Appeal No. UKEAT/0190/14/KN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 2 December 2014
Judgment handed down on 19 December 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

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(1) MR A CHANDHOK
(2) MRS P CHANDHOK — APPELLANTS

MS P TIRKEY — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellants	MR JOHN SAMSON (of Counsel) & MR AIDAN BRIGGS (of Counsel) Instructed by: Legal Services Dept Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR CHRISTOPHER MILSOM (of Counsel) & MS TAMAR BURTON (of Counsel) Instructed by: ATLEU 232 Hornsey Road London N7 7LL
For the Intervener	MR MICHAEL FORD QC (of Counsel) Instructed by: Equality and Human Rights Commission Arndale House The Arndale Centre Manchester M4 3AQ

SUMMARY

RACE DISCRIMINATION

The Claimant worked for the Respondents as a domestic worker. She claimed that they treated her badly and in a demeaning manner, and (by amendment) that this was in part because of her low status which was infected with considerations of caste. The Respondents applied to strike out this amendment, on the ground that "caste" did not fall within the definition of "race" in s.9 of the **Equality Act 2010**, and that the enactment of s.9(5) both initially and as subsequently amended by the **Enterprise and Regulatory Reform Act 2013** demonstrated that Parliament recognised it was excluded from the definition in s.9(1).

Held That though "caste" as an autonomous concept did not presently come within s.9(1) many of the facts relevant in considering caste in many of its forms might be capable of doing so, since "ethnic origins" in s.9(1)(c) had a wide and flexible ambit, including characteristics determined by "descent", and it became common ground during the argument that it was possible that the facts found in hearing the present claim might come within the scope of that phrase. General observations were made about the inappropriateness of relying on assertions as to facts not set out in the claim form when seeking to strike out part of the claim.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This judgment on appeal from a refusal of Employment Judge Sigsworth at Huntingdon to strike out some parts of a claim may have more importance in what needs to be said about the approach to striking out part of a claim than it has to say about whether treating a person adversely because of their perceived caste is justiciable as the law currently stands.

2. In reasons sent on 24th January 2014 the judgment stated simply that "…the claim of caste discrimination as set out in the amended statement of claim is not struck out and the claim will proceed to a merits hearing." That supposes that a claim had been made that there had been "caste discrimination" as if it were a separate species of claim.

3. By her claim, set out at somewhat excessive length over 64 paragraphs, many of which were subdivided, the Claimant said that she was "of Indian nationality and national origin", had been recruited as a nanny, and had worked first for the Respondents in India (they being Indian) and then in the UK until her employment ended on 21st November 2012. She described how she was treated in a demeaning way, such that she was more in a state of servility than service. Apart from a number of other breaches of statute, she claimed in her ET1 as initially filed that this gave her entitlements to

> **"compensation for direct or indirect race discrimination and harassment including injury to feelings;" and**
>
> **"compensation for discrimination on the grounds of religion or belief, including injury to feelings…""**

Despite its length, nothing was said about "caste discrimination".

4. On 23 May 2013, her statement of claim was amended. The amendment of central relevance is contained in paragraphs 53 and 54. In paragraph 53 the words initially present were:

> **"The Claimant contends that the reason she was treated as complained of was that she is of Indian nationality and/or national origin."**

The amendment added the word "ethnic" after the words "Indian nationality", thus asserting her ethnic origin as being a further or alternative ground of the disadvantageous treatment meted out to her.

5. This was in accord with Section 9 of the **Equality Act 2010**, which provides materially as follows, under the sub-heading "Race":

> **"(1)Race includes—**
> **(a)colour;**
> **(b)nationality;**
> **(c)ethnic or national origins."**

6. Paragraph 54, completely new, by amendment, reads as follows:-

> **"For the avoidance of doubt the Claimant avers that her ethnic and/or national origins includes (sic) but is not limited to her status in the caste system as perceived by the Respondents. The International Convention on the Elimination of All Forms Racial Discrimination ("ICERD") prohibits discrimination on the grounds of "descent": its principles are adopted by the Race Framework Directives and, it follows, the Equality Act. Thus s13 EA 2010 must be taken to prohibit caste discrimination. The Claimant avers that the and/or a reason why she was recruited and treated in the manner alleged was that the Respondents concluded that she was of a lower status to them: this view was tainted by caste considerations."**

