PAPERS

Race and Sex Discrimination in English Law

By The Rt Hon Lord Browne-Wilkinson, Lord of Appeal in Ordinary, United Kingdom

Introduction

In the absence of any written Constitution guaranteeing human rights, English common law failed to develop any general law to protect the individual as such, from any adverse discrimination on the grounds of race, colour, creed or sex. In consequence, the modern law is based on statute, primarily the Race Relations Act 1976 and the Sex Discrimination Act 1975. (I ignore for present purposes the statutory provisions which make criminal acts of incitement to racial hatred and similar conduct which have had little practical impact.)

The two Acts are very similar in both their structure and their wording. They are, to a substantial extent, a statutory enactment of the discrimination law established by the Courts of the USA under its Constitution. English law has also been subject to a further important external influence. In relation to sex discrimination, the United Kingdom is subject to the law of the European Community as interpreted by the European Court of Justice. Article 119 of the Treaty of Rome (and directives made thereunder), prohibits discrimination on the grounds of sex. The European Court of Justice has been more activist than the English Courts in its approach to combating sexual discrimination. In consequence, the ambit of the protection afforded by the Sex Discrimination Act (and its sister statute, the Equal Pay Act 1970) has been much extended by decisions of the European Court of Justice. Since the structure and wording of the two statutes are very similar, a wide construction of the Sex Discrimination Act imposed on the English Courts by the decisions of the European Court of Justice is almost inevitably reflected by the same construction being given to the corresponding provision in the Race Relations Act.

In this paper I propose to give as short an account as possible of the English law in general and then consider the approach of English law to certain specific issues which are bound to arise in any jurisprudence dealing with discrimination.

Outline of English law

(a) <u>Generally</u>

Both Acts are structured in the same way. Each first defines the word "discrimination". Then it specifies in considerable detail the fields of conduct in which the Acts render it unlawful to discriminate. There is no general principle that it is unlawful to discriminate at all. Each Act establishes a Commission (the Commission for Racial Equality and the Equal Opportunities Commission) which is charged with the task of eliminating discrimination, and is empowered to conduct its own investigations and to assist individuals who have been unlawfully discriminated against to bring proceedings. Individuals who have been unlawfully discriminated against can bring civil proceedings for damages and the Commission can in certain circumstances itself bring enforcement proceedings.

(b) "Discrimination"

The United States Supreme Court has identified two types of discrimination, "disparate treatment" and "disparate impact" which are faithfully reproduced by the draftsmen of the Acts and which are normally called in English law "direct" and "indirect" discrimination.

"Direct discrimination" ("disparate treatment") consists in a person "on racial grounds" or "on the grounds of sex" treating another less favourably than he would treat others of a different racial group or different sex. Direct discrimination therefore covers the classic instances with which we are all familiar: the withholding of some benefit because a person is of the "wrong" race or sex. Of this, segregation is an obvious example: in addition, the Race Relations Act specifically renders segregation unlawful. A person can be guilty of direct discrimination even if he has no desire to injure the person discriminated against: an education authority which had no desire to treat girls less favourably than boys, but which in fact provided fewer school places for girls, was held liable for direct discrimination. If the defendant adopts a criterion for selection which is based on sex or race, that constitutes direct discrimination whatever the discriminator's intention may have been. A recent House of Lords decision (*Jones v Eastleigh Borough Council* 1992 AC 751) has taken this principle one step further. In the United Kingdom, women qualify for their pension at the age of 60, men not until they are aged 65. A local authority wished to benefit pensioners by allowing them free admission to a local swimming pool. Mr Jones, who was over 60, but under 65, was charged for admission to the pool. The House of Lords held that this constituted direct discrimination against Mr Jones because a woman of the same age would have got in free. The criterion for free admission was inherently linked to the sex of the person seeking admission and was, therefore, unlawful: "but for" Mr Jones' sex he would have been a pensioner and was, therefore, being treated less favourably on the grounds of his sex than his wife who was the same age as him.

