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ARCHIVED

IMMIGRATION DIRECTORATES' INSTRUCTIONS

**CHAPTER 1
RACE RELATIONS (GENERAL)
SECTION 11**

1. INTRODUCTION

1.1. The Race Relations (Amendment) Act 2000 (RR(A)A) extended the coverage of the Race Relations Act 1976 (RRA) to the functions of public authorities in general. The RRA, as amended by the RR(A)A, does not extend to Northern Ireland, but there the Race Relations (NI) Order was amended in 2003 to comply with EU Directive 2000/43/EC, which largely replicated provisions relating to public authorities which had been included in the RRA for Great Britain. The UK Border Agency would comply with the RRA in Northern Ireland as it does in Great Britain.

1.2. The RRA gave the Secretary of State the power to impose specific duties on public authorities which are subject to the general duty in section 71 of the RRA, to have due regard to the need to eliminate unlawful race discrimination and promote good relations between persons of different racial groups. Under the Race Relations Act 1976 (Statutory Duties) Order 2001 (Statutory Instrument 2001 No. 3458), specified public authorities, including government departments, are obliged to put in place a Race Equality Scheme detailing how they propose to carry out their duties under the RRA. The Home Office made the decision to have in place a three strand equality scheme, which also covers its duties with regard to disability and gender, and it has produced a set of schemes (including an Overarching Scheme) of which the UK Border Agency Associate Scheme is one constituent part.

1.3. This section refers mainly to the RRA, but it is important to bear in mind that the UK is a signatory to the European Convention on Human Rights, Article 14 of which states that: 'The rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The UK is also a signatory of the International Convention on the Elimination of All Forms of Racial Discrimination.

2. WHAT DOES THE RRA MEAN FOR THE UK BORDER AGENCY?

2.1. Section 19B of the RRA states that it is unlawful for a public authority (which of course includes the UK Border Agency) in carrying out its functions to do any act which constitutes racial discrimination.

2.2. In addition, by virtue of section 71 of the RRA, the UK Border Agency is under a general duty, placed on all public authorities, to have due regard to the need to eliminate unlawful racial discrimination and promote good relations between persons of different racial groups. The UK Border Agency is however exempt in carrying out immigration and nationality functions (but not as an employer) from the general duty to promote equality of opportunity between persons of different racial groups.

2.3. The general duty is supported by specific duties set out in secondary legislation and they are enforceable by the Commission for Equality and Human Rights (CEHR). The CEHR is able to issue a compliance notice to a public authority which it believes to be failing to fulfil any specific duty laid down and, if necessary, to seek a court order to enforce the notice. In addition, the CEHR is empowered to issue Codes of Practice to provide guidance to public authorities on how to fulfil their general and specific duties.

2.4. Section 19D of the RRA (as inserted by the RRA(A)) contains a limited exemption for immigration functions. Discrimination is allowed on grounds of nationality, ethnic or national origin if it is required or authorised by legislation or a Minister acting personally.

2.5. The RR(A)A also amended the RRA to oblige the Secretary of State to appoint a Race Monitor to monitor the likely effect on the operation of section 19D of Ministerial authorisations and the actual operation of such authorisations.

2.6. Section 57 of the RRA allows persons who claim they have been unlawfully discriminated against to bring proceedings in the county court or sheriff court (not the AIT) and claim civil remedies. Section 57A clarifies the position with regard to immigration claims (e.g. claims that the UK Border Agency has unlawfully discriminated against a person in contravention of section 19B of the RRA). It states that proceedings may not be brought under section 57 in respect of an immigration claim if:

- (i) the act in question was done by the UK Border Agency in the taking of a decision relating to the entitlement of the claimant to enter or remain in the UK; and
- (ii) the question of whether the act was unlawful by virtue of section 19B has been or could be raised in an appeal which is pending or could be brought under the Immigration Acts.

Similarly, no proceedings may be brought under section 57 in respect of an immigration claim if it has already been decided in the course of an appeal under the Immigration Acts that the act in question was not unlawful by virtue of section 19B.

If it is decided in the relevant immigration proceedings that an act is unlawful, the appeal may be allowed on those grounds and the matter may be referred to the county court or the sheriff court to determine a claim for damages. The county court or the sheriff court cannot then question the decision of the AIT that the act in question was unlawful by virtue of section 19B of the RRA.

