Appeal No: SN/AM/2014 & SN/FM/2014

Hearing Date: 27th June 2014

Date of Ruling: 18th July 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before

UPPER TRIBUNAL JUDGE PETER LANE

"FM AND AM"

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant AM: Mr R De Mello

Instructed by: Broudie Jackson Canter

For the Respondent: Ms C Callaghan and Mr J Blake

Instructed by: The Treasury Solicitor

DIRECTIONS REGARDING ISSUES OF DISCRIMINATION UNDER CERTAIN LEGISLATION

Upper Tribunal Judge Peter Lane:

Introduction

1. It is appropriate at this stage for SIAC to give directions concerning certain discrimination claims, which FM and AM have respectively sought to raise in connection with their challenges to the refusals of the Secretary of State to naturalise them as British citizens. The claims involve asserted racial and/or religious discrimination, contrary to one or more of the following UK Acts of Parliament; namely, the Race Relations Act 1976, the Equality Act 2006 and the Equality Act 2010. These directions follow a hearing held on 27 June 2014 pursuant to rules 5 and 39 of the Special Immigration Appeals Commission (Procedure) Rules 2003.

FM

2. On 12 July 2006 the Secretary of State informed FM that his application for naturalisation as a British citizen had been refused on the basis that FM was not considered to be of good character. That decision was confirmed in a letter dated 28 February 2007, following a letter before action sent by FM's solicitors. FM issued a claim for judicial review on 29 May 2007. Section 3 of the claim form specified the decision under challenge as that made on 28 February 2007. In his grounds, FM contended that, in refusing naturalisation, the Secretary of State had discriminated against FM on grounds of race, contrary to section 19B[1] of the Race Relations Act 1976 and had failed to comply with the public sector equality duty in section 71

[1] Section 19 was specified; but it is common ground that section 19B was meant.

of that Act. The grounds also asserted that the refusal constituted unlawful religious discrimination, contrary to sections 45, 46 and 52 of the Equality Act 2006:

> "Because the claimant is alleged to have expressed a religious view in a mosque which is perceived to be anti-western in tone he is barred from obtaining naturalisation. Muslim priests are the disadvantaged group when compared with other groups or priests."

2. On 6 February 2014 the Secretary of State, acting pursuant to section 2D of the Special Immigration Appeals Commission Act 1997 (Jurisdiction: review of certain naturalisation and citizenship decisions), certified her decision to refuse FM a certificate of naturalisation. As permitted by section 2D(2), FM applied to SIAC to set aside the decision. In his grounds accompanying that application, FM contended that the refusal of naturalisation was incompatible with his rights under Articles 8, 9, 10 and 14 of the ECHR. In a subsequent document, entitled "Amended Grounds" dated 30 April 2014, FM sought to rely, inter alia, on "sections 9, 10, 13, 14, 19, 29(2)(vi), 113(3)(a)(c) Equality Act 2010" on the basis that the refusal to naturalise constituted unlawful direct and indirect discrimination on grounds of race and/or religion. He also sought to rely upon section 149 of the Equality Act 2010 (public sector equality duty). FM continued to rely upon the Race Relations Act 1976 and the Equality Act 2006.

AM

3. On 12 May 2010 the Secretary of State refused AM's application for British citizenship on the grounds that AM could not show he was of good character. Following an invitation from AM's solicitors to the Secretary of State to reverse her decision, that decision was confirmed by letter dated 26 May 2010. On 27 July 2010 a letter before action was sent by AM's

solicitors. The Secretary of State's response of 9 August 2010 gave no further reasons for her decision.

4. On 11 August 2010 AM issued a claim for judicial review, seeking to challenge "the decision of the [Secretary of State] to refuse the Claimant's application for naturalisation as a British citizen". The claim form specified the decision under challenge as being dated 26 May 2010. The grounds made no reference to discrimination or to any breach of anti-discrimination legislation.

