

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (ALIENS) (AMENDMENT) REGULATIONS 2018
2018 No. 1210

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Armed Forces Act 2006 (“AFA”) prohibits aliens being members of the regular forces, unless the Defence Council makes regulations which provide that aliens who satisfy prescribed conditions may do so. The Armed Forces (Aliens) Regulations 2009 (“2009 Regulations”) exempt Nepalese citizens or nationals who serve or have served for at least 5 years in the Brigade of Gurkhas.
- 2.2 This instrument amends the 2009 Regulations so that Gurkha soldiers, who enlist on or after 1st January 2019, serve for at least 7 years in the Brigade of Gurkhas before they have the option to transfer to other units in the Armed Forces.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is pertinent to members of the Brigade of Gurkhas wherever they are in the world.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Section 340(1) of the AFA provides that an alien may not be a member of the regular forces. Section 340(2) of the AFA gives the Defence Council the power to make regulations which exempt subsection (1) from applying to an alien who satisfies prescribed conditions, which are set out in subsection (3). A condition may require an alien to be of a prescribed nationality and to serve in a prescribed unit.

- 6.2 Under section 50(1) of the British Nationality Act 1981, an alien is neither a Commonwealth citizen, nor a British protected person, nor a citizen of the Republic of Ireland. Therefore, citizens or nationals of Nepal are considered to be aliens for the purpose of this legislation.
- 6.3 The 2009 Regulations, made under section 340(2) of the AFA, provide that section 340(1) of the AFA does not apply to citizens or nationals of Nepal who are serving in the Brigade of Gurkhas or who have served for at least 5 years in the Brigade.
- 6.4 These Regulations amend the 2009 Regulations for citizens or nationals of Nepal who join the Brigade of Gurkhas from 31st December 2018, by extending the period of time, from 5 to 7 years, before they can transfer to another unit of the Armed Forces.
- 6.5 Schedule 23, paragraph 1 of the Equality Act 2010 (“EA”) provides that provisions prohibiting direct or indirect discrimination on grounds of nationality, including those in Part 5 of the EA, will not be contravened, where a measure is taken under an enactment or under arrangements made by or with the approval of a Minister of the Crown. As well as making the 2009 Regulations, a ministerial arrangement was made.

7. Policy background

- 7.1 The Tripartite Agreement signed between the UK, India and Nepal in 1947 provides the basis for the service of Gurkhas in the British Army. The origins of today’s Brigade of Gurkhas, which stem from the independence of India in 1947, have meant that before 1 April 2007 Gurkhas served on different terms and conditions of service to other parts of the Army. From 2007 Gurkhas have served on the same terms and conditions of service as the wider Army, but with specific conditions to protect the identity and reputation of the Brigade designed to satisfy the Government of Nepal.
- 7.2 Prior to 2007, and the change in terms and conditions of service, Gurkha soldiers were not permitted to transfer to other units of the Armed Forces. The 2009 Regulations permit Gurkha soldiers to transfer from the Brigade of Gurkhas to other regular units in the Armed Forces after 5 years of service in the Brigade.
- 7.3 The purpose of this amendment to increase the period from 5 to 7 years before a Gurkha soldier may transfer from the Brigade of Gurkhas to a unit in the wider Armed Forces. The annual intake of Nepali nationals into the Brigade of Gurkhas is approximately 230. Currently every year approximately 80 personnel are transferring from the Brigade to other units in the Armed Forces, with this expected to rise to 150 annually as the first cohorts who enlisted on the initial 12-year engagement from 2008 approach the conversion point to the 24-year engagement. The rate at which personnel are transferring is affecting the operational capability and long term sustainability of the Brigade. Any increase in numbers transferring out of the Brigade will compound the existing gaps at unit level. It will also constrain the ability of the Brigade to fulfil the new roles within the Army with which it has been tasked.
- 7.4 The initial Army engagement is 12 years with a conversion to a 24-year engagement possible by the 10th year of service. The current position within the Brigade is that constrained structures and high retention will result in 64% of Gurkhas leaving the Army after 12 years’ service unless they transfer to the wider Army before that point. The main reason Gurkhas transfer out of the Brigade is for longer service and career opportunities.
- 7.5 The Army’s Principal Personnel Officer’s Committee considered other longer minimum periods of service but concluded that 7 years met the Department’s

requirement. By serving potentially an additional 2 years in formed units within the Brigade of Gurkhas individuals would still have enough time to take up specialised roles in the wider Armed Forces and gain conversion to the 24-year engagement. This was considered to be a reasonable balance between an individual's choice if the soldier wishes to transfer to another unit, and maintaining the operational capability and long-term sustainability of the Brigade of Gurkhas.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate the 2009 Regulations at present, but we will keep this under review.

10. Consultation outcome

10.1 There has been no formal consultation with the population that will be affected by this change because they have not yet been selected or enlisted into the Army. However, a thorough programme of briefing and gathering responses within the units of the Brigade of Gurkhas was undertaken in September 2016. Misgivings on the policy were allayed by the prospect of more 24 year engagements within the Brigade of Gurkhas, longer service being the key Gurkha aspiration. There will be no impact on any serving personnel as the change is prospective but serving Gurkhas understood the intent of the policy and the part it played in growing the Brigade of Gurkhas. Consultation with the different corps manpower planning teams in Army Headquarters confirms that transferring at the 7-year point will not affect whole career attainment based on ability.

11. Guidance

11.1 Full details of the new arrangements will be published prior to these Regulations coming into force using Army internal communications mechanisms. These will involve an Army policy statement and supporting Defence Instructions and Notices and Army Briefing Note.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies as this change is an internal Army matter and the effects will not be felt outside the service.

12.2 There is no, or no significant, impact on the public sector. For the Home Office in five years' time there will be a reduction in naturalisation applications from Gurkhas who transfer to the wider Army which will last for two years until the effect of the new regulation has worked through.

12.3 An Impact Assessment has not been prepared for this instrument because it is a prospective change which will not affect any of the serving Brigade. The only personnel that will be affected are those who enlist on or after 1st January 2019, and only then from 2024 when they otherwise would have been able to transfer. The requirement to serve for longer in the Brigade of Gurkhas is mitigated by the new positions which are opening up. There will be vacancies to fill within new Gurkha

units and within existing Brigade units; the latter due to more senior people moving into newly created management positions. The additional constraint inherent in this policy adjustment is balanced by measures that have already been endorsed by the Army which will dramatically enhance career and employment opportunities uniquely for Gurkha soldiers. Only Gurkha soldiers can be employed in Gurkha posts: British soldiers cannot. To date over 800 new positions for Gurkhas have been created which will need to be manned in the near future. The Army continues to seek other posts that will further increase conversion to longer 24 year engagements and to align Gurkha career aspirations with opportunities within the Brigade of Gurkhas.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that it subject to continued monitoring and review as required.

15. Contact

- 15.1 Michael Roberts at the Ministry of Defence Telephone: 01264 886086 or email: Michael.Roberts353@mod.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Damian Paterson SCS1 at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Mark Lancaster TD MP at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.