the age discrimination challenge the High Court relied on its earlier decision in *R (Gurung) v. Ministry of Defence* [2008] EWHC 1496 (Admin) (summarised at paragraphs 45 – 49 below), in which it held that the difference in treatment did not occur due to the difference in age but due to the dates at which service had been rendered. The judge in the present applicants' case noted that

> "when lines are drawn for any purpose by reference to dates the result may well include some indirect age discrimination."

36. In reaching this conclusion, the court rejected the argument – advanced by the applicants – that age discrimination should be treated as a "suspect" ground.

37. In respect of the discrimination-on-grounds-of-nationality challenge the High Court considered that it was bound by *R (Purja and Others) v. Ministry of Defence* [2003] EWCA Civ 1345 (summarised at paragraphs 41 – 44 below), in which the Court of Appeal had ruled that Gurkhas with service before 1 July 1997 were in a markedly different position from other soldiers serving in the British Army before that date. The difference in pension arrangements reflected the different historical position of the Gurkhas. Although the High Court accepted that the 2004 change in the Immigration Rules (see paragraph 13 above) undermined some of the assumptions supporting the decision in *Purja*, it held that the changes did not affect the reasoning of the Court of Appeal as that reasoning applied to the calculation of pension entitlements which accrued before 1 July 1997. For all the reasons advanced by the High Court Judge in *Gurung*, the High Court considered that the choice of 1 July 1997 to mark the boundary for different treatment of accrued pension was a rational and reasonable one.

38. The applicants were granted permission to appeal to the Court of Appeal. On appeal, their case was put exclusively by reference to Article 14 of the Convention read together with Article 1 of Protocol No. 1.

39. On 13 October 2010 the Court of Appeal dismissed the applicants' appeal. In respect of the discrimination-on-grounds-of-nationality claim the Court of Appeal, like the High Court, considered itself bound by the decision in *Purja* (cited above). In respect of the age-discrimination claim the court, relying on the Strasbourg Court's judgment in *Neill v. the United Kingdom*, no. 56721/00, 29 January 2002, held that even if a relevant comparison could be drawn between older and younger Gurkhas, the Ministry of Defence could easily justify the difference in treatment.

40. On 13 December 2010 the Supreme Court refused to grant the applicants permission to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. *R (Purja and Others) v. Ministry of Defence* [2003] EWCA Civ 1345

41. In *Purja and Others*, which concerned a challenge to the GPS brought prior to the 2004 changes to the Immigration Rules and the GOTT, the complainants submitted, *inter alia*, that the difference in pension rates between Gurkha and non-Gurkha soldiers was irrational and constituted direct discrimination on the grounds of nationality.

42. The High Court dismissed their complaints. In relation to the discrimination complaint, it held that the situation of Gurkha soldiers on retirement was not analogous to that of their non-Gurkha counterparts and some difference in treatment was therefore justified.

43. The complainants appealed to the Court of Appeal. In dismissing the appeal, Simon Brown LJ stated:

> "... not only are Gurkhas, as the judge there observed, 'leaving the United Kingdom and returning to Nepal, where their pensions will be paid, and conditions in Nepal are markedly different from those in the United Kingdom', but it must be borne in mind too that these pensions are generally payable from a much earlier age. Whether that consideration - that the Gurkhas' pensions become payable immediately after 15 years whereas British soldiers only receive theirs after 22 years or (in 83% of cases) at the age of 60 – is to be regarded as a) demonstrating that the two groups are not 'in an analogous or relatively similar situation' or b) providing 'reasonable or objective justification' for the distinction between their respective pension rates, or perhaps even c) suggesting that British soldiers are not after all enjoying 'preferential treatment' (all these phrases being taken from *Stubbings* – see paragraph 43 above), seems to me a matter of choice and ultimately immaterial.
>
> 59. The question directly raised by article 14 is whether the Gurkhas' pension rights are 'secured without discrimination on [the] ground [of] national ... origin', which to

my mind translates into the question whether, in regard to their pension rights, they have been unjustifiably less well treated than others because of their being Nepalese.

