A0010

The RRA

'Racial grounds', 'racial group'

1. 'Racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins[1]. 'Racial group' means a group of people defined by reference to the same matters, namely colour, race, nationality or ethnic or national origins. References to someone's racial group include any racial group into which he falls and is therefore inclusive in its scope. If a racial group comprises two or more distinct racial groups it can still form a particular racial group for the RRA 1976[2]. The concept of "race" was said by the Court of Appeal in R v White[3] to include "African" even though it is possible that many different colours, ethnic groups and nationalities exist in Africa.

Ethnic origins

2. Ethnic origins are determined by reference to the individual's ethnic group. For a group to be an ethnic group it must regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics[4]. It must have:

   (*a*) a long, shared history, the memory of which the group keeps alive and which consciously distinguishes it from other groups; and

   (*b*) a cultural tradition of its own including family and social customs and manners, often, but not necessarily, associated with religious observance.

3. In addition, there are other relevant characteristics, one or more of which will commonly be found and will help to distinguish the group from the larger community:

   (*a*) either a common geographical origin or descent from a small number of common ancestors;

   (*b*) a common language, not necessarily peculiar to the group;

   (*c*) a common literature peculiar to the group;

   (*d*) a common religion different from that of the neighbouring groups or from the general community surrounding it; and/or

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[1] Section 3(1) of the RRA 1976. Nationality includes citizenship (section 78 RRA).

[2] s 3(2), RRA 1976

[3] R v White [2001] EWCA Crim 216

[4] Mandla v Lee [1983] ICR 385 Sikhs are such an ethnic group.

(*e*) a sense of being a minority or being an oppressed or dominant group within a larger community.

4. Thus a pub putting up a 'no travellers' notice could discriminate indirectly on the grounds of ethnic origin against Romanies[5].

5. The significant characteristics of the racial group in question may be both ethnic and religious. Is the treatment based on race or religion? Discrimination based on religious observance grounds may constituted a breach of Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 6 HRA 1998[6]. Muslims are not a distinct ethnic group[7]. Refusal to permit a religious observance or a traditional practice of a religious group not amounting to an observance could amount to unlawful indirect racial discrimination[8]. Information will need to be provided on the statistical ethnic/racial makeup of the particular religious group.

6. Rastafarians although a separate group with identifiable characteristics, have yet to establish a separate identity by reference to their ethnic origins[9]. Neither the English nor the Scots have the requisite racial element required for recognition as an ethnic group[10]. Cf 'national origins'. Irish travellers constitute an ethnic group[11], having their own language "Shelta", beliefs and social customs.

National origins

7. Under section 19D(1) a relevant person does not discriminate under section 19B(1) in carrying out an immigration function if he discriminates on the grounds of national origin. 'National origins' refers only to a particular place or country of origin[12]. There is no discrimination *on*

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[5] CRE v Dutton [1989] IRLR 8 Although the words 'traveller' and 'gypsy' were ambiguous, the latter constituted a racial group if defined in the narrow sense of 'Romanies'. This was the case if there remained a discernible minority of the group which adhered to the group even though a substantial proportion of it had become assimilated in the general public. NB, if the same notice were to appear today the case might have to be approached on the basis that the "no travellers" sign was a requirement or condition excluding new age travelers as well as the ethnic groups Irish Travellers and gypsies.

[6] cf pre HRA case of Seide v Gillette Industries Ltd [1980] IRLR 427

[7] Nyazi v Rymans Ltd (EAT, 10 May 1988). From 2 December 2003 discrimination on grounds of religion or belief in employment and further and higher education will be unlawful under the Employment Equality (Religion or Belief) Regulations 2003.

[8] Hussain and others v J H Walker Ltd [1996] IRLR 11

[9] Crown Suppliers (PSA) Ltd v Dawkins [1993] ICR 517

[10] BBC Scotland v Souster [2001] IRLR 150

[11] O'Leary –v- Allied Domecq Inns Ltd. CL 950275, July 2000 (unreported)

[12] Tejani v The Superintendent Registrar for the District of Peterborough [1986] IRLR 502.

grounds of national origins where the complainant is treated less favourably on the grounds that he was born abroad, without reference to any particular place or country of origin, notwithstanding that a person born in the UK would not have been treated in the same way. There are clearly identifiable separate nations of the English and the Scots. Therefore there are different national origins[13]. Whilst Welsh is a group defined by national origin, and therefore protected under the RRA 1976, , the group could not be further sub-divided into Welsh speakers and English speakers[14].

Nationality

8. Nationality seems a clear concept at first sight. Nationality includes citizenship[15].

9. As for the other grounds, to show discrimination on grounds of nationality it is not necessary to prove that the treatment was based on the victim's nationality nor that the discriminator knew, or accurately assumed, the victim's nationality. It is sufficient that nationality was the grounds for the unlawful treatment. Hence discrimination may occur where X discriminates against Y on the basis of Z's nationality or on the basis of a misperception of Y's nationality. Similarly a person may be discriminated against on the basis that they do not possess a particular nationality.

10. In the context of immigration, of course, precise attribution of nationality is often a critical part of a complaint, as a person is likely to be discriminated against because he is of a particular (probably non UK) nationality. A person may also be discriminated against because of not having UK nationality. That distinction may be important because discrimination on the basis of possession of a particular nationality (which is less favourably treated) is unlawful, whereas there is some suggestion that discrimination because a person is a non-UK national is not unlawful (see below).

11. However, whether a person possesses a particular nationality will depend on the law relating to possession of that nationality created by the country whose nationality is asserted. For asylum appeals it is for the appellant to assert a nationality or statelessness as part of the process of proving that he qualifies for protection. The IAT in *Tikhonov*[16] ruled that nationality, being a question of foreign law, "can only be determined, in the absence of agreement between the parties, by the leading of expert evidence either in the form of oral evidence or by affidavit: see *Bradshaw* [1994] Imm AR 359, Lord McLean at p 366 and Professor Jackson, Immigration Law and Practice[1st ed] , pp.25-6". The Tribunal went on to

[13] Northern Joint Police Board v Power [1997] IRLR 610

[14] Gwynedd County Council v Jones [1986] ICR 833

[15] section 78

[16] [1998] I.N.L.R. 737 and see ASIF KHAN [2002]UKIAT04412(starred appeal)

say that translations of foreign laws unsupported by expert evidence would be given little or no evidential weight; likewise Foreign Office letters did not constitute expert evidence.

12. However in *Argatha Smith*[17] the IAT took a broader approach (again the context was asylum) expressly differing from *Tikhonov*. To decide questions of nationality Adjudicators use a variety of sources. Five different items were identified as potentially relevant:

Relevant documentation. The relevant country of nationality may be established with documentation such as a passport or travel document[18]. However, other items of documentation may be relevant[19].

The claimant Where documentation is not available or admitted to be false, evidence from the claimant will be especially important. Relatives and friends may also have relevant evidence. Just because there is no documentary evidence to support the appellant's claimed nationality is not fatal if his word is believed as to his nationality[20].

Agreement between the parties (*Tikhonov* (G0052)).

Expert oral or affidavit evidence (Ibid.).

Foreign Office letters.

Text of relevant nationality law of country(ies) concerned.

13. The IAT accepted that insofar as it involves foreign law the issue of country of nationality is a question of fact and it is open to the parties to adduce expert evidence as to that law[21]. The IAT expressly had regard to the context in which the nationality had arisen

14. But the approach in *Tikhonov* takes too far reliance on rules of evidence and proof forged in non-refugee law contexts, the conflict of laws context and United Kingdom immigration and nationality context in particular. The 1951 Convention, however, has been accorded primacy under United Kingdom law. In all its aspects it has to interpreted purposively in accordance with Art 31 of the Vienna Convention on the Law of Treaties 1969. In the context of refugee determination, therefore, the overriding consideration has to be the necessity to undertake and complete an individual examination of each claim to asylum. To exclude a priori a claimant on the basis that he

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[17] 00/TH/02130

[18] In *Polivina* (18441), in which a claimant was adjudged to be Croatian, possession of a passport was held to create a strong presumption of citizenship which could only be displaced by weighty evidence to the contrary.

[19] e.g. letters from relevant authorities in the country concerned or birth certificates in respect of countries that operate qualified or unqualfied ius soli.

[20] *Benda* (13293)

[21] *Bumper Development Corporation v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362; s.4(1) Civil Evidence Act 1972; P.Murphy, Murphy on Evidence, 5th Ed. P.320-1

has failed to prove either a nationality or a statelessness could undo the purpose of the Convention as set out in its Preamble, to protect fundamental rights and freedoms. Above all, it could fail to prevent refoulement to any country or persecution whatsoever of a person who is in fact a refugee, as set out at Art 33(1). The Tikhonov approach also runs counter to paragraph 197 of the 1979 UNHCR Handbook which states:

> "The requirements of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself"

15. In the context of race claims there is no reason why the usual rule set out in *Tikhonov* should not apply. It is a principle of international law that it is for each state to determine under its own laws who are its nationals. All states use common legal reference points and common parameters within which they construct their own criteria and guidance on nationality legislation and practice[22]. The position can be summarised

"To be considered as a national by operation of law means that, under the terms outlined in the State's enacted legal instruments pertaining to nationality, the individual concerned is ex lege, or automatically, considered a national. As a minimum, there must be a State, the constitution or laws of which make some provision for nationality. Those who are granted citizenship automatically by the operation of these legal provisions are definitively nationals of that State. Those who have to apply for citizenship and those the law outlines as being eligible to apply, but whose application could be rejected, are not citizens of that State by operation of that State's law. Wherever an administrative procedure allows for discretionary granting of citizenship, such applicants cannot be considered citizens until the application has been approved and completed and the citizenship of that State bestowed in accordance with the law"[23].

16. This gives rise to the problem that if an asylum claim is accompanied by a race claim (in which the appellant asserts discrimination on the grounds of ascription of a particular and incorrect nationality) two different standards may need to be applied. In the asylum claim the Smith approach can be adopted, but for the purposes of the race claim the stricter *Tikhonov* approach (which accords with the ordinary approach in civil cases) should be adopted. By contrast, if, in an asylum claim, the Secretary of State asserts that the Appellant is of a certain nationality, which the Appellant denies, the Appellant is only required to show that there is a reasonable likelihood that he is not of that nationality[24].

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[22] see I.Brownlie, Principles of Public International Law 4th Ed 387ff; P. Weis, Nationality and Statelessness in International Law 1979.

[23] C.A.Batchelor, "Statelessness and the Problem of Resolving Nationality Status" IJRL Vol.10 1998 157 at 158. cited in Argatha Smith above.

[24] *Simone Lucas* CC53850-99 upheld on appeal [2002] EWCA Civ 1809.

17. Generally it will be for the party asserting possession of a particular nationality to prove it. Where the Appellant wants to say that he has been discriminated against on this ground he will have to adduce the evidence to show that he is of nationality he claims (and not the incorrect one ascribed to him). Where the Secretary of State wishes to invoke the nationality condition against a person, under the ministerial authorisations he will have to prove the nationality that appears on the list.

Asylum seekers

18. A racial group can be defined by a negative (ie non-UK citizens). What of a group such as asylum seekers? Arguably asylum seekers would be such a group. There is an argument that the group is not defined by reference to nationality etc[25]. There is an argument that the group is not a racial group because it is defined by reference not to race, but only the civil and political act of claiming asylum (which can be done by a UK citizen as much as not). However not being an asylum seeker may be a requirement or condition, giving rise to indirect discrimination against non-UK nationals[26].

Refugees

19. The necessary feature of those who make the civil and political act of obtaining refugee status is that they are non-UK citizens. Recognised refugees would therefore be a racial group.