"Indirect discrimination" (or, in the American terminology, "disparate impact") is concerned with a different problem. If one class of the community (an ethnic minority or women) because of their circumstances or because of discrimination in the past, has had less opportunity of obtaining, for example, educational qualifications, that class will be adversely affected if an employer makes it a requirement that his employees must possess certain educational qualifications if they are to be employed or promoted. This requirement of an educational qualification perpetuates the status of members of that class as second class citizens. To meet this type of case, the Acts provide that a person discriminates against another if he applies to him a requirement (which he also applies to others) which (1) is such that the proportion of members of that race or sex who can comply with that requirement is considerably smaller than the proportion of those who are not of that racial group or sex who can comply with it, (2) operates to the detriment of the complainant, and (3) the person imposing the requirement cannot show to be "justifiable". The application of this complicated formula has given rise to much litigation, most of which turns on the wording of the individual statute. Much the most important aspect, as a matter of principle, is what constitutes sufficient justification for imposing such a condition: I consider this separately below at 3(a).

The other aspect of indirect discrimination which calls for mention is that, because of the way in which the Acts are worded, an employer who takes into account in selecting for employment or promotion a number of different factors, one of which has a disparate impact on a particular racial group but none of which is by itself decisive, is not guilty of indirect discrimination. The racial discriminatory factor does not have to be satisfied but is merely one which is taken into account: it is, therefore, not a requirement or condition of the employment. This substantially limits the scope of indirect discrimination.

(c) <u>The Fields</u>

As I have said, English law does not make every manifestation of race or sex discrimination unlawful. Such discrimination is only actionable in certain defined areas or fields. The fields in which it applies are employment, education, the provision of goods and services and (in relation to racial discrimination) membership of associations and the exercise by local authorities of their planning functions.

Of the cases which have come before the Courts, the vast majority have been in the employment field. Practically all aspects of discrimination in the employment field are unlawful: discrimination in selection for employment, in the terms of service, in opportunities for promotion, in access to training, in membership of trades unions, in membership of partnerships and in relation to the award of professional qualifications, are all outlawed. There are certain very limited exceptions where the possession of a particular racial quality or membership of a particular sect is a genuine occupational requirement for the job, for example, it is not unlawful to require that the part of a woman in a play should be accessible only to a woman actress.

(d) <u>Enforcement</u>

Any individual who has been unlawfully discriminated against can bring proceedings. If the discrimination is in the employment field, the proceedings must be brought in an Industrial Tribunal. Industrial Tribunals are not part of the ordinary Court system: they were designed to give speedy informal redress in labour disputes. Their decisions on questions of fact cannot be challenged, an appeal being on a point of law only. In cases of direct discrimination, the Industrial Tribunal can order compensation to be paid (including compensation for injury to feelings) but subject to a maximum figure which is currently £10,000. In cases of indirect discrimination, the Industrial Tribunal cannot order compensation to be paid if the employer shows that he had no intention of treating the claimant unfairly on the grounds of race or sex. The Industrial Tribunal can make recommendations as to the employer's future conduct but cannot grant an injunction. No legal aid is available in the Industrial Tribunal.

An individual can bring proceedings in the County Court for unlawful discrimination in fields other than employment. Unlimited damages can be awarded for direct discrimination but, again, no damages are payable for indirect discrimination if the employer shows that he had no intention to discriminate. See also at (e) below as to enforcement by the Commission.

(e) The Commissions

The Commissions are established for the general promotion of good race relations and equal opportunities. They are given wide powers to conduct formal investigations, including compulsory powers to obtain information. The Commissions can issue non-discrimination notices which require an individual or organisation to cease discriminatory practices: in the event of non-compliance, the Commissions can apply to the Court for an injunction. These wide, and necessary, powers were plainly directed to counteracting widespread discriminatory practices which claims by individuals are unable to stop. Unhappily, the statutory procedures prescribed are so convoluted and long drawn out that the powers have proved to be of little practical impact.

Much more practically relevant is the power of the Commission to assist individuals to bring individual complaints before the Courts and Tribunals. Given that most cases have been brought in the employment field and therefore in the Industrial Tribunals where legal aid is not available, most of the important decided cases have been funded by the Commission.

(f) The State

Although the Crown is bound by the statutes, discriminatory acts done under statutory authority are not unlawful. The English Courts, therefore, have no power to challenge discriminatory legislation. On the other hand, it has now been established that in order for this exemption to apply, it is not enough simply to show the act complained of was done in pursuance of a statutory power: the act must have been done in the necessary performance of an express obligation contained in a statutory enactment.

