EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Cameron of Lochbroom

Lord Marnoch

Lord Nimmo Smith

019/18(16)/99

OPINION OF LORD CAMERON OF LOCHBROOM

in

APPEAL

under section 37 of the Employment Tribunals Act 1996 (as amended)

by

BBC SCOTLAND

Appellants;

against

a decision of the Employment Appeal Tribunal dated 15 January 1999

of

MARK DOUGLAS SOUSTER

Respondent:

_____

Act: O'Neill, Q.C., Carmichael; Maclay Murray & Spens (Appellants)

Alt: Bovey, Q.C., Collins; Drummond Miller, W.S. (Respondent)

7 December 2000

[1] In this appeal the appellants, B.B.C. Scotland, bring before this Court decisions by an Industrial Tribunal and subsequently by the Employment Appeal Tribunal which determined in principle that the respondent, who is a journalist, was entitled to bring a claim based on a complaint alleging racial discrimination on the part of the appellants, the claim proceeding on averments relating to the national origins of the respondent. In his application the respondent states that he is English. He was employed by B.B.C. Scotland between February 1995 and May 1997 on successive contracts as a presenter of a programme entitled "Rugby Special" on B.B.C. Television. The substance of his complaint relates to the refusal of the appellants to renew his contract as a presenter of that programme from November 1997. He states that the appointment made to that position in November 1997 was of a Scottish woman. He further states that he believes that a major factor in the decision of the appellants not to appoint him in November 1997 as a presenter was "his national origin". He had been told, he says, that the appellants would prefer a Scot for the job. He goes on to state that he believes that the actions of the appellants were contrary to Part II of the Race Relations Act 1976 in that "they have discriminated against me on grounds of my national origin in their decision not to offer me the employment in question."

[2] In their grounds of appeal the appellants recognise the respondent's complaint as being one that, because he had been denied appointment as a presenter of "Rugby Special", the respondent has been treated less favourably on the grounds of his English "national origins" than the appellants treat or would treat other persons, particularly those of Scottish "national origin" and that he thereby has a relevant claim for race discrimination contrary to the Race Relations Act 1976. The respondent in his answers supplements this by indicating that he also seeks to rely upon such discrimination on the grounds of his English nationality (or not having Scottish nationality). The appellants then assert that the categories of "English" in comparison to "Scottish" are not distinct racial groups for the purposes of the Race Relations Act 1976 and therefore that comparisons as regards allegedly different treatment on the grounds of being either Scots or English are not covered by the Act. In so asserting, the appellants seek to bring under review the decision of the Employment Appeal Tribunal in *Northern Joint Police Board* v. *Power* [1997] IRLR 610.

[3] Before the Industrial Tribunal and again before the Employment Appeal Tribunal the appellants accepted that the tribunal was bound by the decision of the Employment Appeal Tribunal in *Power*. In that case a police authority had advertised the post of chief constable. The respondent had applied for the post but had not been short listed. He thereafter applied to an industrial tribunal for a finding that his treatment in that respect contravened the Race Relations Act 1976 on the basis of discrimination against him as an Englishman. The Industrial Tribunal was required to determine whether or not such discrimination was, as a matter of general law, relevant in terms of the legislation. It held as a matter of jurisdiction that the Act was habile to cover discrimination as between English and Scots persons on grounds of race. In their judgment, the Employment Appeal Tribunal correctly indicated that the background to the matter was the legislation itself and, in particular, the definition of "racial group" which, it said, was central to the prohibition of discrimination as set out in section 1 of the Act.

[4] The Employment Appeal Tribunal considered the history of the legislation. In the original Race Relations Act 1965, section 1 (1) of that Act provided as follows:

> "1.-(1) It shall be unlawful for any person being the proprietor or manager of or employed for the purposes of any place of public resort to which this section applies, to practise discrimination on the ground of colour, race, or ethnic or national origins against persons seeking access to or facilities or services at that place."

In terms of the Race Relations Act 1968, section 1(1) provided as follows:

> "1.-(1) 'For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other, in any situation to which section...5 below applies, less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of those grounds.'"

This was the statutory provision considered by the House of Lords in *Ealing London Borough Council* v. *Race Relations Board* [1972] AC 342. Following the decision in *Ealing* the Race Relations Act 1976 was passed. The relevant statutory provisions which now apply are as follows:

> "1.-(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if -
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> (a) on racial grounds he treats that other less favourably than he treats or
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> would treat other persons; or
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> (b) he applies to that other a requirement or condition which he applies or
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> would apply equally to persons not of the same racial group as that other but -
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> (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
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> (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
>
> (iii) which is to the detriment of that other because he cannot comply with it.
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> ...
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> 3.-(1) In this Act, unless the context otherwise requires -
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> 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

> 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.
>
> (2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.
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> (3) In this Act -
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> (a) references to discrimination refer to any discrimination falling within
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> section 1 or 2; and
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> (b) references to racial discrimination refer to any discrimination falling
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> within section 1,
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> and related expressions shall be construed accordingly."