The stateless

20. An interesting question arises whether there can be race discrimination (on the grounds of nationality) on the grounds that a person is stateless. That is a group defined by reference to nationality (i.e. citizenship) as the stateless person has no nationality.

Direct discrimination

21. There are two elements to a claim of direct discrimination:

(*a*) less favourable treatment; and

(*b*) racial grounds.

In addition, in a comparison of the case of a person of a particular racial group with that of a person not of that group, the relevant circumstances must be the same or not materially different[27].

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[25] A requirement of being a racial group under section 3 is that the group is defined by reference to among other matters nationality.

[26] For example if a shopkeeper or a medical practice decided not to provide goods or services for asylum seekers.

[27] s 3(4), RRA 1976

Knowledge

22. Knowledge of the respondent as to the complainant's specific racial group will not be relevant to whether discrimination has taken place. If a 'sieve' is adopted specifically to screen out people of a particular race the Respondent's knowledge will not be relevant[28].

Less favourable treatment'

23. For direct discrimination to occur X must treat Y less favourably than he treats or would treat another (on the grounds of race).

24. Words or acts of discouragement could amount to less favourable treatment[29] and all that is necessary is denial of an opportunity or choice to Y even if there is no proof that what is lost was objectively better. All that is necessary is that Y has been deprived of the choice or opportunity that was available to the comparator and is valued by them reasonably[30]. It is a question of fact not law.

25. It is important that adjudicators are properly focussed on the correct question in this area. It is not whether there was bias or any other vague formulation, but whether Y has been less favourably treated than the appropriate comparator on racial grounds[31].

26. It is necessary to have a comparator for a claim of direct discrimination. The circumstances of the comparator must be comparable to those of the person claiming to have been discriminated against. Cases suggesting that it is not necessary to have a comparator in such cases[32] were observed to be incorrectly decided recently by the House of Lords[33].

27. The new regulations introduce an explicit definition of harassment for certain purposes. This is in addition to the existing concepts of harassment and is designed only to apply to those areas which are covered by the Race Directive and only on grounds of race or ethnic or national origins.

28. As a result of *Pearce* it cannot be argued now that X treats Y less favourably as a result of Z's action simply because X has sufficient control over the situation in which Z treats Y less favourably to prevent that treatment. It would be necessary now to show that the failure to protect was itself on the grounds of race.

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[28] Simon v Brimham Associates [1987] ICR 596

[29] Simon v Brimham Associates [1987] ICR 596

[30] R v Birmingham City Council, ex parte Equal Opportunities Commission [1989] 1 All ER 769

[31] Glasgow City Council v Zafar [1998] ICR 120 and Marks & Spencer v Martins [1998] ICR 1005

[32] Burton v De Vere Hotels [1997] ICR 1 and Sidhu v Aerospace Composite Technology Ltd [2000] IRLR 602 . The same observations apply to the SDA case Porcelli v Strathclyde RC [1986] I.C.R. 564

[33] Pearce v Governing Body of Mayfield School Secondary School [2003] IRLR 512 ([2003] UKHL 514)

29. "On racial grounds" should be read as applying in any case where the race of either the complainant or a third party was *the effective cause* of the treatment[34]. Thus it would apply to a person who is treated less favourably on the grounds of being married to a person of a particular race. In other words there may be several causes at work, but if race is an effective cause discrimination may have taken place.

Discriminator's motive or intention

30. The absence of a discriminatory motive is not a defence[35]. In *James v Eastleigh* Borough *Council*[36], the HL considered what is meant by the phrase 'on grounds of'. They held that the test is objective, so that what is to be determined is not the subjective reason for the treatment, but the effect of it. But for the ground would Y's treatment have been better?

Appropriate Comparator

31. When comparing the treatment of the complainant with others of a different racial group, the relevant circumstances must be the same or not materially different[37]. Consideration of immigration law has lead the courts into confusion in this area[38].

32. In *Dhatt v McDonald's Hamburgers Ltd* [*1991*] *ICR 238*, the tribunal rejected the applicant's complaint that he had been treated less favourably than a EU national would have been, when as an Indian national he was dismissed for failing to provide evidence of his right to work in the UK. The tribunal (upheld) thought that the material circumstances were not the same. He should have compared his treatment to that of a national of another country who was also subject to immigration control.

33. The *Dhatt* decision appears to be at odds with the *James* case noted above, but it was distinguished on the basis that, since immigration requirements are imposed by statute, it was Parliament which had made nationality a relevant circumstance. The scope of the exclusion for statutory provisions was not addressed.

34. However the Court of Appeal addressed the point again in 1999[39]. The Court then said

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[34] Showboat Entertainment Centre Ltd v Owens [1984] ICR 65 (and CA in Wethersfield Ltd v Sargent [1999] ICR 425).

[35] R v Commission for Racial Equality, ex P, Westminster City Council [1984] ICR 770

[36] [1990] ICR 554

[37] s 3(4) of the RRA 1976

[38] Most recently in European Roma Rights Centre v Immigration Officer Prague Airport [2003] IRLR 577 [2003] EWCA Civ 666 para 87 and para 90 per Mantell LJ.

[39] Naraine v Hoverspeed CCRTF 1998/0190/82 CA

"The case of the husband and wife in *James v. Eastleigh Borough Council* was different, since in that case the Eastleigh Borough Council introduced a discriminatory criterion entirely of its own accord and not under statutory compulsion."

35. Note that the treatment in Dhatt was on the basis that the person was subject to immigration control. The immigration and nationality department cannot rely on the case to justify discrimination between different groups within the group of persons subject to immigration control. Note also that Dhatt depends on the feature of immigration law which the employer relies upon being mandatory. In the case of the IND not all of the immigration provisions are mandatory and generally discretion is exercised. If there is a difference in the discretionary treatment of groups of nationalities or groups by ethnic origins or national origins, (a) no section 41 defence can be run by the Secretary of State and (b) their circumstances will be like if both groups are subject to similar immigration *requirements*.

36. In the absence of evidence of treatment of an actual comparator, the adjudicator should construct a picture of how a hypothetical comparator would have been treated in comparable circumstances[40]. A permissible way is to see how unidentical but not wholly dissimilar cases were treated. If the adjudicator fails to make the statutory comparison that is an error of law[41]. The adjudicator would be expected expressly to consider both actual and hypothetical comparators.

Preparation for a case of direct discrimination

37. IND Guidance states that a person cannot benefit from the RRA right of appeal where the decision was served before 2 April 2001. This is not strictly correct. The concept of an act of discrimination under the RRA includes an omission. Thus a failure to review a decision, when an opportunity to review may arise can amount to an act of discrimination.

38. Make the claim at the earliest opportunity. The grounds of appeal under section 82(4) NIAA 2002 include that the decision involved unlawful discrimination under section 19B RRA. There is a danger that an adjudicator will not entertain a claim which could have formed the ground of an appeal but did not.

39. When taking a statement in a claim including a race claim ensure that the racial basis of the claim is clear from the introductory paragraphs of the witness statement. Each element of the claim should form a heading in the witness statement and should then be dealt with (so far as there is evidence available from the Appellant on the point).

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[40] Chief Constable of West Yorkshire v Vento [2001] IRLR 124

[41] Balamoody v UK Central Council for Nursing [2002] IRLR 288 and Shamoon *v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 (see in particular the judgement of Lord Scott).

40 . The IND Guidance states that where race is one factor among others and not the principal factor this will not be racially discriminatory. This is an incorrect statement of the law on causation in race discrimination and should be challenged. For the correct position see "Grounds" above.

Harassment

41. Case law has established racial harassment as a form of direct racial discrimination under the 1976 RRA. A recent decision of the House of Lords, overturning earlier decisions, made clear that

a) where it is claimed that racial harassment is direct discrimination a comparator is required; and

b) the employer can be liable for acts of racial harassment by third parties only when the employer's failure to protect against such acts is on the grounds of race[42].

42. This decision makes it more difficult to argue that a body such as an accommodation centre is liable if it fails to ensure that racial harassment (which would include violence) does not happen between those detained in the centre and under its control. In July 2003, however, the RRA was amended to include a new, separate unlawful act of harassment (see section 3A above). This provision replaces the common law where harassment occurs within activities included in section 1(1B) and where it is on grounds of race or ethnic or national origins.

43. The new concept, transposing the EC Race Directive, does not dislodge or narrow the scope of the pre-2003 common law concept[43]. Where the statutory definition applies, however, only the statutory definition can be used. The definition of detriment inserted in section 78 RRA excludes conduct amounting to harassment under section 3A. The Directive makes clear that its introduction may not lead to a reduction in the protection afforded to people. There will be an issue as to whether the removal of "harassment" as a detriment is compatible with the Directive.

44. Within the fields referred to in section 1(1B) RRA 1976 harassment defined in the RRA is prohibited. The new form of harassment captures unwanted conduct which has the purpose *or effect* of either violating the other's dignity or creating an intimidating hostile, degrading humiliating or offensive environment for the other. Whether such conduct has taken place is an objective question. The perception of the person harassed must in particular be taken into account when considering whether the conduct has the prohibited effect.

45. The new provision does not prevent a person arguing that harassment has taken place in other circumstances, but the test for harassment will the one developed in the case law rather

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[42] Pearce v Governing Body of Mayfield School Secondary School [2003] IRLR 512 ([2003] UKHL 514)

[43] It is a new EU concept of harassment that is introduced and which does not supercede the common law concept. It is a concept that has application only in those areas covered by section 1(1B) RRA 1976.

than this statutory definition.

Indirect discrimination

46. *Core concept*: Indirect discrimination on account of a person's race or colour will be actionable in the making of immigration decisions.

Since July 2003, the RRA has contained two different definitions of indirect discrimination. Like harassment (discussed above), the new definition, introduced to meet the requirements of the EC Race Directive, applies only to activities within section 1(1B) and only on grounds of race or ethnic or national origins. For indirect discrimination within the other functions of public authorities or on grounds of colour or nationality, the original definition in section 1(1)(b) remains in force.

Looking first at **indirect discrimination under section 1(1)(b):**

Indirect discrimination occurs where a requirement or condition is applied irrespective of race but:

(*a*) which is such that the proportion of people of the same racial group as the complainant who can comply with it is considerably smaller than the proportion of people not of that racial group who can comply with it[44]; *and*

(*b*) which is not justifiable irrespective of the colour, race, nationality or ethnic or national origins of the complainant[45]; and

(*c*)which is to the detriment of the complainant[46].

47. So a requirement or condition which is race neutral but which discriminates against a disproportionate number of people of a particular colour will, at first glance, be unlawful.

Requirement or condition

48. The complainant has to identify something which is an absolute requirement and not merely one of a number of factors or preferred characteristics[47]. What the objective effect of the requirement is, will be the primary question and motive is irrelevant. It includes any obligation and may not be narrowly construed[48]. Thus requiring the applicant to have completed a particular type of training course was a requirement or condition within the

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[44] s 1(1)(b)(i), RRA 1976

[45] s 1(1)(b)(ii), RRA 1976

[46] s 1(1)(b)(iii), RRA 1976

[47] Perera v Civil Service Commission (No 2) [1983] ICR 428; see also Meer v London Borough of Tower Hamlets [1988] IRLR 399).

[48] per Waite J in Home Office v Holmes [1984] ICR 678.

meaning of the section[49]. How does the Dhatt principle impact on this issue? If a matter is requirement of immigration law it will be a relevant material difference between the group failing and the group succeeding under the requirement. However if the matter is simply required in practice (e.g. under a concession) it may constitute an indirectly discriminatory requirement. Requirements such as having an 'O' level in English[50] and being ordinarily resident in the UK[51] have constituted requirements or conditions with the potential to discriminate indirectly.

