IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND & WALES) (CIVIL DIVISION) (2016) EWCA Civ 2

Lord Justice Laws, Lord Justice Lewison,
And Lord Justice Christopher Clark

Between

P

Appellant

V

The Commissioner of Police for the Metropolis

Respondent

Application for Permission to Intervene by the filing of an Amicus Curiae Brief

Issues in the Appeal & The Amicus Brief

1. This Amicus brief is filed on behalf of a number of BME professional organisations, namely The Society of Black Lawyers, The Association of Muslim Lawyers, Operation Black Vote, The NHS BME Network, BLAKSOX, BARAC, The National Black Police Association and the Runneymede Charitable Trust.

2. This Appeal and the related Amicus Curiae brief raise important matters of public policy as to whether police officers, (and employees/office holders in comparable professional bodies) are entitled to bring discrimination proceedings under the Equality Act 2010 (EqA) against dismissals by the Police Misconduct Tribunals, (the dismissing authority), established by the Police Misconduct Regulations (2008), SI 2008/2864. This question relates to whether such Tribunals enjoy Judicial Immunity and are therefore exempt from discrimination law under the EqA.

3. Parliament has given Police officers the statutory right to pursue discrimination claims under the EqA 2010, which deems that they are treated as employees under s 42, and therefore enjoy those rights under s 39 (2) (c) and s 120 EqA 2010.

4. The Court of Appeal in the case of **Heath v The Commissioner of Police for the Metropolis (2005) ICR, 329** decided that the Police Misconduct Tribunals are Judicial bodies and therefore enjoy Judicial immunity. As such they are therefore exempt from the EqA 2010. The Court of Appeal in this instant case found itself bound by Heath, (ante).

5. This Amicus brief raises the following questions:-

   (i) Whether the case of Heath (ante) was correctly decided;
   (ii) Whether the Police Misconduct Tribunal is a Judicial body such that it enjoys judicial immunity from suit, e.g. **Trapp v Mackie (1979) 1 W.L.R. 377, HL**;
   (iii) If other bodies, acting in a similar fashion to Police Misconduct Tribunals should also be exempt from the Equality Act 2010 on the basis of judicial immunity;
   (iv) If the Police Misconduct Tribunal, and other comparable bodies are a judicial body whether:-

a) Parliament has conferred the right to challenge a decision for dismissal by it in any event;
b) Whether the decision of the Court of Appeal and by the Tribunal below to bar her claims due to Judicial immunity is incompatible with her right under @ 6 of the ECHR (read together with @14 ECHR), and under s47 of the EU Charter.; (**see Benharbouch v The Sudanese Embassy (2015) ICR 793)**; and the duty to advance equality of opportunity under s149 (1) (b) EqA 2010.
c) Whether the immunity prevents police officers from enjoying a legitimate remedy under @14, the ECHR, and the EU;
d) Whether the immunity prevents solicitors, barristers, magistrates, judicial office holders, medical professionals, nurses and midwives, and others, from enjoying the protection of the Equality Act 2010 as regards misconduct and dismissal hearings.

6. A number of amendments have been made to the Misconduct Tribunal regulations set out in Regulation 25, (2012), relation to their composition with the Chair being chosen under Judicial Appointment eligibility criteria; Regulation 27A (2015) concerning the notification of the hearing; and Regulation 31, (2015), providing that the hearings are in public, but they do it materially affect the substance of this amicus brief.

7. The issues raised in this case are of major public importance as they may be applicable to several professional bodies that are governed by disciplinary misconduct panels or tribunals, namely solicitors, barristers, magistrates, Judges, medical professionals, nurses and midwives.

8. Lord Diplock, in giving judgment, in **Trapp v Mackie (ante)** set out the test to be applied. He held,

> *"So, to decide whether a tribunal acts in a manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under what authority the tribunal acts, and secondly, the nature of the question into which it is its duty to enquire; thirdly, the procedure adopted by it in the carrying out of the enquiry; and fourthly, the legal consequences of the conclusion reached by the tribunal as a result of the enquiry."*

9. The importance of such issues as raised in this Appeal and the wider application of the principles to be decided affect hundreds of thousands of employee and office holders. A distinction may, as Justice Laws expressly stated in the Court of Appeal may be, *"However, I have been troubled by a particular feature if the case. If I am right, it would appear that claims of discriminatory dismissal brought by police officers, where the effective dismissing agent is a disciplinary Tribunal such as was convened here, will not be viable in the Employment Tribunal; yet Parliament has legislated to allow such claims to be made. Parliament, however, must have passed the Equality Act 2010 in the knowledge of the Heath judgment, and included no provision to remove the cloak of immunity from the Disciplinary Tribunals."*

10. There is therefore a clear contradiction between the opinions expressed on the subject. In the ET, Etherington J and in the EAT, Langstaff J both considered that the decision to dismiss may be challenged in the ET, (save for the disciplinary panel itself), whereas the Court of Appeal held that the entire proceedings before the panel, including the decision itself is protected by immunity.

