Neutral Citation Number: [2010] EWHC 3 (Admin)

Case No: CO/2343/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th January 2010

Before :

THE HON MR. JUSTICE BURNETT

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Between :

BRITISH GURKHA WELFARE SOCIETY & OTHERS	**Claimant**
- and -	
MINISTRY OF DEFENCE	**Defendant**

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- -

Mr. D. O'Dempsey and Miss O. Dobbie (instructed by **Russell Jones & Walker**) for the **Claimant**
Mr. R. Singh QC and Mr. Grodzinski (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 27th and 28th October 2009

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APPROVED JUDGMENT

Mr. Justice Burnett :

Introduction

1. This application for judicial review is brought by the British Gurkha Welfare Society and two individual retired Gurkhas. It seeks to challenge the pension arrangements put in place for Gurkhas following a Government review, the results of which were published in December 2006. The results of that review were implemented by the 'Gurkha Offer to Transfer' ["the GOTT"] and Armed Forces (Gurkha Pensions) Order 2007 SI 2007/2608 ["the Order"]. Historically, pension arrangements for Gurkhas and others serving in the British Army were entirely separate and calculated on different bases. The effect of the changes made in 2007 was to enable Gurkhas to elect to transfer to the Armed Forces Pension Scheme ["AFPS"] from the Gurkha Pension Scheme ["GPS"] but only if they served after 1 July 1997. For time served after 1 July 1997, the transfer rights are calculated on a full year for year basis of service. The effect is that pension accrues for those years broadly in the same way as it does for other British soldiers. However, for time served prior to 1 July 1997, the transfer value is calculated on an actuarial value basis for service given. Thus accrued rights are transferred without the enhancement available for post 1 July 1997 service (save for some who joined after 1 January 1993). The precise impact of that difference varies as between different ranks of those who served in the Gurkha Brigade before 1 July 1997. For most it means that pension was accruing at a rate of between 23% and 36% of the equivalent available to others in the Army.

2. In substance the claimants challenge:

   i) The decision that Gurkhas who retired prior to 1 July 1997 are not entitled to transfer their pension rights under the GPS into the AFPS, thereby denying them the right to enhance their existing pensions. The second claimant retired in February 1997 after 15 years' service and thus has been unable to enhance any of his pension rights;

   ii) The decision for those Gurkhas who retired after 1 July 1997 and therefore can transfer their pension rights into the AFPS that the service before that date does not rank on a year for year basis but rather on an actuarial basis. The third claimant retired in July 2002 and thus falls into the category of ex-Gurkha who was able to transfer his pre-July 1997 accrued pension only on an actuarial basis.

   The complaint in respect of both groups is that the MoD failed to equalise pension entitlement in respect of periods of service before 1 July 1997 as well as after.

3. The challenge is advanced under three headings. First, it is said that the terms of the GOTT and the Order discriminate against Gurkhas on the basis of age and nationality in the context of Article 1 of Protocol 1 of the European Convention on Human Rights ["ECHR"] in combination with Article 14. Secondly, it is argued that the GOTT and Order are irrational. Thirdly, it is contended that the MoD failed to pay due regard to the need to promote equality of opportunity and good relations between people of different racial groups, as required by section 71 of the Race Relations Act 1976 ["the 1976 Act"]. The claimants seek declaratory relief rather than quashing orders, in part to meet the defendant's argument that all relief should be denied because of the delay in starting these proceedings. They were not commenced until March 2008, fully a year after the GOTT was announced.

4. The MoD resist each of the arguments on their merits. Additionally, Mr Rabinder Singh QC submits that most, if not quite all, of the arguments have been decided by Sullivan J in the High Court and in the Court of Appeal in *R (Purja & others) v Ministry of Defence*, [2003] EWHC 445 (Admin) and [2004] 1 WLR 289 (CA) and by Ouseley J in the High Court in *R (Gurung) v Ministry of Defence* [2008] EWHC 1496 (Admin). The decision of the Court of Appeal is binding on this Court and those of the High Court should not be departed from. Those two earlier judicial reviews concerned challenges to the pension arrangements of Gurkhas. Mr Singh also submits that should any ground of challenge be made out no relief should issue on account of the delay in pursuing the claim.

5. The MoD has taken the point that the first claimant is not a victim for the purposes of the Human Rights Act 1998. However, Mr Singh QC was content that I should determine the issues of substance in this challenge without deciding that matter. He reserved his client's position for argument elsewhere, should it be necessary.

6. The challenge in ***Gurung*** was to precisely the same GOTT and Order as is challenged in these proceedings. Ouseley J concluded that both were rational and also did not discriminate unlawfully on grounds of age. Factually nothing has changed. In stating that, it is important to appreciate that this claim challenges decisions implemented in 2007. These proceedings were issued on 7 March 2008. It would be idle not to mention that in the last 9 months a campaign on behalf of retired Gurkhas persuaded the Government to extend to all retired Gurkhas the opportunity to settle in the United Kingdom which hitherto had been available only to those who had retired after 1 July 1997. That development is now agreed by the parties to be irrelevant for the purposes of this application for judicial review. These policy developments, reflected in changes to the Immigration Rules in the summer of 2009, cannot have any bearing on the order which was approved by Parliament in September 2007 or the earlier policy announcement made in the GOTT relating to pension provision. Although this development was referred to in the written material and

orally by the parties, both Mr O'Dempsey who appeared for the claimants and Mr Singh QC readily accepted that it could not assist in determining the legality of the GOTT and the Order. It is particularly important to bear that in mind when considering the submissions advanced by Mr O'Dempsey to attack the rationality of the GOTT and Order together with age related discrimination. Whilst eventually disavowing in oral argument any reliance on the policy change made this year, it had been relied upon in the written argument as a basis for attacking the conclusions in the earlier decisions of this Court and the Court of Appeal.

7. The challenge in *Purja* was to the pension provision for Gurkhas based upon the 1947 Agreement between the United Kingdom, the newly independent state of India and Nepal. Such provision reflected in broad terms the pension paid in the Indian Army. Rates of pay in the Indian Army and thus pension provision were (and are) much lower than those paid to soldiers in the British Army but both pay and pension for Gurkhas were linked to Indian rates. Importantly, when the agreement was entered into, retired Gurkhas had no right to settle in the United Kingdom on their retirement from the Army. The expectation was that having been discharged in Nepal they would remain there. That was the factual background on which Sullivan J and the Court of Appeal determined the rationality of the pension policy and its lawfulness by reference to the ECHR and discrimination on grounds of nationality. It was rational and did not unlawfully discriminate on grounds of nationality.

Background Facts

8. The three judgments referred to in paragraph [4] above, between them set out a good deal of the history of the Brigade of Gurkhas and its status first in the British Indian Army and, since Indian independence, in the British Army. The high regard in which the Brigade is held by the British people is well known as is the admiration for the Gurkhas as individuals and the role they have played, and continue to play, in the defence of the interests of the United Kingdom. Whilst a full treatment of the background facts can be found in the judgment of Sullivan J between [21] and [36], the judgment of Simon Brown LJ between [1] and [21] and Ouseley J between [1] and [5], a summary will suffice to enable the arguments advanced in this application to be understood.

9. The Gurkhas have played a long and distinguished part in the service of the Crown. Since 1947 they have formed an integral part of the British Army by virtue of arrangements put in place under the tri-partite agreement to which I have referred. That agreement provided that six regiments of Gurkha rifles should serve with the Indian Army and four be transferred to the British Army, forming the Brigade of Gurkhas. Gurkhas are recruited from Nepal. All are Nepalese nationals on recruitment and remain so until retirement. Their terms and conditions of service have been different from those of others in the British Army, although there has been a gradual alignment in recent years. Before 1997

the Brigade of Gurkhas was based in the Far East, particularly in Hong Kong. There has also been a long standing arrangement whereby one regiment is based in Brunei. That arrangement continues. Before 1997 Gurkhas did serve from time to time in the United Kingdom at Aldershot but their base remained in Hong Kong. Pay and other conditions reflected the terms available to the Gurkhas serving in the Indian Army. Leave was taken in Nepal, much longer leave than allowed to others in the British Army, and the universal assumption was that Gurkhas would retire to Nepal. There were different arrangements relating to wives and children accompanying Gurkhas from the rest of the British Army, which formed part of the complaint in *Purja.* Prior to 1997 pay was much lower than for the rest of the British Army and pension arrangements entirely different. Gurkhas are recruited at the age of 18. Those who do not progress beyond the rank of corporal serve for 15 years. Put simply, the historical position was that after 15 years such Gurkhas retired and received an immediate pension, payable for life, based on their accrued service. No pension was payable if a Gurkha served fewer than 15 years, although almost all completed that length of service. Those promoted beyond the rank of corporal could serve for longer and received an immediate pension on retirement.

10. The position for those serving elsewhere in the British Army was that no pension could be paid immediately to soldiers or non-commissioned officers unless they completed 22 years' service. That pension could be deferred to 60. Those who served for less than 22 years accrued pension rights, but no pension could be taken until 60. Recent changes have resulted in the deferred pension age being raised to 65. Different arrangements, the details of which are immaterial for the purposes of the arguments in this application, apply to officers.

11. The long established GPS paid out pensions which were generally lower than those available to others who retired from the British Army, albeit that they were available sooner. However, the overall effect was that most Gurkhas received less than a soldier serving elsewhere in the British Army who had provided the equivalent service but whose pension was paid under the AFPS.

12. The return of Hong Kong to the Republic of China in 1997 gave rise to fundamental changes to the way in which Gurkhas served. The three regiments based in Hong Kong were unable to remain there. In consequence since 1 July 1997 three Gurkha regiments have been based in the United Kingdom, with one at any time being stationed in Brunei. The immediate impact was that as time passed all Gurkhas spent increasingly large amounts of their time in the United Kingdom and developed contacts and roots here; so too their families.