5. On 6 February 2014 the Secretary of State, acting pursuant to section 2D of the SIAC Act 1997, certified the decision to refuse AM naturalisation. In his notice of application for review of that decision, filed on 20 February 2014, AM contended that the decision "is contrary to public law and Article 8 ECHR. Please see grounds attached with original claim. Further grounds may follow". In a document entitled "Grounds of Appeal" filed on 30 April 2014, AM first made reference to discrimination, submitting as follows:-

> "22. The Appellant argues that there has been a breach of the [Equality Act 2010] in light of the fact that all or the vast majority of the unreasoned nationality decisions were taken against persons who were both Muslim and members of ethnic minorities. That implies that the decisions will be a breach of the 2010 Act unless justified. Again, that will require SIAC to make findings of fact necessary to determine directly whether there has been a breach of the 2010 Act."

Equality Act 2010

6. The Equality Act 2010 ("EA 2010") is in part a restatement of earlier enactments relating to discrimination, including the Race Relations Act 1976 and the Equality Act 2006. Part 2 establishes "key concepts" concerning equality. Section 4 defines "protected characteristics". These include "race" and "religion or belief". Section 9(1) provides that race includes colour, nationality and ethnic or national origins. Chapter 2 of Part 2 specifies "prohibited conduct", including "direct discrimination" (section 13) and "indirect discrimination" (section 19). Section 29 prohibits a "service-provider" from discriminating against a person requiring the service by not providing the person with the service. A service provider must not, in providing a service, discriminate against a person in specified ways; nor must a service-provider harass or victimise a person in ways proscribed by that section. Section 29 does not, however, apply in relation to race discrimination, so far as relating to nationality or ethnic or national origins, in the exercise of certain immigration functions (Schedule 3, paragraph 17).

7. Section 149 (public sector equality duty) provides that a public authority must, in the exercise of its functions, have due regard to the need to, amongst other things "eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act". The fact that section 149 imposes a procedural, rather than a substantive, duty is plain from the judgment of Singh J in Hamnett v Essex County Council [2014] EWHC 246 (Admin): "... it is a procedural duty and does not control the substance of a public authority's decisions" [68]. Accordingly, a failure to comply with this duty "does not confer a cause of action of private law" (section 156).

8. Section 196 and Schedule 23 provide a number of general exceptions, including that a person acting in pursuance of an enactment does not contravene Part 3 (services and public functions) by doing anything "which discriminates against another because of the other's nationality".

9. Part 9 deals with enforcement. Section 113(1) provides that "proceedings relating to a contravention of this Act must be brought in accordance with this Part". In general, the county court (or sheriff in Scotland) has jurisdiction to determine claims, including those concerning Part 3 (services and public functions) (section 114). However, the court/sheriff does not have jurisdiction to deal with Part 3 claims in certain specified cases. These include claims falling within section 115 (immigration cases).

10. By section 115(1) a claim is within section 115 if it relates to the act of "an immigration authority" (defined by subsection (4) as including the Secretary of State) in taking "a relevant decision" (defined by subsection (6) as decisions under the Immigration Acts relating to the entitlement of a person to enter or remain in the United Kingdom and decisions on appeal against such decisions). The jurisdiction of the county court/sheriff is restricted where the question whether there has been a contravention of Part 3 "has been or could be raised on an appeal which is pending, or could be brought, under the immigration provisions, or (b) it has been decided on an appeal under those provisions that the Act is not a contravention of Part 3" (section 115(1)). In such a situation, the relevant decision is not subject to challenge in the county/sheriff court and is not affected by the decision of any such court (section 115(2)). Section 115(5) defines the "immigration provisions" as "(a) the Special Immigration Appeals Commission Act 1997, or (b) Part 5 of the Nationality, Immigration and Asylum Act 2002".