11. The Amicus Brief adopts the "Statutory Framework" (paragraph 5), and the four "Grounds of Appeal" as set out in the Appellants "Application for Permission to Appeal", dated 16th February 2016.

Article 6 read with Article 14 of the European Convention on Human Rights (ECHR)

12. Article 14 of the European Convention on Human Rights provides:

> *"The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights 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."*

13. Article 14 must be pleaded in relation to some other substantive right in the Convention. It is not necessary to establish an actual violation of another Article; if the claim comes within the ambit of another protected right then it is possible for

the applicant to succeed on discrimination alone, even if the primary violation has not been established, or the Member State's action has been found to come within one of the permissible exceptions to that right **(Belgian Linguistic Case (1967) 1 EHRR 252).**

14. According to **The Practitioner's Guide to The European Convention on Human Rights (Sweet and Maxwell, 2015),** there has been a recent emphasis on the condemnation of racism and ethnic hatred with corresponding positive obligations on the state to maintain the confidence of minorities in the ability of the authorities to protect them from racist violence, and to investigate properly incidents of racial hatred (**Menson v United Kingdom, App No 47916/99) ECHR 2003)**. Indirect discrimination may disclose a violation of Article 14; in other words where a neutral measure has a disproportionate effect on a group it is not necessary to show that there is any discriminatory intent; the burden shifts on to the Government to show that the difference in impact of the legislation or the or measure was the result of objective factors unrelated to ethnic origin: **DH v Czech Republic**, where statistics showed that Roma children were being grouped into special schools (13 November 2007).

15. Although this could have been done with the best possible intention of providing educational support, the Court criticised the way that in practice these became ways of excluding the Roma children from mainstream schooling, without effective procedural safeguards. The fact that the parents themselves had consented to the placements was not a defence. The Court stated that no waiver of the right not to be subjected to racial discrimination could be accepted.

16. The actions of the various professional disciplinary/misconduct tribunals must therefore be open to challenge under @6 read together with @14. The empirical evidence shows BME professionals are far more likely to be subject to disciplinary action than their white counterparts, and if charged before a disciplinary panel more likely to be made subject to disciplinary sanction, struck off, or disbarred from practice.

17. In the case of **Kulkarni v Milton Keynes Hospital NHS Foundation Trust (2010) ICR 101**, Smith LJ referred obiter to the European Court judgment of **Le Compte, van Leuven and De Meyere v Belgium 4 EHRR 1, 65**, *"in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, @6 would not be engaged. However, where the effect of the proceedings could be far more far serious and could, as in that case, deprive the employee of the right to practice his or her profession, the article would be engaged……where an NHS Doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS".*

18. It would therefore be a fundamental contradiction if BME professionals could be made subject to disciplinary proceedings subject to @6 and @14 but then face

misconduct proceedings where Judicial immunity was enjoyed and prevented from mounting an effective challenge of discrimination being applied under @14 where the enabling article is the right to a fair trial, @6.

The Evidential Presumption in favour of the paramountcy of the Equality Act 2010 over the cloak of Judicial Immunity.

19. T*he Macpherson Report defined institutional racism as* ***"the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."*** This Amicus brief seeks to demonstrate the overwhelming evidence that in each profession there exists race discrimination, and often sex discrimination and victimisation against BME professional staff that fundamentally undermines any change in the law to cloak disciplinary misconduct with Judicial immunity. Such a move would fly in the face, not only of the Equality Act 2010, but would also significantly jeopardise the positive changes to police culture and practice, and within comparable professional bodies, triggered by the responsse to the murder of Stephen Lawrence.

20. The fundamental evidential basis is the academic and anecdotal proof that for BME professionals they are disproportionally likely to be subject to misconduct proceedings resulting in dismissal or disciplinary proceedings than their white counterparts. The same issues arise to a similar extent to other groups such as women, people with disabilities, and other groups who possess, “protected characteristics” as defined by the Equality Act 2010.

21. The level of disproportionate treatment usually varies between different professionals but the unifying experience is the differential treatment on grounds of race, and religion. The pathology of race discrimination is such that it exists at all levels of society and across every social and economic demographic. The propensity to discriminate on grounds of race does not suffer a reduction simply on the basis that a person qualifies within a professional structure. There is strong evidence that race discrimination is not only a persistent feature of everyday life in the UK but that it is even more prevalent within influential professional bodies where BME communities have historically been under represented.

22. There is an abundance of evidence of racial discrimination relating to employment within the United Kingdom and we invite the Supreme Court to take judicial notice of the pervasive nature of such disparity of treatment. This occurs at all levels of professional organisations, relating to recruitment, retention, promotion and to dismissal. This same reality affects the service of police officers and is arguably one of the most acute examples.

