IN THE EMPLOYMENT APPEAL TRIBUNAL **UKEAT/ 0190/14/KN**

B E T W E E N:

MR A CHANDHOK (1)

MRS P CHANDHOK (2)

Appellant

- and -

MS P TIRKEY

Respondent

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Intervener

SKELETON ARGUMENT ON BEHALF OF THE EQUALITY AND HUMAN RIGHTS COMMISSION

[*References in bold and square brackets are to the pages in the EAT bundle]*

1. This skeleton argument is submitted on behalf of the Equality and Human Rights Commission (the "Commission") in accordance with the directions of Mr Justice Langstaff in a letter dated 31 October [**94**]. The parties are referred to below as Claimant and Respondents, as they were before the employment tribunal (the "Tribunal").

2. The Commission is grateful for being granted permission to intervene. As the EAT is no doubt aware, it is an independent public body established under the Equality Act 2006 which has statutory duties, among other matters, to promote understanding of the importance of equality, diversity and human rights, and

work towards the elimination of unlawful discrimination.[1] It plays an active role in monitoring compliance of the UK with UN Treaties.

3. In making these submissions the Commission has not addressed all the issues raised in the Notice of Appeal or the Answer but has focussed on those issues on which it hopes it can assist the EAT and supplement the arguments.

4. **Central issue - summary**. The issue determined by the Tribunal was whether to strike out the Claimant's claim in §54 of the amended IT1 [**64**], in which the Claimant supplemented her claim of direct race discrimination under ss 9 and 13 of the Equality Act 2010 ("EqA") by contending that her ethnic origins included her status in the caste system as perceived by the Respondents. The Tribunal also dealt with other related pleadings - see §2 of reasons [**2-3**].

5. In the event, the Tribunal decided not to strike out those parts of the claim for the reasons set out in its conclusions [**14-15**], including that discrimination by descent was unlawful under existing case law on race discrimination (§26.2) and the breadth of the term "ethnic origin" in the EqA (§26.4). The Commission submits that the Tribunal was right not to do so. In outline it submits as follows.

   (1) For the purpose of a strike out application on the ground, presumably, that the claim stood no reasonable prospect of success under rule 37(1)(a) of the 2013 Rules, the Tribunal was correct to proceed on the assumption that the Claimant proved her case.

   (2) If the Respondents believed the Claimant (i) to be the member of a separate race or ethnic group, (ii) to be descended from what they believed to be a distinct racial or ethnic origin or (ii) not to be a member of a distinct racial or ethnic group, and treated her less favourably because of their belief, this would be direct race discrimination for the purpose of s.9 EqA read with s.13 EqA. The basis for the Respondents' belief is irrelevant, whether religious or otherwise: such treatment is direct race discrimination owing to racial or ethnic origin. The existing

[1] See ss 9-10 of the Equality Act 2006

provision of the EqA protect against this form of discrimination, in accordance with normal principles of domestic law.

(3) The Claimant contends that she was a member of the Adivasi people, recognised as a distinct servant caste with their own appearance and culture, that she was perceived to be a member of a separate caste by the Respondents, and that she was treated less favourably as a result of that perception. In that light it was not appropriate for the Tribunal to strike out the case prior to a full hearing on the facts: it requires a full hearing to determine whether in fact the case on direct race discrimination is made out.

(4) This argument is reinforced by the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), which expressly includes discrimination on the basis of descent, and which the Respondents do not dispute covers caste-based discrimination. In accordance with ordinary principles of construction, domestic law in the field of ICERD should be interpreted, if reasonably possible, to be compatible with that Convention; s.9 of EqA can be so interpreted.

(5) The submission is also supported by Council Directive 2000/43/EC (the "Race Directive"), implementing the principle of equal treatment between persons irrespective of racial or ethnic origins. The recitals to the Directive, the international human rights instruments to which they refer and the general principles of EU law show that the Directive has a broad, not narrow, reach and applies to descent-based discrimination. The practical impossibility of separating discrimination on grounds of race or ethnicity from discrimination on grounds of descent show that the Race Directive is intended to cover descent-based discrimination too.

(6) No preliminary reference is necessary to the Court of Justice of the EU (the "ECJ"), above all prior to a full hearing on the facts which would be necessary to provide the factual circumstances to the ECJ.