7. The wording of paragraph 54 asserted primarily a claim that she had been treated as she was because of her ethnic and/or national origins. There was no separate claim of caste discrimination as such. The paragraph combines talk of "ethnic and national origins" with "status", "caste", and "descent", both together, as factual concepts, and with legal argument as to the scope of section 13 of the **Equality Act**. What is not said as a matter of fact is the particular caste, if any, to which the Respondents thought the Claimant belonged; nor does it

say anything specific about the "caste considerations" involved. However, depending upon the way the paragraph is read, it may suggest that the Respondents thought her to have a particular status in the caste system (thereby, separately asserting that there was a "caste system" of relevance).

8. All this was said "for the avoidance of doubt", a phrase normally used to make it clear how a party intends a point should be understood: in this case, that discrimination against the claimant because of her "ethnic (or, as it may be, national) origins" was to be established in part by factual evidence about the Respondents viewing her as being of lower status than they were, a perspective associated with their idea of her caste.

9. It was however on the basis that this paragraph raised a case that the Claimant had been discriminated against specifically on the ground of her caste that an application to strike out paragraph 54 was pursued.

10. Though the paragraph is not as clear as it might be (because of its reference to several different labels, concepts and mixture of fact and law), I do not accept that it can properly be read in this way. These are my reasons:

a) The originating application has to be read as a whole. At paragraph 64, where the claims are separately identified and set out in summary, there is no separate claim for caste discrimination – merely for direct and indirect race discrimination, or alternatively discrimination on the grounds of religion or belief;

b) Paragraph 54 itself begins by confining what is to be said to explaining how "ethnic and/or national origin" is to be advanced;

c) It stops short of asserting that in this particular case "caste" is a discrete reason for the adverse treatment alleged;

d) As Mr Samson and Mr Briggs for the Appellants were keen to show me, there is considerable uncertainty in authoritative literature as to the precise definition and boundaries of "caste" – such that there is scope for saying that some "caste considerations" involve no consideration of "descent". To allege that "caste" on its own was a reason for adverse treatment is not only too general a concept to be useful, but likely to have been seen as such by the pleader. If the literature is at all a reliable guide, it would require considerable qualification. Here the reference is to "discrimination on the grounds of descent", which shows that what is being complained of is the perceived origin of the Claimant, which repeats the concept expressed in the first sentence of paragraph 54, rather than "caste" in the unspecific general sense relied on by the Appellants. After all, "origins" invites a consideration of "descent".

11. Though I think that the preferable reading of the paragraph is that it argues that in the case of the Claimant her perceived caste was bound up factually with the Respondent's perception of her ethnic origins, I acknowledge that it is also open to the view that the Claimant is asserting there that she was treated as she was in part because of her caste, that discrimination on the grounds of caste is prohibited, and that this is so because caste is determined by descent. This appears to be the view the Appellants took of it, though upon reflection it is not mine.

12. The amendment was made at a hearing before Employment Judge Ward on 30th May 2013. Curiously, although the amendment was effected at that hearing, the Appellants did not apply then that it be refused. They applied subsequently to strike it out. That application came before Judge Sigsworth, whose judgment is under appeal.

13. The question whether there was, here, a justiciable claim involving caste was not heard as a preliminary issue. What was proposed was the removal of paragraph 54 coupled with those parts of the claim which asserted that the Claimant was treated as she was because of her perceived caste.

14. She did not say in the claim itself that she belonged to any caste, nor give particulars of those matters which would have made her recognisable as a caste member. The Judge, however, set these details out and relied upon them in part. He thus went well beyond the words of the originating application. He also set out in considerable detail what "the caste position" was, seeking definitions of it from Wikipedia, and considering factual material relating to caste, and its various meanings, which was put before him by the parties. None of this material was subject to cross-examination, for the Judge heard no evidence: the application was to strike-out parts of the claim, not to determine a preliminary issue.

15. In paragraph 4 of his judgment the judge identified the Claimant's case – saying it was that she was one of the Adivasi people - not from what was asserted in the claim, lengthy though it was, but from material which could only have come from either her witness statement (which was brief) or what he was told.