The proportion who can comply

49. It is necessary to identify the pool for comparison and whether the person "can comply".

(1) *Pool of comparators.* If there are other conditions which must be satisfied before a person is considered, the comparison must be between suitably qualified people of one racial group and similarly qualified people of another. The applicant must make the comparison and provide statistical information if necessary[52]. It is not necessary for a statistically perfect match to be found[53]. A small percentage difference may be sufficient (see *Lea's* case where a difference of just over 4% of the relevant population was sufficient as a considerably smaller proportion).

(2) *'Can comply'.* Means can comply in practice rather than theory (*Mandla*). *Dutton* case ([*1989*] *IRLR 8*). The test is whether the person could have complied at the time at which the condition was applied; it does not matter whether he could have avoided it by acting differently previously.

Justification

50. It is for the respondent to show that the requirement etc is justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied[54]. It is a question of fact.

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[49] Hampson v Department of Education and Science [1988] ICR 278, in the EAT

[50] Raval v Department of Health and Social Security [1985] ICR 685 (EAT)

[51] Orphanos v Queen Mary College [1985] IRLR 349 (HL)

[52] Pearse v City of Bradford Metropolitan Council [1988] IRLR 379. Interlocutory disclosure or witness statement orders can be used to obtain from the IND the statistics relating to impact of a requirement or condition – to a certain extent.

[53] Greater Manchester Police Authority v Lea [1990] IRLR 372

[54] s 1(1)(b)(ii), RRA 1976 'Irrespective of' means 'without regard to' (Orphanos v Queen Mary College [1985] A.C. 761).

51. The CA in *Hampson v Department of Education* [*1989*] *ICR 179* held that the test for justification was an objective one in which there must be an objective balance between the discriminatory effect of the condition and the reasonable needs of the respondent. There must also be a relevant need in connection with the condition imposed. Thus general claims about immigration control will be insufficient. The Respondent must show now the requirements of immigration policy require the condition to be imposed[55]. It will be open to Appellants to postulate alternative conditions which are not at first sight discriminatory on racial grounds and to argue that these could reasonably have met the alleged 'need' if the adjudicator finds that they should reasonably have been considered and adopted by the Secretary of State, then the defence might fail[56].

52. The CA has accepted that where French carriers' liability law created a risk that a carrier would have to pay a fine for carrying a British Visitors Passport holder, although there might be indirect discrimination, the discrimination was justified where there was a substantial risk of the fine[57].

53. *Discriminator's motive.* Whereas s 1(1)(b)(ii) of the RRA 1976 is concerned with the objective possibility of justifying the discrimination without reference to racial grounds, the intention of the discriminator will be a consideration in respect of compensation for indirect discrimination under s 57(3) of the RRA 1976.

the new concept of indirect discrimination in section 1(1A)

54. A person discriminates against another if in any circumstances relevant for the purposes of provisions referred to in section 1(1B) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but -

(a) which puts or would put persons of the same race or national or ethnic origins as that other at a particular disadvantage when compared with other persons,

(b) which puts that other at that disadvantage, and

(c)which he cannot show to be a proportionate means of achieving a legitimate aim.

2. By section 1(1C) where this approach to indirect discrimination reveals unlawful discrimination the more familiar concept of indirect discrimination under section 1(1)(b) does not apply.

55. This definition has a number of advantages compared to the definition under s.1(1)(b); 'provision, criterion or practice' do not impose an absolute bar; 'disadvantage' does not require statistical evidence.

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[55] Greater Manchester Police Authority v Lea [1990] IRLR 372.

[56] see Cobb v Secretary of State [1989] IRLR 464

[57] Naraine v Hoverspeed CCRTF 1998/0190/82

56. None of the common immigration matters fall under the exceptions to section 19 set out above. However in an accommodation centre setting issues might arise as to health care or other social advantages. This would probably include NASS support.

Segregation

57. Section 1(2) of the RRA 1976 declares that it is direct discrimination to segregate someone from others on racial grounds. See *Furniture, Timber and Allied Trades Union v Modgill* [*1980*] *IRLR 142*. What is meant by segregation? For segregation there must be evidence of some act which keeps a person apart from others on the grounds of his race. Situations not meeting this definition of segregation but in which racial groups are nearly segregated may arise either due to direct or indirect discrimination.

Victimisation

58. Under the RRA 1976, victimisation is a separate and distinct head of claim (see section 2 above). This occurs where someone (the victim) is treated less favourably than others are or would be treated in the same circumstances because the discriminator knows, believes or suspects that the victim has done a 'protected act'; that is, that the victim has or intends to:

(*a*) bring proceedings under the RRA 1976;

(*b*) give evidence or information in connection with any proceedings brought under the RRA 1976;

(*c*)do anything by reference to the RRA 1976 whether in relation to the discriminator or someone else; or

(*d*) allege (whether expressly or not) that someone has committed an act which would amount to a contravention of the RRA 1976.

59. The provision is to ensure, so far as possible, that victims of racial discrimination should not be deterred from doing any of these acts by the fear that they may be further victimised in one way or another[58]. The phrase 'by reference to' in s 2(1)(c) of the RRA 1976 is broadly construed. The complainant did not need to have in mind any particular provision of the RRA 1976 to be protected.

60. The appropriate comparator is one who has not done the relevant act (rather than someone who might have done it or a similar act).

61. In Chief Constable of West Yorkshire v Khan [2001] IRLR 830: The HL held under section 2(1) of the Race Relations Act 1976 the comparison to be made was simply between the treatment afforded to the complainant who had done the protected act and the treatment that had or would have been afforded to other employees who had not done it, and no other

[58] Aziz v Trinity Street Taxis Ltd [1988] ICR 534

features needed to be factored into the comparison. The House of Lords was willing to distinguish between a refusal to give a reference based on the fact of having brought proceedings against the Respondent employer and the nature of the proceedings brought.

62. There is no requirement to identify an individual 'perpetrator' and victimisation may simply to attributed to a department of the Respondent generally[59].

Employers, Agents and Principals

63. If an immigration officer, in the course of his employment, does an act, it is treated for the purposes of the RRA as being done by the employer as well as by the immigration officer[60]. It does not matter for these purposes whether the employer knew or approved of the act. Thus the adjudicator may have to consider cases concerning the conduct of individual officers who may be joined as parties to the proceedings. It will be a defence for the employer if he can prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment, acts of that description[61].

64. Note that common law vicarious liability rules are not applied and the ordinary meaning of "in the course of his employment" will be applied, otherwise the more serious the act of discrimination the less likely the court would be to hold that it was done in the course of the person's employment. The phrase 'in the course of employment' to be construed by the adjudicator in a layman's sense, as a question of fact[62].

65. The Home Office will need to establish that proportionate steps were taken to avoid a risk of acts of discrimination being perpetrated. As the consequences of discrimination are extremely serious in immigration cases the Home Office will be expected to take stringent preventive measures. They must take reasonably practicable measures.

""Reasonably practicable" is a narrower term than "physically possible", and seems to me to imply that a computation must be made by [the home office] in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money time or trouble) is placed in the other, and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them"[63].

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[59] Suraju Tiyamiyu v LB Hackney (Unreported, 20 February 1998)

[60] section 32 RRA 1976

[61] section 32(3) RRA 1976

[62] Jones v Tower Boot Co Ltd [1997] 2 All E.R. 406; [1997] I.C.R. 254

[63] Edwards v National Coal Board [1949] 1KB 704 at 712 per Asquith LJ

66. The defence is to be construed narrowly, as a matter of legislative policy. If further steps could have reasonably been taken, it is not necessarily a defence for the employer to show that even if taken they could not have been effective[64].

67. Sometimes the work of the Home Office is contracted out. Anything done by a person as an agent for another with the authority[65] of that other person shall be treated[66] as done by the principal as well as the agent[67]. Where the Home Office has contracted out public functions such as detention the body undertaking the activity will be considered to be a public authority and will directly be bound by section 19B[68].

Aiding discrimination

68. A person who knowingly aids another to do an act made unlawful by the RRA is treated for the purposes of the RRA as himself doing an unlawful act of the like description[69]. Employees and agents are deemed to aid the doing of an act by the employer or principal[70]. Even if the employer manages to establish a defence under section 32(3) the employee will remain liable as a result of this provision.

69. A person does not knowingly aid another to do an unlawful act if he acts in reliance on a statement made to him by the other that by reason of a provision of the RRA, the act he aids would not be unlawful[71], and it is reasonable for him to rely on that statement.

70. In other words the immigration officer, having applied common sense, who relies on a statement of legality contained in the IDIs or in a Ministerial authorisation, would not commit an unlawful act. However if such a statement is made recklessly, the person who makes it commits an offence[72].

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[64] Canniffe v East Riding of Yorkshire Council [2000] IRLR 555, EAT

[65] the authority can be express or implied, precedent or subsequent

[66] except in relation to criminal offences under the RRA

[67] section 32(2) RRA 1976.

[68] section 19B(2)(a) RRA 1976.

[69] Section 33(1) RRA 1976.

[70] Section 33(2) RRA 1976

[71] section 33(3)(a)

[72] section 33(4) RRA.

71. A person "aids" another when he gives help or assistance to that other [73]. What is necessary is no more than a relationship of co-operation or collaboration. 'Aids' is a familiar word in everyday use and has no technical or special meaning.

72. However the scope of the concept 'knowingly aids' is narrow. Where the police advised a council that a wedding, for which rooms were being booked from the Council, was to be a 'gypsy wedding'. The council imposed extra conditions. Hallam sought damages from the police officers concerned, for knowingly aiding the council to discriminate. It was held that the claimant has to prove that aid was provided with a particular type of knowledge or intention. The police officers were neither a party to, nor involved in, the making of the council's decision. Where section 33 liability is alleged the defendant must be shown either to have wanted the discriminatory result to follow, or to have known that the service provider would treat or was contemplating treating the victim in a discriminatory way. Suspicion that a discriminatory act will be the outcome of his own behaviour may not be enough. The fact that he should have realised (but did not) that discrimination would be the result will not be enough. It will depend on the information communicated or the aid given.[74].

73. Thus where an immigration officer falsely states that a person is of a particular nationality as a result of an interview, for example so that removal directions can be given to a particular country, he will be taken to want the natural consequences of his action and will commit an act of knowingly aiding an act of discrimination if it transpires that the person is not of the alleged nationality.

Statutory defences

74. As far as immigration cases are concerned there are two forms of statutory defence.

(a) Defences under section 41.

(b) Defence under section 19D (dealt with below).

75. The first to consider is the (now altered) section 41 defences. These apply in any discrimination claim whatever the venue or subject matter.

76. The amendments to s. 41 (1) in 41(1A) removing of the statutory defence for discrimination on grounds of race or ethnic or national origin could have implications where indirect discrimination on these grounds occurs as a result of provision in primary or secondary legislation. The new wider application of s.41(2) may re-open the possibility of a statutory defence for indirect discrimination!

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[73] Anyanwu and Ebuzoeme v South Bank Students' Union and South Bank University [2001] 1 W.L.R. 638; [2001] 2 All E.R. 353

[74] Hallam v Avery [2001] 1 W.L.R. 655; [2001] I.C.R. 408

The distinction between the provision of services and other functions of a public body

77. Part III of the RRA deals with discrimination in the fields other than those related to employment, including education, housing and management of premises, provision of goods and services and the carrying out of other functions of public authorities.