(7) The existence of, at the material time, a power in s.9(5) EqA to extend the

reach of that section to include "caste" discrimination is an insufficient basis upon which to restrict the scope of s.9(1). It is inconceivable that Parliament intended a subsection which potentially extended the reach of s.9 to have the effect of restricting its scope until such legislation is passed. Nothing in the legislative history points to that result. Such an interpretation would in some circumstances be incompatible with the Race Directive as well as with ICERD.

Legal and Factual Context

6. **Facts**. The facts alleged by the Claimant for the purpose of the claim are set out in the amended ET1 [**45-68**] and her witness statement for the preliminary hearing [**100-102**]. The relevant factual background to the Tribunal's decision is at §§3-5 and §§8-10 of its reasons [**3-5**], explaining the Claimant's evidence about her membership of the Adivasi people, including they are regarded as a servant caste and wear distinct clothing, and that the Respondent enquired about her caste but would have known it from her dark skin, poor clothes and dialect (§4). At §9 the Tribunal set out information about the Adivasi people, described as a "heterogeneous set of ethnic and tribal groups claiming to be the indigenous or aboriginal population" of India, whose treatment has been linked with the Dalits and who have protected status under the Indian Constitution. The Claimant complains of various acts of discriminatory treatment up until her employment terminated in November 2012: Tribunal §1 [**2**].

7. **Caste and EqA**. Race is a protected characteristic for the purpose of the EqA (s.4). Race is not exhaustively defined in s.9 but "includes" colour, nationality, and ethnic or national origins. This is similar to the definition in s.3 of the Race Relations Act 1976 ("RRA").

8. The original Equality Bill contained no reference to caste discrimination.[2] Eventually, however, the Government supported an amendment from the Lords, adding a power to s.9(5) by which a Minister "may" amend the EqA to "provide for cast to be an aspect of race". The Government also commissioned research on

[2] The history of the debates is usefully summarised in D Pyper, *The Equality Act 2010: Caste Discrimination* (9 April 2014: House of Commons Library).

caste discrimination by the National Institute of Economic and Social Research (NIESR).[3]

9. Subsequently, following votes in the House of Lords to add caste as an aspect of race in s.9(1) EqA, the coalition government introduced s.97 of the Enterprise and Regulatory Reform Act 2013 ("ERRA"), which amended a s.9(5) so as to provide that a Minister "must" amend s.9 to provide for caste to be an aspect of race. This subsection came into force on 25 June 2013, after the Claimant's employment terminated: see s.103(2) ERRA. By virtue of s.97(5) ERRA a Minister of the Crown may carry out a review of the effect of s.9(5) and any orders made under it. By s.97(7) ERRA, if the Minster considers it appropriate in the light of the outcome of such a review, the Minister may by order repeal or amend s.9(5) EqA.

10. The Government's original programme and timetable provided for a public consultation with legislation to be issued in the summer of 2015.[4] However, this timetable has been subject to delay for two reasons. First, the Government is considering how to conduct research to establish "baseline data" on caste discrimination; second, it is awaiting developments in the present litigation to see whether caste discrimination is already unlawful under the EqA.[5]

11. "Caste" is not defined in the EqA. It is a contested concept with no single definition, primarily associated with South Asia. As summarised by a leading academic writer on the subject, Annapurna Waughray:[6]

> There is no agreed sociological or legal definition of caste, but a number of salient features can be identified. Castes are enclosed groups, historically related to social function, membership of which is involuntary, hereditary (that is determined by birth) and permanent....Unlike class, it is not generally possible for individuals or their descendants to move into a different caste. Caste is governed by

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[3] See Metcalf and Rolfe, *Caste Discrimination and Harassment in Great Britain*, December 2010 (NIESR).

[4] See the Government Equalities Office, *Caste Legislation Introduction - Programme and Timetable* (July 2013) [**96-99**].

[5] See *Hansard* 9 July 2014 C139WH.

[6] See A Waughray, Capturing Caste in Law: Caste Discrimination and the Equality Act 2010 (2014) 14 *Human Rights Law Review* 359-379.

> rules relating to comensality (food and drink must only be shared by others of the same caste) and is maintained by endogamy (marriage must be within the same caste). It entails the idea of innate characteristics and hierarchically graded distinctions based on notions of purity and pollution, with some groups considered to be ritually pure and others ritually impure. A crucial feature of caste in South Asia is the concept of 'Untouchability', whereby certain people are considered to be permanently and irredeemably polluted and polluting, hence 'Untouchable', with whom physical and social contact is to be avoided. Despite the notional nature of caste, Untouchability is conceptualised as an innate, physical property separating the untouchables from the rest of society.