16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required

to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

19. Neither party complained directly of this error of approach in the notice of appeal or Respondents' notice. Both sought to take advantage of the licence it gave to make wide-ranging submissions about "caste", and assert "facts" in respect of the present case, though Mr. Ford QC for the Intervener was more circumspect. It was, however, argued that those occasions on which a strike out should succeed before the full facts of the case struck-out had been established in evidence were rare. This is particularly so where the claim is one of discrimination. Such a claim will centrally require a Tribunal to establish why an employer acted as it did. That will usually require an evaluation of the reasons which the relevant decision-maker(s) or alleged discriminators had for acting as they did. Such an evaluation depends, often critically, upon what may be inferred as well as proved directly from all the surrounding circumstances, including evidence of the behaviour (whether by word, deed, or inaction) of such individuals not only contemporaneously to the events complained of but also in the past and, sometimes, even since the events on which the claim was founded; and it may include an assessment, in the light of the evidence that was called, of whether the failure to

call other evidence was of significance. These can often be challenging assessments, all the more so where there are complications of language and culture. Considerations such as these led Lord Steyn in **Anyanwu v South Bank Student Union** [2001] ICR 391, HL, to express the view at paragraph 24 (echoed by Lord Hope in his paragraph 37) as follows:

> "**In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university**."

20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura** [2007] ICR 867):

> **"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."**

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no

further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision.

The Judgment

21. The Judge dismissed the application to strike out the claim in this case because:-

a) The definition of race in section 9(1) of the **Equality Act 2010** is not exclusive, but inclusive: it "includes" ethnic origin. It could be argued that "caste" insofar as it was an aspect of "ethnic" origin was thus already included.

b) Domestic case law, namely **Mandla v Dowell Lee** [1983] 2AC 548 HL, and the "Jewish Free School Case" - **R(E) v Governing Body of JFS and Another** [2010] 2 AC 728, SC - were authority that discrimination by descent was unlawful as being direct race discrimination.

c) If "caste" is based on ethnic origin – and discrimination on grounds of ethnic origin is not proscribed by the **Equality Act -** then arguably the **Equality Act** does not fully implement the provisions of the EU Race Directive, which was intended to give effect to the International Convention on the Elimination of Race Discrimination ("ICERD") (to which the UK is a signatory), and "racial discrimination defined therein includes discrimination on the basis of, inter alia, descent".

d) The EHRC Code of practice on employment gives a wide breadth to the definition of "ethnic origins" and "ethnic group".

e) Since the Claimant's case was that her Adivasi status was inextricably linked with her case on race and religious discrimination, and "the Claimant's case is she is lower caste by birth and therefore descent" her claim was within these legal provisions.

22. He would have been entitled to add that it was necessary to adopt an attitude of reluctance towards striking out a claim for discrimination, for the reasons set out in the immediately foregoing paragraphs.

23. Stripping out of the Judge's reasons those matters of which he was told but which were not part of the claim as such, points (a)-(c) above were all principles of law; and whereas (d) and (e) included matters which were not set out in the claim form or any amendment of it, nonetheless they reflect the essence of the case which was set out in paragraph 54 as I read it: that the claim was that there had been discrimination against the Claimant on the basis of her ethnic and national origins, of which a broad view was to be taken, and with which her caste (unspecified) and her lower status was bound up.

The Grounds of Appeal

24. The first ground was entitled "ousting the will of Parliament". It argued that "caste" was not included as a protected characteristic within the definition of "race" in section 9(1) of the **Equality Act 2010**. The fact that it was deliberately omitted was emphasised by the provision at section 9(5) as originally enacted:

> **"A Minister of the Crown may by order – (a) amend this section so as to provide for caste to be an aspect of race; (b) amend this Act so as to provide for an exception to a provision of this Act to apply or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances."**

In the **Enterprise and Regulatory Reform Act 2013** ("**ERRA**") this subsection was amended to provide (quoting only so far as material):

> **"5. A Minister of the Crown…. (a) must by order amend this section so as to provide for caste to be an aspect of race; (b) may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste, or to apply or not to apply, to caste in specified circumstances."**

25. The section effecting this amendment was Section 97 of **ERRA**. Sub-section 5 of it provided for a Minister of the Crown to carry out a review of the effect of section 9(5) of the **Equality Act 2010** and orders made under it, and whether it remained appropriate, though this power was not to be exercised before a period of 5 years beginning with the day on which the **ERRA** was passed had elapsed. Having reviewed the matter, the Minister in exercise of the power under section 97(7) might by order repeal or otherwise amend section 9(5) of the **Equality Act 2010**.