Accordingly, it is in the 1976 Act that the word "nationality" first appears as one of the grounds giving rise to racial discrimination.

[5] The Appeal Tribunal noted that the Industrial Tribunal had concluded that an Englishman fell to be included within the ambit of the definition of "racial group" under reference to the phrase "national origins" and accordingly that, in principle, the tribunal had jurisdiction.

[6] The Employment Appeal Tribunal was concerned to address two issues. The first, the principal issue, was whether or not the respondent, in making an application on racial discrimination on grounds that he was English, could relevantly do so as a matter of law under the umbrella of the phrase "national origins". The second, the secondary issue, was whether or not, separately, the English should be regarded as falling within the definition of "racial group" by reason of the phrase "ethnic origins".

[7] On the first issue, the Employment Appeal Tribunal made reference to certain excerpts taken from the speeches of Viscount Dilhorne and Lord Simon of Glaisdale in *Ealing*. The substance of their decision is found in the following passage:

> "In seeking to address this matter, we confess that we do not find the discussion by Lord Simon, which we have quoted, to be particularly helpful, other than to point to the nature of the elements which may enter the equation determining whether or not, in a particular context of England and Scotland, there are national attributes. On the other hand, it is perfectly clear that the phrase 'national origins' has to be given a different context and meaning within the legislation from the word 'nationality', but we have no difficulty with this concept. Nationality, we consider, has a juridical basis pointing to citizenship, which in turn, points to the existence of a recognised state at the material time. Within the context of England, Scotland, Northern Ireland and Wales the proper approach to nationality is to categorise all of them as falling under the umbrella of British, and to regard the population as citizens of the United Kingdom. Against that background, what context, therefore, should be given to the phrase 'national origins'? It seems to us, so far as there needs to be

> an exhaustive definition, what has to be ascertained are identifiable elements, both historically and geographically, which at least at some point in time reveals the existence of a nation. Whatever may be difficult fringe questions to this issue, what cannot be in doubt is that both England and Scotland were once separate nations. That, in our opinion, is effectively sufficient to dispose of the matter, since thereafter we agree with the proposition that it is for each individual to show that his origins are embedded in such a nation, and how he chooses to do so requires scrutiny by the tribunal hearing the application. In our opinion, whatever factors are put forward to satisfy the relevant criteria will be self-evidently relevant or irrelevant as the case may be. There is, therefore, no need for the tests such as enunciated by Lord Fraser in *Mandla, supra* with regard to the question of groups based on ethnic origins in relation to the issue of national origins, since the former by definition need not have, although it might have, a defined historical and geographical base. It is perfectly possible that the two defined groups may overlap, but that does not affect the issue which is required to be approached in each context from a different direction. The existence of a nation, whether in the present or past, is determined by factors quite separate from an individual's origins, and those factors are easily established in any given case by reference to history and geography. That the same cannot be said in relation to groups based on ethnic origins creates the need for Lord Fraser's test."

The Employment Appeal Tribunal held that the industrial tribunal had come to the correct decision

> "as a matter of general jurisdiction as to whether or not the industrial tribunal has the power to entertain an allegation of discrimination against an Englishman *per se*, or for that matter a Scotsman, based on national origins."

[8] For the appellants it was submitted that the case of *Power* was wrongly decided. Although much ground was traversed in the course of the debate before this court, at the end of the day it appeared that the nub of the appellants' submissions was reduced to the simple proposition that the phrase "national origins", as used in section 3(1) of the 1976 Act, referred to and comprehended nationality in the legal sense alone. That is to say, where a person claimed that his national origins were Scots or English or Welsh, this was no more that saying that his origins lay in the United Kingdom of which he was a citizen and that his national origins were British. Therefore, it was said, there could be no discrimination, direct or indirect, within Great Britain (to which the Act alone applies) arising from the fact that a person was of Scots or English national origins or from that the fact that he was a member of a racial group denominated as Scots and composed of members of Scottish national origins as compared with another racial group denominated as English and being composed of members of English national origins or *vice versa*.

[9] This result was justified on a number of different and differing arguments. The first was that by introducing the word "nationality" into the definition of "racial grounds" in the Act of 1976 Parliament had intended that the meaning to be given to the word, and by extension to the word "national", was limited to nationality as that word was used in its legal sense by reference to citizenship of a sovereign state. On this argument, "national origins" was to be interpreted as meaning citizenship of a sovereign state acquired at birth. Allied to this submission was a further argument that in the Act of 1976 Parliament had been intending to correct, and had corrected, an anomaly created by the decision of the House of Lords in *Ealing* and that any dicta in that case bearing on the meaning to be attributed to the phrase "national origins" were *obiter*.