13. For some time prior to 1997 Gurkhas stationed temporarily in the United Kingdom had received a supplement to their pay. That arrangement became a permanent fixture for those based in the United Kingdom after 1 July 1997. The supplement brought the Gurkhas' take-home pay up to the level of a soldier of equivalent rank in the British

Army. However, it was not treated as pensionable pay. Pension arrangements remained as before. The continuing assumption was that on retirement Gurkhas would return to Nepal. To speak of 'retirement' in the usually accepted sense of its association with approaching old or late middle age is inapposite. Most of those retiring were in their early 30s and would develop a second career in Nepal. Nonetheless, the pension payable could maintain a reasonable lifestyle, irrespective of whether the person concerned would (as was usual) earn additional money. The evidence suggests that the pension of an ordinary Gurkha in Nepal equated with the pay of a captain in the Nepalese Army.

14. In the years that followed the handing back of Hong Kong, pressure grew upon the MoD to deal with anomalies in the terms and conditions of service ["TACOS"] of Gurkhas. Many considered that the differences lacked continued justification once the Brigade became based in the United Kingdom. In parallel, pressure mounted to enable Gurkhas to remain in or re-enter the United Kingdom after they retired. That pressure resulted in a change to the Immigration Rules HC 395. With effect from 24 October 2004 any Gurkha with at least four years' service in the British Army and who had been discharged after 1 July 1997 was able to apply for indefinite leave to enter or remain ("ILR/E") in the United Kingdom. Paragraphs 276E to 276K of the Immigration Rules dealt with the change. In official documents the rule is referred to as 'HMFIR'. The power conferred by the rule is expressed in discretionary terms but the reality is that all those who have applied under the rule have been given the necessary permission. This rule change thus followed the decision of the Court of Appeal in *Purja***.** As Ouseley J noted in paragraph [5] of his judgment in *Gurung***:**

> "[The rule change] in train created the probability that the wife and children of a Gurkha with ILR/E would also obtain leave in line with that granted to the Gurkha. The [rule] change was in its terms retrospective. About 90% of the 2230 eligible Gurkhas discharged after 1st July 1997 have taken advantage of that provision, along with their qualifying dependants."

15. The rule change applied only to those discharged after 1 July 1997 with the necessary service. Nothing was said about those discharged before 1 July 1997, the large majority of whom were living in Nepal. The youngest of that cohort would have been 33 years old on discharge in 1997 and so 40 at the time of the rule change. Although the evidence does not reveal the complete age profile of retired Gurkhas in Nepal the natural expectation would be that there were many who retired in the four decades before then. The evidence now available suggests that there are about 25,000 Gurkhas in receipt of a GPS pension who retired before 1 July 1997. That compares with a Brigade strength of 3,400 and about 2,200 who had retired since 1 July 1997 when the review which led to the GOTT began. It was perhaps obvious that the change in the Immigration Rules would result in new pressure to bring the pensions

payable to Gurkhas into line with those paid to others in the British Army. Whilst that was the general aim of those campaigning on behalf of Gurkhas, for understandable reasons those making the political arguments did not seek precise equivalence. The ability to retire after 15 years with an immediate pension is a valuable one which the Gurkhas are keen to retain. The story of what then followed is taken up in the judgment of Ouseley J:

> "6. In January 2005, the Secretary of State for Defence announced a review of the Gurkha TACOS. Mr Hoon said:
>
> > "As the House will be aware, our policy is to keep the Brigade of Gurkhas' terms and conditions of service under review, to ensure that they are fair and that any differences from the wider Army are reasonable and justifiable. We are also aware of our historic relationship and understandings with the Governments of Nepal and India, which have enabled Gurkhas to serve in the British Army since 1947.
> >
> > Gurkha soldiers have spent an increasing proportion of their time in UK since withdrawal from Hong Kong in 1997, and successive amendments to the conditions under which they serve have recognised their changing role, status and personal aspirations. The most recent of these was their inclusion in the new HM forces immigration rule, which took effect from 25 October 2004. This has potentially far-reaching effects on the way we recruit and manage the brigade and care for its serving members, families and veterans. In addition, some public criticism and unease continues about the remaining differences between Gurkhas' terms and conditions and those of the wider Army. We are, therefore, anxious to ensure that such differences are absolutely justifiable as well as fully understood and accepted by our Gurkha soldiers and want to ensure that the MOD's position, both legally and morally, is beyond reproach.
> >
> > I have therefore directed that the MOD should carry out a wide-ranging review of all Gurkha terms and conditions of service. This will be an extensive piece of work and we will endeavour to take account of the views of all those with a legitimate interest. This new review will build on earlier findings, including work to date on the review of Gurkha married accompanied service (MAS), but its scope will be much wider and it is aiming to complete in late autumn 2005."

7. Before publication of the results of that review, the results were announced of the earlier review into the differences between British Gurkhas and the rest of the British Army in the availability of Married Accompanied Service, an increasingly troublesome issue as the Brigade of Gurkhas was now based in the UK. With effect from 1st April 2006 MAS was allowed to those who had served 3 years in the Brigade, so that serving Gurkhas were entitled to be joined in the UK by wives and children. …

8. In December 2006, the MoD published the results of the wider TACOS review. The context of the Review was the new Immigration Rules and the changes to MAS which:

> "changed the traditional assumption that British Gurkhas would retire in Nepal, and pointed to a future in which Gurkhas could be expected increasingly to regard the UK, rather than Nepal, as their family base. In addition it was clear that the remaining differences between Gurkha terms and conditions of service and those applied to the rest of the Army were increasingly open to legal challenge"

9. Its overall conclusions were:

> "The Review Team 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. However the Review Team also concluded that some differences should be retained on the grounds of maintaining the Brigade's military capability and to satisfy the Government of Nepal."

10. Although many aspects of service were reviewed, crucial to this case is what was said about pensions. Chapter 10 of the Report said that pension arrangements, together with the length of service provisions of the Brigade of Gurkhas, represented the most significant differences between the Gurkha TACOS and the rest of the British Army TACOS: these were "complex and unprecedented" but the changes (to which I have referred above) made "radical reconsideration inevitable". The previous assumption of retirement in Nepal, which was the general basis for the decision in *Purja* that these differences had been lawful, had been replaced by an entitlement to live in the UK after retirement and to obtain employment.

11. …

12. The quite elaborate consultation process with the Gurkhas about changes to pension arrangements led to a clear view that they preferred the AFPS 2005[1], although for some the GPS had particular advantages. …

13. The discussion in the report ended:

> "On balance, then, the GPS was clearly more suitable than AFPS to support the "life-cycle" of the great majority of Gurkhas up until July 1997. However, UK basing for BG and HMFIR changed the previously valid assumption of retirement in Nepal. For a Gurkha retiring to a second career in UK, the GPS profile is 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"

14. It concluded:

> "Pensions have proved to be an extremely complex area. The GPS has evolved since 1948 to meet the changing needs of BG as and when they were recognised. It remained, until recently, decidedly more "fit for purpose" than AFPS but the rules are complicated and arcane. It has been maintained largely on a piecemeal basis and (with scarce exceptions such as its arrangements for Gurkha DE officers) on the assumption that Gurkha and UK TACOS would never have to converge. Whilst the Review Team's vision for the future of Gurkha pensions is now clear and summarised in the following recommendations, there is no doubt that their development and implementation will reveal a myriad of transitional anomalies that will need time and substantial and skilled staff resources to resolve."

15. The report recommended, put shortly, that serving and retired members of the Brigade of Gurkhas should be enabled to transfer from the GPS to either AFPS 1975 or 2005, 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

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[1] The Armed Forces Pension Scheme 2005 superseded that known as AFPS 1975. Although both are referred to in the judgment of Ouseley J, and they confer different benefits, those difference do not affect the principles that were applied in Gurung, nor do they affect the arguments advanced in this case.

effect from April 2006, in effect for the 2006 recruit intake which attested in December of that year.

16. The transfer options were put to the Gurkhas for their individual decision, with the aid of illustrations and advice in what was known as the Gurkha Offer to Transfer or the GOTT, which was announced by Mr Twigg, Parliamentary Under Secretary of State at the MoD in March 2007. The decision to make the offer in the terms in which it was made is the subject of these proceedings.

17. The GOTT reflected the recommendations of the Review Report. It applied to all Gurkhas who retired or were serving on or after 1st July 1997. Those who wished to stay in the GPS for the advantages which it offered them could do so. They could transfer to the AFPS on this basis: their accrued pension based on service in the Brigade of Gurkhas *after* 1st July 1997 would transfer into the AFPS scheme on a Year for Year credit. This would have the effect of raising their accrued pension benefits, bringing their pot into line with what the rest of the British Army had accrued for that period, as if they had been members of the AFPS from 1st July 1997. …

18. For the years of service *before* 1st July 1997, the value of the Gurkha Pension rights would be valued actuarially and the whole of that value would be transferred in to the AFPS, as a pension credit. However, for those years before 1st July 1997, as the total value of a year's pension in the GPS at Gurkha pensionable pay, was rather less than the total value of a year's pension in the AFPS at the then rest of the British Army pensionable rates of pay, 100% of its value in the GPS would be considerably less than 100% of the same year in the AFPS for the rest of the British Army. …

19. …

20. The transition from the GPS to the AFPS for those opting to transfer who were already in receipt of a pension under the GPS would not deprive them of their existing GPS pension, which would already be in payment. Very few would have been in a position to claim either the Immediate Pension after 22 years under the AFPS 1975 or the Early Departure Payments after 18 years under the 2005 AFPS, because they would not have had enough years of service. Transfer to the relevant AFPS would occur at 60 or 65, when they would receive the preserved pension. However, because they would have been in receipt of the GPS pension from normally about age 33, the capital value of the pension pot at retirement age would be reduced by the payments received under the GPS up to that date. This could mean that there would be no increase in pension at retirement age

under the AFPS. But by comparison a soldier retired from the rest of the British Army might have been in receipt of nothing for what could be as long as 27 years during the whole of which a Gurkha could have been in receipt of pension under the GPS.