78. As is discussed below, because of the exemption for certain immigration functions, it is relevant to understand, if possible, where a distinction can be drawn between acts which constitute the provision of goods, services and facilities by a service provider (which can be the state) and acts which involve other public functions.. Immigration decisions will generally fall under the 'other public functions' part of the division, although other decisions affecting asylum seekers or immigrants may come within other sections.

79. We first look at some of the cases in which this distinction has been considered.

80. In *Kassam v Immigration Appeal Tribunal*[75] the Court of Appeal had held that when giving leave to enter or remain in the United Kingdom in the exercise of his powers under the Immigration Act 1971 or the rules made thereunder, the Secretary of State was not "any person concerned with the provision ... of ... facilities ... to the public" within the meaning of [SDA section 29 (1) (equivalent of section 20 RRA)], since the kind of facilities with which the section was concerned were facilities akin to goods or services, and not the grant or refusal of leave under the Act of 1971 or the Immigration Rules; accordingly, the Secretary of State could not be said to have discriminated unlawfully against the applicant[76].

81 . In *Savjani v Inland Revenue Commissioners*[77] the Court of Appeal had held that in the exercise of their responsibilities as to entitlement to tax relief, and in the giving of advice and the actual advice given thereon, the Inland Revenue were "concerned with the provision ... of ... services to the public or a section of the public" within the meaning of section 20 (1) (b) of the Race Relations Act 1976. The court distinguished Kassam on the basis that the immigration service was not providing any service, but that the tax service, in respect of the reliefs in issue were providing services.

The facts of *Savjani* were as follows:

The plaintiff, an accountant, was born in India and came to the United Kingdom in 1970. He married and in May 1976 his wife gave birth to a son.

He attended his local tax office in order to claim tax relief in respect of his son. He was

[75] [1980] 1 W.L.R. 1037

[76] see1042H-1043C, H-1044B, C-E.

[77] [1981] Q.B. 458; [1981] 2 W.L.R. 636.

> interviewed by a tax officer of the Inland Revenue who on the ground that according to a statement by the plaintiff included in the relevant tax file the plaintiff was born in Kanakpur, India, advised him to produce a certified copy of the entry in the Register of Births relating to his son to substantiate his claim. The plaintiff was handed a claim form which he took away. The plaintiff completed the claim form and dated it November 28, 1976. He posted it to the tax office with a copy of a short form birth certificate relating to his son and a covering letter dated November 28, 1976. The letter state: 'Attached to the form is a photostat copy of the birth certificate of my child. If you want the original certificate of birth please state your reasons for wanting it.' The tax office replied on December 9, 1976, stating: 'With reference to your letter dated 28.11.76 please supply the full birth certificate as the shortened form is not sufficient for our purposes.' On January 26, 1977, the plaintiff called again at the Lillie House office and was seen by an inspector of taxes. He produced a short form of birth certificate for his son and inquired why the short form of birth certificate was not acceptable. He was told that it was not acceptable according to departmental rules and that child allowance would be granted for his son on production of the proper document. The plaintiff stated that he would endeavour to obtain a full certificate.
>
> On April 18, 1977, the Race Relations Board wrote to the Chairman of the Board of Inland Revenue. This was replied to on May 17, 1977, and a further letter dated June 24, 1977, from the Commission for Racial Equality was sent to the Chairman of the Board of Inland Revenue ....
>
> On June 15, 1977, the plaintiff again attended the Lillie House offices in order to claim tax relief in respect of his son. He was interviewed by a young lady on behalf of the defendants, who again advised and required him to produce a certified copy of the entry in the register to substantiate his claim. The plaintiff asked her to confirm this in writing, and she wrote, 'We would like a large copy of the child's birth certificate.' The plaintiff, who knew that a person not of Asian origin would have been advised and required to produce only a short form of birth certificate to substantiate his or her claim to tax relief for a dependent child, felt humiliated and angry.

82. In *R. v Entry Clearance Officer, Bombay, Ex p. Amin*[78] the House of Lords held that the corresponding SDA provision to section 20 RRA applied to the direct provision of facilities or services, not to the mere grant of permission to use facilities. The provision of the special voucher under that scheme was the latter. The crux of the argument was that by virtue of section 85(1) SDA, section 29 SDA (20 RRA) was to be construed as applying only to acts that were at least similar to acts that could be done by private persons. Since the entry clearance officer was not providing a service for would-be immigrants but only performing his duty of controlling them, the refusal of a special voucher was not unlawful discrimination within the Act of 1975[79].

83. The House of Lords accepted the distinction from *Savjani* between duties – duties which are laid upon the state body by statute – and services. It was also accepted that in order to perform the duties, the state body may also have to provide services. Templeman LJ drew some interesting distinctions in the context of tax:

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[78] [1983] 2 A.C. 818; [1983] 3 W.L.R. 258

[79] see 267D-F, H, 268F, 269C, E, G, H-270A, 282D-E

"The duty is to collect the right amount of revenue; but, in my judgment, there is a service to the taxpayer provided by the board and the inspector by the provision, dissemination and implementation of regulations which will enable the taxpayer to know that he is entitled to a deduction or a repayment, which will [enable] him to know how he is to satisfy the inspector or the board if he is so entitled, and which will enable him to obtain the actual deduction or repayment which Parliament said he is to have."

84. Clearly immigration law exists to facilitate entry to and stay in the UK in cases parliament intends. In particular section 3 1971 Act provides that the immigration rules shall lay down the practice to be followed in the administration of the 1971 Act for regulating the entry into and stay in the UK. It also permits (but does not require) account to be taken of nationality or citizenship.

85. The application of sections 20 and 21 etc to the acts of the immigration department is determined in part by reference to section 75 RRA 1976[80]. In short[81] the act of the Home Office must be similar to one for which a private individual could be held liable under sections 20 and 21.

86. In *Amin* the distinction was put thus by the majority. The acts to which section 20 or equivalent does not apply are those done in the course of formulating or carrying out of government policy, which are quite different in kind from any act that would ever be done by a private person, and to which the Act does not apply. I would respectfully agree with the observations ... made by Woolf J in *Home Office v Commission for Racial Equality* [1982] QB 385, 395.[82]

87. In the *Home Office v CRE* case the Home Office attempted to argue that the CRE could not conduct an investigation into its immigration practices in part because its activities in the field of immigration were outside the scope of the RRA as then drafted. Woolf J held that it would be an overly restrictive interpretation of section 75 to hold that it is only if the act could be done by an individual that its performance by the immigration authorities would be subject to the Act. Woolf J stated that the exercise of immigration control was not something that a private individual could do, but was similar to activities such as being a doorkeeper. He said (in the observation with which Amin agreed): "An act for the purposes of section 75, which is defined in section 78 as including a deliberate omission, means some act which while not necessarily the same, is one similar to the kind of act which can amount to unlawful discrimination under the Act of 1976. It does not, in my view, include activities of the sort involved in formulating and expressing government policy, or the hearing of cases before the courts of law and tribunals. I draw attention to the contrast between the word "act" and the word "functions" used in section 71".

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[80] This Act applies - (*a*) to an act done by or for purposes of a Minister of the Crown or government department; or (*b*) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office, as it applies to an act done by a private person.

[81] see Woolf J in Home Office v CRE [1981] 1 WLR 703 at c 710, Savjani, and Farah (below),

[82] *R v Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818, 835 per Ld Fraser of Tullybelton

88. Thus even by that time the division between what was a pure function of the state and the provision of services etc was not clear. It was to become more blurred later.

89. In *Farah v Commissioner of Police of the Metropolis*[83] the Court of Appeal held that the performance of a public duty does not preclude the provision of a service and that police officers in assisting and protecting members of the public were acting in the same way as any other public service and were therefore covered by section 20 RRA.

90. Thus only the functions that cannot reasonably be said to be analogous to those that might be carried out by a private body (or non-crown body) are to be dealt with solely under section 19B(1). For the others section 20 etc exist.

91. This division may present problems in terms of venue. complaints that in taking an immigration decision the decision maker has racially discriminated go before the adjudicators, while all other non-employment discrimination cases go before the county court (sheriff court in Scotland).

Sections 19B and 19D RRA

92. It is important to remember that the provision of the RRA making it unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination is not needed, and does not apply if the act of discrimination is made unlawful by virtue of any other provision of the RRA[84].

93. What are the immigration functions involved? The effect of section 19D is simply that section 19B does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration functions.

Questions initially raised by section 19D:

?? What is an immigration function?

?? Who is a relevant person

?? What does "in carrying out" mean?

94. "Immigration functions" means functions exercisable by virtue of any of the following enactments

[83] [1998] Q.B. 65; [1997] 2 W.L.R. 824

[84] Section 19B(1) and 19B(6) RRA 1976

a. the Immigration Acts (within the meaning of section 158 of the Nationality, Immigration and Asylum Act 2002[85]) excluding sections 28A to 28K of the Immigration Act 1971 (c 77) so far as they relate to offences under Part III of that Act;

b. the Special Immigration Appeals Commission Act 1997 (c 68);

c. provision made under section 2(2) of the European Communities Act 1972 (c 68) which relates to immigration or asylum; and

d. any provision of Community law which relates to immigration or asylum.

95. Thus the function must be capable of being exercised as a result of those Acts. In broad terms this will cover decision making on individual cases, examination and coercive powers.

More detail on immigration functions is given in the Ministerial authorisations (see below).

96. "A relevant person" means a person acting in accordance with a Ministerial authorisation. The concept of a relevant person requires that the person *be* acting in accordance with the authorisation. Satisfaction of all the requirements of the authorisation (as opposed to a reasonable belief that the person is satisfying them) will be a condition. If the person is not acting in accordance with the authorisation he will not be a relevant person and will be subject to the full range of race discrimination duties in the performance of his immigration functions.

97. "in carrying out" could indicate the fact of doing the immigration functions or could indicate that acts done in the course of doing those functions are covered by the exception? It is suggested that it indicates the exercise of the immigration functions themselves rather than the manner in which they are carried out.

98. The phrase "in carrying out" occurs in section 19B(1) in the context "in carrying out any functions of the authority to do any act which constitutes discrimination". The phrase "in carrying out" covers the fact of doing those functions. The words "to do any act" then makes clear that any act done in the process of doing those functions is rendered unlawful if it is discriminatory.

99. However the scope of immigration functions is broad covering any of the powers given to immigration officers under the immigration Acts. The wording creates the problem that if an immigration officer is abusive to an applicant for an immigration status who is then refused that status, the complaint about the refusal (as an act of discrimination) will go before the adjudicator. However the complaint about the abuse may have to go before the county court.

The scope of section 19D(1): a relevant person

100. As noted, in order to benefit from the exception in 19D(1) the person doing the function must be "a relevant person". If he is not a relevant person section 19B applies to any act he does in carrying out the functions of the immigration authority. A relevant person is either the Minister

[85] The Immigration Acts are the 1971 Act, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the 1996 Act, the 1999 Act and NIAA 2002

acting personally or is any other person "acting in accordance with a relevant authorization"[86]. Thus an immigration officer carrying out immigration functions will still be liable to the application of 19B(1) if either (a) there is no relevant authorization or (b) he is not acting in accordance with it. Further, as the Minister promoting the Bill stated "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"[87].

101. The Secretary of State cannot delegate the power to make authorizations. To be valid, the protection from liability for acts of race discrimination that results from a ministerial authorisation given under section 19D(3)(a) must satisfy the following conditions:

(i) the "relevant authorisation" must be in respect of a specified act by a particular person, who can thus be said to be "*acting in accordance with*" the authorisation in question[88]; and

(ii)the "relevant authorisation" must be given with respect to a certain case or class of case [89].

