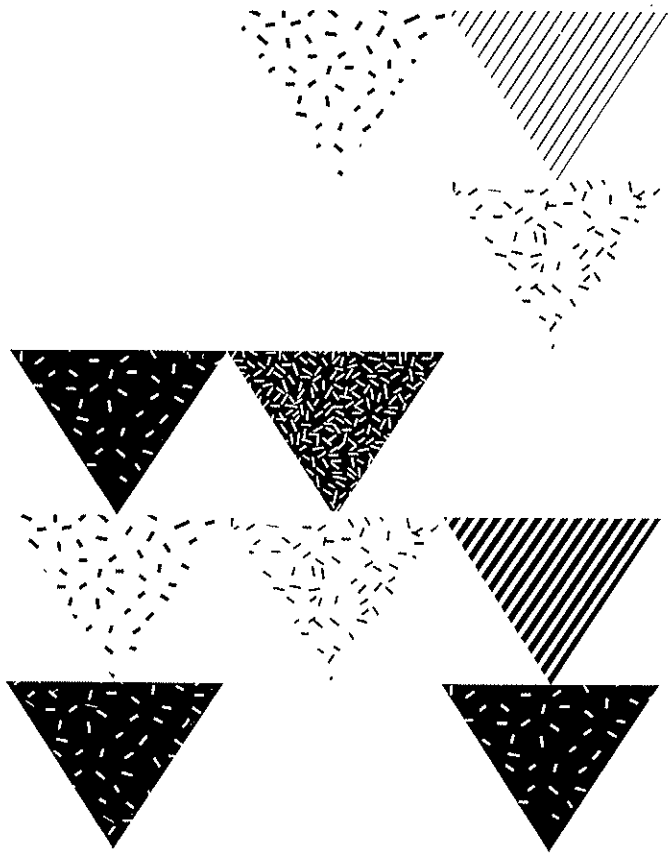

ministerial statements

The immigration exemption in the Race Relations (Amendment) Act 2000

A compilation of ministerial statements concerning immigration, asylum and nationality made on behalf of the government during the Bill's passage through Parliament

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INTRODUCTION

The following compilation can be read as a narrative, but its main purpose is to provide practical assistance to legal practitioners concerned with immigration, asylum and nationality. Like ILPA's earlier publications on the Asylum and Immigration Act 1996 and the Human Rights Act 1998, it gives extracts from ministerial statements as a guide to what the courts may consider to be Parliament's intentions in passing legislation: in this case the Race Relations (Amendment) Act 2000.

In one way, the impression given by these extracts is misleading if one looks at the Act as a whole. The emphasis everywhere, except in the sections concerned with what will here be called the immigration exemption, is on extending powers to deal with racial discrimination in all its forms, on promoting equal opportunities and on requiring new duties from public authorities so as to create an equal, multiracial, multicultural society. The tone of debates on all these proposals is unusually amicable; there is broad support from all sides of the House by the time the Bill reaches its final stages. Criticisms made at an early stage were accepted by the Government, notably with indirect as well as direct discrimination being covered. By the end of the Commons Committee stage, speakers from all parties were congratulating each other. Yet on the immigration exemption, any criticisms were stonewalled. The Government's position was starkly different from its position on all other parts of the Bill, and the concessions made to critics were nugatory.

All immigration laws are of necessity discriminatory on grounds of nationality, since they must distinguish between nationals of the legislating state and non-nationals. Whether, or in what circumstances, such discrimination is justifiable on moral, social or economic grounds is outside the scope of this publication, but legally there can be no doubt that international law permits states to control the entry and stay of non-nationals. At the same time, international law requires states to admit their own nationals. And it has certain norms which states are expected to observe, one of which is that there should in general be no discrimination on racial grounds.

On their surface, British immigration statutes have not been racially discriminatory. In their effects, it has been argued since the 1960s that they have been so. The possibility of effective discrimination lies in the very large discretion which the legislation has afforded to the Secretary of State, not only since the 1960s but in the aliens legislation of 1905, 1914 and 1919 which established much of the machinery of modern controls. The possibility also exists for other forms of discrimination (of which there was a great deal, in the first half of the twentieth century, on political grounds); likewise, of course there is the possibility of positive forms of discrimination or of no particular form of discrimination at all beyond the distinction between British citizens and others.

Some of the ways in which some applicants have been treated differently from others were described at length in the report of a formal investigation by the Commission for Racial Equality, published in 1985.[1] The CRE had had great difficulty in making the investigation, the Home Office having objected, but the High Court decided in October 1980 that the CRE's duty to promote good race relations permitted the work to be carried out. The Court "could not accept that Parliament must be assumed to have intended, as the Home Office contends, that the field of immigration should be a no-go area for the Commission". The report concluded inter alia that there should be a major change of emphasis in the procedures. A significant number of genuine applicants were being refused. In countries where there was supposed to be "pressure to emigrate", procedures were heavily biased against acceptance of individuals. Among would-be visitors, those from New Commonwealth or other Third World countries were the most likely to be refused or detained at port or admitted under more restrictive conditions. For example, in 1980, visitors from the New Commonwealth or Pakistan were 30 times more likely to be refused than visitors from the Old Commonwealth. Procedures for admitting spouses from the Indian sub-continent were often drawn out for years, while spouses from New Zealand or Canada met no difficulty. Differential treatment in family reunion caused particular concern. The appeals system had not impinged on any of the fundamental problems in immigration control procedures. Cautiously expressed though the whole report was, it confirmed criticisms of unfair bias against applicants from non-white countries. Its quotations from unpublished instructions to immigration and entry clearance staff show that, if the full force of the anti-discrimination measures in the Race Relations Act 1976 had been applicable to immigration control, procedures would have had to be radically and fundamentally altered.

In the debates on the Race Relations (Amendment) Bill 1999 (now the Race Relations (Amendment) Act 2000) the government sought and obtained Parliamentary approval for Ministers to discriminate on the grounds of nationality or ethnic or national origin in the administration of immigration, asylum and nationality law.

Ministers are not to be allowed to discriminate on grounds of race or colour in these fields. How the distinction is to be made between race or colour and ethnic or national origins is not, even after many hours of debate, obvious, although Ministers repeated that they wanted the matter to be "crystal clear".

Ministers have become very wary of making "Pepper and Hart statements". Since it was decided in Pepper (Inspector of Taxes) v. Hart (1993 AC 593) that lawyers may refer in court to clear ministerial statements made during the passage of a Bill in order to clarify the meaning of the legislation concerned, few hostages have been given to fortune. Therefore, passages of careful Home Office prose are frequently repeated in the Government statements on this Bill, while many questions posed by opponents of the "immigration exemption" were

[1] "Immigration Control Procedures: Report of a Formal Investigation" CRE, London 1985.

simply left unanswered. For these reasons, the following compilation of ministerial statements includes some quite lengthy extracts from speeches by the exemption's critics. The failure to answer directly may provide at least a negative idea of the Government's intentions.

The new provision and the arguments about them have received virtually no general publicity. The Long Title of the Bill said only that it was "to extend further the application of the Race Relations Act 1976 to the police and other public authorities; to amend the exemption under that Act for acts done for the purpose of safeguarding national security, and for connected purposes". There was nothing to suggest that a change to immigration, asylum and nationality law would be one of the connected purposes. Organisations and individuals concerned with immigration were not alerted. Newspaper reports concentrated on the Bill's main avowed purpose: to respond to the Macpherson report on the death of Stephen Lawrence.

The Act prohibits discrimination by all public authorities, including central Government, following the definition of public authority in the Human Rights Act. It imposes on certain listed authorities a duty to promote equality of opportunity and good race relations, and the Commission for Racial Equality is given new powers to assist compliance. The Home Office will be bound by these provisions – except in the administration of immigration, asylum and nationality law. Thus IND's employment policies are covered in the main Act but not its behaviour. Officials may under instructions from a Minister or on a Minister's personal decision discriminate on grounds of nationality, or ethnic or national origin.

The exemption concerning decisions on the grounds of nationality is reasonable enough in immigration law, where different treatment between British citizens and others, and between EEA nationals, Association Agreement nationals and others already exists on legal and defensible grounds. But to be able to discriminate on grounds of nationality in the treatment of asylum-seekers, for example when taking decisions on detention, or exceptional leave to remain, rather than on the basis of an individual's claim of persecution, is questionable. Just as dubious is the authorisation to discriminate on nationality grounds in the grant of British citizenship. One can see no rationale for this, and indeed the Government did not offer one during the debates. Since there is no appeal against refusal of British citizenship, and the Home Secretary is not bound to give reasons for refusal, one might say cynically that the new provision hardly matters. But it does matter, like the rest of the exemption, because it writes a hitherto unacceptable form of discrimination into statute law.

The puzzle is, how is anyone going to distinguish in practice between discrimination, on grounds of "race or colour" on the one hand and "ethnic or national origin" on the other? Ministers will decide. They are to deal "very firmly" with the former, which is unlawful, while authorising the latter, quite lawfully. But suppose a Chinese, who has been discriminated against on the latter, lawful

ground, claims he has been refused because of his race or colour. How will his race or colour be distinguishable from his ethnic or national origin? The point was argued forcefully by Lord Lester in the House of Lords:

House of Lords Hansard text, 14.12.99

Unlike discrimination on grounds of nationality or place or residence, discrimination based on ethnic or national origins is as much racial discrimination as is discrimination based on colour or race, as the definition of racial discrimination in Article 1 of the United Nations Convention on the Elimination of All Forms of Discrimination 1966 makes crystal clear. Such discrimination involves treating one individual less favourably than another for what is not chosen by them but for what is innate in them at birth – their genetic inheritance – whether as ethnic Jews, Roma gypsies or Hong Kong Indians. It is as invidious and unfair as is discrimination based on the colour of a person's skin. That is why the Race Relations Act 1976 forbids direct discrimination on any of those racial grounds, apart from a range of clearly defined exceptions.

The sweepingly broad exception in Section 19C is incompatible with the very principle of non-discrimination which the legislation is intended to secure. If the Home Office wishes to make special arrangements aimed at providing protection to particular groups seeking shelter in the United Kingdom, such as the Bosnians and Kosovars who were granted exceptional leave to remain during the recent crisis in the Balkans, it is difficult to understand how that would require an exception. The reason for affording favourable treatment to some of those groups is surely not their ethnic or national origins but their well-founded fear of persecution, the urgency of their humanitarian needs and the need to comply with the UK's obligations under the refugee convention. The policy is not based upon or caused by their ethnicity. It does not involve discriminating against anyone on the grounds of their ethnic or national origins.

As the Government have correctly stated in the UK report to the CERD Committee, which is the UN

committee (CERD/C/299/Add.9, 2nd December 1966, paragraph 58),

"There is nothing racist about designating countries which produce large numbers of unfounded asylum applications".

The same is true of refugee situations, if humanitarian provision is made, not on the basis of nationality or ethnic or national origin, but on the basis of an objective assessment of the conditions in the country concerned. The Section 19C exception is therefore not only unsightly, but unnecessary.

I go further. Even if it were appropriate, for the avoidance of doubt, to include an exception to cover situations of that kind, the exception to the fundamental right to equal treatment without discrimination would need to be prescribed in legislation in a way carefully tailored to what is necessary to give effect to the Government's legitimate aims, with adequate judicial safeguards against the abuse of this extraordinary power, to ensure that the doing of a discriminatory act is justified by its purpose, as with national security.

The functions covered by Section 19C include decisions to deport, exclusion directions, leave to enter or remain, the grant asylum, exceptional leave to remain, and even naturalisation as a British citizen. Section 44 of the British Nationality Act 1981 provides that any discretion vested by that Act in the Secretary of State, a governor or lieutenant governor, must be exercised,

"without regard to the race, colour or religion of any person who may be affected by its exercise".

Yet Section 19C would allow the discretion to be exercised on the basis of ethnic or national origins which are part of the international legal definition of what constitutes "racial discrimination".

As it stands, Section 19C authorises breaches by a future populist illiberal Home Secretary, or by a prejudiced administration, of the various international human right conventions by which the

within the duties of public authorities and of private authorities exercising public functions (e.g. prison staff and Group 4) not to discriminate.

Applicants whose visa applications have been successful but who nevertheless consider they have been racially discriminated against by an entry clearance officer may seek redress in the county court. Unsuccessful visa applicants have no such redress. Further Government Amendments at this stage included the extension, mentioned above, of the CRE's role in immigration appeals and the extension of the Lord Chancellor's jurisdiction under the SIAC Act 1997 to make rules.

Also in Commons Committee, the Government introduced what it described as an important exemption to the exemption. S.19E authorises the Secretary of State after consulting the CRE to appoint a monitor, not a member of his staff, having first submitted draft reports to IND, to report annually to Parliament on the operation of the exemption. The work is expected to occupy 40 days a year, and the monitor will have access to all relevant papers and will visit operational IND posts. But the monitor will not be an appellate authority and will not be concerned with recommendations on individual cases, but rather with the overall impact of the exemption. The post is comparable with the existing one of Entry Clearance Monitor.

Very little attention was paid during the debates to the authorisation for discrimination in the grant of British nationality. Lord Lester and Lord Avebury mentioned the issue briefly but the Government had no justifications to advance. Thus Parliament's intentions here were not clarified.

In the British Nationality Act 1981, the Secretary of State must exercise his discretion to naturalise without regard to the race, colour or religion of an applicant (S.44(1)). However, under S.44(2) the Secretary of State is not required to give reasons for a refusal, so it is not possible to discover whether regard was had to race, colour or religion or not. The decision by the Court of Appeal in the cases of the Fayed brothers in 1996[2] stated that although the Home Secretary was not obliged under S.44(2) to give reasons for refusal, he was required, before reaching a final decision, to inform an applicant of the nature of any matters weighing against the grant of the application in order to afford the applicant an opportunity of addressing them. The fact that S.44(2) provided that the decision was not to be subject to appeal or review did not affect the obligation of the Home Secretary to be fair or interfere with the power of the court to ensure that requirements of fairness were met. The contrary argument was wholly inconsistent with the principles of administrative law.

The Fayed cases were concerned with the "good character" requirement for naturalisation. But the court held that Parliament was not, in enacting S.44(2) intending by the ouster provision to exclude the ability of the court to review a

[2] For the judgement see Appendix C.

decision of the Home Secretary on the ground, for example, that he had not complied with any requirement of fairness which the Act imposed on him or the express prohibition against discrimination in S.44(1) when considering applications for naturalisation.

No case has yet been brought alleging that the Home Secretary discriminated on grounds of race, colour or religion. If one were brought, the court might have to consider the question whether "race" had the meaning in the RRA 1976 or whether it was distinct, under S.19(C) of the RRA 2000, from national or ethnic origin, and if so how.

Naturalisation is not the only means of acquiring British citizenship where the Home Secretary has a discretion. Under S.13 of the BNA 1981, the Home Secretary has discretion to register a person who has renounced British citizenship for any reason whatever, while the arrangements for resumption by entitlement are very limited. He also has discretion to register any minor, whether inside or outside the United Kingdom. This is important because the provision in the Act for entitlement to registration for minors are closely drawn. For example, a child born in the UK to asylum-seekers who had been granted only temporary leave to remain or no leave at all, might be born stateless (depending on the laws of the parent's country), and would be entitled to registration only when over 10 and under 22 and on production of proof that he or she had always been stateless, had spent five years in the UK or the UK and a dependent territory immediately before application, and had not been absent for more than 90 days in any one year of the five. The prospects for, say a Roma child acquiring British citizenship by entitlement would clearly be negligible.

Whereas EC nationals from other states will not be affected by the immigration exemption, since their movement is governed by Community law, it is not inconceivable that in future an EC national might apply here for naturalisation and be refused without reasons being given. However, the EC Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin might be invoked by, say, a French citizen/applicant of Algerian origin. Under Article 3(2) the Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned. So, while British immigration policy is not to be affected by the Directive, it appears that naturalisation policy might be.

The other international aspects of the immigration exemption were exhaustively described by Lord Lester in the speech quoted above (see p.00). Lord Bassam, in replying, made two points: first that the exemption simply allowed "existing legislation to continue as Parliament, in our view intended"; secondly that it provided the immigration authorities "with the necessary latitude to conduct their

TIMETABLE OF BILL

House of Lords

First Reading	2 December	1999	Hansard col. 917
Second Reading	14 December	1999	Hansard col. 127
Committee	11 January	2000	Hansard col. 532
	13 January	2000	Hansard col. 754
Report	27 January	2000	Hansard col. 1671
Third Reading	3 February	2000	Hansard col. 351

House of Commons

Second Reading	9 March	2000	Hansard col. 1203
Standing Committee			
	11,13,18 April and 2 May 2000		
Amendments considered			
	30 October	2000	Hansard col. 516

House of Lords

Commons Amendments considered			
	27 November	2000	Hansard col. 1189

General intentions of new immigration sections

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading 14.12.99,
Col. 130

The Bill provides a number of consequential measures to secure proper alignment between the various statutory provisions covering race relations and those that govern immigration, asylum and nationality. These are necessary to allow our immigration laws to continue to be administered as Parliament intended, and to support the Government's policy of reforming and accelerating the immigration and asylum appeals system.

Col. 131

The Bill seeks to strike a sensible balance between prohibiting discriminatory behaviour we would all regard as abhorrent on the one hand, and allowing justified and necessary acts of discrimination to maintain the Government's immigration and nationality policies on the other.