60. It can of course be said that it is only because they are Nepalese that the Gurkhas will be retiring to Nepal and living there more cheaply than their British counterparts. But I reject entirely the proposition that they are therefore to be regarded as unjustifiably less well treated on the ground of their nationality. It is, of course, only because they are Nepalese that they are recruited into the Gurkha Brigade in the first place. Nor am I impressed by [the claimants'] argument that because, say, an Irish or Jamaican (dual) national will be discharged from the British Army with a pension calculated without reference to wherever he may be intending to retire, so too should a Gurkha. I simply cannot recognise the two groups as being in 'an analogous or relevantly similar situation' looking at the nature of the Gurkha Brigade as a whole – the basis and circumstances of the Gurkhas' recruitment, service and discharge."

44. Chadwick LJ drew attention to five features distinguishing the situation of Gurkha soldiers from non-Gurkha soldiers:

"84. It is enough to draw attention to the following: (i) Gurkha soldiers are recruited, exclusively, from Nepal, under arrangements to which the governments of Nepal and India have given approval; (ii) Gurkha soldiers are, invariably, discharged in Nepal at the end of their service, and have no right of abode in the United Kingdom; (iii) Gurkha soldiers will, almost invariably, complete 15 years' service and retire on pension (payable with immediate effect) at or about the age of 35 years; (iv) there is an obvious, and recognised, need in those circumstances to foster and maintain links between Gurkha soldiers while in service and the country (Nepal) to which they will return on retirement; and (v) that need is enhanced by the wide social, economic and cultural differences between Nepal and the United Kingdom – and between Nepal and the other countries throughout the world in which Gurkha soldiers have been, or are likely to be, required to serve.

85. Taking those matters into account I find it impossible to reach the conclusion that the characteristics of soldiers serving in Gurkha units in the British Army are so closely analogous to the characteristics of soldiers serving in non-Gurkha units in the same Army that the circumstances call for a positive justification for the different treatment, in relation to basic pay and pensions, for which Gurkha TACOS provide. Once it is appreciated that there are good reasons for the payment of an immediate pension to Gurkha soldiers after 15 years' service – as, plainly, there are, given the fact that Gurkha soldiers will return to Nepal on completion of their service - rather than a deferred pension payable at age 60 on retirement after less than 22 years' service, or an immediate pension only after 22 years' service, it seems obvious that the amount of the immediate pension payable to Gurkha soldiers will differ from the immediate, or the deferred, pension payable to non-Gurkha soldiers ..."

B. *R (Gurung and Others) v. Ministry of Defence* [2008] EWHC 1496 (Admin)

45. In *Gurung and Others* the complainants submitted that the pension policy adopted by the Government in the GOTT was irrational and resulted in a form of indirect age discrimination. The Article 14 challenge was based solely on the transfer value of the years of service before 1 July 1997 and related to the effect which the differences in transfer value created between

groups of Gurkhas based on age and on their individual length of service at particular dates.

46. In its judgment the High Court had regard to the difficulty faced by the authorities in fixing the transitional arrangements following the decision to bring the Gurkhas' pensions into line with those of other soldiers serving in the British Army. It stated:

