

ETHNICITY

Mandla and another v Dowell Lee and another

HOUSE OF LORDS

[1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, [1983] IC R 385, [1983] IRLR 209, (46 MLR 759, 100 LQR 120, [1984] CLJ 219)

HEARING-DATES: 28 FEBRUARY, 1, 2, 24 MARCH 1983

24 MARCH 1983

CATCHWORDS:

Race relations -- Discrimination -- Discrimination against racial group -- Sikhs -- Racial group defined by reference to colour, race, nationality or ethnic or national origins -- Ethnic or national origins -- Ethnic -- Headmaster refusing to admit Sikh boy to school unless he removed his turban and cut his hair -- Headmaster desiring to minimise religious distinctions in school which wearing of turbans would accentuate - - Whether unlawful discrimination -- Whether Sikhs a 'racial group' -- Whether Sikhs a group defined by reference to 'ethnic or national origins' -- Whether discrimination justifiable -- Race Relations Act 1976, ss 1(1)(b), 3(1).

HEADNOTE:

The headmaster of a private school refused to admit as a pupil to the school a boy who was an orthodox Sikh, and who therefore wore long hair under a turban, unless he removed the turban and cut his hair. The headmaster's reasons for his refusal were that the wearing of a turban, being a manifestation of the boy's ethnic origins, would accentuate religious and social distinctions in the school which, being a multiracial school based on the Christian faith, the headmaster desired to minimise. The boy, suing by his father, sought a declaration in the county court that the refusal to admit him unless he removed his turban and cut his hair was unlawful discrimination under s 1(1)(b) of the Race Relations Act 1976 against a member of a 'racial group' as defined in s 3(1) of that Act. The boy contended that the headmaster's 'no turban' rule amounted to discrimination within s 1(1)(b)(i) and (ii) because the boy was not a member of a 'racial group . . . who can comply' with the rule and the headmaster could not show the rule to be 'justifiable irrespective of [the boy's] ethnic . . . origins'. The evidence before the court was that the Sikhs were originally a religious community founded at about the end of the fifteenth century in the Punjab area of India, and that the Sikhs were no longer a purely religious group but were a separate community with distinctive customs such as the wearing of long hair and a turban although racially they were indistinguishable from other Punjabis, with whom they shared a common language. The judge dismissed the boy's claim on the ground that Sikhs were not a 'racial group' within the definition of that term in s 3(1) of the 1976 Act since Sikhs could not be 'defined by reference to . . . ethnic or national origins'. The boy appealed, contending that the term 'ethnic' embraced more than merely a racial concept and meant a cultural, linguistic or religious community. It was common ground that Sikhism was primarily a religion, that the adherents of a religion were not as such a 'racial group' within the 1976 Act and that discrimination in regard to religious practices was not unlawful. The Court of

Appeal dismissed the boy's appeal on the grounds that a group could be defined by reference to its ethnic origins within s 3(1) of the 1976 Act only if the group could be distinguished from other groups by definable racial characteristics with which members of the group were born and that Sikhs had no such characteristics peculiar to Sikhs. The boy appealed to the House of Lords.

na Section 1(1) is set out at p 1065 a b, post

nb Section 3(1), so far as material, is set out at p 1065 g, post

Held - The appeal would be allowed for the following reasons--

(1) The term 'ethnic' in s 3 of the 1976 Act was to be construed relatively widely in a broad cultural and historic sense. For a group to constitute an 'ethnic group' for the purposes of the 1976 Act it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics, two of which were essential. First it had to have a long shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it kept alive, and second it had to have a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition, the following characteristics could also be relevant, namely (a) either a common geographical origin or descent from a small number of common ancestors, (b) a common language, which did not necessarily have to be peculiar to the group, (c) a common literature peculiar to the group, (d) a common religion different from that of neighbouring groups or from the general community surrounding it, and (e) the characteristic of being a minority or being an oppressed or a dominant group within a larger community. Applying those characteristics, the Sikhs were a group defined by reference to 'ethnic origins' for the purpose of the 1976 Act even though they were not racially distinguishable from other people living in the Punjab (see p 1066 b c and g to p 1067 g, p 1068 f, p 1069 a to e, p 1071 b to e and p 1072 d to j, post) *King-Ansell v Police* [1979] 2 NZLR 531 adopted.