Home Secretary Mr Jack Straw MP,
HC Second Reading 9.3.2000,
Col.1211

The Bill provides various consequential measures to secure a proper alignment between the various statutory provisions covering race relations and those governing immigration, asylum and nationality. Those are necessary to allow our immigration laws to continue to be administered as Parliament intended, and to support the Government's policy of reforming and accelerating the immigration and asylum system...

The safeguards in the Race Relations Acts covering acts of discrimination done in pursuance of other statutory provisions, as interpreted by case law, are – within the context of the Bill – insufficient to allow the immigration system to operate as it should. If consequential provisions were not made, Ministers would, for example, be unable to authorise special compassionate exercises when necessary for particular ethnic or national groups – as we did last year, when we had the special exercise to evacuate and provide protection to Kosovo Albanians – and immigration staff would be unable to perform their duties in accordance with Ministerial instructions.

The powers in the Bill will be subject to very close safeguards. It will be unlawful for immigration staff to discriminate on grounds of race or colour or, in the case of nationality or ethnic and national origins, go beyond what is specified in immigration and nationality law or

open-ended power to discriminate, even outside the immigration rules.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading
14.12.99,
Cols 182 to 183

The noble Lords, Lord Lester and Lord Avebury, asked about the exemption of immigration, nationality and asylum and whether the provisions had been too widely drawn. We believe that the existing safeguards provided by Section 41 of the Race Relations Act for acts done by a statutory authority are insufficient to allow the immigration system to continue to operate as Parliament intended. Section 41 protects discriminatory acts which are carried out in pursuance of statutory provisions for ministerial arrangements. That was explained earlier. The courts have adapted a narrow interpretation, as required by law. The operation of an immigration system necessarily requires the exercise of some discrimination by Ministers and appropriately authorised officials. The authorisations are necessarily detailed in operational staff instructions approved by Ministers. It would therefore be impractical to set out in legislation every set of circumstances where discrimination would be required. I trust that that answers the question.

There are other examples such as those covering entry clearance officers overseas who need to be able to treat people differently because of their nationality or ethnic or national origin. That includes countries associated with state-sponsored terrorism or where the country has a track record of hostile intelligence activity. Alternatively, it may be where the country is known to issue passports to non-nationals or where there is a need to provide special treatment or protection to those at risk.

***Lord Lester**: My Lords, I apologise for being like a jack-in-the-box this evening, but I hope it is helpful to probe a little and give the Minister time for reflection. Does he agree that it is in no sense the policy of the immigration and nationality department of the Home Office ever to discriminate against anyone on the basis of their ethnic or national origins? The example he gave was not about discriminating against someone because of their ethnic or national origins. It is an example of making special treatment or a difference in treatment an objective reason that has nothing to do with ethnic or national origins. It would be a disaster if the immigration and nationality department were regarded as having a policy of*

discriminating on the basis of ethnic or national origin in naturalisation, immigration or anything else.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading
14.12.99,
Col. 183

Yes, my Lords, in a sense the noble Lord adds to my explanation and I find the intervention helpful. However, the general point I am trying to make is that there are occasions when there will be forms of lawful discrimination. There is a difficulty in drafting legislation to take account of that in relation to indirect discrimination. It is a matter for further debate and we can probe the issue some more as we progress.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Cols 583 to 585

We believe that it [Lord Lester's amendment limiting discrimination to persons of a particular nationality, religion or ethnic or national origin being afforded special treatment on humanitarian grounds] would remove the existing proposed exemption for immigration and nationality functions and replace them with a much narrower provision covering special treatment in humanitarian grounds. When we met in December to discuss these issues, the noble Lord made clear to me his view that the existing legal safeguards in the Race Relations Act 1976 should be sufficient to allow the immigration system to continue to operate effectively. He repeated that argument today. I understand that this amendment has been tabled for the avoidance of doubt in respect of the Bill's application to humanitarian exercises.

As I have made clear, the Government believe that the Race Relations Act has made a tremendous contribution to our society, and I repeat the tributes paid to its architect, the noble Lord, Lord Lester. We sympathise with the objective of ensuring that the Bill does not outlaw special exercise in relation to Kosovo Albanians. But we do not believe that the proposed amendment would provide adequate legal protection for the immigration system as a whole. That is the important point.

The operation of immigration policies necessarily and legitimately involves different treatment between individuals based on their nationality and, more rarely, their ethnic or national origins. In our view, the existing exemption for immigration and nationality functions strikes the right balance between providing victims of unlawful direct discrimination with an effective right of action and protecting necessary discriminatory activity in the exercise of immigration

functions which is required or authorised by Ministers or by legislation.

The pressures on the immigration system, of which noble Lords will be well aware, are such that we cannot allow any ambiguity to arise in relation to the application of this legislation to immigration staff. We know from experience that the immigration and asylum system, including the appeal system, is frequently used by those with an unfounded claim who are seeking to delay and frustrate the process. That is why we took firm action in the Immigration and Asylum Act 1999 to streamline the process to produce a fairer, firmer, faster system.

This Bill must make it crystal clear what is unlawful and what is permissible in the public interest. We believe that the existing formulation in Clause 1 (new Section 19C) does so. Activity which is authorised or required by law or by Ministers will be lawful, as will be personal decisions taken by Ministers in the public interest. Unauthorised acts of direct race discrimination will be unlawful, and the Government will have no hesitation in dealing very firmly with them.

Failure to provide clarity in this legislation would be unwise, both as an act of policy and to ensure that staff are fully protected when they carry out the duties Parliament and Ministers have laid upon them. The Government do not share the noble Lord's confidence in the adequacy of the existing legal safeguards provided by the Race Relations Act. Section 41 of the 1976 Act protects discriminatory acts which are carried out "in pursuance to" statutory provisions or ministerial arrangements. But the courts have adopted a very narrow interpretation of "in pursuance to". For acts to benefit from Section 41 they must be actually "required" by law.

However, the operation of the immigration system necessarily requires the exercise of discretion by Ministers and by appropriately authorised officials in accordance with published, transparent instructions. For example, the Immigration Service at ports requires the ability to target and prioritise certain nationalities for particular scrutiny where it has intelligence that particular national travel documents are being abused or where there is intelligence that individuals or groups of one nationality are presenting themselves as the nationals of another country in

order to benefit from compassionate policies or asylum procedures. There is chapter and verse on that. There are many such examples of such activity.

The Immigration Service and Integrated Casework Directorate need the ability to carry out special "nationality specific" exercises involving the fast tracking of cases and even the use of detention in response to sudden or sustained influxes of certain nationals, most recently from Eastern Europe, seeking to circumvent control. Entry clearance officers need the ability to treat individuals differently on various grounds. Examples include if their country is associated with state-sponsored terrorism or has a track record of hostile intelligence activities or if their country is known to have lax or inappropriate passport issuing arrangements. Such activity is a necessary part of operating the immigration system but may not be considered by the courts as strictly required by law.

There are also many examples of where the immigration system discriminates positively in favour of individuals on the basis of their nationality or ethnic or national origins. One example is the special treatment for Kosovan Albanians during the recent conflict in the Balkans. Kosovan Serbs were not treated the same way, for entirely understandable reasons. There are other examples where guidance to asylum caseworkers directs that one ethnic or national group from a particular country should be treated differently from another. For example, our policy in relation to persons originating from Bosnia-Herzegovina is to grant exceptional leave where the applicant's ethnic group is no longer in the majority. A Bosnian Croat originating from a Serb area would not be expected to return there, nor would a Bosnian Serb originating from a Muslim area.

Current asylum policy makes a distinction between Kosovan Serbs and Kosovan Albanians where the basis of claim is ethnic origin. The former are a minority and may qualify for asylum, while the latter may be refused and returned. The ethnic or national origin of the applicant in cases involving various other nationalities is also a key consideration in the determination of applications for asylum. It would be impossible to operate a rational asylum determination process if caseworkers were unable to make such distinctions. That is why the Bill makes it clear that

discriminatory activity which is required or authorised by law, or by Ministers, cannot be considered to be unlawful.

Lord Lester: *Before the Minister does so – I am grateful to him for giving way – he has not yet given a single example of discrimination based on a person's ethnicity as distinct from all the other considerations. We are dealing here with only direct discrimination, not indirect discrimination. I should like to know from the Minister whether there is any example where a person's race – that is what ethnicity is about, it is a part of race – is the basis for treating him worse than someone else. Perhaps I may give an example: the infamous one of the British Asians from East Africa who were refused entry to the country by Mr Callaghan's government by statute. That was held by the European Human Rights Commission to be inherently degrading treatment because it was based on their ethnicity.*

Under the bill as it stands there is nothing to stop the Home Office refusing to allow British Asians from East Africa in a similar situation coming here, not on the basis of their colour but of their ethnicity. Surely that is not what the Minister has in mind and surely the Home Office would not dream of discriminating against someone on the grounds of their ethnicity? If that is indeed the case, will the Minister please give some examples of where they have done so? I personally should be deeply shocked if that was so.

Lord Cope: *Before the Minister responds, I agree with what the noble Lord, Lord Lester, has just said. It did not seem to me that the examples given by the Minister of Kosovar Albanians or Serbs were based on their ethnicity but on their genuine fear of persecution. That is, after all, what asylum is supposed to be based on. Therefore, those examples do not answer the questions which I asked.*

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Col. 586

I should probably beg to differ, but I am open to looking at the matter further. Perhaps it would be wise for me to reflect more on the point which has been made and reiterated. We take the view that the cases of the Kosovar Serbs and Kosovar Albanians are exact examples of why positive discrimination may be necessary. That is why, in those instances, we believe that the way we have begun to phrase the legislation is right. However, I shall reflect more on

the comments made by the noble Lord in his intervention.

HL Report 27.1.2000 Col. 1691

Lord Lester of Herne Hill *moved Amendment No. 9:*

Page 2, leave out lines 22 to 25 and insert – ("(1) Nothing in section 19B shall render unlawful any act done by a relevant person in carrying out immigration and nationality functions in affording persons of a particular nationality, religion, or ethnic or national origin special treatment on humanitarian grounds.").

The noble Lord said: My Lords, Amendment No. 9 stands in my name and those of the noble Baronesses, Lady Prashar and Lady Howells. In previous debates I have said a great deal about this matter. I shall not repeat what I have said. The Minister sent me two letters explaining the position within the Home Office. Having read the letter of 26th January I how understand better than I did before what the concerns are of the Immigration and Nationality Directorate. However, I am still concerned about the great breadth of the exception, as it stands, in authorising ethnic discrimination in respect of any aspect of immigration control or the conferring of naturalisation and the effect that that may have in damaging the good reputation of the Immigration Service.

I have already expressed those views, and I believe that it would be more sensible not to add to my comments – I know other noble Lords wish to speak to this amendment – but to listen to the Minister's explanation. No doubt he will put on record the substance of his letters to me and consider the matter further. I beg to move.

Baroness Prashar: *My Lords, before I speak to this amendment I want to congratulate the Government on the two announcements that have been made. The extension of indirect discrimination to public authorities is particularly welcome. However, on this issue, to date I have heard no clear or convincing case for the exception that would allow Ministers of the Crown and immigration officials to discriminate on grounds of ethnic and national origin. Nothing that has been put forward has convinced me. I have carefully studied the Minister's letter to the noble Lord, Lord Lester, which was placed in the Library, and that*

has concerned me even more. I shall quote the paragraph that causes me concern[1]*:*

"It has also become clear during the course of our examination that it is also necessary on some occasions for the Immigration Service to differentiate between individuals on the basis of their ethnic or national origin. As an example, from time to time, the Immigration Service detects Chinese nationals with falsified documents that misrepresent them as Malaysian or Singaporean nationals of Chinese ethnic origin. Were this problem to grow significantly, it would be necessary for the Immigration Service to scrutinise with particular care the documents presented by these nationals of Chinese ethnic origin and to interview them".

I see the problem. My concern is that it would actually perpetuate stereotyping and that needs further consideration. Furthermore, in my view, this exception is incompatible with the principle of non-discrimination that the legislation is designed to serve. It will undermine the confidence of ethnic minorities in the legislation. I, for one, have vivid memories of the case of the East African Asians who, in 1968, were treated differently on grounds of their ethnic and national origin. As noble Lords know, the matter was

HL Report 27.1.2000, Col. 1692

taken to Strasbourg. That has had a long-lasting adverse effect both on ethnic minorities and on race relations generally. Exceptions in immigration, as other matters, should be based on objective considerations, such as conditions in countries of origin or fear of persecution, and not on ethnic or national origins. I fear that this blanket exception will give unfettered power to Ministers of the Crown and immigration officials to discriminate on grounds of ethnic or national origin, which may be administratively convenient but in my view is totally unacceptable on any other reasonable grounds. For that reason I urge the Minister to reconsider the position.

Lord Avebury: *My Lords, the noble Baroness referred to the cases of the Chinese who were detected at immigration presenting documents purporting that they were of Malaysian or Singaporean nationality. Can the Minister explain that*

[1] Lord Bassam's letter of 26 January 2000 to Lord Lester is reproduced in full at Appendix A

a little further?

If these people were asylum seekers coming from the People's Republic of China, clearly they had good reason for presenting those documents because they would not be able to leave China and come to the United Kingdom as refugees using Chinese passports. As the noble Lord, Lord Bassam, knows well, the problem of false documents has been dealt with extensively on the Floor of the House and in the courts. It has been ruled that the presentation of false documents by an asylum seeker is not a criminal offence and that consideration of it must be deferred until the end of the asylum process. I am mystified, therefore, that the Minister should give that example in support of the Home Office policy on discrimination in the Immigration Service.

Conversely, I can see every argument for a provision such as that suggested by my noble friend because there are instances where the Immigration Service positively discriminates in favour of certain nationalities. For example, it is well know that the ports at entry treat Somali nationals favourably because they know what the situation is in Somalia. There is no proper government and people who belong to the wrong group are at risk of being killed by armed factions. Therefore, great sympathy is applied in consideration of applications for asylum by Somali nationals. More or less all of them are accepted as qualifying for exceptional leave to remain, and I have no quarrel with that when I look at the situation in their country of origin. But if it is necessary to allow that kind of thing to happen explicitly, a provision should be put on the face of the Bill while we have the opportunity.

***Lord Cope**: My Lords, I too had the opportunity, thanks to the courtesy of the Minister, to see the letter of 26th January explaining what the Government were attempting to achieve.*

The noble Baroness, Lady Prashar, quoted the example (given in the letter) of Chinese nationals with false documents. I make a distinction – it has been made many times before both in this house and

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elsewhere – between those who, for obvious reasons, are obliged to travel on false documents (or for that matter with no documents) and those who when they

arrive attempt to deceive our Immigration Service by presenting false documents. It may be that they do not realise the quality of our Immigration Service or the way in which it works. But that is a different matter from someone escaping from China or some other country where they are being persecuted. To arrive here and attempt to gain entry on false documents needs a lot more explanation. That is why the Home Office is concerned, and the Minister indicates concern in his letter, that the Immigration Service should be able to scrutinise entry particulars carefully on arrival. It is not only the Chinese, of course; there will be comparable cases from other parts of the world from time to time.

Lord Bassam: My Lords, your Lordships will recall that when the House debated this matter in Committee, I explained the Government's view that the proposed amendment would leave the immigration system without adequate legal protection. I also explained why we consider it necessary to retain the existing proposed exemption for immigration and nationality functions in Clause 1, new Section 19C. The effect of the amendment would be to remove the existing formulation and replace it with a much narrower provision covering special treatment on humanitarian grounds.

I made it clear that in our view the existing legal safeguards provided in Section 41 of the Race Relations Act 1976 would be insufficient to allow the immigration system, which necessarily involves some discrimination on grounds of nationality or, on occasions, ethnic or national origin, to continue to operate as Parliament intended. The Government's view has been informed and supported by the case law.

Any system of immigration control necessarily involves discrimination on grounds of nationality. I hope that there is now common agreement on the need for an exemption that allows immigration staff and Ministers to discriminate on grounds of nationality where such discrimination is properly authorised or required.

I understand the noble Lord's concerns about the exemption for immigration and nationality functions to discrimination on grounds of ethnic or national origins. Noble Lords will recall that in Committee I undertook

that the Government would look again at these issues in detail. It is for that reason that the correspondence referred to was conducted.

We carefully considered whether the exemption in relation to ethnic or national origin is necessary and if so, whether it should be narrowed. As I explained earlier, that was the purpose of our correspondence; that is, to advise Members of our considerations and to try to be helpful. We concluded that the exemption in its current form in Clause 1, new Section 19C, is necessary and that there is no real scope for restricting it further. There is at least one precedent for Parliament permitting distinctions to be made by reference to a person's origin in this context; namely,

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
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Section 41(3)(a) of the Immigration and Asylum Act 1999 which re-enacts an amendment made to the Immigration (Carrier's Liability) Act 1987 made by the Asylum and Immigration Appeals Act 1993.[2]

As I made clear in Committee, we believe that the exemption is necessary to allow the immigration system to handle asylum applications and cases requiring exceptional treatment on compassionate grounds. The noble Lord made clear his view that the courts would not find that the Home Office had acted unlawfully in cases where differential treatment had been provided to different ethnic or national groups because of the situation in their countries of origin. However, as I also made clear, we simply cannot afford any degree of ambiguity to arise in relation to the immigration and asylum system. We are required in practice to operate policies that are country specific, and to treat applications alike without always considering the individual circumstances of a person falling within the relevant ethnic or national group and who is from the country concerned.