The term "caste" encompasses the *varna* concept in Hinduism based on the four classes in Sanskrit texts, outside of which are the Dalits; the South Asian concept of *jati*, found in South Asian religious communities; and the *biradari*, most in the Punjabi region.[7] A workable explanation of caste is also included in the Explanatory Notes to the EqA, set out in the research of the NIESR[8] and cited by the Tribunal at §8 [**4**].

12. There is, therefore, no single definition of "caste". The label covers many different empirical social structures and many different belief systems and cultures, as well as many different perceptions about members of a caste, emphasising the need for a hearing on the facts, and not determination on a strike out. This applies as much to the Claimant's claim as it does to any other claim labelled as caste discrimination.

Submission - domestic law

13. The Commission's first contention is that many (if not all) forms of caste discrimination, including the kind alleged by the Claimant, fall within the conception of race discrimination in the EqA as a matter of ordinary domestic law. However, this matter can only be determined at a full hearing with evidence about e.g. the Claimant's ethnic origins and the Respondents' perceptions of her racial or ethnic origins. Hence the Tribunal was right not to strike out the relevant parts of the pleaded claim (see, generally in the discrimination sphere

[7] See Waughray note 6 above at p 363.

[8] See Metcalf and Role, *Caste Discrimination and Harassment in Great Britain* (NIERS: December 2010)

the well-know comments of Lord Steyn in ***Anyanwu v South Bank Student Union*** [2001] ICR 391 at §24 of the importance of not striking out discrimination claims "except in the most obvious cases").

14. **Ordinary domestic law**. The previous definitions of "racial grounds" and "racial group" in s.3(1) RRA was in similar terms to s.9 EqA, though it also included "race" as a concept. The test for establishing what is an ethnic group, and the cognate term of ethnic origins, for the purpose of s.3(1) RRA is well-known: see ***Mandla v Lee*** [1983] 2 AC 548 per Lord Fraser at 562D–563B. The test, so far as Counsel is aware, has never been doubted. The Commission draws attention to the following in his speech:

    (1) The term "ethnic" should be construed widely, in a broad cultural/historical sense: 563D.

    (2) Membership of an ethnic group can occur by birth or adherence: see 562H-563A.

    (3) Discrimination can arise from a person's subjective perception that another belongs to a racial or ethnic group, even if that perception is erroneous: 563B.[9]

15. Subsequent case-law has confirmed the application of Lord Fraser's criteria in ***Mandla v Lee***: see especially ***Regina (E) v Governing Body of JFS*** [2010] 2 AC 728, in which the Supreme Court held that the term "ethnic origin" in s.3 RRA include descent which can be traced to an ethnic group (per Lord Phillips at §§33, 42-45; Baroness Hale at §66; Lord Mance at §§81-84). Moreover:

    (1) The flexible test in ***Mandla*** is broad enough to encompass not only an ethnic group in accordance with the criteria of Lord Fraser but also the narrower test, used e.g. by the CA in ***Mandla***, of descent from a common ancestry (or, to be more accurate, perceived descent from such ancestry):

[9] See too the citation from the New Zealand case, ***King-Ansell v Police*** [1979] 2 NZLR 531 at 564B-D, endorsed by Lord Fraser at 564E.

see Lord Mance at §82.

(2) Confirming ***Mandla***, ***JFS*** makes clear that race discrimination can arise because a person subjectively perceives another to be a member of an ethnic group: see Lord Mance at §85, citing ***English v Thomas Sanderson*** [2009] ICR 543.[10] Indeed, the worst forms of race discrimination have frequently been justified by false assertions or beliefs, including religious beliefs, about the inferiority of other groups who are perceived as different - see the example given Sedley LJ in the Court of Appeal in ***JFS***, cited by Lord Clarke at §150.

(3) It is not necessary that the victim of discrimination is a member of the ethnic group so long as he or she is a descendant of such a group (see Lord Phillips at §§44-45) - or, it follows, is believed to be.

