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Submission to the Hong Kong Legislative Council Bills Committee on Race Discrimination Bill

in response to the paper (LC Paper No. LS14/07-08) prepared by the Legal Service Division on 12 November 2007

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Introduction

This submission based on my experience working in Northern Ireland, UK, Europe (both EU and Council of Europe) and UN at large in the field of human rights and racial discrimination, I would like to share my expertise as a Hong Kong citizen on the proposed Bill, in particular the compatibility with the international human rights standards and the UK anti-discrimination law in which the proposed Bill is based upon. Due to the unforeseeable workload in 2007 I missed the opportunity to submit my paper to the Bills Committee in April 2007. I used my draft paper in April 2007 in preparation for this submission.

This submission forms two parts: Part I - the international human rights standards and Part II - my substantial comments on the LC Paper No. LS14/07-08.

First of all I would like to welcome the Administration introducing legislation to outlaw racial discrimination in response to the UN Committee on the Elimination of Racial Discrimination (CERD) demand to fulfil the Convention obligation under Article 2 over the last two decades (under both the British Colonial government and the existing SAR government). [1] Therefore the proposed Racial Discrimination Bill should be compatible with the international obligations under Convention for the Elimination of all forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention for the Elimination of all forms of Discrimination

[1] In the last Conclusion Observations of CERD in 2001 it stated that "….The Committee does not accept the argument put forward for not initiating such legislation, i.e. that such legislation would not be supported by the society as a whole. It is recommended that the Government of the State party and the local authorities of the Hong Kong Special Administrative Region review the existing unsatisfactory situation thoroughly and that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent, or national or ethnic origin, as has been done with regard to discrimination on the grounds of gender and disability." (A/56/18,paras. 247, China 09/08/2001)

Against Women (CEDAW) and Convention on the Rights of the Child (CRC) as apply to Hong Kong.

At the same time I have my great concerns and reservation that the proposed Bill has too many exemptions and exceptions (Clause 3 in particular) in which defeat the purpose of the legislative protection to the most vulnerable group in our society who experience discrimination and/or prejudice based on the fact that they are not Hong Kong Chinese. The New Arrivals from Mainland is one of the most vulnerable groups in our society due to their accent, language barriers, prejudice in the society and other disadvantages. The same situation is also happened in United Kingdom (UK), as well as in Northern Ireland in which new arrivals from Mainland receive less pay and other benefits compare with Hong Kong migrants or British Chinese in the same type of job. My experiences in both Hong Kong and UK inform me that prejudice and/or discrimination against Mainland Chinese by Hong Kong Chinese is common and typical. Other vulnerable groups such as domestic helpers, asylum seekers and refugees, due to restrictive immigration control (to a limited extent is permissible under international law) will have similar as well as difference experiences. Therefore these exemptions and exceptions must be compatible with the international obligations and standards.

Part I: International Human Rights Standards on equality and non-discrimination principle

1. **International Covenant on Civil and Political Rights (ICCPR)**
   1.1 Article 26 of ICCPR provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The ground covered is non-exhausted and open-ended. It is also a freestanding clause.

   In Zwan-de Vries v. the Netherland (1987), the Human Rights Committee ruled that non-discrimination in relation to economic and social rights is covered by ICCPR irrespective of the existence of the International Covenant on Economic, Social and Cultural Rights.

   1.2 Although ICCPR neither defines the term "discrimination" nor indicates what constitutes discrimination, the Committee believes that "the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an

equal footing, of all rights and freedoms." (paragraph 7 of the General Comment No. 18) [2]

1.3 In Althammer et al. v. Austria (2003) [3] HRC further developed the concept of "Indirect Discrimination". In Althammer "the Committee recalls that a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decision with such an impact do not amount to discrimination if they are based on objective and reasonable grounds."[4]

1.4 The HRC developed an important defence for the alleged "Indirect Discrimination" in the form of two-tier test. Firstly the policy or measure must pass the justification test on the purpose of the alleged discriminatory policy or measure. If the test is affirmative, it goes straight to show whether the means to implement the policy or measure is proportional. If both tests are affirmative, there is no discrimination as the purpose is justifiable and the means are proportionate. If both tests either one is negative, it is discriminatory.

1.5 This important jurisprudence set the defence standards on the concept of "Indirect Discrimination", which is compatible and consistence to any jurisdictions. The proposed Bill, in terms of the definition of "Indirect Discrimination should be consistence to and compatible with this jurisprudence. But I am afraid this is not the case in the proposed Bill (see Clause 4 (2)(b), 4(3) and 4(4)(a), (b), (c) and (d) and 4(5)).

1.6 Another principle interpreted by the HRC is that "the enjoyment of rights and freedom on an equal footing, however, does not mean

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[2] See also paragraph 6 of the General Comment No. 18 on the definition under CERD and CEDAW

[3] In Althammer the authors claim that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The HRC ruled that the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure o them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measures, as was stressed by the Austrian courts (para. 23 above), was based on objective and reasonable grounds.

[4] CCPR, Communication No 998/2001: Austria. 22/09/2003. CCPR/C/78/D/998/2001 (jurisprudence), at paragraph 10.2.

identical treatment in every instance. In this connection, the provisions of the Covenant are explicit." (paragraph 8 of the General Comment No. 18) [5]

1.7 Different treatments in response to different circumstances are another milestone to the non-discrimination principle, which obliges to treat like alike. Accommodating differences (socially, physically or otherwise) are compatible to the equality principle.

1.8 The Committee also takes note that "the principle of equality sometimes requires parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant." (paragraph 10 of the General Comment No. 18)

1.9 This important "positive equality" concept through affirmative action is aimed at tackling the structural or institutional discrimination. But the proposed Bill tries their best to exclude this element such as Chinese language support programme for non-Hong Kongese in mainstreaming education system, interpreters for non-Cantonese speaking in order to get access to the public services, etc.

