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(Admin)

Case No: CO/6373/2008
CO/6374/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th September 2008

Before :

THE HON MR. JUSTICE BLAKE

Between :

The Queen on the application of:

- (1) Deo Prakash Limbu
- (2) Chakra Prasad Limbu
- (3) Birendra Man Shrestha
- (4) Gyaendra Rai
- (5) Bhim Prasad Gurung
- (6) Gita Kumari Mukhiya

Claimants

- and -

- (1) Secretary of State for the Home Department
- (2) Entry Clearance Officer, Kathmandu
- (3) Entry Officer, Hong Kong

Defendants

Mr. Edward Fitzgerald QC, Mr. Mark Henderson and Mr. Mark O'Connor (instructed by
Howe & Co) for the Claimants

Mr. Steven Kovats (instructed by **Treasury Solicitor**) for the Defendants

Mr. Sharaz Ahmed (instructed by **NC Brothers**) for Interested Party

Hearing dates: 16th and 17th September 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE BLAKE

The Hon Mr. Justice Blake :

Introduction:

1. There are before the court six applications for judicial reviews pursuant to leave granted in July 2008 by Sullivan J. Five of the Claimants are veterans of the Brigade of Gurkhas and one is a widow of such a veteran. Each has applied for entry clearance to come to the United Kingdom for settlement here on the basis of past military service with the Crown. In each case this service came to an end before the 1st July 1997. Each has been refused entry clearance on various dates between December 2006 and February 2007 and each appealed to the Asylum and Immigration Tribunal (AIT) on the basis that the decision was not in accordance with the law and in particular was contrary to the Human Rights Act 1998¹. These applications were representative of a number of similar such applications where appeals against refusals of entry clearance had been lodged with the AIT. These cases were in due course selected as lead cases for the appeal by way of test case.
2. It is common ground that none of these Claimants can comply with the new Immigration Rules for Gurkha veterans promulgated in October 2004 and forming paragraphs 276E to 276K HC 395 as amended. This is primarily because they were not discharged after 1st July 1997 as required by rule 276F (ii). Further their applications for entry clearance were not made within 2 years of their discharge as required by rule 276F (iii). Their complaint is not therefore concerned with the operation of the Immigration Rules as such, which are usually prospective in effect and there would be nothing inherently unfair or irrational in requiring applications for settlement to be made within two years of the completion of the qualifying service. However at the same time as these Immigration Rules were promulgated the Government recognised that some element of retrospective provision was considered appropriate in the particular circumstances of these veterans and this was to be achieved by two publicly available operational instructions to Entry Clearance Officers. The first is not of present concern and provides a period now expired in which those who had been discharged after 1st July 1997 but before the Rules came into effect to make the application for settlement that they had previously had no opportunity to make.
3. The second is central to the present application for judicial review. It is to be found in the Diplomatic Service Procedures (DSP): Entry Clearance Volume 1 General Instructions. Chapter 29 of these instructions is entitled “Settlement entry for former members of HM Forces and their dependants”. Chapter 29.4 is in the following terms:-

“29.4 Discretion-Gurkhas

In addition to the discretion exercised during the transitional period, discretion may also be exercised by ECOs in individual cases where an applicant does not meet the requirement of discharge from the British Army in Nepal after 1st July 1997, or discharge not more than 2 years prior to the date of application. Discretion may be exercised to waive these requirements in

¹ The fifth claimant has been granted entry clearance whilst these proceedings have been outstanding

cases where there are strong reasons why settlement in the UK is appropriate. *For example*, consideration should be given to the following factors:

- Strength of ties with the UK- have they spent a significant amount of time living in the UK, such as a three year tour of duty pre-discharge or 3 years living in the UK after discharge?
- Do they have any close family living in the UK? What proportion of their close family are in the UK as opposed to living in Nepal?
- Do they have children being educated in the UK?
- Do they have a chronic/long-term medical condition where treatment in the UK would significantly improve quality of life?

If one or more of the factors listed above are present, ECOs may exercise discretion and grant entry clearance for settlement in the UK.

Close family means immediate family, such as brothers, sisters, children, parents or grandparents.

The requirements for an applicant to have completed at least four years service as a Gurkha with the British Army and to have been discharged on completion of their engagement should not be waived”.

(Emphasis supplied)

4. Each of the Claimants was refused entry clearance by notices stating that they did not meet one or more of the terms of the discretionary policy. It is a disputed issue as to whether the ECOs in addition went on to consider any discretion that the policy may have afforded them despite the fact that one or more of the qualifying conditions was not present. None of the factors relied on by the various Claimants including length of service in the Brigade of considerably more than four years, residence in the United Kingdom for over two years during service, being wounded in action, fighting in the Falklands Islands or being the recipient of awards for bravery was considered sufficient for the favourable exercise of discretion. In the light of the issues before the court a recital of the individual circumstances of the Claimants is not necessary.
5. It is of considerable relevance that there are instructions for waiver of the Rules relating to foreign and Commonwealth citizens discharged from HM Forces other than Gurkhas. They are in substantially the same terms as the discretion for Gurkhas (see DSP para 29.7). The Immigration Rules for such foreign and Commonwealth soldiers were promulgated at the same time as those relating to Gurkhas but those Rules have no provision equivalent to rule 276F (ii) imposing a requirement of discharge after 1st July 1997 and accordingly there was no need for instructions about waiver of this provision. The Claimants however point to the existence prior to 2004

of a sequence of concessions operated by the Home Office outside the rules known as the Armed Forces Concession (AFC). The AFC seems to have dated back to 1980 at least, and has been re-issued periodically thereafter in broadly the same terms. The version for 1987 reads as follows:

“On leaving the armed forces, a person without the right of abode will be asked in his letter of discharge to send his passport to the Home Office. A copy giving his private address will be sent to the Home Office. If his passport is not received within three weeks he should be informed in writing that he is no longer entitled to exemption from the terms of the Act which he enjoyed whilst enlisted and be told to submit his passport and regularise his position.

Four years service by those without the right of abode may count as approved employment for the purposes of any application for indefinite leave.

Those who serve less than four years should be advised to bring themselves within the terms of the Rules if they wish to remain. Where such a person is granted a limited leave to remain he has a right of appeal under section 14(2) against the decision to limit the leave. APP 109A should be used.

For the purposes of this instruction, persons locally enlisted abroad should not normally be regarded as serving in the ‘Home Forces’.”

6. It will be seen from this document, promulgated by the Home Office in the context of how immigration discretion should be exercised, that those members of Her Majesty’s forces who did not have the right of abode in the United Kingdom could acquire indefinite leave to remain on discharge after four years service. The AFC makes no reference to those who served in the Brigade of Gurkhas but as the policy presumes that the soldier will have been discharged in the United Kingdom and that was not the practice for Gurkhas at the relevant time, it is common ground that it never applied to them. As a policy document from the Home Office explained in January 1997:

“Gurkhas are members of the home forces within the meaning of the 1971 Act. They are therefore exempt from control; when entering/remaining in the United Kingdom.

On discharge, however, Gurkhas have no claim to receiving indefinite leave to enter/remain in the United Kingdom. Neither can they claim to have “voluntarily adopted” residence in the United Kingdom during their posting here as members of the home forces.”

7. On the face of it therefore, the similar considerations marked out by the DSP instructions for consideration of discretionary claims outside the rules by Gurkhas and other soldiers who were not British citizens masks a substantial inequality in practice. Gurkhas were never able to claim indefinite residence in the United Kingdom on the

basis of their military service however long and gallant it may have been. Foreign and Commonwealth soldiers who did not have the right of abode and who served in the British Army had, since 1980 at least, been able to obtain indefinite residence simply on completion of four years military duty irrespective of the precise length and quality of their service or the amount of time they actually spent in the United Kingdom. All that had happened in 2004 for this group of non-British citizens was that the basic terms of the AFC were translated into an Immigration Rule. Nevertheless, soldiers who could have applied for indefinite leave to remain on discharge but did not do so, were still afforded a chance to do if their discharge preceded 1997 by reference to the same factors as applied to Gurkha veterans who had never had the opportunity of doing so.