Specific Issues

(a) Justifiability

In cases of direct discrimination, it is not possible for the defendant to escape liability on the grounds that his discriminatory conduct was necessary in order to achieve some other purpose. For example, in the *Eastleigh Borough Council* case (see 2(b) above), the local authority was using the test of pensionable age as an easy method of discovering whether those seeking admission to the pool were, by reason of retirement, short of money. That factor was irrelevant, since the criterion it had adopted was sex related and, as such, unlawful. The only defences to claims of direct discrimination are those narrowly and specifically defined by the Statutes, eg genuine occupational requirements for the job.

In cases of indirect discrimination the position is quite different. Say an employer makes it a requirement for an appointment to a job that the applicant should have a university degree. This would, in the United Kingdom, probably have the effect of excluding more Caribbean immigrants than other members of the population. Therefore, it would constitute indirect discrimination unless the employer is able to show that the requirement of a degree is justifiable. It is, therefore, of crucial importance to decide what is the test of justification, the more so because the question whether a requirement is justifiable is one fact on which, in the employment field, the decision of the Industrial Tribunal is final and conclusive.

For a long time the law of England was unsatisfactory, a number of different tests having been propounded. At one extreme it was suggested that the employer had to show that the requirement was "necessary" for the job and that there was no other way in which the employer's aim could be achieved. At the other extreme, it was said that it was enough if the employer showed that he had imposed the requirement for reasons which were "acceptable to right thinking people as sound and tolerable reasons". This latter test is wholly unacceptable since some "right thinking people" might take the view that running an efficient business was more important than eliminating discrimination. Happily, the test has now been established as requiring the employer to show that (objectively, and not merely in his own view) the requirement reflects a real need of the employer's business, is appropriate with a view to satisfying that need and is reasonably necessary to satisfy that need: ***Hampson v*** *Department of Education and Science* (1990) 2 All ER 25, applying the decision of the European Court of Justice in *Bilka-Kaufhaus GMBH v Hartz* (1989) 2 CMLR 701.

Reverting to the example of an employer who requires his employees to have a degree, the justifiability of such a requirement will depend upon the nature of the job. If the job is sweeping floors, it would be impossible to justify since, objectively, the job does not require the skills of a graduate. If the job is a university lectureship, the requirement is plainly justifiable since an academic must have a degree in the subject which he is to teach. Very difficult cases are those which lie somewhere in between. For example, if the job is in higher management of a technical business, the employer would have to show more than that it was his policy only to use graduates in such positions; he would have to show that the nature of the work did in fact require the skills of a graduate.

(b) Stereotyping

Few cases now come before the Courts in which either the defendant accepts or it is proved that he intentionally acted with a view to excluding someone on the grounds of his race or sex. Far more common is the case where the defendant genuinely thinks that he acted on non-discriminatory grounds for a non-discriminatory purpose, but acted on the assumption that a person of that race or sex would not have the necessary qualities. For example, in one case a restauranteur employed a waitress. When he discovered that she had children, he dismissed her on the grounds that reliability in attendance was crucial to his business, that he had found that in practice women (unlike men) put their responsibilities to their children before their responsibilities to their jobs, and for that reason he did not employ women with children. In the United Kingdom today, the assumption made by the defendant is probably correct. *Most* women do put their children before their jobs: but not *all*. It is the essence of anti-discrimination law that individuals are to be treated as individuals and not stereotyped as all possessing or having characteristics which, rightly or wrongly, their race or sex is generally thought to manifest. The defendant was found liable in that case for unlawful discrimination: if he had investigated the particular waitress he would have found that her record of reliability was exceptional and that she had made arrangements covering any crisis in her children's affairs.

(c) Positive discrimination

In a number of jurisdictions, Courts and other institutions which find the existence of long term discriminatory practices against a particular racial group seek to rectify the continuing effects of such past discrimination by providing that in the future a given proportion of future employees or future persons promoted must come from members of that racial group, even though there are others better qualified for selection. Only by so positively discriminating in their favour, it is said, can a fair balance between the racial groups be established.

The problems raised by positive discrimination of this kind have not arisen in the United Kingdom since, with very limited exceptions, such action would itself be unlawful as being discriminatory. Any requirement, however meritorious in other respects, which gives a preference to members of one group must by definition discriminate adversely against all others competing for the same benefit. Moreover, such discrimination would be on the grounds of race, ie that they are not members of the racial group which has been given preference.

