

Sir Mota Singh Memorial Lecture

Lincoln's Inn, 13 November 2018

Racial Equality and the Law

Introduction

1. It was exactly two years ago, on 13 November 2016, that sadly Sir Mota Singh passed away. It is an honour to give the inaugural lecture in his memory at Lincoln's Inn, of which he was a Bencher. It is a particular pleasure for us to welcome Swaran Kaur (Lady Singh) and other members of his family to be with us this evening. Mota Singh was not only a wise judge but a much loved person, amongst his colleagues, amongst practitioners and with the staff at Southwark Crown Court, where he sat for some 20 years after his appointment as a Circuit Judge in 1982. I know that because, having myself sat at Southwark when I was a Presiding Judge on the South Eastern Circuit, I found that, more than a decade after his retirement, Mota Singh was still remembered with great affection by the judges and staff there.
2. Having grown up in Kenya, Mota Singh came to this country initially in the 1950's to complete his education. He then settled in this country in the 1960's in order to practise law at the Bar. He took Silk in 1978 and was appointed to the Circuit bench in 1982. He was an inspiration to many of us. It is difficult for us to imagine today what the environment must have been like for a person of colour when he was first beginning to establish himself both as a practitioner

and later to become a judge in this country. It is no exaggeration I think to say that Sir Mota Singh opened doors which enabled others like me to come through in a way which would have been very difficult if not impossible to imagine previously. And he did so not by banging on those doors in any aggressive way. Far from it. That was not his character. He was a quiet and gentle person.

3. I have called my lecture ‘Racial Equality and the Law’ but I want to make one thing clear at the outset: there is only one race, the human race. Race is not a scientific concept. The law in this area makes this clear, for example in the preamble to the EU Race Directive of 2000,¹ recital (6) of which states that:

“The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.”

4. That this had to be said at the beginning of the EU Directive on racial discrimination is perhaps understandable in view of the history of Europe in the 20th century. The law as it has developed in this area emerged in order to counteract the pernicious effects of racism and the spurious pseudo-scientific theories on which it was sometimes based. Robert Wald Sussman, Professor of Physical Anthropology at Washington University in St. Louis, has written a comprehensive book entitled The Myth of Race,² in which he demolishes the unscientific idea of race but also addresses why the notion still persists. He points out that in 1950 UNESCO issued a statement that the human race is one species and that the concept of race has no basis in biological fact. Race is a

¹ Directive 2000/43.

² (Harvard University Press, 2014).

social construct, intertwined with history, geography, language, religion and most of all with culture. But the fact that race does not exist does not mean that racism does not.

5. In the preface to his book Black and British the historian David Olusoga describes his own experience of growing up on a council estate in the north-east of England in the 1980's in the following way:

“Almost every black or mixed-race person of my generation has a story of racial violence to tell ... In 1984 my family ... were driven out of our home by a sustained campaign of almost nightly attacks ... We lived in darkness, as the windows of our home were broken one by one, smashed by bricks and rocks thrown from ... across the street. As replacing the glass merely invited further attacks the windows were boarded up and we slowly disappeared into the gloom, quarantined together behind a screen of plywood.”³

6. In her book Brit(ish) Afua Hirsch, who is a barrister of this Inn and a journalist, describes this incident when she was growing up in a more affluent area in the 1990's:

“The harshest lessons came in my late teens, visiting my best friend at work at a boutique in Wimbledon Village. The manager told her I could not come in: ‘It’s off-putting to the other customers,’ she said ‘and the black girls are thieves. Tell her she is not welcome.’ ... The sense that I was not welcome in my own local shops, in the place I had lived since childhood, had a profound effect.”⁴

³ Black and British: A Forgotten History (Pan Books, 2016), p.xvii.

⁴ Brit(ish): On Race, Identity and Belonging (Jonathan Cape, 2018), p.11.

Constantine v Imperial Hotels Ltd

7. I want to start with a story about cricket, or at least a famous cricketer. I hope Sir Mota would have approved. As many of you will know one of Mota Singh's loves was cricket. In fact he was widely regarded as having the potential to play for the Kenyan national team.

8. On 30 July 1943 the famous cricketer from the West Indies, Learie Constantine (later Lord Constantine) thought that he had booked himself and his wife a room at the Imperial Hotel in London. However, when they arrived at the hotel they were informed that there was, as it were, no room at the inn for them. It would appear that the underlying reason why they were turned away was that there were American soldiers stationed at the hotel who objected to their presence on racial grounds. At that time the armed forces of the United States were still subject to racial segregation. Mr Constantine and his wife went under protest to the Bedford Hotel instead.

9. Mr Constantine brought an action against Imperial Hotels which came before Mr Justice Birkett as he then was.⁵ Mr Constantine was represented by one of the foremost advocates of his day: Sir Patrick Hastings KC, leading Rose Heilbron, who would later become one of the first two women silks in this country and a High Court judge. The cause of action relied upon was a breach of an innkeeper's duty to receive a traveller. After lengthy consideration of the authorities, Mr Justice Birkett held that this cause of action did not require proof of special damage. He considered that the principles of the decision in *Ashby v*

⁵ [1944] 1 KB 693.