23. In general terms, the pathology of racism comprises a number of accumulated factors that occurs within this non exhaustive list namely that BME professionals:-

i) Are more visible than their white counterparts and experience a higher level of complaint from members of the general public, where race may be a factor;
ii) Are more often subject to race discrimination from senior white managers, who challenge their behaviour in a discriminatory manner;
iii) Are more likely to have their professional behaviour and responses challenged and criticised than their white counterparts;
iv) Are more likely to experience referrals for investigation for misconduct;
v) More frequently have their behaviour referred to as "misconduct' as opposed to being dealt with as capability or competence than their white counterparts;
vi) Face disproportionate sanctions, warnings and dismissal within all misconduct/disciplinary Tribunal hearings;
vii) Experience misconduct/disciplinary Tribunals which are often unrepresentative of BME members and lack training on equality issues.

Barristers

24. Historically the Bar has faced significant race and gender discrimination that has directly affected entry into the profession and career progression at every level. This was first highlighted in 1979 by the Benson Commission report[1] that led to the creation in 1980 of the Bar Race Relations Committee, with the Law Society announcing a similar committee soon thereafter.

25. Bar Disciplinary Tribunals are Chaired by barristers or Judges and appointed subject to criteria published by the Council of the Inns of Court. In 2005 the Visitors to the Inns of Court, led by Mr Justice Colman, adjudged the Bar Disciplinary Tribunals to have been in breach of @6 of the ECHR, and to be in breach of the principles of natural justice in the case of Barrister, P, stating inter alia, that "no man can be a Judge in his own cause". Lay members had sat on the Bar Disciplinary Tribunal and had for many years also sat as members of the Professional Conduct Committee that decided whether to lay a charge of misconduct or not. There is a right of appeal to the Visitors of the Inns of Court, chaired by a High Court.

26. The BSB has had its record of targeting BME barristers challenged in the case of **O'Connor v The Bar Standards Board (2016) CA** and whilst her claim in the ET was held to be out of time there was a reasonable prospect of success in claiming inherent and systemic bias by the disciplinary tribunal of the BSB.[2]

[1] ROYAL COMMISSION ON LEGAL SERVICES (Hansard, 30 October ...
hansard.millbanksystems.com/lords/1979/oct/30/royal-commission-on-legal-services 30 Oct 1979
[2] Court of Appeal rules barrister's race claim out of time | News | Law ...
https://www.lawgazette.co.uk/law/court-of-appeal...barristers-race.../5056828.article.In O'Connor v Bar Standards Board, the Court of Appeal said Daphne ... O' Connor had accused the regulator of 'systematic bias' against black **barristers** and said the code of ... The discrimination proceedings were issued in February 2013. ... the allegation that the BSB infringed O'Connor's right to a fair **t**rial was ' on its face ...

27. Discrimination is not limited to race as the Bar Standards Board report in 2015, entitled, "Women at the Bar" discovered that two out of five women had experienced discrimination, but that eight out of ten of those failed to report it. The primary reason was that to do so would be to harm one's career. These statistics obviously include BME women at the Bar who may well experience a double jeopardy of suffering a detriment due to their gender and race.

28. The report by the Bar Standards Board[3], cited previous reports and research from 2007 to 2011 that showed,

> *"BME barristers were over-represented in the complaints process in relation to the makeup of the practicing Bar. In addition, BME barristers were more likely to have an external complaint referred to disciplinary action, white barristers are more likely to have an external complaint dismissed without referral to disciplinary action, and BME barristers were more likely to be subject to a disciplinary action outcome of upheld for external complaints; even when controlling for differences in the subjects of the.*

29. The report however concludes that due to other criteria *complaints* ethnicity is unlikely to be a determinate factor. It does however urge caution, due to the relatively small sample base. Our anecdotal evidence strongly suggests that the Bar disciplinary process is not race neutral, especially given the prevalence of overt and covert racial discrimination at the Bar, within solicitors firms and the Courts themselves all playing a role.

"Regression analysis of complaints outcomes predicts that ethnicity no longer plays a role, whether complaints are closed without investigation, or referred to disciplinary action, when other predictive characteristics are controlled for. The analysis identified a range of characteristics that contribute to a higher or lower likelihood of a complaint being closed without investigation or referred to disciplinary action that are more significant predictors than ethnicity."

30. The other finding of the report does find continuing cause for serious concern as it state's that,

> *"Regression[4] analysis of complaint likelihood indicates that ethnicity does significantly predict a barrister being subject to an internal complaint[5] – "even when other predictive characteristics are controlled for - white barristers are less likely to be subject to an internal complaint than BME barristers or barristers for whom the BSB does not have ethnicity data available"*

[3] Complaints at the Bar: An analysis of ethnicity and gender 2012-2014;
[4] Regression analysis is a statistical process for estimating the relationships between variables.
[5] Internal Complaint- one initiated by the BSB

Solicitors

31. Solicitor's disciplinary procedure is governed within the statutory framework of the SRA (Disciplinary Proceedings) Rules 2011 and set out under s47 of the Solicitors Act 1974, (as amended by the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990). There is a right of Appeal to the High Court. In 2008 Lord Herman Ouseley found a disproportionate number of BME solicitors were subject to disciplinary action, featuring more often in interventions, and receiving a far higher rate of referral to the Solicitors Disciplinary Tribunal (SDT).