26. It was originally proposed that there would be full public consultation during 2014, with draft legislation as to caste being introduced into Parliament during summer 2015.

27. In the light of this, the Appellants argue that Parliament was expressing its recognition that caste was not included within the definition of race within section 9(1). It was not for an Employment Tribunal to anticipate the legislation to be introduced next summer by holding that the Claimant could currently maintain a claim which included caste.

28. The second ground argued that **JFS** and **Mandla v Lee** were distinguishable from the Claimant's case, since the judgments adopted a purposive interpretation to the meaning of "ethnic origin" as provided for under the predecessor legislation (the **Race Relations Act 1976**). That legislation had no specific provision for the racial groups in question (respectively Jews and Sikhs) whereas caste had been singled out for specific statutory provision by section 9(5) of the **Equality Act 2010**, rendering those authorities inapplicable.

29. In my view, this raises essentially the same point as does the first ground, for it argues that the effect of the enactment of the **ERRA** is to shut out any consideration of caste by an employment tribunal.

30. The third ground was that the EU Race Directive was inapplicable since the present case was brought between individuals and not against the State or emanations of the State. A directive could only have direct vertical effect, and not horizontal effect. ICERD included not only race, colour, national and ethnic origin but also descent within the definition of race which it adopted. Caste discrimination fell within that category, as opposed to within the scope of race, colour, national or ethnic origin. Neither descent, nor caste as an aspect of descent, could be conflated with any of those characteristics. The EU Race Directive however, made no reference to either descent or caste based discrimination. Article 2 defined the principle of equal treatment as meaning: "that there shall be no direct or indirect discrimination based on racial or ethnic origin". Even if applicable, therefore, it was open to Parliament to exclude caste as it recognised (by providing, by enacting the **ERRA**, that future amendment would be needed to include it) it had chosen to do.

31. A fourth ground argued that the judge was in error to hold that caste could come within the scope of discrimination on the grounds of religion and belief.

32. In argument, Mr Samson who appeared with Mr Briggs for the Appellant, drew attention to the approach to the interpretation of legislation adopted by Underhill LJ in his judgment in **Rowstock Ltd v Jessemey** [2014] ICR 550, beginning at paragraph 28. The natural reading of the words should be considered before asking what the intention of Parliament had been; the first step should be to ask whether domestic law before the enactment had been clear. Caste had not previously been considered as included as part of "race". The second step was to ask what Parliament's intention was. It was that "caste" needed specifically to be added to the legislation for the law to encompass it. The third step was to see whether there was a clear indication from the contextual material as to whether it

was or was not included: there was every indication here from the words used in the **Equality Act** itself, as well as the timetable for legislation set out in **ERRA**, that Parliament intended that "caste" needed to be added if discrimination because of it was to be proscribed. Just as Underhill LJ had looked to the Explanatory Notes to the statute to discover the intention of Parliament in enacting it, so here a court is entitled to look at the context provided by the **ERRA**. Fourth, just as Underhill LJ asked if to construe the statute in the way proposed would be in breach of an international obligation, which Parliament would not have intended, so here it could be said that the interpretation for which the Appellant contended was compliant with international obligations: the provision in the **2010 Act**, as amended by **ERRA**, that "caste" should be included would give effect to the international obligations to which the UK was subject, and thereby comply. Fifth, just as Underhill LJ sought to seek a rational basis for the interpretation, so here the rational approach was to conclude that the wording of the Act was insufficient to encompass "caste", which is what the entire purpose of the enactment of the **ERRA** in the relevant respects was to remedy. It had not done so yet: caste was excluded: therefore paragraph 54 of the claim, and any part necessarily associated with it, should have been struck out.