21. The GOTT was given statutory effect in the Armed Forces (Gurkha Pension) Order 2007 SI 2007/2608 in force on 1st October 2007. It includes the actuarial percentages of the value in the AFPS of transfer from the GPS for the years not transferred on a Year for Year basis, for different ranks. Those years, transferred on the basis of actuarial valuation, are at the heart of this case. …

22. The decision date for serving Gurkhas was 30th September 2007, the day before the Order came into force. There appears to have been a clear consultation and information process for the Gurkhas as to what the best option for them individually would be. The MoD's evidence was that all 3400 serving Gurkhas made a positive election and nearly all chose the AFPS; only 10 stayed in the GPS. 90% were eligible for transfer to the AFPS 1975. Of the 2230 eligible retired Gurkhas, 73% made a positive election, with most choosing AFPS 1975, as that was the scheme for which they were eligible. Only 65 made a positive choice to stay in the GPS. If no positive election were made, the retired Gurkhas would stay in the GPS.

23. The position of the 3 Claimants here is as follows: Mr Shrestha enlisted in 1987 and after 20 years was discharged as a Staff Sergeant in March 2007. He opted for the AFPS 05 and the value of his 10.5 GPS years service before 1st July 1997 was transferred to the AFPS at either 26% of 29% of the AFPS value. As Mr Davies puts it, a little tendentiously perhaps, that treated 4 years of actual Gurkha service as equivalent to 1 year's service by the rest of the British Army or 1 year's service by a Gurkha after 1st July 1997. Mr Purja, a Rifleman throughout, enlisted in 1989 and was discharged in December 2006. He opted for AFPS 1975. His 8 years GPS service before 1st July 1997 were transferred at 40% of the AFPS value. Mr Gurung served 20 years as a Rifleman before discharge in January 2007. He made no positive option and so stayed in the GPS. Had he opted for the AFPS, his 10.5 years before 1st July 1997 would also have been transferred at 36%. 70% of Gurkhas retire as Riflemen or Lance Corporals.

24. Although there are some distinct features about each of these cases, including the unusual length of service and their medical discharge, the complaint which they make is a simple one and would in principle be applicable to all those who had years of service transferred in to the AFPS on a less than Year for Year basis. For those post 1st July 1997 years, 100% of the GPS value,

> albeit only 36% of the AFPS value, was transferred as 100% of the AFPS; that is the effect of the Year for Year transfer. The Claimants contended, and it is at the heart of the case, that that should have been the basis of transfer for all their years of service, including those before 1st July 1997 or 1st October 1993. If all the years of service had been transferred on a Year for Year basis, and not just the years after 1st July 1997, or 1st October 1993 in certain cases, their individual pension pot would have been larger on reaching 60 or 65. In general terms, the MoD accepts that that would enlarge the pension pot at retirement, although it cautions against the assumption that that would always increase the pension payable at 60 or 65, because of the effect of the deduction from the retirement pension pot of the amount already received by way of Immediate Pension from age 33 under the GPS. …"

The Conclusions of Ouseley J in Gurung

16. Ouseley J identified the central question in the claim before him in paragraph [24] of his judgment which I have set out. There were two routes by which the GOTT and the Order were challenged before him. First, it was said that it was irrational to pick 1 July 1997 as the date from which to allow parity of accrual for pension purposes. The claimants' contention in that case was that the only rational approach was to equate all service whenever it occurred. It was submitted that none should have been transferred on an actuarial basis. The claimants were all individuals who had retired after 1 July 1997 and had accumulated service that allowed them to take advantage of the HMFIR, but also had service before 1 July 1997. They were thus in the same position as the third claimant in these proceedings. The argument in *Gurung* was not concerned with any individual who had retired before 1 July 1997. Mr O'Dempsey makes the same submission on irrationality before me as was advanced before Ouseley J. Secondly, it was argued that the GOTT and the Order were unlawful by virtue of section 6 of the Human Rights Act 1998 and Article 14 ECHR read with Article 1 of Protocol 1. The contention was that the application of the GOTT and Order gave rise to indirect discrimination on grounds of age which was not justifiable. That argument is also repeated before me. There was no challenge in that case on grounds of nationality, as there had been in *Purja***.** No argument was advanced in either *Purja* or *Gurung* by reference to section 71 of the 1976 Act.

17. Ouseley J concluded that it was rational to formulate a policy, and implement it through the Order, which fixed upon 1 July 1997 as a date after which pension would be earned on a one year for one year basis, but before which it would transfer over on an actuarial basis. He concluded that the policy was justifiable for the purposes of Article 14 in so far as it resulted in indirect age discrimination.

18. Mr O'Dempsey recognises that in order to succeed in the claimants' challenges on the same bases in these proceedings he must persuade me that Ouseley J was wrong on both counts.

19. Ouseley J refused permission to appeal. The unsuccessful claimants made an application for permission to the Court of Appeal, which came before Toulson LJ on paper. He refused permission on 6 November 2008 setting out his reasons in some detail. He said:

> "Irrationality
>
> The Judge in his full and careful judgment considered the irrationality argument at length.
>
> His reasoning amply supports his conclusion in para 54 that "the GOTT comes well within the range of responses available to a reasonable decision maker", even without regard to the particular need for caution before making a finding of irrationality in a case of the present kind for the reasons mentioned in para 55.
>
> Discrimination
>
> The selection of 1 July 1997 as the date of the optimal transfer from the GPS to the AFPS Scheme was not irrational and had, of itself, nothing to do with the Gurkhas' ages. The valuation of benefits earned by that date under the GPS was done actuarially. Of course, its effect varied according to the number of years prior service, but that does not make the approach age discriminatory.
>
> The argument was that there was nevertheless indirect age related discrimination. The judge considered whether the effect of the scheme was "disproportionately prejudicial", taking into account the basis of the differentiation between different cases. He concluded that it was not, and I can see no real prospect of a successful appeal against that conclusion".

The application for permission to appeal was not renewed orally.

20. Paragraphs 54 and 55 of the judgement of Ouseley J, on which Toulson LJ focussed for the rationality argument are in these terms:

> "54. For present purposes, I accept that flawed logic, more readily shown than a decision which simply defies comprehension, may breach the principle of rationality. That principle also requires a rational connection between

> the problem to be solved or aim to be advanced and the means chosen to solve the problem or to advance the aim. The GOTT comes well within the range of responses available to a reasonable decision-maker. I also accept that where human rights are interfered with, the greater the scrutiny to which the reason for the interference will be subjected before the Court can be satisfied that the decision is reasonable, ie within the range of responses open to a reasonable decision maker. I shall deal with those rights later when I deal with the next head of arguments.
>
> 55. I also accept Mr Singh's more general submission that, as Sir Thomas Bingham MR said in *Smith v MoD* [1996] QB 517 at 556 A, the greater the policy content of a decision, the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must be in holding a decision to be irrational. This is especially so in the context of the allocation of public resources, as he also said in *R v Cambridgeshire Health Authority ex p* B [1995] 1 WLR 989 at 905. This is I accept a case which does involve the allocation of resources, including how far an exception to the principle of non-retrospectivity in public sector pension improvements should go. But all that said, the decision seems to me quite rational without any special tests."

21. These conclusions were found in a long discussion of the rationality argument that extended between paragraphs [28] and [62] of the judgment. The central arguments advanced by the claimants that Ouseley J considered were as follows:

i) The assumption underlying *Purja*, namely that all Gurkhas retired to Nepal was no longer true. Most Gurkhas who could retire in the United Kingdom would do so. Nepal related cost of living was thus no longer relevant.

ii) A pension with an element calculated actuarially for pre-1997 service would not provide an adequate pension for those who retired here.

iii) Thus to enable a Gurkha to retire in the United Kingdom, the review recognised that changes to pension arrangements would be needed.

iv) The Government accepted the need for year for year transfer as part of those new arrangements and so it was irrational to exclude years before 1997 in circumstances where the aim of the policy was to be legally and morally justifiable.

v) The date of 1 July 1997 was relevant only for operational but not pension purposes. To exclude the earlier periods from year for year transfer was contrary to the rationale of the policy change itself.

vi) The near universal take up by those eligible to retire in the United Kingdom emphasised the necessity of extending the year for year scheme to all service.

vii) Cost (about £170 million) was not put forward as a primary reason for resisting further backdating. In so far as it was relied upon little weight should attach to it.

viii) The undoubted policy of not enhancing public sector pensions with retrospective effect was not in point, because there was an element of retrospective enhancement in the scheme in any event.

22. Ouseley J rejected those submissions. Whilst I may not do justice to the Judge's reasoning in the summary that follows, his essential reasons were these:

i) The combination of the move from Hong Kong and the HMFIR would strengthen ties with the United Kingdom and weaken those with Nepal. The GOTT's fundamental aim was to reflect those changes which, as from 1 July 1997, had altered the assumptions about where Gurhkas would retire. Changes to pension arrangements had to be made.

ii) It was necessary to make transitional arrangements for those already in the GPS who wished to transfer to the AFPS. There were three options:
   (a) all on an actuarial basis;
   (b) all on a year for year basis; or
   (c) a mixture of the two.

iii) *Purja* had held that the terms of service and pension arrangements which applied before 1 July 1997 were lawful when based upon the previous assumption about where Gurkhas would retire.

iv) The first option (all actuarial) would undervalue service after 1 July 1997, because since then the Gurkhas were being paid at the same rate as others in the British Forces and were based in the United Kingdom. The second option (all year for year) would enhance the pension payable substantially, but on the basis of assumptions that had no place when the pension was earned before 1 July 1997. The third (that adopted) reflected the different assumptions that underlay pay and pensions before and after 1 July 1997.

v) Although that means that years served before 1 July 1997 are valued for pension purposes differently as between Gurhkas and other British Soldiers, *Purja* had held that the differences were objectively justified.

vi) The distinction drawn at 1 July 1997 reflects the fact that the Gurhkas thereafter became United Kingdom based. Furthermore, it is the retirement date by reference to which the opportunity to settle here became an option. The longer the service after 1997, the greater are the ties to the United Kingdom. Conversely the shorter the service after 1997, the greater are the ties to Nepal.

vii) The policy's aim was not to provide an adequate sum upon which to retire in the United Kingdom. HMFIR gave an option for retirement here. Nepal remains an option and in any event Gurhkas could be expected to find another source of income on retirement.

viii) For the years after 1997 there was an enhancement of the pension package to reflect location in the United Kingdom which turned the additional pay allowance into pensionable pay. It did not follow that the years before 1997 should be enhanced in the same way.