[10] In the second place, the appellants submitted that the primary purpose of the legislation, from its inception in the Race Relations Act 1965 and subsequently, had been to deal with a social background which did not comprehend discrimination within Great Britain based on such historical and geographical concepts as nationhood as distinct from nationality in its legal sense.

[11] In the third place, the appellants advanced an argument which was addressed to the introduction in the Act of 1976 of the concept of indirect discrimination and, with that, the concept of "racial group" as defined in section 3(1) by reference to "colour, race, nationality or ethnic or racial origins". It was said that if the meaning of "national origins" extended beyond citizenship of a sovereign state acquired at birth to a more amorphous concept of nationhood, such as was postulated in *Ealing*, it imposed an impossible task upon, for instance, employers to determine in advance how such racial groups should be constituted and recognised as such, so that employees could be identified by reference to their membership of any particular racial group. Parliament could not have intended to place impossible tasks upon employers in determining *ab ante* how they could avoid indirect discrimination within their working practices. However, certainty would be achieved by giving to the phrases "nationality" and "national origins" the same meaning, namely, one limited to that of citizenship of a sovereign state acquired at birth, i.e. national origins, or such citizenship as might subsequently be acquired but was existing at the date of the discriminatory act (whether that act constituted direct or indirect discrimination).

[12] I have already set out the relevant sections of the Act of 1976 to which these submissions were addressed. But I note that the long title of the Act provides amongst other things that it is "An Act to make fresh provision with respect to discrimination on racial grounds and relations between people of different racial groups..."

[13] There are three basic elements to unlawful direct race discrimination, namely, (a) there must be less favourable treatment, (b) the treatment must be on racial grounds and (c) like must be compared with like. As regards indirect discrimination, that is concerned with equal treatment which has an unequal effect upon the people to whom the treatment applies. In order to establish unlawful indirect discrimination, an applicant has to show that "a requirement or condition" has been applied to him and further that there has been a disparate impact in the application of the particular requirement or condition to his detriment. Equal treatment requires that any comparison of the treatment meted out to members of different racial groups is such that the relevant circumstances in the one case are the same or not materially different than in the other. But the important element in either form of discrimination is that it has to be shown that the discrimination is on "racial grounds" as defined in the Act of 1976. In that regard, "racial group" is defined by reference to the same factors as is "racial grounds".

[14] In my opinion, the appellants' submissions are misconceived. In the case of *Mandla (Sewa Singh)* v. *Dowell Lee* [1983] 2 AC 548 Lord Fraser in his speech, with which the other members of the House agreed, considered the meaning of the word "ethnic" as used in the Act of 1976. He said that Parliament must have used the word in some more popular sense than that by reference to some distinctive biological characteristics, assuming such characteristics existed. He went on to say this:

> "I respectfully agree with the view of Lord Simon of Glaisdale in *Ealing London Borough Council* v. *Race Relations Board* [1972] AC 342, 362, referring to the long title of the Race Relations Act 1968 (which was in terms identical with part of the long title of the Act of 1976) when he said:

> 'Moreover "racial" is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the work "race" is biologically at all relevant to the species amusingly called homo sapiens.'
>
> A few lines lower down, after quoting part of section 1(1) of the Act, the noble and learned Lord said:
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> 'This is rubbery and elusive language - understandably when the draftsman is dealing with so unprecise a concept as "race" in its popular sense and endeavouring to leave no loophole for evasion.'"

Later in his speech Lord Fraser said:

> "But in seeking for the true meaning of 'ethnic' in the statute, we are not tied to the precise definition in any dictionary. The value of the 1972 definition is, in my view, that it shows that ethnic has come to be commonly used in a sense appreciably wider that the strictly racial or biological. That appears to me to be consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin."

[15] In *Mandla* Lord Fraser approved a passage from the judgment of Richardson J. in *King-Ansell* v. *Police* [1979] 2 NZLR 531 as follows:

> "The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group."

[16] Again in *Mandla* Lord Fraser observed :

> "Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3(1); 'references to a person's racial group refer to any racial group into which he falls'. In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group. This view does not involve creating any inconsistency between direct discrimination under paragraph (a) and indirect discrimination under paragraph (b). A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous".

[17] Thus the perception of the discriminator may itself give rise to unfavourable treatment on racial grounds. In this regard the quotation from Oppenheim's *International Law* cited in the speech of Viscount Dilhorne in *Ealing* (quoted in *Power*), is instructive in that it distinguishes Englishmen and Scotsmen by reference to race. Indeed, immediately after the quotation Viscount Dilhorne goes on to point out that the

word "nationality" can be used in two senses, the first, in the sense of citizenship of a certain state and, the second, in the sense of race, just as can the word "national".