11. Since the definition of "the Immigration Acts" (currently contained in the UK Borders Act 2007) does not include the British Nationality Act 1981, section 115 of the EA 2010, as originally enacted, would not have the effect of ousting the jurisdiction of the county court/sheriff in the case of reviews of nationality decisions pursuant to section 2D of the

SIAC Act 1997. Accordingly, the Justice and Security Act 2013 (which also inserted section 2D into the SIAC Act) added the following subsection to section 115:

> "(8) This section applies in relation to reviews under section 2D of the Special Immigration Appeals Commission Act 1997 as it applies in relation to appeals under the immigration provisions."

12. Finally, the requirement in section 113(1) that proceedings must be brought in accordance with Part 9 is subject to the following important exception:-

> "(3) Subsection (1) does not prevent –
>
> (a) a claim for judicial review;
> (b) proceedings under the Immigration Acts;
> (c) proceedings under the Special Immigration Appeals Commission Act 1997;
> (d) ..."

Commencement and Transitional Provisions

13. The main provisions of the EA 2010 were brought into force on 1 October 2010 by the Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317). For our purposes the relevant transitional/savings provisions are contained in articles 7 and 15:-

> "**7.**
>
> Part 9 of the 2010 Act (enforcement) applies where –

(a) an act carried out before 1 October 2010 is unlawful under a previous enactment, and

(b) that act continues on or after 1 October 2010 and is unlawful under the 2010 Act.

15.

The 2010 Act does not apply where the act complained of occurs wholly before 1 October 2010 so that –

(a) nothing in the 2010 Act affects –

(i) the operation of a previous enactment or anything duly done or suffered under a previous enactment;

(ii) any right, obligation or liability acquired or incurred under a previous enactment;

(iii) any penalty incurred in relation to any unlawful act under a previous enactment;

(iv) any investigation, legal proceeding or remedy in respect of any such right, obligation, liability or penalty; and

(b) any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty may be imposed, as if the 2010 Act had not been commenced."

14. The effect of articles 7 and 15 is that, where an act complained of is of a continuing nature and straddles 1 October 2010, the EA 2010 applies. Acts occurring wholly before 1 October

2010, however, fall to be dealt with by reference to any relevant preceding legislation, rather than the EA 2010.

Race Relations Act 1976

15. Section 1 of the Race Relations Act 1976 ("RRA 1976") sets out what actions constitute racial discrimination for the purposes of the Act. Both direct and indirect discrimination are covered. Section 3 defines "racial grounds" as "any of the following grounds, namely, colour, race, nationality or ethnic or national origins".

16. Section 19B (public authorities), added with effect from 2 April 2001, makes it unlawful for a public authority in carrying out any functions to do any act which constitutes discrimination. Amongst the exceptions to section 19B are those contained in section 19D, whereby it is not unlawful to discriminate on the grounds of nationality or ethic or national origins in carrying out immigration functions. "Immigration functions" is defined by section 19D(4) as functions exercisable by virtue of specified enactments. These include the SIAC Act 1997 (section 19D(5)(b)).

17. Part 8 of the RRA 1976 concerns enforcement. Section 53(1) and (2) are as follows:

> "(1) Except as provided by this Act or the Special Immigration Appeals Commission Act 1997 or Part 5 of the Nationality, Immigration and Asylum Act 2002 no proceedings, whether civil or criminal, shall lie against any person in respect of any act by reason that the act is unlawful by virtue of a provision of this Act.

(2) Subsection (1) does not preclude the making of an order of certiorari, mandamus or prohibition".

18. Section 57 provides that (except for certain purposes irrelevant in the present context) claims that a person has breached the RRA 1976 shall be brought only in "a designated county court" or, in Scotland, a sheriff court. However, by section 57A (claims under section 19B in immigration cases) no proceedings may be brought under section 57(1) in respect of an immigration claim "if the act was done in the taking by an immigration authority of a relevant decision and the question whether the act was unlawful by virtue of section 19B has been or could have been raised in proceedings on an appeal which is pending, or could be brought, under the Special Immigration Appeals Commission Act 1997 or Part 5 of the Nationality, Immigration and Asylum Act 2002 or … it has been decided in relevant immigration proceedings that that act was not unlawful by virtue of that section" (57A(1)). By 57A(3), a decision in relevant immigration proceedings that an act was unlawful by virtue of section 19B is, in effect, binding on the County/Sheriff Court. Section 57A(5) defines "relevant decision" as a decision taken under the Immigration Acts relating to entitlement to enter or remain in the United Kingdom; or a decision on appeal against such a decision.