32. The diversity statistics published in 2013 by the SRA show the proportion of BME solicitors referred to the SDT has decreased for the second consecutive year, from 35% in 2011 to 32% in 2012 to 28% in 2013. This is despite the fact that only 13% of all solicitors are from a BME background. There has for many years been a dramatic over representation of African, Caribbean and Asian solicitors who have faced intervention, investigation and dismissal from the profession at a rate sometimes six times greater than the white counterparts. The 2008 report by Lord Ouseley found systemic failures by the Solicitors Regulatory Authority (SRA), who despite a series of reports over the years still adopts practices and procedures which results in disciplinary action against small firms, where over 50% of BME solicitors operate, largely due to the racism in the profession.

33. The report found that discrimination operated within several areas of SRA activity. Lord Ouseley, found evidence of disproportionality affecting BME solicitors who are more subject to forensic investigations than white solicitors and, as a consequence, are disadvantaged considerably through the non-disclosure of information about allegations made about them.[6] The report stated, "Disproportionality is also evident in applicants for student enrolment or admission to the Roll being referred for character and suitability assessments. One of the main reasons for disproportionality is that sole practitioners and small firms are targeted for regulatory activity. 5.8% of BME solicitors are sole practitioners and most of the rest are found in small firms. Only 3.4% of white solicitors are sole practitioners."

34. In 2014, a further report by Professor Gus John found that disproportionality continued at various stages of the disciplinary process. Despite only 13% of solicitors being from a BME background, they were the subject of 26% of new SRA investigations, 29% of interventions and 33% of referrals to the Solicitors Disciplinary Tribunal (SDT).

35. BME lawyers are nearly four times less likely to be appointed as Judges, according to new statistics from the Judicial Appointments Commission (JAC). And a survey by 'Chambers Student', of 105 law firms found that only 5.6% of partners and 12% of associates are from BME groups.

    But at universities, law is one of the most ethnically diverse subject choices. BME students made up 32% of those studying law at university in the UK in 2012-13, according to government statistics.

[6] Download Lord Ouseley's report (PDF 542K, July 2008)

Judges, Magistrates & Lay Members of Tribunals

36. The Judicial Conduct Investigation Office (JCIO) is responsible for the disciplinary proceedings that concern the 3,200 members of the full and part time Judiciary, 19,300 Magistrates and 5,600 lay members of Tribunals. Its remit is covered by the Judicial Appointment and Disciplinary Regulations 2014[7]. The JCIO annual report of 2015/16, whilst detailing the outcome of the 3271 complaints received has never included any ethnic or gender breakdown of those members of the Judiciary and Magistracy who received complaints. The strong anecdotal evidence based on the disproportionate number of African, Caribbean and Asians that appear on the JCIO website strongly suggests ethnicity is a factor.

37. Judicial Disciplinary panels, whilst conforming to the eligibility criteria of the Judicial Appointments Commission, include lay members whose ethnic and gender breakdown is not shown in any published statistics. The Judicial Appointments Commission statistics continue to show the underrepresentation of ethnic minorities and women in the Judiciary and Magistracy.[8]

38. The percentage of BME Judges is just 5%, and supposedly rising to 9% within Tribunals, but only if one includes lay members. Without lay members the figure again falls to 5%. Between 2011 and 2016 the figure for BME Judges has remained almost constant despite the increasing numbers of barristers and solicitors that constitute the theoretical pool.

39. Currently three members of the part and full time Judiciary, and one lay Tribunal member are alleging race discrimination and victimisation and in one case sex discrimination against the Ministry of Justice (MOJ) making significant allegations against the operations of the JCIO, nominated Judges and one disciplinary panel. In all four cases the MOJ has agreed a stay of proceedings pleading that the Judicial Misconduct Panels and all the actions of the JCIO and nominated Judges are subject to Judicial immunity.

40. Recorder D Peter Herbert O.B.E., who faced an unlawful suspension for his speech, addressing a meeting in Tower Hamlets in 2015 facilitated by several High Court

[7] http://judicialconduct.judiciary.gov.uk/rules-regulations/
[8] https://jac.judiciary.gov.uk/jac-official-statistics

Judges and the JCIO has yet to receive an apology. To date neither the Lord Chief Justice not the Justice Minister has thought fit to refer any of the Judges responsible for a misconduct investigation. The Judicial misconduct panel that has recommended to the Lord Chief Justice that Herbert be given formal advice refused to consider the issue of race discrimination stating, *"these are matters for which there are other avenues of redress"*.[9] In addition the disciplinary panel also refused to permit Herbert to call any oral witnesses and initially refused to permit his legal representative to make any oral submissions.

41. In this key sector of public service it is a matter of public importance that there is already a poor record of diversity within the Judiciary and magistracy. This is exacerbated when Judges, magistrates and lay members are unable to challenge discrimination or removal from office if judicial immunity is permitted to extend to the actions of the JCIO, nominated Judges and the actions of disciplinary panels. This cloak of immunity, if held to apply, would undermine the principle of our democracy based on a diverse and independent Judiciary. Judicial Misconduct panels, unlike the Police Disciplinary Panels do not have the power of dismissal but only of recommendation to the Lord Chief justice and Lord Chancellor. They are not hearings open to the public and can determine their own rules unlike ordinary court hearings that enjoy judicial immunity.

