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Race Discrimination Authorisation

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On 15 February 2011, the Minister for Immigration, Damian Green MP, announced that he had, on 10 February 2011, authorised the UK Border Agency to discriminate, in the way it dealt with applicants and migrants, such that some nationalities could be treated differently, and less favourably, than others. The Minister's announcement can be seen at:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110215/wmstext/110215m0001.htm#11021542000010>

Relevant UK legislation

The Race Relations Act 1976 made race discrimination unlawful where this discrimination took place in certain situations – including in employment, the provision of school and further education, and the provision of goods and services. The Race Relations (Amendment) Act 2000 amended the 1976 Act so as to make race discrimination by public authorities generally unlawful. However, the amendments included specific exceptions in the area of immigration. The scheme set out by the 1976 and 2000 Act was essentially incorporated into the Equality Act 2010. This Act brings together the UK's equality laws, including those on race, sex, disability and age discrimination. It also includes exceptions allowing for race discrimination in the area of immigration.

Schedule 3 of the Equality Act 2010 includes provisions permitting discrimination in the area of immigration (see paragraphs 16 to 19). There are three types of discrimination, which Schedule 3 permits in certain circumstances in this area – discrimination on the grounds of disability, race and religious belief. The provision permitting race discrimination is paragraph 17. In short, paragraph 17 permits a Government Minister, carrying out an immigration function, to treat someone differently and less favourably by reason of his or her nationality, or ethnic or national origins. It also permits a Government Minister to authorise the UK Border Agency to treat someone in this way. As indicated above, last month the Minister made such an authorisation.

The Minister's authorisation

The authorisation permits different and less favourable treatment of certain nationals (see below) in the following ways:

- more rigorous scrutiny of someone's application for a visa to transit or enter the UK, or of someone at a UK port seeking to enter the UK
- making greater exercise of powers to seek information and documents from someone seeking to enter the UK
- refusing someone permission to enter the UK
- cancelling someone's permission to enter the UK (before he or she has entered)
- detaining someone for the purpose of considering their entitlement to enter the UK

- failing to give formal notice of a decision on an application for permission to enter the UK in the required standard form
- setting more restrictive conditions (e.g. reporting conditions) on someone granted temporary admission to the UK while his or her application for permission to enter the UK is being considered (or while steps are taken to remove him or her from the UK)

The “certain nationals”, who may be discriminated against in these ways are not identified. The UK Border Agency has said it will not make public which are the relevant nationalities. The only information about these nationalities, which is publicly available, is stated in the authorisation itself. It says that, for the Minister to specify a nationality (which may be discriminated against), he must be satisfied that there is statistical or other information available which either:

- “suggests that a significant number of persons of that nationality have breached or will attempt to breach the immigration laws and/or Immigration Rules” or
- shows a particular proportion of “UK visa refusals, adverse decisions or breaches of immigration laws and/or the Immigration Rules by persons of that nationality” during one of the previous three months

The Minister’s authorisation is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/section11/annexee81?view=Binary>

Further comments

When the Minister announced the authorisation, he gave a brief explanation of what it permitted the UK Border Agency to do, but he did not give any reasons why he considered it was necessary or desirable. It is noteworthy, however, that the Chief Inspector of the UK Border Agency, in his report on entry clearance in Abu Dhabi and Islamabad, published in November 2010, had found discrimination by the UK Border Agency in deciding the applications of Pakistani nationals.

The authorisation permits the UK Border Agency to discriminate very broadly, and in ways that could be very detrimental to an individual. For example, it permits the UK Border Agency to refuse permission to enter the UK, or to cancel the permission someone already has, simply because of his or her nationality. Moreover, exercising this power will increase the number of refusals for persons of that nationality. The number of refusals made is (see above) directly related to whether the power can be continued into the future. In this way, the power to discriminate creates the circumstances in which the power may continue to be used into the future.

Two weeks after announcing this authorisation, the Minister announced his intention to again increase immigration application fees – in some instances, the proposed increase is by more than an hundred pounds, and the highest proposed fee for entry to the UK would be over £1,800. The Minister’s authorisation would permit someone to be refused entry to the UK and lose their application fee (they may also lose other money, such as payment for flights to the UK); and, since the UK Border Agency will not disclose which are the specified nationalities, the person would neither know that his or her application could be dealt with in a discriminatory fashion nor that the refusal in his or her case was because of the authorisation permitting discrimination.

Refusals of permission (or of a visa) to enter, or cancellations of permission to enter, the UK may be appealed. Appeals can be brought on the ground of race discrimination. Although, the Minister’s authorisation permits (as described here) race discrimination, no court or tribunal can know that any discrimination has been permitted because the specified nationalities are not to be made known. It appears that a court or tribunal, which finds that someone was refused because he or she was of a particular nationality, will have to find that race discrimination is made out; and ultimately that person should obtain (possibly substantial) compensation for that discrimination.