> "Transitional arrangements were required for those already in the GPS who might wish to transfer. Provision had to be made for the Gurkha who retired after 1st July 1997 under the GPS and was already in receipt of that pension but who still wished to transfer to the AFPS. The question was how the pension pot in the GPS should be transferred: at actuarial value or at a Year for Year value or a mixture of the two. The fact that the terms of service before 1st July 1997, and the pension arrangements, were fit for the previous assumption, as *Purja* held, obviously creates a problem for those whose years of service spanned that date. The first option would undervalue the years of service after 1st July 1997 by reference to the actual pay received with the [universal addition], and by comparison with the value earned in their pension pots by the rest of the British Army to whom, after that date, the same retirement assumptions now could be applied. The second, although not itself irrational, would give to the transferring Gurkha an enhancement to his pension not just by reference to its value but also by reference to assumptions inapplicable before 1st July 1997 when the pension or deferred pay was earned. The third, which was adopted, reflected the differences in the assumptions which underlay the pay and pension arrangements before and after 1st July 1997.
>
> ...
>
> A distinction within the Brigade between pay and pension before and after 1st July 1997 reflects the point at which the Brigade of Gurkhas became UK based, and the retirement date after which [indefinite leave to enter or remain] became an option. The longer the service after 1997, the greater the personal connection with the UK and the corresponding loosening of the ties with Nepal, the greater the number of years transferred on a Year for Year basis. The converse is also the case: the greater the number of years served before 1997, the greater the ties with Nepal. Although in fact the percentage of retired Gurkhas coming to the UK after retirement between 1997 and 2004 is very high indeed, that does not mean that the pension transfer provision is irrational in not making it financially easier for them to do so. The system is a rough reflection of the degree of the ties with either country in which retirement could be enjoyed. The Year for Year transfer of all pension rights of those retiring after 1st July 1997 would create a sharp distinction between those Gurkhas who retired before and after that date in respect of years of service before that date.
>
> ...
>
> The aim of the GOTT was not to allow the Gurkha to retire in the UK on an Immediate Pension at 33 years old free from further labour, nor to allow other servicemen now to do so under the AFPS. Nor was it to require retired or serving Gurkhas to forego the immediate pension to which their TACOS had entitled them, in order that at age 60 or 65 they would receive the preserved pension under the AFPS which is all that 15 years' service would have entitled them to."

47. With regard to the question of age discrimination, the court held:

> "The grounds of differentiation here, not wholly aptly characterised as those of age, are not suspect grounds. The grounds of difference do not arise because someone is

> above or below a particular age, but because the introduction of changes which are not directly age related are defined by dates, and years of service. The drawing of lines, by reference to dates, around schemes which help some but not others is an inevitable part of many legislative or policy changes; this is the more so where a past disadvantage or even wrong is being remedied retrospectively. Of course, this means that either the older or younger will be affected; the date itself will import an indirect differentiation on age grounds. But that is a weak starting point for an assertion of indirect discrimination on age grounds. In any event, if there is a rational basis for the selection of the date as at which the changes are made, that disposes of the Article 14 challenge."

48. Having regard to the generous margin of appreciation where the decision is about social and economic policy, particularly those concerned with the equitable distribution of public resources, the court concluded as follows:

> "A line was drawn; that was in itself reasonable, and the particular dates chosen for its drawing are reasonable too. The difference reflects not age in reality but the number of years of service based in the Far East or in the UK. If there was indirect discrimination on the grounds of age or 'other status', it was justified and proportionate."

49. Consequently, the High Court dismissed the application for judicial review.

THE LAW

I. PRELIMINARY ISSUE: VICTIM STATUS

50. It is necessary to address at the outset the matter of the "victim" status of the first applicant. The British Gurkha Welfare Society is a non-governmental organisation, comprised of 399 retired Gurkhas, which had standing before the domestic courts in the litigation concerning the subject-matter of the present case. Nevertheless, the Court has held that "victim" status must be interpreted autonomously, irrespective of its meaning under domestic law, and according to established case-law it will normally only be granted to an association if the latter has been directly affected by the measure in question (see *Association des amis de Saint-Raphaël et de Fréjus et autres v. France* (dec.), no. 45053/98, 29 February 2000; *Dayras and Others and the association "SOS Sexisme" v. France*, (dec.), no. 65390/01, 6 January 2005; and *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no.2)*, no. 26740/02, § 20, 31 May 2007).

