judicial proceedings. Any challenge of discrimination in sentencing would have to be under the Human Rights Act 1998 (HRA) – relying on Articles 14 and 6(1) of the ECHR as in the Todorova case. To the best of the writer's knowledge no such claim has yet been litigated in Great Britain.

Is there race discrimination in sentencing in Great Britain? Are any of our judges, like at least some judges in Bulgaria, consciously or unconsciously influenced by negative stereotypes of particular racial groups? The short answer is that we do not know. The latest Race and the Criminal Justice Statistics show that for both adults and juveniles in 2008 higher percentages of people from black and minority ethnic (BME) groups compared to white groups were sentenced to immediate custody.[1] The Ministry of Justice comments that *'this could be due to a number of reasons other than discrimination including: the mix of crimes committed; the seriousness of the offence; the presence of mitigating or aggravating factors; whether a defendant pleads guilty; or whether the defendant was represented or not'*. The Ministry acknowledges that there is a need for research on the factors that may be relevant to this higher proportion of immediate custodial sentences.

Despite guidance by the Judicial Studies Board[2], there are still anecdotal reports of judges making unsuitable remarks relating to the race or religion of parties in criminal and civil proceedings. However, unless a particular sentencing decision is challenged under the HRA or unless there is relevant up-to-date research data, we cannot know whether, and if so how often, cases like Todorova occur or could occur here.

Barbara Cohen
Discrimination law consultant

1. In 2008 28% of white adults were sentenced to immediate custody for indictable offences in England and Wales and the percentage for BME groups ranged between 42% and 52%; for juveniles the pattern was similar with 10% of white juveniles sentenced to immediate custody for such offences while for BME groups the percentage ranged between 17% to 22%. Statistics on Race and the Criminal Justice System 2008/09, Ministry of Justice, June 2010

2. Equal Treatment Bench Book, Judicial Studies Board, April 2010 http://www.jsboard.co.uk/etac/etbb/index.htm

Briefing 566

Closed proceedings and the right to a fair trial

The Home Office v Tariq [2010] EWCA Civ 462, May 4, 2010

Legal issues

In this case, the CA was asked to consider the impact of the closed material procedure provided for under rule 54 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2004 (Tribunal Rules) and under the Employment Tribunals (National Security) Rules of Procedure on an individual's right to seek an effective judicial remedy for discrimination. In particular, it had to determine whether the closed material procedure amounted to an unlawful derogation from European Union directives providing for the right not to be discriminated against, and whether it contravened the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR).

Facts

Mr Kashif Tariq (T), a Muslim of Pakistani origin, was employed by the Home Office (HO) as an immigration officer from April 21, 2003. As an immigration officer, T would have access to sensitive information and was therefore subject to security clearance checks. On August 10, 2006 T's brother and cousin were arrested in relation to a suspected plot to carry out terrorist attacks on transatlantic flights. Whilst T's brother was released without charge, T's cousin was, in 2008, convicted of conspiracy to murder.

Around the time of the arrests T was questioned by the police and although there was no information to suggest that he was involved in the terrorist plot, the police concluded that there was a risk that he could be influenced to abuse his position as an immigration officer. Subsequently on August 18, 2006 T was informed that his security clearance was being reconsidered and he was suspended from duties pending the outcome. On December 20, 2006 T's security clearance was withdrawn. T appealed against the decisions and the consequent action taken.

Employment Tribunal

On March 15, 2007 T lodged a claim in the ET alleging that the withdrawal of his security clearance amounted to unlawful direct and indirect discrimination on the grounds of his race and or

religion. He alleged direct discrimination claiming that he had been treated less favourably because he shared the same race or ethnicity as the individuals who had been suspected of terrorist activity. He alleged indirect discrimination arguing that the HO policy on security clearance placed individuals of his racial, ethnic and religious origin at a disadvantage. T relied on the provisions of the Race Relations Act 1976 (RRA) and the Employment Equality (Religion and Belief) Regulations 2003 (the 2003 Regulations).

The HO denied the allegations relying upon regulation 24 of the 2003 Regulations which provides a defence to a finding of discrimination where the discriminatory act was 'done for the purpose of safeguarding national security' and was 'justified by that purpose'. The HO sought to engage rule 54 of the Tribunal Rules and on February 15, 2008 the ET ordered that the whole of the proceedings be conducted in private and that T and his representatives be excluded from proceedings where closed evidence or closed documents were to be given or considered. A Special Advocate (SA) was appointed to represent T when closed evidence was being heard.

T had applied for a pre-hearing review to consider whether rule 54 was compatible with European Community law and his right to a fair trial under Article 6 ECHR. However, the tribunal resolved to hear arguments on this point before hearing the open evidence.

On March 5, 2009 the ET found in the HO's favour ruling that it had the power to use the closed material procedure and that the procedure was not incompatible with T's rights under EC law and the ECHR. The tribunal also determined it would hear the closed evidence before the open evidence. T appealed to the EAT.