(2) The words 'can comply' in s 1(1)(b)(i) of the 1976 Act were not to be read literally, i e as meaning 'can physically' so as to indicate a theoretical possibility, but were to be construed as meaning 'can in practice' or 'can, consistently with the cultural conditions of the racial group' to which the person belonged. The 'no turban' rule was not a requirement with which the applicant boy could, consistently with the customs of being a Sikh, comply and therefore the application of that rule to him by the headmaster was unlawful discrimination (see p 1069 f to h, p 1071 b to e and p 1072 h j, post) *Price v Civil Service Commission* [1978] 1 All ER 1228 applied. (3) The 'no turban' rule was not 'justifiable' within the meaning of s (1)(b)(ii) of the 1976 Act merely because the headmaster had a genuine belief that the school would provide a better system of education if it were allowed to discriminate against those who wore turbans (see p 1069 h j, p 1070 a to d and f, p 1071 b to e and p 1072 h j, post). Decision of the Court of Appeal [1982] 3 All ER 1108 reversed.

NOTES:

Notes

For the general meaning of unlawful discrimination on ground of ethnic or national origins, see 4 Halsbury's Laws (4th edn) para 1035. For the Race Relations Act 1976, ss 1, 3, see 46 Halsbury's Statutes (3rd edn) 395, 397.

CASES-REF-TO:

Cases referred to in opinions

Ealing London Borough v Race Relations Board [1972] 1 All ER 105, [1972] AC 342, [1972] 2 WLR 71, HL, 2 Digest (Reissue) 316, 1783. King-Ansell v Police

[1979] 2 NZLR 531, NZ CA.

Panesar v Nestlae Co Ltd [1980] ICR 144, CA.

Price v Civil Service Commission [1978] 1 All ER 1228, [1977] 1 WLR 1417, EAT, Digest (Cont Vol E) 407, 72Ab.

INTRODUCTION:

Appeal

The plaintiffs, Sewa Singh Mandla and his son, Gurinder Singh Mandla, an infant suing by his father and next friend, who were both Sikhs, appealed by leave of the Appeal Committee of the House of Lords granted on 18 November 1982 against the decision of the Court of Appeal (Lord Denning MR, Oliver and Kerr LJ) ([1982] 3 All ER 1108, [1983] QB 1) on 29 July 1982 dismissing their appeal against the judgment of his Honour Judge Gosling sitting in the Birmingham County Court on 10 December 1980 whereby he dismissed the plaintiffs' claim against the defendants, Mr A G Dowell Lee and Park Grove Private School Ltd, the headmaster and owner respectively of Park Grove School, Birmingham, for, inter alia, a declaration that the defendants had committed an act of unlawful discrimination against the plaintiffs within the Race Relations Act 1976 by refusing to admit the second plaintiff to the school as a pupil unless he removed his turban and cut his hair to conform with the school rules. The facts are set out in the opinion of Lord Fraser.

COUNSEL:

Alexander Irvine QC and Harjit Singh for the appellants.

The first respondent appeared in person.

The second respondent was not represented.

JUDGMENT-READ:

Their Lordships took time for consideration.

24 March. The following opinions were delivered.

PANEL: LORD FRASER OF TULLYBELTON, LORD EDMUND-DAVIES, LORD ROSKILL, LORD BRANDON OF OAKBROOK AND LORD TEMPLEMAN

JUDGMENTBY-1: LORD FRASER OF TULLYBELTON

JUDGMENT-1:

LORD FRASER OF TULLYBELTON. My Lords, the main question in this appeal is whether Sikhs are a 'racial group' for the purposes of the Race Relations Act 1976. For reasons that will appear, the answer to this question depends on whether they are a