8. The Gurkha veterans who had been denied entry clearance wanted to take the point that the instructions that had been applied in determining their claims were unlawful and discriminatory in that they did not reflect the historic inability of Gurkhas to apply for settlement in the United Kingdom before 2004. Moreover, if those instructions were to be interpreted as excluding length and quality of military service in the Brigade of Gurkhas of itself as a significant favourable factor in coming within the paragraph 29.4 discretion that was unlawful in that it excluded such an obviously relevant factor to the exercise of discretion that the policy could not stand.
9. To make their claim good the appellants before the AIT sought an order for discovery of documents that were in the possession of the relevant Ministries that might throw light on the purposes behind the Rule changes in 2004 and thus the ambit of the discretionary policy under the DSP. In due course the Deputy President of the AIT ruled in June 2008 that the AIT had no power to make orders for the wide ranging disclosure sought. The Claimants sought judicial review of the AIT's ruling still hoping at this stage that the long listed hearing date for the appeals in July could be maintained. On the 15th July 2008 after an oral hearing on the permission application Sullivan J. decided that the question of the lawfulness of the policy relating to Gurkha veterans compared to other foreign nationals could be examined on judicial review, with consequential obligations of voluntary disclosure of relevant material pursuant to judicial review principles. Permission was granted, an expedited hearing date fixed and the proceedings before the AIT were stayed pending the outcome of this application. In due course in early September three volumes of material comprising some 1247 pages were made available to the Claimants by way of voluntary disclosure that also discharged Freedom of Information Act obligations. The material ranges in date from 1947 to December 2006, and provides an extensive picture of governmental thinking relating to the immigration position and material Terms and Conditions of Service (TACOS) of the Brigade of Gurkhas.
10. Of considerable importance to the Claimants' case as finally argued was the exchange of correspondence between the Secretaries of State for Defence and the Home Department leading up to the change of immigration policy towards the Gurkhas in 2004. Aware that a long-standing review was nearing completion and that the Home Secretary, David Blunkett, had taken a decision to grant settlement to Gurkha veterans, Mr. Geoff Hoon, Secretary of State for Defence wrote on the 22nd September 2004 as follows:

“Your proposal, therefore, to introduce a separate Armed Forces Concession for Gurkhas, which explicitly recognises

their distinct position by allowing ex-Gurkhas to apply for Indefinite Leave to Enter the United Kingdom following their discharge in Nepal, appears to form the basis of a workable solution that will be viable for the next few years. It should allow us to preserve, at least for the time being, the Gurkhas' distinct identity and conditions of service. Our initial soundings indicate that this approach would be acceptable to the Nepalese government, *except that they would be very concerned about any extensive retrospection*. We should therefore seek to limit the concession to those who were discharged after 1 July 1997, when the Gurkhas in effect became based in the United Kingdom following the handover of Hong Kong.”

(emphasis supplied)

11. The Home Secretary responded as follows:

“The Home Secretary has considered the letter of 22 September from the Secretary of State for Defence and has agreed that the policy should not apply to those people discharged before 1 July 1997 for the reasons set out in that letter. However, he has made some changes to the policy which are within his control in order to help those people as much possible.”

12. Subsequently the press release explaining the reasons for the change in policy was drawn up in the following terms:

The Prime Minister said:

“The Gurkhas have served *this country* with great skill, courage and dignity during some of the most testing times in our history. They have made an enormous contribution not just to our armed forces but to *the life of this country*, and it is important their commitment and sacrifice is recognised.”

The Home Secretary David Blunkett said:

“*Throughout their history, the men of the Gurkha Brigade have shown unquestioning loyalty to the Queen and the people of the United Kingdom. In battle they have distinguished themselves as brave and skilful soldiers in all conditions and all terrains. Their 13 Victoria Crosses and numerous other bravery awards speak for themselves. I am very keen to ensure that we recognise their role in the history of our country and the part they have played in protecting us. This is why we have put together the best possible package to enable discharged Gurkhas to apply for settlement and citizenship. I hope that the decision I have made today will make our gratitude clear. Those high military standards have been mirrored in their demeanour in civilian life. Their families too have shown*

devotion and commitment by travelling across continents to support the Brigade.”

Emphasis supplied

13. In recent years, there have been at least three challenges by Gurkha veterans to aspects of their treatment by the UK Government with respect to eligibility to the prisoner of war gratuity (Gurung [2002] EWHC 2463 Admin McCombe J.), the quantum of entitlement to pension payments (Purja [2003] EWHC 445 (Admin) Sullivan J.; and [2004] 1 WLR 289 Court of Appeal) the relevance of 1997 with respect to the calculation of revised pension arrangements (Gurung and Shrestha [2008] EWHC 1496 (Admin) Ouseley J.). None of these challenges was concerned with granting leave to remain upon discharge. Indeed at paragraph 12.1 in his witness statement made in 2002 for the Defendant in the case of Purja Mr. Michael Scott, the Deputy Command Secretary at the Adjutant General Headquarters, indicated that decisions relating to leave to remain were outside the purview of the Ministry of Defence and are the responsibility of the Home Office. Much of the material that has been disclosed for the present hearing is new, particularly that relating to the representations made by the MOD to the Home Office about the grant of leave to remain to Gurkha veterans. Further the material relating to the attitude of the Government of Nepal to these proposed changes is of particular interest.
14. In the present application the Claimants challenged the legality of the DSP discretionary policy in two different ways:
 - i. By only extending a right to Gurkha veterans to claim indefinite leave to enter or remain in the United Kingdom to those who were discharged after 1st July 1997 and by continuing to exclude them from the right to obtain settlement after four years pre-July 1997 service as provided at this time under the AFC, the Secretary of State for the Home Department unlawfully discriminated against Gurkha veterans without any or any sufficient justification.
 - ii. Alternatively, even if the right to indefinite leave could lawfully be limited to Gurkha veterans who were discharged after 1st July 1997, it is irrational for the Home Secretary to rely on a policy where discretion could only be exercised in favour of indefinite leave to remain on the basis of restrictive express factors. As developed in argument this broke down into four sub- grounds:
 - a. The example of three years residence in the United Kingdom itself and the other express criteria under DSP vol 1 29.4 were ones that most pre-1997 discharged veterans would be unable to meet.
 - b. Further it is irrational to exclude exceptional length and quality of service in the armed forces of the Crown (wherever undertaken) as a sufficient basis for the exercise of discretion to grant settlement in the United Kingdom. Even if they are not to be given rights after four years service, Gurkha veterans may have (and on the evidence usually have) served far longer than this and most serve the

maximum 15 years under the Gurkha Terms and Conditions of Service (TACOS).