(4) Even if the relevant group today is not an ethnic group on the basis of the ***Mandla*** criteria, if the test of membership of that group focuses on descent from a particular people, that is itself a test based on ethnic origins: Lord Mance at §86.

(5) The logic of ***JFS*** applies equally whether the claimant is discriminated against because of his or her membership or descent from an ethnic group or people, or non-membership or non-descent from such a group: see Baroness Hale at §60.

16. The decisions in ***Mandla v Lee*** and ***JFS*** must apply equally to the conception of race discrimination in EqA. The two Acts use the same term, "ethnic origin", share the same purpose, and the policy of both Acts is that individuals should be treated as individuals and not have assumptions made about them, such as false stereotypes, based on their actual or perceived membership of a group, including as a result of birth: see Lord Mance in ***JFS*** at §90.

17. Applying the criteria in ***Mandla v Lee*** and the reasoning in ***JFS*** to the Claimant's

[10] See Sedley LJ at §§39-40 and Lawrence Collins LJ at §46.

case shows there is a serious issues to be tried, including whether the Claimant's less favourable treatment was because (i) the Adivasi constitute an ethnic group of which the Claimant was a member or a descendant; (ii) the Claimant was perceived by the Respondents as a member or descendant of that or another ethnic group; and/or (iii) the Claimant was not, or was perceived as not being, a member of another ethnic or racial origin (e.g. her lack of "high caste" status). In the event that her less favourable treatment was because of those reasons, her claim would be a good one under the RRA.

18. Not all forms of unequal treatment based on descent amount to unlawful discrimination under the EqA. The examples given in ***JFS*** were of discrimination because a person was not the son of a peer or the son of a member of the SOGAT union,[11] where a link to an actual or perceived ancestral ethnic group (or other protected characteristic) is absent. The Commission doubts, however, that these examples will ever be relevant to discrimination based on caste. Whether the discrimination arises because a "caste" is identified as different owing to religious belief, to beliefs of innate difference, to beliefs on descent from a different people or to a distinct ethnic identity, in each case the ***JFS*** test is likely to be met. But this serves only to emphasise the need for a full hearing, to decide whether the Claimant was treated as she alleges and, if so, the reasons and beliefs which led to her treatment.

19. **ICERD**. The above argument is strengthened as a matter of pure domestic law by reference to the ICERD.

20. Ratified by the General Assembly of the UN on 21 December 1965, the ICERD entered into force on 4 January 1969 (Article 19). It defines racial discrimination in Article 1.1 on five grounds as follows:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the

[11] See Lord Phillips at §29. See too Baroness Hale at §66.

political, economic, social, cultural or any other field of public life.

State parties undertake to pursue a policy of eliminating race discrimination (Article 2.1) and providing effective remedies (Article 6). The Committee for the Elimination of Racial Discrimination ("CERD"), established by Article 18, monitors compliance with the ICERD. ICERD was ratified by the UK in 1969, and thus has bound the UK since that date.

21. There is a strong presumption in favour of interpreting English law in a way which does not place the UK in breach of its international treaty obligations: see ***Hounga v Allen*** [2014] ICR 847 at §50. The words of domestic legislation in the field of the UK's international obligations are to be construed, if they are reasonably capable of bearing such as meaning, as intended to carry out the obligation: see ***Garland v British Rail*** [1983] 2 AC 751 per Lord Diplock at 771A-C; ***AH v West London Mental Health Trust*** [2011] UKUT per Lord Carnwarth at §16 (referring to the Convention on Persons with Disabilities). This rule does not apply, of course, where Parliament makes it plain that it intends to pass legislation inconsistent with an international obligation.

22. The Respondents do not dispute that caste discrimination falls within Article 1.1. ICERD; their argument is that it only falls within the category of "descent": see Notice of Appeal at §11-12 **[10]**. The Commission agrees that caste discrimination has been treated as an aspect of "descent" in Article 1.1 (cf. Lord Mance in ***JFS*** at §81). Thus:

    (1) The CERD "strongly reaffirmed" in its General Recommendation XXIX[12] ("GR 29") that discrimination based on "descent" under Article 1 includes discrimination "against members of communities based on forms of social stratification such as caste and analogous systems which nullify or impair their equal enjoyment of human rights." It recommended, too, that State parties took steps to identify "descent-based communities who suffer from discrimination, especially on the basis of caste" and drew attention to factors that allow such communities to be recognised, including

[12] The CERD first affirmed in 1996 that discrimination on the basis of descent includes discrimination based on caste: see Waughray note 6 above at p 367.

inability to alter inherited status, socially enforced restrictions on outside marriage and dehumanising discourses.