ix) The suggestion that because the Government accepted that the GPS was not fit for purpose after 1997 (in the light of the HMFIR) they should have accepted that it was no longer fit for any purpose was fallacious. The difference reflected where Gurhkas had served and their expectations at the time.

x) The additional costs of £170m or so (in addition to £90m - £120m cost of establishing prior service back to 1 July 1997 on a year for year basis) were not irrelevant. Cost was part of the overall consideration. Costs were a concern.

xi) Whilst the Government could not simply rely on the policy of resisting retrospective improvements in public sector pension arrangements (since they had demonstrated they could do so) there was nonetheless no principle of law, logic or morality that required 'in for a penny, in for a pound.'

xii) Where to draw the line in public expenditure terms calls for an exercise of political judgement and thus may give rise to an appearance of arbitrariness where very similar cases fall either side of a chosen line.

xiii) The GOTT and the Order only apply to those who retire after 1 July 1997. There is nothing irrational in drawing the line there because of the changes in the home base of the Brigade of

Gurhkas, in the HMFIR and hence the expected place of retirement.

xiv) Those who retired before 1 July 1997 would not be confronted with the prospect of colleagues who retired later having secured additional pension entitlement in respect of the same earlier service based (at the time) on the same assumptions. That result would generate a different but stronger irrationality argument in the mouths of those who had retired before 1 July 1997. This was a potential outcome of the judicial review challenge before Ouseley J if year for year transfer were applied to all service for those who retired after 1 July 1997 because, by contrast, the position might be left unchanged for those who had retired before and had no entitlement to come to the United Kingdom.

23. Having dealt with all the arguments based upon the underlying facts and policies when considering the rationality argument, Ouseley J summarised his conclusions on the discrimination argument briefly between paragraphs [72] and [77] of the judgment:

> "72. The groups are not defined by age but by years of service at particular dates. There should be two dates in his definition of the groups because the date at which Year for Year transfer began varied according to the circumstances of a particular group anyway; the groups as formulated by Mr Davies require further adjustment to reflect the years after 1st October 1993. This complicates further the question of status and any age discrimination.
>
> 73. Be that as it may, and I do not need to resolve it, this is not a case of direct age discrimination between those two groups and was not argued to be such. Mr Davies contended that there was indirect age related discrimination. I bear in mind what Carnwath LJ said at para 17 in *R (Esfandiari and Others) v SSWP* [2006] EWCA Civ 282 about the need for caution in the application to Article 14 of the concept of indirect discrimination. Mr Davies submits that in such a case the question formulated by Lord Hoffman in *Carson* requires a degree of adjustment to reflect that fact. Is the measure employed disproportionately prejudicial to one group compared to the other? Is there enough of a difference between the two groups to justify the effect of the difference in treatment on the impugned ground? Mr Singh submits that the question is still: is there enough of a difference between the two groups to justify differential treatment? They amount to the same test to my mind. Proportionality and justification are obviously relevant to answering the question.
>
> 74. There may be differences of view about whether age is or can be a "suspect" ground for discrimination, requiring a more intense scrutiny, or whether "old age", which is not quite the same,

can be. But 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.

75. I also accept what Mr Singh says about the ECtHR's approach to Article 14, where the decision is about social and economic policy, particularly those concerned with the equitable distribution of public resources: a generous margin of appreciation is allowed; see Lord Hoffman in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1WLR 1681. Mr Singh referred to the ECtHR, admissibility decision in *Neill and Others v UK* (App 56721/00) 29 January 2002 which concerned claims by retired army officers that the calculation of widows' service pensions was discriminatory in breach of Article 14 and Article 1, Protocol 1 because of differences arising out of dates of marriage and retirement. The Court said:

"The Court observes that, in making provision for the future payment of service pensions to servicemen and to their widows, national authorities are in principle permitted to set conditions governing entitlement to such pensions and, in particular, to restrict such entitlement to those who are 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."

76. The application was ruled inadmissible. I accept that that supports his contentions.

77. I see no need to repeat here the reasons which I have given for regarding the decision in GOTT, and the Order which gave effect to it, as reasonable and lawful. They apply to this part of the claim as well and show that the dates chosen for the change to Year for Year transfer from actuarial valuation are reasonable, and that the difference which that creates is justified. 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.

24. Extensive evidence was filed on behalf of the Ministry of Defence in *Gurung*. Mr Flitton was the author of those witness statements. He also provided evidence in these proceedings. His earlier evidence was exhibited to his witness statement. Nonetheless, he usefully summarised the approach to the GOTT:

> "7. In very brief summary however. Gurkhas were not in an analogous position to the rest of the British Army before 1 July 1997. They were overseas based, in Hong Kong and elsewhere in the Far East, and had little or no opportunity to develop the close physical ties needed to satisfy the immigration regulations. This changed from 1 July when the Gurkhas became UK based. This clear distinction is behind the different treatment of service either side of this date. Service on or after 1 July 1997 was given a year-for-year value in the AFPS, while service before this date was given a value by the scheme actuary broadly the same as the pension benefits earned in the GPS.
>
> 8. I should make clear that the MoD wrote to the first and third Claimants in December 2005 to invite their participation in the MoD's review of the Gurkhas Terms and Conditions of Service (the "GTACOS Review"), the background to which I also explain in my earlier statements. That letter made clear the Review would not generally look at the TACOS of those who had retired. However, it also made clear that exceptionally it would consider the arguments for changing the TACOS for those Gurkhas who left the Army on or after 1 July 1997. The Government made this position clear in a Parliamentary debate in the House of Commons on 7 June 2006 when the Minister said:
>
> > "As part of the [GTACOS] Review, The Department is looking again at the pension position of Gurkhas back to 1 July 1997, when the Gurkhas first became a UK-based force. We remain of the view that the position of Gurkha veterans discharged prior to 1 July 1997 remains exactly as it was when the judicial review [Purja in 2003] reached its conclusions." (Official Report cols 93-94)
>
> 9. The responsible MoD Minister wrote letters to Tikendra Dewan, the third Claimant and Chairman of the British Gurkha Welfare Society (BGWS), the first Claimant, in the first half of 2007 to explain the basis of the GOTT. There was also a meeting with the Minister on 28 March 2007. The third

Claimant was therefore fully apprised of the Government's position not to include in the Review those who left the Army before 1 July 1997.

10. The fact that Gurkhas who left the Army before July 1997 were not covered by the Review meant, for pensions, that the target group for the GOTT was relatively small: there were 3,400 serving Gurkhas and 2,200 who retired on or after 1 July 1997. There are around 25,000 retired Gurkhas in receipt of GPS pension, so the eligible group of retired Gurkhas was less than 10% of the total group.

11. As far as I know, this was the first time a public sector pension scheme had offered to change the terms on which some of its pensioners had left service. Such an exercise to amend past terms and conditions is fraught with difficulty and is not usually done.

12. The GOTT exercise would of course have been very different if all 25,000 retired Gurkhas, most of whom live in Nepal, had been included. The idea of a GOTT for all retired Gurkhas would have been called into question for two reasons – namely significantly increased cost and the difficulty of communications with retired Gurkhas. I deal with each of these below.

The cost of equalising pensions for all retired Gurkhas

13. The main reason that MoD would not have agreed to give GOTT to all retired Gurkhas, rather than only those who retired on or after 1 July 1997, is because the cost would have been too great. A pre-1 July 1997 retiree would, of course, have been better off only if the terms of the GOTT had been improved to value all their service as equivalent to AFPS. This offer would then have had to be extended to the serving brigade for their service before 1 July 1997. The cost of giving year-for-year to the eligible group for all their service would have increased from around £150m to £320m (see paragraph 46 in JF1). Further, and depending on the assumptions made, for example how far back improved terms were offered, the cost of extending the GOTT in the way described for serving and retired Gurkhas would have run to many hundreds of millions of pounds. It should also be noted that the further back in time any approach is taken the more technically difficult it would be to construct something which is fair to any transferees. These retired Gurkhas would have been drawing their pension over many years. Providing a fair value option is likely to be significantly more complicated than the existing

> GOTT option which needed to consider only leavers since 1 July 1997."

He went on to explain the nature of the communications operation to convey the proposals. Mr O'Dempsey did not accept the figures provided by Mr Flitton of the additional cost involved in enhancing the pensions of those retired Gurkhas who had transferred into the AFPS to give year for year value to pre-1997 service. Nonetheless he accepted that the cost of enhancing the pensions of all Gurkhas would cost hundreds of millions of pounds.

25. Mr O'Dempsey recognises that in the face of Ouseley J's reasoning and Toulson LJ's endorsement of it, he has a difficult task in seeking to argue that I should take a different view. This aspect of the case is unusual. Judges exercising the supervisory jurisdiction of the High Court not infrequently encounter a decision of a fellow judge that authoritatively interprets primary or secondary legislation for the first time. It is less common to encounter a case where the decisions under challenge have been recently considered by another judge on the same grounds advanced by reference to the same arguments. Yet that is the position in this case in connection with the age discrimination and irrationality challenges. As *R v Greater Manchester Coroner ex parte Tal* [1985] QB 67 establishes, one High Court Judge will follow the decision of another High Court Judge unless satisfied that the earlier decision is wrong although not strictly bound to do so. There is no question here of Ouseley J's decision being made in want of relevant authority nor, indeed, a full panoply of argument on these grounds. Those factors can provide a foundation for departing from an earlier decision.

26. The claimants have not sought to identify any date other than 1 July 1997 at which a rational distinction might be drawn between full equalisation of pension entitlement and actuarial calculation. Their focus was in suggesting that the cut off date of 1 July 1997 was an irrational choice but at the same time emphasising that it was not for them to identify any other date, still less positively to aver that the choice was as stark as had been advanced before Ouseley J: having admitted that equal pension accrual was correct for some period in the past, it had to be extended to the whole of past service. Ouseley J characterised the argument as 'in for a penny, in for a pound' and was unable to accept it. There is no avoiding this argument because the logic of the claimants' position is indeed that having admitted the principle of retrospectivity to a limited degree by backdating the year for year accrual to 1 July 1997 the Government is obliged to backdate it further to cover all service and for all retired Gurkhas.