Police Officers

42. The Stephen Lawrence Inquiry exposed the levels of police racism in its historical analysis of the pathology of police officers in their dealings with BME members of the public. The recommendations highlighted the need to recruit, retain and promote significantly more BME officers. At present only 11% of police officers in London are from the BME community, despite 40% of the London community being from a BME background. In 2015, The Metropolitan Black Police Association (BPA), the biggest group representing minority officers in the force, says despite the training and community initiatives put in place over the past two decades, Scotland Yard has failed to tackle the mindset at the heart of failures over Lawrence. The BPA stated on the 20th anniversary of the murder of Stephen Lawrence in April 2013 that[10],

> *"These officers disproportionately hug the lower ranks, face significantly slower rates of career progression and are over-represented in disciplinary actions, in comparison to their white counterparts. This current position is unsustainable, as it severely impacts on police legitimacy and more*

[9] Justice system is racist, says the black judge criticised for misconduct ...
www.thetimes.co.uk/.../justice-system-is-racist-says-the-black-judge-criticised-for-mis...
[10] Metropolitan police still institutionally racist, say black and Asian ...
https://www.theguardian.com › World › UK News › Metropolitan police, 21 Apr 2013

importantly erodes trust and confidence in BME communities."

43. A report by the ECHR in 2013, found that there was a culture of fear that prevented BME staff from complaining of race discrimination and victimisation.[11] Police in the UK's largest force expect their careers to be destroyed if they complain about racism, the ECHR report claimed.
    Officers fear putting their 'heads above the parapet' because they will be denied promotion and suffer other reprisals, it was found. Scotland Yard was accused of failing to admit to mistakes and apologise for them after complaints from ethnic minority, gay and female employees.

44. A significant problem is the misuse of police misconduct proceedings to victimise BME officers and others with a "protected characteristic". Misconduct panels can therefore be used as a key tool of this pattern of discrimination and victimisation. It would be invidious of the misconduct proceedings themselves and the Police Misconduct Tribunals are immune from the EqA 2010. That will simply encourage the MPS and others police forces to engineer misconduct allegations in the knowledge that dismissal may be facilitated to hide victimisation, and all forms of discrimination.

45. One of many examples of how race and sex discrimination, and victimisation continues within the Metropolitan Police Service (MPS) and by definition in other police forces is illustrated by the case of Carol Hudson, formerly the first and only black female firearms officer, who won her case in 2014 against the MPS.[12] She has been investigated for assault, harassment, making threats to damage property, perverting the course of justice, witness intimidation and possession an indecent image of a child. In a witness statement, Mrs Howard, who was suspended from duty until the ET hearing, said the Metropolitan Police had 'deliberately and maliciously smeared' her.

46. She told the tribunal: *"I have been unfairly and unjustly smeared not only as a criminal but as a child predator because of misleading information deliberately and maliciously provided to the media by the police. 'I have always denied attacking my husband to whom I am still married. As for the alleged indecent image, it is a single innocent picture of my own six-year-old daughter shared with her father only, which the CPS have already alluded is not in the public interest to pursue."*

47. In another typical case, PC Daniel Lichters faced baseless gross misconduct and criminal claims after his police dog bit a member of the public who attacked it. In the second case, where a PC was taunted for being gay, a tribunal found the force had *'either set out to, or were reckless about destroying the claimant's character.'*

[11] Read more: http://www.dailymail.co.uk/news/article-3778932/Officers-afraid-blow-whistle-police-racism-Report-finds-staff-fear-putting-heads-parapet-suffer-reprisals.html#ixzz4aDfvX8rC
[12] Black police officer Carol Howard claims she was bullied after winning ... www.dailymail.co.uk/.../Elite-black-police-officer-Scotland-Yards-poster-girl-claims

48. In a third example of a BME officer winning a race discrimination case despite being dismissed for gross misconduct it is clear that there ought to be no immunity for police misconduct tribunals which are used to facilitate race discrimination.

49. PC Ricky Haruna, the former bodyguard to Kate Middleton won her case for race discrimination after being falsely accused and dismissed for gross misconduct following a complaint she made against a colleague of race discrimination.[13] P.C. Haruna was sacked from the force after what she called a 'malicious arrest' over an alleged fraud, one of three claims which led to her dismissal, and which she was later cleared of. She told the tribunal the MPS only took disciplinary action against her because she pursued the racism complaints.

50. She said: 'There was no evidence on which any reasonable, unbiased panel would have dismissed me.' The racist abuse started in 2010 when a suspected shoplifter called her 'midnight' - a racist term used in South London. She said instead of supporting her other officers present 'appeared to laugh'.

51. She added she did not receive support from senior officers when she told them a colleague called her "a n*****". She said: 'After that I was harassed and - victimised by racist police officers and those that support and cover up for racists in senior management.' This was yet another serious example of the grave consequences for permitting the police to use the cloak of Judicial immunity to shield police forces from discrimination and victimization against BME and female officers.