- c. Further the only reasons identified by the Home Office for promulgating the 2004 change in policy for Gurkha veterans was said to be recognition of the debt of gratitude the nation owed them for loyalty and commitment to the Crown through their service in British Army. It is said that in addition to service far longer than the four years identified by the AFC and brought into the Immigration Rules, Gurkha veterans have served with conspicuous bravery in many dangerous theatres of war before 1997. Many fought in the successful campaign to restore British sovereignty to the Falkland Islands. In that and similar contexts they have received wounds in battle and some of their number have performed exceptionally conspicuous acts of gallantry for which they have been decorated. The claims of these veterans to a debt of honour can be said to be no less compelling than those who served after 1997, yet these factors appear to count for naught in the determinative exercise of discretion allocated to Entry Clearance Officers.
 - d. In so far as the Secretary of State was dissuaded from making broader criteria for the exercise of discretion by the Defence Secretary's concerns that the Government of Nepal would be opposed to this, there is no evidence to support this opposition indeed the evidence consistently points the other way.
15. These are powerful submissions, powerfully advanced by Mr Fitzgerald QC and his team for the Claimants. They deserve the fullest and most careful consideration by this court, although it must be stated at the outset that it is not the function of this court in the constitutional scheme of things to devise policies of its own or under the guise of judicial review give vent to what the individual judge may consider a fair and just resolution to a long-standing grievance by a group of men who understandably have commanded the affections and sense of fair play of many members of the public. The court's task is to determine whether the Claimants have been lawfully as opposed to merely fairly treated.
16. In order to determine whether Gurkhas should have been treated in the same way as Commonwealth veterans and have the same entitlement to indefinite leave after four years, it is necessary to determine whether they are in broadly the same position as these Commonwealth soldiers. Although this task has been performed by the courts on the previous occasions to which reference has been made, and those comparisons provide useful points of reference, it is well recognised that one can be in a broadly comparable position for one purpose but not for another. This judgment therefore proceeds to examine the historical material for two reasons:-
- i. First, to review the historical circumstances behind the formation of the Brigade of Gurkhas and how and why Gurkhas were and are able to serve in Her Majesty's Armed Forces.
 - ii. Second, to identify the comparable position of those non-Gurkha soldiers who were not British citizens or did not have the right of abode in the

United Kingdom but who were nevertheless able to join the British Army at the relevant time.

2. The Brigade of Gurkhas

17. The Immigration Rules HC 394 paragraph 276E defines Gurkha for the purposes of the Immigration Rules as “a citizen or national of Nepal who has served in the Brigade of Gurkhas of the British Army under the Brigade of Gurkhas’ terms and conditions of service”. This is the definition of Gurkha used in this judgment save where otherwise stated. This starting point reveals the single most significant characteristic of the Gurkha soldier. As a citizen of Nepal he is and always has been an alien who therefore owes no allegiance by reason of birth or nationality to Her Majesty. Rather, as an alien and a national of Nepal allegiance is owed to the sovereign of that state, who was at all material times relevant to this application the Maharajah of Nepal. An alien for nationality purposes means someone who is not a British citizen, a citizen of another Commonwealth country, a citizen of the Republic of Ireland or a British protected person (British Nationality Act 1981 s.(50 (1)). Nepal is not and has never been a British dominion or a Commonwealth country. Its nationals were not British subjects at common law and did not become British subjects within the meaning of the British Nationality Act 1949 (that is say by and large Commonwealth citizens).
18. By contrast with Commonwealth citizens, aliens cannot vote in general elections, serve on juries, and are not generally admissible for service in the civil and military service. The historical prohibition on aliens serving in the armed forces (Act of Settlement 1701 s.3) has been modified by statute (s. 21 Army Act 1955; to be replaced in due course by s.340 Army Act 2006). In fact, apart from the special arrangements creating the Brigade of Gurkhas, the Army does not recruit aliens who are not also British citizens into its ranks (see Purja CA para 52) probably because the general rule with respect to allegiance in the military context is that a man cannot serve two masters.
19. The recruitment of Gurkhas is a long-standing and honourable exception to this rule extending back to the early years of the nineteenth century long before British or United Kingdom or Commonwealth citizenship was a concept in British nationality law. As a matter of ethnology a Gurkha was a member of one of the martial clans from the former Kingdom of Gurkha in the remote hinterland of Nepal. Gurkhas were recruited into the British Army in India with the personal authorisation of the sovereign of Nepal. They rapidly acquired the reputation for loyal and distinguished military service which made them such a cherished part of the HM Forces and goes far to explain the public esteem in which they continue to be held today.
20. Gurkhas were enlisted and trained in the territory of what was then British India. They were deployed in Gurkha units and were attached to the armed forces of British India. In 1947 with Indian independence, the British Army wished to be able to retain the services of some of the Gurkha soldiers it had previously commanded. So too it seems did the Government of India. Tri-partite discussions took place between representatives of the governments of India, Nepal and the United Kingdom, whereby the following consensus emerged:-

- i) The Maharajah of Nepal consented to his subjects serving in the British Army so long as they were not deployed against hindus, could be withdrawn in the event that Nepal is involved in any war, and that the sovereign was informed where they would be deployed. It was reluctantly accepted that recruitment and enlistment could take place in Nepal itself for the first time in due course.
 - ii) The Government of India permitted the British Army to recruit and enlist Gurkhas at places now within its territory until such time as new recruiting stations could be established in Nepal. This did not happen until 1952.
 - iii) The salaries and terms for service were based on applicable rates of the Indian Army, partly to deny the British Army an unfair advantage in recruiting Gurkhas on more favourable terms and thus undermining Indian acceptance of this arrangement. The Government of Nepal was content with these terms of service but added its own observation that

“In all matters of promotion, welfare and other facilities the Gurkha troops should be treated on the same footing as the other units in the parent army so that the stigma of mercenary troops may for all time be wiped out. These troops should be treated as a link between two friendly countries”
 - iv) Gurkhas would serve in the British Army in a dedicated Brigade reflecting the Nepali language, culture and educational standards. This was not a Brigade in the conventional sense of a deployment of various regiments and military units in a formation headed by a Brigadier, but a specialist Gurkha unit reflecting these unique arrangements and the continuing links to Gurkha culture.
21. This consensus was reflected in a document known as the Tri-partite Agreement (TPA) of 1947. This is a curious document that does not have the formality and clarity of an international treaty settled by diplomats, but is full of annexes containing the understandings or aspirations of one or other of the parties to the agreement, with the substance being the tri-lateral consent for the establishment of Gurkha units in the British Army and the Indian Army. Without the consent of both other governments there could have been no Brigade of Gurkhas in 1947. As Nepal can now be reached directly by air and as bases have been established there since 1952 where recruiting, enlisting and (until very recently) discharge takes place, the continued interests of the Government of India with respect to Gurkha TACOS is less significant.
22. By contrast, the future existence of the Brigade still depends on the consent of the Government of Nepal. There is uncontested evidence before the court that today the Government of Nepal regards retention of Nepalese nationality while its troops serve in the Brigade of Gurkhas as of considerable importance. It is only through the retention of Nepalese nationality that it could recall these soldiers to defend its territory for example. It may well be right to regard the Tri-Partite Agreement as less a treaty as notes towards a possible treaty that never came to be drawn up. There is a dispute between the parties as to what the TPA actually required in terms of Gurkha TACOS, notably whether it was an implied term of the agreement that Gurkhas would be discharged from military service in Nepal and nowhere else once the facilities for doing so were established there.

23. In my judgment, it is not necessary to resolve this or related issues in order to decide this application, even if I were the appropriate tribunal to attempt to do so. I accept the evidence filed on behalf of the Defendants in this matter that adherence to the spirit of the TPA has at all times been a material consideration for the Ministry of Defence who are concerned that the Brigade of Gurkhas be allowed to continue. It does not wish to risk a loss of goodwill by leaving it open to the accusation that it is treating Gurkhas in a fundamentally different way than envisaged in 1947, and it has been cautious in adopting policies or permitting other departments of the UK Government to adopt policies that might undermine continued consent for the survival of the Brigade in the twenty-first century. I note the importance that Mr Justice Sullivan attached to the continuing cultural connections to Nepal and the spirit of these arrangements when considering the rationale for distinct TACOS for Gurkhas in Purja (para 48).
24. I recognise that from the start the Gurkha TACOS reflected these origins and the importance of the opportunity to preserve ties with home when travel was difficult and time consuming. As the courts have noted when dealing with the pension claim, a Gurkha tour of duty was 15 years as opposed to the 22 years in the rest of the British Army. A pension was payable forthwith on completion of this period of service when the veteran might still be in his 30s and fit for employment in Nepal or elsewhere in the world. There was no liability for service in the reserve. Different arrangements for marital visits during service in part reflected these factors. There is also the fact that uniform application of the British Army's educational and language requirements for admission into military services would have excluded the recruitment of most Gurkhas immediately; different treatment does not therefore necessarily mean less favourable treatment.
25. On the other hand I accept that there is strength in some of the Claimants' observations and submissions that the MOD continued to adopt a very rigid position to what the TPA required or what the Government of Nepal wanted by way of treatment of Gurkha troops during or after service, that was long out of date in changed circumstances and values of the modern world. Although this part of the evidence presented by the Claimants and the interested parties was not the subject of submissions during the hearing, I cannot fail to note the apparently reliable testimony of a former Colonel of the Brigade and others that Gurkhas were to be prevented by application of military discipline from marrying Chinese women when they were stationed in Hong Kong, or from leaving behind dependants who might have a right of residence in such places on redeployment or discharge. The opportunity to preserve cultural links with Nepal may certainly have been a historic assumption of the TPA but it is not for the Army to force cultural purity down the throats of Gurkhas irrespective of their wishes. Within the broad confines of the special arrangements that gave rise to the Brigade including the need to preserve Nepalese nationality during service with it, there is plenty of room for the dignity and autonomy of the individual to make informed choices, indeed the far-sighted observations of the Government of Nepal quoted at paragraph 20(3) above and attached to Annex 3 of the TPA may be said to require it.
26. Following its establishment of the Brigade of Gurkhas, its Headquarters and its normal centre of gravity seems from 1952 to 1997 to have been based in South East Asia: in Malaya, Hong Kong and for a detachment still today Brunei. Clearly some