However, proceedings may be brought (and have been brought) against the UK Border Agency in the county court or the sheriff court arising out of acts other than immigration decisions (e.g. enforcement operations or the conduct of UK Border Agency staff). Further guidance on handling legal proceedings brought against the UK Border Agency for racial discrimination is given in section 12 below.

2.7. Under the RRA, the CEHR has the power to conduct formal investigations. If, in the course of these, it is satisfied that an act of unlawful discrimination has been or is being committed, it may serve a non-discrimination notice requiring the person who has committed the discrimination not to do so. Such a notice can be triggered by a finding of unlawful discrimination by the AIT or the civil courts.

2.8. Section 29 of the RRA prohibits the publication of advertisements which indicate, or

might reasonably be understood as indicating, an intention by a person to discriminate. This would not catch, for example, a statement or explanation of the law.

3. WHAT IS RACE DISCRIMINATION?

3.1. Direct racial discrimination occurs when a person treats another person unfavourably on racial grounds than he treats or would treat someone else.

3.2. Indirect racial discrimination under section 1(1)(b) occurs when a person applies to another person a requirement or condition which he or she applies or would apply equally to persons not of the same racial group as that other but –

- i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- ii) which he or she cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- iii) which is to the detriment of that other because he cannot comply with it.

The treatment in such cases may be equal in a formal sense but discriminatory in its effect.

3.3 Indirect discrimination under section 1(1A) occurs when a provision, criterion or practice which on the face of it has nothing to do with race or ethnic or national origin and is applied equally to everyone –

- i. puts or would put people of a certain race or ethnic or national origins at a particular disadvantage when compared with others; and
- ii. puts a person of that race or ethnic or national origin at that disadvantage; and
- iii. cannot be shown to be a proportionate means of achieving a legitimate aim.

This is more restrictive than the indirect discrimination defined in section 1(1)(b) because it only applies in specified circumstances, and has limited application in relation to acts performed by public authorities.

Section 10(1) defines “Racial grounds” as meaning any of the following grounds: colour, race, nationality or ethnic or national origins. “Ethnic origin” refers to a group with a long shared history of which the group is conscious as distinguishing it from other groups and with a cultural tradition of its own. Examples are Sikhs, Roma and Jewish people. Rastafarians and Muslims have been found not to be ethnic groups. “National origin” refers to a person whose origins are embedded in a group of people which is recognisable as a nation, whether or not that nation is associated with a sovereign state (for instance, Welsh is regarded as a national origin).

3.5. In trying to establish whether an action is discriminatory it is important to focus on other persons not of that racial group in the same or similar circumstances. For

example, if people seeking asylum claim they have suffered racial discrimination in the determination of their claim, then their discrimination claim should be examined in the light of the treatment of other asylum seekers not of the same racial group.

3.6. The RRA also defines discrimination by way of victimisation. This occurs if a person (the discriminator) treats another person (the victim) less favourably and does so because the victim has:

- a) brought proceedings against the discriminator or another person under the RRA; or
- b) given evidence or information in connection with proceedings brought by another person against the discriminator or any other person under the RRA; or
- c) otherwise done anything under or by reference to the RRA in relation to the discriminator or another person; or
- d) alleged that the discriminator or another person has committed an act which (whether or not the allegation so states) would contravene the RRA.

or because the discriminator knows the victim intends to do any of those things, or suspects that the victim has done, or intends to do any of them.

3.7 The RRA defines harassment as occurring when, on grounds of race or ethnic or national origins, the discriminator engages in unwanted conduct which has the purpose or effect of:

- a) violating the victim's dignity, or
- b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

4. THE IMMIGRATION EXEMPTION

4.1. Section 29 of the RRA contains a specific exemption in respect of immigration functions. Discrimination on the grounds of nationality or ethnic or national origin which takes place in carrying out immigration functions will not be unlawful where it is done by a Minister of the Crown acting personally or by officials acting in accordance with a relevant authorisation. **Discrimination on the grounds of race or colour is not permitted except where the activity is justified for the purpose of safeguarding national security.**

4.2. In practice, this means that discrimination on grounds of nationality or ethnic or national origin is permitted if immigration legislation imposes such a requirement (the relevant legislation is listed in **Annex DD**), or if Ministers have personally authorised such discrimination, in regard to a particular class of case. Decisions taken by Ministers on individual cases are also exempt.