51. Although its 399 members were "directly affected" by the GOTT, the British Gurkha Welfare Society does not appear to have been "directly affected" by the measure in its own right. It is therefore doubtful whether it

can claim to be a "victim" of the alleged violations within the meaning of Article 34 of the Convention. However, in view of the Court's conclusions on the merits of the applicants' complaints, there is no need to reach any firm conclusion in this regard.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

52. The applicants complained that the significantly lower pension entitlement of Gurkha soldiers who retired or served before 1 July 1997 amounted to differential treatment on the basis of nationality, race and age. They complained that the difference in treatment could not be justified and, as such, represented a violation of Article 14 read together with Article 1 of Protocol No. 1 to the Convention.

53. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

54. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

55. The Government contested those arguments.

A. Admissibility

1. The "race discrimination" complaint

56. The Government argued that, insofar as the applicants now seek to complain about race discrimination, they have failed to exhaust domestic remedies as no such claim was pursued before the High Court or the Court of Appeal.

57. Although the applicants accepted that in the domestic proceedings the allegation of race discrimination was eventually dropped, they contended that in the present case the link between nationality and race was strong and, as a consequence, the Court should not adopt an overly formalistic approach to the exhaustion of domestic remedies.

58. The Court cannot accept the applicants' submission. In Article 14 of the Convention "race" and "national origin" are identified as two distinct grounds of discrimination. It is true that in a given case the two might be "strongly connected"; however, as different considerations might be relevant to each, it does not necessarily follow that complaints under both grounds will stand or fall together. Consequently, the existence of any such "connection" between the two grounds cannot absolve an applicant from raising each separately before the domestic courts.

59. Consequently, given that the applicants, by their own admission, did not pursue their claim of discrimination on grounds of race before the domestic courts, this part of their complaint must be rejected as inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies (see, for example, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014).

2. The remaining complaints

60. The Court considers that the applicants' remaining complaints (namely, those concerning differential treatment on the grounds of nationality and age) raise sufficiently complex issues of fact and law, so that they cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is further satisfied that they are not inadmissible on any other ground. They must therefore be declared admissible.

B. Merits

1. The Court's general approach in Article 14 cases

61. The Court has repeatedly held that Article 1 of Protocol No. 1 does not guarantee as such any right to become the owner of property; nor does it guarantee, as such, any right to a pension of a particular amount (see, among many authorities, *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, ECHR 2009). If, however, a Contracting State does decide to create a pension scheme, it must do so in a manner which is compatible with Article 14 (see *Stec and Others*, cited above, § 55).

62. As established in the Court's case-law, only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom*

[GC], no. 13378/05, § 60, ECHR 2008). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden*, cited above, § 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 87, ECHR 2009). However, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010 and *Stec and Others v. the United Kingdom* [GC], no. 65731/01 and 65900/01, § 52, ECHR 2006-VI).

63. The Court observes at the outset that, as with most if not all complaints of alleged discrimination in a welfare or pensions system, the issue before it for consideration goes to the compatibility of the system with Article 14, not to the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation (see, for example, *Carson and Others*, cited above, § 62; *Stec and Others*, cited above, §§ 50-67; *Burden*, cited above, §§ 58-66; and *Andrejeva*, cited above, §§ 74-92). Rather, the Court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation (*Carson and Others*, cited above, § 62).

2. Application to the present case

64. The Government have accepted that the facts underlying the present complaint fall within the ambit of Article 1 of Protocol No. 1. Furthermore, they do not dispute that nationality and age are protected grounds of discrimination.

65. Consequently, what is in dispute in the present case is whether there was a difference in the treatment of persons in relevantly similar situations; and, if so, whether that difference in treatment had any objective and reasonable justification.

(a) Discrimination on grounds of national origin

(i) The applicants' submissions

66. In the applicants' submission, they had been treated unfavourably compared with non-Gurkha soldiers in the British Army of an equivalent rank and position, with whom they had stood shoulder to shoulder, serving the same cause, defending the same nation, and facing the same risks and dangers with the same valour, commitment, passion and dedication; and this difference in treatment was on account of their Nepalese nationality.