Medical professionals: Doctors and Dentists

52. The situation of medical professionals has been highlighted in several academic reports. The assessment in the report entitled, "The Involvement of Black and Minority Staff in NHS Disciplinary Proceedings",[14] noted that despite the significant contribution of BME staff in the NHS there were serious concerns about disproportionality,

> *"Since the inception of the NHS, black and minority ethnic staff have made an immense contribution to the way health services are delivered in this country, often being cited as the 'backbone' of the service when labour has been in short supply (Akinsanya,1988; Obrey and Vydelingumm, 2004). …Anecdotal evidence and a growing body of empirical substantiation suggest however that staff from BME backgrounds are overrepresented in disciplinary procedures and that disciplinary processes are not being applied consistently within the NHS (Esmail and Everington, 1994; Lyfar-Cissé, 2008).*

[13] Police officer Ricky Haruna who guarded Kate Middleton wins race ...
www.dailymail.co.uk/.../Police-officer-beat-winning-race-discrimination-claim.html 1/3/2015

[14] University of Bradford, 2008, Centre for inclusion and Diversity, Professor Uduak Archibong & Dr Aliya Darr

This is an issue of concern, given that individuals of BME background currently make up 14% of the NHS workforce and the NHS is the largest employer of BME staff in England. "

53. The pattern of a disproportionate number of BME Medical staff coming before the BMA disciplinary bodies remain, as the report noted,

"Statistics from various national sources and case studies from the National Clinical Assessment Service suggest that BME doctors experience differential treatment at local level in that they are more likely to be referred to the GMC and to be on long-term suspension (NCAS, 2006). BME medical staff are also more likely to be involved in disciplinary proceedings than their white counterparts at consultant grade (NAO, 2003), and clinicians whose primary qualification has been gained overseas are more likely to be involved in disciplinary procedures than either BME or white clinicians trained in the UK (Allen, 2000)."

54. One example of many, where a Fitness to Practice panel (FTPP) finding was itself found to have acted improperly in the case of a BME eye surgeon, was identified in the case of Malhar Soni v The General Medical Council EWCA CO/1530/2014, by Mr Justice Holdroyde. The allegation was that Mr Soni, an internationally recognized consultant ophthalmologist, had dishonestly used Trust facilities. The allegation was initially dismissed by the General Medical Counsel, and then re-opened again 18 months after the case was closed on the insistence of the East Hertfordshire NHS Trust. The FTPP refused an application to recuse itself and proceeded to find dishonesty, and serious misconduct on behalf of Mr Soni leading to their decision being dismissed by the High Court, finding that,

"The Panel made a determination which went not only beyond the evidence but even beyond the allegation, and which it should not have done…….I conclude that the Panel made a wrong determination against Mr Soni. It was wrong to reject the submission of no case to answer, and wrong to find that dishonesty was proved. With all respect to the Panel, I am afraid it must have confused grounds for suspicion with evidence sufficient to prove, on balance of probabilities, a serious allegation against a professional man".

55. Whilst it was not specifically pleaded that this case was driven by an overtone of discrimination the General Medical Council (GMC) re opening investigations without any new evidence had only occurred in seven previous cases. There is a strong possibility that the GMC, and the FTPP panel would not have acted in such a cavalier fashion of Mr Soni had been a white consultant.

Nurses and Midwives

56. Disciplinary procedure for nurses and midwives is governed by the Nursing and

Midwifery Council. There are three separate stages for misconduct allegations with case examiners, investigating committees, and for the most serious cases a Conduct and Competence Committee. The latter is chaired by nurses and midwives with lay members. There is no requirement to have a legally qualified Chair as with other disciplinary panels. Under s 12 of the Nurses, Midwives and Health Visitors Act 1997, a right of appeal lies to the High Court only a decision to remove or suspend a person's registration.

57. The situation for African, Caribbean Nurses and Midwives reflects the experience of other BME professionals. As the US civil rights movement once said we tend to be the "last hired and the first fired". A number of reports over the years have highlighted the disproportionate levels of BME nurses and midwives that experience not only discrimination but adverse disciplinary findings against them, including dismissal. Of all staff for whom data are available in the NHS and community health services, 11% are foreign nationals, while 14% of professionally qualified clinical staff and 26% of doctors are from outside the UK. Overall, 40% of doctors in the NHS are from a BME background.

58. This ethnic diversity is not proportionately represented through the NHS hierarchy. A study by Roger Kline, "The Snowy White Peaks of the NHS", examined BME progression in the health service in London and exposed the stark contrast between the city's demography, with 45% of the population and 41% of its NHS staff made up of BME people, and BME representation of only 8% of trust board members, and 2.5% of chief executives and chairs. The London picture was reflected in every respect nationally, with BME representation absent from the boards of some national NHS bodies.

59. As an example of the type of discrimination faced by BME nurses is to be seen in the case of the late Rose Purves. For seven years the black staff nurse was abused by a white mother who did not want a black nurse looking after her child, who had cystic fibrosis.