I listened with care and interest to what the noble Baroness, Lady Prashar, had to say in support of the amendment. Although in a historical sense I can

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[2] S.41 (1) The Secretary of State may by order require transit passengers to hold a transit visa.
(2) "Transit passengers" means persons of any description specified in the order who on arrival in the United Kingdom pass through to another country without entering the United Kingdom; and "Transit visa" means a visa for that purpose.
(3) The order –
(a) may specify a description of persons by reference to nationality, citizenship, origin or other connection with any particular country but not by reference to race, colour or religion;

understand her concerns about the issue, it has become clear to us during the course of our examination of the situation that it is necessary, on some occasions, for the Immigration Service to differentiate between individuals on the basis of their ethnic or national origins. I shall go through the example I gave in the letter again because it is important to understand it. From time to time, the Immigration Service detects Chinese nationals with falsified documents that misrepresent them as Malaysian or Singaporean nationals of Chinese ethnic origin. As has been said, were this problem to grow significantly, it would be necessary for the Immigration Service to scrutinise with particular care the documents presented by these nationals of Chinese ethnic origin and to interview them. But with 89.1 million passenger arrivals in the United Kingdom during the last financial year, of which 12.2 million were subject to immigration control, even with the best will in the world the Immigration Service does not have the capacity or the resources to interview every Malaysian or Singaporean seeking to enter the country, irrespective of their ethnic origin. An assessment of risk, based on available intelligence, must be made. Moreover, it has to be said that this risk assessment may sometimes have to be based on the ethnic or national origin of passengers. I give way.

5 p.m.

Lord Lester of Herne Hill: *My Lords, I am most grateful. I am very worried by the answer and the explanation that has been given. Perhaps I may clarify exactly what we are talking about. If one were dealing with would-be immigrants who were white--that is to say, European in appearance--who came, say, from the Russian Federation, there would be no basis to treat them differently because of their ethnic origin or the kind of grounds mentioned in the letter.*

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The Minister is saying that because people look Chinese we must reserve the right to single them out for special treatment on the basis of their appearance--their ethnic characteristics--and the fact that they are not white. We could not do that with anyone who was white because there are no distinguishing ethnic characteristics of that kind. If that is what is being said, does not the Minister realise that that is quite different from singling out people on the basis of their

country of origin or their nationality: it goes to the root of what they are and cannot help being because of their ethnicity, their colour or race. Does the Minister recognise that? Am I correctly understanding what is said in the letter and what is being said by him today?

Lord Bassam of Brighton: My Lords, I am trying to explain to the House that, yes, there will be some circumstances where, on the basis of careful intelligence and a risk assessment, we have to make that judgment based on what is perceived as an individual's ethnicity.

Perhaps I may develop the point further. During 1999, the Immigration Service detected more than 5,000 attempts to enter the United Kingdom using forged or counterfeit travel documents or visas. The noble Lord, Lord Avebury, quite understandably referred to the circumstances in which someone might use documents of that sort because he is fearful of the situation in the country from which he originated and this is the best way to effect an escape. However, I urge noble Lords to accept that it is the case that scams are being operated essentially by people who are seeking to come to the United Kingdom because it is an attractive place to live and because it is in their economic interests to come here. These scams are being operated to get round the effect of our immigration legislation. That cannot be acceptable. It is in such extreme circumstances where we suspect that sort of criminality that we feel we need this exemption. That is why we are putting forward this argument.

We do not desire pro-actively to discriminate. But if we do not have the capacity to mount such operations, with a carefully thought-through risk assessment, our system of immigration control will be fundamentally weakened. We do not believe that that is desirable or that that has been Parliament's intention in the past. We do not believe that it accords with legislation that we have recently put on the statute book through the Immigration and Asylum Act 1999.

I believe that the case we have made highlights the very real challenges faced by immigration staff in performing their duties. I ask noble Lords to bear in mind the fact that they are very difficult tasks to fulfil. We take the view that immigration staff need very clear and transparent guidance to ensure that they respect the rights of others. There is no argument about that. The exemption for immigration and nationality functions in Clause 1 will provide Ministers with the framework within which to provide guidance. The

latter is very important in this context and I ask noble Lords to reflect on that.

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As far as possible the guidance will be published for Parliament and the public to see in line with the Government's commitment to openness and very much in line with our commitment to ensure that we operate our legislation within a framework that combats racism--whether direct or indirect--in all its forms. We must have immigration procedures and practices that will be thoroughly reviewed to ensure that the only discriminatory activity that is necessary and can be justified is covered by clear guidance, approved by Ministers, and that any discriminatory activity which cannot be justified is eliminated. That must be our policy objective.

I hope that noble Lords will accept my explanation. On that basis, I also hope that the noble Lord will accept that we have considered these issues very carefully and, as a result, he will feel able to withdraw his amendment. We believe that this exemption is very important; we believe in the strength of our case; and we believe that it is right to protect the integrity of our immigration system.

Baroness Prashar: *My Lords, I do not underestimate the difficulties faced by the Immigration Service--*

Lord Bach: *My Lords, I am sorry to interrupt the noble Baroness, but I must remind the House that this is the Report stage of the Bill. I believe I am right in saying that after the Minister has responded and sat down, only the mover of the amendment may speak. I apologise, again, for interrupting the noble Baroness.*

Lord Lester of Herne Hill: *My Lords, I am glad and grateful that the Minister has given his explanation, but I am very concerned about the matter. Like everyone else, I am strongly against any form of dishonesty or evasion of immigration control and in favour of firm, fair and effective immigration control. That is not in issue. I accept that the policy must be based on nationality and country of origin; and, indeed, humanitarian considerations, together with other special grounds. But what worries me--*

Lord Bassam of Brighton: My Lords, I am sorry to interrupt the noble Lord, but perhaps he will bear with me for a moment.

I have explained carefully that we intend to consider and publish guidance in this field. Clearly we will have to

publish such guidance and, obviously, we will have to take on board comments made by your Lordships and others. I should like to think that, in the guidance, we can tackle the concerns and issues that the noble Lord has quite properly raised on the Floor of the House this afternoon. I make that point because I believe it might help the noble Lord in determining how he wishes to proceed with the amendment.

Lord Lester of Herne Hill: *My Lords, guidelines are crucial and they must be transparent. I also believe that they should be subject to parliamentary scrutiny and approval. I add the words "and approval" because*

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I think that this is quite an exceptional situation where Parliament should act as a watchdog over any approval of ethnic discrimination of this kind. However, perhaps I may try to explain why I am so concerned.

Everyone in this House understands that the police must not use their stop and search powers on the basis of racist assumptions. But if they cannot stop black people because of their ethnicity, they cannot take a short cut and say, for example, with regard to the Chinese, "We think that there is a great deal of criminality of a particular kind among the Chinese community, so anyone who looks Chinese will be stopped and searched for the very important function of detecting and prosecuting crime". The Home Office has accepted, and we have accepted in this legislation, that that conduct must be unlawful.

It is unconscionable for a public officer to treat one person worse than another in exercising the powers of the state because of that person's ethnicity. There is no difference between ethnicity and a person's colour. If you look Chinese, it does not matter whether it is because you look yellow or have Chinese features; it is to do with characteristics that you cannot help. For the Immigration Service to stop and search in precisely that way on the basis of ethnic stereotyping is, I suggest, equally unacceptable. No guidelines are going to make it acceptable.

The point is that as a matter of principle immigration officers should not be stopping, searching and interviewing people differently because they are black, Chinese or because of any other ethnic reason. I very much hope that between now and Third Reading we

will be able to find an appropriate form of words. It would be very sad if the Bill were to leave this House with a very important fundamental principle still being contentious.

I am very grateful for the letter and the explanation I have received, but I still think it is contrary to the very principles of the legislation to allow immigration officers to treat people differently because they look Chinese any more than because they come from the Caribbean and they are black. I see that we are dealing not with colour discrimination but ethnic discrimination. For the reasons I have given, I do not think that this is acceptable. The noble Lord, Lord Cope of Berkeley, very helpfully throughout these debates has taken exactly the same point of principle, distinguishing between ethnicity and nationality. We all see the reasons why the Home Office must distinguish on the basis of nationality, country of origin and humanitarian considerations. I very much hope that we can make progress on this between now and Third Reading to find a form of words which will give the Home Office all the protection it needs without undermining the very principles of the legislation. On that basis, I beg leave to withdraw the amendment.

Amendment, by leave, withdrawn.

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Mr. Hughes: *A good example was given of obvious discrimination that could give rise to concern… an occasion when the Government had reason to believe that people of Chinese origin might be participating in illegal activity with regard to entry. Therefore, it was not only people from China, but people of Chinese origin from Singapore, Malaysia and other places who were understandably the subject of immigration officials' attention at a particular time on the basis of information received… In the House of Lords, a parallel example was given of a white Russian coming to this country, whom immigration officials would not be able to distinguish from any other white entrant from elsewhere in Europe…*

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien,
HC Committee
13.4.2000,

White people are not one homogenous group, incapable of being distinguished one from another. It is possible to distinguish people from different groups, although I shall not go into the ways in which that can be done. However, given the sheer numbers of white people who come into Britain, a white person might well find it easier to breach immigration control than

5.00pm

someone from an ethnic minority. Given that only 6 per cent of our population are from ethnic minorities, fewer people from ethnic minorities than white people will be entering at any one time. Therefore, the chances of someone who is running a scam getting into this country are greater if they happen to be white simply because of our national make-up. It is likely to be easier for a white person, but that does not mean that immigration officers should not be asked to exercise some judgment about people's origin, which does not just involve looking at them.

These days, intelligence-led immigration control relies less and less on that method of identifying people. That is why immigration service officers get rather perturbed when critics suggest that they are making all these decisions merely by looking at someone's colour. They may have received information, which did not readily identify the individual's colour, when making a decision to stop them. Information is often provided by the airline or intelligence sources in other countries. It may be possible to gain that information from a name, but that is not always the case.

The immigration service needs to be able to exercise judgement. I do not accept the view that all white people look alike, any more than I accept that people from any other ethnic background look alike. People differ and have different characteristics. Colour is not usually the sole basis on which an immigration officer makes a decision to stop and check someone. It is much more likely these days that he would receive information from an intelligence source and that his decision to stop and check would be unrelated to colour.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Report 30.10.2000, Col. 541

There are other examples in which guidance to asylum caseworkers indicates that one ethnic or national group from a particular country should be treated differently from another. The ethnic or national origin of the applicant is a key consideration in the determination of applications for asylum and exceptional leave. It is clearly important to establish whether a particular ethnic group is the subject of some form of persecution in the country from which it comes, rather than another ethnic group. It would be impossible to operate a rational asylum process, requiring the immigration authorities to treat cases alike without always delving into the detail of each claim, if caseworkers were unable to make such

distinctions. That would make the operation of the asylum and immigration system extremely difficult.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Report 30.10.2000, Cols 541 to 542

Certainly each asylum application is decided on its individual merits. To that extent the hon. Gentleman (Mr. Hughes) is right. The individual however comes with a history – a background. In the case of Kosovo, for instance, in which we operated special procedures in relation to ethnic Albanians, it was clearly relevant to determine whether an individual claiming to be an ethnic Albanian was indeed an ethnic Albanian. An ethnic Albanian coming from Kosovo rather than Albania itself might be given different treatment from an Albanian coming from Albania, or a Serb coming from Kosovo. On that basis we had to examine not just individual circumstances, but the broader context. It was not necessary to look much further into the individual circumstances of a person identified as a Kosovan Albanian to decide how that person should be dealt with.

The hon. Gentleman is right in principle: when deciding whether to grant asylum, we should consider individual cases. However, the context in which the decision is made cannot be ignored.

[In answer to Mr Cohen] As we have already identified, when an asylum or immigration case is determined, the circumstances of the individual are important, as is the individual's background. I do not think that my hon. Friend and I disagree on that point. However, he appears to think that there is reason to believe that many, or at least a significant number, of the decisions taken by immigration officers are based on some sort of stereotyping or discriminatory intention. That is not my experience of the professional way in which decisions are normally taken. That is not to say that there have been no mistakes made – no public service is immune from the errors of individuals or the mendacity of a small minority – but, by and large, the immigration service bases its decisions on the proper and openly arrived at decision-making guidance issued by Ministers.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee

The operation of immigration policy necessarily and legitimately involves differential treatment for individuals based on their nationality and on occasion their ethnic or national origins. In our view, the existing exemption for immigration and nationality functions in clause 1 strikes the right balance between

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providing victims of unlawful discrimination with an effective right of action and protecting the necessary, proper, legitimate and discriminatory exercise of immigration functions. That is perhaps required by the legislation, by regulation. Discrimination can be authorised by Ministers, including when it is necessary for humanitarian purposes.

The pressures on the immigration system have already been alluded to by the hon. Member for Aylesbury. The Committee will be aware that we cannot allow any ambiguity to arise in the application of legislation by immigration staff. We know, from experience, that those with an unfounded claim who are seeking to delay or frustrate the process frequently use the immigration and asylum system, including the appeal system. This is why we took firm action in the Immigration and Asylum Act 1999 to streamline the process to produce a fairer, firmer and faster system.

Although the Government have carefully considered accepting the amendments, and we understand the wish of hon. Members to ensure that the immigration exemption is no wider than absolutely necessary, we believe that the amendments would not provide adequate legal protection for the immigration system. If the amendments were made, immigration staff who carried out their duties in accordance with immigration legislation and instructions approved by Ministers could face successful legal challenges from those wishing to frustrate our immigration laws. That would be unacceptable. As hon. Members are aware, the Government believe that the existing legal safeguards for actions taken in pursuance of statutory authority, contained in section 41 of the Race Relations Act, are insufficient. That is why we are making specific provision for the immigration system in new section 19C.

We take the view that, without the benefit of the exemption in new section 19C, Ministers would be unable to authorise special humanitarian treatment or deal with some of the issues that face immigration officers on all too many occasions. Nevertheless, we have listened to the concerns expressed in another place and today, and we will table an amendment to introduce some independent statutory oversight of the operation of the immigration system. The system requires the ability to make distinctions between

individuals, but we should have some oversight of the way in which that is done. I hope that that is viewed as a helpful way to proceed.

Necessity for discrimination on grounds of nationality

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading 14.12.99, Col. 131

The operation of an immigration policy necessarily and legitimately entails discrimination between individuals on the basis of their nationality. Differential treatment is unavoidable because, for example, arrangements for the operation of our immigration control at ports must distinguish between our own citizens, who are free from immigration control, and other nationalities who are subject to such control. Furthermore, there are different rules for those who enjoy free movement rights under our international obligations and those who do not. The immigration rules make distinct provisions for those nationals who require visas to come to the UK and those who do not. Some rules and policies apply only to Commonwealth countries or specified nationalities. There are other examples.

[See also the full text of Lord Bassam's speech at Committee stage, HL 11.1.2000, Cols 583 to 585, given under 'Necessity to Discriminate', pp. 5-8.]

The Home Secretary, Mr Jack Straw MP
HC Second Reading 9.3.2000, Col. 1211

The operation of an effective and rational immigration system, however, necessarily and legitimately requires a distinction to be made between individuals on the basis of their nationality and, occasionally, their ethnic or national origin. For example – this may be stating the obvious, but it is quite important that it should be stated – the operation of our immigration control at ports must distinguish between our own citizens, who are free from immigration control, and other nationalities, who are not. There are different rules for those who enjoy free movement rights under European law and those who do not. The immigration rules therefore make distinct provisions for nationals who require a visa to travel to the United Kingdom and for those who do not. Some rules and policies apply only to Commonwealth countries or to specified nationalities.

The Parliamentary Under-Secretary of State, Home Office,

I am fully aware of the concerns expressed about the immigration and nationality exemption. The Government have said on many occasions that it should be no wider than is absolutely necessary. The

Mr Mike O'Brien,
HC Report
30.10.2000,
Cols 540 to 541

amendments, however, would damage our attempts to provide a fast, firm and fair immigration control. They ignore a number of the principal functions contained in the immigration legislation in which discrimination may well be proper and necessary. In particular, they would not permit discrimination in respect of the removal, deportation or detention of individuals who did not qualify for leave to enter or remain. Detention, for example, is sometimes necessary to enforce the removal of those who do not qualify for leave to remain, and who will not comply voluntarily with instructions to leave the United Kingdom.

As hon. Members will know, owing to operational factors such as the ready availability of national travel documentation, or the preparedness of other states to allow us to return their nationals using other forms of documentation, some nationalities are easier to remove than others. In respect of certain nationalities, enforcing removal can be a prolonged process. In such cases, when there is no immediate prospect of removal, detention may not be appropriate.

It is necessary for the immigration service and the integrated casework directorate to conduct special nationality-specific exercises, involving the fast-tracking of cases in response to sudden or sustained influxes of certain nationals seeking to circumvent control. In particular, the immigration service needs to ensure that resources are targeted at the nationalities that offer the best prospect of successful removal, often in the light of other Governments' attitudes to accepting the return of their nationals. I am not convinced that the amendments would permit such activity.