(2) In resolution 2000/4 the UN Sub-Commission on Human Rights declared that discrimination due to work and descent is a form of discrimination prohibited by international human rights law, based on Article 2 of the Universal Declaration of Human Rights. In 2001 the first Working Party established as a result addressed caste-based distinctions as the most notable manifestation of discrimination due to descent and listed the various manifestations of such discrimination.[13] A subsequent Working Party report in 2003 examined communities not traditionally referred to as "castes" but identified causal factors common to caste-based and other forms of descent-based discrimination, including descent as a defining criterion for membership of the group, traditional menial roles often associated with religious beliefs, endogamous isolation, being regarded as "polluted", hierarchical ranking based on ideas of "purity", basis in religious belief and ascribing a different "racial" or ethnic origin to the dominant community.[14]

(3) Third, as Waughray notes, since 2003 the CERD has called upon the UK government to protect against caste-based discrimination.[15]

23. The Commission does not accept, however, the second step in the Respondents' argument. It is irrelevant that UK law does not explicitly prohibit "descent" as a form of discrimination in s.9 EqA. The EqA should be interpreted if reasonably possible to protect against the forms of racial discrimination which fall within the ICERD's conception of descent-based discrimination: see the authorities cited in §21 above. It is the *end*, not the means, that matters.

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[13] See Goonesekere *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities*, UN Doc. E/CN.4/Sub.2/2001/16 at §7. It listed the various manifestations of such discrimination as including prohibitions on intermarriage, physical segregation, and social prohibitions on physical contact and sharing utensils based, it appears, on Hindu scriptures and widespread social beliefs: see §§8-10.

[14] See Eide and Yokoata, *Prevention of Discrimination*, UN DoC. E/CN.4/Sub 2/2003/24 at §§45-51.

[15] See note 6 above, at p 368.

24. The Commission submits that the concept of "ethnic origin" in s.9 EqA is perfectly capable of accommodating the forms of descent-based discrimination identified by the CERD and the UN Sub-Commission Working Parties. First, the "broad, flexible" test in ***Mandla*** can accommodate a test based on actual or perceived common ancestry, however remote in time, which is often central to descent-based discrimination (per Lord Mance in ***JFS*** at §82). Second, the causal factors identified e.g. in §1(a) of GR29 and by the 2003 Working Party as associated with descent-based discrimination are precisely the sorts of matters which a tribunal would and should examine in applying that "broad, flexible" test - either to decide that the claimant is perceived as a member of a particular ethnic minority or is perceived as <u>not</u> belonging to another, perhaps dominant, ethnic group.

25. The Commission, at present, finds it hard to think of an example of caste-based discrimination which would <u>not</u> be caught by direct race discrimination. Whenever that discrimination is the result of a belief that another caste is descended from a distinct ancestry, or has its own ascribed characteristics (based on e.g. religious of social beliefs of difference), this is likely to amount to direct race discrimination, given the flexible test under domestic law and the purpose of the legislation. But, at the risk of repetition, this issue does not arise at the strike out stage and can only properly be addressed after a full hearing with evidence about the matter.

<u>Submission - the Race Directive</u>

26. For reasons already set out above, the Commission considers it would be premature to make a reference to the ECJ under Article 267 before there has been a full hearing, to see if the Claimant's claim can be addressed under domestic law without need of any reference to the ECJ. Prior to that stage, it is not clear if a reference to the ECJ is "necessary to enable [the tribunal] to give judgment" within the meaning of Article 267, and the absence of full factual material will hamper observations from the parties, the Commission and Member States. The ECJ has become increasingly strict that it has sufficient information about the factual circumstances on which a reference is based: see e.g. Case C-388/04, ***Criminal Proceedings against Placanica*** [2007] 2 CMLR at §34.

27. Subject to that fundamental point, if necessary the Commission will submit that it is plain the Race Directive is intended to protect against discrimination based on descent, including caste-based discrimination, and/or to protect against the sort of discrimination alleged by the Claimant. The argument for the Respondents that there is real doubt whether Directive is intended to protect against discrimination based on descent - see Notice of Appeal at §§17-22 - is not sustainable. The matter is *acte clair*.