60. On one occasion, when Purse was moving the child from its bed, the mother confronted her, "shouting and swearing that I had no right to be there, that black people shouldn't be in hospital." Feeling they should cater for the mother's wishes, Southampton University Hospitals NHS Hospitals Trust, instead of challenging the mother's racist behaviour, moved the child to another ward. The mother continued to leave racist messages and subjected Purves to abuse.

61. Feeling isolated, Purves became depressed and was off sick for six months. Eventually she decided she had to take a stand. Her complaint was not against the mother, but against the Trust. She felt it should have supported her, that the Trust did not take racism and racial discrimination seriously. The employment tribunal agreed and awarded her £20,000"

62. Ethnic discrimination was also highlighted by data and research on NHS recruitment and career progression, resulting in an "ethnic gradient" within the workforce, with BME staff being represented in larger numbers at lower pay grades and status roles. Racism and discrimination against staff take other forms too. A 65% increase in racist verbal and physical attacks against staff by patients was reported in the five years up to 2013 by one study we came across. Another report described how a

hospital had acquiesced when parents requested that their child was to be treated by a white doctor. These attitudes and the pathology of discrimination have persisted since the 1950's. The enduring nature of race discrimination in every facet of the nursing profession is a sad reflection of the historic contribution made by BME nurses since the time of Mary Seacole during the Crimean war to the present day.

The Criminal and Civil Justice System

63. It is accepted that the administration of justice does require the principle of Judicial immunity to apply to all adversarial proceedings in civil and criminal cases where a person's office or employment are not the subject of a determination between adversarial parties. The principle is necessary to safeguard the independence of the Judiciary however there is cause for serious concern. There is however no need to extend this immunity as to do so would do serious damage to whole issue of determining equality under the law. The EqA 2010, specifically excluded the Judiciary and the Crown from the application of the bringing of discrimination proceedings for any "protected characteristic" s1 EqA 2010. However it is clear the drafters did not intend this immunity to extend beyond the normal Court system.

64. In 2016, the former Prime Minister David Cameron stated, that when it came to black people and criminal justice, the figures were so stark that action needed to be taken.

65. He said,
"If you're black, you're more likely to be in a prison cell than studying at a top university, and if you're black, it seems you're more likely to be sentenced to custody for a crime than if you're white. We should investigate why this is and how we can end this possible discrimination."

"There are no black generals in our armed forces and just 4 per cent of chief executives in the FTSE 100 are from ethnic minorities." He may have added that there are only four Asian High Court Judge and none of African Caribbean origin after the resignation of Linda Dobbs who recently spoke about her experience of race discrimination as a barrister and as a Judge.

"That's why I have asked David Lammy MP to lead a review of the over-representation of defendants from black and ethnic minority backgrounds in the criminal justice system."

66. The most significant study of sentencing and bail decisions was conducted by Dr Roger Hood, of the Oxford University Criminology Department who assessed Judges, both full and part time at Walsall and Wolverhampton Crown Court in 1992. The study assessed over 3,000 sentencing and bail decisions and found an "unexplained" disparity in sentencing and bail which found that African Caribbean defendants in particular were more likely to be given an immediate custodial sentence, with fewer previous convictions for the same offence as their white counterparts.[15]

[15] https://www.amazon.co.uk/Race-Sentencing-Report-Commission.../dp/0198258402

67. The disparity in sentencing could actually be narrowed down to individual Judges although identification in this manner by name was specifically excluded by the Lord Chancellor. Some 25 years later in 2017 the statistics are worse than ever with the disparity in sentencing and bail decisions actually growing.

68. Evidence of disparity of sentencing and bail decisions have been examined by a number of UK academics over the years with a study by Dr Bonny Mlanga, a research fellow at the University of Hull Centre for Criminology and Criminal Justice, of a 5 year study of young men in Brent prior to 1996 found black defendants were more likely to be charged than their white counterparts but were significantly more likely to be acquitted because of lack of evidence, however of those convicted they were more likely to receive a custodial sentence.[16] The clear evidence of a number of studies is that disproportionate sentencing and bail decisions have continued apace seemingly impervious to the race awareness training that has been conducted since 1991. Studies have shown that:

- The chances of a young black male's custodial sentence at a Crown Court being 12 months or longer are 6.7 times those of young white men, accounting for other variables.
- The chances of a young male with parents of different ethnicities being prosecuted are 2.7 times that of a young white male with similar case characteristics.
- For a young female with parents of different ethnicities, the chance of being prosecuted is 6 times that of a white female who has committed a similar offence.[17]

69. The landmark Stephen Lawrence Inquiry in 1998 that produced an upsurge in the reporting of all hate crimes across the UK was sadly now matched by any significant culture shift in the Judiciary. There was throughout the country and massive "push back" against an organization being labeled, "institutionally racist". Many senior members of the Judiciary have never engaged with the residential training that was rolled out between 1991 and 1999 and the induction training for Judges has been devolved to training consultants who are far too preoccupied with retention of contracts. There is a disturbing level of complacency by many members of the full and part time Judiciary whose overriding concern is to be polite and not to "rock the boat" rather than in challenging colleagues about what they actually do in practice.