Employment Appeal Tribunal

Before the EAT hearing, a decision was handed down on *Secretary of State for the Home Department v AF* (No.3) [2009] UKHL 28, [2009] 3 WLR 74. The applicability of the findings in that case became a live issue in T's appeal. *AF (No.3)* provides that, where a closed material procedure is used, a claimant is entitled to be provided with sufficient information to enable him to effectively instruct legal representatives; he is entitled to know the 'gist' (as it has been referred to) of the allegations against him.

Subsequently, the EAT upheld the ET's decision that the closed material procedure was lawful and appropriate. However, in light of *AF (No.3)* and *A v United Kingdom* (3455/05) (2009) 49 EHRR 29 ECHR (Grand Chamber), it held in addition that T's Article 6 ECHR right entitled him to be provided with sufficient information to give effective instructions to legal representatives. The HO appealed to the CA on the latter point and T cross-appealed challenging the lawfulness of adopting the closed material procedure in the ET.

The EAT also considered the third issue in dispute regarding the sequence in which the evidence should be heard. The EAT disagreed with the ET finding that, in order to determine whether further material should be disclosed to T, the tribunal should hear the open evidence of both sides first and only then hear the closed evidence of the respondent.

Court of Appeal

Lawfulness of the closed material procedure

The CA judgment records that T submitted on appeal that a closed material procedure in the ET was not provided for by the ECHR or the relevant EU legislation – the Employment Equality Directive 2000/78/EC and the Race Directive 2000/43/EC – from which the domestic law derived. On this basis, the Tribunal Rules providing for a closed procedure amounted to an unlawful derogation from the EU legislation.

It is notable that the actual point made by counsel for T was that there was no necessity for closed evidence in ET proceedings where necessity meant that there was a risk as serious as terrorism on both sides of the equation; i.e. as pointed out by the EAT, if the HO could not use closed evidence there was then no risk of a terrorist incident by virtue of not relying on that information, a subtle but significant point. The CA went on to deal with the EU directives and the ECHR separately.

With regard to the directives, the CA found that there was no authority for T's proposition that a substantive right derived from a directive cannot, without express provision in the directive, be subject to a closed procedure.

Under *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] 1 QB 129 a substantive right may not be taken away without an express derogation provision. However, the present case concerned the reduction of procedural rights and in such circumstances the law under *Kadi v Council of the European Union* [2008] 3 CMLR 41 provided a safeguard. Under *Kadi* appropriate scrutiny is required to be applied in such circumstances to ensure that effective judicial protection is not lost. Paul Troop, who acted for T, has subsequently indicated that counsel's

argument on this issue was actually that a closed procedure can only be justified by necessity, and since there was no necessity, it was unlawful to invoke a closed procedure.

With regard to Article 6, the CA referred to *A v UK* and *AF (No.3)* to support its view that the interests of national security can necessitate a closed material procedure. The CA did not accept that such a procedure was inherently incompatible with Article 6.

With regard to T's submission that SAs are inherently prejudiced by virtue of being appointed by the Attorney General, the CA dismissed this relying on Lord Bingam's judgment in *Regina v H* [2004] 2 AC 134, [2004] UKHL 3 supporting the independence and reliability of the Attorney General's function.

Does AF (No.3) apply to the proceedings

Having decided that the closed procedure rules were not inherently unlawful, the CA went on to consider whether Article 6 impacts on the content of the rules, and in particular whether *A v UK* and *AF (No.3)* give rise to a disclosure obligation over and above disclosure to a SA. The CA focused on the issue of whether a litigant has a right to know the essence of the case against him, if necessary by 'gisting.' Citing *Al-Rawi v Security Service* (2010) EWCA Civ 482, common law principles and the cases of *A v UK* and *AF (No.3)*, the CA considered the HO's submissions that the nature of the present case, being one which does not concern control orders (as in the precedent cases), should preclude T from being entitled to know the gist of the allegations. The CA held that the principle illustrated by *AF (No.3)* must apply to ensure that T benefits from the fairness to which he is entitled under Article 6 and at common law.

Open or closed evidence first?

Lastly, the CA considered the issue of whether a tribunal should hear open evidence before it hears the closed evidence. In the course of its findings on this point, the CA highlighted the continuing duty on the tribunal to *'keep matters under review so as to ensure that the hearing continues to be Article 6 compliant'*. However, it concluded that the order of evidence remained a matter for the discretion of the tribunal.

To ensure Article 6 compliance in the context of the closed material procedure, the CA commented that:

- T should be entitled to submit written representations for consideration at a closed hearing;
- 'substantial weight' should be given to 'the procedural wishes' of the party disadvantaged by the closed material procedure; and,
- where the claimant's legal representative and/or SA seek to have the open evidence heard before the closed evidence a tribunal would need to have *'very cogent reasons indeed'* to go against their wishes. On this final point, the CA observed that an SA may be assisted by hearing the open evidence before the closed evidence is called. The SA is often given a useful 'steer' by the way the open case is put.