102. Therefore to constitute a valid "relevant authorisation" within the meaning of section 19D(3)(a) of the 1976 Act, it must satisfy the following conditions:

(i) the authorisation in question must be given by the Minister, acting personally; and

(ii)it must be clear from the terms of the authorisation in question what act or acts in respect of what case or class of case are rendered lawful, despite constituting discrimination against another person on the grounds of nationality or ethnic or national origins.

103. Thus it will be insufficient for an immigration officer to be authorized to make an assessment of the statistical evidence and/or intelligence material relating to a group and then to decide whether, in respect of persons of a particular nationality, one or other of the conditions specified in a purported authorization is satisfied[90]. For it to be a valid authorisation under section 19D(3)(a), an Authorisation must have been given by the Minister acting personally and so given in respect of a particular case or class of case. The First authorization was struck down as a result.

Ministerial authorisation

104. The Secretary of State brought the latest Ministerial Authorisation under section 19D(3)(a) of the Race Relations Act 1976 into force from 25 July 2003. It is to remain in force until revoked.

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[86] section 19(2)(b)

[87] Hansard 30 October 2000

[88] see section 19D(2)(b)

[89] see section 19D(3)(a)

[90] see R (Tamil Information Centre) v Secretary of State for the Home Department [2002] EWHC 2155 Admin.

The Authorisation applies in the following circumstances:

Examination

(a) where a person is liable to be examined by an immigration officer[91]. Thus any person who has arrived in the UK may be examined for certain purposes (i) to ascertain whether he is a or is not a British Citizen and (ii) whether or not he may enter the UK without leave; and (iii) whether he has been given leave (still in force) or he should be given leave (for what period and on what conditions) or whether he should be refused leave. If the nationality list condition[92] is satisfied

a. he may be subjected to a more rigorous examination than other persons in the same circumstances;

b. he may exercise the following powers:

i. having examined the immigrant may require him (in writing) to undergo a further examination. A person arriving as a transit passenger/member of the crew of a ship or aircraft or for the purpose of joining a ship or aircraft as a member of the crew may not be prevented from joining the same by this requirement[93].

ii. (In the case of a person arriving with leave to enter that remains in force but which was given to him before his arrival) examine him for the purpose of establishing whether there has been a change in the circumstances of his case such that the leave should be cancelled. He may also examine the arriving person to see whether the leave was obtained as a result of false information given by him or by his failure to disclose material facts. He may examine him to see whether there are medical grounds on which that leave should be cancelled. He may be examined to see whether it would be conducive to the public good for leave to be cancelled. He may be required to undergo further examination, but not so as to prevent a person arriving as a transit passenger/member of the crew of a ship or aircraft or for the purpose of joining a ship or aircraft as a member of the crew from leaving by the intended means. The immigration officer may also suspend the arriving immigrant's leave to enter pending completion of examination. After examination the immigration officer may cancel arriving immigrant's leave[94].

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[91] para 2 Sch 2 1971 Act

[92] paragraph 6 of RRIAA2002

[93] para 2(3) Sched 2 IA

[94] Para 2A sched 2 1971 Act

iii. Detain the person's passport or other document until the person is given leave to enter the UK or is about to depart or be removed[95]; search the person, baggage, vehicle or other belongings of, or the means of transport in which he arrived in the UK, of a person who has been required to declare whether or not he is carrying or conveying (or has carried or conveyed) documents of any description[96]. There is no power for a man to search a woman or girl. The immigration officer may detain relevant documents after examination.

iv. Grant temporary admission, whether on restrictions concerning employment occupation, reporting to policy or to an immigration officer or not[97]. If the person is at large and fails to comply with a restriction the immigration officer may direct that the person's examination shall be treated as concluded as that point in time.

v. Detain the person pending examination[98].

vi. Decline to give the person's notice of grant or refusal of leave to enter in a form permitted under Part III of the Immigration (Leave to Enter and Remain) Order 2000.

vii. Require the person concerned to reside in accommodation provided under section 4 of the Immigration and Asylum Act 1999 and prohibit him from being absent from that accommodation except in accordance with the restrictions imposed on him[99].

Persons wishing to travel to the UK

(b) Where a person is outside the UK, but wishes to travel to the UK the Secretary of State or an immigration officer may (where the nationality list condition is satisfied), by reason of the person's nationality:

a. Decline to give or refuse the person leave to enter before he arrives in the UK

b. Exercise powers to seek information and documents under articles 7(2) (extension of information requiring powers under para 2 or 2A of Sched 2 1971 Act to entry

[95] Para 4(2A)

[96] para 4(3) sched 2.

[97] Para 21 Schedule 2 1971 Act

[98] para 16(1) Sched 2 1971 Act.

[99] Para 21 Schedule 2 1971 Act

clearance officers etc), 7(3) (power to require an up to date medical report), and 13(8) (obtaining of information and medical reports for the purpose of determining whether to vary or cancel leave to enter the UK (including leave to enter under an entry clearance) or leave to remain in the UK) of the Immigration (Leave to Enter and Remain) Order 2000.

Removal directions

(c) Priority may be given by a person responsible for giving directions under section 10 IA 1999 or paras 8-10 of Sched 2 1971 Act to the setting of removal directions for persons of a particular nationality (if the nationality list requirement is satisfied).

The nationality condition

105. Essentially the nationality condition is that the nationality in question appears on the list approved personally by the Secretary of State.

106. Which countries appear on the list? No one knows outside the IND. The conditions for inclusion on the list are that the Minister must be satisfied that

(a) there is statistical evidence showing that in at least one of the preceding three months, the total number of adverse decisions or breaches of the immigration laws by persons of that nationality exceeds 150 in total or 50 for every 5,000 admitted persons of that nationality; or

(b) there is specific intelligence[100] or information[101] 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[102] have breached or will attempt to breach the immigration laws; or

(c) there is statistical evidence showing an emerging trend of adverse decisions or breaches of the immigration laws by persons of that nationality.

107. There are two conditions for its operation:

(a) the person *is* of a nationality appearing on the list (objective question of foreign law);

(b) the person *claims* to be of a nationality appearing on the list (simple question of evidence of what the person said or wrote).

108. The conditions are conditions precedent to the operation of the authorisation in the sense that an immigration officer who believes that a person is of a particular nationality and for that reason discriminates by doing one of the above listed acts will commit an act of unlawful discrimination under section 19B(1) if in the exercise of the immigration function in question he directly or indirectly discriminates against that person and it emerges on the evidence that the person is not of the nationality that the immigration officer alleges.

109. As a result of the changes to the Authorisations in the light of the Tamil case inclusion in the list of countries is subject to challenge by reference to Wednesbury standards of rationality. A person would be unlikely to be able to challenge that fact of the inclusion of his country on the list

[100] What does that mean?

[101] What quality does this information need to have?

[102] What constitutes a significant number?

(unless it was wholly irrational). However operation of the nationality condition as a whole is not to be judged by reference to Wednesbury[103] standards of reasonable decision making, but by reference to the Khawaja[104] standard of legality dependent upon precedent fact. When does a person "claim" to be of a nationality?

110. ILPA has tried to get publication of the listed Nations. On 19 February 2003 ILPA wrote to the Minister. On 20 May 2003 there was a reply. It was said that it would not be in the interests of international relations to publish the list, that it would not be in the interests of immigration control as it would alert traffickers to avoid telling people to say that they are of those nationalities. "...placing the list of nationalities in the public domain would give criminals a clear indication which nationalities are ripe for exploitation by their omission". Although statistics are published concerning asylum and immigration the Minister was unwilling to public the list of those nations whose nationals will be scrutinised with care at ports. It is said that the implications for foreign relations of publication were taken into consideration when deciding not to publish the list.

111. The Minister stated that the conditions for inclusion are transparent. It is not clear whether the Code referred to in the Authorisation is published. It is not clear when trigger points are passed in relation to the substantial numbers of breaches required. It is not therefore clear what the basis of inclusion is.

112. However all of this may be academic. In order to challenge the lack of publication the swiftest way would be to bring a claim for discrimination which is met by reliance on the authorisation and at that stage to seek discovery of the list and all documents relating to it. Equally it is possible to obtain discovery of relevant documents on an application for judicial review.

113. This appears to be what the Minister is inviting as the letter states "if a passenger considers they have been discriminated against by the IND, it is open to him to bring legal proceedings under the Race Relations Act. If the issue of the application of an authorisation is relevant to the proceedings, we will present the necessary information to the court or adjudicator." So it seems that the government will give the information if asked. Don't be so sure, as the letter continues: "The Government was entirely clear in its statements to Parliament during the passage of the Race Relations (Amendement) Act that the nationality of individuals was an important factor in our efforts to counter people smuggling, trafficking and immigration fraud." It is likely therefore that any attempt to obtain discovery would be met by a claim that the right to discovery was outweighed by the legitimate aim of fighting crime and that the refusal to give the information was proportionate to that aim.

114. The other authorisation it is necessary to consider is that relating to language analysis. Broadly speaking nationals of certain countries (which are ironically named in a schedule to the

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[103] Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223

[104] R. v Secretary of State for the Home Department, Ex p. Khawaja [1984] A.C. 74

authorisation) may be requested to take part in language analysis where there is doubt that they are of the nationality concerned. If they refuse that may be taken into account when considering the applicant has assisted the Secretary of State or an immigration officer in establishing the facts of the case.

115. The Minister, in a letter to ILPA of 23 May 2003 stated various justifications for the inclusion of Iraq on the list of nationalities. Of course at that precise time it was academic as returns were not happening to Iraq. However within a matter of days of that letter that policy appears to have changed.

Procedure

An embarrassment of choice?

116. Confronted with an act by an immigration officer which may be an unlawful act of discrimination the following choices of venue exist:

?? under the NIAA 2002 appeal procedure where the discrimination occurs in the taking of a decision relating to the right to enter or remain in the UK or a decision in an appeal relating to such a decision

?? a claim in the county court in relation to facilities goods and services or public functions other than a decisions relating to right to enter or remain in the UK

?? judicial review concerning a decision against which there is no appeal, in the administrative court.

The special nature of the race discrimination jurisdiction before the adjudicator

117. Where a person wishes to complain about race discrimination in relation to an immigration decision section 57A of the RRA requires that the claim is brought before the immigration Adjudicator under the NIAA 2002 appeal procedure. The adjudicator may allow the appeal on the sole ground that such discrimination has taken place. If the discrimination influenced the decision para 2 HC 395 will have been breached and the decision will not be in accordance with the immigration rules. The appeal should be allowed in those circumstances.

118. The claim of race discrimination can be raised as a ground of appeal[105]. Note that claims for discrimination may take the form of

[105] section 84(1) NIAA 2002

(a) a claim that although a ministerial authorisation is claimed for the act, the ground for the decision was colour or race;

(b) a claim that the ministerial authorisation does not apply, and therefore section 19B(1) prohibits discrimination by the IND on grounds of race in the sense of colour, race, nationality, or ethnic or national origins.

Rights of Appeal

119. Where an immigration decision is made in respect of a person he may appeal to an adjudicator[106]. For the purposes of appeals the expression "immigration decision" means-

(a) refusal of leave to enter the United Kingdom,

(b) refusal of entry clearance,

(c) refusal of a certificate of entitlement under section 10 of this Act,

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,

(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,

(f) revocation under section 76 of NIAA 2002 of indefinite leave to enter or remain in the United Kingdom,

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 (removal of person unlawfully in United Kingdom),

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (control of entry: removal),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act[107].

120. Neither:

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[106] section 82(1) NIAA 2002

[107] section 82(2) NIAA 2002

A variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain nor

A revocation under section 76 of NIAA 2002 of indefinite leave to enter or remain in the United Kingdom

have effect while an appeal against the immigration decision containing that variation or revocation-

(a) could be brought (ignoring any possibility of an appeal out of time with permission), or (b) is pending[108].