70. Consequently, race is still perceived as a problem when encountered head on by most members of the Judiciary and Magistracy. Whilst, it is acknowledged that the vast majority of Judges or Magistrates do not commence a sentencing or bail exercise thinking that African Caribbean, or Asian defendants, especially women or Muslims are somehow more of a risk than any other members of society the outcomes of decisions are undeniably exercised against African Caribbean defendants and other minorities.

Race and Sentencing: A Study in the Crown Court - A Report for the Commission of Racial Equality Paperback – 1 Dec 1992. ... This major study examines whether race is a factor influencing the sentences imposed on men and women in the Crown Courts in England. ... The findings will provide

[16] "The Colour of English Justice" (Avebury) Independent 11.6.1997

[17] May, T. et al. 2010, Differential Treatment in the Youth Justice System, London: Equalities and Human Rights Commission

71. Even if one factors in poverty, unemployment and other variables there is still not only an over representation in the prison population but in the means by which that disproportionate population is maintained. The probation service has managed to ensure reports and recommendations are of a better quality with regular references to the sentencing guidelines but the disparity of treatment keeps on growing. The Sentencing Guidelines Council (SGC) has for the first time in 25 years advised that race discrimination may be a factor when sentencing juveniles. A small step in the right direction.

72. The SGC, in the published guide to set out how the sentencing process is developed makes no other mention of disparity in treatment on grounds of race or gender. If one looks at the whole of the guidelines there is no mention at all of the known facts that according to the official Home Office s 95 statistics. The situation has grown steadily worse over the years with the Magistracy and Judiciary having to take full responsibility for the unlawful disparity in treatment. All the evidence suggests this is due to the passive operation of underlying and generally unconscious bias against BME defendants, and now Muslims, especially those of African and Caribbean origin.

73. It is a cause of deep disquiet when the SGC fails to issue any guidelines on the need to ensure that BME defendants are not treated more harshly than white defendants. At present, people from black and ethnic minority groups make up over a quarter of prisoners in England and Wales, but only 14 per cent of the wider population. Figures also show that 61 per cent of offenders from black and ethnic minority backgrounds receive jail sentences, compared to 56 per cent of white offenders.

74. A report entitled "Statistics on Race and the Criminal Justice System "2012, produced by the Ministry of Justice found that a black person aged ten or older in 2011/ 2012, was six times more likely than a white person to be stopped and searched and nearly three times more likely to be arrested.

SGC

75. The same report found that only 26 per cent of white criminals were handed immediate custodial sentences as compared to 31 per cent for black criminals and 32 per cent for Asian criminals. Again this differential treatment can be seen in the average custodial sentence for black prisoners which was 23.4 months compared to 15.9 months for white prisoners. The publication of the interim report by the Lammy Review highlighted the serious disparity in treatment across the Criminal Justice System. The primary findings are a re statement of historical trends that found If you are African Caribbean you are 16% more likely to be remanded in custody than if you are white; you are also likely to obtain a custodial sentence of 24 months compared to your white counterpart's sentence of only 17 months.

76. The race crisis within the justice system itself provides absolutely no confidence that the protection offered by the cloak of Judicial immunity should be expended t any other aspect of employment of professional life. Judicial immunity is a necessary principle but must be carefully balanced against the dangers that go hand in hand of decision makers who are effectively immune from challenge and can act as the came above the law. Neither the criminal justice system nor our civil Courts give any confidence that judicial immunity ought to extend beyond where it does at present.

Conclusion

77. The struggle to achieve equality before the law is an on-going struggle that can be seen as being a manifest problem for all professions with on British Society. The protection offered by Judicial immunity protects the decision makers but offers scant comfort to all those on the receiving end of discrimination. The overwhelming evidence as set out above is that BME professionals are more likely to be subject to investigation, suspension from office or employment, face more severe sanctions and are dismissed in a wholly disproportionate manner than their white counterparts.

78. Parliament was well aware of this fact when it passed the Equality Act 2010. It was never envisaged that the cloak of judicial immunity would be used to undermine the whole essence of BME professionals and others with "protected characteristics" being excluded from the right to challenge their dismissal and treatment. If the Supreme Court took the view of the Court of Appeal in **Heath** this would prevent hundreds of thousands of BME professionals, women, people with disabilities, religious minorities and others suffering from age discrimination, religious discrimination or sexual orientation from enjoying the protection of the Equality Act 2010. That is such a fundamental challenge to BME rights as professionals, office holders and citizens it should only be left to Parliament to decide.

79. There is no social imperative to extend the cloak of judicial immunity outside of the justice system itself. Protection from discriminatory dismissal through misconduct Tribunals ought not to be permitted. To do so would be to undermine a key pillar of British society where equality before the law is a basic principle to be enjoyed by all, including those who have trained and studied for many years to achieve their professional qualifications.

D Peter Herbert O.B.E., Chair, Society of Black Lawyers
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