67. In particular, the applicants maintained that their pension entitlements were less favourable than those of non-Gurkha soldiers in the British Army, as their service prior to 1 July 1997 was valued at as little as twenty-three per cent of the service of other soldiers serving at the same time. The applicants did not accept the contents of the actuarial report submitted by the Government (see paragraph 70 below), which suggested that the majority of them would not be in a significantly better position had they been treated as if they were always members of the AFPS. In response, the applicants submitted their own actuarial report commenting on the data, methodology and assumptions employed in the Government's report. The applicants' actuary indicated that the comparisons relied on in the Government's report were "only a single snapshot that depends on both the time at which it is calculated and the assumptions that are made". In other words, as the relevant calculations depended on assumptions relating to exchange rates and life expectancy, different results would be seen if the assumptions were to be made at a different time.

68. The applicants further argued that there was no objective and reasonable justification for the difference in treatment. In this regard, they considered the fact that, prior to 1 July 1997, the Brigade's home base had been in Hong Kong (and before that, Malaya) to be immaterial as the Brigade was at all times eligible for deployment on any British Army mission in any country in the world. Likewise, they contended that the fact that Gurkhas historically retired to Nepal was not logically connected to the pension that they should receive for the service they rendered. Once it was acknowledged that Gurkhas served the British Army in the same way as other soldiers, it was inescapable logic that they should receive the same pension. This was particularly so given that a pension was a form of deferred pay, and where a worker comes from and how they spend their income should be irrelevant to the level of remuneration that they receive.

69. Finally, the applicants contended that discrimination on grounds of nationality was considered to have "specially protected status" and therefore "very weighty reasons" would be required by way of justification. The Government could not, therefore, rely on budgetary considerations to justify treating the applicants differently from other members of the British Army. Likewise, the fact that Gurkhas could chose to retire in Nepal was not a

relevant factor, as the rate of pension should be set by reference to work done and not to a person's life options.

(ii) The Government's submissions

70. The Government submitted a report by the Government Actuarial Department ("GAD") which indicated that most of the applicants would not now be in a significantly better position if they had been treated as if they had always been members of the AFPS. This was because pension payments under the GPS were payable immediately upon retirement, whereas an immediate pension under the AFPS was only payable after twenty-two years' service and most (non-Gurkha) army personnel did not serve that long. Consequently, most of the applicants would receive pension payments for over twenty-five years before many non-Gurkha soldiers of the same rank and length of service would qualify for any payments under the AFPS. According to the Government, an immediate pension at the age of thirty-three was not necessarily worth less than a larger, deferred pension at the age of 60. In fact, the GAD report indicated that of the 308 applicants the Ministry of Defence had been able to identify, approximately four per cent would have been in a better position had they been treated as members of the AFPS throughout their service. This group mostly consisted of officers, who would have been entitled to AFPS benefits immediately upon retirement.

71. Insofar as this small minority of applicants had been the subject of adverse differential treatment in the way their pensions were calculated for periods of service prior to 1 July 1997, the Government acknowledged that the difference was on grounds of nationality. However, they contended that either the applicants could not be said to be in a relevantly similar position to other soldiers in the British Army in relation to the accrual of their pension rights for periods of service prior to 1 July 1997, or, if they were, the difference in treatment had an objective and reasonable justification.

72. In particular, they noted that, until the changes to the Immigration Rules in 2004 and 2009, retired Gurkhas had no entitlement to settle in the United Kingdom after the end of their service. It was therefore presumed that they would retire in Nepal, where their GPS pension would be paid earlier than an AFPS pension and, given the significant difference between the economic conditions in the two countries, would, in real terms, be much more valuable than the equivalent sums paid in the United Kingdom.