2. International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)

2.1 ICERD is the only UN Convention to tackle racial discrimination directly in additional to other thematic group protection, such as CEDAW, CRC, the Migrants Convention (International Convention on the Protection of the Rights of All Migrants and Members of their Families) and Disabled Person Convention (Convention on the Rights of Persons with Disabilities [not yet into force])[6]. Although both the Migrants Convention and Disabilities Convention are not binding Hong Kong government, as a good practice we should look at what we need to be improved in order to promote equality of opportunities for all persons.

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[5] See article 6, paragraph 5, which prohibits the death penalty to people under the age of 18. The same also applies to pregnant women. Similarly article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Additionally, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

[6] The Chinese government is not the State Party of the Migrants Convention but is the State Party of the UN Women Convention with one reservation and the Children Convention with a number of reservations for the SAR government, including detention of children while seeking refugee status.

2.2 The Committee on the Elimination of Racial Discrimination (CERD) publishes its interpretation of the content of human rights provisions, in the form of general comments (referred to as "General Recommendations") on thematic issues. These include, relevant to this submission, discrimination against non-citizens (General Recommendations 30, 01/10/2004) and gender related dimensions of racial discrimination (General Recommendation 25, 20/03/2000), in particular abuse of women workers in the informal sector or domestic workers employed abroad by their employers.

2.3 One of the key issues encounter by the CERD is paragraph 2 and 3 of Article 1 of the ICERD in relation to the distinction, exclusions, restrictions or preference by State Parties between citizens and non-citizens (paragraph 2) and legal provision by State Parties on nationality, citizenship and naturalisation (paragraph 3). The CERD, in its latest open discussion in 2003 in which I participated, published its General Recommendation 30 on Discrimination Against Non Citizens in 2004 and close an important chapter on the interpretation of paragraph 2 and 3 of Article 1 of the ICERD which is relevant to this submission.

2.4 The General Recommendations 30 provides the following guidance that is highly relevant to this submission:

2.4.1 Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 states that the legal provisions of State Parties on nationality, citizenship and naturalisation must not discriminate against any particular nationality (paragraph 1);

2.4.2 Article 1, paragraph 2, must be construed to avoid undermining the basic prohibition of discrimination. It should not be interpreted to detract in any way from the rights and freedom recognised and enunciated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (paragraph 2);

2.4.3 Under ICERD differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[7] Differentiation within the scope of article 1, paragraph 4, of ICERD regarding special measures is not considered discriminatory (paragraph 4); and

2.4.4 It is the obligation of the state to report fully upon legislation on non-citizens and its implementation (paragraph 5).

[7] ICERD is in consistence to the interpretation of the Human Rights Committee on the concept of indirect discrimination (see General Comments No. 18 above)

The proposed Bill, in particular, excludes non-citizens to the enjoyment of rights under Article 5 as it will exclude all functional departments, as well as criminal justice enforcement agencies through its application to the Government (see details in Clause 3).

3. European Convention of Human Rights and Fundamental Freedom

3.1 Article 14 of the European Convention of Human Rights and Fundamental Freedom ("the Convention") is the key provision to outlaw any forms of discrimination. Article 14 provides that "The enjoyment of the rights and freedoms set forth in the 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."

3.2 Unfortunately Article 14 is not a freestanding clause and must be used in conjunction with other Convention rights. This issue is now settled in 2000 when the Council of Minister adopted the new Protocol 12 of the Convention. Protocol 12 mirrored Article 14 and has enforced since 2006 as a result of a dozen of Member States who rectified Protocol 12.

3.3 The ECtHR has well established that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (Willis v UK, no. 36042/97, paragraph 48; and Okpisz v Germany, no. 59140/00, paragraph 33). However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them. In certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (Belgium case, 23 July 1968, Series A no. 6, paragraph 10; Thilmmenos v Greece [GC], no. 34369/97, paragraph 44; and Stec and Others v UK [GC], no. 65731/01, paragraph 51).

3.4 The ECtHR has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even though it is not specifically aimed at that group (Hugh Jordan v UK, no. 24746/94, paragraph 154; and Hoogendijk v the Netherlands (dec.), no. 58461/00). It also accepted that discrimination potentially contrary to the Convention may result from a de facto situation (Zarb Adami v Malta, no. 17209/02, paragraph 76).

3.5 Discrimination based on a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which

diversity is not perceived as a threat but as a source of enrichment (Nachova and Others v Bulgaria [GC], nos. 43577/98 and 43579/98, paragraph 145; and Timishev Russia, nos. 55762/00 and 55974/00, paragraph 56).

3.6 The ECtHR has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (Timishev, cited above, paragraph 58).

3.7 On burden of proof the ECtHR has established that once the applicant has shown a difference in treatment, it is for the government to show that it was justified (see Chasssagnou and Others v France [GC], nos. 25088/94, 28331/95 and 28443/95, paragraph 91-92 and Timishev, cited above, paragraph 57).

3.8 On what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the ECtHR stated in Nachova and others (cited above, paragraph 147) that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The ECtHR adopted the approach that are supported by the free evaluation of all evidence, including such inferences as may flow from the facts that and the parties' submissions.

3.9 According to the established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of roof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (D.H. and Others v Czech [GC], no.s 57325/00, paragraph 178).