Discussion

33. There are two central questions. The first is whether the law of discrimination as it stood under the predecessor statute, the **Race Relations Act 1976** provided a remedy for discrimination in the factual circumstances which the claimant was offering in her claim form to establish in evidence. The second is whether, if so, the fact that the **Equality Act 2010** both as originally enacted, and as amended by the **ERRA**, envisages the specific addition of "caste" to the list of those matters specifically included in section 9(1) means that any claim asserting reasons for less favourable treatment which are labelled "caste" reasons is precluded, such that the law no longer extends to provide a remedy for them.

34. To answer the first question, it is necessary to consider the two principal authorities as to the scope of "race" in the **Race Relations Act 1976**.

35. **Mandla v Dowell Lee** considered whether the headmaster of a private school was acting in a racially discriminatory manner when he refused to admit a Sikh youth as a pupil without his cutting his hair and ceasing to wear a turban. To wear such a turban was a sign of communal identity. He could not therefore comply with the instruction to remove it without sacrificing that identity.

36. The issue before the court was whether Sikhs as a group came within the definition of "racial group" in the **Race Relations Act 1976** (which was as it is in section 9 of the **Equality Act** set out above). If so, then on those facts the refusal to admit the youth was discriminatory. Sikhs were not a group defined by reference to colour, race, nationality or national origins: the argument turned entirely upon whether they constituted a group defined by "ethnic origins". Lord Fraser of Tullybelton said in his speech (562D – H):

> **"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. Some of these characteristics are essential; others are not essential, but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to be essential are these: (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. In addition to these two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) 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.**

> **A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Providing 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 to 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."**

At 563 C-D Lord Fraser added:

> **"In my opinion, the word "ethnic" in the Act of 1976 should be construed relatively widely, in what was referred to as Mr Irvine as a broad, cultural/historic sense."**

37. Applying that approach, and borrowing from words used by Richards J in the Court of Appeal in New Zealand in **King-Ansell v Police** [1979] 2NZLR531, at 542 and 543, he held that Sikhs were a group defined by reference to ethnic origins even though not biologically distinguishable from other peoples living in the Punjab.

38. The Jewish Free School case concerned the refusal of a place by the governing body of the Jewish Free School. The school gave priority to children recognised as Jewish according to the Office of the Chief Rabbi, such recognition being based on matrilineal descent or conversion in accordance with the tenets of Orthodox Judaism. The child's mother had been converted according to non-Orthodox Judaism, whose conversion was not recognised by the office of the Chief Rabbi. It was on that ground that her child was refused a place. An appeal against the holding by the Court of Appeal that Jews constituted a racial group defined principally by ethnic origin, such that the school's admission policy discriminated on racial grounds against the Claimant's son, was dismissed. Since the Orthodox test as to who was a Jew focussed on matrilineal descent, that fell for specific consideration. Lord Phillips at paragraph 29 said:-

> **"Discrimination on the basis of descent simpliciter is not necessarily discrimination on racial grounds. To discriminate against someone because he is not the son of a peer, or the son of a member of the SOGAT printing union, is not racial discrimination. Under the Orthodox test the Jewish woman at the head of the maternal line may be a convert of any nationality and from any ethnic background. Furthermore, because the Orthodox test focuses exclusively on the female line, any Jewish national or ethnic blood can become diluted generation after generation, by the blood of fathers who have no Jewish characteristics of any kind."**

It was argued before the Supreme Court by Lord Pannick for the School that it was possible to identify a Jewish ethnic group applying the criteria set out in **Mandla**: they shared what Lord Fraser regarded as the essentials, and would be recognised by the man in the street as a Jew. A second group, however, could be identified by Orthodox criteria. Though there was a considerable overlap between these two groups, there would be some in the latter group who did not come within the **Mandla** group, most of those being descendants from Jewish women who had married out of and abandoned the faith. They would not satisfy the two vital criteria identified by Lord Fraser.