73. Although the Government accepted that a pension was a form of deferred pay, they pointed out that the applicants had "definitively acquired" the relevant portion of their pension rights prior to 1 July 1997, at a time when the Brigade's home base was not in the United Kingdom, they had no entitlement to accompanied service there, and they had no right to settle there upon retirement. Consequently, they had very limited ties to the United Kingdom during this period. The Government rejected the

applicants' assertion that pay could only lawfully be set by reference to work undertaken, with the consequence that the place where the worker was receiving his pay (and by extension, his pension) was irrelevant. On the contrary, many public-service and private-sector jobs in the United Kingdom had a "London weighting" to reflect the higher cost of living in that city.

74. In any case, the Government pointed out that although many Gurkhas were now entitled to settle in the United Kingdom, they were not obliged to do so: unlike any other soldier in the British Army, they retained the right to retire in Nepal. Consequently, the Government argued that it was not obliged to fund a fully retrospective increase in their pensions on a year-for-year basis on the assumption that they would choose to settle in the United Kingdom rather than return home. This was especially the case given that many Gurkhas who opted to settle in the United Kingdom went on to enjoy a second career there, which produced an income from which they could meet their living expenses.

75. Finally, the Government contended that the present case raised issues of social and economic policy, and in such cases the Court normally respected the legislature's policy choice unless it was "manifestly without reasonable foundation" (*Stec*, cited above, § 52). As in *Stec*, the Government was trying to put right an inequality and its policy choice in doing so was not "manifestly without reasonable foundation". This was especially so given that, for the reasons already identified, that policy choice was neither unreasonable nor arbitrary. Furthermore, in allowing pension rights accrued in respect of years of service after 1 July 1997 to be transferred to the AFPS on a year-for-year basis, the Government effectively created an exception to its general policy of non-retrospectivity when it came to the enhancement of pension schemes. However, the cost of equalising all years of service prior to July 1997 for members of the Brigade in service on that date would have cost an additional GBP 320 million, while extending the GOTT to all Gurkhas, including those who retired before 1 July 1997, and valuing their service on a year-for-year basis would have cost in the region of GBP 1.5 billion over twenty years. Moreover, such an approach, if adopted, might have led beneficiaries of other public sector schemes to complain about the non-retrospectivity of any enhancements in their own schemes.

(iii) The Court's assessment

(α) "Difference in treatment"

76. The Court has established in its case-law that, in order for an issue to arise under Article 14, the first condition is that there must be a difference in the treatment of persons in relevantly similar situations.

77. In the present case Gurkha soldiers were undoubtedly treated differently from other soldiers in the British Army in respect of their entitlement to a pension since, prior to 1997, they were governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions. In addition, for those eligible for transfer to the AFPS, only accrued rights to a pension for years of service after 1 July 1997 were transferred on a year-for-year basis, while accrued rights in respect of years of service prior to that date were transferred at actuarial value (approximately twenty-three to thirty-six percent of the value of a year's service of a non-Gurkha soldier of equivalent rank – see paragraph 27 above). However, the notion of discrimination implies that the group in question was not only treated differently, but also less favourably (see, for example, *Elsholz v. Germany* [GC], no. 25735/94, §§ 60-61, ECHR 2000-VIII), and in the present case the Government contend that this criterion was not met as the vast majority of Gurkhas (both those who retired before 1 July 1997 and those who retired on or after that date) would not have been in a significantly better financial position if they had been treated as if they had always been in the AFPS.