Equality Act 2006

19. Part 2 of the Equality Act 2006 ("EA 2006") makes unlawful certain forms of discrimination on the grounds of religion or belief. Section 52 makes it unlawful for a public authority exercising a function to do any act which constitutes discrimination. Section 65 to 77 concerns enforcement. Section 65 (Restriction of proceedings) reads as follows:-

"65. **Restriction of proceedings**

(1) Except as provided by this Act, no proceedings, whether criminal or civil, may be brought against a person on the grounds that an Act is unlawful by virtue of this Part.

(2) But subsection (1) does not prevent –

(a) an application for judicial review,

(b) proceedings under the Immigration Act,

(c) proceedings under the Special Immigration Appeals Commission Act 1997, or

(d) ..."

20. Section 66 provides that a claim that a person had acted in a way that was unlawful by virtue of Part 2 may be made in a county court or, in Scotland, a sheriff court. Section 67 (immigration) however, provides that proceedings may not be brought under section 66 alleging unlawful action by a pubic authority (section 52) if the question of the lawfulness of the act could be raised (and has not been raised) in immigration proceedings. If, in immigration proceedings, the court or tribunal has found that an act was unlawful by virtue of section 52, a court hearing proceedings under section 66 "shall accept that finding".

21. Section 67(3) defines "the immigration proceedings" as "proceedings under or by virtue of (a) the Immigration Acts, or (b) the Special Immigration Appeals Commission Act 1997".

22. The relevant provisions of the Equality Act 2006 concerning religious discrimination came into force on 30 April 2007. Both those provisions and the relevant provisions of the RRA

1976 were repealed by the Equality Act 2010, subject to the transitional and other provisions already mentioned.

Discussion

(a) Decisions to refuse naturalisation: "one-off" or continuing acts for purpose of Equality Act 2010 etc?

23. In her written and oral submissions, Ms Callaghan, for the Secretary of State, accepts that, in principle, the Commission has jurisdiction in proceedings under section 2D of the SIAC Act 1997 to determine discrimination claims pursuant to the EA 2010. However, the Secretary of State submits that neither FM nor AM can advance such claims. This is because the acts complained of by FM and AM in each case occurred wholly before 1 October 2010. Article 15 of the 2010 Order (SI 2010/2317) provides in terms that the EA 2010 does not apply to such acts. For FM, Mr De Mello submits that the refusal to naturalise his client is a continuing act, falling within article 7 of the Order. Alternatively, Mr De Mello contends that, even if the refusal of naturalisation was in the nature of a "one-off" act, its consequences for FM are ongoing and those consequences constitute an act, which continues for the purposes of Article 7(b).

24. Mr De Mello also advances a separate submission that, regardless of the fate of FM's other arguments, the EA 2010 falls within the scope of the present SIAC proceedings because the decision of the Secretary of State in February 2014 to certify under section 2D of the SIAC Act 1997 the decision to refuse naturalisation constitutes a discrete decision, reviewable *inter alia* on the basis that certification was discriminatory in ways made unlawful by the EA 2010.

25. I consider it plain that the decisions to refuse to naturalise FM and AM are not continuing acts, beginning before 1 October 2010 and extending thereafter (or, indeed, extending across

any other period). They were specific decisions, each made at particular points in time, refusing certificates of naturalisation, in response to applications. In this regard, it is significant that both FM's and AM's judicial review claim forms specified the decision sought to be impugned as one taken on a particular date; and there is nothing in either set of judicial review grounds to suggest any qualification of that stance.