At ports the immigration service requires the ability – under close ministerial supervision – to treat people differently on the basis of their nationality and, occasionally, their ethnic or national origin when it has intelligence that, for example, certain national travel documents are being abused, or individuals or groups of one nationality are presenting themselves as nationals of another country in order to benefit from compassionate policies or asylum procedures that are being applied to one nationality or ethnic group but not to others. The Kosovan situation is an obvious example.

We have encountered a number of rackets emanating from various countries. There are also many examples of the immigration system discriminating positively in favour of individuals on the basis of their nationality or ethnic or national origins. For example, in the past we have given special treatment to Kosovan Albanians, during the recent conflict in the Balkans. Kosovan Serbs were not treated in the same way, for obvious reasons.

Discrimination in the granting of British nationality

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Third Reading
3.2.2000,
Col. 357

A section of the British Nationality Act 1981 already provides that any discretion in this area [the granting or refusal of British nationality to persons who apply for it] is to be exercised without regard to the race, colour or religion of any person who may be affected by exercise of the discretion. It is for those reasons that we believe that we should continue to exempt those functions. We think that it would be anomalous to have to depart from that.

Col. 358

Lord Avebury: My Lords, I am rather confused by the Minister's reply…if this provision goes through unamended it will be lawful for Ministers to exercise their nationality functions – in accordance with the law, that is, as the Minister has explained – in such a manner as to discriminate against another person on the grounds of nationality, or ethnic or national origin.

[No reply from Lord Bassam]

Positive discrimination

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Third Reading 11.1.2000, Col. 585

There are [also] many examples of where the immigration system discriminates positively in favour of individuals on the basis of their nationality or ethnic or national origins. One example is the special treatment for Kosovan Albanians during the recent conflict in the Balkans. Kosovan Serbs were not treated the same way, for entirely understandable reasons. There are other examples where guidance to asylum caseworkers directs that one ethnic or national group from a particular country should be treated differently from another. For example, our policy in relation to persons originating from Bosnia-Herzegovina is to grant exceptional leave where the applicant' ethnic group is no longer in the majority. A Bosnian Croat originating from a Serb area would not be expected to return there, nor would a Bosnian Serb originating from a Muslim area.

Current asylum policy makes a distinction between Kosovan Serbs and Kosovan Albanians where the basis of claim is ethnic origin. The former are a minority and may qualify for asylum, while the latter may be refused and returned. The ethnic or national origin o the applicant in cases involving various other nationalities is also a key consideration in the determination of applications for asylum. It would be impossible to operate a rational asylum determination process if caseworkers were unable to make such distinctions. That is why the Bill makes it clear that discriminatory activity which is required or authorised by law, or by Ministers, cannot be considered to be unlawful.

Col. 586

Lord Cope: *Before the Minister responds, I agree with what the noble Lord, Lord Lester, has just said. It did not seem to me that the examples given by the Minister of Kosovar Albanians or Serbs were based on their ethnicity but on their genuine fear of persecution. That is, after all, what asylum is supposed to be based on. Therefore, those examples do not answer the questions which I asked.*

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,

...We take the view that the cases of the Kosovar Serbs and Kosovar Albanians are exact examples of why positive discrimination may be necessary.

HL Committee
11.1.2000,
Col. 586

Col. 1692

[On an amendment by Lord Lester to limit discrimination to special treatment on humanitarian grounds]

Lord Avebury: *...it is well known that the ports at entry treat Somali nationals favourably because they know what the situation is in Somalia. There is no proper government and people who belong to the wrong group are at risk of being killed by armed factions. Therefore, great sympathy is applied in consideration of applications for asylum by Somali nationals. More or less all of them are accepted as qualifying for exceptional leave to remain, and I have no quarrel with that when I look at the situation in their country of origin. But if it is necessary to allow that kind of thing to happen explicitly, a provision should be put on the face of the Bill while we have the opportunity.*

Modifications to the exemption

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Report 30.10.2000, Cols 544 to 546

Government amendment No. 3 would modify the exemption for immigration and nationality functions in clause 1, new section 19C. As I have said, we have consistently made clear our view that the exemption should be no wider than is absolutely necessary to safeguard the effective operation of immigration control. We have reached the view that a refinement to the immigration exemption can be made in the interests of securing the Bill's objectives without the risk of harm to immigration control.

The amendment is designed to remove from the scope of the immigration exemption sections 28A to 28K of the Immigration Act 1971 as they relate to offences under part III of that Act. Those offences include seeking to obtain leave to enter or remain by deception, facilitating the entry of an illegal entrant into the United Kingdom, and possessing false immigration documents – such as passports, visas and work permits – for use. Many of those offences are committed by our own citizens, although some may be commissioned only by those subject to immigration control.

The amendment would place the immigration service, in the investigation and prosecution of such offences, on the same legal basis as police – with whom they often participate in joint operations – in operating the Bill's provisions.

It is right that the investigation and prosecution of offences should be based on some objective evidence or intelligence, rather than on an individual's nationality or ethnic or national origin. The immigration service does not prioritise the investigation of such offences by nationality. It is also right that the immigration service and police should be subject to the same legal constraints in carrying out similar activities, often conducted together. Those constraints will not harm or hinder the administration of justice or action against those engaged in immigration fraud or human trafficking.

Immigration service functions that support the removal or deportation of individuals from the United Kingdom will, however, remain within the scope of the exemption. As I said, it is sometimes necessary to prioritise cases for removal on the basis of nationality in response to particular pressures on control or as a result of the attitude of other Governments towards accepting the return of their own nationals.

The amendment contains a justifiable refinement of the immigration exemption. We have listened carefully to concerns expressed by hon. Members and by Members of another place, and we have taken action to ensure that the exemption is no wider than necessary. I hope that the House will accept this Government amendment to new section 19C.

Government amendment No. 35 provides that a finding of unlawful discrimination by the independent appellate authority in an immigration case will trigger the power of the Commission for Racial Equality to seek an injunction under section 62 of the Race Relations Act 1976.

Government amendment No. 36 extends section 66 of the 1976 Act to allow the CRE to give assistance to people in immigration proceedings before the independent appellate or the special immigration appeals commission.

Government amendment No. 37 amends section 67 and will protect applicants whose visa applications are unsuccessful, but who nevertheless consider that they have been racially discriminated against by an entry clearance officer. It ensures that redress is available in the county court.

Government amendments Nos 44 and 45 are technical ones to ensure that in cases in which a claim of racial discrimination has been certified as manifestly unfounded, an adjudicator is able to determine whether it was correct for the Home Secretary to issue a certificate when the claim was made and to make a decision on that certificate. A consequential amendment has also been made to the equivalent certification provisions on human rights and asylum in the Immigration and Asylum Act 1999.

Immigration rules

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 13.4.2000, 4.45pm

Amendment No. 4 is similar to that tabled by Lord Lester in another place earlier this year. It would qualify the current proposed exemption for immigration and nationality rules. It reflects concern about the scope of the immigration exemption in clause 1. We need an approach that allows Ministers quickly to take account of circumstances and to make a decision about the exercise of discretion almost over night, particularly for humanitarian reasons or because a criminal attempt has been made to breach immigration controls. We might need quickly to assist people who come here, and we might not have enough time to change the immigration rules to do that. Equally, we might need to prevent people who seek to breach our immigration rules from doing so. To restrict the ability to make those decisions to the immigration rules, which would need to be subject to parliamentary approval and the normal procedures, would be completely unworkable in the practical circumstances faced by immigration staff. That could send the wrong message in humanitarian terms if there was a need to act urgently. However, immigration rule 2 requires all immigration officers to have proper regard to the race of passengers and applicants when carrying out their duties. Officers are, therefore, constrained by requirements, rules and the direction of Ministers to act in a proper way. [3]

[3] Immigration Rule 2 says:
Immigration officers, Entry Clearance Officers and all staff of the Home Office Immigration and Nationality Department will carry out their duties without regard to the race, colour or religion of persons seeking to enter or remain in the United Kingdom.

Ministerial Powers

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading
14.12.99

...it will be unlawful for immigration staff to discriminate on the grounds of race or colour or, in the case of nationality and ethnic and national origins, where they go beyond what is specified in immigration and nationality laws or what is expressly authorised by Ministers. The personal decisions of Ministers in individual immigration and asylum cases will also be exempt, as such decisions may make legitimate distinctions on the grounds of nationality not covered by existing approved arrangements.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Col. 584

The Bill must make it crystal clear what is unlawful and what is permissible in the public interest. We believe that the existing formulation in Clause 1 (new Section 19C) does so. Activity which is authorised or required by law or by Ministers will be lawful, as will be personal decisions taken by Ministers in the public interest. Unauthorised acts of direct race discrimination will be unlawful, and the Government will have no hesitation in dealing very firmly with them.

HL Committee
11.1.2000,
Col. 582

Lord Lester: *Section 41 (2) of the Race Relations Act states:*

"Nothing in Parts II to IV shall render unlawful any act whereby a person discriminates against another on the basis of that other's nationality or place of...residence or the length of time for which he has been present or resident in or outside of the United Kingdom...if that act is done (a) in pursuance of any arrangements made (whether before or after the passing of this act) by or with the approval of, or for the time being approved by, a Minister of the Crown; or (b) in order to comply with any condition imposed...by a Minister of the Crown."

Those words were carefully inserted because the immigration and nationality department wished to have them there to give it the freedom that it needed in exercising its public functions. That is why they are in Section 41. I do not understand that there has been any change of circumstances since 1976 to require any wider authorisation to be given than that in Section 41. It is carefully controlled in Section 41 so that it cannot be abused.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Col. 584

The Government do not share the noble Lord's confidence in the adequacy of the existing legal safeguards provided by the Race Relations Act. Section 41 of the 1976 Act protects discriminatory acts which are carried out "in pursuance to" statutory provisions or ministerial arrangements. But the courts have adopted a very narrow interpretation of "in pursuance to". For acts to benefit from Section 41 they must be actually "required" by law.

HL Committee
11.1.2000,
Col. 587

Lord Lester: *The Minister has repeatedly used the word "safeguards" in reference to new Section 19C, by which he means safeguards for the Home Office. We are concerned about safeguards for the individual. There are no safeguards in Section 19C as it stands. It says that it will not be unlawful for a relevant person to discriminate against another person on grounds of ethnic origin in carrying out any immigration or nationality functions provided that the relevant authorisation has been given. There are extremely broad powers of authorisation. As it stands, it applies to the entire immigration functions of the Immigration Service and even to the entire nationality functions of the nationality service of the Home Office.*

I have attempted in my amendment to meet the need for the avoidance of doubt where humanitarian concerns were at stake. I do not understand what was wrong with the situation in 1976 when Section 41 was written into the Act. That would be quite properly narrowly construed, of course, because the concern was with the liberty of the subject. The Home Office does not want race discrimination to be practised by the immigration and nationality department without good reason. That will be viewed with great concern by immigrants and their descendants in this country as giving a blank cheque to some future government to discriminate on blatant grounds of ethnic origin.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien,
HC Committee
13.4.2000,
4.30pm

The Bill must make crystal clear what is unlawful and what is permissible in the public interest. We believe that the existing formulation in Clause 1 - new Section 19C in other words - does this. Activity that is authorised and required by law or by Ministers will be lawful, as will be personal decisions taken by Ministers in the public interest. Unauthorised acts of direct race discrimination will be unlawful and open to challenge in the courts.

Let me deal with the point about Ministers having

unfettered and unchecked discretion. Of course what the Ministers decide is always subject to parliamentary review and to the courts. Ministers are answerable to Parliament, they can be summoned before Select Committees and they are always answerable for any decision that they take. Likewise, Ministers may well be the subject of a challenge in the courts...Ministers have found that their decisions are often subject to judicial review. The courts might well have to look at any Wednesbury unreasonable decision reached by a Minister, and would then need to check the Minister.

There are provisions that allow Ministers to be checked, and likewise, regardless of whether our courts could check for a breach of the European convention on human rights, Ministers and the Government could always be challenged in the European courts at Strasbourg. Those courts would not be constrained by our domestic legislation. If a provision in our legislation contravened the ECHR, it would no doubt get drawn to our attention quickly, although it can take a while to get to Strasbourg, we are certainly conscious of the need to comply with the convention, particularly in view of the Human Rights Act. I draw hon. Members' attention to our derogation from the convention in respect of immigration matters.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Report 30.10.2000, Col. 532

Finally, the hon. Member for Aylesbury asked me whether the legislation covered Government Ministers exercising a judicial function. The answer is yes. An immigration function, for example, would be covered. That is not a good illustration as immigration matters are excluded, but any other quasi-judicial decsion would be covered by the exemption. However we want to make sure that Ministers are aware that they have moral as well as legal responsibilities and that they must not discriminate unless there is a good public interest reason for doing so. Later amendments relate to circumstances in which discrimination may be proper and lawful and may well have the support of the House, but normally that would not be the case.

Scope of immigration staff's powers to discriminate

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading
14.12.99,
Col. 130

...new section 19C. The extension of the Race Relations Act will cover immigration staff. This includes all Home Office and Foreign and Commonwealth Office staff who operate the UK's immigration control, both in this country and overseas.

Col. 131

Overall [therefore] it will be unlawful for immigration staff to discriminate on the grounds of race or colour, or, in the case of nationality or ethnic and national origins, where they go beyond what is specified in immigration and nationality laws or what is expressly authorised by Ministers.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Cols 584 to 585

[For full passage see under "Necessity to Discriminate" pp 5-8]

The pressures on the immigration system, of which noble Lords will be well aware, are such that we cannot allow any ambiguity to arise in relation to the application of this legislation to immigration staff...Unauthorised acts of direct race discrimination will be unlawful, and the Government will have no hesitation in dealing very firmly with them.

Failure to provide clarity in this legislation would be unwise, both as an act of policy and to ensure that staff are fully protected when they carry out the duties Parliament and Ministers have laid upon them...the operation of the immigration system necessarily requires the exercise of discretion by Ministers and by appropriately authorised officials in accordance with published, transparent instructions. For example, the Immigration Service at ports requires the ability to target and prioritise certain nationalities for particular scrutiny where it has intelligence that particular national travel documents are being abused or where there is intelligence that individuals or groups of one nationality are presenting themselves as the nationals of another country in order to benefit from compassionate policies or asylum procedures... The Immigration Service and Integrated Casework Directorate need the ability to carry out special "nationality specific" exercises involving the fast

tracking of cases and even the use of detention in response to sudden or sustained influxes of certain nationals, most recently from Eastern Europe, seeking to circumvent control. Entry clearance officers need the ability to treat individuals differently on various grounds. Examples include if their country is associated with state-sponsored terrorism or has a track record of hostile intelligence activities or if their country is known to have lax or inappropriate passport issuing arrangements. Such activity is a necessary part of operating the immigration system but may not be considered by the courts as strictly required by law.

[See also under "Positive Discrimination", p 28 and "Ministerial Powers" p 34.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Report 27.1.2000, Cols 1695 to 1697

We take the view that immigration staff need very clear and transparent guidance to ensure that they respect the rights of others. There is no argument about that. The exemption for immigration and nationality functions in Clause 1 will provide Ministers with the framework within which to provide guidance. The latter is very important in this context and I ask noble Lords to reflect on that. As far as possible the guidance will be published for Parliament and the public to see in line with the Government's commitment to openness and very much in line with our commitment to ensure that we operate our legislation within a framework that combats racism--whether direct or indirect--in all its forms. We must have immigration procedures and practices that will be thoroughly reviewed to ensure that only discriminatory activity that is necessary and can be justified is covered by clear guidance, approved by Ministers, and that any discriminatory activity which cannot be justified is eliminated. That must be our policy objective...I should like to think that, in the guidance, we can tackle the concerns and issues that the noble Lord has quite properly raised on the Floor of the House this afternoon.

Lord Lester: *My Lords, Guidelines are crucial and they must be transparent. I also believe that they should be subject to parliamentary scrutiny and approval. I add the words "and approval" because I think that this is quite an exceptional situation where Parliament should act as a watchdog over any approval of ethnic discrimination of this kind.*

[Quoted also under "Necessity to Discriminate" where full debate on Report is given, pp 9-20]

Home Secretary Jack Straw MP,
HC Second Reading
9.3.2000,
Col.1211

The powers in the Bill will be subject to very close safeguards. It will be unlawful for immigration staff to discriminate on grounds of race or colour or, in the case of nationality or ethnic and national origins, go beyond what is specified in immigration and nationality law or expressly authorised by Ministers. We are also considering making further changes to the Bill to provide independent oversight of those provisions. I hope to make further proposals on those changes in Committee.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien,
HC Committee
13.4.2000,
4.30pm

Failure to provide clarity in legislation such as this Bill is [therefore] unwise because it is so readily open to challenge. Staff should be fully protected when they carry out the duties that Parliament and Ministers require of them. The Government do not believe that the legal safeguards under the Race Relations Act 1976 are adequate for such purpose, and that view is supported by case law.

Section 41 of the 1976 Act protects discriminatory acts that are carried out "in pursuance to" statutory provisions or ministerial arrangements, but the courts have adopted a narrow interpretation of "in pursuance to". For acts to benefit form section 41, they must be required by law, but the operation of the immigration system necessarily requires the exercise of discretion by Ministers and appropriately authorised officials. That discretion often is to the benefit of applicants, but often it is not. For example, the immigration service and integrated casework directorate need the ability to carry out special nationality-specific exercises involving the fast-tracking of cases and even the use of detention in response to sudden or sustained influxes of certain nationals, most recently from some parts of eastern Europe, who are seeking to circumvent the control.