[18] I observe that words such as English, Scots, Welsh or Irish are used in common parlance both as nouns and as adjectives in what can only be described as a racial sense as that is to be understood for the purposes of this legislation. To take a notorious example from the early days of the legislation, it would be regarded as racial discrimination to advertise for a Scots nanny, the implication being that only a Scot would be appointed. Thus to speak of "the Scots" or "the English" or "the Welsh" or "the Irish" is to denominate a group as having a particular historical identity in terms of their origins. In *Ealing* Lord Cross observed :

> "The reason why the words 'ethnic or national origins' were added to the words 'racial grounds' which alone appear in the long title was, I imagine, to prevent argument over the exact meaning of the word 'race'."

Again in *Mandla* Lord Templeman, with whose speech Lords Edmund-Davies, Roskill and Brandon of Oakbrook agreed, said:

> "A racial group means a group of persons defined by reference to colour, race, nationality or ethnic or national origins. I agree with the Court of Appeal that in this context ethnic origins have a good deal in common with the concept of race just as national origins have a good deal in common with the concept of nationality. But the statutory definition of a racial group envisages that a group defined by reference to ethnic origin may be different from a group defined by reference to race, just as a group defined by reference to national origins may be different from a group defined by reference to nationality."

[19] So a racial group may be defined by reference to its communal origins and tradition, which may either "national" or "ethnic". I also bear in mind that the courts in the United Kingdom have consistently adopted a broad approach to the construction of the legislation. A similar sentiment was expressed by Woodhouse J. in *King-Ansell.* Having quoted the second part of the passage from Lord Simon of Glaisdale's speech, to which Lord Fraser referred in *Mandla,* about the meaning to be ascribed to discrimination "on the ground of colour, race or ethnic or national origins", he said this:

> "With respect I agree with that statement and the reference to 'race' as being used 'in its popular sense'. Furthermore, I think with Lord Simon that the language is probably deliberately flexible. The problem of racial discrimination is difficult to pin down in any final form of words and those that are used here have been left imprecise because in my opinion they are intended to completely embrace every aspect of that elusive and worrying subject-matter. I think it is clear that the kind of discrimination which amounts to religious intolerance alone is not the target of this particular legislation [i.e. the New Zealand Race Relations Act 1971 which made it an offence, amongst other things, to bring into contempt or ridicule any group of persons 'on the ground of the colour, race, or ethnic or national origins' of that group of persons]: but to give effect to its important purpose of making every form of *racial* discrimination unlawful I am satisfied that the language must not be interpreted in any confined or restricted way but broadly and in terms of common sense."

[20] Looking to the terms of the Act of 1976 itself, there seems neither reason nor logic in the proposition for which the appellants contend, that the phrase "national origins" means no more than the nationality in the legal sense acquired by an individual at birth. Nor is it supported by any of the cases to which I refer above.

[21] I am fortified in this conclusion by a consideration of the other arguments advanced for the appellants. It was suggested that the changes made in the Act of 1976 indicated some change of purpose identified with the need to reverse the decision in *Ealing.* I do not agree. As Lord Fraser noted in *Mandla,* there is an identity between the long title of the Act of 1968 and that of the Act of 1976. That would serve to indicate that the purpose of the prior legislation remained unchanged after the passage of the Act of 1976. This indication is strengthened by the fact that although the definition of "racial grounds" was amplified by the addition of the word "nationality", Parliament provided in section 78(1) that, unless the context otherwise required, "'nationality' includes citizenship". That is to say, Parliament deliberately did not define nationality exclusively by reference to citizenship. If that be so, there is no warrant for limiting "national origins" to citizenship acquired at birth.

[22] Moreover it is clear that the word "nationality" is not related to any precise point of time such as the word "origins" suggests. It can encompass a change in nationality after an individual's birth. Equally, an individual can become a member of a racial group defined by reference to "origins" through adherence, as for instance by marriage, as was pointed out by Lord Fraser in *Mandla.* The word nationality is as referable to the present nationality of an individual as it is to his nationality at birth derived from his national origins. Since it is possible for a person to change his nationality, the word does not, in my opinion, refer only to his nationality at birth. Furthermore, Parliament has not restricted the meaning of the word to citizenship. Its meaning is to be read in context. If it is possible to become an adherent to and thus a member of a racial group defined by reference to "ethnic origins" (see *Mandla*), it would seem to me to be perfectly possible to adhere to and thus become a member of a group defined by reference to "national origins". In this matter the perception of others may be important. The claim to play for Scotland at, say, rugby or football is often grounded, relatively speaking, upon a fairly remote basis, not immediately referable to birth but more to descent. Such a person would refer to himself, and would be regarded by others, as a Scotsman rather because of his adherence to, or, it might be said, adoption of, the racial group than by his origins at birth. Accordingly, as a matter of relevancy, I agree with the respondent that an applicant can be discriminated against on grounds of his English nationality where that nationality has been acquired by adherence or adoption since his birth or because he has been perceived to have become a member of the racial group, the English. It will be for him to prove that he is English, whether that be because his national origins are English or because he has acquired English nationality or that he is perceived to be English.