26. I agree with Ms Callaghan that the present cases are analogous with the position in Sougrin v Haringey Health Authority [1992] ICR 650. In that case, a health authority refused to upgrade a black nurse, whilst upgrading a white nurse with whom the claimant compared herself. Balcombe LJ held that:-

> "In the present case, the complaint made, on the facts correctly made, by the applicant was that she was graded E while her white comparator was graded F. This was a "one-off" act. The continuing consequence of that act is that the applicant is paid less than Ms [M]. This is precisely what the industrial tribunal said ... that finding contains no error of law" [p 657B].

27. Mr De Mello submits that, in the present case, the Secretary of State was acting pursuant to a power (contained in section 6 of the British Nationality Act 1981); and that acting pursuant to a power points towards refusal of naturalisation being a continuing action. I do not find merit in that submission. The fact that the act was done pursuant to a power does not indicate that it falls to be treated as continuing. On the contrary, one can envisage circumstances in which a breach of statutory duty may properly be characterised as ongoing. In each case, it is the substance of the decision that matters. In the present cases there was no failure to reach a decision on the application but, rather, a clear decision, which happened to be adverse to the applicant.

28. Mr De Mello says the refusal to naturalise should be treated as ongoing because it was apparently taken by reference to a policy of the Secretary of State, the terms of which have been withheld from FM. However, in the public law field, decisions are frequently taken by ministers by reference to policies. Whether a decision has been taken by reference to a policy cannot, as such, be determinative of whether an act falls to be treated as "one-off" or continuing, for the purposes of particular legislation. Mr De Mello was also unable to explain why the legal nature of the act in question (as opposed to its validity) falls to be determined by reference to whether any policy underpinning it has been disclosed to the person concerned.

29. My finding on this issue is also made in the light of the judgment of the Employment Appeal Tribunal in Amies v Inner London Education Authority [1977] ICR 308. There, the applicant, a female art teacher and deputy department head, applied for the job of department head, which was instead given to a man. In finding that the alleged act of sex discrimination (contrary to the Sex Discrimination Act 1975) was not a continuing act, the EAT (per Bristow J) held:

> "There is nothing in the definition of the Sex Discrimination Act 1975 or the sections to which that refers to require us to give any other than the ordinary common sense meaning to the provisions of the Act. The applicant's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the employers have unlawfully discriminated against her. She herself has in our judgment given the right definition of "act of discrimination" of which she complained to the tribunal under section 63(1).
>
> …

That there may be discrimination by an act "extending over a period", that is, a continuing act, is clear from section 76(6)(b). This provides that for the purpose of calculating the period within which a complaint must be presented to the industrial tribunal "any act extending over a period shall be treated as done at the end of that period." An illustration of what the legislature had in mind as an act extending over a period can be seen in the provisions of section 6(1), which makes it:

> "unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman – (a) in the arrangements he makes for the purpose of determining who should be offered that employment…"

So, if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint. In contrast, in the applicant's case clearly the time runs from the date of appointment of her male rival. There was no continuing rule which prevented her appointment. It is the omission to appoint her and the appointment of him which is the subject of her complaint." [p 311A-E).

30. The reference to "common sense" in that passage chimes with what is said at paragraph [25] above. By contrast, the reference to the existence of a rule constituting continuing discrimination must be read in the context of the statutory provision regarding arrangements made by an employer for determining whom to employ. In any event, the judgment is not authority for a proposition that any public law decision, if referable to any policy, must for that reason be treated as a continuing act.

31. I am not persuaded by Mr De Mello's submission, to the effect that, even if the decision to refuse to naturalise FM was a "one-off" act, its consequences were such as to engage Article 7(b) of the 2010 Order. In Sougrin the failure to upgrade the applicant had the continuing effect that she was paid less than her white counterpart. But those consequences did not transform the one-off act of alleged discrimination into a continuing one. The point is well made in Amies:-

> "Like any other discrimination by act or omission, the failure to appoint her and the appointment of him, must have continuing consequences. She is not head of the department; he has been ever since October 13, 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself." [p 311C]

In the present case, the expression "act", as used in the 2010 Order, does not contain different shades of meaning. The act is either one-off or continuing,

(b) Is certification reviewable by SIAC?