4.3. All of the UK Border Agency's current policies and procedures have been audited to identify discriminatory practices. Ministerial authorisations have been obtained where appropriate. An authorisation can only be made if comparative evidence shows that the discriminatory treatment is justified and it is considered that the treatment is reasonable. It must be proportionate to the purpose which it seeks to achieve. If not it is likely to be

vulnerable to challenge in the courts.

4.4. It is important that all staff satisfy themselves that they are not engaged in discriminatory activity which is not covered by legislation or Ministerial authorisation. If doubts exist as to whether the activity is covered, or whether it constitutes discrimination, they should be raised with a senior officer or with the Diversity Policy Team (DPT), who are readily available to provide advice on race discriminatory issues.

4.5. If it is decided that an authorisation is needed the Legal Adviser's Branch (LAB) should then be invited to draft the necessary authorisation on the basis of clear instructions as to what is required. Units should not seek to draft authorisations themselves. When the authorisation has been drafted units should forward it to DPT along with a draft submission. DPT will then amend the submission if appropriate and arrange for it to be sent to the Minister along with the authorisation. When the Minister agrees to authorise the activity, DPT will arrange for a copy of the authorisation to be published on the UK Border Agency website.

4.6. All current authorisations are listed in **Annex EE** and the wording of all ministerial authorisations is provided in the numbered EE annexes.

5. THE RACE MONITOR

5.1. Section 19E of the RRA, as inserted by the RRA(A), provides for the appointment of a Race Monitor to monitor the likely effect on the operation of the immigration exemption of any relevant authorisations given by Ministers which allow immigration and nationality staff to discriminate on the grounds of nationality or ethnic or national origin. The Monitor also monitors acts done in accordance with any such authorisations. An annual report is submitted by the Monitor to the Secretary of State and is laid before Parliament.

5.2. The Monitor has access to relevant documents and has regular meetings with Ministers and officials. Staff should act promptly when dealing with any request for information from the Monitor.

5.3. The Monitor's job description is at **Annex FF**. The Monitor is security cleared before appointment.

6. INVESTIGATION AND PROSECUTION OF OFFENCES

6.1. The immigration and nationality exemption does not extend to the investigation and prosecution of certain offences (sections 28A to 28K of the Immigration Act 1971 so far as they relate to offences under Part III of that Act). These offences include seeking to obtain leave to enter or remain by deception, facilitating the entry of an illegal entrant into the UK and possessing false immigration documents for use. The effect of this is to place the Immigration Service in the same position as the police in respect of the investigation and prosecution of offences.

6.2. This limitation on the immigration and nationality exemption reflects the fact that investigation and prosecution of offences should be based on objective evidence or intelligence, rather than on an individual's nationality or ethnic or national origin.

However, Immigration Service functions that support the removal or deportation of individuals from the UK will remain within the scope of the exemption. For example, it is sometimes necessary to prioritise cases for removal on the basis of nationality due to particular operational considerations.

7. DUTIES ON PUBLIC AUTHORITIES

7.1. There are three elements of the race relations duties on public authorities:

i) A general duty on all specified public authorities to have due regard to the need (a) to eliminate unlawful racial discrimination and (b) to promote good relations between persons of different racial groups (an additional requirement to promote equality of opportunity does not apply in relation to the carrying out of immigration and nationality functions) (section 71(1) of the RRA);

ii) Specific duties imposed by Order under section 71(2) of the RRA (such an Order is the Race Relations Act 1976 (Statutory Duties) Order 2000) on some or all of the public authorities subject to the general duty to ensure the best performance by those authorities of their general duty; and

iii) CEHR Codes of Practice to provide guidance to public authorities on how to fulfil their general and specific duties.

7.2. The UK Border Agency is subject to the general duty. As policy makers, service providers and employers, it needs to ensure that representatives of ethnic minority communities are consulted, that account is taken of the potential impact of policies on ethnic minorities, that it monitors the actual impact of policies and services and takes remedial action where necessary to address any unexpected or unwarranted disparities. In addition as an employer the UK Border Agency must promote equality of opportunity between persons of different racial groups in its employment.

7.3 Section 71 of the Race Relations Act 1976, as amended by the 2000 Act, gives the Home Secretary the power to impose such duties as he considers appropriate to ensure the best performance by public authorities of their duties under the Act. SI 2000/113458 exercised the power that had been given to the Secretary of State and laid down that public authorities must produce a Race Equality Scheme.