[23] I also consider that the Employment Appeal Tribunal went too far in expressing the opinion that the meaning of nationality is to be confined to one having "a juridical basis pointing to citizenship, which, in turn points to the existence of a recognised state at the material time". This does not accord with what was said by Viscount Dilhorne in *Ealing* about the word "nationality" as being capable of being used in the sense of race, just as the word "national" can be so used. Likewise, as Lord Templeman pointed out in *Mandla,* national origins have a good deal to do with the concept of nationality. Later in his speech he again emphasised this when he remarked that the historic kingdom of the Sikhs failed to qualify "as a separate nation or as a separate nationality"(my emphasis).

[24] It was also suggested that the references in the speeches of their Lordships in *Ealing* to the meaning to be given to the phrase "national origins" were *obiter*. In my opinion, upon a proper scrutiny of what was said in *Ealing* it is clear that an important, indeed decisive, element in the reasoning was the meaning to be given to that phrase in the context of an argument that it included nationality in the legal sense at the time of the discriminatory act. Indeed each of their Lordships makes this clear in the course of his speech. Thus Lord Donovan said:

> "So the question comes to this: do the words 'national origins' amount for present purposes to the same thing as 'nationality'. The Act itself contains no definition of national origins. It must, I think, mean something different from mere nationality otherwise there would be no reason for not using that one word..." (my emphasis).

[24] The relevant parts of the speeches of Viscount Dilhorne and of Lord Simon of Glaisdale are set out at length in *Power*. I do not repeat them other than to note that each was concerned to determine the meaning of the phrase for the purpose of the decision. It is correctly stated in *Power* that the two passages place the focus upon "the distinction being made between 'nationality' on the one hand and 'national origins' on the other".

[26] Lord Cross begins by referring to the Act of 1965 where the phrase "national origins" first appeared in the Statute Book. He then says:

> "There is no definition of 'national origins' in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between and individual and one or more groups of people who can be described as a 'nation' - whether or not they also constitute a sovereign state...Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide."

[27] While Lord Kilbrandon dissented from the majority, it is clear from his speech that although he recognised that the phrase "national origins" could be construed to exclude the concept of nationality as that word is used in international law, he considered that nationality in the legal sense was comprehended within the phrase "national origins". I consider that this view is consistent with the meaning now to be given to these words where they appear in the statutory definition of "racial grounds" in section 3(1) of the Act of 1976.

[28] I consider that there is no warrant for saying that the references to the meaning to be given to "national origins" in the legislation which are to be found in the speeches in *Ealing* were *obiter*. Since Parliament did not choose to amend or further define that particular phrase in the Act of 1976, then under the *Barras* principle, it may be presumed that it was intended to continue to have that same meaning in that enactment (see Bennion on *Statutory Interpretation* (3rd ed.) p.459 - 460). That is to say, the meaning of national origins is not limited to the concept of nationality in a legal sense and thus to the citizenship which an individual may acquire at birth.

[29] Since there is, in my opinion, no ambiguity arising from the use of the phrase "national origins" in the legislation, it would not have been necessary to have had any regard to its legislative history.

However, reference was made to passages from Hansard relative to both the Act of 1965 and the Act of 1976. It is sufficient to say that I agree with the view expressed by the Employment Appeal Tribunal in *Power* to the effect that these passages reveal that, firstly, it was the intention of Government in 1965 to make the Act all-embracing as regards racial discrimination and to include Scots, English, Welsh and Irish, and, secondly, that following upon the decision in *Ealing* there was perceived to be a gap in the legislation which was filled by the introduction of the word "nationality" into the definition of the phrase "racial grounds", thereby extending the meaning of that phrase to cover the gap. I would add that there appears to be nothing said in the course of the Parliamentary debates to suggest that a narrow rather than a broad interpretation of the legislation should be adopted.

[30] Finally, on this part of the appellants' submissions, I do not consider that there is any substance in the argument that the problems of identifying the existence of a racial group comprising persons of English or Scots national origins or an individual's membership of such a racial group, in relation to indirect discrimination, are such that it must be concluded that Parliament did not intend that the legislation should extend to include such groups. I would observe that section 1(1)(b)(ii) of the Act of 1976 provides for a defence that any particular requirement or condition which would otherwise give rise to a finding of racial discrimination, was justifiable. In addition, section 57(3) of the Act provides that, as respects an unlawful act of discrimination falling within section 1(1)(b), no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on racial grounds. So Parliament has provided suitable safeguards for the employer by way of allowing the employer to justify his decision to impose a particular requirement or condition, or of excusing him from liability in damages where there was no intention to treat the claimant unfavourably. It is not, I suggest, for this court to suggest how employers should carry on their businesses so as to avoid engaging in racially discriminatory acts. In their decision in *Power*, the Employment Appeal Tribunal made reference to what had been said in their earlier decision in *Boyce and Others* about a similar argument presented in relation to "the question of Scottishness on grounds of discrimination with regard to ethnic groups". If what follows on that passage is to be understood as suggesting that the impossibility of defining what tests could be applied by an employer to an individual case, is to be a factor in defining what constitutes a racial group, then it is, in my opinion, plainly wrong.