27. Mr O'Dempsey submits that the conclusions of Ouseley J and Toulson LJ were simply wrong on the question of rationality. In connection with the age discrimination argument he submits that the Judge failed to analyse the nature of the decision under challenge correctly. In particular it is said that he went wrong in suggesting that indirect age discrimination was a weak basis for mounting a challenge. He also erred in suggesting that if

there was a rational basis for the choice of the date of 1 July 1997, the discrimination challenge would fall away. He submits that the fact that the discrimination alleged was indirect, rather than direct, calls for no less compelling justification to survive scrutiny under Article 14. He also submits that age should be treated as a 'suspect category' for the purposes of Article 14 just as, for example, is discrimination on grounds of race. That flows from the increasing realisation that discrimination on grounds of age is unacceptable unless it can be justified. It is reflected in the European Union legislation that was considered by the European Court of Justice in *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ICR 1080.

28. It was in the course of his submissions seeking to suggest that Ouseley J was wrong or that the underlying facts had changed since the decision in *Gurung* that the importance of appreciating that the changes in the Immigration Rules made in 2009 have no bearing of the arguments before me came into sharp relief. At one point Mr O'Dempsey was disposed to argue that the 2009 changes in the Rules (which as noted allow Gurkhas who retired before 1997 to settle in the United Kingdom) provided a basis for departing from Ouseley J's decision. That cannot be so, because the decision and statutory instrument under challenge both predated that decision.

29. It is beyond doubt that nothing factually has changed which affects the correctness or validity of the decision reached by Ouseley J in *Gurung*. I am not able to accept that the Judge misunderstood the nature of the discrimination challenge before him, nor am I able to accept that he applied the wrong test in reaching his decision on the question of discrimination. Ouseley J had earlier directed himself to the tests to be applied in Article 14 cases as articulated in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1AC 173. His observation that the indirect age discrimination claim was a weak starting point for this aspect of the claim must be read in the light of the sentences that precede it. He was doing no more than making, if I may say so with respect, the obvious point that when lines are drawn for any purpose by reference to dates the result may well include some indirect age discrimination.

30. Mr O'Dempsey was understandably keen to make good his submission that age discrimination is a 'suspect' ground, for the simple reason that the Strasbourg Court has repeatedly emphasised that discrimination on suspect grounds calls for particularly strong justification. I was not shown any Strasbourg authority which supports the proposition that age should be treated as a suspect ground. So far as domestic authority is concerned, I do not read the opinions in the House of Lords in *Carson* as supporting the proposition either. Indeed the discussion of the concept of 'suspect grounds' in the opinion of Lord Walker of Gestingthorpe between paragraphs [55] and [60] suggests the contrary.

31. Discrimination on grounds of age is commonplace in circumstances where few would find it offensive or deserving of condemnation. Children occupy the same space on aircraft and other forms of transport as adults,

but pay less. Rates of subscription payable for membership of many organisations vary depending upon age or years standing. The elderly benefit from numerous concessions denied to younger adults. All these may or may not be justified for various purposes, but few would suggest that the discrimination involved requires justification of the type needed to justify discrimination on grounds of race or sex for the purposes of Article 14. Furthermore, Mr O'Dempsey's invocation of Luxembourg jurisprudence and the EU legislation relating to age discrimination provides no real support for the proposition that age should be treated as a suspect ground. The decision of the ECJ in the *Age Concern* case made clear the wide margin accorded to member states in this area (see paragraph [60] of the judgment).

32. Ouseley J was obviously right to concentrate on the rationality in choosing 1 July 1997 as a cut off date for the treatment of pensions in the context of the Article 14 challenge. If that date had failed to satisfy the test of rationality, the GOTT and the Order would have been in legal difficulty. His overall conclusion was that the policy was 'justified and proportionate'. Not only am I not persuaded that Ouseley J was wrong in his conclusions on Article 14 and rationality I have reached exactly the same conclusions essentially for the same reasons. It follows that the challenge based on rationality and age discrimination fail before this Court, as they did in *Gurung.*

Purja

33. The claimants in *Purja* attacked the legality of various aspects of the terms and conditions under which the Gurhkas served the Crown. For the purposes of this application it is the challenge to different pension provisions between the Gurhkas and others who retired from the British Army that is of interest. The submission before Sullivan J was that there was discrimination on grounds of nationality which could not be justified for the purposes of Article 14. The Secretary of State accepted that the different pension arrangements discriminated on grounds of nationality. The claimants additionally argued that it was irrational in a traditional public law sense to distinguish on grounds of nationality between soldiers performing the same duty. Sullivan J approached the question of discrimination through the series of steps formulated by Brooke LJ in *Wandsworth London Borough Council v. Michalak* [2003] 1 WLR 617 at paragraph [20]. As is well known, those steps were subject to adjustment and refinement in the Court of Appeal and the House of Lords in *Carson* but not in a way that affects the reasoning of Sullivan J in *Purja* or the subsequent treatment by the Court of Appeal of the same issues. Sullivan J was prepared to accept (without deciding) that Gurkhas were less favourably treated for pension purposes than others in the British Army. He did not consider that the Gurhkas were in an analogous situation with other soldiers in the British Army. If wrong on that he was satisfied that such difference of treatment as there was had objective and reasonable justification. In paragraph [49] he said this:

> "So far as pay is concerned, for so long as they are in an analogous situation to a British soldier whilst they are serving in the United Kingdom or abroad outside Nepal, elementary fairness would suggest that they should receive the same treatment, including the same take home pay. They will be undertaking the same duties in the same circumstances as their British counterparts. Since the introduction of UA in 1997, the TACOS have recognised this. But the position of the ex British soldier and the ex Gurkha soldier on retirement is not analogous. While there will be a few exceptions, the former will have been born in the United Kingdom and will expect to retire in the United Kingdom. He may choose to retire to a more or a less expensive country, but in that respect he would be no different from any other United Kingdom pensioner. By contrast, the Gurkha, born in Nepal and a citizen of Nepal, will retire to Nepal. It would be wholly irrational to fail to have regard to the very different circumstances that exist in Nepal and Great Britain when making provision for pensions on retirement."

He also noted that whilst the claimants before him had originally contended that Gurhkas who were retired in Nepal were entitled to the same pension as all other British soldiers, the argument was refined to a proposition that a retired Gurkha should have an 'equivalent standard of living' in Nepal. That entailed a concession that the cost of living in Nepal was relevant for pension purposes. I mention this concession made by counsel at first instance in *Purja* because no such concession is made before me. On the contrary Mr O'Dempsey's core proposition is that each and every year of service of a Gurkha should be transferred into the AFPS on a year for year basis. Sullivan J considered that the concession was obviously correctly made. Sullivan J also rejected a bare irrationality challenge to the pension arrangements.

34. In the Court of Appeal the concession just identified was withdrawn, namely that the cost of living in Nepal was a relevant consideration (see paragraph [35] of the judgment of Simon Brown LJ). The Court of Appeal approached the question of discrimination through the reformulated test set out by Laws LJ in paragraph [63] of his judgment in *Carson* [2003] 3 All ER 577.

35. As already noted, in this case nothing turns on the differences between the formulations of the questions for consideration in Article 14 cases in *Michalak*, *Carson* in the Court of Appeal and *Carson* in the House of Lords. As it happens, the Strasbourg Court, when it considered *Carson*, approached the question of discrimination through a series of steps that was closer to the *Michalak* questions (see paragraphs [77] *et seq* of the judgment of the Grand Chamber [2008] EHRR 941). All of the formulations have been devised to assist in determining the issues under Article 14. Simon Brown LJ, in the course of his judgment in *Purja*,

identified the danger on the facts surrounding Gurkha pensions of treating each question identified in *Michalak* as self-contained and logically sequential. Even the question whether as regards pension they are treated less favourably than others in the British Army is not clear cut. They retire earlier with a pension payable immediately. Furthermore, they enjoy long periods of leave not available to other British Soldiers (see paragraphs [44] to [47] of his judgment).

36. Simon Brown LJ identified the appellant's main contention as follows:

> "We are left, therefore, with Mr Blake's core argument that because Gurkhas and British soldiers live and die together in the field, there should be no distinction made between them as to the amenities and benefits of their service. [50]"

37. He went on between paragraph [56] and [60] of his judgment to consider the question whether Gurkha pension rights involved unlawful discrimination on grounds of nationality for the purposes of Article 14:

> "56. Domestic legislation cannot, of course, override the UK's obligations under ECHR. In the final analysis the decision for this court is whether, the 1976 Act notwithstanding, it is unlawful to engage soldiers on two quite different bases, the consequence of which is that in various respects British soldiers enjoy certain advantages over the Nepalese nationals who comprise the Gurkha Brigade.
>
> 57. With that thought in mind let me return to *Michalak* question iii), or rather to Laws LJ's reformulation of that question in *Carson*: "Are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X?"
>
> 58. If one asks this question in relation to British and Gurkha soldiers' respective pension entitlements I am in full agreement with Sullivan J's conclusion at paragraph 55 of his judgment (see paragraph 25 above). Indeed 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 Mr Blake's 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."

38. The reference to the 1976 Act was to the Race Relations Act which, as a matter of domestic law legitimises the distinctions in the TACOS based upon nationality. Rix LJ agreed with Simon Brown LJ on this aspect of the case. Chadwick LJ reached the same conclusion. Following a detailed analysis of the correct approach in Article 14 cases he stated his conclusions:

> "The manner in which the treatment of the appellants under Gurkha TACOS differed from the treatment of non-Gurkha soldiers serving in the same Army - and the manner in which the characteristics of Gurkha soldiers relevant to terms and conditions of service differ from the characteristics of non-Gurkha soldiers - have been fully set out both by the judge and in the judgment of Lord Justice Simon Brown. It is unnecessary for me to rehearse those matters in any detail. 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.
>
> 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. Further, once it is appreciated that there are good reasons for Gurkha soldiers to enjoy periods of extended home leave during service – as, plainly, there are, given the need to maintain the links with Nepal – it seems obvious that the amount of pay during those periods of extended leave will be different from the amount paid to non-Gurkha soldiers in respect of the substantially shorter periods of paid leave to which those soldiers are entitled. It is important to keep in mind that the difference in basic pay has practical effect only during periods of extended home leave, when no "universal addition" is payable. It follows that I am satisfied that, in relation to the challenge to basic pay and pensions, the judge was entitled to answer *Michalak* question (iii) in the negative. In relation to basic pay and pensions the judge was correct to reject a challenge based on article 14."