7.4. The component of the UK Border Agency Associate Race, Disability and Gender Equality Scheme sets out how the UK Border Agency discharges its general duties under the RRA, subject to the general provisions of the Home Office Overarching Scheme. These schemes, along with those for all Home Office Agencies and Directorates, can be found on the Home Office's website at www.homeoffice.gov.uk/about-us/publications/staff-equality-targets.

8. RACE EQUALITY IMPACT ASSESSMENTS

8.1. The Race Equality Scheme states that when significant changes to policy or procedure are considered, the UK Border Agency will always assess the potential impact with regard to the avoidance of unlawful racial discrimination and to promoting good race relations. It will do this in accordance with CEHR guidelines by drawing up a race equality impact assessment (REIA).

8.2. When considering whether a REIA should be made, functions and policies should be listed for relevance to race equality – high, medium or low. Assessment should be by screening to begin with, followed by a full REIA if it is considered one is needed. The purpose of a REIA is to anticipate and identify the equality consequences, by identifying the needs of disadvantaged communities and to consider how to reduce or eradicate any adverse effects or impact.

8.3. Guidance can be found on Horizon at Staff Support Groups > Race & Diversity > Equality Impact Assessment,

8.3. REIAs are publicly disclosable documents and on completion should be made available on the UK Border Agency's website.

8.4. The CEHR has the power to enforce compliance with the RRA, and it can look into the quantity and the quality of REIAs conducted by public authorities.

9. NATIONAL SECURITY

9.1. Acts done for the purpose of safeguarding national security are not unlawful under the RRA provided they are justified on national security grounds. The RR(A)A has removed the provision for Ministerial certificates to be issued as conclusive evidence that an act has been performed to safeguard national security.

10. CASE CONSIDERATION AND PROCEDURES

10.1. The following paragraphs provide general guidance on the handling of allegations of race discrimination. More detailed guidance is contained in section 12.

10.2 Under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA"), a person may appeal to the AIT where an immigration decision (as defined in that section) is made in respect of him or her. A decision to refuse leave to enter, a decision to refuse entry clearance, and a decision to remove a person are all immigration decisions. Part V of the NIAA provides for a single right of appeal against an immigration decision, though this may be made on a variety of grounds. One such ground is race (see section 84(1)(b) of the NIAA) – i.e. that the decision is unlawful by virtue of section 19B of the RRA. A person can also raise race discrimination as a ground for appeal during an ongoing one-stop appeal.

10.3 An appeal made on race grounds alone will not generally provide an in-country right of appeal. If, however, the appellant includes a ground of appeal that does attract an in-country right of appeal (such as asylum or human rights) then the appellant may remain in the United Kingdom whilst the appeal is pending.

10.4 This policy has been adopted on the basis that a successful race claim does not

provide a basis for remaining in the United Kingdom. Redress for racial discrimination in an immigration case will usually lie in an entitlement to damages, determined by a county court. Although in some cases a decision may be rendered unlawful by a finding of race discrimination, it will be possible to make a fresh adverse decision on the case if that is justifiable in the circumstances.

10.5. Where a claim of racial discrimination in a decision has been received the decision should be considered to assess whether racial discrimination took place and, if so, whether it was lawful. Where it is found that no racial discrimination occurred or that any such discrimination was lawful, a letter should be sent to the claimant. There will be 3 types of response to such a claim:

- a) that the taking of the decision was not racially discriminatory;
- b) that the taking of the decision was racially discriminatory but was lawful by virtue of legislation;
- c) that the taking of the decision was racially discriminatory but was lawful by virtue of a Ministerial authorisation.

Standard paragraphs for use in a), b) and c) are attached at **Annex HH**.

10.6 Where it appears that the taking of an immigration decision was racially discriminatory, the decision should be reviewed. Where after such a review the original decision is maintained, a letter should be sent to the claimant confirming why the decision has been taken under the Immigration Rules. A new notice should not be sent as the original decision remains in force. Where the immigration decision is found to have been incorrect, the appropriate leave should be granted together with a letter of apology. Consideration should be given to whether an *ex gratia* payment to the claimant is necessary.