39. As to that argument Lord Phillips commented at paragraph 33:

> **"Initially I found Lord Pannick's argument persuasive but on reflection I have concluded that it is fallacious. The fallacy lies in treating current membership of a Mandla ethnic group as the exclusive ground of racial discrimination. It ignores the fact that the definition of "racial grounds" in Section 3 of the 1976 Act includes "ethic or national *origins*" (my emphasis). Origins require one to focus on *descent*. Lord Pannick is correct to submit that *descent simpliciter* is not a ground of racial discrimination. It will only be such a ground if the descent in question is one which traces racial or ethnic origin."**

He went on to hold that although the matrilineal test included descent from Jews by conversion, and could thus be said to be a test applying religious criteria, it was not restricted to application to Jews by conversions and was nonetheless a test of ethnic origin.

40. This approach, and the stress placed upon "origin" as demonstrated by the italics used by Lord Phillips was echoed in the judgment of Lord Mance at paragraph 86:

> **"But, assuming that Orthodox Jews are not a separate ethnic group or sub-group for the purposes of indirect discrimination… I consider that the Orthodox Jewish test of descent in the matrilineal line must still be regarded as a test based on ethnic origins for the purposes of direct discrimination… On the evidence, it is at its core a test by which Orthodox Judaism identifies those to be regarded today as the descendants of a particular people, enlarged from time to time by the assimilation of converts…"**

41. In turn Lord Mance considered it to be consistent with the underlying policy of the prohibition on racial discrimination in the Act that it should apply to rejection of the child on the grounds held by the School. Thus, at paragraph 90:

> **"…the policy is that individuals should be treated as individuals and not assumed to be like other members of a group: *R (European Roma Rights Centre) v Immigration Officer of Prague Airport* [2005] 2AC 1, paras 82 and 90, per Baroness Hale of Richmond and *R (Gillan) v Commisioner of Police of the Metropolis* [2006] 2 AC 307, paras 44 and 90, per Lord Hope of Craighead and Lord Brown and Eton under Haywood. To treat individual applicants to a school less favourably than others, because of the happenstance of their respective ancestries, is not to treat them as individuals, but as members in a group defined in a manner unrelated to their individual attributes… To treat as determinative the view of others which an applicant may not share that a child is not Jewish by reason of his ancestry is to give effect not to the individuality of the interests of the applicant, but to the viewpoint religiously and deeply held though it be, of the school applying the less favourable treatment. That does not seem to me either consistent with the scheme or appropriate in the context of legislation designed to protect individuals from discrimination."**

42. The effect of the principles expressed in **Mandla** and **JFS** is to give a wide and flexible scope to the meaning of "ethnic origins". Given the stress to be placed on the word "origins" in that phrase, descent is, as **JFS** shows, clearly to be included within it, at least where it is linked to concepts of ethnicity. This is emphasised by the fact that the argument that "descent" was not part of "race" as defined by the 1976 Act was made by Counsel for the school, urging that any inclusion of it depended on applying Article 1(1) of ICERD; it should not be, he submitted, since the inspiration for that Article had been caste based discrimination, and it was confined to it. This argument was rejected. However, this demonstrates to me the close link between descent and caste.

43. On analysis, each of the grounds save the fourth which is relied on by the Appellants depends upon the effect of section 9(5) as originally enacted and as amended by the **ERRA** upon the interpretation to be adopted of section 9(1). In agreement with Michael Ford QC who appeared for the Intervener I consider that this places a weight upon section 9(5) which it cannot bear. In my view there is a distinction to be drawn between the intention of Parliament when it enacts legislation, and its subsequently displayed understanding of the effect of the legislation it has enacted. The two are not the same, however closely it may be hoped they will align. Once statute is enacted it has the meaning a court will assign to it. The meaning of a statute, and the intention of Parliament in and when enacting it, may be found from a number of sources: the words themselves, the apparent thrust of the legislation, material identifying the vice which the enactment of the statute was sought to remedy, relevant international obligations which it may be assumed Parliament intended to satisfy rather than flout. But Parliament's own view - even by inference from that which it subsequently expresses legislatively - as to that which the legislation meant cannot be conclusive as to its meaning. That is a matter for the courts applying the tools at their disposal which I have summarised above, as to the application of which there are many examples, amongst which are the passages from Underhill LJ's judgment in **Rowstock** to which Mr Samson drew attention.