group defined by reference to 'ethnic origins'. The appellants (plaintiffs) are Sikhs. The first appellant is a solicitor in Birmingham and he is the father of the second appellant. The second appellant was, at the material date, a boy of school age. The first respondent (first defendant) is the headmaster of an independent school in Birmingham called Park Grove School. The second respondent is a company which owns the school, and in which the first respondent and his wife are principal shareholders. In what follows I shall refer to the first respondent as 'the respondent'. In July 1978 the first appellant wished to enter his son as a pupil at Park Grove School, and he brought the boy to an interview with the respondent. The first appellant explained that he wished his son to grow up as an orthodox Sikh, and that one of the rules which he had to observe was to wear a turban. That is because the turban is regarded by Sikhs as a sign of their communal identity. At the interview, the respondent said that wearing a turban would be against the school rules which required all pupils to wear school uniform, and he did not think he could allow it, but he promised to think the matter over. A few days later he wrote to the first appellant saying that he had decided he could not relax the school rules and thus, in effect, saying that he would not accept the boy if he insisted on wearing a turban. The second appellant was then sent to another school, where he was allowed to wear a turban, and, so far as the appellants as individuals are concerned, that is the end of the story. But the first appellant complained to the Commission for Racial Equality that the respondent had discriminated against him and his son on racial grounds. The commission took up the case and they are the real appellants before your Lordships' House. The case clearly raises an important question of construction of the 1976 Act, on which the commission wishes to have a decision, and they have undertaken, very properly, to pay the costs of the respondent in this House, whichever party succeeds in the appeal. In the county court Judge Gosling held that Sikhs were not a racial group, and therefore that there had been no discrimination contrary to the 1976 Act. The Court of Appeal (Lord Denning MR, Oliver and Kerr LJJ) ([1982] 3 All ER 1108, [1983] QB 1) agreed with that view. The commission, using the name of the appellants, now appeals to this House.

The main purpose of the 1976 Act is to prohibit discrimination against people on racial grounds, and more generally, to make provision with respect to relations between people of different racial groups. So much appears from the long title. The scheme of the Act, so far as is relevant to this appeal, is to define in Part I what is meant by racial discrimination and then in later parts to prohibit such discrimination in various fields including employment, provision of goods, services and other things, and by s 17 in the field of education. There can be no doubt that, if there has been racial discrimination against the appellants in the present case, it was in the field of education, and was contrary to s 17(a) which makes it unlawful for the proprietor of an independent school to discriminate against a person in the terms on which the school offers to admit him as a pupil. The only question is whether any racial discrimination has occurred. Racial discrimination is defined in s 1(1), which provides as follows:

'A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if--(a) on racial grounds he treats that other less favourably than he treats or would treat other persons or (b) he applies to that other a requirement or condition which he 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 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 type of discrimination referred to in para (a) of that subsection is generally called 'direct' discrimination. When the present proceedings began in the county court, direct discrimination was alleged, but the judge held that there had been no direct discrimination, and his judgment on that point was not challenged in the Court of Appeal or before your Lordships' House. The appellants' case in this House was based entirely on 'indirect' discrimination, that is discrimination contrary to s 1(1)(b). When the proceedings began the appellants claimed damages, but that claim was not pursued before this House. Having regard to s 57(3) of the 1976 Act, it would have been unlikely to succeed. They now seek only a declaration that there has been unlawful discrimination against them contrary to the Act. The case against the respondent under s 1(1)(b) is that he discriminated against the second appellant because he applied to him a requirement or condition (namely the 'no turban' rule) which he applied equally to pupils not of the same racial group as the second respondent (i.e. to pupils who were not Sikhs) but (i) which is such that the proportion of Sikhs who can comply with it is considerably smaller than the proportion of non-Sikhs who can comply with it and (ii) which the respondent cannot show to be justifiable irrespective of the colour, etc of the second appellant, and (iii) which is to the detriment of the second appellant because he cannot comply with it. As I have already said, the first main question is whether the Sikhs are a racial group. If they are, then two further questions arise. Question two is what is the meaning of 'can' in s 1(1)(b)(i), and question three is, what is the meaning of 'justifiable' in para (b)(ii) of that subsection?

'Ethnic origins' Racial group is defined in s 3(1) of that Act, which provides:

'... "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.'