78. This latter submission by the Government is based on the GAD's actuarial report, which is contested by the applicants who have submitted their own actuarial report challenging the data, methodology and assumptions employed in the GAD report (see paragraph 67 above). Whether or not the applicants' objections in this respect are justified, the Court notes that the GAD report expressly accepts that Gurkha soldiers of officer rank or above (roughly four per cent of the total) would have been in a significantly better financial position had they been able to transfer all years of service to the AFPS on a year-for-year basis. Furthermore, in the 2004 review conducted by the Secretary of State for Defence it was conceded that Gurkhas generally were "clearly" wronged under the GPS in the changed context of a likely second career in the United Kingdom, in that the GPS paid "sums too small to be useful at a time when [the Gurkha] does not need them and an inadequate pension at retirement age" (see paragraph 23 above). Therefore, even if the total sum of pension payments received by a Gurkha who was not of officer rank would not have been less than the total sum received by his non-Gurkha counterpart, the authorities have acknowledged that what the 2004 review called the different "pension benefit profiles" of Gurkha soldiers were less advantageous. The Court is therefore satisfied that Gurkha soldiers can be regarded as having been treated less favourably in respect of their pension entitlement than other soldiers in the British Army.

(β) "Persons in relevantly similar situations"

79. Article 14 also requires that any difference in treatment be between persons in "relevantly similar situations". In this regard, the Court notes that

the historical situation of the Gurkhas was very different from that of other soldiers in the British Army as they were based in the Far East, had no ties to the United Kingdom, and no expectation of settling there following their discharge. However, their situation has significantly changed over time. Most importantly, on 1 July 1997 their home base moved to the United Kingdom (see paragraph 8 above); in 2004 the Immigration Rules were amended to allow Gurkhas with at least four years' service retiring on or after 1 July 1997 to apply for settlement in the United Kingdom after discharge (see paragraph 13 above); in 2006 the policy on Married Accompanied Service was changed, allowing the wives and children of Gurkha soldiers to also form ties to the United Kingdom (see paragraph 9 above); and finally, in 2009 the Immigration Rules were again amended to permit all Gurkha soldiers with at least four years' service to apply for settlement in the United Kingdom (see paragraph 14 above).

80. In view of these developments, the Court accepts that by the date of the GOTT, namely 2007 (see paragraph 25 above), Gurkha soldiers were in a "relevantly similar situation" to other soldiers in the British Army.

(γ) "Objectively and reasonably justified"

81. It is common ground that where an alleged difference in treatment was on grounds of nationality (see paragraph 71 above), very weighty reasons have to be put forward before it can be regarded as compatible with the Convention (see *Gaygusuz*, cited above, § 42, and *Andrejeva*, cited above, § 87). However, in considering whether such "very weighty reasons" exist, the Court must be mindful of the wide margin usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. That is particularly so where an alleged difference in treatment resulted from a transitional measure forming part of a scheme for the enhancement of a benefit which was carried out in good faith in order to correct an inequality. For example, in *Neill and Others v. the United Kingdom* (dec.), no. 56721/00 of 29 January 2002, the Court recognised that, in making provision for the future payment of service pensions to servicemen and to their widows, national authorities were in principle permitted to restrict entitlement to such pensions to those who were still in service at the time of introduction of the new provisions, and to fix the level of entitlement by reference to the period of service completed following introduction of the relevant provisions.

82. In the present case, following a number of the developments set out at paragraph 79 above, the authorities accepted (in 2004) that the situation of Gurkhas had changed, so that differences in the majority of their terms and conditions of service (including their pension entitlement) could no longer be justified on legal and moral grounds (see paragraph 22 above). As a consequence, the 2007 GOTT was formulated in order to bring Gurkhas'

pensions into line with those of other soldiers in the British Army. However, having decided to allow the Gurkhas to transfer to the AFPS, the authorities were faced with a decision: whether to allow the transfer to the AFPS of pension rights accrued in respect of all years of service on a year-for-year basis; whether to allow only the transfer of pension rights accrued in respect of all years of service on an actuarial basis; or to find a middle ground.

83. It would appear that the first option was rejected for financial reasons: in this respect, the Government have estimated the cost of equalising all years of service prior to 1997 for all Gurkhas serving on that date to be in the region of GBP 320 million, and the cost of extending the GOTT to those Gurkhas who retired before that date (with accrued pension rights valued on a year-for-year basis) to be GBP 1.5 billion over twenty years. The second option was also rejected, because it would have undervalued those years of service acquired at a time when the historical assumption that the Gurkhas would retire to Nepal no longer held good. Consequently, the authorities opted for the third approach, allowing only the transfer of pension rights accrued after 1 July 1997 on a year-for-year basis, and, in doing so, made an exception to their general policy of not enhancing pension schemes retrospectively.