32. In the present cases, therefore, the EA 2010 can be engaged only if the act of certification under section 2D of the SIAC Act 1997 constitutes a discrete decision, reviewable by SIAC on grounds that include relevant discrimination.

33. Ms Callaghan points to the exception in paragraph 17 of Schedule 3 to the EA 2010, concerning discrimination by reference to nationality or ethnic or national origins. She accepts that the exception does not cover discrimination on the basis of colour. There is, however, a fundamental reason why certification for the purposes of section 2D cannot have the effect for which FM contends; namely, that SIAC has no jurisdiction to entertain a

challenge to the act of certification. The applications made to SIAC by FM and AM in February 2014 were, in each case, to set aside the decision concerning the refusal of the Secretary of State to issue a certification of naturalisation under section 6 of the 1981 Act. SIAC's function in a section 2D case is, first, to determine "whether the decision should be set aside" (subsection (3)) and, secondly, if it decides that the decision should be set aside, to decide whether and, if so, what order/relief should be made/granted (subsection (4)). Parliament has made no provision for the certification itself to be reviewed by SIAC.

34. **For these reasons, SIAC directs that the parties prepare on the basis that at the forthcoming hearings neither FM nor AM has any case that may be advanced by reference to the Equality Act 2010.**

(c) Equality Act 2006: status of letter dated 26 May 2007 (FM)

35. So far as the Equality Act 2006 is concerned, the one-off nature of the decision to refuse naturalisation means that FM's ability to advance a case of religious discrimination by reference to that statute requires him to identify an act of the Secretary of State, said to continue discrimination, which post-dates the coming into force of the EA 2006 on 30 April 2007. Mr De Mello submits that, irrespective of the fate of his submissions based on continuing acts and section 2D certification, the Secretary of State's decision-making in FM's case included a challengeable decision taken on 26 May 2007, in the form of a letter from the Secretary of State's Nationality Team, Northwest Region, to FM's solicitors.

36. I accept Ms Callaghan's submissions on this issue. FM's own claim form challenged only a decision said to have been taken on 28 February 2007. The claim was filed on 29 May, but no reference was made there or in the grounds to the letter of 26 May. Indeed, the claim form

contained a request for an extension of time, given that it was being filed one day outside the three month limit set by CPR 54.

37. The original decision had been taken on 12 July 2006. The letter of 28 February was, in part, a response to a letter before action from FM's solicitors. On 28 February, the respondent's official stated that "having consulted fully with other government colleagues, I am writing to inform you that the decision to refuse the application still stands on the grounds that the Home Secretary remains satisfied that your client is not able to meet the requirement to be of good character". The other purpose of the letter of 28 February was to offer an expanded form of words for the decision to refuse on character grounds; namely that "your client has only preached anti-Western views and voiced sympathy with Osama Bin Laden (OBL) at the Hatterley Street Mosque in Liverpool".

38. By contrast, the letter of 26 May 2007 was written in response to correspondence concerning FM's subject access request. The letter of 26 May records that:-

> "We said in our letter of 12 July that The Home Secretary could not be satisfied that your client was of good character, because he had preached extreme Muslim views.
>
> In our letter of 28 February, we confirmed that we stood by the decision to refuse the application, and offered an expanded form of words after consultation with other government colleagues.
>
> I have carefully noted your client's continuing insistence [as detailed in your handwritten fax of 18 May] that he has not openly preached anti-western views and voiced sympathy for UBL.

> I continue to be satisfied with the information on which our decision to refuse has been based and am not prepared to elaborate further on this matter.
>
> I can find no basis for confirmation that we have failed to make our original decision in accordance with the prevailing policy and nationality law at the time your client's application was determined, and at the stage that we offered an expanded form of words [28 February]"

39. In the circumstances, the latest possible decision is that of 28 February 2007. The letter of 26 May merely referred to a decision that had already been taken and did not contain any further "form of words", which might be said to form part of the decision.