[31] I would make only one further comment upon what was said by the Employment Appeal Tribunal in *Boyce and Others* in the passage quoted in *Power.* As I understand what is said there, the Tribunal appears to require that some racial element or racial flavour be found before the individual tests enunciated by Lord Fraser in *Mandla* are applied. If this is what the Tribunal meant, then, in my opinion, they were wrong. It is undoubtedly the case that Lord Fraser, in setting out the meaning to be given to the word "ethnic", stated that the word "still retains a racial flavour". But he went on to say that the word "is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin". In saying this Lord Fraser was expanding the meaning of the word from that which would limit it to the strictly racial or biological. The racial flavour which is required for recognition of a group as an ethnic group in the sense of the Act of 1976 is to be found within, and from the application of, the tests set out by Lord Fraser. For reasons which I detail later in this opinion, I consider that the Scots as a group cannot meet one of the essential conditions for recognition of an ethnic group in the sense of the Act of 1976, not because that racial element required for recognition of any group as a racial group is missing but because the distinctive racial element required for recognition as an ethnic group is lacking.

[32] In his answers to the appellants' grounds of appeal the respondent avers that his case extends to a complaint based on an alternative ground, namely that he was discriminated against on the grounds of his English ethnic origins (or not having Scottish ethnic origins). The argument was presented on the basis that if the meaning of "nationality" was limited to citizenship, that is to say, to its legal sense, then the respondent was entitled to attempt to prove that he was also discriminated on grounds of his English ethnic origin. Before this court it was accepted that if it was held that the respondent's principal case was relevant, namely, that based on national origins or nationality, then there was no proper basis for this alternative case. In my opinion, this concession was properly made. I would add that, strictly speaking, this alternative case does not appear within the terms of the respondent's application. Thus it may be questionable whether this issue falls within the ambit of the present appeal. However, argument was presented before this court on the matter, since it was directed to the correctness or otherwise of the secondary question considered and decided in *Power*. The definition of "racial grounds" refers to "ethnic or national origins". I recognise that there may be cases in which it is unclear whether the discrimination of which the applicant complains, is better described as based on racial grounds defined by reference to ethnic origins or to national origins, or whether the racial groups with which the complaint is concerned are better defined by reference to one rather than to the other of ethnic or national origins. These must be matters for proof unless the matter can be decided without proof either by reference to judicial knowledge or upon agreed facts. Thus where an applicant makes an application alleging racial discrimination on racial grounds related to his origins, it may in certain circumstances be considered permissible by a tribunal to allow him to proceed with his application on the basis that he was discriminated against on the ground of his ethnic or national origins without requiring him to distinguish which of the two labels is to be given to his origins. Equally I recognise that in certain cases it is possible that the relevant racial group may be formed from more than one distinct racial group (see section 3(2) of the Act). (For instance, there is no reason why a racial group should not be formed from "the British", albeit an amalgam of the English, Scots, Welsh and Irish racial groups.) However, as Lord Cross pointed out in *Ealing*, the word ethnic was introduced to deal with possible problems posed by a definition of racial grounds confined to national origins. Therefore it could cover a situation such as arose in *Mandla.* There it was held that the Sikhs as a group could not lay claim to national origins, albeit they were a distinct community with an historic identity and tradition. Although they had the essential conditions and characteristics referred to in the speeches of Lord Fraser and Lord Templeman, they were not regarded as having achieved that sufficient degree of recognition or permanence as a kingdom to qualify as a separate nation or a separate nationality. In *Mandla* Lord Fraser identified two essential conditions or characteristics of an ethnic group as being:

> "(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive: (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance."

[33] In my opinion, while it may be that within Scotland there are groups, for instance, the Gaels, who might lay claim to being an ethnic group, it is within judicial knowledge that the racial group which can properly be described as the Scots has a much wider and broader based cultural tradition than that which would constitute one of the two essential conditions or characteristics for an ethnic group.

[34] By the same token, I consider that the same observation applies to that racial group which can properly be described as the English. Thus in *Mandla* Lord Fraser said:

> "For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics."