3.10 The ECtHR also recognised that Convetnion proceedings do not in all cases lend themselves to a rigorous application of the principle affirmanti incumbit probation (he who alleges something must prove that allegation – Aktas v Turkey (extracts), no. 24351/94, paragraph 272, ECHR 2003-V). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (Salman v Turkey [GC], no. 21986/93, paragraph 100, ECHR 2000-VII; and Anguelova v Bulgaria, no. 38361/97, paragraph 111, ECHR 2002-IV). In the case of Nachova and Others (cited above, paragraph 157), the ECtHR did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular

case in which the allegation was that an act of violence had been motivated by racial prejudice.

3.11 As to whether statistics can constitute evidence, the ECtHR has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (Hugh Jordan, cited above, paragraph 154). However, in more recent cases on the question of discrimination, in which the applicants alleged a difference in the effect of a general measure or de facto situation (Hoogendijk, city above; and Zarb Adami, cited above, paragraph 77-78), the ECtHR extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situation.

3.12 In Chapman (Chapman v UK [GC], no.27238/95, paragraph 93-94) the ECtHR observed that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

3.13 In November 2007 the Grand Chamber of the European Court of Human Rights (the ECtHR) made a landmark decision on Article 14 ruling to overturn the Chamber of the European Court of Human Rights (D.H. and others v The Czech Republic, no. 57325/00 [judgment of D.H. is in appendix of this submission]). It was the first time in legal history that the ECtHR interpreted details on Article 14, in particular the concept of “Indirect Discrimination” and school system for socially disadvantage groups which is very relevant to this submission.

3.14 In D.H. Roma Children were placed in special schools in the town of Ostrava in Czech Republic through the assessment of the school system. Roma Children constituted 56% of the special schools in Ostrava in which they represented only 2.26% of the population. The issue of the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roman children, including the applicants, being placed in special schools without justification and whether such children were placed at a significant disadvantage.

3.15 The ECtHR relied on case law developed in Hoogendijk, Zarb Adami and Nachova and others (cited above) stated in paragraph 188 and 189 that

“In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear an critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the

applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistics evidence.

Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (see, mutatis mutandis, Nachova and Others, cited above, paragraph 157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (ibid., paragraph 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof."

3.16 The ECtHR went on to say in paragraph 194 that

"Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere (see, mutatis mutandis, Nachova and Others, cited above, paragraph 157) to prove any discriminatory intent on the part of the relevant authorities (see paragraph 184 above)."

3.17 Regarding objective and reasonable justification paragraph 198 and 199 concluded that

"The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.

The Grand Chamber observes, further, that the tests used to assess the children's learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. While accepting that it is not its role to judge the validity of such tests, various factors in the instant case nevertheless lead the Grand Chamber to conclude that the results of the tests carried out at the material time were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention."

3.18 Regarding the issue of parental consent to send their children to special schools the ECtHR also decided in paragraph 202-204 that

"However, under the Court's case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (Pfeifer and

Plankl v Austria, judgment of 25 February 1992, Series A no. 227, paragraph 37-38) and without constraint (Deweer v Belgium, judgment of 27 February 1980, Series A no. 35, paragraph 51).

In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent…….

In view of the fundamental importance of the prohibition of racial discrimination (see Nachova and Others, cited above, paragraph 145; and Timishev, cited above, paragraph 56), the Grand Chamber considers that, even assuming the conditions referred to in paragraph 202 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interests (see, mutatis mutandis, Hermi v Italy [GC], no. 18114/02, paragraph 73, ECHR 2006…)"

3.19 The ECtHR concluded the case at paragraph that

"In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionately between the means used and the aim pursued. In that connection, it notes with interests that the new legislation has abolished special schools and provides for children with special education needs, including socially disadvantaged children, to be educated in ordinary schools."

Part II: Comments on LC Paper No. LS14/07-08

Clause 3 – Application to Government

Option A

The merit of Option A by deleting Clause 3 and replacing with a new clause "This Ordinance binds the Government" is consistence with the existing equality legislation. But it does not tackle the roots of the problem in which the Administration is looking for – limit the application of the law to the functional areas of the Administration by arguing that the law only applies to the Government so far as similar act done by a private party (public-private scenario).

Although the intention of the Race Relations Act 1976 applies to all government, the House of Lords decision in Re Amin limited the functional areas of the application. In Re Amin (Amin v Entry Clearence Officer, Bombay

[1983] 1 AC 818) the House of Lords, by majority of 3 to 2, held that the expression 'provision of goods and facilities and services' in anti-discrimination law (Section 20 of the Race Relations Act 1976) applied only to activities or matters analogous to those provided by private undertakings, by one individual to another. It thus excluded areas of governmental and regulatory activities such as the areas of immigration control, the administration of prison system and the law enforcement activities of the police. This judicial decision also applies to gender discrimination legislation at that time, as well as future anti-discrimination law based on the same provision.

This technical argument on par to private undertaking services provision by the Home Office became the bad law in the UK over two decades. The Commission for Racial Equality had published three reviews of the Race Relations Act 1976 in 1985, 1992 and 1998. The three reviews requested to amend the 1976 Act in order to overrule the Amin judgement so that the 1976 Act applies to all aspects of the activities of government and public bodies.