39. Mr O'Dempsey submits that the decision of the Court of Appeal in *Purja* has no bearing on the arguments he advances by reference to nationality

and Article 14 for two reasons. First, the decision, at least at first instance, depended upon a concession. Secondly, that the factual landscape has changed because the central assumption that all Gurkhas would retire to Nepal no longer holds good since the changes in the Immigration Rules in 2004.

40. I do not consider that the first argument can assist the claimants at all. Even in this Court Sullivan J's decision did not depend upon the concession. He would have come to the same conclusion even if the claimants had not made the concession. The Court of Appeal rejected the claimants arguments advanced on the premise that the concession was wrongly made. Mr O'Dempsey advances again the argument rejected by the Court of Appeal, namely that there was and is no justification for the different pay and pension arrangements for Gurkhas that apply to service before 1 July 1997. His central submission is the same advanced in *Purja*.

41. Mr O'Dempsey is, of course, correct to submit that the change in the Immigration Rules reflected in the HMFIR undermined some of the assumptions supporting the decision of the Court of Appeal in *Purja*. Those who retired after 1997 with the qualifying service have acquired rights to live in the United Kingdom. The question is whether those changes have affected the reasoning of the Court of Appeal as it applies to the calculation of pension entitlements which accrued before 1 July 1997. In my judgment they do not. For all the reasons canvassed by Ouseley J in *Gurung* the choice of the date to mark the boundary for different treatment of accrued pension was a rational and reasonable one. For the cohort of claimants who retired before 1 July 1997 none of the assumptions underlying the Court of Appeal's conclusions had changed before the GOTT and Order came into force. For those who have retired since 1 July 1997 but had served before then, and who have (or are entitled to) settle in the United Kingdom, the assumption that their retirement would be to Nepal no longer holds good. But the reasoning of Sullivan J and the Court of Appeal that historical differences in pay and pensions were justified before that date, continue to provide ample justification for the purposes of Article 14 for the distinction drawn by the GOTT and Order between pension accrued before and after 1 July 1997. In the context of nationality a stronger justification is required than in the context of age. That is so even though such discrimination as there is results from a complex historical background and evolution, rather than straightforward discrimination on grounds of nationality. Simon Brown LJ's reasoning remains good, in my view, even given the changed facts which allow those who retired after 1 July 1997 with the requisite service to settle in the United Kingdom. For the reasons which support the rationality of the policy and its proportionality in the context of indirect age discrimination, its rationality and proportionality survive scrutiny under Article 14 through the lens of nationality. Lord Nicholls of Birkenhead distilled the Article 14 question to a simple proposition in paragraph [3] of his opinion in *Carson*:

> "For my part**,** in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

The decision withstands scrutiny. Gurkhas with service before 1 July 1997 were in a different position from others serving in the British Army before that date. Such differentiation in pension arrangements reflected that different position. There is clear justification for drawing the distinction between the actuarial and year for year transfer of pension from the GPS to the AFPS for all the reasons already summarised when considering the policy in connection with the argument advanced by reference to age.

42. There is at the heart of this argument an internal inconsistency in the approach of the claimants themselves which provides further support for this conclusion. The Gurkha Brigade can only exist in its present form if the Ministry of Defence applies a policy of recruitment that discriminates against all nationalities other than Nepalese. Discrimination on grounds of nationality is the founding principle indeed the *raison d'être* of the Gurkha Brigade. Those in the Brigade are also the beneficiaries of treatment denied to others in the British Army which discriminates against those others on grounds of nationality. Obvious examples are the ability to retire after 15 years with an immediate pension and extended paid leave in Nepal. So it is that the challenge before the Court, in conformity with those that have come before, proceeds from the premise that any benefit accruing to the Gurkhas from their different treatment (including the very existence of the Brigade) should be secure, but perceived disadvantages should be remedied. The claimants appear to regard discrimination on grounds of nationality as justified when it provides benefits but not when it gives rise to disadvantage. It is difficult to see why that should be so, when all of the differences, whether now of only historical interest or those continuing to have effect, flow from the unique position of the Gurkha Brigade in the British Army born of its long history of different and special treatment.

43. The claim based on discrimination on grounds of nationality, like that relating to age, fails.

Section 71 of the Race Relations Act 1976

44. No argument was advanced in either *Purja* or *Gurung* that the defendant had failed to comply with its duty under section 71(1) of the 1976 Act, which provides:

> "71(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –
> (a) to eliminate unlawful racial discrimination;
> (b) to promote equality of opportunity and good relations between persons of different racial groups."
> (2) …

The defendant accepts that it is subject to this duty. The performance of the duty is subject to statutory guidance issued by the Commission for Racial Equality ["CRE"]:

> "71C(1) The Commission may issue codes of practice containing such practical guidance as the Commission thinks fit in relation to the performance by persons of duties imposed on them by virtue of subsections (1) and (2) of section 71.
>
> ……
>
> (11) A failure on the part of any person to observe any provision of a code of practice shall not of itself render that person liable to any proceedings; but any code of practice issued under this section shall be admissible in evidence in any legal proceedings, and if any provision of such a code appears to the court or tribunal concerned to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

45. The Code of Practice on the Duty to promote Race Equality came into force on 31 May 2002 pursuant to the Race Relations Act 1976 (General Statutory Duty: Code of Practice) Order 2002, SI 2002/1435. It includes the following provisions to which Mr O'Dempsey drew particular attention:

> "3.2 Four principles should govern public authorities' efforts to meet their duty to promote race equality:
>
> (a) promoting race equality is obligatory for all public authorities listed in schedule 1A of the Act.
>
> (b) Public authorities must meet the duty to promote race equality in all relevant functions.

(c) The weight to be given to race equality should be proportionate to its relevance.

(d) The elements of the duty are complementary (which means they are all necessary to meet the whole duty).

3.16 To assess the effects of a policy, or the way a function is being carried out, public authorities could ask themselves the following questions.

a. Could the policy or the way the function is carried out have an adverse impact on equality of opportunity for some racial groups? In other words, does it put some racial groups at a disadvantage?

b. Could the policy or the way the function is carried out have an adverse impact on relations between different racial groups?

c. Is the adverse impact, if any, unavoidable? Could it be considered to be unlawful racial discrimination? Can it be justified by the aims and importance of the policy or function? Are there other ways in which the authority's aims can be achieved without causing an adverse impact on some racial groups?

d. Could the adverse impact be reduced by taking particular measures?

e. Is further research or consultation necessary? Would this research be proportionate to the importance of the policy or function? Is it likely to lead to a different outcome?

…

Arrangements for assessing, and consulting on, the likely impact of proposed policies

4.16 Public authorities must set out in their race equality scheme arrangements for assessing, and consulting on, the likely impact of their proposed policies on race equality (see 4.6).

4.17 Public authorities are expected to set out their arrangements for:

a. assessing the likely impact their proposed policies will have, including their arrangements for collecting data;
b. consulting groups that may be affected by the policies.

4.18 Public authorities may find that they can use the arrangements they already have in place to carry out the necessary assessments and consultations.

Assessment

4.19 Assessing the likely impact of a proposed policy should help to identify whether that policy might have a different impact on some racial groups, and whether it will contribute to good race relations. The assessment may involve using:

a. information that is already available;
b. research findings;
c. population data, including census findings;
d. comparisons with similar policies in other authorities;
e. survey results;
f. ethnic data collected at different stages of a process (for example, when people apply for a service);
g. one-off data-gathering exercises; or
h. specially-commissioned research.

Consultation

4.20 Public authorities already consult people in a number of different ways. However, an authority will raise confidence in its services and improve the way it develops policy if it uses clear consultation methods and explains them to its staff and to the public.

4.21 Public authorities could consult people through:
a. consultation meeting;
b. focus groups;
c. reference groups;
d. citizens' juries;
e. public scrutiny; or
f. survey questionnaires.

4.22 Whichever consultation method they use, public authorities should try to make sure that:

a. they use people's views to shape their decision-making process;
b. the exercise represents the views of those who are likely to be affected by the policy;
c. the consultation method is suitable for both the topic and the groups involved;
d. the exercise is in proportion to the effect that the policy is likely to have;
e. the consultation's aims are clearly explained;
f. the consultation exercise is properly timetabled;
g. the consultation exercise is monitored; and
g.[sic] the consultation's findings are published.

4.23 If the assessment or the consultation shows that the proposed policy is likely to have an adverse impact or harm race equality, the

public authority will want to consider how it is going to meet the general duty to promote race equality. The authority might ask itself the following questions.

a. If one of our policies leads to unlawful racial discrimination, can we find another way of meeting our aims?

b. If one of our policies adversely affects people from certain racial groups, can we justify it because of its overall objectives? If we adapt the policy, could that compensate for any adverse effects?

c. If the assessment or consultation exercise reveals that certain racial groups have different needs, can we meet these needs, either within the proposed policy or in some other way?

d. Could the policy harm good race relations?

e. Will changes to the policy be significant, and will we need fresh consultation?"