The immigration service at ports requires the ability to target and prioritise certain nationalities for particular scrutiny where it has intelligence that national travel documents are being abused, or that individuals or groups of one nationality are presenting themselves as the nationals of another country in order to benefit from the compassionate policies or asylum procedures that attach to a nationality or group of people for humanitarian purposes. Let me give some

published for Parliament and the public to examine, in line with the Government's commitment to openness.

The hon. Member for Southwark, North Bermondsey referred to the guidance given to immigration officers. If I remember rightly, it was in response to a request from my hon. Friend the Member for Slough (Fiona Mactaggart) that my right hon. Friend the Home Secretary and I decided to publish those directions. Apart from a few exceptional items that were deleted because they might assist criminals, that information is now in the public arena and available on the internet, so it can be accessed by those with an interest in the guidance given to people who control entry and exit from this country.

The issue is sensitive, and wide discretion is important. However, that must be checked, and the hon. Member for Southwark, North and Bermondsey has properly tested the extent of the exceptions. Immigration procedures and practices will be thoroughly reviewed to ensure that instructions from Ministers are clear and cover only necessary and justifiable discriminatory activity. Any unjustifiable discriminatory activity will be eliminated, because our objective is to have a system that is fair as well as firm.

HC Report 30.10.2000, Col. 533

***Mr Harry Cohen MP**: Section 19C states that it will not be"unlawful to discriminate against another person on grounds of nationality or ethnic or national origins..."where the act is by a Minister acting personally or an immigration officer acting in accordance with an authorisation by the Minister, or with respect to a particular class of case authorised by statute or statutory instrument. If this House has delegated the power to a Minister, I see that he could exercise that power. However, I am concerned as to how he will delegate power – presumably down to a civil servant, or even to junior civil servants. I would like the operation of the system to be spelt out. Will the exemption also apply to a junior civil servant in the immigration and nationality directorate acting in the name of the relevant Minister or Civil Servant?*

How will the Minister be held accountable? Will ministerial responsibility extend to the actions of the junior civil servants in the immigration and nationality directorate who act in his name under the proposed legislation, or will he be able to palm things off on the

civil service, as happened with the BSE scandal? That is a serious point about ministerial power and its possible extension to civil servants.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien,
HC Report 30.10.2000
Col. 543

My hon. Friend the Member for Leyton and Wanstead (Mr. Cohen) asks whether junior civil servants have the ability to take unto themselves the exemption. The answer is no: a junior civil servant has no ability to say, "I have decided that, in that case, such a course of action is no longer discriminatory," nor does a senior civil servant, or the chief immigration officer. Immigration officers will operate under the guidance issued by Ministers, which is, by and large, in the public arena. My hon. Friend will be able to ascertain the criteria by which such decisions are made and the way in which they are reached.

In no sense does the Bill create an exemption that gives a civil servant broad discretion to discrimination. Civil servants will be able to discriminate properly and lawfully only when there is a clear instruction from the Minister to do so in specific circumstances, and those circumstances are mainly in the public arena. One of the actions taken by the Government after entering office – indeed, while I was Minister with responsibility for immigration – was to ensure that the guidance on how such decisions are made was put into the public domain and so made available to immigration lawyers such as Frances Webber. There is a degree of openness from which my hon. Friend can take solace. We do not accept that any official is entitled to discriminate in a way that is unacceptable to the Government.

exemptions. We undertook to consider that carefully, and the amendment represents the Government's proposed solution to questions of scrutiny and accountability.

The amendment will create a new statutory function – the race monitor – to provide independent oversight of the operation of the exemption for immigration and nationality functions. In appointing the race monitor, the Secretary of State will be debarred from choosing a member of his own staff, which secures and underlines the independence and impartiality of the role. The Secretary of State will be required to consult the Commission for Racial Equality in appointing the monitor. My right hon. Friend the Home Secretary will therefore be able to draw on the commission's considerable expertise in the field of race relations in selecting a candidate with the right skills and background to perform this important task. We have decided to go down the route of creating a specialist race monitor, rather than relying on the commission to exercise its powers under the Act, because of the specialised nature of the immigration, asylum and nationality system. This important function requires a dedicated resource. This amendment will do nothing to restrict the powers of the commission in dealing with these issues. It will add to the oversight and control in the system.

The race monitor will monitor the likely effect of ministerial authorisations to immigration staff to discriminate on grounds of nationality or ethnic or national origin, and acts carried out in accordance with such authorisations. That means that the monitor will examine the justification for such authorisations, their likely effect on the operation of the exemption, and how they actually work in practice. The monitor will report each year his or her findings to the Secretary of State, who will lay the report before each House of Parliament. The monitor's report will provide an accessible focus for informed debate of these matters. The monitor will not monitor discriminatory activity that is required by legislation, because Parliament will already have considered the justification for such discrimination in passing that legislation.

There is a successful precedent for this approach. The Asylum and Immigration Appeals Act 1993 created an independent entry clearance monitor to monitor refusals given by our entry clearance officers overseas in cases in which, as a consequence of restrictions imposed by the 1993 Act, there is no statutory right of appeal. In creating the entry clearance monitor function – a role performed highly effectively by Dame Elizabeth Anson – Parliament recognised the importance of introducing independent oversight over what would otherwise have been an unrestricted executive power. Parliament reaffirmed the entry clearance monitor's function in section 23 of the Immigration and Asylum Act 1999. The option of appointing the same person to perform the race and entry clearance function will be carefully considered by the Home Office and by the Foreign and Commonwealth Office, though specific statutory authorisation is required.

The Government believe that the approach of establishing a race monitor for the immigration system provides the most effective, workable solution to concerns expressed about the breadth of exemption for immigration and nationality functions. We have listened carefully to those concerns, and the amendment represents a constructive, proportionate response. I hope that hon. Members will support it.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 13.4.2000, 5.15pm

[In answer to questions from Mr. Lidington and Mr. Hughes]

I shall deal first with whether the post will be part time. It is envisaged that it will operate in a similar way to the current entry clearance monitor – currently the very able Dame Elizabeth Anson – which is a part time and remunerated post. I am unsure whether she receives a full salary, but she is certainly remunerated for her work. She does not deal with individual complaints: she is not a court of appeal and does not have the ability to deal directly with complaints from the public, but she looks at individual files and decides how the entry clearance system is operating in practice. She is able to conduct unannounced visits. Similarly, the race monitor will be able to examine

Appeals procedure: claims of unlawful race discrimination in immigration control

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading 14.12.99, Col. 133

A further consequential measure is at Clause 5 of the Bill [s.6 of the Act]. This provides that claims of unlawful race discrimination from individuals who are subject to immigration control, which relate specifically to a decision in an individual immigration or asylum case concerned with their entitlement to enter or remain in the United Kingdom, will be heard by the independent appellate authority as part of the one-stop procedure on appeals. This is consistent with the Government's policy that in immigration and asylum appeals all outstanding matters should be considered by the appellate authority at one time in the interests of producing a system that is fair, fast and firm.

This will in no way deny individuals the right to a fair hearing. It will allow claims of unlawful race discrimination to be considered alongside human rights issues which themselves may concern issues of discrimination, and other matters relating to the fairness of the decision. A claimant who substantiates his or her claim of discrimination will then be able to apply to a county court or a sheriff court for damages.

Those claimants not subject to immigration control or who allege direct discrimination in other respects and who therefore have no appeal under the immigration Acts – such as British citizens – will be able to take their case direct to the county or sheriff court.

Col. 133

Lord Avebury: *My Lords, what happens if the litigant is successful in getting his or her claim against an immigration officer upheld, but his or her substantive case for remaining in or entering the United Kingdom is turned down? How can he or she then seek damages in the county court if he or she is back in Lusaka or Hyderabad?*

The Parliamentary Secretary of State, Home Office, Lord Bassam of

The answer is that anyone from abroad who wishes to bring a claim before the county court will be given leave to enter the UK precisely for that purpose if his of her presence is necessary for the resolution of the

Brighton,
HL Second Reading
14.12.99,
Col. 183

damages claim. That position is not as unusual as it sounds. It happens now in a number of circumstances, for example in custody cases. Noble Lords will note that the Bill provides that in the case now being considered the county court will presume that there is unlawful discrimination unless the contrary is proved.

Home Secretary
Mr Jack Straw MP,
HC Second Reading
9.3.2000,
Col.1211

The House will be familiar with the provisions in the Immigration and Asylum Act 1999 to produce a new one-stop procedure for appeals. Those measures, once implemented, are aimed to support the achievement of our target that, by April 2001, the majority of asylum applications will be resolved within an average of two months, and appeals against a refusal within a further four months.

Home Secretary
Mr Jack Straw MP,
HC Second Reading
9.3.2000,
Cols1212 to 1213

Clause 5 contains a further consequential measure, providing that claims of unlawful racial discrimination from individuals subject to immigration control that relate specifically to a decision in an individual immigration or asylum case will be heard by the independent appellate authority as part of the one-stop procedure on appeals. That is consistent with our policy that all outstanding matters in immigration and asylum appeals should be considered by the appellate authority at one time. We have sought to ensure that there is one appeal for anything related to immigration and asylum. As well as immigration claims, that covers those who decide to develop a subsequent asylum application and appeal and then to put in an appeal against deportation. That is what happens now.

We want all three appeals to be heard in one go. In addition, we have arranged that if people who suddenly have a genuine – or perhaps more often not so genuine – case under the European convention on human rights, they must bring that forward at the same time. Once someone has been through that process and made all their claims in one go, they cannot then make a previously forgotten claim for racial discrimination as a result of the decision, which would then have to go before a separate tribunal, which could take months or years, suspending their removal. A claimant who substantiates their claim of discrimination within the immigration appellate system will then be able to apply to a county court, or to a sheriff court in Scotland, for damages. Those claimants not subject to immigration control who

immigration claims to the county or sheriff's court made outside the framework for appealing to the immigration appellate authorities.

The amendment provides that such claims be subject to the same six months' time limit by the Race Relations Act for the lodging of non-immigration claims. I repeat that there should be little incentive for claimants to adopt this route as the amended clause 5 prevents the county or sheriff's court from revealing the immigration decision to which a claim relates. However, it will provide an avenue of redress for those who wish to complain of discrimination by the Immigration and Nationality Department in reaching a decision. It will not affect the way in which cases are disposed of by way of an immigration decision but it may be a matter that it might be wise to have considered.

An important amendment is the application to immigration appeals of the certification procedure for an action expressly authorised by a Minister of the Crown. This provision is in section 62(2) of the Race Relations Act. The amendment ensures that where a Minister certifies that he has approved certain arrangements, that certificate shall be conclusive evidence. In addition, an amendment to schedule 4 of the Act which inserts a new section 9A allows the Secretary of State to certify an immigration claim if in his opinion it was manifestly unfounded. In such circumstances, it would only serve to delay the enforcement of an immigration decision if a person was allowed to pursue an appeal to the immigration appeals tribunal where an adjudicator was satisfied that the action concerned had been correctly certified. The amendment provides that in these circumstances there is no further right of appeal to a tribunal. The amendments are consistent with our policy of producing what we wish to be a firm, fast and fair immigration system.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 18.4.2000, 6.00 pm

I thank the hon. Member for Aylesbury [Mr Lidington] for his support. The application of the one-stop appeals procedure to complaints involving immigration and asylum applicants will avoid unnecessary delays in the immigration system, thus reducing the burdens on IND. In practice, we expect that race issues will form just one of a series of grounds for an appeal, all of which will be considered together by the immigration appellate authority. It is

likely that we will add it to the list, but sometimes the list is quite long and sometimes it is focussed on a narrow issue – we shall have to wait to see what happens. We do not anticipate that a person would normally seek to determine the outcome of their immigration status by making an application in relation to the race relations legislation. Even if a finding were to be made against IND, that might result in damages but would not necessarily affect the person's immigration status.

The hon. Member for Southwark, North and Bermondsey asked whether judicial review would still be available under the one-stop procedure. The answer is yes. Judicial review is always a possibility; we cannot exclude it. If the immigration appeal tribunal or the Secretary of State behaved in an improper way it would clearly be open to an appropriate court to deal with that. In many immigration cases, the Minister is judicially reviewed at least to the single judge level. At that stage, most judicial reviews tend to get filtered out – many are frivolous. Others, however, go past the single judge level and are dealt with at the divisional court.

The hon. Gentleman asked about the position of manifestly unfounded claims in relation to amendment No. 50. Such cases are subject to a fast-track appeal system and can be dealt with very quickly by the appellate authorities. He asked whether that may involve the possibility of judicial review. Again, the answer is yes; there is always that possibility. We cannot prevent the courts from exercising their normal powers to oversee administrative decisions.

International obligations

Lord Lester
HL Committee
11.1.2000,
Cols 581 to 582

[Quoted also in Lord Lester's speech here, given in full in the Introduction.]

In the United Kingdom's 14th report to the committee dealing with the convention on the elimination of racial discrimination, the Government said that there is nothing racist about designating countries which produce large numbers of unfounded asylum applications. I respectfully agree. There is nothing racist about it. It is not based on colour, race or ethnic or national origins. The same is true of refugee situations if humanitarian provision is made not on the basis of ethnic or national origin but on an objective assessment of the conditions in the country concerned.

Again, we are in the area of international human rights law where we are unaided at present by any statement from the Government on their views about our international treaty obligation. However, in my respectful submission – it is derived in part from Professor Goodwin-Gill who is the leading international refugee legal expert in this country and the author of a major book on the subject – new Section 19C as it stands is not consistent with the United Kingdom's international obligations. It is not consistent with Articles 2, 5 or 6 of the convention on the elimination of all forms of racial discrimination. As the noble Viscount, Lord Colville, indicated in a different context, it is not consistent with Articles 2 and 26 of the international covenant on civil and political rights. Article 3 of the Convention Relating to the Status of Refugees 1951 obliges contracting states to apply the convention's provisions to refugees without discrimination as to race, religion or country of origin. That covers discrimination on the grounds of a refugee's ethnic or national origin.

The UNHCR's executive committee, of which the United Kingdom is an original member, has, as Professor Goodwin-Gill points out, emphasised that decisions on asylum must be made without discrimination as to race, religion, political opinion, nationality or country of origin.

We all agree with the Home Office that in exercising

immigration control one has to draw distinctions which are based, for example, on the nationality of particular people seeking to enter this country. That is not the issue here. We are concerned with the taking of a power which is not in the 1976 Act, even though the 1976 Act already has the powers provided in Section 41. We are concerned with the power to allow the Home Office to discriminate not only in any immigration decisions but also in nationality decisions on the basis of a person's ethnicity. Nothing could do more harm to the reputation of the immigration and nationality service in this country than to give the impression to the ethnic minorities in this country that we are discriminating at the gate, or conferring British nationality and citizenship because of people's ethnicity. I am sure that that is not what we do. Were we to do so, we should be condemned by all international bodies for breaching international human rights law.

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Committee
11.1.2000,
Cols 586 to 587

I turn to our international obligations. The noble Lord suggested that the exemption for immigration and nationality functions would breach this country's international obligations under the UN Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination. The entitlement to immigration, asylum and nationality applicants is detailed in the immigration and nationality enactments listed in Clause 1 of the Bill and in subordinate legislation such as the immigration rules.

The exemption does nothing in our view to rescind or restrict rights or entitlements provided in existing legislation; it simply allows that legislation to continue as Parliament, in our view, intended. It also provides the immigration authorities with the necessary latitude to conduct their business rationally, including targeting resources where there is a concerted attempt to abuse the control or where there is a compelling need for special treatment for a particular group on humanitarian grounds. The exemption does not require Ministers to do anything contrary to their international obligations. The discretion which it gives to Ministers still has to be exercised bearing in mind their international obligations. We believe that to be an important point.

It is clear that these are difficult issues. The Home

Secretary and I are grateful to the noble Lord for meeting us. He has enormous experience in the field and we are happy and pleased, as ever, to acknowledge that. Having said that, we feel on reflection that we need to maintain the safeguards set out in Clause 1 in relation to immigration and nationality functions. The noble Lord may not agree, but on the basis of what has been said, he should feel able to withdraw Amendment No. 10. The same perhaps applies to Amendment No. 11 tabled in the name of the noble Lord, Lord Cope, which has a similar effect.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 13.4.2000, 4.30 pm

[Quoted also under "Ministerial Powers", p 36.]

There are provisions that allow Ministers to be checked, and likewise, regardless of whether our courts could check for a breach of the European convention on human rights, Ministers and the Government could always be challenged in the European courts at Strasbourg. Those courts would not be constrained by our domestic legislation. If a provision in our legislation contravened the ECHR, it would no doubt get drawn to our attention quickly, although it can take a while to get to Strasbourg, we are certainly conscious of the need to comply with the convention, particularly in view of the Human Rights Act. I draw hon. Members' attention to our derogation from the convention in respect of immigration matters.