"The Commission believes that this is wrong. This lack of remedy occurs precisely where the individual is most vulnerable. In the private sector, if there is discrimination at one source, the individual generally has both the opportunity of going elsewhere to another provider of services and also has a remedy under the Act. There appears to be neither opportunity when the individual is facing an immigration officer, prisoner officer or police officer prepared to discriminate improperly in exercising control functions." (Recommendation 3: Governmental functions, p.30-31, Second Review of The Race Relations Act 1976, Commission for Racial, UK, 1992)

"Immigration legislation is, by definition, discriminatory on grounds of nationality or citizenship. Since the case of R v Entry Clearance Officer, Bombay, ex parte Amin [1983] 2AC 818 it has not been possible to challenge immigration practices under the Race Relations Act. To give precedence to the Race Relations Act would mean that, in future, when new immigration legislation is likely also to be discriminatory on grounds of race, colour, or ethnic origin, this would need to be justified when it was proposed." (Under the heading of Racial Equality as a permanent priority and obligation for government and all public bodies: A. Priority for discrimination legislation, p.12, Third Review of the Race Relations Act, Commission for Racial Equality, UK, 1998)

"An amendment is required not only to overrule the limitation introduced since the House of Lords decision in R v Entry Clearence Officer, Bombay, ex parte Amin but to bring all activities by all public bodies within the scope of the Race Relations Act (the Act)." (Under the sub-heading B. The Race Relations Act should apply to all aspect of the activities of government and all public bodies, p.12, Third Review of the Race Relations Act, Commission for Racial Equality, UK, 1998).

The 1976 Act was subsequently amended, by the Race Relations (Amendment) Act 2000 as the result of the Stephen Lawrence Inquiry Report

(the so-called the MacPherson Report) into the murder of a black young man and institutional racism within the police force that recommended the Race Relations Act should apply to all police officers in carrying out its functions (Recommendation 11).[8]

It is now under Section 19B of the Race Relations (Amendment) Act 2000, which states, "It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination."

The Administration introduced in effect Re Amin into the Racial Discrimination Bill, which is very unfortunate by limiting the scope of protection on racial discrimination.

The real issue is whether Option A could prevent Re Amin type decision in our court. My answer is negative! The Hong Kong Immigration Office might challenge the same as Re Amin or other governmental departments in which there is no service provided by private sector such as public assistance. The true effect of Re Amin is not only limited discriminatory policy which can be justified in limited extent under international law but also allow discrimination by those staffs against their service recipients.

Option B

Option B is the least desirable for two reasons. Firstly it is not consistence to the existing equality law but puts more complicated by referring to the Bill of Rights Ordinance. Secondly it cannot prevent Re Amin decision in our Court.

Option C

As I outlined above, both Option A and B could not prevent the Re Amin decision in our court, the core of the issue is to apply the law to all functional areas of the Administration. Therefore the new Clause 34A (1) is the only option that tackle the Re Amin type decision in our court which mirrors Section 19B of the Race Relations (Amendment) Act 2000.

As I outlined in Part I under ICERD there is limited scope to justify discriminatory policy such as security, immigration and nationality issues. The Administration should have such power to act in order to protect the society at large. Therefore I also agreed Section 34A (2)-(5) and mirrors the same under Section 19B (2)-(6), 19C and 19D of the 2000 Amendment Act.

I also agreed a new Clause 49A which mirrors Section 76 of the Race Relations Act 1976 regarding public appointment. Public appointment

[8] For the historical development of Amin and Stephen Lawrence Inquiry Report please refer to the House of Lords Research Paper 00/27, "The Race Relations Amendment Bill [HL], Bill 60 of 1999-2000, 8 March 2000 at p.10-12 and 14-17.

promotes participation in public life that in turns promote social cohesion. The whole issue is about fairness and to prevent political biased appointment. It can classify into both employment and honorary nature. They should subject to both merit test (qualification, experience, expertise, etc.) and non-discrimination principle (in particular gender and race related).

In conclusion Option C is the best option in Clause 3 – Application to Government.

Clause 4 – Racial discrimination

Option A

A new 4(1A) is introduced in Option A in order to have a new definition of "Indirect Discrimination". The new (1A) mirrors Article 4(1)(b) of the Race Relations Act (amendment) Regulations 2003. Before I go into the details comment on the new (1A) I would like to draw your attention to the UN Human Rights Committee.

The UN Human Rights Committee had developed the concept of "Indirect Discrimination" in Althammer case (2003) and the two tiers test of the defence for "Indirect Discrimination" (See Part I, 1.3 to 1.5 above in detials). This is the right approach in any equality legislation. Therefore the proposed Bill must be demonstrated under the Vienna Convention on the Law of Treaties (1969) to comply international obligations and to implement the Conventions in good faith[9].

The original Clause 4(1)(b) mirrors the Race Relations Act 1976 which had been amended under the Race Relations Act (amendment) Regulations 2003 on a new definition of "Indirect Discrimination" as the result of the UK obligation under the implementation of the Racial Equality Directive (Council Directive 2000/43/EC of June 2000 Implementing the Principle of Equal Treatment irrespective of Racial or Ethnic Origin).

Race Relations Act 1976, like most of the UK anti-discrimination law, was developed in the 70s. It is now too old and could not cope with the modern 21st century circumstances and needs. Therefore transposing the old definition of "Indirect Discrimination" to the proposed Bill without using the new definition under the 2003 Regulations reinforces the perception that the Administration has little commitment to implement an effective legislation to outlaw racial discrimination, which is a clear problem in Hong Kong. Moreover as a good model of practice we should learn from other jurisdictions in terms of both the mistakes and the good law.

As a matter of fact the new definition of "Indirect discrimination" of the EU Racial Equality Directive is based on the UK experience that is the leader of

[9] See Preamble paragraph 3 and Article 26 (the Pacta Sunt Servanda rule) of the Vienna Convention.

the field in EU at that time. Under 1976 Act, indirect discrimination must have statistic data to show the detriment of a comparator[10] in order to prove indirect discrimination. These have been changed as the result of the landmark case O' Flynn (O'Flynn v Adjudication Officer, Case C-237/94, judgment of 23 May 1996 [1996] ECR 2417).