28. First, the Directive refers in the third recital to the right to equality before the law and protection against discrimination recognised by, among others, the Universal Declaration of Human Rights, the ICERD, the UN Convention on Civil and Political Rights and the ECHR. Those human rights provisions chime together: all point to a wide conception of what counts as race discrimination, which should therefore embrace descent-based discrimination. Thus:

    (1) The ICERD expressly embraces discrimination based on descent in Article 1.1, and the CERD has made clear this includes caste-based discrimination: see above. The Respondents do not dispute this.

    (2) The Sub-Commission on Human Rights has made clear that Article 2 of the Universal Declaration of Human Rights protects against descent-based discrimination (see Resolution 2000/4) (which includes, as the Working Papers referred to above show, caste-based discrimination).

    (3) The International Covenant on Civil and Political Rights recognises that all persons are entitled to the equal protection of law "without any discrimination" and to equal and effective protection against discrimination "on any ground such as race, colour, language, national or social origin...or other status" (Article 26).

    (4) In considering discrimination under Article 14 of the ECHR, the Strasbourg Court has explicitly referred to and adopted the definition in Article 1.1 of the ICERD (as well as the wide definition in the Policy Recommendation No. 7 of the Council of Europe's European Commission against Racism and Intolerance) and, accordingly, has adopted a very

wide conception of race discrimination and ethnicity: see e.g. ***Timishev v Russia***[16] at §§33-34, 55-56. The width of its conception of discrimination is clear from §55 where the Court said:

> Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural or traditional origins and backgrounds.

The Court went on to make clear that discrimination on account of perceived race or ethnicity falls within Article 14 (§56) - especially relevant to race which is a social construct. Thus ***Timishev*** shows (i) there is no bright line between perceived race/ethnicity (or, one might add, between perceived race and perceived descent from common ancestry); (ii) the factors relevant to ethnicity are wide and themselves have reference to origins; (iii) in determining the scope of Article 14, the Court has regard to the ICERD and its wide definition of race discrimination.

29. The Directive should, therefore, be interpreted in accordance with those international instruments referred to in its recitals, all of which indicate a wide scope to what should be included within discrimination on racial or ethnic origin, sufficiently wide to include within it descent-based discrimination, and caste discrimination of the sort alleged by the Claimant.

30. Second, other provisions and principles of EU law further show that the concept of race discrimination in the Directive should be interpreted broadly. Thus:

(1) Article 2 of the Treaty makes clear that respect for equality and non-discrimination are the most fundamental rights protected by the EU. So too, by Article 6(3), referred to in recital (2) to the Race Directive, are rights protected by the ECHR, including therefore the non-discrimination provision in Article 14 ECHR as interpreted in ***Timishev***. The ECJ has

[16] Application No. 55762/00 and 55974/00; judgment final 13 March 2006.

particular regard to these fundamental rights, especially the ECHR and the case-law of the European Court of Human Rights: see, for example, ***Schmidberger v Austria*** [2003] 2 CMLR 34 at §§71-73; AG Sharpston in ***Volker and Marcus v Land Hessen*** [2010] ECR I-11063 at §64.

(2) The Race Directive gives expression to the principle of equality which is a fundamental principle of EU law, and which points to a wide interpretation of the scope of the Race Directive: see, in the related sphere of sex discrimination, ***P v S*** [1996] ICR 795 at §§18-22; ***Del Cerro Alonso v Osakidetza*** [2008] ICR 145 at §§26-28 and §§36-38.

(3) Similarly, non-discrimination and equal treatment in employment, including on grounds of age and therefore race, are general principles of EU law, based on the various international instruments referred to above, and which are given specific expression in the Directives: see ***Küküdeveci v Swedex*** [2010] IRLR 346 per (then) AG Tizzano at §§76-81, ECJ at §§20-22.

(4) Following the Treaty of Lisbon, Article 6(1) TEU provides that the Charter of Fundamental Rights of the EU has the same legal value as the Treaties. By virtue of Article 21(1), "any discrimination based on any ground such as....race, colour, ethnic or social origin, genetic features, language, religion or belief...membership of a national minority [or], birth....shall be prohibited" (emphasis added). The width of those words is evident. By Article 51, the rights and principles of the Charter are to be respected and observed by the institutions of the EU, including the ECJ, when it interprets the Race Directive.[17] A restrictive interpretation of racial or ethnic origins would be in tension with Article 21 of the Charter.