It is suggested that Sikhs are a group defined by reference to colour, race, nationality or national origins. In none of these respects are they distinguishable from many other groups, especially those living, like most Sikhs, in the Punjab. The argument turns entirely on whether they are a group defined by 'ethnic origins'. It is therefore necessary to ascertain the sense in which the words 'ethnic' is used in the 1976 Act. We were referred to various dictionary definitions. The Oxford English Dictionary (1897 edn) gives two meanings of 'ethnic'. The first is 'pertaining to nations not Christian or Jewish gentile, heathen, pagan'. That clearly cannot be its meaning in the 1976 Act, because it is inconceivable that Parliament would have legislated against racial discrimination intending that the protection should not apply either to Christians or (above all) to Jews. Neither party contended that that was the relevant meaning for the present purpose. The second meaning given in the Oxford English Dictionary (1897 edn) was 'pertaining to race peculiar to a race or nation ethnological'. A slightly shorter form of that meaning (omitting 'peculiar to a race or nation') was given by the Concise Oxford Dictionary in 1934 and was expressly accepted by Lord Denning MR as the correct meaning for the present purpose. Oliver and Kerr LJ also accepted that

meaning as being substantially correct, and Oliver LJ said that the word 'ethnic' in its popular meaning involved 'essentially a racial concept: the concept of something with which the members of the group are born some fixed or inherited characteristic' (see [1982] 3 All ER 1108 at 1116--1117, [1983] QB 1 at 15). The respondent, who appeared on his own behalf, submitted that that was the relevant meaning of 'ethnic' in the 1976 Act, and that it did not apply to Sikhs because they were essentially a religious group, and they shared their racial characteristics with other religious groups, including Hindus and Muslims, living in the Punjab. My Lords, I recognise that 'ethnic' conveys a flavour of race but it cannot, in my opinion, have been used in the 1976 Act in a strict racial or biological sense. For one thing it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend on scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist). The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the word in some more popular sense. For another thing, the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial. I respectfully agree with the view of Lord Simon in *Ealing London Borough v Race Relations Board* [1972] 1 All ER 105 at 115, [1972] AC 342 at 362, referring to the long title of the Race Relations Act 1968 (which was in terms identical with part of the long title of the 1976 Act), when he said:

'Moreover, "racial" is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word "race" is biologically at all relevant to the species amusingly called homo sapiens.'

A few lines lower down, after quoting part of s 1(1) of the 1968 Act, Lord Simon said:

'This is rubbery and elusive language--understandably when the draftsman is dealing with so unprecise a concept as "race" in its popular sense and endeavouring to leave no loophole for evasion.'

I turn, therefore, to the third and wider meaning which is given in the Supplement to the Oxford English Dictionary vol 1 (A--G) (1972). It is as follows: 'pertaining to or having common racial, cultural, religious, or linguistic characteristics, esp. designating a racial or other group within a larger system . . .' Counsel for the appellants, while not accepting the third (1972) meaning as directly applicable for the present purpose, relied on it to this extent, that it introduces a reference to cultural and other characteristics, and is not limited to racial characteristics. The 1972 meaning is, in my opinion, too loose and vague to be accepted as it stands. It is capable of being read as implying that any one of the adjectives, 'racial, cultural, religious or linguistic', would be enough to constitute an ethnic group. That cannot be the sense in which 'ethnic' is used in the 1976 Act, as that Act is not concerned at all with discrimination on religious grounds. Similarly, it cannot have been used to mean simply any 'racial or other group'. If that were the meaning of 'ethnic', it would add nothing to the word group, and would lead to a result which would be unacceptably wide. But in seeking for the true meaning of 'ethnic' in the statute, we are not tied to the precise definition in any dictionary. The value of the 1972 definition is, in my view, that it shows that ethnic has come to be commonly used in a sense appreciably wider than the strictly

racial or biological. That appears to me to be consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin. For a group to constitute an ethnic group in the sense of the 1976 Act, 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 me 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 those 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. Provided 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 purpose of the 1976 Act, a member. That appears to be consistent with the words at the end of sub-s (1) of s 3: 'references to a person's racial group refer to any racial group into 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 1976 Act is concerned, by which route he finds his way into the group. This view does not involve creating any inconsistency between direct discrimination under para (a) and indirect discrimination under para (b). A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous. Finally, on this part of the argument, I think it is proper to mention that the word 'ethnic' is of Greek origin, being derived from the Greek word 'ethnos' the basic meaning of which appears to have been simply 'a group' not limited by reference to racial or any other distinguishing characteristics: see Liddell and Scott's Greek--English Lexicon (8th edn (Oxford), 1897). I do not suggest that the meaning of the English word in a modern statute ought to be governed by the meaning of the Greek word from which it is derived, but the fact that the meaning of the latter was wide avoids one possible limitation on the meaning of the English word. My Lords, I have attempted so far to explain the reasons why, in my opinion, the word 'ethnic' in the 1976 Act should be construed relatively widely, in what was referred to by counsel for the appellants as a broad, cultural/historic sense. The conclusion at which I have arrived by construction of the 1976 Act itself is greatly strengthened by consideration of the decision of the Court of Appeal in *New Zealand (Richmond P, Woodhouse and Richardson JJ) in King-Ansell v Police* [1979] 2 NZLR 531. That case was discovered by the industry of the appellants' counsel, but unfortunately not until after the Court of Appeal in England had decided the case now under appeal. If it had been before the