In O' Flynn Mr. O' Flynn is an Irish national resident in the United Kingdom as a former migrant worker. His son died in the United Kingdom on 25 August 1988. A religious ceremony was held in the United Kingdom but the burial took place in Ireland. Mr O' Flynn applied for a funeral payment, which was refused on the ground that the burial had not taken place in the United Kingdom as required by Regulation 7(1)(c) of the 1987 Regulations. And Mr. O' Flynn appealed against the refusal and the case was brought into the European Court of Justice (ECJ). The ECJ decided that it is discriminatory and developed the famous O' Flynn test (liability test) which did not require statistic to compare once discrimination took place.

According to the European Commission "Unlike direct discrimination, which can be described as a difference of treatment on the grounds of a specific characteristic, indirect discrimination is much more difficult to discern. In the field of sex discrimination, the European Court of Justice has required statistical evidence to prove indirect discrimination. However, adequate statistics are not always available. For example, there may be too few persons in a firm who are affected by the provision in question or where the provision, criterion or practice has just been introduced statistics may not yet be available.

The definition of indirect discrimination in paragraph 2(b) is inspired by the case-law of the European Court of Justice in cases involving the free movement of workers (O'Flynn v Adjudication Officer, Case C-237/94, judgment of 23 May 1996 [1996] ECR 2417).

According to this definition, an apparently neutral provision, criterion or practice will be regarded as indirectly discriminatory if it is intrinsically liable to adversely affect a person or persons on the grounds referred in Article 1. The "liability test" may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned. The emphasis on an objective justification in cases of indirect discrimination is put on two elements. Firstly, the aim of the provision, criterion or practice which establishes a difference of treatment must deserve protection and must be sufficiently substantial to justify it taking precedence over the principle of equal treatment. Secondly, the means employed to achieve that aim must be appropriate and necessary." (Article 2: Concept of Discrimination, COM/1999/0565 final)

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[10] In our painful UK experience in the Tribunal has no interests on any discrimination case if they cannot show a comparator (actual or artificial). We spent 10 years to settle the issue of comparator in both direct and indirect discrimination under both the Sexual Discrimination Act 1975 and the Race Relations Act 1976.

The O'Flynn principle is now enshrined in Article 2(2)(b) of the Directive under the concept "to put someone in particular disadvantage". Article 2(2)(b) provides that "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

This new definition will strengthening the concept of indirect discrimination based on policy and practice (both written and non-written) that applies to everyone regardless their community background or grounds of discrimination on one hand, giving a more objective defence for policy makers, whether it is public or private or both, who has genuine belief that their policy or practice are justifiable and the means to implement it are proportionate.

Currently the UK government is under the infringement proceedings by the European Commission on incorrectly transposed the definition of "indirect discrimination" in which new 1(A) based upon. The issue is that the UK definition under 2003 Regulations does not cover future or possible events. I enclosed the European Commission letter to the UK government for your information.

Therefore 1(A)(b) should be amended according to the following:

> **"(b) which puts or would put that other person at that disadvantage, and"**

Clause 4(3) – 4(5) are the determine factors for Clause 4(2)(b). In most of the jurisdictions it will be the judge to decide the balance of interests in order to determine the justification and proportionality test. No law will set the conditions for the judge to decide under the definition of "Indirect Discrimination."

Clause 4(3) – 4(5) mirror s. 18B of the Disability Discrimination Act 1995 (as amended by 2003 Regulations) regarding the Duty to make reasonable adjustment for disabled persons (accessibility to both workplace and public goods, facilities and services). This is the special measures or positive action to remedy the disadvantaged position of the people with disability. It is justifiable to set such factors for the judge in order to determine whether or not to provide such accessibility to people with disability (justification test).[11]

The implications of the Clause 4(3) – 4(5) is that it will further restrict the judge to strike the balance of interests of the society on one hand, misuse the factors for special measures or positive actions on the others. In light of the

[11] See also Part VI general exceptions, in particular s. 38 – on the special measures for racial groups, which provides conditions to implement the special measures.

circumstances it is suggested to delete the whole Clause 4(3) – 4(5), which is irrelevant for the definition of "Indirect Discrimination".

Therefore Option A is viable on the condition to amend 1(A)(b) and delete Clause 4(3) – 4(5).

Option B

I personally prefer Option B, not in the context of the Race Discrimination Bill, but in the future to harmonise all existing equality legislation under a more robust equality concept. South African is a good model in that regard.

In conclusion on Clause 4 my preference will be Option A with attached condition to delete Clause 4(3) – 4(5).

New Clause – New arrivals from the Mainland

Option A

Option A introduces a new Clause 5A and 7A in order to protect new arrivals from the Mainland. It is one of the key concerns that I have as I outlined in my introduction. I would like to see those vulnerable groups are protected under the new law as a general principle.

The disadvantage of the new Clause 5A and 7A is that it will not consistence with the main definition under Clause 8 as if an offspring from nowhere. As a matter of fact in Northern Ireland the "Irish Traveller" is under a specific group within the definition of racial group. I will explain more details under Option B.

I will only accept Option A unless there is no other alternative.

Option B

Meaning of "race", "on the ground of race", "racial group" and comparison of cases of persons or different racial groups (Clause 8)

Clause 8(2) is the typical exemption clause for the Administration to set the limits on certain groups that under the protection of the law. The Administration has all the rights, as stated in Part I - the International Law (such as Article 1 of the ICERD) on immigration control. But the legal provisions on nationality, citizenship and naturalisation must not discriminate against any particular nationality (See General Recommendation 30 on Non-Citizen, Part I of paragraph 2.4.1 and 2.4.2 above).

At the same time once someone is eligible to enter the country either as asylum seekers, tourists, work permit holders, migrant workers (in particular domestic workers), spouse or dependents of the Hong Kong citizen, etc. they must be protected from racial discrimination as required under ICERD (See

General Recommendation 30 on Non-citizen, Part I of the paragraph 2.4.3 above).