31. Third, there is no bright line in any case between discrimination based on "descent", as set out in Article 1.1 ICERD, and discrimination based on "racial or ethnic origin" (Article 2.1 of the Race Directive). Recital (6) to the Race Directive

[17] See the helpful summary of AG Trstenjak in ***Dominguez v Centre Informatique*** [2012] IRLR 321 at §72-74.

makes clear that for the purpose of the Directive theories based on the factual separation of human races are wrong, so that the Directive treats race as a social construct. The test for racial and ethnic origins must necessarily be flexible, as shown e.g. by the domestic authorities and ***Timishev***. The purposes of the Directive indicate that the test is a wide one. It would generate impossible legal uncertainty to hold, on the one hand, that perceived racial and ethnic origins fall within the Directive but, on the other, a separate category, of descent- or caste-based discrimination, falls outside it.

32. The preliminary facts illustrate the point well. The discrimination alleged by the Claimant, though labelled by reference to caste in §54 of the pleading, is likely to involve a complicated set of factual findings about what the label "caste" in fact means. The attempt to carve out an exception for treatment based on perceptions of "descent" compared to treatment based on beliefs about "ethnic or racial origins" is, in practical terms, impossible to apply. Origin, after all, embodies within it the notion of descent. If A believes B is descended from ethnic group or people Z and treats B less favourably as a result, is that discrimination because of perceived racial or ethnic origin or descent?

33. In its Notice of Appeal the Respondents contend that the Race Directive potentially sought to include only "race" and "ethnic origin" from the ICERD, but to exclude the other terms in Article 1.1 ICERD (colour, descent and national origin): see §18 [**24**]. However, in ***Centrum voor Gelijkheid v Firma Feryn*** [2008] ICR 1390 the ECJ wasted little time in deciding that public statements by a firm that its customers did not want "immigrants" or "Moroccans" constituted direct discrimination: see §25. On the Respondent's argument, if this were categorised as discrimination because of "descent" - on the basis that the "immigrants" referred to were descended from Moroccans who moved to Belgium - it fell outside the Directive. But in fact race discrimination cannot be placed in five hermetically sealed compartments: the concepts shade into each other - see ***Timishev*** - and factors relevant to one category will be relevant to another.

34. It is trite that the EqA must, so far as is possible, be interpreted to achieve the result sought by the Race Directive: see ***Rowstock Ltd v Jessemy*** [2014] ICR 550 per Underhill LJ at §§40-41. There is no difficulty in interpreting s.13 so as to

include descent-based discrimination or in accordance with the Race Directive: the section is an inclusive not exhaustive list; it adopts similar language to the Directive; and descent can in any case be seen as part of the term "ethnic...origins" :see Lord Kerr in ***JFS*** at §108.

The Respondents' argument - s.9(5) EqA

35. In the notice of appeal [**20-21**]the Respondents place much reliance on the existence of s.9(5) EqA, providing that a Minister may/must[18] amend s.9 to provide for caste to be an aspect of race. The Respondents contend that the Tribunal decision ousts the will of Parliament, and renders s.97 ERRA void, because the section shows that Parliament intended to "preclude caste discrimination from its auspices until further democratic consultation has taken place" (§2). Hence, it is suggested, the decision in ***JFS*** should not apply to the EqA (§4).

36. The Commission submits that s.9(5) will not bear the weight which the Respondent seeks to place on it. It provides no sufficient basis for restricting the interpretations set out above both on ordinary rules of domestic law and in order to comply with the Race Directive.

37. First, the purpose of s.9(5) is, plainly, to extend what is embraced within s.9 not to restrict what otherwise fell within the scope of s.9(1).

38. Second, strictly, at the time the Claimant's employment terminated, s.9(5) stated that a Minister "may" by order amend s.9 to include caste in race. It is inconceivable that a permissive power to extend or clarify the reach of the section should be read as restricting its coverage. Viewed in that historical light, nor can the amendment making s.9(5) into a duty have that effect: it merely requires the extension of the subsection.