Court of Appeal it might well have affected their decision. In that case the appellant had been convicted by a magistrate of an offence under the New Zealand Race Relations Act 1971, the offence consisting of publishing a pamphlet with intent to incite ill-will against Jews, 'on the ground of their ethnic origins'. The question of law arising on the appeal concerned the meaning to be given to the words 'ethnic . . . origins of that group of persons' in s 25(1) of the Act. The decision of the Court of Appeal was that Jews in New Zealand did form a group with common ethnic origins within the meaning of the Act. The structure of the New Zealand Act differs considerably from that of the 1976 Act, but the offence created by s 25 of the New Zealand Act (viz inciting ill-will against any group of persons on the ground of their 'colour, race, or ethnic or national origins') raises the same question of construction as the present appeal, in a context which is identical, except that the New Zealand Act does not mention 'nationality', and the 1976 Act does. The reasoning of all members of the New Zealand court was substantially similar, and it can, I think, be sufficiently indicated by quoting the following short passages. The first is from the judgment of Woodhouse J where, after referring to the meaning given by the to the Oxford English Dictionary vol 1 (A--G) (1972), which I have already quoted, he says (at 538):

'The distinguishing features of an ethnic group or of the ethnic origins of a group would usually depend upon a combination, present together, of characteristics of the kind indicated in the Supplement. In any case it would be a mistake to regard this or any other dictionary meaning as though it had to be imported word for word into a statutory definition and construed accordingly. However, subject to those qualifications, I think that for the purposes of construing the expression "ethnic origins" the 1972 Supplement is a helpful guide and I accept it.'

Richardson J said (at 542):

'The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.'

And the same judge said (at 543):

'. . . a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group, they have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.'

My Lords, that last passage sums up in a way on which I could not hope to improve the views which I have been endeavouring to express. It is important that courts in English-speaking countries should, if possible, construe the words which we are considering in the same way where they occur in the same context, and I am happy to

say that I find no difficulty at all in agreeing with the construction favoured by the New Zealand Court of Appeal. There is only one respect in which that decision rests on a basis that is not fully applicable to the instant appeal. That appears from the long title of the New Zealand Act which is as follows:

'An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination.'

Neither the 1976 Act nor its predecessors in the United Kingdom, the Race Relations Acts 1965 and 1968, refer to the International Convention on the Elimination of All Forms of Racial Discrimination. The convention was adopted on 7 March 1966, and was signed by the United Kingdom on 11 October 1966, subject to reservations which are not now material. It was not ratified by the United Kingdom until 7 March 1969 (see Cmnd 4108, August 1969). Under the convention the states parties undertook, inter alia, to prohibit racial discrimination in all its forms, and to guarantee the rights of everyone 'without distinction as to race, colour, or national or ethnic origin' of equality before the law, notably in certain rights which were specified including education (art 5(e)(v)). The words which I have quoted are very close to the words found in the 1976 Act and in its predecessors in this country, and they are certainly quite consistent with these United Kingdom Acts having been passed in implementation of the obligation imposed by the convention. But it is unnecessary to rely in this case on any special rules of construction applicable to legislation which gives effect to international conventions because, for the reasons already explained, a strict or legalistic construction of the words would not, in any event, be appropriate. The respondent admitted, rightly in my opinion, that, if the proper construction of the word 'ethnic' in s 3 of the 1976 Act is a wide one, on lines such as I have suggested, the Sikhs would qualify as a group defined by ethnic origins for the purposes of the Act. It is, therefore, unnecessary to consider in any detail the relevant characteristics of the Sikhs. They were originally a religious community founded about the end of the fifteenth century in the Punjab by Guru Nanak, who was born in 1469. But the community is no longer purely religious in character. Their present position is summarised sufficiently for present purposes in the opinion of the county court judge in the following passage:

'The evidence in my judgment shows that Sikhs are a distinctive and self-conscious community. They have a history going back to the fifteenth century. They have a written language which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than of Hindus. They were at one time politically supreme in the Punjab.'