121. These rights of appeal are subject to the exceptions and limitations specified below. In relation to asylum cases there is a curtailment of rights of appeal where leave to enter has been granted for (in aggregate) less than one year. Where a person made an asylum claim which was rejected by the SOS, but he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate) he may appeal to an adjudicator against the rejection of his asylum claim[109]. Where a person appeals against such a decision the appeal must be brought on the grounds that his removal from the UK would breach the UK's obligations under the Refugee Convention[110].

Grounds of Appeal

122. The grounds of appeal (in immigration decisions cases) are that

?? the decision is not in accordance with immigration rules

?? the decision is unlawful as involving discrimination by a public authority[111]

?? the decision is unlawful because the public authority has acted in a way which is incompatible with a Convention for the Protection of Human Rights and Fundamental Freedoms right in schedule 1 to the HRA 1998 or failed to act compatibly with it[112];

?? the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under Community Treaties in respect of entry to or residence in the UK;

?? the decision is otherwise not in accordance with the law;

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[108] section 82(3) NIAA 2002

[109] section 83 NIAA 2002

[110] section 84(3) NIAA 2002

[111] by virtue of section 19B RRA 1976

[112] under section 6 HRA 1998

?? the person taking the decision should have exercised differently a discretion conferred by immigration rules;

?? that removal of the appellant from the UK in consequence of the immigration decision would breach the UK's obligations under the Refugee Convention or would be unlawful under section 6 HRA 1998 as being incompatible with the appellant's Convention for the Protection of Human Rights and Fundamental Freedoms rights[113].

123. Adjudicators are obliged to consider any immigration decision in respect of which the appellant has a right of appeal[114]. This means that the fact that an issue is not set out in the grounds of appeal does not preclude its consideration. It will also constitute an error of law not to consider any matter in respect of which the appellant could have appealed (although he has not) as these are matters in respect of which the appellant has a right of appeal.

124. However where a person has made an application to enter or remain in the United Kingdom, or an immigration decision has been taken or may be taken in respect of him the Secretary of State (or an immigration officer) may[115] require the person to state- (a) his reasons for wishing to enter or remain in the United Kingdom, (b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and (c) any grounds on which he should not be removed from or required to leave the United Kingdom.

125. The statement by the claimant need not repeat reasons or grounds set out in the application to enter or remain in the UK, or an application to which the immigration decision relates[116]. The adjudicator must consider any matter raised in that statement which constitutes a ground of appeal against an immigration decision against the decision appealed against[117]. The statement to be considered may be made before or after the appeal was commenced[118]. In considering an appeal against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of the decision[119] except where

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[113] section 84(2) NIAA 2002

[114] section 85(1) NIAA 2002. The point is made explicit by section 86 NIAA 2002 the adjudicator must consider any matter raised as a ground of appeal whether or not by virtue of section 85(1) and any matter which section 85 requires him to consider.

[115] by written notice

[116] section 120 NIAA 2002

[117] section 85(2) NIAA 2002

[118] section 85(3) NIAA 2002

[119] section 85(4) NIAA 2002. Thus there should be no disputes about after acquired evidence in immigration decisions. These should now be considered in accordance with a principle of relevance.

the appeal concerns a refusal of entry clearance or a refusal of a certificate of entitlement[120]. In those cases the adjudicator may only consider the circumstances appertaining at the time of the decision to refuse[121].

126. Where documents have been filed with the Immigration Appellate Authority, if no such statement has been made, the appellant may only vary his grounds of appeal with permission of an adjudicator[122].

Allowing appeals

127. In respect of immigration decision appeals and appeals on asylum grounds against the grant of ELR the adjudicator must determine any matter raised as a ground of appeal whether or not by virtue of his duty to consider any appeal against any decision in respect of which the appellant has a right of appeal. The Adjudicator must also consider and make a determination on any matter raised in a statement if that matter constitutes a ground of appeal against the decision appealed against[123]. He must allow the appeal in so far as he thinks that a decision against which the appeal is brought (or is treated as being brought) was not in accordance with the law including the immigration rules or if he thinks that a discretion exercised in making a decision against which the appeal is brought (or treated as having been brought) should have been exercised differently[124]. In so far as he does not reach any of these views, the appeal must be dismissed[125]

128. If a decision that a person should be removed from the UK is unlawful on one basis, but lawful on another, it is not regarded as unlawful[126]. This principle strikes at the effectiveness of appeals based on race discrimination. Provided there is one basis on which the removal is lawful it cannot successfully be appealed. If the decision is tainted by race discrimination, the adjudicator would have to be able to identify an independent basis for the decision which was not so tainted.

129. A refusal to depart from (or authorise departure from) immigration rules is not the exercise of a discretion for the purposes of an adjudicator's consideration of an appeal[127]. However if

[120] Under section 10 NIAA 2002.

[121] Section 85(5) NIAA 2002.

[122] Rule 11 of the Immigration and Asylum Appeals (Procedure) Rules 2003 (SI 652/2003).

[123] Section 86(1) NIAA 2002 Thus it is not permissible for the adjudicator to refuse to make a finding on race discrimination if it is raised in that statement.

[124] section 86(3) NIAA 2002

[125] section 86(5) NIAA 2002

[126] section 86(4) NIAA 2002

[127] section 86(6) NIAA 2002

the SoS refused to depart from the immigration rules on a racially discriminatory basis that would amount to a failure to apply rule 2.

130. Where an appeal is successful the adjudicator may give a direction for the purpose of giving effect to the decision on the appeal[128]. The person responsible for making an immigration decision must act in accordance with a relevant direction[129], but the direction does not have effect while an appeal[130] (or a further appeal) could be brought (timeously) or has been brought and has not been finally determined[131]. There may be an appeal against a direction alone[132].

Claims before the County Court

131. The normal process for enforcement of part III RRA claims is in the county court (section 57 RRA) which may grant remedies for the statutory tort of breach of the RRA. That would be the appropriate venue for claims under sections 20, 21 and under section 19B where what is being complained about is not an immigration decision, but is the exercise of a state function. Discrimination by NASS would fall into this category, as would discrimination by a detention centre or accommodation centre.

132. Such claims are brought in a designated county court and heard by a judge sitting with two lay assessors. Lay assessors are selected from a Home Office list of persons with knowledge and experience of race relations problems. Breach of section 71 RRA duties is only actionable by way of judicial review. Where an administrative practice which indirectly discriminates against a group is challenged (by the CRE) this may be done by means of judicial review. However where a particular act of discrimination is being challenged the County Court will provide the most effective remedy and judicial review will not be available. Judicial review would be available where a claim had been certificated and the certificate was upheld (see below).

133. Claims in the County Court are made using a claim form, particulars of claim etc[133]. The Claimant must bring the claim within 6 months of the act of discrimination, subject to the power of the court to extend time where it considers it just and equitable to do so[134]. The Claimant will be expected to comply with pre-action protocols. He will also have access to the

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[128] section 87(1) NIAA 2002

[129] section 87(2) NIAA 2002

[130] under section 101 NIAA 2002

[131] section 87(3) NIAA 2002

[132] section 87(4) NIAA 2002

[133] section 57 RRA.

[134] Section 68(2) RRA and 68(6) RRA.

RRA questionnaire procedure. He will be able to see pleadings from the Defendant, seek further information from the Defendant, and obtain discovery of documents. At the hearing he will be able to give evidence and test the evidence of the Defendant by cross-examination of witnesses. If no witnesses are called to contradict his version of events, subject to being found inherently credible, his version of events will be accepted.

134. The claims before the County Court will not relate to the administrative decision on the immigration status of the Claimant. The Claims before the adjudicator will deal with the administrative decision which cannot be dealt with under sections 20, 21 or 19B.

Claims in the county court: shift of the burden of proof

135. Claims before the county court will be subject to the new provisions on the burden of proof in respect of matters within section 1(1B) RRA where the alleged discrimination or harassment is on grounds of race or ethnic or national origins.

136. Where, on the hearing of such claims, the claimant proves facts from which the court could (absent any special provision) conclude in the absence of an adequate explanation that the respondent –

(a) has committed such an act of discrimination or harassment against the claimant, or

(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the claimant,

the court shall uphold the claim unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act[135].

137. A model direction in discrimination might look something like this:

(1) It is for the Appellant to prove (on the balance of probabilities) facts from which the adjudicator could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination which is unlawful by virtue of s.19 or is to be treated as having been committed against the appellant. These are referred to below as "such facts".

(2) If the Appellant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Appellant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few people would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based an assumption about the Appellant.

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[135] Section 57ZA RRA 1976. For how this shift in the burden works (and a model direction) see the sex discrimination claim of Barton v Investec Henderson Crosthwaite Securities Ltd (EAT 3 April 2003).

(4) In deciding whether the Appellant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the adjudicator will therefore usually depend on what inferences it is proper to draw from the primary facts found by the adjudicator.

(5) It is important to note the word is "could". At this stage the adjudicator does not have to reach a definitive determination that such facts would lead the adjudicator to the conclusion that there was an act of unlawful discrimination. At this stage the adjudicator is looking at the primary facts proved by the Appellant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or other questions. Note that the questionnaire procedure does not apply before the adjudicator.

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice. The CRE's code on the prevention of discrimination by public authorities will be relevant in this regard.

(8) Where the Appellant has proved facts from which inferences could be drawn that the respondent has treated the Appellant less favourably on the grounds of race, then the burden of proof moves to the respondent.

(9) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.

(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race. In appropriate cases reference may be made to the Race Directive (2000/43), since "no discrimination whatsoever" is compatible with the Directive.

(11) That requires an adjudicator to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, an adjudicator would normally expect cogent evidence to discharge that burden of proof. In particular the adjudicator will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or codes of practice

Claims before the Adjudicator

138. In respect of an immigration claim[136] alleging breach of section 19B the immigrant is obliged in certain cases to bring the claim initially before the adjudicator. Section 57 RRA, which makes provision for county court proceedings in respect of breach of part III, takes effect subject to 57A. Section 57A states that no proceedings may be brought by a claimant under 57(1) in respect of an immigration claim if either of the following conditions have been fulfilled:

(a) the act to which the claim relates was done in the taking by an immigration authority of a relevant decision and the question whether that act was unlawful by virtue of section 19B has been or could be raised in proceedings on an appeal which is pending, or could be brought, under the 1997 Act or Part IV of the 1999 Act or Part 5 of the 2002 Act;

(b) it has been decided in relevant immigration proceedings that the act was not unlawful by virtue of that section.

139. An immigration claim is defined as a claim that a person

(a) has committed an act of discrimination done by an immigration authority in taking any decision

(i) relating to the entitlement of the claimant to enter or remain in the UK and

(ii) in relation to the IAA any decision on an appeal under the 1997 Act or the NIAA 2002 in relation to such a decision,

which is rendered unlawful by section 19B; or

(b) is by virtue of sections 32 (liability of employers and principals) or 33 (a person knowingly aiding discrimination) treated as having committed such an act of discrimination against the claimant.

140. Clearly the inclusion of persons knowingly aiding discrimination allows claims against individuals and contractors who aid discrimination. There will be an issue over the meaning of "in taking any decision".

141. By section 84 NIAA 2002 the adjudicator has jurisdiction to hear claims that an authority has racially discriminated against an appellant.

142. Where the adjudicator or IAT or higher court on appeal decides that a relevant act of discrimination has taken place the county court shall treat the act as an act which is unlawful

[136] The Immigration Acts are the 1971 Act, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the 1996 Act, the 1999 Act and NIAA 2002 (section 158 NIAA 2002)

under section 19B[137] for the purposes of the proceedings for damages. No challenge is possible before the County court to that decision[138].

