

SUMMARY

ECtHR 15 September 2016, application 44818/11. (Gurkha), Discrimination

<p>The ECtHR found no violation of Article 14 of the Convention read together with Article 1 of Protocol 1, in the pension schemes applying to the Brigade of Gurkhas. Although Gurkha soldiers could be regarded as having been treated less favourably than other soldiers in the British army, any difference in treatment had been objectively and reasonably justified.</p>

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Facts

The case concerned Gurkha soldiers' pensions. Nepalese Gurkha soldiers have served the Crown since 1815, initially as soldiers in the (British) Indian Army and then following Indian Independence in 1947, when four of its regiments became an integral part of the British Army. Only Nepali nationals are eligible for service in what is today known as the Brigade of Gurkhas. The Brigade of Gurkhas is not an operational brigade in the conventional sense; rather, it is an administrative entity which ensures that Gurkha units are able to be integrated into – and form part of – other operational brigades in the British Army. Historically, the Gurkhas had been governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions. Gurkha soldiers are required to retire after 15 years' service. The Gurkha Pension Scheme ('GPS') was established in 1949 and applied the former Indian Army Pensions Code to Gurkhas serving in the Brigade. Pension entitlements under the GPS were index-linked to the cost of living in Nepal, as it was presumed that the Gurkhas

would retire there. Pensions were immediately payable upon retirement. The situation of the Gurkhas has significantly changed over time. Originally based in the Far East, the Brigade's home base moved to the United Kingdom on 1 July 1997. This led to a number of developments, for example, in 2009, the Immigration Rules were amended to permit all Gurkha soldiers with at least four years' service to apply for settlement in the UK. The British authorities thus accepted in 2004 that the Gurkhas' situation had changed and that differences in the majority of their terms and conditions of service (including their pension entitlement) could no longer be justified on legal and moral grounds. As a consequence, the 2007 Gurkha Offer to Transfer ('GOTT') was formulated in order to bring Gurkhas' pensions into line with those of other soldiers in the British Army – who are entitled to pensions under the Armed Forces Pensions Scheme ('AFPS'). Soldiers in the British Army are entitled to serve for 22 years and, unlike the Gurkhas, are eligible for deferred pensions. The AFPS is not indexed with the cost of living in the soldier's country of origin. The GOTT enabled Gurkha soldiers who retire on or after 1 July 1997 to transfer from the GPS to the AFPS depending on when they first enlisted in the British Army. The terms of transfer allowed only the transfer of pension rights accrued after 1 July 1997 on a year-for-year basis. The applicants, two retired Gurkha soldiers and an NGO acting on behalf of Gurkha veterans, complained that their pension entitlements had been less favourable than:

- those of non-Gurkha soldiers in the British Army, and;
- those of younger Gurkha soldiers who had more years of service after 1 July 1997.

National proceedings

The applicants brought proceedings before the British courts and were granted permission to pursue a judicial review application in the High Court. They notably challenged the legality of:

- the decision that Gurkhas who retired prior to 1 July 1997 were not entitled to transfer their pension rights under the GPS into the AFPS; and
- the decision that, for those Gurkhas who retired after 1 July 1997, service before that date did not rank on a year-for-year basis.

ECtHR's findings (taken from the Court's Press Release)

The Court reiterated that there was no guarantee, as such, under the European Convention to

a pension of a particular amount. If, however, a Contracting State did decide to create a pension scheme, it had to do so in a manner that did not involve discrimination within the meaning of Article 14 of the Convention. In order for an issue to arise under Article 14 there had to be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference in treatment was discriminatory if it had no objective and reasonable justification.

Complaint concerning race discrimination

The applicants, by their own admission, had not pursued their claim on grounds of race before the domestic courts. That part of their complaint therefore had to be rejected as inadmissible for failure to exhaust domestic remedies.

Complaint concerning discrimination on grounds of nationality

First, the Court found that Gurkha soldiers had undoubtedly been treated differently from other soldiers in the British Army as concerned their entitlement to a pension since, prior to 1997, they had been governed by a different pension scheme from other soldiers in the British Army, with different terms and conditions. In addition, for those eligible for transfer to the AFPS, only accrued rights to a pension for years of service after 1 July 1997 had been transferred on a year-for-year basis, while accrued rights in respect of years of service prior to that date had been transferred at actuarial value (approximately 23 to 36 percent of the value of a year's service of a non-Gurkha soldier of equivalent rank).

Not all Gurkha soldiers would have been financially 'better off' if they had been treated as though they had always been in the AFPS, since pension payments under the GPS were payable upon retirement after 15 years' service. Nevertheless, the Court was satisfied that Gurkha soldiers could be regarded as having been treated less favourably in respect of their pension entitlement than other soldiers in the British Army. The authorities had indeed acknowledged that the pension benefit profile of a Gurkha soldier was less advantageous, paying sums too small at a time when they did not need them and an inadequate pension once they reached retirement age. Notably, during the 2004 review conducted by the Secretary of State for the Defence it was conceded that Gurkhas had "clearly" been wronged under the GPS in the changed context of a likely second career in the UK; and, an actuarial report submitted by the Government expressly accepted that Gurkha soldiers of officer rank or above (roughly four percent of the total) would have been in a significantly better financial position had they been able to transfer all years of service to the AFPS on a year-for-year basis. Further, in view of the significant developments in the Gurkhas' situation, their home base having been moved to the UK and all Gurkhas with at least four years' service who retired after 1 July 1997 having

been permitted to apply for settlement in the country, the Court accepted that by 2007 – the date of the GOTT – Gurkha soldiers had been in a “relevantly similar situation” to other soldiers in the British Army. However, the Court considered that any difference in treatment had been objectively and reasonably justified. The selection of 1 July 1997 as a cut-off point had not been arbitrary. That date represented the transfer of the Gurkhas’ home base to the UK and therefore the point in time from which the Gurkhas had started forming ties with the country. Those who had retired before that date had no ties to the UK and, at the date of the GOTT (2007), had no right to settle there. The Court therefore found no cause to doubt the conclusion of the 2004 review that the GPS continued to be the best scheme to meet the needs of these Gurkhas, since the payments under that scheme, which were available immediately upon retirement, were more than adequate to provide for their retirement in Nepal. As concerned those who retired after 1 July 1997, any pension entitlement accrued prior to that date had been accrued at a time when they had no ties to the UK and had no expectation of settling there following their discharge from the Army. In any case, the purpose of an armed forces pension scheme (either under the AFPS or the GPS) was not to enable the soldier to live without other sources of incoming following retirement from the Army. Given that most Gurkhas retired after 15 years, and the majority of other soldiers in the British Army retired before they had served for 22 years, it was fully expected that they would have other sources of income once they had left the armed forces. Finally, the Court found no support for the applicants’ argument that pensions should not be index linked to their expected country of retirement. Firstly, it was difficult to draw any genuine comparison between the position of pensioners living in different countries on account of the range of economic and social variables applying from country to country; and, secondly, pensions were a form of deferred salary, and many employers regularly adjusted salaries to reflect the cost of living in the city or country of employment. Consequently, there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Complaint concerning age discrimination

Any difference in treatment of Gurkhas on account of age stemmed from the decision to value only service after 1 July 1997 on a year-for-year basis. Any such difference in treatment therefore had to be regarded as objectively and reasonably justified for the same reasons given in relation to the applicants’ complaint concerning discrimination on grounds of nationality. It followed that there had been no violation of Article 14 read together with Article 1 of Protocol No. 1 as concerned the age discrimination complaint either.

Creator: European Court of Human Rights (ECtHR)

Verdict at: 2016-09-15

Case number: 44818/11