10.7. In practice, allegations are likely to be received after an immigration decision (e.g. one relating to leave to enter or remain) has been made. However, it is possible that some persons will, while their application is being considered, allege that the decision-making policies or procedures are discriminatory. Where this occurs, the allegation should be addressed at the time notice of decision is given as that element of the decision. If a further allegation is made in response to the decision, be reviewed by the appellate authorities.

10.8. The procedures to follow in situations when discrimination is alleged while an application is being considered are:

1) refused application attracting a right of appeal – racial discrimination cited by applicant during application

Notify decision with right of appeal as normal, but racial discrimination should be addressed in a covering letter. If further reference is made to racial discrimination this is regarded as a question to be dealt with by the appellate authorities.

The caseworker must detail the reasons for refusal in the normal way, citing under which paragraph of the Rules the decision is made. Specific reference must then be made to the racial discrimination claim and full reasons given as to why the Secretary of State does not consider that unlawful racial discrimination has occurred. A stock paragraph which can be tailored for use in individual cases appears at **Annex HH1** of this IDI.

ii) Refused application with no right of appeal – racial discrimination raised by applicant during application

Again the caseworker must detail the reasons for refusal in the normal way, citing under which paragraph of the Rules the decision is made. Specific reference must then be made to the racial discrimination point and full reasons given as to why the Secretary of State does not consider that unlawful racial discrimination has occurred. A paragraph which can be tailored for use in individual cases appears at **Annex HH1** of this IDI.

11. PREPARATION OF EXPLANATORY STATEMENTS

11.1. Where an explanatory statement is prepared for any of the above cases where racial discrimination has been alleged the allegation must be dealt with in the statement. In cases where, after enquiry, it is not believed that racial discrimination has occurred, the statement must explain why.

11.2. These cases are often complex, and caseworkers should seek advice wherever necessary from senior caseworkers. They in turn may ask L3 for further advice.

11.3. Where it is believed that racial discrimination has occurred but is lawful under legislation, the explanatory statement can simply quote the relevant extracts from the Immigration Rules, statutory instruments or Act.

11.4. Where it is believed that racial discrimination has occurred but is lawful by virtue of a Ministerial authorisation, the text of the relevant authorisation should be sent to the appellant when the claim of racial discrimination is rejected. In some cases, little else may be needed. For example, nationals of a country other than Japan claim racial discrimination on grounds that the UK/Japan Youth Exchange Scheme is discriminatory. The text of the authorisation will be sufficient to rebut their claim.

11.5. More information will however be needed in other cases. For example, if a person claims racial discrimination on the basis that their removal directions have been prioritised on the sole basis of their nationality, the statement will need to refer to the Race Relations (Immigration and Asylum) Authorisation 2004 and the current list approved by the Minister for the purposes of that authorisation which sets out which nationalities are covered by that authorisation.

11.6. Where the decision relies on an authorisation permitting discrimination on grounds of nationality or ethnic or national origin, it will be sufficient to give the text of the authorisation itself in the Explanatory Statement if the authorisation itself specifically lists the nationality or ethnic or national groups which it covers.

12. EXAMPLES OF WHAT IS AND WHAT IS NOT RACIALLY DISCRIMINATORY

12.1 The following activities involve discrimination on racial grounds, and would be unlawful unless covered by a Ministerial authorisation:

i. Asking additional questions at immigration control only to people of one particular nationality, such that they are in general delayed longer than people of other nationalities;

ii. Making extra enquiries on a case where it is the nationality of the applicant which prompts the extra enquiry and where the additional enquiries mean the applicant is disadvantaged in some way.

12.2. The following activities do not involve discrimination on racial grounds:

- i. Surveillance activities where, for example, a flight or vessel is under surveillance.
- ii. Concessions which apply to all persons of a particular territory regardless of their nationality or ethnic or national origin.
- iii. Procedures where cases are prioritised on the basis of category (for example, if all after-entry marriage cases were prioritised regardless of nationality).
- iv. Providing guidance or instructions on legislation and policies even if the legislation or policies are themselves discriminatory.
- v. Taking action against a specific, identified individual or group of individuals on the basis of intelligence or other evidence.

The above lists are not exhaustive and are only intended to give examples. **Each case will turn on its own facts and circumstances and DPT and/ or LAB should be contacted in cases where there is any doubt.**

Enquiries about this instruction to: Diversity Policy Team
Tel: 8760 8447

Other helpline numbers:

AJRU Tel: Apollo House exts 8529 or 8754.

ERD Process Team Tel: 020 8604 1934