Human Rights Act

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton,
HL Second Reading
14.12.2000,
Col. 133

A further consequential measure is at Clause 5 of the Bill [s.6 of the Act]. This provides that claims of unlawful race discrimination from individuals who are subject to immigration control, which relate specifically to a decision in an individual immigration or asylum case concerned with their entitlement to enter or remain in the United Kingdom, will be heard by the independent appellate authority as part of the one-stop procedure on appeals...This will in no way deny individuals the right to a fair hearing. It will allow claims of unlawful race discrimination to be considered alongside human rights issues which themselves may concern issues of discrimination, and other matters relating to the fairness of the decision. A claimant who substantiates his or her claim of discrimination will then be able to apply to a county court or a sheriff court for damages.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien,
HC Committee
13.4.2000,
2.45 pm

The hon. Member for Southwark North and Bermondsey [Mr Hughes] asked whether the human rights committee might oversee the operation of the Bill. It will probably have its work cut out with human rights legislation, although I can see the overlap...However...it is probably inappropriate to give the human rights committee the job of looking after the Bill. There are different ways in which the House might decide to examine matters...Individuals are responsible for what they do under the Bill and under human rights legislation and organisations are responsible for what they do. It is right that they should take that responsibility. That might mean that some individuals have to meet the costs of employing lawyers and so on to find out what their responsibilities are under the law.

National Security

Home Secretary Mr Jack Straw MP, HC Second Reading 9.3.2000, Col.1215

I shall deal briefly with national security. The Bill amends the national security provisions in the Race Relations Act, and that is achieved by clauses 6 and 7 [RRAA sections 7 and 8]. For anyone who is worried about that, it is to bring the provisions into line with the European Convention on Human Rights – not to detach it. The intelligence and security agencies are covered in terms of employment, and we thought that those agencies were quite keen on the provision. We considered whether they would be included in the Bill as a whole, but we did not find a way in which it would be possible for people to put in Section 65 requests for information and to have those compatible with the basic purposes of the intelligence and security services and their need for secrecy.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 13.4.2000, 5.15pm

It is not envisaged that the activities of the security services would be investigated in any way by the race monitor. There are other oversight provisions for the security services, which will remain in place. Separate legislation - passed about 18 months ago – deals with the way in which immigration operates in security cases[4]. The race monitor is, however, likely to be informed about intelligence operations in the immigration service when they relate to criminal matters.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien, HC Committee 18.4.2000, 5.45pm

Amendments to clauses 5 and 9 and detailed consequential amendments to schedule 2 extend the arrangements in respect of immigration claims to appeals under the Special Immigration Appeals Commission. The commission was established to provide a full right of appeal in cases with a national security element where sensitive material may need to be brought before a court. Appeals to SIAC fall under the one-stop process established by part IV of the Asylum and Immigration Act 1999 and it makes sense for immigration claims in respect of national security cases to fall under the same procedures.

6.15 pm

[In reply to Mr. Hughes on Clause 6, National Security]

The hon. Gentleman will be interested to know that

[4] See Immigration and Asylum Act 1999

the clause is in fact a liberalisation measure. It remedies an ECHR incompatibility in the Race Relations Act 1976 by removing the power of a Minister of the Crown to issue a conclusive national security certificate in cases brought under the Act. Conclusive national security certificates were found by the European Court of Human Rights in the case of Tinnelly and McElduff to be incompatible with Article 6(1) of the ECHR.

The clause also changes the national security defence such that it will no longer be sufficient to argue that a discriminatory act was done for the purposes of national security. The act must also be justified by that purpose. The provision will enhance people's ability to assert their rights without endangering national security. It will ensure that the system provides precisely what the hon. Gentleman suggests – an exemption when that is required but that that exemption is the minimum that is necessary to protect national security. That is what clauses 6 and 7 are designed to do.

It is feasible that an issue of racial discrimination would have to be justified by a minister. He would have to show, if he had a certificate, that national security was involved. I doubt whether there will be many such cases, but the hon. Gentleman could argue that it is important to get the principle right even if there is only one such case, and of course he would be correct. However, we must also ensure that there is a national security provision, which I believe we have achieved. I cannot take the matter much further; he has me on the run.

I have just thought of the sort of case that might need such a certificate. Let me run through it.

If the person in a national security case alleges that a decision was made by way of racial discrimination, a Minister could look at the circumstances and conclude that there is no evidence. However, if the case were to proceed elsewhere on that basis, substantial delay in determining it would result, perhaps affecting the expelling of a person from the country. The person would be able to argue before a civil court that they could remain in the country in order to pursue a race relations claim. In those circumstances, the Minister would have to justify that as a national security case, but he would not have to deal with all the arguments.

in the courts under the ECHR. When challenged on reserved matter, Ministers would be advised to propose amendments. Is the Minister confident that there is not a conflict with the ECHR? Perhaps he will address the argument of my hon. Friend the Member for Southwark North and Bermondsey, and relate it to court proceedings rather than the employment tribunal.

The Parliamentary Under-Secretary of State, Home office, Mr O'Brien

May I first clarify my earlier comments? We have checked the case that came under the provisions in relation to national security matter. It appears that the case that went to the European Court of Human Rights, and gave rise to the decision, was under the Fair Employment (Northern Ireland) Act 1976. It has been used only once n the past 25 years, so the number of cases is not large.

As I indicated, clause 6 removes Ministers' powers to issue a conclusive national security certificate in relation to non-employment cases, thus enabling such cases to be brought in the civil courts. The effect of clause 6 is clear. However, if clause 7 were omitted, a court hearing cases that dealt with national security matters would not be able to take important measures to safeguard national security, such as keeping secret all or part of the proceedings. Under clause 6, it is possible, in certain limited circumstances, to bring a case under the Race Relations Act 1976. If the Minister fails to justify the national security provisions, the matter may come before the court. However, that does not deal with the question of bringing confidential matters before the court. Will such matters of national security be open to the applicant to hear and form a view on? Will he be able to pass on to other people information that might endanger national security, so that we do not throw the baby out with the bath water. Issues that are clearly of a sensitive nature must be protected. We were especially anxious to comply with article 6 of the convention, and to ensure that safeguards are in place.

The special advocate procedure, which was introduced in the Special Immigration Appeals Commission legislation, enables the appointment of a special advocate by the court. That person would be a senior and independent counsel, who did not owe allegiance directly to the client. In the relationship between barrister and client, the barrister must

disclose to his client relevant information that may affect the case. However, the special advocate procedure is different. An independent barrister – usually a senior barrister – is appointed, who will speak on behalf of his client, argue his case and take his instructions from him, but will be under no obligation to disclose to him matters of national security that may be heard by the court. A barrier is placed between the special advocate and the client. That may have some prejudicial effect on the client, as he will not know everything that is heard by the court. However, that is for good reason. The European convention on human rights is a balanced piece of legal artwork – that is as it should be, given that British lawyers wrote it in 1951. The balance within article 6 can be struck so that issues of national security can be held in confidence, provided that that is justified, and provided that the circumstances of the applicant are not unduly prejudiced. The special advocate procedure provides protection for the applicant.

Sir Robert Smith
The Minister talked about a court appointing a special advocate. I may have misread the provision, but presumably it would be the Advocate General or the Attorney General in this case.

Mr O'Brien

The hon. Gentleman is right. If I remember rightly, the Advocate General or the Attorney General would in such cases appoint the special advocate. I seem to remember it from when I was dealing with the Special Immigration Appeals Commission Bill. The special advocate is an officer of the court, with a duty to the court. His duty is not to his client but to the court, but, as the hon. Gentleman rightly said, by the Attorney General or the Advocate General for Scotland. In those circumstances, a special advocate is accountable to the court and not to the client.

Sir Robert Smith
So he is accountable to the court and not accountable to the Advocate General or the Attorney General.

The Parliamentary Under-Secretary of State, Home Office Mr Mike O'Brien

That is right. He is accountable to the court in the same way as a Crown prosecutor is accountable to the court for ensuring that he delivers justice when he prosecutes a case. The special advocate will be accountable to the court for ensuring that he defends the applicant's interests and rights – indeed, he will be

able to obtain information from him – even though he will not instructions from the applicant, as instructions will come from the court. He will in effect be an officer of the court, appointed to ensure that the applicant's interests are protected.

One could make a comparison with a guardian ad litem, who is in a position of trust to act on a person's behalf, even though he does not always have to so what that person requires him to do or communicate information that it may be improper to pass to his client.

Mr Hughes
I am grateful to the Minister for dealing with most of the points. One thing that, probably inadvertently, he did not pick up was my question about whether we have – or, if we do not have, could have – a set of court rules that are applicable cross the areas where this issue arises. I gave an example earlier. The clause allows rules, but it is not clear whether the rules would be the same. I asked the Minister the supplementary question whether, if the court said that it wanted to go in camera and ask for the claimant to withdraw, there was an opportunity for that to be argued internally before the procedural decision was upheld and followed by the court.

The Parliamentary Under-Secretary, Home Office, Mr Mike O'Brien

I am not sure whether it is possible to organise an identical set of procedures and rules. To some extent the White Book will apply if national security matters that might involve similar procedures come before the divisional court ro the High Court. However, in the case of the Special Immigration Appeals Commission, we hope that the procedures will be more straightforward. The same protections would exist. Instead of trying to apply a set of rules that might be effective in the divisional court or another court to the simpler and more straightforward situation of the special immigration appeals tribunal, which may meet only four or five times a year, there are arguments for keeping the rule-making separate. The rule-making will be public and one rule will be based on another, but it may not be necessary for SIAC to have all the extra procedures that are no doubt necessary for the divisional court or the High Court.

Mr Hughes
I ask the Minister to look at that again. I understand the points that he is making, but it would be preferable

for those who want to know the procedure and who may be involved if, as far as possible, the procedure for arriving at the decision to exclude somebody and for the affected person's rights to challenge that decision was similar. In a way, special appeal tribunals follow more of a lay procedure. That does not mean that the divisional court of the High Court must have complicated procedures, but a common procedure would be good. I am happy for the Minister to take the matter away and to talk to colleagues in the Lord Chancellor's Department. There may be an opportunity for a common procedure or procedures up the ladder, whether in employment, discrimination or terrorism law, whenever people say that there is a national security issue.

Discrimination, visas and the bond scheme

House of Commons Second Reading
9.3.2000
cols. 1221-1222

Miss Widdecombe
I have a question for the Home Secretary....Why will not his plan to introduce a £10,000 bond for those who wish to enter the UK from India, Pakistan and Bangladesh – but nowhere else – be in breach of the Government's proposed indirect discrimination legislation?....Is it not discriminatory?

Home Secretary Mr Jack Straw
HC Second Reading
9.3.2000
col.1221

No, it will not be discriminatory. We are running a pilot scheme before the final decisions come to be made about the bond scheme. Wherever we pilot it, it is not discriminatory because it is a pilot.

Miss Widdecombe
Ah. So if the pilot is successful, the £10,000 bond will become universal? Is that right? Is the Home Secretary saying yes to that?

Home Secretary Mr Jack Straw
HC Second Reading
9.3.2000
cols. 1221-1222

I return to the explanation I offered the House on the amendments on immigration. Immigration and asylum law, by definition, distinguishes between people of different nationalities and sometimes ethnic origins, so the Bill contains perfectly sensible savings. That is the answer to the right hon. Lady's question.

The Parliamentary Under-Secretary of State, Home Office Mr Mike O'Brien
HC Committee
13.4.2000
4.45pm

I shall now deal with the point about bonds and the small number of people for whom a "minded to refuse" decision is made. In such a case, the immigration officer would be unlikely to grant a visa, but the decision would be marginal – the officer thinks that the person will probably comply, but there are so many doubts that he cannot grant the visa. In those circumstances, as an added option for exercising discretion in the applicant's favour, a bond could be requested. The person would have no obligation to provide one, but would be aware that he would be unlikely to get a visa otherwise. I should make it clear that no one who would get a visa today would have to pay a bond. Some disinformation has been floated to the effect that the bond provision would apply to people who get visas today. That is not the case. The aim is simply to provide bonds in a small number of marginal cases in which the entry clearance officer

makes a careful judgement that he is not satisfied that the person is likely to return. We should remember that the person is required to show that he will comply with our immigration rules. If there is an element of doubt and the entry clearance officer would otherwise refuse the visa, he could then say, "This is a marginal case and I might be prepared to consider a bond."

The proposal for a pilot on bonds was very much at the request of members of the Asian community who spoke not only to me in my surgeries, but to my right hon. Friend the Home Secretary and many other hon. Members. When the proposal went through the House, it got a broad welcome. However, due to a campaign of misinformation subsequently, some members of the Asian community became concerned that it would have wider and more general applicability. It was never our intention that the proposal should apply to people who get visas today. To end the campaign of misinformation and deal with concerns, we therefore decided to say that we were not disposed to apply the pilot to the Indian subcontinent. We are considering several options for piloting it elsewhere, although I cannot tell the hon. Member for Aylesbury where that is likely to be. Several suggestions have been made, but I am not sure where my hon. Friend the Minister of State, Home Office has got to in terms of decisions, because I am not directly involved. Perhaps I will refer the hon. Gentleman's question to her, and she will, I hope, write to him in due course to tell him where she has got to on the issue.

I should emphasise that the approach behind the bond is to assist people who are trying to visit their grandchildren or attend a funeral, not to put an extra encumbrance in front of them. That was certainly not the case. The whole concept of the bond scheme is that it will not be discriminatory; it will not aim to target particular nationals or ethnic groups. The proposals for a bond scheme were a positive development, in that they will facilitate more people coming to this country by providing an opportunity for an applicant to visit family members in the United Kingdom to demonstrate their true intention to entry clearance officers. The proposals will not amount to additional requirements that need to be met for entry clearance to be granted. In all cases, the requirements of the immigration rules as they relate to visitors will apply equally and will have to be met for entry clearance to

be granted.

As I said, we are considering where to pilot the scheme. Only after we have assessed the outcome of any pilot will we consider whether there should be any expansion of the scheme. I do not anticipate that in the next year. The pilot scheme might have begun by then, but any expansion in that time is unlikely.

Religious Discrimination

The Parliamentary Secretary of State, Home Office, Lord Bassam of Brighton
HL Second Reading
Col. 184

The noble Lord, Lord Ahmed, asked why the Bill did not cover religious discrimination. I am aware that this is a matter that particularly exercises the noble Lord, and it is one in which many of us take a keen interest. The Government are alive to the concerns about religious discrimination and the case put forward that it should be subject to law. This issue raises difficult, sensitive and complex questions. We do not believe that there is a ready answer or quick fix solution to it. We have commissioned research to assess the current scale and nature of religious discrimination and the extent to which it overlaps with racial discrimination in England and Wales.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien
HC Committee
13.4.2000
2:45pm

...We are conducting a research project into the extent of religious discrimination and how such discrimination, particularly against Muslims, would be tackled in legislation if it later proved to be necessary.

Duties of public authorities

The Parliamentary Under-Secretary, Home Office, Mr Mike O'Brien
HC Committee
2.5.2000
4:30pm

(on new section 71, New Clause 7)
The Bill will create a positive duty on all public authorities to promote race equality. It will be a major change in law. The Government sees this duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities but in the delivery of services to ethnic minorities.

The home Office already promotes race equality....The public services must recognise that it is no good simply paying lip service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services – it should be part of the mainstream of policy consideration....

New section 71A deals with immigration and nationality functions. Public authorities that carry out such functions will be subject to the general duty in so far as it pertains to eliminating unlawful racial discrimination and promoting good relations between persons from different racial groups. However they will not be subject to the duty in so far as it requires the promotion of equality of opportunity between persons from different racial groups. That is because immigration and nationality policy, by its nature, denies opportunities to some nationalities that are offered to others. That is a basic requirement of immigration law, and we could not have a requirement to give people with British passports the same rights as those with passports from another country....

Mr Liddington
HC committee
2.5.2000
5:15pm

[Secondly] the Minister dealt only generally with the exemption for the immigration and nationality directorate. I will not force votes at this stage, but the government should be aware that, although we all understand that specific circumstances govern the working of the directorate and require it to deal with different people in different ways, excluding the directorate from the duty to promote good race relations and to eliminate unlawful discrimination might be throwing the baby out with the bath water, to use the cliché. Many IND activities, such as decisions

about internal staffing and management, need to be governed by the duty.

I am willing to be persuaded that the Home Office, all its employees and all its agencies are bound by the duty to promote good race relations, as that would cover the IND for the extent to which it was not exempted. If that is the case, Ministers should examine the definitions of what is excluded – even by their light, which would exclude more than we would. There should not be a blanket avoidance of obligation to consider equality of opportunity when nationality is not an issue.

The Parliamentary Secretary of State, Home Office, Mr Mike O'Brien
HC Committee
2.5.2000
5:45pm

The immigration and nationality functions of the immigration and nationality department will be covered by the general duty insofar as it pertains to eliminating unlawful discrimination and promoting race relations between differing racial groups. The exemption in proposed section 19C protects only acts of discrimination required by specific immigration ad nationality legislation, or those authorised by Ministers. Other acts of discrimination by immigration staff would be unlawful under the Bill and the Government would take firm action to eliminate acts of such discrimination. In addition, the duty to eliminate unlawful racial discrimination and promote equality of opportunity would apply fully to the Home Office as an employer.