44. Nor do I accept that the answer to the question whether "caste" as a distinct concept exists as a separate strand in the definition of race is determinative. If the answer is it does not, this still does not exclude the words otherwise appearing in section 9(1) from bearing their usual interpretation, applying the canons of construction I have précised above. Since "ethnic origins" is a wide and flexible phrase (**Mandla**) and covers questions of descent ("**JFS**") at least some of those situations which would fall within an acceptable definition of caste would fall within it. In the course of argument I was referred to the summary by a

leading academic writer, Annapurna Waughruay, in "Capturing Caste in Law: Caste discrimination and the **Equality Act 2010**" (2012) 14 Human Rights Law Review 359-379, in which she said:

> **"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 rules relating to commensality (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"**

45. The fact that there is no single definition of caste, as the parties before me were agreed, does not mean that a situation to which that label can, in one of its manifestations, be attached cannot and does not fall within the scope of "ethnic origins".

46. The pleading at paragraph 54 of the grounds in the ET1 is framed in broad and general terms. Mr Milsom appearing for the Claimant readily accepts that the sentence "Thus s13 EA 2010 must be taken to prohibit caste discrimination" does not entirely follow from what goes before, and claims too much: plainly, section 13 of the **Equality Act** does not, even taking into account section 9, cover anything and everything that might be labelled "caste" as a ground for discrimination. I understood him to be content that no reliance should be placed upon that sentence. But the essential case is not an allegation, set apart from the facts of the case, as to the legal effect of sections 13 and 9: it is that when applying section 9, as it has been and should be interpreted, an allegation that a Claimant was treated disadvantageously because of her having a status which was heavily related to an inherited position in society cannot be ruled out as being established on the evidence. The Tribunal hearing such a claim

will need to establish what it accepts of the treatment alleged and, in relation to the acts which it accepts, why the Respondent did them in respect of the Claimant. If the reason or reasons establish factually that the Respondents treated the Claimant as they did for reasons which more than minimally included their view of her status or origins, and if that status, or that view is bound up with her ethnic origins as understood in domestic case law, the Claimant will succeed in a claim for discrimination. It cannot be ruled out that facts coming within the broad headings she sets out in paragraph 54 could amount to this. It is not necessary in order for her to succeed that the label "caste", or even "lower status" should be applied to her: her case must stand or fall by that which the facts establish, not whether all or some of those facts might be adequately and appropriately summarised or grouped under some label (other than the label "ethnic origins") for which a significance of its own above and apart from those facts is claimed. But that is not to say that facts which establish that a person is seen as belonging to a particular caste are irrelevant to whether a person is within the scope of section 9(1) of the **Equality Act 2010**.

47. In the course of argument, most notably in reply, Mr Samson conceded that aspects of "caste" were covered where "ethnic origins" applied, and thus it was possible under the existing law for a case in which those aspects were established to give rise to liability to race discrimination. He did not concede that caste as such was covered. I was concerned that given that these submissions were made at the end of a tiring afternoon they might not have been best considered (they were made amongst other submissions which were not entirely easy to follow, and they appeared to me in effect to concede the appeal). I thus invited Mr Samson and Mr Briggs to offer further submissions written with the advantage of time for reflection.

48. The context in which the apparent concession was made was in response to a submission by Mr Ford QC that the effect of the law prior to the introduction of the **Equality Act**, had in accordance with **Mandla** and **JFS**, given a scope to the words "ethnic origins" sufficient to encompass many aspects of that which separately might come within the heading "caste" so as to cover the current case. Mr. Ford had characterised the Appellant's argument as seeking to reduce the scope of the **2010 Act** so that it no longer covered situations the law once had**,** and thus to make the forensic point that the Appellant's submissions must be flawed since the circumstances in which discrimination is made unlawful have grown over recent years, not shrunk.

49. In their written further response, after taking the time offered, Mr. Samson and Mr. Briggs denied that the **2010 Act** reduced the scope of the **1976 Act**. No claim for "status in the caste system" as a racial ground or protected characteristic was within the Tribunal's jurisdiction under either Act. "Caste" was not simply based upon descent, but comprised socio-economic issues, occupation, class and the like. However, it is accepted in paragraph 5 of their further submissions that if the less favourable treatment was because of race/ethnic origins which had given rise to a low-caste status the position was "more nuanced"; that the claim might have been capable of proceeding under the **1976 Act,** and that it may be capable of proceeding under the **2010 Act.** Thus:

> **"If the Respondent perceived the Claimant as lower caste because of her ethnic origins… that might permit a claim under either Act."**

50. The acceptance by the Appellants that the claims might (depending on the facts) fall under either the **1976** or the **2010 Act** coincides, if less enthusiastically, with that which the Respondent and the Intervener both submitted. It accords with my own view of the law. The only point then which divides the parties is whether the claim as made asserts "caste" as part

of a protected characteristic rather than simply being evidence of it. As I have already observed, I do not read paragraph 54 of the claim as being so restrictive.