The result is, in my opinion, that Sikhs are a group defined by a reference to ethnic origins for the purpose of the 1976 Act, although they are not biologically distinguishable from the other peoples living in the Punjab. That is true whether one is considering the position before the partition of 1947, when the Sikhs lived mainly in that part of the Punjab which is now Pakistan, or after 1947, since when most of them have moved into India. It is, therefore, necessary to consider whether the respondent has indirectly discriminated against the appellants in the sense of s 1(1)(b) of the 1976 Act. That raises the two subsidiary questions I have already mentioned.

'Can comply'

It is obvious that Sikhs, like anyone else, 'can' refrain from wearing a turban, if 'can' is construed literally. But if the broad cultural/historic meaning of ethnic is the appropriate meaning of the word in the 1976 Act, then a literal reading of the word 'can' would deprive Sikhs and members of other groups defined by reference to their ethnic origins of much of the protection which Parliament evidently intended the 1976 Act to afford to them. They 'can' comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules. On the other hand, if ethnic means inherited or unalterable, as the Court of Appeal thought it did, then 'can' ought logically to be read literally. The word 'can' is used with many shades of meaning. In the context of s 1(1)(b)(i) of the 1976 Act it must, in my opinion, have been intended by Parliament to be read not as meaning 'can physically', so as to indicate a theoretical possibility, but as meaning 'can in practice' or 'can consistently with the customs and cultural conditions of the racial group'. The latter meaning was attributed to the word by the Employment Appeal Tribunal in *Price v Civil Service Commission* [1978] 1 All ER 1228, [1977] 1 WLR 1417, on a construction of the parallel provision in the Sex Discrimination Act 1975. I agree with their construction of the word in that context. Accordingly I am of opinion that the 'no turban' rule was not one with which the second appellant could, in the relevant sense, comply.

'Justifiable'

The word 'justifiable' occurs in s 1(1)(b)(ii). It raises a problem which is, in my opinion, more difficult than the problem of the word 'can'. But in the end I have reached a firm opinion that the respondent has not been able to show that the 'no turban' rule was justifiable in the relevant sense. Regarded purely from the point of view of the respondent, it was no doubt perfectly justifiable. He explained that he had no intention of discriminating against Sikhs. In 1978 the school had about 300 pupils (about 75% boys and 25% girls) of whom over 200 were English, five were Sikhs, 34 Hindus, 16 Persians, six negroes, seven Chinese and 15 from European countries. The reasons for having a school uniform were largely reasons of practical convenience, to minimise external differences between races and social classes, to discourage the 'competitive fashions' which he said tend to exist in a teenage community, and to present a Christian image of the school to outsiders, including prospective parents. The respondent explained the difficulty for a headmaster of explaining to a non-Sikh pupil why the rules about wearing correct school uniform were enforced against him if they were relaxed in favour of a Sikh. In my view these reasons could not, either individually or collectively, provide a sufficient justification for the respondent to apply a condition that is prima facie discriminatory under the 1976 Act. An attempted justification of the 'no turban' rule, which requires more serious consideration, was that the respondent sought to run a Christian school, accepting pupils of all religions and races, and that he objected to the turban on the ground that it was an outward manifestation of a non-Christian faith. Indeed, he regarded it as amounting to a challenge to that faith. I have much sympathy with the respondent on this part of the case and I would have been glad to find that the rule was justifiable within the meaning of the statute, if I could have done so. But in my opinion that is impossible. The onus under para (b)(ii) is on the respondent to show that the condition which he seeks to apply is not indeed a necessary condition, but that it is in all circumstances justifiable 'irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied', that is to say that it is justifiable without regard to the ethnic origins of that person. But in this case the