He then set out certain characteristics which were relevant in determining whether a group was an ethnic group. He noted one as "being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups". That would seem to be an inapt description as a characteristic of the English as a racial group today, standing the passage of their history since 1066 A.D. as a recognised and permanent kingdom. In any event, for the English just as for the Scots, the cultural tradition which underpins them as a racial group is far broader and less coherent than that which is required by the second essential characteristic or condition demanded by Lord Fraser in *Mandla* for the constitution of an ethnic group. For these reasons I consider that the Employment Appeal Tribunal in *Power* (as it had previously done in *Mark Boyce and Others* v. *British Airways plc* (EAT/358/97)) was correct to hold that neither the English nor the Scots as racial groups had the necessary distinctiveness or community by virtue of certain characteristics derived from their origins alone such that they each constituted an ethnic group separately from or additional to their being a racial group measured by their separate and distinct national origins. The cohesiveness which in each case serves to identify them as a separate racial group is largely, but not exclusively, derived from history and geography but lacks that particular and individual distinctiveness of community which is a mark of the characteristics which Lord Fraser viewed as relevant to the constitution of an ethnic group.

[35] On the whole matter, I move your Lordships to refuse the appeal and remit the case back to the Employment Tribunal to proceed as accords.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Cameron of Lochbroom **019/18(16)/99**

Lord Marnoch

Lord Nimmo Smith

OPINION OF LORD MARNOCH

in

APPEAL

under section 37 of the Employment Tribunals Act 1996 (as amended)

by

BBC SCOTLAND

Appellants;

against

a decision of the Employment Appeal Tribunal dated 15 January 1999

in application by

MARK DOUGLAS SOUSTER

Respondent:

_____

Act: O'Neill, Q.C., Carmichael; Maclay Murray & Spens (Appellants)

Alt: Bovey, Q.C., Collins; Drummond Miller, W.S. (Respondent)

7 December 2000

[1] I agree with your Lordship in the chair that this appeal should be refused and that the case should be remitted back to the Employment Tribunal to proceed as accords. In view of their importance, however, I think it right to add one or two observations of my own regarding the various matters which were argued before us.

[2] In the first place, the appellants' argument that there cannot be racial discrimination within the meaning of the 1976 Act in relation to persons coming from different parts of the United Kingdom - and, in this case, England - in my view simply cannot get past the decision of the House of Lords in *Ealing London Borough Council* v. *Race Relations Board* [1972] A.C. 342. In that case the House of Lords construed "national origins" where it appeared in the definition of racial discrimination contained in section 1 of the Race Relations Act 1968 as meaning something other than a reference to nationality in the legal sense of citizenship. Thus discrimination in favour of "a British subject within the meaning of the British Nationality Act 1948" was held to be outwith the ambit of the 1968 Act. Section 1(1) of the 1968 Act was at that time directed against discrimination "on the ground of colour, race or ethnic or national origins". As to what was covered by "national origins" Lord Simon of Glaisdale was perhaps the most explicit of their Lordships and at p. 364A-B he said this:

> "Scotland is not a nation in the eyes of international law, but Scotsmen constitute a nation by reason of those most powerful elements in the creation of national spirit - tradition, folk memory, a sentiment of community. The Scots are a nation because of Bannockburn and Flodden, Culloden and the pipes at Lochnaw because of Jennie Geddes and Flora Macdonald, because of frugal living and respect of learning, because of Robert Burns and Walter Scott...to discriminate against Englishmen, Scots or Welsh as such would, in my opinion, be to discriminate against them on grounds of their national origins."

None of their Lordships took issue with this passage in Lord Simon's speech and at p. 360 Viscount Dilhorne stated, in terms, that "if it had been Parliament's intention, either in 1965 or 1968, to make discrimination between British subjects and aliens unlawful that could easily have been achieved by the addition of the words 'or nationality' after 'national origins'." Further, Lord Cross of Chelsea, at pps. 366-7, at one point identified the question before the House as being whether the words, "or nationality", should be regarded as having been inserted by implication into section 1(1) of the Act. When, therefore, we find that in section 3 of the 1976 Act the word "nationality" is inserted into the definition of what then becomes "racial grounds" it seems to me clear, beyond a peradventure, that this was done to "plug" the gap revealed by the decision in *Ealing*. Further, bearing in mind that "national origins" had only four years previously been interpreted by the House of Lords as referring to something other than nationality in the legal sense of citizenship, it seems to me to be also clear, beyond a peradventure, that it was the intention of Parliament that that phrase should continue to be so interpreted. In these circumstances, to argue, as did the appellants, that the inclusion of "nationality" as a "racial ground" in the 1976 Act should somehow be taken as altering the meaning of "national origins", as interpreted in *Ealing*, seems to me to be almost perverse. It follows, in my opinion, that the Employment Appeal Tribunal in *Northern Joint Police Board* v. *Power* [1997] I.R.L.R. 610 was entirely well founded in following *Ealing* and that, contrary to the appellants' submissions, *Power* was correctly decided. I may say that I am fortified in this view by the consideration that in *Tejani* v. *The Superintendent Registrar for the District of Peterborough* [1986] I.R.L.R. 502 the Court of Appeal in England understood the ratio of *Ealing* in precisely the same sense as that outlined above.