Gurkha soldiers, but more particularly Gurkha officers, might be posted to the United Kingdom or elsewhere in the course of their military service for one reason or another at the instigation of their commanders. The impression obtained from the evidence of the veterans themselves is that such residence would not normally reach the total of three years in the United Kingdom. In addition they might be and were called on to fight in theatres of conflict any where in the world. In the period between 1980 and 1997 one such notable theatre of conflict was the military engagement in the Falklands Islands. The home base however was outside the United Kingdom. Opportunities to establish close connections with the United Kingdom were very limited and constrained by the TACOS themselves. It is also clear that discharge on completion of military service always took place in Nepal after 1952, whether as a requirement of the TPA or because of the MOD's understanding of the principles underlying it. If the Gurkha veteran remained there drew his pension there, and used his training and skills acquired in the Brigade to obtain further employment in Nepal, all this would bring economic benefits to this country, generally recognised to be one of the world's poorest with a particular reliance on foreign remittances. It was assumed that such benefits made the Government of Nepal more inclined to continue with the arrangements first made with the East India Company at the beginning of the nineteenth century.

27. However, the return of Hong Kong to Chinese sovereignty in July 1997 prompted the relocation of the Brigade's Headquarters to the United Kingdom. Gurkhas were now based in the United Kingdom, and returned there between operational tours. This required adjustments to their basic wages and other terms that are not presently material to these applications. Whilst they were in the United Kingdom, Gurkhas were exempt from the requirement to have leave to enter or remain because they were members of the home forces (Immigration Act 1971 s. 8(4)(a)). The opportunities to bring over families and develop links with the United Kingdom increased. By the time of the 2004 Immigration Rules, however, Gurkhas were still discharged in Nepal at the insistence of the Ministry of Defence. From 2000 the Home Office had been curious as to why this was. When serving soldiers were eventually consulted about this by the MOD, it was apparent that this remained an unpopular aspect of practice. Far from wanting to be transported back to Nepal at public expense where opportunities for employment may be limited, these veterans who remained comparatively young men with long working lives ahead of them wanted to be given permission to remain in the United Kingdom, and in due course be able to apply for British citizenship.
28. Since April 2007 discharge has been able to take place in the United Kingdom with the option of travel back to Nepal at public expense. Gurkhas can now also count military service anywhere in the world towards the period of qualifying residence deemed to be in the United Kingdom, for the purposes of naturalisation, although citizenship can only be granted once they have left the Brigade of Gurkhas. These changes were made without objection from the Government of Nepal, just as earlier they had no objection to indefinite leave to remain being granted to Gurkhas.

3. The position of foreign and Commonwealth soldiers:

29. The Claimants seek to compare themselves with other soldiers in the British Army who were not British citizens in the period between 1947 and 1997. On the evidence before the court, apart from a few anomalous exceptions in the case of certain

officers, the only such non-British citizen soldiers serving in the Army during this time were Irish citizens, Commonwealth citizens and British protected persons. Irish citizens are not a particularly useful comparator in the field of immigration treatment, because unless excluded for reasons of personal conduct, irrespective of service in the British Army they would have a right of residence in the United Kingdom pursuant to the common travel area arrangements, and additionally from 1st January 1973 would have free movement rights as EEC citizens.

30. Commonwealth citizens are a different matter. Although at common law any British subject had a right to come and reside in the United Kingdom, since 1962 they have been subject to immigration control and since the coming into force of the Immigration Act 1971 have required permission to enter or remain in the United Kingdom for either a limited or indefinite period when they were not exempt from the need to obtain such leave. As serving members of the Home Forces such Commonwealth citizens would have been exempt from the requirement to obtain leave to enter pursuant to s.8(4)(a) Immigration Act 1971. As noted at paragraph [5] above the Home Office had a concessionary policy promoted outside the Rules since at least 1980 that led to such soldiers obtaining indefinite leave to remain on discharge in the United Kingdom. All the present Claimants were discharged after 1980 and it is not necessary to speculate how far back in history the AFC extended, although I anticipate it would have existed since the time when Commonwealth citizens were first made subject to immigration control.
31. In its evidence before the AIT the Home Office explained the reasons why the policy did not apply to Gurkhas in these terms (a foreign soldier here embracing Commonwealth and Irish citizens and BPPs):

“12. A foreign soldier discharged from HM Forces on or immediately before 1 July 1997 had no entitlement to indefinite leave under the Immigration Rules.

13. A foreign soldier was while serving in HM Forces, exempt from immigration control. Ordinarily, he would be discharged from the Forces in the UK, just as he would have been recruited in the UK. On discharge from HM Forces, he was required to send his passport to the Home Office: Armed Forces Concession section 2.1. If he did not do so, he would be granted 28 days leave to remain to enable him to make arrangements to depart the UK or to appeal: IDI (1997) Chapter 15 section 2 paragraph 3.4.

14. If the discharged foreign soldier, while still in the UK, promptly applied for indefinite leave to remain, he would ordinarily be granted this. The route by which this was effected was the Armed Forces Concession, which treated a foreign soldier's service in the UK in HM Forces as analogous to working in the UK in work permit employment, so that, if the soldier has been resident in the UK for the previous 4 years, he would be treated on similar footing with a foreign national who qualified for indefinite leave to remain under paragraph 134 of

the Immigration Rules by virtue of having spent 4 years in work permit employment in the UK.”

