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Marson, James and Ferris, Katy

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Splitting hairs?

Is it discrimination? **James Marson & Katy Ferris** examine the different approaches of the court to mistreatment on grounds of nationality & immigration status

IN BRIEF

► In *Taiwo v Olaigbe and another: Onu v Akwiwu and another* the Supreme Court had to decide whether the appellants suffered mistreatment on the basis of their nationality (protected by s 13(1) of the Equality Act 2010 (EqA 2010)) or due to their vulnerable immigration status (not protected).

The case of *Taiwo v Olaigbe and another: Onu v Akwiwu and another* [2016] UKSC 31, [2016] All ER (D) 134 (Jun) involved the mistreatment of migrant domestic workers by their employers and whether such action amounted to direct or indirect race discrimination.

The question for the Supreme Court was whether the appellants suffered mistreatment on the basis of their nationality (which would be protected by s 13(1) of the Equality Act 2010 (EqA 2010)) or due to their vulnerable immigration status (which is not protected).

The facts

Ms Taiwo's case

Ms Taiwo, a Nigerian national, entered the UK in 2010 with a migrant worker's visa obtained, falsely, by her employers Mr and Mrs Olaigbe. They achieved this on the basis of a "manufactured history" of previous employment between Ms Taiwo and the parents of Mr Olaigbe. Mr and Mrs Olaigbe had two children, and at the time were fostering a further two children. Ms Taiwo was engaged as a carer for the children. Olaigbe had fabricated a contract of employment for Ms Taiwo and, on her arrival in the UK, confiscated her passport.

Ms Taiwo's responsibilities included being "on duty" most of her waking time with no rest periods (contrary to the Working Time Regulations 1998 (SI 1998/1833) (WTR 1998)); she had not been paid the minimum wage; she was not provided with sufficient food—leading to dramatic weight loss; and she was subject to physical and mental abuse by Mr and Mrs Olaigbe and his mother. Ms Taiwo shared a bedroom with the children and was subject to conduct which the Employment Appeal Tribunal considered as "systematic and callous exploitation".

In April 2011 Ms Taiwo succeeded in her claims against the employer under the National Minimum Wage Act 1998; s 13 of the Employment Rights Act 1996 (ERA 1996); WTR 1998 and for failure to provide a written statement of particulars as required under s 1 of the 1996 Act. Ms Taiwo also brought proceedings on the basis of direct and indirect race discrimination under EqA 2010 and the Race Relations Act 1976 (RRA 1976).

Ms Onu's case

Ms Onu's case was similar to that of Ms Taiwo. She too was a Nigerian national who entered the UK on a domestic worker's visa obtained by her employers. Again, false information had been provided to the UK authorities in order to obtain the visa. Her contract of employment (to which Ms Onu never had access) was drafted in Nigeria and included clauses that she had to remain in their employ for a minimum of one year and if she broke this agreement, Ms Onu would be reported to the police and the immigration authorities. Ms Onu worked on average 84 hours per week caring for the employers' children (one of whom required special care) and was not provided with statutorily required rest periods, annual leave, nor was she paid the minimum wage. Ms Onu was threatened and abused by her employer. Following her escape from the employer, Ms Onu brought proceedings on the same grounds as Ms Taiwo, adding harassment and victimisation under EqA 2010.

The employment tribunal upheld her claims. They found Ms Onu to have been constructively and unfairly dismissed and, significantly, to have been directly discriminated against and harassed on the grounds of race. The employers had treated her less favourably than they would have treated someone who was not a migrant worker. However, the EAT reversed the finding of discrimination on the basis of race, maintaining the employers' treatment of Ms Onu was inherently based on her subordinate position. It further rejected a claim of indirect discrimination based on a provision, criterion or practice (PCP) of "the mistreatment of migrant domestic workers".

The issues

The Court of Appeal heard both appeals and determined, on the question of direct discrimination, two issues. The first, the grounds issue, was rejected as the employers had not published nor applied a discriminatory criterion. The second, the nationality issue, was also rejected as immigration status was not to be equated with "nationality" for the purpose of RRA 1976 and EqA 2010.

A further argument was presented on the basis of indirect discrimination. There was also no indirect discrimination present as the mistreatment of migrant workers was not a PCP. The employers' actions were not what indirect discrimination was intended to address. This was not a neutral criterion that disproportionately disadvantaged some of those to whom it applied when compared with others.

Ms Taiwo was granted leave to appeal on the nationality issue and was joined in her appeal by Ms Onu.

The judgment

The Supreme Court dismissed the appeals of both Ms Taiwo and Ms Onu as neither had been the victim of race discrimination. The abuse they suffered, although clearly wrong, was as a result of their vulnerability as a migrant worker rather than their nationality.