The Parliamentary Under-Secretary of State, Home Office, Mr Mike O'Brien
HC Report
30.10.2000
col. 527

(in answer to Mr Hughes and Mr Lidington)
In response to these concerns, we made a commitment in Committee to introduce amendments that would provide for the adoption of a generic definition for the purposes of defining public authorities. These amendments meet that commitment. They delete the provisions for a listing approach for the purposes of section 19B of the 1976 Act and provide instead for a definition based on section 6 of the Human Rights Act 1998. As flagged up in Committee, the generic definition has been adjusted to allow for a very limited number of specific exemptions – namely for the Houses of Parliament, the legislative functions of the Scottish Ministers, the National Assembly for Wales and United Kingdom Ministers, the intelligence agencies and judicial acts.

The Government stress that functions have not been exempted other than where there are good reasons for doing so. Our approach is governed by the

principle that the Bill should not fetter the legislative functions of Westminster, the Scottish Parliament or the National Assembly for Wales. Ministers will remain subject to parliamentary scrutiny but, like others involved in the legislative process, they must retain the ability to make legislation that discriminates, where that is justified – for example, to implement immigration legislation that requires discrimination on grounds of nationality, or social security or education legislation that discriminates on grounds of residence. That is consistent with the existing provisions of the 1976 Act, which provide that acts done with statutory authority are not unlawful.

Col. 528

We should ensure that private sector organisations which undertake private functions should know that they will have obligations under the race relations legislation, and that the Bill will cover them in so far as they undertake the public functions for which they re contracted. Indeed, Group 4 has today take the trouble to say publicly that it is delighted that the Government have decided to use the Human Rights Act definition of a public authority in the Bill. Group 4 says that it firmly believes that there should be a level playing field between the public and private sectors in all social policy matters. I welcome Group 4's announcement; it is entirely along the lines that my right hon. Friend the Secretary of State has said that he wants to go.

Home Secretary
Mr Jack Straw M.P.
HC Second Reading
9.3.2000
col. 1214

The Bill would not be necessary if there were not institutional racism in a wide variety of public bodies.... There has been institutional racism in the Home Office – and that is not to say that I have ever met a senior manager or a Minister in this Government or the previous Government who could be described as openly racist or harbouring racist beliefs.[5]

[5] Mr Straw's further remarks here are all about Home Office employment policies and not about any other Home Office activity.

Annex A 1

HOME OFFICE

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Lord Steve Bassam of Brighton
Parliamentary Under Secretary of State

Lord Lester of Herne Hill QC
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21 JAN 2000

Dear Anthony

RACE RELATIONS (AMENDMENT) BILL: IMMIGRATION EXEMPTION FOR DISCRIMINATION ON GROUNDS OF ETHNIC ORIGIN

During the debate in the House for the Committee Stage of the Race Relations (Amendment) Bill on 11 January, I undertook that we would look again at the exemption for acts of discrimination on the basis of ethnic or national origin in relation to immigration and nationality functions. I share your concern that the Government should enjoy only as much protection from the important duties the Bill imposes as is absolutely necessary and I have carefully considered with Home Office colleagues whether this exemption is in fact necessary, and if so whether it should be narrowed. However, we have concluded that the exemption is necessary, and that there really is no scope for limiting it further.

As I made clear during the Committee Stage debate, we believe the exemption is necessary to allow the immigration system to handle asylum applications and cases requiring exceptional treatment on compassionate grounds. You have made clear your view that the courts would not find that the Home Office had acted unlawfully in cases where differential treatment had been provided to different ethnic or national groups because of the situation in their countries of origin. However, as I also made clear, we simply cannot afford any degree of ambiguity to arise in relation to the immigration and asylum system. We are required to operate policies that are country-specific, and to treat applications alike without consideration of the individual circumstances of a person falling within the relevant ethnic or national group and who are from the country concerned.

It has also become clear during the course of our examination that it is also necessary on some occasions for the Immigration Service to differentiate between individuals on the basis of their ethnic or national origin. As an example, from time to time, the Immigration Service detects Chinese nationals with falsified documents that misrepresent them as Malaysian or Singaporean nationals of Chinese ethnic origin. Were this problem to grow significantly, it would be necessary for the Immigration Service to scrutinise with particular care the documents presented by these nationals of Chinese ethnic origin and to interview them. But

VB

with 89.1 million passenger arrivals in the United Kingdom between March 1999 and April 2000, of which 12.2 million passengers were non-EEA nationals subject to immigration control, the Immigration Service simply does not have the resources to interview every Malaysian or Singaporean seeking to enter the country, irrespective of their ethnic origin. An assessment of risk based on available intelligence must be made, and this risk may sometimes be based on the ethnic or national origin of passengers.

During the calendar year 1999, the Immigration Service detected more than 5,000 attempts to enter the United Kingdom using forged or counterfeit travel documents or visas, or by persons impersonating a third party and presenting a passport to which they were not entitled. The threat to the immigration control is not imaginary, and the task of individual immigration staff performing their duties is becoming ever more difficult. Clearly, all immigration staff need clear guidance to ensure that they respect the rights of others. The immigration exemption in clause 1 of the Bill will provide Home Office Ministers with the framework within which to provide that guidance and, subject to any overriding reasons of operational necessity, it will be published for Parliament and the public to see in line with the Government's commitment to openness. Immigration procedures and practices will be thoroughly reviewed to ensure that only discriminatory activity that is necessary and justifiable is covered by clear instructions approved by Ministers, and that any discriminatory activity which cannot be justified is eliminated.

As I explained during the Committee Stage debate, we are also satisfied that the exemption for immigration and nationality functions would not give rise to breaches of the United Kingdom's international obligations under the UN Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all forms of Racial Discrimination. The exemption does nothing to restrict or remove existing rights or entitlements provided in existing legislation, but simply enables that legislation to continue to operate as Parliament intended. It does not require Ministers to do anything contrary to their international obligations, and Ministers would still need to observe their international obligations in exercising the discretion the exemption provides.

I hope you will accept that we have looked at this question rigorously and with an open mind. I am aware that for Report on Thursday, you have put down the same amendment to the immigration exemption you tabled at the Committee Stage. I hope that in the light of the reasons I have provided in this letter and the points I made during the Committee Stage debate on 11 January, you will agree to withdraw the amendment or at least not to press the matter.

I am copying this letter to Lord Cope and placing a copy in the libraries of both houses.

Yours

LORD BASSAM OF BRIGHTON

JAN24.RW1

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Racial Discrimination: Legitimate Acts

Lord Lester of Herne Hill asked Her Majesty's Government:

> Whether they will specify each occasion during the past three years in which a Minister of the Crown, acting personally, or any other person acting on his behalf, has discriminated against another person on grounds of ethnic or national origin in carrying out (a) immigration and (b) nationality functions.[HL345]

Lord Bassam of Brighton: We have no records of any such individual cases. However, circumstances have arisen, as I have explained separately, where discrimination has been needed to deal with a particular situation.

Lord Lester of Herne Hill asked Her Majesty's Government:

> Whether they will specify any acts of racial discrimination done under Section 41(1) of the Race Relations Act 1976 since the entry into force of that Act; and [HL346]
>
> What arrangements they have made with ministerial approval under Section 41(2)(a) of the Race Relations Act 1976 since the entry into force of that Act; and [HL347]
>
> What conditions, if any, have been imposed by a Minister of the Crown under Section 41(2)(b) of the Race Relations Act 1976 since the entry into force of that Act.[HL348]

Lord Bassam of Brighton: Section 41(1) of the Race Relations Act 1976 provides that acts are not unlawful under the Act if they are required to be done by an enactment, or in order to comply with a condition or requirement imposed by a Minister by virtue of an enactment.

Section 41(2)(a) and 41(2)(b) of the Race Relations Act 1976 provide that acts that discriminate on the basis of nationality, place of ordinary residence, or length of residence or presence in or outside the United Kingdom or an area within the United Kingdom, are not unlawful under the Act if they are required to be done in pursuance of arrangements made by, or with the approval of, or for the time being approved by, a Minister of the Crown; or to comply with any condition imposed by a Minister of the Crown.

10 Jan 2000 : Column WA78

Records of specific acts taken that are acts of racial discrimination but which are not unlawful because they fall within the exemptions in Section 41(1) and 41(2) are not kept centrally. But examples would include acts done under statutory authority that discriminate on the basis of residence status--for example, in relation to the charging of fees for attendance at universities, entitlement to education awards, or entitlement to free National Health Service hospital treatment.

Lord Lester of Herne Hill asked Her Majesty's Government:

> What acts of racial discrimination, if any, have been done for the purpose of safeguarding national security, under Section 42 of the Race Relations Act 1976, since the entry into force of that Act.[HL396]

Lord Bassam of Brighton: Section 42 of the Race Relations Act 1976 provides that acts are not unlawful under the Act if they are done for the purpose of safeguarding national security. Records of specific acts taken under this exemption are not kept centrally.

Race Relations (Amendment) Bill

Lord Lester of Herne Hill asked Her Majesty's Government:

Whether they will specify each of the "immigration and nationality functions" referred to in Clause 1(1) of the Race Relations (Amendment) Bill by describing the nature of each function.[HL328]

Lord Bassam of Brighton: The main functions are:

the grant or refusal of an entry clearance under the Immigration Rules by an entry clearance officer;

the grant or refusal of leave to enter or remain in the United Kingdom under the Immigration Rules by an immigration officer, or caseworker, acting for the Secretary of State;

the grant or refusal of asylum in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees;

the grant or refusal of leave to remain exceptionally outside the Immigration Rules on various grounds, including compassionate circumstances;

the decision of an immigration officer to proceed against an individual as an illegal entrant, or of the Secretary of State to institute deportation or administrative removal action against an individual;

the decision to detain an individual under Immigration Service powers; and

the grant or refusal of British citizenship under the British Nationality Act 1981.

10 Jan 2000 : Column WA79

Lord Lester of Herne Hill asked Her Majesty's Government:

In respect of which of the "immigration and nationality functions" referred to in Clause 1(1) of the Race Relations (Amendment) Bill they consider that it is appropriate and necessary to discriminate against an individual on the grounds of ethnic or national origins in carrying out such functions; and[HL329]

In respect of which of the "immigration and nationality functions" discrimination on the grounds of ethnic or national origins has been practised during the past three years.[HL330]

Lord Bassam of Brighton: Some discrimination on the grounds of national or ethnic origin is necessary in any immigration and asylum system. For example, an asylum claim will often rest on

the treatment given in the country of origin to a particular national or ethnic group, so that discrimination in favour of individuals from such groups will be required in order to take fair decisions in accordance with obligations under international law. It may also be necessary, in order to manage the process effectively in the interests of all applicants, to give priority from time to time to particular national or ethnic groups, as was done, for example, in dealing with the cases of evacuees from Kosovo during the recent conflict and, at other times, to applicants from certain Eastern European countries making unfounded claims in large numbers.

Unjustifiable Indirect Discrimination

Lord Lester of Herne Hill asked Her Majesty's Government:

> Whether they consider that the concept of non-discrimination, protected by the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention for the Elimination of Discrimination Against Women, forbids unjustifiable indirect discrimination as well as direct discrimination by public authorities.[HL442]

Lord Bassam of Brighton: The texts of the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention for the Elimination of Discrimination Against Women do not define, prohibit or explicitly refer to unjustifiable indirect discrimination. The case-law is sparse and open to interpretation. However, taken with relevant General Comments of the enforcement bodies, there are some suggestions that the concept of non-discrimination in these instruments may, to some extent, include some forms of unjustifiable indirect discrimination.

10 Jan 2000 : Column WA80

Scotland: Impact of Race Relations (Amendment) Bill

Lord Lester of Herne Hill asked Her Majesty's Government:

> Whether they have sought the views of the Scottish Parliament, Scottish Ministers and other interested parties in Scotland, about the contents of the Race Relations (Amendment) Bill and its impact upon areas of devolved competence.[HL444]

Lord Bassam of Brighton: The Race Relations (Amendment) Bill's provisions are for reserved purposes, although some provisions make incidental and consequential changes in devolved areas of law. The Scottish Executive has been consulted and its views sought on the Bill's impact upon areas of devolved competence.

European Committee for the Prevention of Torture

Lord Lester of Herne Hill asked Her Majesty's Government:

> Further to the Written Answer by Lord Bassam of Brighton on 13 December (WA 15), whether they would consent to the publication of the reports by the European Committee for the Prevention of Torture of 1998.[HL445]

Lord Bassam of Brighton: On 20 December 1999, the Government requested the European Committee for the Prevention of Torture to publish its report of March 1998.

THE TIMES

November 18 1996

COURT OF APPEAL

Applicant can address adverse matters

Regina v Secretary of State for the Home Department, Ex parte Mohammed Al Fayed

Regina v Same, Ex parte Ali Fayed

Before Lord Woolf, Master of the Rolls, Lord Justice Kennedy and Lord Justice Phillips

[Judgment November 13]

Although the Home Secretary was not obliged under section 44(2) of the British Nationality Act 1981 to give reasons for refusing an application for naturalisation where the grant of such an application was a matter for his discretion, he was required, before reaching a final decision, to inform an applicant of the nature of any matters weighing against the grant of the application in order to afford the applicant an opportunity of addressing them.

The Court of Appeal so held, Lord Justice Kennedy dissenting, when allowing appeals by Mohammed Al Fayed and Ali Fayed from Mr Justice Judge who had refused their applications for judicial review of the decisions of the Home Secretary rejecting their applications for naturalisation.

Section 44 provides: "(2) The secretary of state . . . shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the secretary of state . . . on any such application shall not be subject to appeal to, or review in, any court."

Mr Michael Beloff, QC and Mr Rabinder Singh for the first applicant; Mr Michael Beloff, QC and Mr Mark Shaw for the second applicant; Mr Stephen Richards and Mr Stuart Catchpole for the Home Secretary.

THE MASTER OF THE ROLLS referred to section 6 of and Schedule 1 to the 1981 Act which governed the applicants' naturalisation applications and said that although the Home Secretary had no discretion to grant an application to a person not of good character, a decision refused on that ground was one to which section 44(2) applied. That was accepted by Mr Beloff.

There were other provisions of the Act which gave a person who fulfilled certain conditions an entitlement to be registered as a British citizen, and accordingly section 44(2) did not apply to them.

Section 40(6) of the Act, setting out the procedure where the Home Secretary wished to deprive a naturalised citizen of his citizenship, required him to give such a person notice in writing of the grounds of the proposed order and informing him of his right to an inquiry.

The Home Secretary accepted that section 44(2) did not prevent the court exercising its jurisdiction to review a decision on the traditional grounds available on an application for judicial review. The reason for the acceptance of jurisdiction assisted in determining the questions in issue.

His Lordship referred to *Anisminic Ltd v Foreign Compensation Commission* ([1969] 2 AC 147) and *Attorney-General v Ryan* ([1980] AC 718). The latter case, to which his Lordship attached great importance in the present cases, was decided and reported before the 1981 Act was passed.

The inference could therefore appropriately be drawn that Parliament was not, in enacting section 44(2) intending by the ouster provision to exclude the ability of the court to review a decision of the Home Secretary on the ground, for example, that he had not complied with any requirement of fairness which the Act imposed on him or the express prohibition against discrimination in section 44(1) when considering applications for naturalisation.

First issue

Would there be any requirement of fairness in the absence of section 44(2), and if so, was it breached ?

It was obvious that refusal of their applications had damaging implications for the applicants, because of their high public profile, and the damage was the greater because it was not in dispute that they complied with the formal requirements other than that of good character, the relevance of which to the refusal was not known.

The refusal also deprived them of the substantial benefits of citizenship, such as freedom from immigration control, citizenship of the European Union, and its accompanying rights, and the right to vote and stand in parliamentary elections. The decisions of the minister were therefore classically ones which but for section 44(2) would involve an obligation on him to give the applicants an opportunity to be heard before that decision was reached.

The fact that the Home Secretary might refuse an application because he was not satisfied that the applicant fulfilled the rather nebulous requirement of good character or "if [the Home Secretary] thinks fit" underlined the need for an obligation of fairness.

Except where non-compliance with a formal requirement other than that of good character was being ruled on, unless the applicant knew of areas of concern which could result in the application being refused in many cases, and especially the present cases, it would be impossible for him to make out his case.

The result could be grossly unfair. The decision-maker might rely on matters as to which the applicant would have been able to persuade him to take a different view: see *R v Gaming Board for Great Britain, Ex parte Benaim* ([1970] 2 QB 417) and *R v Secretary of State for the Home Department, Ex parte Doody* ([1994] 1 AC 531).

The present cases were, therefore, cases where, ignoring section 44(2), the courts would intevene to achieve fairness for the applicants by requiring the minister to identify the areas which were causing such difficulty in reaching the decision.

Second issue

What was the effect of section 44(2)?

The fact that section 44 provided that the decision was not to be subject to appeal or review did not affect the obligation of the Home Secretary to be fair or to interfere with the power of the court to ensure that requirements of fairness were met.

That that power had no application to the present case depended alone on the argument that to comply with what would be the normal requirements to inform the applicants of the case they had to meet would be inconsistent with the express prohibition in section 44(2).

That prohibition it was submitted impliedly excluded the requirement to give the applicants and others in the same position the notice which fairness dictated they needed to make an application, and that unless that was the situation the intention of Parliament expressed in section 44(2) would be frustrated.

His Lordship rejected that argument as wholly inconsistent with principles of administrative law.