32. Thus it was the place of discharge that was regarded as critical although the place of discharge of Gurkhas was decided by military orders and was not generally a matter of individual choice. In the case of one example of a Gurkha officer who wanted to remain in the United Kingdom in 2000, the MOD were vigorously opposed to the Home Office granting him permission to do so in accordance with their understanding that the TPA required discharge in Nepal and granting permission to remain would undermine the principles on which the TPA was founded. All three assumptions have been shown by subsequent events to be unfounded: discharge in Nepal was not a requirement of the TPA; from 2004 to 2007 soldiers could be discharged in Nepal and still be given leave to enter the United Kingdom for an indefinite period; the grant of ILR to those who have ceased their service with the Brigade is not inconsistent with the TPA or contrary to the express wishes of the Government of Nepal.
33. The existence of the policy strongly suggests that there were Commonwealth citizens and others who would benefit from it, although the Home Office would not be the Ministry best able to inform the court as to the recruiting practice of the Army at the material time. In its evidence in opposition to this application for judicial review, the Ministry of Defence indicate that in fact prior to 1998 the Army did not normally recruit Commonwealth citizens unless they already had the right of abode or were “bona fide resident” in the United Kingdom. Recruiting forays conducted abroad such as one undertaken in Fiji in 1961 (before there was immigration control) were not repeated until 1998 since when numbers of Commonwealth soldiers serving in the armed services has increased markedly.
34. Mr. Kovats who appeared for the Defendants in these applications suggested that the explanation for the AFC may be that Commonwealth citizens who had indefinite leave to remain before recruitment into the armed services and then became exempt required a concession to regain their indefinite leave on ceasing to be exempt. I am satisfied that this cannot be right. Indefinite leave to remain does not lapse on the holder becoming exempt whether through diplomatic or military service. Indefinite leave to remain would automatically return on cessation of exemption. Although leave to remain could lapse by travel abroad outside the Common Travel Area, s.3(4) Immigration Act 1971 provides that it does not lapse if the holder “returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter”. As the authors of Macdonald’s Immigration Practice 3rd Edition (1991) comment at p.137 this refers to return by those who are exempt such as diplomats.
35. It may well be that comparatively speaking the number of Commonwealth nationals recruited into the Army before 1997 was small. There is some evidence of figures of between 790 and 650 being noted. However, I am satisfied that some of them, at least, did not have indefinite leave before enlistment and the AFC was designed to give it to them as if they had been a work permit holder or otherwise engaged in permit free employment and had earned it by four years continuous employment. Further as the Claimants submit, this court is not concerned directly with the recruiting practices of the army but the Home Office policies with respect to the grant of indefinite leave to remain. The AFC is clearly expressed as the first grant of ILR by reason of four years qualifying military service and not the restoration of it to those who already had it.

36. The Gurkhas were unable to benefit from such a concession as the evidence filed by the Defendant explains:

“The concession was predicated on a foreign soldier serving with the British Army being discharged in the UK and seeking indefinite leave to remain here. A Gurkha could not have benefited from the concession because, having been discharged in Nepal, he would have been seeking indefinite leave to enter the UK. Moreover, soldiers who enlisted outside the UK (i.e. Gurkhas) have had no statutory right to be sent here to be discharged.”

37. In March 2003 in answering an adjournment debate on the question the Parliamentary Under Secretary of State for Defence Dr Lewis Mooney sought to explain why Gurkhas were only discharged in Nepal:

“Gurkhas are discharged in Nepal *because we have a duty to ensure that they return to their home country*. We also have an obligation to ensure that they do not feel that they are returning to a foreign country. It is partly for this reason that Gurkhas are entitled to special periods of five months long leave in Nepal every three years, although I take account of the right Hon. Lady’s assertion that these tours can sometimes be reduced. This is quite unlike any provision available to British personnel.”

(Emphasis supplied)

38. As already noted the first part of this answer put the case too high. There is no duty to discharge in Nepal under the TPA or other international agreement. This was pointed out by the Home Office legal advisers in December 2003 in the consideration of the documents leading to the 2004 change. The highest that it can properly be put is that the spirit of the TPA envisaged continued links with Nepal and the expectation of the parties since 1952 was that Gurkhas would be discharged there as they have been.

39. As for the attitude of the Government of Nepal, when the matter was raised in the course of an MOD review of Gurkha TACOS, it had no objection to discharge of Gurkhas in the United Kingdom and consequently this became the norm from April 2007. The disclosure material reveals the following broad sequence of input from the Government of Nepal:-

- i) In January 2004 the Defence Attaché to the British Embassy Kathmandu was not convinced that “there was particularly strong opposition to a change in immigration policy that allowed Gurkhas to remain in or return to the UK”.
- ii) In September 2004, an Embassy memo recorded that “the Nepalese Government would welcome an exercise which addressed the legitimate concerns of current and former Gurkhas” and in response to a question of detail was informed that it was not believed that the exercise would be made retrospective. There is no indication that such a course would have caused

concern indeed the context of addressing the grievances of former Gurkhas is that this would have been welcomed as well.

- iii) In March 2005 there was information known to the MOD that the Government of Nepal raised no objections to discharge in the UK. This was confirmed in November 2005 at a formal consultation where the Embassy records reveal:

“15. The representative from the Nepalese MOD confirmed earlier soundings that:

a. The GoN supported the broad direction of the Review, appreciating that the changes would improve the conditions of service for Gurkha soldiers but preferred that formed units be retained because of their close connection with the image and identity of Nepal; that only Nepalese citizens should be recruited and that those who wish to join should do so in Nepal as at present, including any Nepalese citizen residing in the UK;

b. The GoN had no difficulty with discharge in either UK or Nepal.”

- iv) On the 16th November 2006, the Ministry of Foreign Affairs of the Government of Nepal wrote to the British Embassy in Kathmandu in the following terms:

“1. The Government of Nepal has its concurrence to the continuation of the British Gurkha in view of the friendly relations between the two countries. The Government of Nepal is agreeable to the proposed Gurkha Terms and Conditions of Service. However the Government of Nepal prefers to see the retention of the unique characteristics contained in the 1947 Tripartite Agreement.

...

3. The Government of the United Kingdom is requested to address with due priority and in an appropriate way the grievances of the ex-British Gurkhas concerning pension, equity, compensation, temporary entry to the United Kingdom and other associated issues”.

40. As previously noted, in this letter the Government of Nepal wanted the Gurkhas to remain Nepalese nationals during service with the Brigade and the retention of the unique arrangements of the TPA that were the consequences of this continuing nationality link. By 2006, however, the only grievance relating to entry to the United Kingdom was the failure of the British Government to provide sufficiently broad criteria to permit the Gurkhas discharged before 1997 to come to live here. There is therefore nothing in the papers before the court to suggest that this was a recent change of mind by the Government of Nepal or that there had previously been opposition in 2004 or before either to discharge in the UK or a generous retrospective application of the new policy permitting Gurkha veterans to obtain indefinite leave to remain. Further the interested parties have lodged the witness statement of a senior

Nepalese civil servant Dr Trilochan Upreti who is Secretary of the Ministry of Law Justice and Parliamentary Affairs in the Government of Nepal and who has indicated that he speaks for that government in making the statement that he has. He says:

“In 2004 the Nepalese government was consulted for the first time by the British Government on the subject of Gurkhas being granted settlement in the United Kingdom. At that time the Government of Nepal made it clear that it was happy for Gurkhas to settle in the United Kingdom. The position of the Government of Nepal is that this should extend to all those who served as members of the British Army’s Brigade of Gurkhas regardless of the date upon which they retired from the Brigade of Gurkhas”.

41. I appreciate that usually diplomatic communications between governments come through the respective Foreign Ministries, but there has been no challenge to the accuracy of Dr. Upreti’s evidence or his position and his account appears to be supported by the September 2004 memo referred to at [39] (ii) above. Moreover it is consistent with the historic concerns of the Nepal Government as recorded in the TPA Annex III which was for equal treatment of Gurkhas in such matters (see [20] (ii) above). If in 2004 it was explained that non-British citizen Commonwealth soldiers were eligible for settlement on completion of military service and had been so eligible since 1980 irrespective of when they were recruited and discharged then Dr Upreti’s account of how the Government of Nepal responded to the complaint of Gurkha veterans would have been far from surprising. In any event there is an absence of any information that would have been capable of supporting Geoff Hoon’s reference to the Nepal Government being “very concerned” in his letter of the 22nd September (see [10] above). The Home Office, through no fault of its own or the responsible Minister, appears to have been misled as to the existence of such a factor in formulating its discretionary policy for Gurkha veterans discharged before 1997.
42. With this brief and necessarily selective description of some of the core material underlying this challenge, I now come to decide as between the rival arguments on this challenge to the policy.