Reasoning

EqA 2010 provides, in s 13(1), that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. "Race" is one of eight protected characteristics covered by the Act and at s 9(1) race "includes (a) colour, (b) nationality, and (c) ethnic or national origins". It was acknowledged by Lady Hale, providing the only substantive judgment, that the appellants had been treated disgracefully, and that this was on the basis of their vulnerable immigration status. Unlawful direct discrimination would have occurred had the conduct of the employers been "on racial grounds" (per RRA 1976) or "because of" race (per EqA 2010). However, neither RRA 1976 or EqA 2010 include nationality in the definition of race.

Arguments were presented that immigration status is a function of nationality (para. 15) and is indissociable from it. On this basis, broad interpretations of nationality exist in Art 14 of the European Convention on Human Rights ("any ground such as...national or social origin...or other status") and s 28(4) of the Crime and Disorder Act 1998 (a racial group means "a group of persons

defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”).

However, these sources did not need to distinguish between immigration status and nationality discrimination and were not instructive in interpreting RRA 1976 or EqA 2010. Parliament, when enacting the EqA 2010 and its predecessors, had the ability to include immigration status as a protected characteristic but chose not to (para 22). Also, while accepted that immigration status is a function of nationality in that non-British nationals (apart from Irish citizens) are subject to immigration control, there exist a wide variety of immigration statuses. Ms Taiwo and Ms Onu were both particularly vulnerable to the mistreatment they suffered as they entered the UK on domestic workers’ visas which were granted for one year, although renewable, and employees would need approval of the immigration authorities to change their employer while in the UK. Other vulnerabilities present included that the employees were engaged (and resided) in the UK without their family or other support networks; they were unfamiliar with UK culture and language; they worked long hours; they had little knowledge of their legal rights; they worked in private homes which are less easy to regulate; they were often paid informally; and they had no recourse to public funds (para 25). Despite these factors, there are many non-British nationals living and working in the UK who do not share this vulnerability. It was further acknowledged that UK nationals working in the employers’ homes would not have been so badly treated, nor would they have treated non-British nationals who had the right to live and work in the UK in this way (para 26).

The case did not involve indirect discrimination (para 31), either under

EqA 2010 or RRA 1976. There was no PCP as required under s 19 of EqA 2010, but the Supreme Court maintained that this did not prevent the possibility of indirect discrimination occurring in other cases involving the exploitation of migrant workers (para 33).

Commentary

Nationality

The term “nationality” is based on a person being a national of a particular country or can also involve their non-nationality (non-UK national etc) and constitutes a significant aspect of their identity. Further, his or her identity will likely include more than one aspect of “race” such as their colour, their national and/or ethnic origins, and may, for the purposes of the appellants to the current cases, include their immigration status. Therefore migrants, refugees, asylum seekers (for example) possess multiple identities and are largely protected against being discriminated against, being harassed or victimised, by equality laws—on the basis of their age, sex, sexual orientation, disability, religion or belief and so on. It is also true that for many migrants, their nationality (their particular nationality and the fact that they may be considered as a “foreigner”—a non-national) constitutes a significant aspect of their negative experience. They may be particularly vulnerable to discrimination, harassment and prejudice experiences while in the UK.

Particular vulnerabilities of migrant workers

Migrant workers are likely to suffer disadvantages which are unique to their status and to those (non-migrants) who share a common protected characteristic other than their race. They are less likely in many instances to have the support networks and family members on whom to

rely for comfort and help. They will lack the group membership for their social identity; they will have a lack of knowledge of how “things work” or from whom reliable, accurate help and guidance may be sourced. This will likely engender a fear and specific vulnerability which can be exploited by unscrupulous employers—confiscating passports, informing migrant workers of (incorrect) possible state punishment for any infraction of employment rules, and making their continued residence in the UK conditional on approval by the employer establishes an environment prime for abuse.

Way forward?

Dismissing the migrant workers’ appeals that they were discriminated on the basis of their race, the Supreme Court held their mistreatment had nothing to do with nationality. It was due to the women’s vulnerability arising from their immigration status (and their visas which made them dependent on their employers for continued residence in the UK) and this was not a protected characteristic in EqA 2010. Nor was immigration status to be interpreted as “race” for the purposes of the Act. It was acknowledged that the law cannot redress all the forms of harm that people suffer, but Lady Hale did question whether the remedy provided in s 8 of the Modern Slavery Act 2015 was too restrictive in scope and whether employment tribunals should be granted powers to offer a remedy for workers mistreated in the manner suffered by the appellants. Parliament could have included immigration status as a specific protected characteristic, but chose not to. **NLJ**

Dr James Marson, principal lecturer, & research & scholarship lead for law, department of law & criminology, Sheffield Hallam University & **Dr Katy Ferris**, senior lecturer, law school, University of Huddersfield (J.Marson@shu.ac.uk; k.l.ferris@hud.ac.uk)