One of the difficult issues in the proposed Bill is whether the people from Mainland China included in the Bill. The definition in Clause 8(1)(a), (b) and (d) involves by reference to ethnic origin of the person. The House of Lords decision in Madla v Lee [1983] 2AC 548 laid down the concept of "what constitute an ethnic group" within the meaning of the Race Relations Act 1976. Lord Fraser of Tullybelton gave the followings criteria for a group constitutes an ethnic group:

"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 group." (at 1067).

By analogy of the decision under Madla v Lee Chinese, whether they are coming from Mainland, Taiwan, Singapore, etc., is an ethnic group within the meaning of the law. The issue is whether we should rely on case law or do we have an express term in the law to protect that particular group.

In Northern Ireland when the Administration introduced the Race Relations (NI) Order 1997 there is a specific provision to protect "Irish Traveller" who are the most vulnerable group in our society. By Madla v Lee there was a case law established that Romas, Gypsies and Travellers are ethnic group within the meaning of the 1976 Act (CRE v Dutton [1989] IRLR 8 CA). The Administration saw there was a merit to have an express law rather than based on the case law.

I outline Article 5 of the 1997 Order for your information:

"**Meaning of "racial grounds" "racial group" etc.**

5. - (1) Subject to paragraphs (2) and (3), in this Order -

"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

"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.

- (2) In this Order "racial grounds" -

(a) includes the grounds of belonging to the Irish Traveller, that is to say the community of people commonly so called who are identified (both by themselves and by others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland; and

(b) does not include the grounds of religious belief or political opinion.

- (3) In this Order "racial group" -

(a) includes the Irish Traveller community;

(b) does not include a group of persons defined by reference to

religious belief or political opinion

- (4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Order.

Therefore I suggest use the Northern Ireland experience to include a new Clause 8(2) and (3) right after 8(1)(e) [the rest of the Clause 8 thereafter will automatically renumbering] to put new arrivals from Mainland under the mainstreaming concept of race, racial group, etc.

" 8 (2) In this Ordinance "racial grounds" includes the grounds of belonging to new arrivals from the Mainland, that is to say the community of people commonly so-called who are Chinese origin and is not a Hong Kong permanent resident or has not the right of abode in Hong Kong. It also includes the length of residence in Hong Kong of a person or that a person is regarded as a member of the group of persons who have been granted one way permit by the relevant Mainland authorities to come to Hong Kong, and have recently come to settle in Hong Kong from the Mainland."

(3) In this Ordinance "racial group" includes the new arrivals from the Mainland."

Therefore my preference is Option B provided that it should includes a new Clause 8(2) and (3) as suggested above in conjunction to the deletion of the original Clause 8(3)(b)(i) and 8(3)(c) [original sub-section (d) will be renumbered as (c)]

Clause 58 – The language exemption

Option A

In UK we do not have the equivalent Clause 58 – the language exemption. If English is not the mother language of any particular ethnic group, the refusal to provide interpreter in order to get access to public services deemed to be "indirect discrimination". It is also in breach of both Article 26 of ICCPR and Article 1 of ICERD. Moreover provides training or language support for foreigners, in particular second generation, into the host language will promote social cohesion and in long-term objective it will promote better integration as language barriers remove.

Therefore Option A is not acceptable.

Option B

I agreed Option B is the only viable option provided that Clause 5B(5) becomes a sunset clause.

For further information or questions about this submission, please contact:

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Brief CV of Mr. Patrick Yu

Mr. Yu is the Executive Director of the Northern Ireland Council for Ethnic Minorities. He is actively involved in the race equality and human rights campaign in Northern Ireland, UK and Europe. He was honoured in the Queen's 2006 New Year list for an OBE on Community Relations

He is currently the member of the Legal Expert Panel (since 2002) to advise the government on the Single Equality Bill for Northern Ireland. He is also the member of the Racial Equality Forum, an inter-departmental forum to monitor the implementation of the Racial Equality Strategy for Northern Ireland 2005-2010. He was the member of the Public Appointment Commissioner's Working Group on Diversity of Public Appointment (2003-2005) and was the former Commissioner, Chair of Equality Committee and member of the Legal Committee of the Northern Ireland Human Rights Commission (2001-2003) and Deputy Chairman and Chairman of the Legal Committee of the Commission for Racial Equality for Northern Ireland (1997-1999).

At European level, he was formerly the European Co-ordinator of the training programme on Strategy for Litigation to tackling Discrimination (SOLID) for 25 EU Member States NGOs, which was funded by the European Commission. He was the Expert of Rapporteur Sharma of the European Economic and Social Committee on the Opinion of ESSC on EU Fundamental Human Rights Agency (adopted on 14 February 06). He was also the former Chair of the Starting Line Group (1998-2001), a European Network of legal experts and key NGOs, which campaigns for the EU Directive on racial and religious discrimination. The Starting Line proposal became the cornerstone of the European Commission's Racial Equality Directive.

Mr. Yu was also the Experts in the EU-China Human Rights Network and participated in two rounds of training in 2002 and 2003 in China on Access to Justice and Minority Protection.

Mr. Yu also involved the European preparation for the World Conference Against Racism as one of the seven Expert Members (representing Western Europe) of the NGO Resource Group of the Council of Europe (1999-2001) in which working in partnership with 41 Member States organised the European Conference Against Racism and the NGO Forum in Strasbourg in 2000. He was also the Rapporteur of the Legal Protection Caucus of the NGO Forum at the World Conference Against Racism in Durban in 2001.