[3] In the second place if, as I think, it is correct that what is important is the perception of the discriminator, rather than the objective validity of his perception, it is clearly necessary to give the phrase "ethnic or national origins" its widest possible meaning. As it was put by Woodhouse J. in *King-Ansell* v. *Police* [1979] 2 N.Z.L.R. 531 at p. 537, (when dealing with the phrase, "colour, race, or ethnic or national origins" in the New Zealand Race Relations Act 1971):

> "The problem of racial discrimination is difficult to pin down in any final form of words and those that are used here have been left imprecise because...they are intended to completely embrace every aspect of that elusive and worrying subject-matter...To give effect to its important purpose of making every form of racial discrimination unlawful I am satisfied that the language must not be interpreted in any confined or restricted way but broadly and in terms of common-sense."

So read, I am, myself, far from clear that the Industrial Tribunal need do more than satisfy itself that an application falls within one or other branch of "ethnic or national origins" without troubling itself as to which, if either branch, is most apposite. Certainly, the grammar and punctuation would suggest this approach. Indeed, under the earlier legislation I note that "colour, race or ethnic or national origins" were

all regarded as a single "ground" of discrimination and they were, I think, so regarded, for purposes of the New Zealand legislation, by the New Zealand Court of Appeal in *King-Ansell cit. sup.* I refer particularly to the judgment of Richmond P. at pps. 533-4 and the judgment of Richardson J. at p. 542. The use of the word, "grounds", in the 1976 Act may not necessarily invalidate that approach but, even if it does, I cannot, as I say, see anything in the new wording which requires any choice to be made in relation to "ethnic or national origins". In any event, it seems to me that the question of whether the application falls properly under either or both branches of "ethnic or national origins" will almost always be a pure question of fact. In particular, I cannot, myself, discount the possibility that some discriminators - let us say those ignorant of Scottish history - will perceive the communal origins, traditions and culture of the Scottish people in "ethnic" rather than "national" terms. In saying that, I do not overlook either of the tests formulated by Lord Fraser in *Mandla* v. *Dowell Lee* [1983] A.C. 548 at p. 562 and, as for Lord Fraser's earlier reference to "racial flavour", it seems to me that this is really implicit in any discrimination against a communal group which otherwise satisfies these two tests. It should not be forgotten, either, that, at a later stage in his speech, Lord Fraser expressly adopted, by way of summing-up, what was said about "ethnic origins" by Richardson J. in *King-Ansell* at p. 543:

> "a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

[4] For myself, therefore, I am inclined to think that *Boyce* v. *British Airways (No. 1)* 31 July 1997 E.A.T. was wrongly decided in so far as broad assertions were made as matter of relevancy and "racial flavour" was regarded as a necessary "free-standing" component of "ethnicity". In my opinion it would have been more appropriate for the Tribunal to have invoked Rule 4 of their Rules of Procedure S.I. 1993/2688 (Schedule 1) to the effect of requiring further particulars of the "grounds" on which Mr. Boyce relied and of the facts and contentions relevant thereto. It may or may not have been the case that the matter could then have been disposed of as one of relevancy. Likewise, in the present case, I would have been for allowing the application to proceed, in the meantime, by reference to both national and ethnic origins.

[5] Lastly, in expressing the above views, I have not overlooked the appellants' submissions to the effect that the decision we have arrived at will give rise to great practical difficulties on the part of employers who seek to guard against so-called "indirect discrimination" under section 1(1)(b) of the 1976 Act. However, I am inclined to think that those difficulties are more imaginary than real. The present decision relates only to matters of principle and it remains to be seen how far actual discrimination is made out as matter of fact. At the same time, I can see that an extension of the law along the lines approved by the Court of Appeal in England in *Weathersfield Ltd* v. *Sargent* [1999] I.R.L.R. 94, [1999] I.C.R. 425 - namely by allowing the test of unfavourable treatment on racial grounds to be satisfied where a person is discriminated against by virtue of a third party's, rather than his own, racial characteristics - might well create real difficulties for employers. In the present case, for example, it was suggested at one stage that if the appellants were doing no more and no less than "pandering to a Scottish audience", this, of itself, could be discriminatory and struck at by the Act. As to this aspect of matters, it is perhaps sufficient to say that, despite what is said by Swinton Thomas L.J. at p. 434 of the I.C.R. Report, I, for my part, would

wish to think very seriously about the possible application of the rule in *Pepper* v. *Hart*, and a consequent reference to Parliamentary materials, before following a decision which was apparently taken without such assistance.

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OPINION OF LORD NIMMO SMITH

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7 December 2000

I agree that, for the reasons given by your Lordship in the chair, this appeal should be refused and that the case should be remitted back to the Employment Tribunal to proceed as accords.