The CA dismissed the HO's appeal and T's cross appeal. It was clear that its comments on the sequence of evidence should be read as clarification and guidance.

Implications and comment

This case has to some degree clarified the law in this area without substantially changing it. Claimants who are suspended or dismissed on national security grounds will continue to face enormous frustration where a closed material procedure is invoked.

The decision is welcomed for clarifying that *AF (No.3)* is applicable in discrimination cases not concerning control orders. However, the notion of 'gisting' remains a vague one and offers little consolation to claimants and practitioners on the receiving end of the closed materials procedure and faced with the inequality of arms that comes with it.

The judgment in *Tariq* offers no clarification however on the level of detail required to constitute 'the gist' and therefore goes little distance to allay fears about abuse of the closed material procedure. Respondents' duty in such cases to respect an individual's Article 6 right has not been extended far enough to ensure protection of that right. Consequently it remains incumbent upon the individual to ensure his Article 6 rights are protected by challenging, where necessary, a respondent's compliance with their duty under *AF (No.3)*. This will inevitably involve challenging the interpretation of the 'gisting' duty so far as this is possible (where a claimant has no idea what information remains undisclosed, which tends to be the majority experience of claimants).

There are also residual problems such as perception of the fairness of the proceedings where the SA is actually supported by the same solicitor as the HO. It also remains a serious concern that SAs are restricted from meeting with the excluded person once they have seen the closed material.

The judgment in *Tariq* gives emphasis to the common law right to a fair trial and highlights the positive duty on employment tribunals to 'ensure' compliance. However, it remains the case that the right

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only extends so far as the interests of national security permit. Fundamentally, and as per the proposition advanced by counsel for T, closed evidence is unnecessary in these cases. If the current position is allowed to stand then this has a very serious and significant impact in the safeguarding of an individual's civil liberty in all court proceedings which invoke the closed procedure. Protection for an individual's Article 6 rights remains compromised. It is, after all, damage to individuals that this Article is intended to prevent.

Despite being obiter, the CA's procedural guidance in *Tariq* is welcomed and practitioners are encouraged to seek to enforce their procedural preferences taking full advantage of the opportunity to submit written submissions in closed proceedings addressing in the strongest terms the impact of the closed procedure on their client's Article 6 rights.

Counsel for T has confirmed that an application for permission to appeal and a cross appeal to the Supreme Court has been lodged and remains to be considered.

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Briefing 567

Religion or belief discrimination in employment: whose belief counts?

Eweida v British Airways Plc [2010] EWCA Civ 80, February 12, 2010

Implications for practitioners

This decision has important implications for proving unlawful discrimination in employment on grounds of religion or belief. It highlights the following key factors in such cases:

- it must be proved by the claimant that a group of persons of the claimant's religion or belief are, or would be, put at a particular disadvantage by the provision criterion or practice (PCP); and
- it must be proved that the PCP interferes with the observance of an established religious doctrine or belief. It is not sufficient that the claimant personally believes that they have experienced a particular disadvantage.

Facts

Ms Eweida (E) is a practising Christian who had worked part-time for British Airways (BA) on their check-in desk since 1999. She is required to wear a uniform. In 2004 BA changed its uniform from a high-necked blouse to a uniform that incorporated an open collar but prohibited the wearing of visible items of jewellery. Between May 20 and September 20, 2006, E attended work on a number of occasions wearing a visible silver cross on a necklace. When she refused to conceal the cross, she was sent home. She remained at home, unpaid, from September 20 until February 2007, when the uniform policy was amended allowing staff to display a faith or charity symbol. She then returned to work and remains employed by BA.

E brought a number of claims against BA including claims under the Employment Equality (Religion or Belief) Regulations 2003 (the 2003 Regulations) of direct and indirect discrimination and harassment on grounds of religion or belief.

Employment Tribunal

The ET dismissed E's claims. It held that there was no direct discrimination. E had not been treated less favourably than BA would have treated any other person with a faith, or no faith, displaying jewellery over their uniform.

The ET also held that there had been no harassment. There was no evidence that BA had engaged in unwanted conduct. It had simply sought to enforce its contractual uniform policy. Further there was no evidence that BA's treatment of E was on the grounds of her religion.

In relation to the claim of indirect discrimination, the ET found that BA had applied a PCP to E. This was the requirement that any personal jewellery should be concealed by a uniform. However, the tribunal said that this did not put Christians at a particular disadvantage compared with other persons. As a result the claim of indirect discrimination also failed.

Employment Appeal Tribunal

E appealed the ET's finding on indirect discrimination. The EAT upheld the tribunal's decision. It said that the whole purpose of indirect discrimination is to deal with