principal justification on which the respondent relies is that the turban is objectionable just because it is a manifestation of the second appellant's ethnic origins. That is not, in my view, a justification which is admissible under para (b)(ii). The kind of justification that might fall within that provision would be one based on public health, as in *Panesar v Nestlae Co Ltd* [1980] ICR 144, where the Court of Appeal held that a rule forbidding the wearing of beards in the respondent's chocolate factory was justifiable within the meaning of s 1(1)(b)(ii) on hygienic grounds, notwithstanding that the proportion of Sikhs who could [sc conscientiously] comply with it was considerably smaller than the proportion of non-Sikhs who could comply with it. Again, it might be possible for the school to show that a rule insisting on a fixed diet, which

included some dish (for example, pork) which some racial groups could not conscientiously eat was justifiable if the school proved that the cost of providing special meals for the particular group would be prohibitive. Questions of that sort would be questions of fact for the tribunal of fact, and if there was evidence on which it could find the condition to be justifiable its finding would not be liable to be disturbed on appeal. But in the present case I am of opinion that the respondent has not been able to show that the 'no turban' rule was justifiable.

Final considerations

Before parting with the case I must refer to some observations by the Court of Appeal which suggest that the conduct of the Commission for Racial Equality in this case has been in some way unreasonable or oppressive. Lord Denning MR ([1982] 3 All ER 1108 at 1114, [1983] QB 1 at 13) merely expressed regret that the commission had taken up the case. But Oliver LJ ([1982] 3 All ER 1108 at 1118, [1983] QB 1 at 18) used stronger language and suggested that the machinery of the 1976 Act had been operated against the respondent as 'an engine of oppression'. Kerr LJ ([1982] 3 All ER 1108 at 1123, [1983] QB 1 at 25) referred to notes of an interview between the respondent and an official of the commission which he said read in part 'more like an inquisition than an interview' and which he regarded as harassment of the respondent.

My Lords, I must say that I regard these strictures on the commission and its officials as entirely unjustified. The commission has a difficult task, and no doubt its inquiries will be resented by some and are liable to be regarded as objectionable and inquisitive. But the respondent in this case, who conducted his appeal with restraint and skill, made no complaint of his treatment at the hands of the commission. He was specifically asked by some of my noble and learned friends to point out any part of the notes of his interview with the commission's official to which he objected, and he said there were none and that an objection of that sort formed no part of his case. The lady who conducted the interview on behalf of the commission gave evidence in the county court, and no suggestion was put to her in cross-examination that she had not conducted it properly. Opinions may legitimately differ as to the usefulness of the commission's activities, but its functions have been laid down by Parliament and, in my view, the actions of the commission itself in this case and of its official who interviewed the respondent on 3 November 1978 were perfectly proper and in accordance with its statutory duty. I would allow this appeal. The appellants have agreed to pay the costs of the respondent in this House and they do not seek to disturb the order for costs in the lower courts in favour of the present respondent made by the Court of Appeal.

JUDGMENTBY-2: LORD EDMUND-DAVIES

JUDGMENT-2:

LORD EDMUND-DAVIES. My Lords, I have found this case unfortunate in several ways and by no means free from difficulty. But I have had the advantage of reading in draft form the speeches prepared by my noble and learned friends Lord Fraser and Lord Templeman. They are in conformity with the conclusion at which I had ultimately arrived, and I do not find it necessary or desirable to add any observations of my own. I therefore restrict myself to concurring that the appeal should be allowed.

JUDGMENTBY-3: LORD ROSKILL

JUDGMENT-3:

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Fraser and Lord Templeman. For the reasons given in those speeches I too would allow this appeal.

JUDGMENTBY-4: LORD BRANDON

JUDGMENT-4:

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Fraser and Lord Templeman. I agree with both speeches, and for the reasons which they give I would allow the appeal.

JUDGMENTBY-5: LORD TEMPLEMAN

JUDGMENT-5:

LORD TEMPLEMAN. My Lords, the Race Relations Act 1976 outlaws discrimination in specified fields of activities against defined racial groups. The fields of activity in which discrimination is made a criminal offence are employment, education and the provision of goods, facilities, services and premises. Presumably Parliament considered that discrimination in these fields was most widespread and harmful. By s 3 of the 1976 Act the racial groups against which discrimination may not be practised are groups 'defined by reference to colour, race, nationality or ethnic or national origins'. Presumably Parliament considered that the protection of these groups against discrimination was the most necessary. The 1976 Act does not outlaw discrimination against a group of persons defined by reference to religion. Presumably Parliament considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups. The 1976 Act does not apply and has no reference to the situation in Northern Ireland. The Court of Appeal thought that the Sikhs were only members of a religion or at best members of a religion and culture. But the evidence of the origins and history of the Sikhs which was adduced by the parties to the present litigation disclosed that the Sikhs are more than a religion and a culture. And in view of the history of this country since the 1939--45 war I find it impossible to believe that Parliament intended to exclude the Sikhs from the benefit of the Race Relations Act 1976 and to allow discrimination to be practised against the Sikhs in those fields of activity where, as the present case

illustrates, discrimination is likely to occur. Section 17 of the 1976 Act makes it unlawful for the proprietor of a school to discriminate against a person in the terms on which the school offers to admit him to the school as a pupil. By s 1(1):

'A person discriminates against another . . . if . . . (b) he applies to that other a requirement or condition which he 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 cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied . . .'

The respondents are only willing to admit the appellant Gurinder Singh to Park Grove School if he complies with the school rules. Rule 22 stipulates that 'Boys' hair must be cut so as not to touch the collar . . .' As an orthodox Sikh Gurinder Singh must allow his hair to grow unshorn. Rule 20 requires boys to wear the school uniform. The method adopted by orthodox Sikhs for containing unshorn hair is the wearing of a turban a school cap is useless for that purpose. Gurinder Singh says he cannot comply with rr 22 or 20 because he is a Sikh and on his behalf it is argued that Sikhs constitute a racial group, being a group of persons defined within the 1976 Act and cannot comply with rr 22 or 20, whereas all non-Sikhs can comply with those rules, then the school is guilty of discrimination against the Sikh Gurinder Singh unless the respondents can show that rr 22 and 20 are justifiable irrespective of the ethnic origin of Gurinder Singh. In the course of the argument attention was directed to the dictionary definitions of the adjective 'ethnic'. But it is common ground that some definitions constitute the Sikhs a relevant group of ethnic origin whereas other definitions would exclude them. The true construction of the expression 'ethnic origins' must be deduced from the 1976 Act. A racial group means a group of persons defined by reference to colour, race, nationality or ethnic or national origins. I agree with the Court of Appeal that in this context ethnic origins have a good deal in common with the concept of race just as national origins have a good deal in common with the concept of nationality. But the statutory definition of a racial group envisages that a group defined by reference to ethnic origin may be different from a group defined by reference to race, just as a group defined by reference to national origins may be different from a group defined by reference to nationality. In my opinion, for the purposes of the 1976 Act a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin and a group history. The evidence shows that the Sikhs satisfy these tests. They are more than a religious sect, they are almost a race and almost a nation. As a race, the Sikhs share a common colour, and a common physique based on common ancestors from that part of the Punjab which is centred on Amritsar. They fail to qualify as a separate race because in racial origin prior to the inception of Sikhism they cannot be distinguished from other inhabitants of the Punjab. As a nation the Sikhs defeated the Moghuls, and established a kingdom in the Punjab which they lost as a result of the first and second Sikh wars they fail to qualify as a separate nation or as a separate nationality because their kingdom never achieved a sufficient degree of recognition or permanence. The Sikhs qualify as a group defined by ethnic origins because they constitute a separate and distinct community derived from the racial characteristics I have mentioned. They also justify the conditions enumerated by my noble and learned friend Lord Fraser. The Sikh community has

accepted converts who do not comply with those conditions. Some persons who have the same ethnic origins as the Sikhs have ceased to be members of the Sikh community. But the Sikhs remain a group of persons forming a community recognisable by ethnic origins within the meaning of the 1976 Act. Gurinder Singh is a member of the Sikh community which qualifies as a racial group for the purposes of the 1976 Act. I agree with my noble and learned friend that Gurinder Singh cannot comply with the school rules without becoming a victim of discrimination. The discrimination cannot be justified by a genuine belief that the school would provide a better system of education if it were allowed to discriminate. I also agree that the Commission for Racial Equality were under a duty properly to investigate the present complaint of discrimination and that their conduct was not oppressive. I agree that the appeal should be allowed.

DISPOSITION:

Appeal allowed.

SOLICITORS:

Bindman & Partners (for the appellants).