40. **SIAC accordingly directs that FM and the respondent shall prepare for the forthcoming hearing, on the basis that FM is unable to advance grounds contending that the refusal of naturalisation constituted religious discrimination proscribed by the EA 2006.**

(d) SIAC's jurisdiction to consider a claim under the Race Relations Act 1976

41. Ms Callaghan submits that, although FM had been entitled to raise race discrimination by reference to the RRA 1976 in his judicial review grounds, SIAC has no jurisdiction to consider those grounds in the context of proceedings under section 2D of the SIAC Act 1997. She says this is because the RRA 1976 contains no provision equivalent to section 115(8) of the EA 2010 or section 67 of the EA 2006. Each of those provisions, albeit in different ways, circumscribed the jurisdiction of the county court/sheriff court in the case of (amongst other things) the proceedings with which we are presently concerned. In other words, section 67A of the RRA 1976 (claims under section 19B in immigration cases) is silent as to SIAC's

section 2D proceedings, albeit that SIAC's appellate proceedings in respect of decisions under the Immigration Acts are covered by that section.

42. Ms Callaghan accepts that this submission, if correct, has potentially undesirable consequences. Although section 53(2) of the RRA 1976 had permitted FM to raise race discrimination in his grounds of judicial review, that aspect of his challenge cannot, in effect, be carried across to the review to be undertaken by SIAC pursuant to section 2D. One consequence of this apparent *lacuna* might be that FM, in due course, would need to approach the county court to extend time for bringing a claim under section 57.

43. SIAC is unable to accept those submissions. The structure of the RRA 1976, the EA 2006 and the EA 2010 is, in this regard, closely comparable. Section 68 of the EA 2006 and section 115 of the EA 2010, properly construed, are not provisions that confer jurisdiction on SIAC (or others) to adjudicate on relevant claims alleging discrimination. On the contrary, those sections – and section 57A of the RRA 1976 – circumscribe the jurisdiction of the county court/sheriff court. Thus, for example, in the case of the EA 2010, a county court has no jurisdiction to adjudicate upon a discrimination claim which is ongoing in proceedings before SIAC or before the Immigration and Asylum Chamber of the First-tier Tribunal or the Upper Tribunal. Any decision on the discrimination issue reached by SIAC or the Tribunal will then be binding on the court (section 114(5)).

44. Instead of looking at section 57A of the RRA 1976, section 68 of the EA 2006 and section 115 of the EA 2010, the relevant enactments for our purpose are, in fact, section 53(1) of the RRA 1976, section 65 of the EA 2006 and section 113 of the EA 2010. Each of those provisions requires proceedings for contravention to be brought in accordance with the Act (or Part of it) in question. But, crucially, each provision contains a specific exception for the

SIAC Act 1997. Thus, section 113 of the EA 2010 states that the requirement in subsection (1) does not prevent "(c) proceedings under the Special Immigration Appeals Commission Act 1997". An identical exception is contained in section 65(2)(c) of the EA 2006.

45. The relevant wording in section 53(1) of the RRA 1976 is:-

> "Except as provided by this Act or the Special Immigration Appeals Commission Act 1997 or Part 5 of the Nationality, Immigration and Asylum Act 2002, no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of the provision of this Act".

46. Section 2D of the SIAC Act 1997 provides that where a person has been refused naturalisation and the refusal decision has been certified by the Secretary of State, that person "may apply to the Special Immigration Appeals Commission to set aside the decision". Section 2D(3) requires the Commission to "apply the principles which would be applied in judicial review proceedings" in determining whether the refusal decision should be set aside. A decision which is unlawful by virtue of an Act of Parliament is, plainly, a decision which is capable of being set aside in judicial review proceedings. The exception in section 53(1) is therefore engaged.