84. The selection of 1 July 1997 as a "cut-off point" was not arbitrary. This date represented the transfer of the Gurkhas' home base to the United Kingdom and was therefore the date from which the Gurkhas starting forming ties with that country. Those who retired before that date had no ties to the United Kingdom and, at the date of the GOTT (2007), had no right to settle there. Although this changed following the 2009 amendment to the Immigration Rules, the applicants agreed before the domestic courts that this development – which post-dated both the GOTT and the commencement of the domestic proceedings in the present case – was irrelevant (see paragraph 34 above). Consequently, the Court finds no cause to doubt the conclusion of the 2004 review that the GPS continued to be the best scheme to meet the needs of these Gurkhas, since the payments under that scheme, which were available immediately upon retirement, were more than adequate to provide for their retirement in Nepal (see paragraph 23 above).

85. For those Gurkhas who retired after 1 July 1997, any pension entitlement accrued prior to that date was accrued at a time when they had no ties to the United Kingdom and no expectation of settling there following their discharge from the Army. It is true that the majority of Gurkhas falling into this category did subsequently settle in the United Kingdom (see paragraph 13 above). Nevertheless, in considering the impact of the GOTT on their financial situation, it must be borne in mind that the purpose of an armed forces pension scheme (either under the AFPS or GPS) was not to enable the soldier to live without other sources of income following

retirement from the Army. Given that most Gurkhas retired after fifteen years, and the majority of other soldiers in the British Army retired before they had served for twenty-two years, it was fully expected that they would continue to be economically active and have other sources of income once they left the armed forces. In fact, the evidence submitted by the Government indicates that many of those Gurkhas who retired after 1 July 1997 and who remained in the United Kingdom have gone on to find other gainful employment there (see paragraph 74 above).

86. Unlike the situation in *Neill* (cited above), the Gurkhas' pensions under the GPS were index-linked to their expected country of retirement. However, the Court finds no support for the applicants' argument that pensions should not be index-linked in this way. In *Carson* (cited above, § 86) the Court expressly recognised that it was difficult to draw any genuine comparison between the position of pensioners living in different countries on account of the range of economic and social variables applying from country to country. Moreover, in their submissions to the Court, the parties have agreed that pensions are a form of deferred salary, and many employers – both at the domestic and international level – regularly adjust salaries to reflect the cost of living in the city or country of employment.

87. In light of the aforementioned findings, the Court considers that insofar as the applicants have complained of discrimination on grounds of nationality, any difference in treatment was objectively and reasonably justified. Consequently, no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 can be found on the facts of the present case.

(b) Discrimination on grounds of age

88. The Court has recognised that age might constitute "other status" for the purposes of Article 14 of the Convention (see, for example, *Schwizgebel v. Switzerland*, no. 25762/07, § 85, ECHR 2010 (extracts)), although it has not, to date, suggested that discrimination on grounds of age should be equated with other "suspect" grounds of discrimination. Nevertheless, even if it were accepted that "older" Gurkhas were treated less favourably than "younger" Gurkhas on account of their age, the differential treatment, which also flows from the decision to value only service after 1 July 1997 on a "year-for-year" basis, must be regarded as objectively and reasonably justified for the reasons given in relation to the applicants' complaint concerning discrimination on grounds of nationality (see paragraphs 82 – 87 above).

89. The foregoing considerations are sufficient to enable the Court to conclude that the applicants' complaint concerning age discrimination also discloses no violation of Article 14 of the Convention read together with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning discrimination on grounds of national origin and age admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 14 of the Convention read together with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 15 September, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Mirjana Lazarova Trajkovska
Registrar	President