Ground 1: Discrimination

43. On the ground relating to discrimination, Mr Fitzgerald QC identified three bases for his claim:-
 - i. the common law principle of equality that is an integral part of the public law doctrine of irrationality
 - ii. the application of Article 14 of the ECHR when taken together with Article 8 and the concept of respect for private life
 - iii. statutory race discrimination contrary to the Race Relations Act 1976 as amended.
44. The last matter can be promptly disposed of as wholly unfounded. I agree with the helpful submissions of Mr. Kovats on this issue in his skeleton argument. Even if

those who are recruited as Gurkhas have racial or ethnic features in common as a sub group of Nepali nationals this has nothing to do with the present challenge, which is not based on a failure to be recruited but once recruited a failure to treat them equally with other non-British soldiers. They may be treated differently on the grounds of nationality, but this has nothing to do with their racial identity and this is an unnecessary intrusion into these proceedings. In so far as nationality based difference of treatment is concerned it is a complete answer to the claim that the difference in treatment in the field of immigration is authorised by instruments made under the Immigration Acts see Race Relations Act s.19D(3)(b)(iii). Both the Immigration Rules and instructions to immigration officers are formal pronouncements of pertinent policy binding on immigration officials, immigration judges and applicants. They are made pursuant to statutory powers under s. 3(2) and Schedule 2 paragraph 1(3) Immigration Act 1971 respectively. Although the rules have not been considered to be subordinate legislation, they are considered to be part of the law for determining whether a decision is taken in accordance with the law AA (Afghanistan) v SSHD [2007] EWCA Civ 12. They are also part of the law for the purpose of justifying any interference with rights afforded under the ECHR and a failure to adhere to them would prevent any such interference being justified (see Al Nashif v Bulgaria 36 EHRR 37 at 128-129).

45. I can see no reason why they are not “instruments” given the important legal effect they have. Moreover the same result is achieved by application of Race Relations Act 1976 s.41(2) as Mr. Fitzgerald was not inclined to dispute. In short this is a hopeless point that has clogged up consideration of the real issues.
46. I was initially inclined to consider that there were equal difficulties in deploying Article 14 of the ECHR. It is obvious that this is not a free standing Convention obligation but only prevents discrimination in the context of another Convention right. Since an application for immigration permission cannot be property within the meaning of Protocol 1 to the ECHR, the case depended on the Claimants’ bringing the discrimination complained of within the ambit of the right to respect for private or family life recognised by Article 8(1). Mr. Fitzgerald’s initial submission was that a belief by a claimant that they belonged to a country was sufficient to bring the subject matter within the core principles of Article 8. That appeared to me to be far too broad and wholly unsupported by authority.
47. By the end I understood that he had narrowed his submission to the proposition that a policy on indefinite leave to remain on the grounds of close links with the United Kingdom was a policy designed in part to promote the private and family life of those eligible for admission just as immigration rules on family reunion promote or have impact on the ability to enjoy family life (Abdulaziz and Cabales v United Kingdom (1985) 7 EHRR 471). It is clear that one does not need an individual right to be infringed before Article 14 can come into play; it is sufficient that the law or policy complained of is within the ambit of the Article and reflects the principles and interests protected by the Article in question. Although Mr. Kovats opposed even this narrower formulation of the ambit of Article 14, I am prepared to assume for the purpose of this case that it may be right and that I should accordingly test the legality of the policies under challenge by reference to Article 14.
48. The House of Lords have explained the proper approach to be considered with respect to discrimination within the ambit of the Convention. In the case of Carson v

Secretary of State for Work and Pensions [2006] 1 AC 173 [2005] UKHL 37, Lord Nicholls said at [3] that:

“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.”

49. I further note the assistance given by the House of Lords in its decision in and AL Rudi v SSHD [2008] 1 WLR 1434 at [24]–[27]. The focus is not on whether the comparator classes are in the same position in all respects but whether they are sufficiently similarly situated to call for explanation and justification. Where the basis for the distinction in treatment directly concerns a characteristic specifically protected by the Convention weighty reasons may need to be given.

50. Even if Article 14 was not engaged, the common law principle of equal treatment certainly would be. Moreover, for the reasons explained by McCombe J. in Gurung, that I gratefully adopt, the common law principle is an important instrument whereby it can be determined whether a discretionary public law decision is rational. It is also clear from AL and Rudi at [5] [42] and [51] that the common law and Convention principle essentially walk hand in hand together, although the common law principle has to be applied through the public law doctrine of rationality. Thus even if Article 14 was not in play the court should enquire:

“Was it open to a reasonable SSHD properly directing herself to conclude that the differences in treatment between Gurkhas and other non UK nationals was justified by reasons of differences of distinction in their situation so as not to infringe the common law principle of equality?”

51. The Claimants submitted that the only reasons that could be taken into account were the reasons given by the Home Secretary when announcing the Rule change in 2004 or the Home Office when filing their formal statement in the AIT. I do not consider that the matter is so constrained and any evidence relied on by the Defendant that shows that the comparator classes are not sufficiently analogously situated or that substantial reasons justifying a difference of treatment were in play at the time that the policies were adopted and the decisions applying them should be considered.

52. It is curious that the evidence presented to this court in witness statements, and those who were intended to be called before the AIT, were all from MOD witnesses dealing with recruitment into and retention of the Brigade of Gurkhas, whereas the policy under challenge is an immigration policy that Mr. Scott of the MOD once submitted to the courts was outside the province of that department. However, it is clear from the documents disclosed relating to the history of these changes that any restriction on the retrospective application of these policies were prompted by the concerns of the MOD. If those concerns had substance the Home Secretary would be entitled to rely on them. Even if it was the arrangements made or insisted on by the MOD that led to a difference in material situation with regards to residence and stay in the United Kingdom, in my judgement that would still be a relevant factor for the Home Office in forming its policy. It was entitled to take the position of the Gurkhas as they are or were rather than how with the benefit of hindsight they ought to have been.
53. In the end whether the matter is reviewed through Article 14 ECHR or the common law principle, I am satisfied that the discrimination part of the challenge fails. In simple terms the position of Gurkhas discharged pre-1997 was not sufficiently similar to non-British soldiers to have required equal treatment in the application of the AFC concession from 1980 to 1997. I reach this conclusion for the following reasons:-
- i. The recruitment of Gurkhas into the British Army was a historical exception to the general rule that only British subjects should so serve. It was only by reason of special arrangements including the retention of their status as aliens during service, that were able to be recruited at all.
 - ii. It was only by recruitment into a dedicated Brigade of Gurkhas that such soldiers could become a part of the British Army in the first place. The Home Office was entitled to attach weight to the Ministry of Defence view that immigration policies should not undermine the distinct identity of the Brigade or Gurkhas that would ultimately impact on the ability to continue to recruit.
 - iii. The ethos of the Brigade was based on retention of the Nepali language, culture and religion and the assumption that continued links with Nepal were of importance. This was reflected in the special leave arrangements and the practice of discharge in Nepal.
 - iv. Differential pension rates were one aspect of the special TACOS of the Brigade of Gurkhas that was not held by the Court of Appeal in Purja to be discriminatory on the ground of nationality, as Gurkhas were not sufficiently in the same situation as those with other TACOS. Ouseley J. subsequently held in Gurung that a different basis of calculation of pension entitlements by reference to service before or after 1997 was not unlawful or irrational.
 - v. People who were not physically in the United Kingdom when discharged from service were not in the same position as those who were. Presence and ordinary residence here for a substantial period prompted the policy behind the AFCs. Physical absence on discharge and the absence of substantial prior residence was a material difference in circumstance. Equally service on operations overseas might be said not to be an aspect

of ordinary residence in the United Kingdom if the service did not start from a base in the United Kingdom