In summarising his conclusions he said:

1 The suggestion that notice need not be given, although that would be unfair, involved attributing to Parliament an intention that it had not expressly stated that a minister should be able to act unfairly in deciding that a person lawfully in the United Kingdom should be refused citizenship without the courts being able to do anything about it.

English law had long attached the greatest importance to the need for fairness to be observed prior to the exercise of a statutory discretion. However, at least until recently, English law had not been so sensitive to the need for reasons to be given for a decision after it had been reached.

So to exclude the need for fairness before a decision was reached because it might give an indication of what the reasons for the decision could be was to reverse the actual position. It involved frustrating the achievement of the more important objective of fairness in reaching a decision in an attempt to protect a lesser objective of possibly disclosing what would be the reasons for the decision.

2 It would be surprising if it was the implied intention of Parliament that the lack of a requirement to give reasons should have the effect of avoiding the requirement to give notice of a possible ground for refusing an application since the minister could voluntarily both give notice and reasons, if he chose to do so.

3 In many situations the giving of notice of areas of concern did no more than identify possible rather than actual reasons. Thus as long as the minister sought representations for more than one area of concern the applicant in the absence of reasons would not know whether any particular area of concern played any part in the refusal of the application.

4 As the minister had a discretion to give the applicant notice he had to exercise it reasonably. If not to give notice would result in unfairness then the discretion could only reasonably be exercised by giving notice. It was already ministerial practice to inform the applicant if one of the preconditions which were discretionary bars to success were not fulfilled.

If that was the practice it was by no means obvious that there was any logical reason for not taking the same course in the areas where the Home Secretary had an even wider discretion when the identity of the issues would be less ascertainable by the applicant.

5 If the Home Secretary was correct, the effect of the restriction on the obligation to give

reasons was far reaching indeed. In any readily identifiable situation it would totally exclude the courts' power of review.

6 Section 40(6) was of no assistance in deciding the present issue: the reason for that section was explained by the fact that it involved an inquiry. A procedure which included an inquiry required an express provision.

7 *Attorney-General v Ryan* was highly persuasive authority in favour of the Home Secretary not being relieved of his obligation to be fair by section 44(2), and the case could not be distinguished.

Applying the approach in that case his Lordship said that it did not require the Home Secretary to do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he could.

In some situations that might involve disclosing matters which it was not in the public interest to disclose. If that was the position then the Home Secretary would be relieved from disclosure and it would suffice if he merely indicated that that was the position to the applicant who, if he wished, could challenge the justification for the refusal before the courts.

Referring to the administrative burden of giving notice of areas of concern, his Lordship said that administrative convenience could not justify unfairness, but he would emphasise that his remarks were limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern was identified by notice.

In many cases less complex than the present the issues might be obvious, obviating the need for notice.

Third issue

Was the Home Secretary despite section 44(2) required to give reasons?

The minister was not prohibited by the section from giving reasons. He had a clear discretion to do so. At common law there was no universal obligation to do so. But despite that the present cases were such that, apart from section 44(2), reasons should have been given.

However, in the light of the express prohibition on requiring the Home Secretary to give reasons, the need for reasons was not so essential that fairness could not be achieved without reasons as long as an applicant had been given sufficient information as to the subject matter of the decision to enable him to make such submissions as he wished.

He would therefore reject Mr Beloff's argument on that issue.

Until the areas of concern were identified so that it could be ascertained whether the applicants would be in a position to make further representations it would not be possible to say whether an injustice had occurred.

However, justice had not only to be done, but be seen to be done. The applicants had not had the fairness to which they were entitled and the rule of law had to be upheld. The Home Secretary's decisions had to be quashed so they could be re-taken in a manner which was fair.

That was the concern of the courts, Parliament not having excluded the obligation to be fair. They were not concerned with the merits of the decisions which should be made. That was the concern of the Home Secretary.

LORD JUSTICE KENNEDY, dissenting, said that the appeals turned on the construction of section 44(2). In order to give effect to the words of that section the Home Secretary, when called on to exercise his discretion, had to be relieved not only of any obligation to give reasons at the time of or immediately after he made the decision but also of any duty to indicate to an applicant at any earlier stage why he was minded to refuse.

As Mr Richards had pointed out, if Parliament had intended otherwise why, was there not to be found in section 44(2) some provision equivalent to that in section 40(6)?

He would dismiss the appeals.

Lord Justice Phillips delivered a judgment concurring in the result with the Master of the Rolls.

Solicitors: D. J. Freeman; Palmer Cowen; Treasury Solicitor.

RACE MONITOR: MANNER OF MONITORING

The Home Secretary has determined that in performing the legal duties created by new section 19E of the amended Race Relations Act, the Race Monitor will:

- Spend not more than 40 days per year in connection with this employment, at a rate of £350 per day (the daily rate for immigration adjudicators). Up to 9 days per annum may be spent on familiarisation visits to one or more entry clearance posts abroad. The Home Office Immigration and Nationality Directorate (IND) will pay travel and subsistence costs. The 40-day period for monitoring activities will be reviewed after the first year, to determine whether it should be increased or reduced in the light of the number and scope of Ministerial authorisations made;

- Present his or her formal report to the Home Secretary no later than 20 November each year, being first presented to the Immigration and Nationality Policy Director (INPD) in draft for factual errors to be corrected;

- Submit an interim report to the IND Director General at least once during the year, preferably half way through the period, which may be disclosed in full or in part to the public in accordance with the Code of Practice on Access to Government Information and, in due course, the Freedom of Information Act. Draft to be presented to INPD for correction of factual errors. Such interim reports may focus on specific authorisations or concern specific visits to posts, ports or casework units;

- Be informed immediately of any Ministerial authorisations made. Sample cases that have been decided or handled in accordance with Ministerial authorisation to establish whether the authorisation has been exceeded;

- Have full access to all Ministerial authorisations made by either Home Office or Foreign Office Ministers, together with any supporting papers including sensitive or restricted material up to and including secret classified files. Because of the classified nature of some of IND's activities, which may be subject to Ministerial authorisations under the extended

Race Relations Act, the Monitor will be subject to restrictions on the disclosure of certain information by virtue of the Official Secrets Act (OSA). The Monitor will be subject to the provisions of the OSA, and will exercise extreme sensitivity in handling classified material, and will consult the Secretary of State before commenting on such matters in yearly or interim reports. In certain circumstances, the OSA may require the omission from any published report on public observations of classified material and the Monitor may be directed to do so by the Secretary of State;

- Meet IND's Director General, Deputy Director (Operations) and Deputy Director (Policy) formally at least once per year to discuss the justification for and operation of Ministerial authorisations. Meet senior managers in IND's business delivery areas (the Immigration Service, Integrated Casework Directorate and National Asylum Support Service) at least once per year, and more often if necessary to discuss specific authorisations made. If possible, meet the Home Office Immigration Minister or Home Secretary at least once per year;

- Make at least 8 familiarisation visits per annum to operational IND units in the United Kingdom, including ports, local enforcement offices, and casework units or presenting officer units. These should focus on the operation of any Ministerial authorisations, but should provide the Monitor with the opportunity to develop a broad degree of familiarity with the immigration system;

- Liaise with the Home Office Research Development and Statistics Directorate over information needs flowing from the extended Race Relations Act, making proposals to IND, where appropriate, for research projects relating to Ministerial authorisations; and

- Liaise with the IND Complaints Audit Committee and entry clearance monitor to discuss any areas of mutual concern.

ANNEX B

CHAPTER 1
SECTION 11

RACE RELATIONS (GENERAL)

RACE RELATIONS ACT 1976
SECTION 19D MINISTERIAL AUTHORISATION

Race Relations (Immigration and Asylum) Authorisation 2001

Made March 2001

Coming into Operation 2nd April 2001

I make the following authorisation under section 19D(3)(a) of the Race Relations Act 1976[a]:

PART I

GENERAL

Citation, commencement and interpretation

1. This authorisation may be cited as the Race Relations (Immigration and Asylum) Authorisation 2001 and shall come into operation on 2nd April 2001.

2. In this authorisation –

"claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom;

"immigration laws" has the meaning given to it in the Immigration Act 1971 [b];

"immigration rules" means the rules for the time being laid down under section 3(2) of the Immigration Act 1971;

"Refugee Convention" and "Human Rights Convention" have the meanings given to them in the Immigration and Asylum Act 1999[d].

PART II

DISCRIMINATION JUSTIFIED BY STATISTICS OR INTELLIGENCE

Examination of passengers

3. (1) This paragraph applies where a person is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971.

(2) If one or more of the conditions in paragraph 6 are satisfied, the immigration officer may, by reason of the person's nationality –

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[a] 1976 c. 74. Section 19D is inserted by section 1 of the Race Relations (Amendment) Act 2000 (c. 34).
[b] 1971 c. 77.
[d] 1999 c. 33.

(a) subject the person to a more rigorous examination than other persons in the same circumstances;

(b) exercise powers under paragraphs 2(3), 2A, 4 and 21 of Schedule 2 to the Immigration Act 1971;

(c) detain the person pending his examination under paragraph 16(1) of Schedule 2 to the Immigration Act 1971;

(d) decline to give the person's notice of grant or refusal of leave to enter in a form permitted by Part III of the Immigration (Leave to Enter and Remain) Order 2000[c]; and

(e) impose a condition or restriction on the person's leave to enter the United Kingdom or on his temporary admission to the United Kingdom.

Persons wishing to travel to the United Kingdom

4. (1) This paragraph applies where a person is outside the United Kingdom but wishes to travel to the United Kingdom.

(2) If one or more of the conditions in paragraph 6 are satisfied, an immigration officer or, as the case may be, the Secretary of State may, by reason of the person's nationality –

(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom; and

(b) exercise the powers to seek information and documents under articles 7(2), 7(3) and 13(8) of the Immigration (Leave to Enter and Remain) Order 2000.

Removal Directions

5. Persons responsible for giving directions under section 10 of the Immigration and Asylum Act 1999 or under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 may give priority to the setting of directions for the removal of persons of a particular nationality if one or more of the conditions in paragraph 6 are satisfied.

Conditions

6. The conditions are that:

(a) there is statistical evidence showing a pattern or trend of breach of the immigration laws by persons of that nationality;

(b) there is specific intelligence or information which has been received and processed in accordance with the IND Code of Practice for the recording and dissemination of intelligence material and which suggests that a significant number of persons of that nationality have breached or will attempt to breach the immigration laws.

PART III

MISCELLANEOUS AUTHORISATIONS

Asylum Work Streaming

7. The Secretary of State may give priority to the consideration of claims for asylum from persons of a particular nationality or ethnic or national origin if there are a

[c] S.I. 2000/1161.

significant number of claims for asylum from persons of that nationality or ethnic or national origin which are unfounded or which raise similar issues in relation to the Refugee Convention or the Human Rights Convention.

Permission to work

8. Immigration officers and entry clearance officers may, otherwise than in accordance with immigration rules, grant leave to enter or entry clearance in a form which permits the holder to work in the United Kingdom to –

(a) participants in the British Universities North America Club programme; and

(b) participants in the Japan: Youth Exchange Scheme; and

(c) British Dependent Territories citizens whose status derives from a connection with St Helena or Tristan Da Cunha.

Translation of Documents

9. (1) This paragraph applies where a person is to be given information relating to his application or entitlement to enter or remain in the United Kingdom and that information is available in a limited number of languages.

(2) If the information is not available in a language which the person understands, it is not necessary to provide the information in a language which he does understand.

Minister of State

March 2001
Home Office

RACE RELATIONS ACT 1976 AS AMENDED BY THE RACE RELATIONS (AMENDMENT) ACT 2000: AUTHORISATIONS MADE UNDER SECTION 19D IN RESPECT OF IMMIGRATION FUNCTIONS

Explanatory Note

Section 19D of the amended Race Relations Act provides that discrimination by a relevant person on the basis of nationality or ethnic or national origin in carrying out immigration and nationality functions is not unlawful. A "relevant person" is defined as a Minister of the Crown acting personally or any other person (e.g. an immigration official) acting in accordance with a relevant authorisation. A "relevant authorisation" is defined as a requirement imposed or express authorisation given with respect to a particular case or class of case by a Minister of the Crown or by specified enactments, mainly in the field of immigration and nationality. The purpose of this note is to explain the authorisation made by the Home Office Minister of State and which has been placed in the library of the House.

Examination of Passengers

The ability of immigration officers at ports of entry to examine passengers is paramount in the operation of the United Kingdom's on-entry control. The need to respond immediately to intelligence or patterns or trends of breach of the immigration laws is crucial if the Immigration Service is to have the capacity to restrict entry to those who qualify under the Immigration Rules. The decision on a passenger's entitlement to enter the United Kingdom will continue be taken on the merits of the case in accordance with the Immigration Rules. The authorisation simply allows the Immigration Service to prioritise and manage its resources effectively in undertaking examinations necessary in order to reach that decision.

The authorisation in respect of the examination of passengers provides that where there is statistical evidence showing a pattern or trend of breach of the immigration laws by persons of a particular nationality, or specific intelligence or information which has been received and processed in accordance with the IND

Code of Practice for the recording and dissemination of intelligence material and which suggests that a significant number of persons of that nationality have breached or will attempt to breach the immigration laws, an immigration officer may by reasons of a person's nationality:

a) subject them to a more rigorous examination than other persons in the same circumstances arriving at the same time; or

b) exercise specific powers under Schedule 2 to the Immigration Act 1971, namely:

- Requiring a person to submit to further examination;
- Requiring a person to furnish information and documents;
- Examining and detaining a person's documents;
- Searching a person
- Detaining a person pending examination
- Granting temporary admission

c) impose a condition or restriction on that person's leave to enter or their temporary admission

d) decline to give the person's notice of grant or refusal of leave to enter in a form permitted by Part III of the Immigration (Leave to Enter and Remain) Order 2000. This relates to the flexibility provisions introduced by the Immigration and Asylum Act 1999.

The authorisation places immigration officers operating at the control zones in Coquelles and operating the juxtaposed controls for Eurostar services at French stations in the same position as their counterparts at UK ports of entry.

Persons wishing to travel to the UK

This authorisation is necessary to ensure a proper alignment between the flexibility provisions in the Immigration and Asylum Act 1999 and the Immigration (Leave to Enter and Remain) Order 2000 on the one hand and the extended Race Relations Act on the other. The authorisation provides that immigration officers are not under an obligation to give or refuse leave to enter before arrival in the UK if their reason for not doing so is based on grounds of

nationality supported by statistical evidence or intelligence of breach or attempted breach of the immigration laws.

Removal Directions

This authorisation allows the prioritisation for removal on the basis of nationality of persons who do not enjoy a lawful basis of stay in the United Kingdom, where there is statistical evidence showing a pattern or trend or breach of the immigration laws by persons of that nationality.

Asylum Work Streaming

The asylum work streaming authorisation enables the Secretary of State to give priority to the consideration of claims for asylum from persons of a particular nationality of ethnic or national origin if there are a significant number of claims for asylum from persons of that nationality or ethnic or national origin which are unfounded or which raise similar issues in relation to the 1951 UN Convention relating to the Status of Refugees or the European Convention on Human Rights. This is necessary to enable the Immigration and Nationality Directorate to manage its resources effectively, deliver

the Government's asylum targets, and to respond promptly to rising numbers of claims of a particular type from certain groups. All applications will, of course, continue to be considered on the basis of their individual merits in accordance with the United Kingdom's international obligations.

Permission to Work

This authorisation provides that immigration officers and entry clearance officers may, otherwise than in accordance with the Immigration Rules, grant leave to enter or entry clearance in a form which permits the holder to work in the United Kingdom to participants in the British Universities North America Club programme, participants in the Japan Youth Exchange Scheme, and British Dependent Territories citizens whose status derives from a connection with St Helena or Tristan Da Cunha. This authorisation relates to three specific concessionary polices which are currently operated outside the Immigration Rules.

The British Universities North America Club (BUNAC) and its counterpart in the USA, the Council on International Educational Exchange, arrange visits of British and American university

students. Under this scheme, American students who come to the United Kingdom may, if they wish, take employment for all or part of their stay, provided they obtain prior approval from the Department for Education and Employment.

The Japan Youth Exchange Scheme permits young Japanese people between the ages of 18 and 25 to spend up to a year in the United Kingdom enjoying an extended holiday visit of which employment is only an incidental part. The scheme was announced by the Foreign Secretary on 6 September 1999 and launched in Japan on 2 February this year.

The authorisation also covers British Dependent Territories Citizens whose status derives from a connection with St Helena or Tristan Da Cunha. It is the Government's intention to confer British citizenship on nearly all British Dependent Territories Citizens via primary legislation in due course.

Translation of documents

The Immigration and Nationality Directorate already produces a number of documents in a series of different languages. A revised

explanatory letter to accompany the Statement of Evidence Form (SEF) in over 30 languages will be introduced, designed to help asylum seekers complete the SEF within the required number of days to assist in the speedy resolution of claims. Within this context, the authorisation provides that IND is not obliged to make information available in all of 120 or more languages in use around the world. The authorisation applies where a person is to be given information relating to his or her application or entitlement to remain in the United Kingdom and that information is available in a limited number of languages. It provides that if information is not available in a language which the applicant understands, it is not necessary to provide it in a language which they do understand.