143. There is no power for the adjudicator to refer the case to the County Court. The Appellant has to institute proceedings. Once before the County Court the finding of discrimination cannot be challenged (section 57A(3)), so that the issues for the county court become whether the Appellant/Claimant has suffered any loss as a result of the discrimination. Such loss will include damages for injury to feelings arising out of the act of discrimination. Obviously difficult issues will arise as to the effect of the negative immigration decision and the effect of the discriminatory act. Schedule 4 paragraphs 13 and 14 provide that the six month time limit for lodging a race relations complaint to the county court or sheriff court in relation to an immigration matter begins once that immigration matter has been dealt with under immigration legislation. This is achieved by section 68(2A) which provides that the six months runs from the end of the time during which the claim cannot be put before the County court.

144. The claim that a decision is rendered unlawful because it involves an act of discrimination in the carrying of a public function will arguably include any step of the Home Office under the Immigration Acts germane to the appellant's entitlement to enter or remain in the United Kingdom. He may appeal to an adjudicator against that decision.

145. In effect the decision of the adjudicator is determinative of the right to a remedy in the county court. That remedy will include a declaration that a tort has been committed and may include injunctive relief or general damages for injury to feelings. The right to those damages are a matter of private law right.

The approach to the evidence before the adjudicator

146. The burden of proof rests on the Appellant to show discrimination. The Court of Appeal in *King v Great Britain-China Centre* [*1992*] *ICR 516* reviewed the authorities and stated the principles to be followed as follows:

(1) It is for the person who complains of racial discrimination to make out his case. This must be done on the balance of probabilities.

(2) However it is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few [in that case employers] will be prepared to admit such discrimination

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[137] Section 57A(3) RRA

[138] section 57A(4) RRA. The court remarked in Kariharan (below) the scheme of the amendment [to s65] is that an immigration adjudicator, rather than the county court, decides whether the claim of discrimination is made out, and if the adjudicator decides that it is, any further race relations issues as to remedies are then for the county court."

even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption (e.g.) that 'he or she would not have fitted in'.

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 65(2)(b) of the RRA 1976 from an evasive or equivocal reply to a questionnaire. (However, note that the questionnaire procedure appears to be disapplied to adjudicator hearings).

(4) Although there will be some cases where the act is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the [employer] for an explanation. If the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for it to infer that the discrimination was on racial grounds. This is not a matter of law but common sense.

(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of the evidence the tribunal should make findings as to the primary facts and draw such conclusions as they consider proper from those facts. They should reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a complainant and the fact that it is for him to prove his case.

147. The IAA must set out the primary facts upon which any inferences of unlawful discrimination are based and may be required to look at the surrounding circumstances in appropriate cases[139]. They are not required to make findings on every issue before it but only to reach conclusions on the essential issues[140] and the failure to apply an equal opportunities policy does not of itself warrant an inference of unlawful discrimination[141].

148. The adjudicators are used to having different standards of proof applying to different grounds of appeal. The burden and standard will be the same as in immigration appeals (as opposed to asylum appeals). It is likely that the date on which the question of whether discrimination has occurred will be the date of the original decision or the date of the act of discrimination[142]. This has the implication that it would not be open to the Secretary of State to justify indirect discrimination by reference to matters which only emerge after the date of the act of discrimination. However it is likely that if the allegation arises in the context of an immigration case the IAA will be willing to consider justification which arises after the application of the requirement or condition. Different grounds of appeal will have different burdens of proof. In immigration appeals the normal standard applies. The legal burden is on

[139] Anya v University of Oxford [2001] IRLR 377

[140] Wheeler v Durham County Council [2001] EWCA Civ 844 23 May 2001

[141] Quereshi v London Borough of Newham [1991] IRLR 264

[142] Kotecha [1982] Imm AR 88

the Appellant unless it is clear from the immigration rule or legislation in question that the burden is on the SSHD[143]. Thus in the case of a person who holds an entry clearance, refusal of leave to enter must be justified by the Respondent[144].

149. It is suggested that the same approach should be adopted in race claims as is adopted in asylum claims where the Secretary of State makes an assertion about conditions in another country. Those assertions should be given little weight save where supported by evidence [145]. The extent to which matters may be taken as a matter of judicial notice will differ however. In the context of discrimination legislation tribunals are warned against letting their gut feelings determine the matter. Anti discrimination legislation is socially reforming legislation and therefore it is dangerous to take these feelings as guides[146]. Naturally certain matters may be agreed between the parties, such as what a person from a particular culture means by a reference to a familial relationship, but caution must be exercised by the adjudicator.

150. In relation to race claims background evidence may prove difficult to rely upon. There is a danger of over reliance on abstractions of conditions in the country reports. However the Appellant's credibility is regularly assessed by reference to such reports[147]. The IAA is cautioned against assuming that the Appellant will act or think in the way in which a judge in the UK would regard as reasonable[148].

151. The adjudicator should give an analysis of the evidence and if he disbelieves what the witness is saying this should be spelled out[149]. In assessing the evidence the adjudicator should be warned against assessing the Appellant on the basis of demeanour, particularly if the evidence is being given through an interpreter[150]. However the demeanour of the immigration officer or other Home Office official called to give evidence may be significant in determining whether an act of discrimination had taken place. Where prevarication is blatant adjudicators will take this into account.

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[143] Rule 39, IAA(Procedure) Rules 2000 (SI 2000/2333)

[144] para 321 HC 395

[145] Laken (132124)

[146] Philips J in Peake v Automotive Products in the EAT (restored in effect by MOD v Jeremiah (CA) said in the case of a reforming Act of this kind, deliberately introducing new ideas and policies, preconceived ideas of what is fit are at best an uncertain guide, and the only sure course is to follow the words of the Act in accordance with what appears to be its policy.

[147] Horvath in the IAT [1999] Imm AR 121, Mendes (12183) and Nimets (17884).

[148] Kasolo (13190)

[149] R v SSHD ex p Chugtai [1995] Imm AR 559 per Collins J.

[150] Gordonbhai Patel [1986] Imm AR 208

152. Inconsistencies may also be taken into account. However such errors can arise from interpretation[151]. The way in which the interview was conducted may also be a relevant factor, and particular attention should be paid to the interview if what is being said is that the person conducting the interview acted in a discriminatory manner in doing so[152]

Procedure before the Adjudicator for complaints of discrimination

153. It is arguable that Race Relations claims before the Adjudicators should be subject to the same guarantee of a fair trial under Article 6 as other claims for race discrimination, for example those brought in respect of claims under Part III otherwise in the County court.

154. Decisions in respect of immigration matters form part of the public law of the state[153]. However the touchstone when deciding whether Art.6(1) applies to an administrative decision is whether the decision determines or affects rights in private law[154]. Clearly where the adjudicator makes a finding that discrimination has occurred, this gives rise to private law rights in the form of the ability to claim compensation in respect of that unlawful act in the county court.

155. If this argument is sound it means that the Immigration and Asylum Appeals Procedure Rules 2003 must be interpreted (under section 3 HRA) so far as it is possible to do so to accord the same rights in respect of a hearing as a person would have if bringing a claim for race discrimination under Part III before the County Court. Failure to interpret the rules in this was would be on the basis that the person is an appellant in an immigration case making a private law claim that he has been discriminated against on the grounds of race. The Secretary of State would have to be able to justify objectively why having that status should deprive the person of a right to a fair trial of the question of whether he has been discriminated against.

(a) he cannot serve and rely on a questionnaire under section 65 of the RRA (see section 65(7) RRA);

(b) he cannot serve and rely on proper pleadings from the Secretary of State (again narrowing down the scope for sudden explanations being produced by the immigration officer concerned)

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[151] Kasolo (13190)

[152] A number of cases deal with this: Soleem (13202), Nzuzi (14065) and Ibrahim v SSHD [1998] INLR 511.

[153] Maaouia v France (39652/98) (2001) 33 E.H.R.R. 42; 9 B.H.R.C. 205

[154] R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions [2001] 2 W.L.R. 1389, and see Begum (Runa) v Tower Hamlets LBC [2002] 2 All E.R. 668; and Mavronichis v Cyprus (2001) 31 E.H.R.R. 54; [1998] H.R.C.D. 480.

(c) evidence from the Secretary of State is not capable of being challenged by cross examination as of right?

156. In relation to (a): Note that the effect of section 65(7) RRA is to disapply section 65 RRA to immigration appeals. However that disapplies a rule which states that the answers to the questionnaire shall be admitted in evidence. That allows the adjudicator to admit the questionaire and reply in evidence as a matter of discretion. The Adjudicator has the power to receive oral documentary or other evidence of any fact which appears to that authority to be relevant to the appeal (IAA(Procedure) Rules 2003, rule 48).

157. The position is that he cannot as of right rely on failure to answer the questionnaire or the evasive nature of the responses. Questionnaires may also be served on prospective respondents in the County Court. In a claim for race discrimination therefore the odd position arises that although he may not rely be permitted to rely on the responses before the adjudicator, he may rely on the questionnaire replies in relation the amount of damages he should recover for hurt feelings. For example he may want to claim that aggravated damages should be awarded against the Secretary of State, and invite the court to conclude that the Secretary of State had acted in a high handed or oppressive manner by reference to the kind of answers (or failure to answer the questions).

158. In relation to (b): Rule 38(5)(d)(iii) IAAP 2003 provides that Directions may provide for the furnishing of any particulars, which appear to be requisite for the determination of the appeal. In order to ensure that the appellant is placed in the same position as a person bringing a claim under part III the adjudicator should require particulars to be provided by the Respondent as to any response to the allegation. Practitioners should include a request for a direction to this effect either in the notice of appeal or in an accompanying letter. This will be particularly important in limiting the attempted reliance on the immigration exceptions and in relation to claims of indirect discrimination.

159. In relation to ©: Rule 47 also permits any witness to be required to give evidence on oath. In order to guarantee a fair trial the adjudicator must require the immigration officer to give evidence on oath. That evidence can be given in writing. How is that evidence to be tested? One direction the adjudicator can give is to require the parties to give a list of witnesses the party wish to call to give evidence (rule 38). Rule 47 permits the summoning of witnesses. However if the appellant asks for the attendance of the witness he may be required to pay conduct money. That practical barrier may render the theoretical power to require attendance of the alleged discriminator nugatory.

160. A witness summons can be issued at the request of a party who wishes to cross examine a witness[155].

[155] R v IAT ex p Cheema [1982] Imm AR 124

161. In the case of any alleged individual act of discrimination carried out by an immigration officer the adjudicator would therefore need to ensure that the appeal was run along very similar lines to a civil action.

162. The IND takes the view that race claims can be certified under section 94 (unfounded human rights or asylum claims).

163. The House of Lords has warned against striking out race discrimination claims at an early stage because of the inferential nature of the jurisdiction[156]. The effect of such certification is that there is no in country right of appeal. However the practical effect of removal may be to prevent the appellant pursuing the discrimination aspect of the case.

164. Section 94 represents a procedural obstacle to the exercise of that right. Moreover it gives to one party to that private litigation the right to make it practically impossible to enforce the right of claim for discrimination.

Discovery

165. It is open to the adjudicator to make an order for documentary evidence under the rule relating to the furnishing of particulars which appear to be required for the determination of the appeal and the witness order may be used to obtain the production of a document[157].

Directions

166. Directions should be sought in any discrimination hearing. The following might be useful in an asylum based claim where both actions and omissions of the home office are criticised.

(i) Appellant particularizes the claim to the the Respondent.