- vi. Similarly the Immigration Rules themselves treat 1997 as a relevant date when the circumstances of the Gurkhas changed. The identification of July 1997 as a relevant date for entitlement under discretionary immigration policies was not an arbitrary or irrational consideration. Before that date Gurkhas were based overseas and would be ordinarily resident at the place where they were based. Their visits to the UK for operational purposes were short visits rather than evidence of voluntarily acquisition of ordinary residence here for an indefinite period.
54. I recognise that after July 1997 factors iv. to vi. had very substantially changed so that service in a unit based in the UK was much closer to comparable service by Commonwealth soldiers who were not British citizens. Patterns of recruitment between such Commonwealth and Gurkha soldiers looked much more similar after this period. There was also evidence of pre-selection recruitment forays abroad to Fiji, the Caribbean and Ghana as a result of which increasing numbers of volunteers from these countries joined. Although discharge in Nepal remained the unique practice for Gurkhas this was because the MOD required it rather than because the individual Gurkhas wanted it or the TPA required it. This could not be a decisive factor for immigration policy and as already noted discharge in Nepal was no bar to ILR being granted in the 2004 Rules. Whatever may have been thought in the absence of enquiry, the Government of Nepal proved not to be opposed to this when there was consultation. The documents showing the emergence of the change of policy demonstrate that the Home Secretary was increasingly concerned that it was not possible to justify the different immigration treatment of Gurkhas and foreign and Commonwealth soldiers who were not British citizens. If there had been no change in 2004 and a challenge brought about the failure to change policy and the court had had to address the question “from what date was the difference in treatment no longer justifiable?”, the date of July 1997 would have been a rational and appropriate date for such a conclusion. Accordingly it cannot have been irrational or unjustifiable to distinguish July 1997 as the date after which *rights* as opposed to discretion to settle in the United Kingdom accrued.

Ground 2: Rational criteria for discretion for those discharged pre 1997

55. None of these conclusions diminish the strength of the Claimants’ second challenge to the policy that the apparently exclusive criteria adopted for the exercise of the discretion were contrary to the purpose of the policy and irrational in the context of why the policy had been brought into existence before.
56. I recognise at once that a successful challenge to a discretionary scheme supplementing an Immigration Rule, will be a rare creature, given that there is no statutory steer as to the requirements of such a policy and given that the principle of equal treatment with others covered by a policy has not been infringed. It is not sufficient to condemn such a policy as irrational that the court considers it has excluded a circumstance that the court considers rational if a reasonable Minister properly directing himself has concluded that it is not. However, where the Minister has explained why the policy has been brought into being and what it is intended to

achieve, the court's scrutiny may extend to consider whether its terms as understood and applied by officials have illogically and irrationally frustrated its purpose.

57. It is clear that the gestation of the 2004 policy was prompted by inter-departmental concerns over the case of a former Gurkha Major in the United Kingdom who was facing immigration action to remove him from the United Kingdom, but the immigration Minister on reconsideration concluded that this was not justifiable and wanted to reverse the decision and grant indefinite leave to remain. The MOD was concerned with the implications of such a decision and there were vigorous interdepartmental communication. As the Home Office investigated the reasons for the MOD concerns it concluded that a case based on the requirements of the TPA was misconceived and that there was no rational distinction in immigration law that could be made between soldiers recruited to the Brigade of Gurkhas in Nepal and then based in the United Kingdom and other Commonwealth or Foreign soldiers who served from bases in the United Kingdom. It is also clear that the Home Secretary considered that exceptionally it was necessary to remedy the historic denial to Gurkhas not merely of a right to settlement but any opportunity to apply for it as a matter of concession. This denial of opportunity resulted from reasons wholly outside their control and based on misunderstanding of the international legal obligations. The Secretary of State for the Home Department wanted to be as generous as possible to Gurkha veterans who had performed historic service to this country. He was clearly discouraged from being over-generous in this respect by warnings from the MOD as to the concerns of the Government of Nepal. But the existence of these concerns proved to be misconceived. What the Government of Nepal wanted and indeed has obtained is that during service in the Brigade of Gurkhas, the soldiers remained Nepalese citizens and the links of allegiance to Nepal were not broken. The issue before the court is how should they be treated *after* they served?
58. Mr. Kovats has submitted that:
- i. Immigration policies are not usually retrospective let alone reaching back to a trigger event very many years before the policy came into being. The Minister cannot be faulted for generosity in providing that some pre-1997 claimants are eligible for discretionary admission.
 - ii. The criteria used for discretionary admission were the same as those used for non Gurkha Commonwealth soldiers and so there was no differential treatment between the two groups.
 - iii. In immigration terms it is rational to base a policy on physical or family links with the UK itself as opposed to the wider reaches of its dependent territories or overseas interests.
 - iv. The policy is a genuine discretionary one not trammelled by a mandatory requirement to fulfil one or more of the specified examples, whatever the individual decisions rejecting the claims may at first blush have indicated. The essence of the policy is whether "there are strong reasons why settlement in the UK is appropriate". This is a judgment formed by the individual ECO using the factors as a guide. If one or more of the identified factors existed discretion should be exercised favourably, but it

could be so exercised if other unspecified considerations led to the same conclusion.

- v. It would be legitimate to note the MOD's concerns about over-generosity in retrospective application of the policy possibly endangering the future of the Brigade or the Gurkha TACOS and particularly their pensions.

59. Mr Fitzgerald submitted that length and quality of service should be one of those considerations and should be sufficient in itself to qualify. Mr. Kovats accepted that four years or more service in the Brigade of Gurkhas before July 1997 could not be sufficient to justify the favourable exercise of discretion as that would undermine the bright line drawn around that date.
60. The court inquired whether for example: a) 10 years service in the Brigade before 1997 could be considered a factor of sufficient strength, b) whether injuries incurred in active service during that time could count, c) whether the fact that service was in the Falklands was relevant and d) whether the fact that service may have been so conspicuously gallant that decorations up to and including the Victoria Cross were awarded for service was a relevant and sufficient factor. In respect of this last question, Mr. Kovats could do no better than indicate it was a matter for an individual ECO as to whether an award of the VC was sufficient: one might lawfully conclude that it was and one might lawfully conclude that it was not.
61. It was this point in the hearing that the court began to have serious doubts as to whether the policy was sufficiently clear and consistent as to be a lawful way of promoting its objectives. The example of the VC was not an abstract one. Hon Lt. Pun had been awarded this highest honour for gallantry in war-time that the sovereign can bestow. He was initially refused admission under the policy but following understandable political concern at such a decision his case was reviewed personally by the Secretary of State and he was admitted. It was unclear whether this was an exercise of discretion under the policy or outside it. Bearing in mind that on an appeal to the AIT the Tribunal's powers are limited to whether the decision was in accordance with the law rather with whether a discretion should be exercised differently one can see the importance of clarity as to what the ambit of the policy was.
62. In promoting the historic change of policy Mr. Blunkett had referred to distinction in battle, the award of 13 Victoria Crosses, and the need to recognise the role the Gurkhas played in history and protecting the country (see [12] above). All this strongly suggests that identification of these factors mentioned at [60] could substantiate of themselves the discretionary grant of settlement, but whether they did or not remained unclear and it would be unlikely that the AIT could determine the issue since it was concerned with the singular question of whether the ECO had acted lawfully in accordance with the policy and could not review the exercise of any discretion that was not accorded under the Immigration Rules (see Nationality Immigration and Asylum Act 2002 s. 84(1)(f) taken with s.86). It would be impossible for an Immigration Judge to determine whether the decision had been in accordance with the law where the "law" was so unclear as to permit conflicting decisions and where and ECO could have acted lawfully in accordance with the policy by either granting or refusing entry clearance in an identical case.