47. At a late stage in the proceedings on 27 June, Ms Callaghan indicated that she wished to seek clarification of the Secretary of State's stance on this issue. Directions were given that any such clarification should be filed in writing by 4pm on 30 June. Although filed in time, these further submissions were not seen by me until a draft of these directions had been prepared. In her further submissions, the respondent accepts that section 53 of the RRA 1976 should be read as conferring jurisdiction on SIAC; although her concentration is on subsection (2),

which provides that subsection (1) does not preclude the making of an order of certiorari, mandamus or prohibition. The Secretary of State submits that section 2D of the SIAC Act 1997 requires SIAC to apply judicial review principles in deciding whether to set aside a decision, with the result that section 53(2) of the RRA 1976 applies to section 2D cases. On SIAC's analysis, it is unnecessary to invoke section 53(2); but that provision affords an alternative route to the same conclusion.

48. Accordingly, there is no jurisdictional fetter in the forthcoming section 2D hearing on FM's ability to advance the grounds which accompanied his 2010 claim for judicial review. This conclusion is entirely without prejudice to the Secretary of State's ability to rely on any statutory or other defence and does not constitute any intimation of whether SIAC would decide, in the exercise of its discretion, to set aside the decision and/or to grant any form of relief, by reference to the race discrimination ground (In this regard, SIAC specifically notes the Secretary of State's submission that FM's race relations claim was not brought timeously). **SIAC accordingly directs that FM and the respondent shall prepare for the forthcoming hearing on this basis.**

(e) AM's discrimination case

49. For the reasons given, AM is not entitled at the forthcoming hearing to advance grounds based on the EA 2010. Neither in his 2010 judicial review challenge nor subsequently (whether before SIAC or otherwise) has AM sought to advance a claim that the Secretary of State's refusal decision of 12 May 2010 constitutes discrimination proscribed by the RRA 1976 and/or the EA 2006. Particularly having regard to the relevant time limits for judicial review and other enforcement action under those Acts, any request that might now be made by AM to amend grounds in this regard would be extremely problematic. **Accordingly, AM**

and the respondent are directed to prepare for the forthcoming hearing on the basis that AM's case will not involve any ground concerning discrimination by reference to the RRA 1976, the EA 2006 or the EA 2010.

(f) EU law

50. At paragraph 8 of Mr Southey QC's "Skeleton Argument on Preliminary Issues" (27 May 2014), it is contended, in effect, that the reference to the Equality Act 2010 in paragraph 22 of AM's Grounds of Appeal filed on 30 April 2014 (see paragraph [5] above) "is intended to encapsulate not just a domestic 2010 Act claim, but also an equality claim advanced in European Union ("EU") law". Reference is then made to Articles 10 and 19 of the Treaty on the Functioning of the European Union (concerning discrimination), Council Directive 2000/43/EC ("the Race Directive"), Council Directive 2004/113/EC ("the Gender Directive"), European Parliament and Council Directive 2006/54/EC (equality of opportunity etc) and Article 21 of the Charter of Fundamental Rights (prohibition on discrimination).

51. Insofar as AM is seeking to advance these provisions by reference to the Equality Act 2010, the fact that he is unable to rely on that Act presents a major difficulty for him. So too does his failure to challenge the decision of May 2010 at the appropriate time by reference to these provisions and/or their domestic counterparts. Any attempt to rely on the EU provisions in isolation from (and contrary to) the relevant United Kingdom legislation (including its commencement provisions, time limits and general enforcement mechanisms) would also face considerable difficulties. I am conscious that funding difficulties have precluded AM from playing an active part in the proceedings leading to the forthcoming hearing. Nevertheless, as matters stand, SIAC is not persuaded that AM or FM has made an arguable case for requiring these EU provisions to be addressed substantively in the course of SIAC's review of the 2007

and 2010 refusal decisions. **The parties are accordingly directed to prepare for the forthcoming hearing on this basis.**

(g) Discrimination and the ECHR

52. Both FM and AM have raised ECHR Article 8 in their grounds and FM has expressly raised Article 14. Nothing in this ruling is intended to preclude discrimination from being argued in the context of the ECHR where that would otherwise be relevant (as to which see paragraphs [20] to [22] of SIAC's Judgment on the standard of review).