46. The claimants submit that the defendant focussed in its decision making on the question whether there was unlawful racial discrimination under the Act. No complaint is made of unlawful discrimination under the 1976 Act. They submit that the defendant failed to have due regard to the promotion of equality of opportunity and also to the promotion of good relations between different racial groups. It was a striking feature of the very detailed skeleton argument on this topic from the claimants that there was no discussion of what 'equality of opportunity' was in play in connection with the decision making process that led to the GOTT and the Order. Neither was there any suggestion of how the decision impacted on 'good relations' between people of different racial groups. Mr O'Dempsey had suggested in the skeleton argument that 'equality of opportunity' would encompass the opportunity to take advantage of the right to settle in the United Kingdom granted by HMFIR. The question 'equality with whom' was not expressly dealt with. There are other soldiers who benefit from the opportunity to settle here, namely those from Commonwealth and foreign nations who have joined the British Army and enjoy the same terms and conditions as other soldiers. The fact that almost all Gurkhas who could take advantage of the 2004 change in the Immigration Rules have done so suggests that the pension arrangements have not had any adverse impact on their opportunity to do so. In oral argument Mr O'Dempsey explained that the equality of opportunity the claimants had in mind was the opportunity to enjoy and spend the additional money that would flow to Gurkhas with service before 1 July 1997 if year for year transfer were applied to that service. The question of good relations between different racial groups was a more elusive concept in the context of the decision making process with which this case is concerned. There is no reason at all to suppose that there is anything other than extraordinarily harmonious relations between serving and ex-Gurkhas, on the one hand, and the generality of the British people, on the other, whatever their racial origin. The Gurkhas are held in the highest of esteem. No suggestion was made that the Gurkhas have any grouse against the British people which is reflected in disharmonious relations. On the contrary, it is the reluctance of the British Government, as distinct from the people, to provide the additional pension provision that causes resentment. Recent events have

demonstrated the power of public opinion mobilised in support of the Gurkhas to deliver results, which provide eloquent evidence of the very harmonious relations between the Gurkhas and the British people.

47. So a practical question underpinning this argument is: in what way does the policy impact upon good relations between the Gurkhas and others? In answer the claimants identified the Gurkhas' sense of ill-treatment at the hands of the British Government. Put shortly, despite the changes made in the Gurkhas' TACOS since 1997 to reflect not only legal but moral obligations, the Gurkhas believe that the Government has not yet gone far enough. However, that does not reflect the state of relations between different racial groups. Mr O'Dempsey submits that deeper thinking about the section 71 duty, and more consultation, would very probably have uncovered strong feeling amongst other soldiers (serving and retired) that the Gurkhas' pensions should be enhanced further. Whether that is right or wrong is a matter of speculation, but it does not seem to me to bite on the question of good relations between races. Mr O'Dempsey also suggested that by enhancing the pension entitlement of the Gurkhas, good relations with other serving units would be promoted. The honour and respect in which Gurkhas are held would have concrete results and would in turn enhance good feelings from the Gurkhas. All this is, in my judgment, a strained use of the concepts found in section 71(1) and demonstrates the theoretical, indeed artificial, nature of much of the argument. Whilst I accept that the GOTT and Order have an impact on equality of opportunity in the narrow sense articulated by O'Dempsey (more money provides greater financial opportunity) I am unable to accept that they have any real impact on relations between different racial groups.

48. This is the essential background against which the claimants' detailed criticisms of the defendant's policy making by reference to section 71 of the 1976 Act must be judged. The claimants submit that:

(i) the defendant simply failed to comply with section 71 of the 1976 Act before devising the GOTT and laying the Order;
(ii) there was no equality and diversity impact assessment made before the material decisions, as the defendant's own procedures required. It was mandated by the MoD's Equality and Diversity Scheme for 2006 – 2009 ["the Scheme"];
(iii) Such an impact assessment was in any event recommended by the CRE in its statutory Code of Practice on the Duty to Promote Race Equality, and the defendant generally failed to have regard to that Code when devising the policy;
(iv) There is no detail before the Court of the product of the consultation undertaken by the defendant in formulating its policy, nor of its dealings with the CRE which are merely referred to but not elucidated in the documents;
(v) The defendant carried out a formal impact assessment after the decision making process was complete. That represents a formulaic

response to the criticism of an absence of proper consideration of section 71, which is in any event defective.

49. A comprehensive analysis of the nature and scope of the duty under section 71 of the 1976 Act is found in the judgment of Dyson LJ in *R (Baker and others) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141. Its context was a planning application made by individuals recognised as enjoying 'gypsy status' to retain touring caravans and mobile homes on a green field site in Kent. The council refused permission. There was an appeal to a planning inspector and then to the High Court. Section 71 of the 1976 Act was not referred to by the parties before the Inspector, nor by the Inspector herself in the decision. The section 71 duty was raised in the High Court challenge under section 288 of the Town and Country Planning Act 1990 (albeit at that stage as a distinctly secondary matter) but came more to the fore in the Court of Appeal. The circumstances in which travellers may, or may not, be allowed to benefit from planning permissions plainly raise sensitive issues of harmonious relations between different racial groups, and affect equality of opportunity for travellers, for example, to have access to many statutory services and education. The conclusion of the Court of Appeal was that the relevant planning guidance and policies reflected the section 71 duty, and that the Inspector had proper regard to them. That said, the analysis of the duty is valuable. Dyson LJ gave the only reasoned judgment and encapsulated the Court's conclusions on this aspect between paragraphs [30] and [38]:

> "30. We had detailed submissions from Mr Allen as to the meaning of section 71(1) and in particular the promotion of equal opportunity limb of section 71(1)(b). I shall summarise his principal submissions briefly, because they were not disputed by Mr Coppel. First, the duty is imposed on a large range of public authorities. This demonstrates its importance as a national tool for securing race equality in the broadest sense. Secondly, promotion of equality of opportunity (and indeed good relations) will be assisted by, but is not the same thing as, the elimination of racial discrimination. Mr Drabble emphasised that his case on behalf of the appellants was not based on an allegation of racial discrimination. Thirdly, the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination. Fourthly, the duty is to have due regard to the need to promote equality of opportunity (and good relations) between the racial group whose case is under consideration and *any* other racial groups. The reference to any other racial groups may be no more than a reference to the general settled community. Fifthly, the equality of opportunity is of opportunity in all areas of life in which the person or persons under consideration are, or may not be, at a disadvantage by reason of membership of a particular racial group. In practice, this is likely to include disadvantage in

the fields of education, housing, healthcare and other social needs.

31. In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due* regard to it. What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.

32. In the context of the present case, the areas of the appellants' lives affected by the inequality of opportunity are of central importance to their well-being and the extent of the inequality of opportunity is substantial. As is clearly stated at para 5 of Circular 01/2006, gypsies and travellers suffer the worst health and education status of any disadvantaged group in England and there is a pressing need to promote equality of opportunity in these areas between gypsies/travellers and the general settled community in order to eliminate the problem. Again as recognised by the Circular, an effective way of achieving this is to reduce the number of unauthorised encampments and developments and increase the number of gypsy and traveller sites in appropriate locations with planning permission.

33. On the other hand, the fact that the appeal sites are on Green Belt land is a powerful countervailing factor: see paras 3.2 and 3.3 of PPG2. It is common ground that the residential use of all 3 appeal sites is "inappropriate development" within the meaning of para 3.4 of PPG2. Paras 49, 50 and 71 of the Circular make it clear that PPG2 applies with equal force to applications for planning permission from gypsies and travellers.

34. Thus, in discharging the duty to have due regard to the need to promote equality of opportunity in this case, the Inspector was required to take into account the need to promote equality of opportunity for the appellants to have housing which would enable them to have access to education, health care and

other social needs. But she also had to take into account the powerful countervailing imperative of PPG2. Ultimately, how much weight she gave to the various factors was a matter for her planning judgment.

35. Mr Drabble (supported by Mr Allen) submits that a person does not perform the section 71(1) duty unless he demonstrates by the language in which he expresses his decision that he is conscious that he is discharging the duty. Applying that approach to the facts of the present case, Mr Drabble submits that the Inspector's decision letter should have included something along these lines:

> "I recognise that, in addition to the considerations flowing from ordinary gypsy policy, there is a situation in Bromley in which there is not equality of opportunity for Irish travellers. I am under a duty to have due regard to the need to promote such opportunity. I must, therefore, give proportionate weight to that need."

36. I do not accept that the failure of an inspector to make explicit reference to section 71(1) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form. I agree with what Ouseley J said in *The Queen (on the application of Lisa Smith) v South Norfolk Council* [2006] EWHC 2772 (Admin), para 87:

> "I do not accept the submission made by Mr Bird that s71 was concerned with outcomes; ultimately of course it is aimed at affecting the way in which bodies act. But it does so through the requirement that a process of consideration, a thought process, be undertaken at the time when decisions which could have an impact on racial grounds or on race relations, to put it broadly, are being taken. That process should cover the three aspects identified in the section. However, that process can be carried out without the section being referred to provided that the aspects to which it is addressed are considered, and due regard is paid to them..."

37. The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed. The form of words suggested by Mr Drabble to which I have referred above may not of itself be sufficient to show that the duty has been performed. To see whether the duty has been performed, it

> is necessary to turn to the substance of the decision and its reasoning.
>
> 38. Nevertheless, although a reference to section 71(1) may not be sufficient to show that the duty has been performed, in my judgment it is good practice for an Inspector (and indeed any decision-maker who is subject to the duty) to make reference to the provision (and any relevant material, including the relevant parts of the Code of Practice and Circular) in all cases where section 71(1) is in play. In this way, the decision-maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced.

50. Dyson LJ also considered whether there had been any material failure to have regard to the CRE Code of Practice but observed that the Code does not amplify the duty imposed by section 71(1) in any material way. He added that the material principles articulated in paragraph 3.2 of the Code are expressed at a high level of abstraction. Further, that paragraph 3.16, expressed in the language of 'could ask themselves the following questions …", is not prescriptive of what public authorities must do.

51. The review of the TACOS reported in December 2006. It had been established in October 2004 and worked to terms of reference approved by the Secretary of State in January 2005. Those terms of reference excluded from the scope of the review any consideration of the pension position of Gurkhas who had retired before 1 July 1997. The review was concerned only with those who had retired after that date and would thus be in a position to benefit from the HMFIR. In paragraph 25 of his witness statement Mr Flitton said this in connection with section 71 of the 1976 Act:

> "It will be apparent from the evidence given above and in my earlier witness statements that the main driver leading to the GTACOS Review and the GOTT was the MoD's wish to address issues of inequality between the Gurkhas and the wider Army. Thus the MoD considers that in arriving at the decisions now under challenge, due regard was had to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between persons of different racial groups, as required by section 71. However, the MoD did not undertake a formal equality and diversity impact assessment (EDIA) at the time of the Review. Whilst section 71 does not require such a formal assessment to be undertaken, the MoD has considered it appropriate, since the present litigation has arisen, to carry out an EDIA focussed on pension issues. I attach a copy of the formal assessment."