(ii) The Respondent to serve a formal statement as to why in taking any immigration decision in relation to the Appellant race discrimination has not taken place and stating any other ground on which the allegation is being resisted.

(iii) If necessary seek further particulars of the way in which the Respondent puts the case.

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[156] Anyanwu and Other v. South Bank Student Union and Another And Commission For Racial Equality [2001] 1 W.L.R. 638; [2001] 2 All E.R. 353 per Lord Hope para 37.The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.

[157] Rule 30(4)(c) IA procedure rules and R v IAT ex p Dhillon [1987] Imm AR 385.

(iv) The Respondent to disclose all relevant documents relating to the decision making process in the Appellant's case. To include documents which are confidential on the understanding that any identifying features on the documents may be blanked out. This is a very important phase in the process. If necessary it should be revisited in the light of the information provided about the decision makers – it will include all forms of information such as e-mails.

(v) The Respondent to disclose the identity of all relevant decision makers in relation to any immigration decisions taken regarding the Appellant.

(vi) Witness statements dealing with the discrimination aspect of the case.

(vii) Skeleton arguments.

(viii) Witness orders either immediately or after disclosure of identities of decision makers.

Positive duty of public authorities under the RRA

167. As well as extending the scope of protection against discrimination, the RRAA also amended the RRA[158] to impose a positive duty on all public authorities listed in Schedule 1A[159] to the Act. Public authorities carrying out immigration and nationality functions[160] are required to have due regard to:

(a) the need to eliminate unlawful discrimination and

(b) to promote good relations between persons of different racial groups.

All other public authorities must also have due regard to the need to promote equality of opportunity between persons of different racial groups.

168. The Home Office, like all central government departments, is subject to the general duty as well as specific duties imposed under the Race Relations Act 1976 (Statutory Duties) Order 2001. For many public authorities, the first duty is to publish a race equality scheme setting out how they will meet their positive duties. The race equality scheme for IND can be seen on www.homeoffice.gov.uk/raceact/racescheme.htm. Section 4 of the IND race equality scheme states that it will be common practice for all submissions to Ministers or the IND Board on

[158] s.71(1)

[159] as amended by the Race Relations Act 1976 (General Statutory Duty) Order 2001

[160] S. 71A(1) as amended by s.6(5) of the NIAA

change of policy or procedure will include an assessment of the proposal's potential impact on good race relations and on the need to eliminate racial discrimination.

169. Failure to comply with the general duty, for example, failing to take race issues into account when introducing an important new policy to which race equality is highly relevant could be challenged by applying for judicial review.

170. Failure to comply with any of the specific duties set out in the Statutory Duties Order could result in enforcement action by the CRE; the first stage is the service of a compliance notice, requiring certain action; if the authority continues fails to act as specified in the notice, the CRE can apply to the county court for an order for compliance.

The Race Monitor

171. In response to the strong objections to the exemptions for immigration and nationality functions that were expressed in both Houses of Parliament, the government announced its intention to include in the RRAA provision for the appointment of an independent race monitor(as amended by the Race Relations Act 1976 (General Statutory Duty) Order 2001).[161] Mike O'Brien MP, then Under Secretary of State, explained,

"The race monitor ... will examine the justification for [Ministerial] authorisations, their likely effect on the operation of the exemption, and how they actually work in practice."[162]

172. The terms of reference for the Race Monitor (involving 40 days' work per year) were published by the Home Office when the post was advertised; these include at least 8 familiarisation visits to ports or other IND operational units, having access to all relevant files and sample cases handled in accordance with Ministerial authorisation and production of an annual report and an interim report. The Race Monitor is also expected to make proposals to IND for research projects relating to Ministerial authorisations.

173. The first authorisation came into operation on 2 April 2001. Mary Coussey was appointed as Race Monitor in April 2002. Her first annual report, covering the period April 2002 to March 2003 was published in June 2003. [163]The report describes her visits to ports (Heathrow terminals 2 and 3, Gatwick and Stansted) where she observed surveillance and interviews and talked to CIOs, IOs and forgery and intelligence officers about how they made decisions and the impact of the authorisations. The report also describes her visits in October and November 2002 to the Croydon Asylum Screening Unit, her observation of substantive interviews, discussions with asylum caseworkers and reviews of 100 sample files.

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[161] s.19E

[162] House of Commons Committee Hansard, 5.00 pm, 13.4.00

[163] Full report available at http://194.203.40.90/filestore/IRM_AnnualReport2002.pdf

In her report the Race Monitor expresses concern about the decision-making in some cases that were rejected solely on the basis of credibility, noting that the burden of proof applied appeared to be beyond the standard of 'reasonable doubt'. While support of asylum seekers is outside her terms of reference, she refers to the obligations of IND under the Race Relations (Amendment) Act and queries whether due regard had been given to the impact on different nationalities when adopting the new rules regarding asylum seekers' entitlement to support. She also expressed strong concern about reports in some newspapers expressing inflammatory and negative opinions about asylum. The recommendations in her first report are:

a) Government should take positive steps to encourage a more balanced and tolerant public mood on asylum seekers;

b) Annual monitoring of the consistency of decisions by nationality, comparing different officers and units where possible, and examination of differential grant/refusal rates or significant increases in refusal rates in similar or comparable circumstances;

c) Caseworkers should be required to consult senior casework and give reasons for rejecting evidence on the basis of credibility alone;

d) The forthcoming Home Office review of the IND Race Equality Scheme should consider the effectiveness of race equality impact assessment carried out prior to new legislation and new IND procedures, including an evaluation of the weight given to evidence of adverse impact of changes, how the change was justified and whether the desired income could have been achieved in less discriminatory way; and

e) Further consideration should be given to greater openness about the nationalities subject to greater scrutiny under the authorisations, and to whether statistical evidence of breaches and adverse decisions for each nationality in the authorisations should be proportionate to the numbers of arrivals for this nationality.

She proposes to monitor the operation of the authorisation on language testing and removal directions and to consider the operation of fast track procedures on asylum seekers of different nationalities.

174. The scope of the duties of the Race Monitor include monitoring:

(a) the likely effect on the operation of the exception in section 19D of any relevant authorisation relating to the carrying out of immigration and nationality functions which has been given by a Minister of the Crown acting personally; and

(b) the operation of that exception in relation to acts which have been done by a person acting in accordance with such an authorisation.

175. The latter duty would permit the Race Monitor to comment on whether an act had been done in accordance with the authorisation or not. Clearly practitioners could bring to the Race Monitor's attention particular acts which have been carried out. The Race Monitor would be able to comment on the scope of any particular authorisation and whether the act in question fell under it. In the course of proceedings

before an adjudicator there is no reason why the Report of the Monitor in this respect should not be admissible in evidence. It would not be conclusive of construction of the authorisation.

The Commission for Racial Equality: its role in supporting individual complaints and conducting formal investigations

CRE advice and assistance to victims of discrimination

176. Under the RRA[164] the CRE is required to consider every application for assistance and may grant assistance in various forms, including legal representation:

"(a) on the ground that the case raises a question of principle; or

(b) on the ground that it is unreasonable, having regard to the complexity of the case, or to the applicant's position in relation to the respondent or another person involved, or to any other matter, to expect the applicant to deal with the case unaided; or

(c)by reason of any other special consideration."

177. Decisions relating to the grant of legal representation are made by the Legal Committee of the Commission on the advice of officers, who will normally have interviewed the applicant and made some enquiries to test the merits of the applicant's case. The Legal Committee meets periodically; emergency decisions are possible between meetings.

178. The CRE is expected to consider an application and inform the applicant of its decision within two months, although the CRE can give notice extending this to three months. Where the application relates to a case in the county court (or sheriff court in Scotland), an application to the CRE within the 6 month time limit for commencing proceedings will extend that time limit for issuing proceedings to 8 months (or 9 months where CRE extended its consideration of the application).

179. In recent years, when the CRE has granted legal representation, this has normally been provided by CRE in-house solicitors, and, where appropriate, by counsel whom they instruct. Exceptionally the CRE has granted assistance in the form of funding for legal representation by external solicitors.

180. The CRE can also intervene to assist the court, for example in cases which raise significant questions of interpretation of the RRA.

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[164] s.66

CRE power to conduct formal investigations

181. Under s.48 of the RRA the CRE can conduct a formal investigation for any purpose connected with the carrying out of its duties to work to eliminate discrimination and to promote equality of opportunity and good race relations. Since it was established in 1977, the CRE has conducted more than 100 formal investigations.

182. Most CRE formal investigations are undertaken where the CRE has grounds to believe that a particular organisation may have committed or may be committing acts of unlawful discrimination. In such investigations the CRE has powers to require production of documents and attendance of named persons to give oral evidence.[165] If, at the conclusion of an investigation based on a suspicion of discrimination the CRE is satisfied that discrimination has occurred or is occurring, it can serve a non-discrimination notice requiring the discrimination to come to an end. Before commencing an investigation and also before service of a non-discrimination notice, the CRE must allow the respondent opportunity to make written and oral representations.[166] Among recent CRE formal investigations are those into discrimination in employment in the Household Cavalry, Ford and the CPS, and into employment and treatment of inmates at Brixton and Parke prisons (report awaited) and into the murder of Zahid Mubarek at Feltham Young Offenders Institute and Remand Centre.

183. The CRE can also carry out a non-accusatory 'general' formal investigation, in which the CRE examines practices of a single organisation or a number of organisations carrying out similar activities. It is not based on a suspicion of unlawful discrimination. At the conclusion of a general formal investigation the CRE can make recommendations but cannot serve a non-discrimination notice. In 1981 the CRE began a 'general' investigation into immigration control procedures including entry clearance criteria and procedures, post-entry controls, selection and training of immigration control staff and the appeals system, The Home Office issued proceedings to challenge the CRE's powers to do so, but the High Court held that, while not relevant to the duty to eliminate unlawful discrimination (since the RRA did not then cover immigration control), such an investigation was consistent with the CRE's duty to promote good race relations;

> *"I cannot accept that Parliament must be assumed to have intended, as the Home Office contends, that the field of immigration should be a no-o area for the Commission"*[167]

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[165] s.50

[166] s.49(4) and s.58(5)

[167] Woolf, J., Home Office –v- CRE [1981] 1AllER 1042

184. The CRE could use its powers to conduct a general investigation to examine whether, and if so to what extent, certain public authorities are complying with their positive duty under the RRA.

Territorial scope

185. Although the RRA does not apply to acts of discrimination outside Great Britain section 19B does apply to acts done outside the UK as well as those done within Great Britain in relation to granting entry clearance (within the meaning of the 1971 Act)[168].

186. Schedule 2 Paragraph 12 RRAA amended section 67 of the RR Act in order to protect those applicants whose visa applications are successful but nevertheless consider that they have been discriminated against by an entry clearance officer outside Great Britain. It ensures that redress is available in the county court. It provides that a designated county court will have the jurisdiction to entertain proceedings with respect to an act done outside the United Kingdom where section 19B applies in relation to such an act by virtue of section 27(1A). This provides that in its application in relation to granting entry clearance (within the meaning of the Immigration Act 1971) section 19B applies in relation to acts done outside the United Kingdom, as well as those done within Great Britain. Thus it is only in respect of entry clearance that the Act's geographical jurisdiction is extended for immigration decisions.

October 2003

[168] section 27(1A) RRA and see the CA decision in EUROPEAN ROMA RIGHTS CENTRE v THE IMMIGRATION OFFICER AT PRAGUE AIRPORT, The Secretary Of State For The Home Department And THE UNITED NATIONS' HIGH COMMISSIONER FOR REFUGEES (Intervener) [2003]EWCACiv666 20/05/2003