No reverse burden race cases concerning discrimination on grounds of colour

A recent EAT decision upholding the current two-tier system in discrimination claims has exposed a flaw in the Race Relations Act 1976, which requires necessary and urgent reform.

By Sarah Wilkinson

The EAT in *Okonu v G4S Security Services (UK) Ltd* **(**UKEAT/0035/07/JOJ) concluded that section 54A RRA 1976 only shifts the burden of proof in cases involving discrimination on grounds of race, ethnic or national origins and does not shift the burden in cases of discrimination on grounds of colour or nationality. The EAT's reasoning was as follows.

1. Parliament decided to implement the burden of proof aspect of Council Directive 2000/43/EC by Regulation 41 of the Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1626.

2. The 2003 Regulations were made under paragraph 2 of Schedule 2 to the European Communities Act 1972 and a statutory instrument made under the 1972 Act can go no further than is required by the EU legislation which it is intended to implement.

3. Directive 2000/43/EC could not be of direct effect in the case because the Respondent was not an emanation of the state.

4. No purposive construction could override the clear words of section 54A(1)(a) by inserting the words "colour" and "nationality" into that paragraph.

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It is hard to believe that either the architects of the Directive or the government intended that discrimination on grounds of colour and nationality should be treated differently as types of discrimination to discrimination on race, ethnic or national origins since all five elements (colour, nationality, race, ethnic and national origins) are present in the definition of "*racial grounds*" in section 3(1) RRA 1976. 'Colour and nationality' are not inherently easier to prove for claimants than the other categories such that employers should escape the reversed burden in those cases. The government, however, acknowledged that there would be a two-tier system during the passage of the 2003 Regulations.

But is the EAT right to uphold this two-tier system on the grounds it gave, even though its decision appears to accord with parliamentary intention? Perhaps not. Section 54A applies where a complaint is that the respondent has committed an act of discrimination, on grounds of *'race or ethnic or national origins'*. Racial discrimination is defined in section 1(1) RRA 1976 as on *'racial grounds'*. Section 3(1) RRA 1976 defines *'racial grounds'* as *'colour, race, nationality or ethnic or national origins.'* Section 54A therefore leaves out *'colour'* and *'nationality'* from the section 1(1) definition but includes *'national origins'*. The EAT reasoned that the amendments to section 54A implementing the Directive could not go further than the Directive. But they already had gone further: the Directive only refers to *'discrimination on grounds of racial or ethnic origin'*. Those who drafted the amendment to section 54A added *'national origins'* which is not present in the Directive.

So either point 2 above is wrong or, on the EAT's argument, the implementing Regulations are *ultra vires*. As to point 2, Article 6(1) of the Directive provides, which is common in Directives, that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive. It appears that the framers of the implementing Regulations did just that: they included *'national origins'* as well as *'racial or ethnic origins'*. That argument does not, however, answer why they excluded colour and nationality. The absence of *'nationality'* can be explained (i.e. my country of citizenship as opposed to my country of origin). Paragraph (13) of the Preamble to the Directive provides *'This prohibition of*

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discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality.' Article 2 of the Directive implements this '*This Directive does not cover difference of treatment based on nationality.'*

The absence of '*colour*' in both the Directive and the amending Regulations remains unexplained. In the face of express government pronouncements that colour was to be excluded, the EAT was right to come to its conclusion but its reasoning is flawed. The government could have added *'colour'* to section 54A by relying on Article 6(1) of the Directive. If point 2 were right, '*national origins*' should also be out of section 54A. However, since government expressly did not include *'colour'* even though it had the power to do so, it is suggested that further amending Regulations are required to close the lacuna of '*colour*' and that this is a necessary and urgent reform. An employee should not be deprived of the reversed burden of proof because his discriminators failed to promote him on the grounds that he is '*black'* rather than because he is '*African'*.

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