CHANTAL HUGHES

COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

Brussels, 29 VI 2007

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UNITED KINGDOM PERMANENT
REPRESENTATION TO THE
EUROPEAN UNION
Avenue d'Auderghem 10
1040 BRUSSELS

Subject: Reasoned Opinion
Infringement No 2005/2363

Please find enclosed the text of the Reasoned Opinion addressed by the Commission of the European Communities to the United Kingdom of Great Britain and Northern Ireland under Article 226 of the Treaty establishing the European Community, on account of failure to transpose correctly Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

For the Secretary-General,

Karl VON KEMPIS

Encl. C(2007)2665

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27/06/2007

2005/2363
C(2007)2665

REASONED OPINION

addressed to the United Kingdom of Great Britain and Northern Ireland under Article 226 of the Treaty establishing the European Community, on account of failure to transpose correctly Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

REASONED OPINION

addressed to the United Kingdom of Great Britain and Northern Ireland under Article 226 of the Treaty establishing the European Community, on account of failure to transpose correctly Articles 2(2)(b), 2(4), 3(1)(a), 4 and 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Introduction

1 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was primarily transposed in the United Kingdom by the Race Relations Act 1976 (Amendment) Regulations 2003 ("the Regulations") and the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 ("the NI Regulations"), and in Gibraltar by the Equal Opportunities Ordinance 2004 ("the Ordinance").

A letter of formal notice in case 20005/2363 was sent by the Commission on 7 February 2006 (SG(2006)D/200549), which was replied to on 5 April 2006 (SG(2006)A/02994). The letter of formal notice raised the following points, in relation to the United Kingdom and separately for Gibraltar:

A In relation to the UK:

Definition of Indirect Discrimination

2 Article 2(2)(b) of the Directive provides as follows:

"b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

3 In the letter of formal notice the Commission noted that Regulation 3 of the Regulations inserts a new definition of indirect discrimination in section 1 of the 1976 Race Relations Act. Under the new Section 1A(b) the supposedly neutral provision, criterion or practice must put the person at a disadvantage. The Commission drew the conclusion that the definition of indirect discrimination therefore seems to require *actual* disadvantage.

4 In their reply to the letter of formal notice the British authorities express the view that the Directive is not intended to allow a person who had no intention of applying for a particular job to challenge the employer on the grounds of indirect discrimination. In their view the person must have actually suffered disadvantage. In support of this point of view they mention articles 7(1) and 8(1) on the right to a judicial remedy and the shift of the burden of proof, both of which can only apply in their view to a person who is affected by an act of discrimination. The British authorities also refer to paragraph 15 of the preamble to the Directive,

which provides that "the appreciation of facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice".

5 The Commission does not believe that a person can allege indirect discrimination in a purely hypothetical situation, for example in relation to a job for which he or she has no intention of applying. However, if a person sees a job advertised for which he or she is qualified, but it is clear that an apparently neutral rule will in fact prevent them from being employed, they should be able to challenge this situation. In such a case the person *has* suffered disadvantage, and been affected by an act of discrimination. This could arise in practice in the situation outlined in the letter of formal notice, of a Sikh man who would not apply for a job in a company that had a "no beards" rule. Under current UK law this situation could not be challenged: However, in the Commission's view such a rule falls squarely within the wording of article 2(2)(b).

The UK authorities' argument about Articles 7 and 8 of the Directive, does not, in the Commission's view, alter the above conclusion. Article 7 provides that judicial procedures must be available for the enforcement of obligations under the Directive. It does not affect national procedural rules which determine whether a person has standing before the court. If the court found that the allegation was *purely* hypothetical it could (and would) refuse to hear the case. Under article 8 a person alleging discrimination must present facts which give rise to a presumption of discrimination. It is for the national Court to determine whether the facts presented are sufficient – and if the case presented was purely hypothetical this would not be the case.

The British authorities refer to the fact that the Commission for Racial Equality can bring proceedings against an employer in respect of discriminatory practices, in the absence of a complainant. This is clearly a useful power for the CRE, but is discretionary and should not been seen as a substitute for a judicial remedy for an individual who may have been indirectly discriminated against.

6. The Commission therefore concludes that the UK has incorrectly transposed the definition of indirect discrimination in Article 2(2) (b) of the Directive.

Instructions to Discriminate

Article 2(4) of the Directive provides that an instruction to discriminate shall be deemed to be discrimination based on racial or ethnic origin.

8 In the letter of formal notice the Commission stated that Section 30 of the Race Relations Act makes it unlawful to instruct someone to discriminate. Under section 63 of the Race Relations Act, the Commission for Racial Equality (CRE) is the *only* body able to bring proceedings for breach of section 30. It does not appear that the Commission for Racial Equality is under an obligation to bring such proceedings and this leaves the individual victim of an instruction to discriminate without a right to seek effective legal redress.

The Commission furthermore referred to the case law of the Court of Justice with regard to the right to a judicial remedy to secure the enjoyment by an individual of a fundamental right.

9. In their reply to the letter of formal notice the British authorities make four points.

Firstly, they mention the judgment of Court of Appeal in the case of Weathersfield v Sargent[1], which provides that "discrimination by an employer against an employee because he refuses to carry out instructions to discriminate constitutes direct discrimination under section 1(1)(a) of the Race Relations Act 1976.

Secondly, they explain that under section 32 of the Race Relations Act an employer or a principal cannot avoid liability for discrimination by getting an employee or an agent to discriminate on their behalf.

Thirdly, the UK authorities explain that Section 33 of the Race Relations Act provides that person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act .The effect of this is apparently that a person who instructs another to discriminate will himself be liable for the act of discrimination.

Finally, they point to Section 30 of the Race Relations Act which makes it unlawful for a person instruct to instruct someone over who he has authority to commit act unlawful under the Act. Section 63 of the Race Relations Act provides that only the CRE can enforce section 30 of the Act. The British authorities view this last point as an additional form of protection.