63. Allied to the strong statements made by the Prime Minister and the Home Secretary in promoting the policy, is the fact that the health example spelt out under the policy: “Do they have a chronic/long-term medical condition where treatment in the UK would significantly improve quality of life” does not indicate that prior residence in the United Kingdom or existence of family here is a pre requisite. This was not even an example of a moral debt owed directly as the health problems of the veteran concerned may be entirely unrelated to military service.
64. The example of service in the Falklands serves again to tease out lack of clarity or inconsistency in this policy. It is well-known that at the time of the Argentine invasion of the islands, the intended nationality status of most islanders on implementation of the British Nationality Act 1981 was going to be British dependent territories citizen with no automatic right of abode in the United Kingdom. Following the successful military outcome and loss of lives of the British armed forces in the service of Her Majesty in right of the United Kingdom, the nationality laws were amended and Falkland islanders became or were entitled to become full British citizens. It would be curious if the Home Office had concluded that the islanders themselves who may have stayed put for many years were regarded as having a close enough connection with the United Kingdom but those who risked their lives and limbs to bring them their freedom did not. This would seem to irrationally subvert the historic debt that the Prime Minister and the Home Secretary spoke of. Some of the present applicants are Falklands’ veterans but failed to obtain a favourable outcome from the Entry Clearance Officer.
65. Transparency, clarity, and the avoidance of results that are contrary to common sense or are arbitrary are aspects of the principle of legality to be applied by the courts in judicial review. They are well exemplified by the jurisprudence of the European Court on Human Rights on the term “in accordance with the law”. Thus in Al Nashif (loc cit) the Court at [139] repeated its consistent case law that the phrase implies:

“the legal basis must be accessible and foreseeable. A rule’s effects are foreseeable if it is formulated with sufficient precision to enable any individual— if need be with appropriate advice- to regulate his conduct....the law must indicate the scope of any such discretion with sufficient clarity to give the individual adequate protection against arbitrary interference”.
66. I am conscious that I am borrowing from this jurisprudence developed in the context of interferences to assist in determining the legality of discretionary policies that seem in part internally contradictory and in any event at odds with the statement of purpose of the promoting Minister. The status of such policies as law has already been noted [44] above. It is important that ECOs know precisely what discretion is being afforded to them, and for the AIT to know when the ECOS are acting in accordance with the law and when they are not.
67. In my judgment, the context for the policy, the Ministerial announcement preceding it and the recognition that for some highly debatable reasons Gurkhas had not been allowed to settle here whilst other non-citizen soldiers have, serve to undermine the cogency of Mr. Kovats’ submissions outlined at [58] above.
68. For each proposition, there is a rebuttal applying the purpose of the policy as follows:

- i. Retrospectivity was precisely recognised as being appropriate in this policy, because Gurkha veterans had never before been offered any chance to settle and some measures were needed to correct this historic injustice whether they were in the same situation as Commonwealth veterans or not.
- ii. The fact that the same terms applied to Commonwealth and Gurkha veterans undermines rather than supports the policy. The court has already concluded that there were sufficient differences in the two groups before 1997 to preclude a legal requirement for identical treatment, but it is as unlawful and irrational to treat two differently situated groups the same as it is to treat two similarly situated groups differently. In particular, where Gurkhas were not allowed stay for long tours pre-1997 or develop family links here while Commonwealth soldiers could, it is irrational to make this a requirement for both groups.
- iii. This is not an ordinary case of immigration policy based on physical presence in the United Kingdom. Long military service was performed for the Crown at the instigation of Her Majesty's government of the UK, rather than of a dependant territory alone. It is a connection with this country wherever it is performed. If service overseas on behalf of the government of the UK can count for periods of qualifying residence for citizenship, it is difficult to see why such service in principle could not even be a reason to grant settlement in the UK. The fact that enlistment or discharge took place in Nepal may be a material difference from Commonwealth soldiers but is not a reason to deny discretionary settlement at all, as subsequent practice has made clear. Further given that Gurkhas tend to serve much longer why should not 10 years service when HQ was based overseas not been seen as broadly comparable to four years service when HQ was based in the UK? Both groups may spend considerable time away from base, and there was no element of minimum number of days presence in the UK for Commonwealth soldiers to obtain settlement as of right under the AFC.
- iv. If the policy is intended to be as broad as is claimed and to truly embrace the Home Secretary's reasons on announcement then further guidance by way of examples apart from physical presence in the UK, is needed to be spelt out, so that a clear answer could be given to the questions posed at [60].
- v. The MOD's concerns as to the impact on military effectiveness were doubtless legitimate but the dismissal by the court of the challenge to the first limb frees the Secretary of State to do what he or she thought fit in discharge of the moral debt without compromising bright lines adopted in the field of pensions, and pension contributions. If Gurkha veterans are to be allowed to come in as a matter of discretion because of evidence of compelling links through very long or very gallant service, that

does not mean that their pensions based on historic terms of service must be uplifted. Perhaps they will choose to remain where they are and their money may go further. Rather than the decisions of the Court of Appeal in Purja and Ouseley J. in Gurung supporting the resistance to this part of the challenge, they undermine a potential justification.

- vi. Finally, it should be noted that the one reason identified by the MOD in the exchange of correspondence between the Defence and Home Secretary immediately before the adoption of the policy has turned out to be plain wrong. The Government of Nepal never expressed opposition to retrospective settlement of Gurkhas in 2004 or before. The evidence indicates that they wanted Gurkha grievances addressed and as equal treatment as possible. A potentially substantial reason for caution in this area has proved to be unfounded and should play no role in the ambit of the policy. The really important issue about nationality during service has been recognised and addressed.

69. In my judgment, for all these reasons I conclude that there is substance in the Claimants' second ground for attack on the operative policy. Transparency and clarity are significant requirements of instructions to immigration and entry clearance officers that are published to the world at large, generate expectations of fair treatment and bind appellate bodies in the performance of their statutory functions. The policy under challenge in this case either irrationally excluded material and potentially decisive considerations that the context and the stated purpose of the policy indicate should have been included; alternatively, it was so ambiguous as to the expression of its scope as to mislead applicants, entry clearance officers and immigration judges alike as to what was a sufficient reason to substantiate a discretionary claim to settlement here.
70. There is a delicate balance between rigidity and flexibility to be applied in the formation of such sensitive policies, but this policy has failed to coherently describe itself. If factors such as 10 years service are to be recognised as weighty along with injury in service, decorations for bravery, service in the Falklands conflict or similar matters, this should be identified by further specific examples so the parameters of the qualifying class can be identified. At present the examples restrict the identification of the class to physical presence by claimant or family, whilst the purpose of the policy does not. If a decision has been taken that these kind of reasons cannot and should not be allowed to weigh significantly in the balance then some rational Home Office explanation is needed of why that is the case. Do the Home Secretary's reasons of September 2004 still stand? Has some new consideration not hitherto ventilated entered the equation?
71. The court is thus not determining what the elements of a rational future policy must be, it is merely declaring that given the context, objects and purposes of the discretionary Gurkhas policy, the instructions given to ECOs are unlawful and need urgent revisiting. It is of course for the Home Office to determine what should be done in response to this judgment and take political responsibility for the outcome where it is answerable to the electorate. A fresh look seems particularly appropriate in the light of the evidence about the attitude of the Government of Nepal. I will hear

counsel on the appropriate declaration and other terms of relief. It may not be necessary to quash the policy itself if it can still benefit claimants and merely needs supplementing and clarification. The individual decisions in this case, however, could be set aside and re-determined when the Home Office have responded to this judgment within a confined time scale of perhaps three months.

72. The Home Office will doubtless wish to consult with the MOD, but if Home Office policy to discharged veterans does not impede military effectiveness, and there are no international law or foreign policy constraints, it is difficult to see why the MOD should not itself welcome clarity and the honouring of a historic debt. The court is conscious that at the heart of military life and the sacrifices that soldiers make in the discharge of their duties is the Military Covenant. This reads:

“Soldiers will be called upon to make personal sacrifices – including the ultimate sacrifice – in the service of the Nation. In putting the needs of the Nation and the Army before their own, they forego some of the rights enjoyed by those outside the Armed Forces. In return, British Soldiers must be able to always expect fair treatment, to be valued and respected as individuals, and that they (and their families) will be sustained and rewarded by commensurate terms and conditions of service”.

Rewarding long and distinguished service by the grant of residence in the country for which the service was performed would, in my judgment, be a vindication and an enhancement of this covenant.