51. It follows that with the omission of the bold assertion from paragraph 54 that "caste discrimination" is prohibited by the **Equality Act** – as to which the answer must be there is as yet no formal definition of "caste" for those purposes - there may be factual circumstances in which the application of the label "caste" is appropriate, many of which are capable - depending on their facts - of falling within the scope of section 9(1), particularly coming within "ethnic origins", as portraying a group with characteristics determined in part by descent, and of a sufficient quality to be described as "ethnic". As the Judge put it, caste "is an integral part of the picture" in the present case.

52. I am particularly happy to have reached this conclusion upon the effect of the wording in the current domestic statute, given its interpretation as expressed in **Mandla** and in **JFS**, albeit by reference to the earlier statute. I do not accept that the effect of section 9(5) of the **Equality Act** is to limit the scope to which the statutory definition of race extends. The decisions in those two leading cases remain fully applicable. Such an interpretation is consistent with the UK's international obligations, including that derived from ICERD. On this basis, section 9(5) contains a power to supplement or clarify section 9(1), not to restrict it. The **ERRA** leaves open the possibility that there may yet be no formal introduction of "caste" as a separate, and separately defined, species of the genus which is "race". The interpretation which I favour is compatible with EU Law. These are additional reasons for thinking the conclusion to which I had come to be correct.

53. I would propose the excision, for the sake of clarity, of the penultimate sentence in paragraph 54 of the amendment, which is as Mr Milsom recognises in no way necessary for

the Claimant to succeed on her claims. She can succeed in her claim if she can bring the facts of her case within the scope of the section as it stands, without needing the Tribunal to assume that section 9 of the **Equality Act 2010** should be re-written as if sub-section (1) had added to it, separately, as sub-section 9(1)(d), the word "caste". If she proves facts which – whether colloquially or accurately – could be described as "caste considerations" which come within the heading "ethnic or national origins" in section 9(1)(c) she will succeed in her claim if the Tribunal concludes that she was less favourably treated because of those facts: if she fails, then no matter how much it might be asserted that she is of a particular caste, and that that was a reason for her treatment, she will fail unless at least part of her treatment falls within section 9(1)(a), (b) or (c).

Conclusion

54. In conclusion therefore, since the facts which the Claimant promises to establish if her claim is made out could come within section 9(1) of the **Equality Act**, a pleading to that effect cannot properly be struck out without hearing and determining the full facts. Employment Judge Sigsworth was right so to determine.

Post Script

55. I was taken to seven Treaties, Conventions and UN reports; nineteen authorities; and eleven other publications in an initial bundle of authorities, together with a further eleven authorities, two publications and three Hansard extracts in a supplementary bundle of authorities. Given this, the parties may have been gearing up to secure a definitive decision in principle that discrimination on the ground of caste as such either was, or was not, within the scope of the **Equality Act 2010**. I hope I shall be forgiven if I have disappointed anyone by having referred to very few of these authorities in the course of this judgment. My focus has been on the appeal in this particular case, in its particular circumstances: I have not seen my

role as being to resolve academic disputes, and establish more general propositions, of no direct relevance to the case in hand. In the event, all that it has been necessary to say is that on the facts of this particular case, and the wording of the amended ET1 as such – without regard to other factual material for the reasons set out above – this Claimant may yet establish that the grounds of her treatment fall amongst those proscribed by section 9 of the **Equality Act 2010**. If I had paid regard, as the Judge did, and though I do not think the invitation to him to do so was appropriate, to further asserted facts as being "her case" this would only have strengthened the factual basis in favour of this Claimant. It is unnecessary for me to say more.

56. The Appeal is dismissed.