39. Third, such a result is contrary to the purpose of and history to the EqA. It has the surprising result that, while many if not all forms of caste-based

[18] Depending on the version in force at different times - in the case of the Claimant, the first version.

discrimination could have been caught by the terms of s.3(1) RRA, which was an exclusive definition, the re-enactment of the almost the same words in s.9(1) EqA,[19] which is a wider, inclusive subsection, must be read subject to s.9(5). If Parliament had intended such a radical result, potentially restricting the previous understanding and case-law of what was included in race, s.9(1) would say so explicitly. It would say, for example "subject to s.9(5)" or "provided always that race shall not include caste within the meaning of s.9(5)" .

40. Fourth, as already submitted, it is not possible conceptually or factually to draw neat distinctions between discrimination because of caste and discrimination because of ethnic origins. The two overlap. It is inconceivable that Parliament intended to allow a new defence to a claim of race discrimination that, in essence, this was "caste" discrimination. Suppose, for example, the child in ***JFS*** was excluded from the school because he was believed to be a descendant of a group who possess a distinct ethnic identity as well as being viewed as a distinct caste. That discrimination would, plainly, have been caught by the RRA, just as in the ***JFS*** case. Without the existence of s.9(5) it would plainly have been caught by the EqA. Yet, on the Respondents' argument, the employer would now have a good defence to the claim. The bizarre logic of the Respondents' case is that a provision designed to extend the scope of EqA has the effect of restricting it.

41. Fifth, as set out above, domestic law should be interpreted consistently with the UK's international obligations, including the ICERD. This can be done simply by treating s.9(5) as a power to supplement or clarify s.9(1), not to restrict it. Such an interpretation is reasonably possible on any view. There is no basis for an argument that Parliament intended not to comply with ICERD or other provisions of international law in enacting the EqA or s.9.

42. Sixth, the Commission submits that the meaning and effect of s.9(1) is not ambiguous or obscure for the purpose of ***Pepper v Hart***. But if the EAT considers it necessary to refer to Hansard, the Commission submits that the statements made by Ministers or on their behalf show that the subsection was never intended to restrict what was caught by s.9(1). On the contrary, the statements

[19] The only omission is "race".

show that the Government considered that caste-discrimination could already be dealt with by the existing law. Thus, answering a question at the Second Reading, Harriet Harman, the Minister for Women and Equality, said that discrimination by caste and descent was already covered by the law.[20] When, in the Committee Stage in the Lords several peers argued for an express inclusion of "caste" to make the position clearer;[21] in response Baroness Thornton, for the Government, stated that more research was needed to see if caste discrimination related to areas covered by discrimination law and whether the current law already provided redress.[22]

43. Seventh, such a result is incompatible with EU law. It is clear, as set out above, that the conception of race discrimination in the Directive is a wide one, owing to the human rights instruments referred to in recitals to the Directive and the general principles of EU law. In any case domestic law must protect against discrimination on "racial or ethnic origin" within the meaning of Article 1 of the Directive. But if s.9(5) is to operate so as to remove from s.9(1) discrimination on grounds of ethnic origin which would otherwise be caught by s.9, it has the result that the protection given by the EqA will not be, in some cases, co-extensive with that in the Directive. Take the present case. Ignoring s.9(5), the Claimant may have a good claim under s.9(1) and s.13 EqA and the Race Directive, on the basis of discrimination owing to her "ethnic origins". If her claim is debarred because it could also be categorised as discrimination on grounds of caste, this would be incompatible with the Directive, which contains no exclusion for caste-based discrimination. There is no difficulty in interpreting s.9 to avoid this result - by treating s.9(5) as an extension of s.9(1) not a restriction of it.

Conclusion

44. The Commission's position is, in summary, that the Tribunal was undoubtedly right not to strike out the claim. On the alleged facts, it cannot be argued that the claim has no reasonable prospect of success, as the pleaded claim falls squarely within the concept of direct race discrimination as a matter of domestic law and

[20] See the citation from HC Deb 11 May 2009 C652 in Pyper, above.

[21] See the citations in Pyper, above, at pp 10-12.

[22] See HL Deb 11 January 2010 C342-45 (quoted in Pyper above).

EU law. No reference to the ECJ is required because such a reference is (i) premature and/or (ii) unnecessary in any event.

45. The Commission has not addressed other points which were made before the Tribunal - including e.g. the direct effect of the Charter of Fundamental Rights and the potential relevance of religious discrimination - but will, of course, assist the EAT if it wishes it do so.

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14 November 2014