10. With regard to Section 33 it appears to the Commission that the way this provision has been drafted seems to indicate action which is accessory rather than action by a person having the authority to instruct another to commit a discriminatory act.

With regard to Section 30 the Commission is of the view that the possibility to take action against instructions to discriminate de facto risks being restricted if enforcement action may only be undertaken by the CRE.

Therefore, it appears to the Commission that only the first point put by the British authorities could be considered as possible transposition of Article 2(4) of the Directive. However, the question arises whether a judgment of the Court of Appeal can constitute an adequate transposition of a provision of a Directive.

A Member State does of course have flexibility in how it transposes a Directive into its national legal system. Nevertheless, the transposition must be done in such a way that is clear and precise enough to allow individuals to know what their rights are under the Directive in question. This is particularly the case when dealing with Directives that grant individuals the fundamental right not to be discriminated against.

[1] 1990 IRLR 94

The European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal certainty.[2]

The Commission accepts that in relation to a common law legal system a Court of Appeal judgment with precedent value *may* constitute an adequate transposition of a provision of a Directive. However, there remains a problem of transparency, as it would be difficult for an individual who had been the victim of an instruction to discriminate on grounds of race to know that he or she was in fact protected from this form of discrimination.

The Commission therefore in conclusion maintains its position that the United Kingdom has incorrectly transposed Articles 2(4) of the Directive in relation to instructions to discriminate.

B In relation to Gibraltar:

12. In the letter of formal notice the Commission raised four points in relation to Gibraltar:

a. Employment in private households

According to Article 3(1)(a) the Directive applies to all persons with regard to conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

Under section 12(3) of the Equal Opportunities Ordinance 2004, the prohibition of discrimination does not apply to employment in private households.

b. Third country nationals

Article 3(2) of the Directive makes it clear that the Directive does not cover differences of treatment based on nationality and is without prejudice to provisions on third country nationals and their rights of entry and residence.

Section 31(3) of the Ordinance provides that "it is not unlawful for a relevant person to discriminate against another person on the ground of nationality or ethnic or national origin in carrying out immigration and nationality functions".

Genuine and determining occupational requirements.

Article 4 of the Directive allows Member States to provide that a difference of treatment based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the *particular* occupational activities concerned or of the context in which they are carried out,

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See in particular Cases 29/84 *Commission v Germany* [1985] ECR 1661 paragraph 23; C-159/99 *Commission v Italy* [2001] ECR I-3541 paragraph 24; C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9; and C-144/99 *Commission v The Netherlands*, [2001] ECR I-3541, paragraphs 17 and 21.

such a characteristic constitutes a *genuine and determining occupational requirement*, provided that the objective is legitimate and the requirement is proportionate. This exception is narrowly drafted, as emphasised by recital 18 to the Directive.

Section 15 of the Ordinance establishes what seems to be a closed list of examples where being of a particular race is genuine and determining occupational requirement, such as dramatic performances, photographic models and staff in certain restaurants. In relation to these examples, there is no necessity that the requirement to be a member of a particular racial or ethnic group be justified by a legitimate objective or that the requirement is proportionate.

d. Body for the promotion of equal treatment

Article 13 of the Directive provides as follows:

"1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination."

Although Section 51 of the Ordinance provides for the Gibraltar Government to designate a body for the promotion of equal treatment, no such body seems to have yet been established. The information provided mentions that the Citizens' Advice Bureau already exists for the purposes of promoting equal treatment.

It is not clear however that it can perform the three tasks set out in article 13 of the Directive. To the best of the Commission's knowledge there is no information to this effect on the Gibraltar CAB website.

13. In the reply to the letter of formal notice the United Kingdom authorities explained draft legislation is being prepared in respect of points (a) and (c) above. No information was provided on point (b) and in relation to point (d) the Gibraltar Government was apparently considering which existing body should be responsible for the promotion of equal treatment.

No further information about possible draft legislation on points (a), (b), (c) and (d) has been communicated.

4. The Commission, therefore, concludes that the United Kingdom has not correctly transposed Articles 3(1)(a), 3(2), 4 and 13 of the Directive with regard to Gibraltar.

FOR THESE REASONS

THE COMMISSION OF THE EUROPEAN COMMUNITIES

after giving the United Kingdom of Great Britain and Northern Ireland the opportunity to submit its observations 7 February 2006 (SG(2006)D/200549), and in view of the reply of the Government of the United Kingdom of Great Britain and Northern Ireland dated 5 April 2006 (SG(2006)A/02994),

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

under the first paragraph of Article 226 of the Treaty establishing the European Community, that

1) by defining indirect discrimination in its legislation in such a way as to require a showing of actual disadvantage,
2) by not defining the notion of instruction to discriminate sufficiently clearly,
3) by restricting the material scope of the Directive in relation to employment in private households in Gibraltar,
4) by providing in the legislation pertaining to Gibraltar that the exception to the prohibition against difference of treatment with regard to the entry and residence of third-country nationals also covers ethnic origin,
5) by not providing in the legislation pertaining to Gibraltar that a genuine and determining occupational requirement in order to justify a difference in treatment needs to be justified by a legitimate objective and needs to be proportionate,

the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(2)(b), 2(4), 3(1)(a), 3(2), 4 and 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Pursuant to the first paragraph of Article 226 of the Treaty establishing the European Community, the Commission invites the United Kingdom of Great Britain and Northern Ireland to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of this Opinion.

Done at Brussels, 27/06/2007

For the Commission

Vladimir SPIDLA
Member of the Commission

COMMISSION OF THE EUROPEAN COMMUNITIES

IN CONFORMITY WITH COMMISSION DECISION
For the Secretary - General,

Jordi AYET PUIGARNAU
Director for the Registry