52. Much of the work of the review was done before the Ministry of Defence introduced the Scheme in April 2006. Paragraph 62 of that Scheme stated

that an Equality and Diversity Impact Assessment Statement would be attached to all new policies informed by an Equality and Diversity Impact Assessment Tool. In the CRE Code an impact assessment is defined as:

> "a systematic way of finding out whether a policy (or proposed policy) affects different racial groups differently. This may include obtaining and analysing data, and consulting people, including staff, on the policy."

The review did not contain a statement of the nature identified in the Scheme although the impact of various aspects of the TACOS upon Gurkhas was what the review was all about. The review did, however, have explicit regard to the defendant's duties under section 71(1) in its paragraph 1. It did not link those duties to the question of pension changes in the overall conclusions of the report set out in paragraph 15 of Chapter 1, but it recognised the need to apply the principle of 'equality of treatment' to the whole of the Gurkhas' remuneration package, including pensions (see Chapter 8 paragraph 19). The methodology adopted for the purposes of the review, which it must be remembered covered the entire spectrum of Gurkha TACOS, included 'a comprehensive Attitude Survey of the serving Brigade and number of Pension focus groups.' In addition to consulting other Government Departments, the Governments of Nepal and India were consulted as was the CRE 'and groups representing Gurkha ex-servicemen in UK and Nepal'. Those groups included the first claimant in these proceedings.

53. The consultation with Pension Focus Groups was explained in further detail:

> "8. During the development of the survey, AMCS and the Review Team concluded that due to the complexities of pension issues, meaningful responses on that subject were unlikely to be obtained through a multi-choice answer questionnaire. An external agency was therefore commissioned to conduct a series of focus groups specifically to find out the attitudes of Gurkhas towards pensions issues. The methodology used was to set out the likely changes to pensions in the future and what options were likely to be available and to explain the key differences between the Gurkha Pension Scheme (GPS) and the AFPS 1975 (AFPS 75) and 2005 (AFPS 05).
>
> 9. AFPS 05 was the preference amongst most Gurkhas with the higher monthly payouts and larger lump sums after the age of 60/65 being considered in the context of living and working in the UK after retirement.
>
> 10. Some of the more junior soldiers (LCpl and below), however, held to the view that for them the GPS was a better scheme, noting that in actuarial terms it was worth about the same for many junior ranks as the AFPS, and that it would be

> more beneficial to receive payment of pension at an earlier stage.
>
> 11. The most significant issue to arise was how past service credit from GPS to AFPS 05 would be treated with a clear preference for transfer to be done on a one for one basis. This is addressed in detail in Chapter 10."

The Indian Government felt it inappropriate to comment on TACOS of those serving in the British Army and was content for the matter to be dealt with bilaterally between the British and Nepalese Government. The latter were consulted on proposed changes to the TACOS, including pension arrangements. So too were representative groups in the United Kingdom and Nepal.

54. Chapter 10 of the review dealt with pensions and contained the recommendations that were eventually incorporated within the GOTT and Order. Chapter 13, entitled 'Way Ahead' noted the extent of consultation and concluded that the overall outcome reflected in its proposals on the range of topics it considered was 'positive'. It went on:

> "The exception is the position of ex-Gurkhas who retired before 1997, although their position fell outside the scope of the Review."

55. In my judgment the decision making process which led to the GOTT and the order reflected in the review had due regard to the statutory factors found in section 71(1) of the 1976 Act. Just as in *Baker*, the Court of Appeal was satisfied that the Inspector had 'in substance' had due regard to the statutory factors, so too here did the review and decision making process that spawned the GOTT and the Order. The review's 'main driver' was the defendant's express wish to consider issues of inequality between the Gurkhas and the wider British Army. All such inequality was connected to the Nepalese nationality of the Gurkhas. In conformity with the ministerial statement which had announced the review, the officials looking at Gurkha TACOS were not concerned only with technical legality. Discrimination on grounds of nationality to enable the Gurkha Brigade to exist is immunised from illegality under the 1976 Act by virtue of section 41. The review was concerned with broader moral obligations as well as with questions of equality. There was nothing perfunctory or slipshod about the nature of the review exercise or in the extent of the consultation undertaken. Mr O'Dempsey's difficulty in articulating, beyond the straightforward augmentation of funds, how the policy could affect equality of opportunity or good relations between different racial groups provides a good explanation why there is no focussed discussion of the section 71 duty in the context of pensions in the body of the review.

56. Since the review was concerned with the TACOS of serving Gurkhas and pension arrangements of those who had retired since 1 July 1997, its authors cannot be criticised for failing explicitly to consider the position

of those who retired earlier. In any event, no additional issues arise for that cohort for section 71 purposes, as compared with those whose service straddles 1 July 1997, when considering pension arrangements. It is their position vis-à-vis their Gurkha colleagues who have retired since July 1997 (primarily in immigration terms and secondarily pension terms), rather than British nationals, that is affected.

57. I have considered whether there is any substance in the claimants' criticism of the defendant for failing to follow, step by step, the consultation processes set out in the CRE Code. The Code does not dictate the precise arrangements that must be followed when making an impact assessment or consulting on proposed changes to policy. The consultations undertaken to inform the review were comprehensive and, in my view, more than adequate to enable the defendant to have due regard to the section 71 factors. Whilst the detail of the consultation responses is not in evidence, there is no foundation for believing that the review failed to take them into account.

58. The EDIA on changes to Gurkha TACOS conducted after these proceedings were issued amplifies the thinking of the review group. It is dated 16 April 2009. It confirms that the Ministry of Defence had explicit regard to the matters identified in paragraph 3.16 of the CRE Code. The EDIA recognised explicitly that there was an adverse impact on grounds on nationality by not giving year for year pension value for service before 1 July 1997, which would have an impact on equality of opportunity in a financial sense. It also spoke of the 'strength of feeling amongst many Gurkhas that they were being badly treated', something already alluded to in the original review. Although my conclusion that the review itself had due regard to the matters referred to in section 71 means that this EDIA is not determinative of any issue in these proceedings, it serves to reinforce that conclusion.

59. Mr O'Dempsey was critical of the lack of further analysis of the nature and extent of that strength of feeling. He submitted that the failure to consider the position of those who retired before 1 July 1997 was a further critical failure and also noted that there was no express reference to good relations between different racial groups within the EDIA. He also referred to the EDIA's failure to deal with another aspect of the Gurkha pension arrangements with which some are unhappy, namely that to qualify for any pension a Gurkha must serve for 15 years.

60. The criticism that there is a lack of analysis of the strength of feeling amongst Gurkhas on the pension issue is, to my mind, rather unreal. Those who conducted the review were fully informed via the consultation with individuals and representative groups of the strength of feeling that year for year transfer should extend beyond 1 July 1997. There had already been a legal challenge to the pension arrangements (*Purja*) which demonstrated that the issue was a highly charged one. It was not peripheral or based upon equivocal feeling. Due regard was plainly had to the way that the Gurkhas, as a whole, felt on the issue. The claimants are

correct in suggesting that the EDIA did not refer to those who retired before 1 July 1997. That was because their position did not form part of the review which itself substantially flowed from the change to the HMFIR. That change only applied to those who had retired after 1 July 1997. As already noted, the effect on those who retired prior to 1 July 1997 raises no distinct issues under section 71 of the 1976 Act. The last criticism relating to the 15 year service required to earn any pension is accurate in the sense that the EDIA makes no mention of it. It has not formed part of the challenge in these proceedings (or indeed in *Purja* or *Gurung*). The review itself touches on the question only in passing, noting that 'very few Gurkhas' serve for less than 15 years. It is a criticism which is immaterial for the purposes of this challenge.

61. The claimants sought a declaration that the defendant had failed to have due regard to the matters set out in section 71 of the 1976 Act because it would have 'a salutary effect, if nothing else' as Mr O'Dempsey put it in reply. In that the claimants were recognising that even if their arguments under section 71 were good and there was no 'due regard' in the sense for which they contended, the result would have been the same. I have no doubt that if the review group had sat down with the benefit of the claimants' written and oral arguments on section 71 the outcome would have been the same. Be that as it may, for the reasons I have sought to articulate my conclusion is that the claimants have not established that the defendant failed to comply with the duty imposed upon it by section 71 of the 1976 Act.

Delay

62. The claimants' attack upon the GOTT and the Order has failed. Thus the question of delay does not arise for consideration. It is sufficient to indicate that had any of the challenges been successful I would have been disinclined to grant any relief. These proceedings were started on 7 March 2008, but not served on the Treasury Solicitor until 4 April 2008. Any complaint made on behalf of those who retired before 1 July 1997 flows from the decision to exclude such people from the review process. That was known to the claimants from at least 7 June 2006, when the junior minister made it plain in a debate in the House of Commons. As Mr Flitton's evidence showed, the first claimant was aware of this from the previous December. The GOTT was published on 8 March 2007. From that date the position relating to actuarial as opposed to year for year transfer for service prior to 1 July 1997 for those retiring after was clear. By contrast the challenge in *Gurung* was launched promptly following the publication of the GOTT and before the Order was laid. The legality of the Order was nevertheless considered in *Gurung* which was heard in June 2008. This claim was launched 11 months after that in *Gurung*. Even if the date of the Order were treated as the date at which time began to run for a challenge (October 2007), this challenge was very slow in being launched.

63. The claimants recognise that the delay would make it inappropriate to quash either the GOTT or the Order. However, even declarations would

require the defendant to revisit the question whether to include the 25,000 retired Gurkhas in the review, rather than the review and its product (the GOTT) being concerned with 3,400 serving Gurkhas and 2,200 eligible retired Gurkhas. That suggested error in the whole process has been patent since at least the summer of 2006. Much of what followed would be rendered worthless. There could be no question on the arguments advanced in this case by those who retired after 1 July 1997 succeeding in their challenge, but those who retired before failing, or *vice versa*. For the purposes of section 31(6) of the Senior Courts Act 1981, it seems to me that the defendant is correct in suggesting that any relief would give rise to very significant detriment to good administration.