(d) Proof of discrimination

The burden of proving discrimination lies on the complainant. Experience has shown that it is an onerous task. In cases of direct discrimination, the case often requires the proof without documentary assistance, that the grounds on which the defendant denied the complainant the benefits which he sought were based on race or sex, a fact that lies wholly within the mind of the defendant. To meet this difficulty English law now provides the complainant with two forms of assistance.

First, the complainant can serve on the defendant a questionnaire designed to elicit the grounds on which the defendant took the decision complained of. The defendant is not bound to reply: if he does so, his answers are admissible in evidence; if he does not do so, the Tribunal can draw adverse inferences from such failure.

Second, and more important, the Courts have adopted a special approach in discrimination cases. Take as an example, a black applicant for promotion who fails to obtain promotion. If he can demonstrate that he had better qualifications or experience for the promotion than the successful (white) applicant, in the absence of satisfactory evidence from the defendant that he did not make his decision on racial grounds, the Court can and should draw the inference that it was made on racial grounds: see *King v Great Britain - China Centre* 1991 IRLR 513. Although the Courts deny that they are adopting a special approach to proof in such cases, in fact they do recognise the special difficulties of proof and draw inferences which, in ordinary litigation, they would not draw.

(e) Statistical evidence and discovery

Given the difficulty of proving discrimination, statistical evidence can be of great importance. In cases of direct discrimination a complainant who can demonstrate by reference to the employer's records a pattern of discrimination in the past is obviously in a strong position. In cases of indirect discrimination, statistical evidence as to the number of members of the complainant's racial group as compared with members of the other racial groups to which a requirement is attached by the employer is almost essential.

The obtaining and proof of such statistical evidence present problems of expense and oppression to the defendant, bearing in mind that normally the claim is brought by one complainant only and the case is conducted in a low level of court. Experience in large class actions in the United States shows that the scale and complication of the statistics necessary to make a sound statistical analysis can be formidable: moreover, to require an employer to produce the necessary information can, in itself, impose on him an enormous financial burden.

English law has not solved the problem satisfactorily. It has been said that full statistical evidence is not always necessary to prove indirect discrimination. In claims for discovery of an employer's documents, discovery must not be ordered if it would be oppressive in that it would require the employer to produce documents not readily available, or to take steps which would add unreasonably to the length or cost of the hearing.

The effectiveness of English law

The anti-discrimination statutes have had only a limited impact in the United Kingdom. They have been valuable in "setting the tone", ie in establishing the principle that discrimination on the grounds of race or sex is not acceptable. For the most part, blatantly anti-racial or sexually biased language and behaviour no longer occur.

But the impact of the law in the United Kingdom has been far less than, for instance, in the United States. This is due to a number of inter-connected factors:

(a) Comparatively few cases have been brought before the courts and tribunals. The reasons for this are set out below;

(b) Most cases relate to the employment field where the cases have to be brought in the Industrial Tribunal. An Industrial Tribunal cannot grant an injunction. No compensation is recoverable for indirect discrimination. Even in cases of direct discrimination the compensation is comparatively small, being limited to £10,000.

(c) The adverse consequences to an employer of being found guilty of discriminatory conduct, therefore, do not provide a sufficient inducement to him to eradicate such discriminatory procedures.

(d) The difficulty of proof in discrimination cases means that the lack of legal aid in Industrial Tribunals is a serious shortcoming: the funds available to the Commissions to aid individual complaints are inadequate.

(e) In cases of indirectly discriminatory practices which are deeply rooted, the statistical evidence and complication of litigation requires the procedures and machinery only available in the High Court. But cases cannot be brought in the High Court.

(f) Given the complexity of such litigation, it cries out for a class action in which the claims of all members of the racial group adversely affected can be adjudicated upon. If this were possible, the disproportion between the sum at stake in the litigation and the cost of obtaining and deploying the necessary statistical and other evidence would be diminished.

(g) Formal investigations by the Commissions (which might well have proved a satisfactory alternative to elaborate class actions) have proved to be largely unworkable.

In sum, in my view, the experience of English law demonstrates that an effective law designed to eradicate discrimination cannot be run on the cheap. If the law is to be an effective weapon in producing fundamental changes in social behaviour, it must be recognised that it requires in all but the simplest cases the deployment of legal machinery, money and forensic skills (including judicial skills) appropriate to the most difficult areas of civil litigation.