*White*⁶ applied to this context. Therefore judgment was given for the plaintiff and damages awarded of five guineas.

10. The decision in *Constantine* is of interest not only for historical reasons but because it illustrates the capacity of the common law to develop from time to time in order to remedy an injustice. However, Mr Constantine might not have been so fortunate if he had for example been subjected to racial discrimination not when seeking accommodation from an innkeeper but applying for a job or to rent accommodation. As is well known, right up to the 1960's, there was openly practised racial discrimination in this country in fields such as employment, housing and the provision of goods and services to members of the public. It is possible that the common law might have developed in such a way as to control racial discrimination even in those contexts. It is certainly possible to conceive that implied terms could have been inserted into many contracts or leases to that effect. However, it would have been much more difficult if not impossible for the common law to deal with the very common situation where a person was discriminated against on racial grounds without there ever being a contract or other relevant legal relationship already in existence, typically where they applied for a job or for housing and were turned down.
11. Before I turn to the development of the law in this area it is worth recalling the reasons why racial equality is important. As various courts have said over the years, there are four main reasons why it is important.⁷

⁶ 2 Lord Raymond 938; 3 Howell's State Trials Volume XIV, Lord Raymond 320.

⁷ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at paras. 131-132 (Baroness Hale of Richmond); and *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at paras. 269-271 (Arden LJ).

12. First, it follows from the fundamental principle that each individual should be treated on their own merits and not for some irrelevant reason, especially if that reason is immutable and something over which a person has no control, such as their colour or ethnic or national origins. In a modern democracy we consider that every human being has equal worth and should be afforded equal concern and respect. As Article 1 of the Universal Declaration of Human Rights puts it: “Every human being is born free and equal in dignity and rights.” As a devout Sikh, Mota Singh would have recognised this, since it is a fundamental tenet of the Sikh faith that every human being is equal. Sikhism rejects notions such as race and caste.
13. Secondly, the law in this area recognises the harm that is done to an individual who is the victim of racial discrimination. This can be financial harm, as when a person is refused a job or a promotion which they deserve on their merits, but it can also include injury to feelings. Anyone who has suffered discrimination will know that it can cause embarrassment, humiliation and self-doubt: a questioning of a person’s self-worth.
14. Thirdly, there is a utilitarian justification. Society generally benefits when a person is treated on their individual merits, not just that person. This is because, for example, society will then have the best person appointed for the job in question. This can be illustrated by the film *Hidden Figures*, made in 2017, which was based on the true story of Katherine Goble Johnson and her colleagues at NASA in the 1960’s. They were known as the “computers”, at a time when human beings rather than machines still had to do the maths that would enable astronauts to go into orbit and eventually reach the moon.

Katherine Johnson was employed in what was called the “colored computers” section of NASA. She and her colleagues suffered dual discrimination, as they were women and they were African-Americans. In the film there is a scene when Katherine Johnson points out to her white colleagues that they are prepared to use her calculations but they are not prepared to drink from the same coffee jug as her: she has to drink from a separate jug marked “colored.” Yet she and others persevered. Eventually, Katherine Johnson’s contribution to the American space programme was recognised by President Obama when she was awarded the Presidential Medal of Freedom (the highest civilian honour in the US) in 2015.

15. Fourthly, there is also this utilitarian justification for promoting racial equality: the maintenance of social harmony and cohesion. History teaches that, in a society in which a racial minority – or perhaps even a majority, as in South Africa during *apartheid* – is systematically discriminated against, there is likely to be public disorder and violence. Racial discrimination is not good for the health of society.
16. At this stage of my lecture I want to go back in time to look at the history of racial discrimination and the law in the United States because in that country we see that the first attempts were being made to use the law to prohibit racial discrimination as early as the 1860’s after the American Civil War. There are two reasons for looking at the American experience. First, it is intrinsically interesting in showing us both the limits of law and also its potential in combatting racial discrimination. Secondly, American law has influenced the development of the law in this country too.

The American Experience

17. I have suggested elsewhere that the approach of the law to issues of racial discrimination can be viewed at two different levels.⁸ The first level is the constitutional level. This concerns attempts by constitutional law to regulate the powers of state bodies, including potentially even the legislature, in the field of racial discrimination. The second level is the non-constitutional level. This often concerns the relations between private individuals and entities, such as employers, landlords and companies providing goods and services to the public, such as railway companies. These situations may involve state bodies or they may involve private entities. Sometimes the law, usually in the form of legislation, rather than constitutional provisions, attempts to prohibit racial discrimination in such areas of human activity.

18. In the United States in the middle of the 19th century we see early attempts by the law to address racial discrimination both at the constitutional level and at the non-constitutional level. In the five years after the Civil War ended in 1865, as part of the process known as “Reconstruction”, by which the states which had seceded in 1861 to form the Confederacy were brought back into the Union, three important constitutional amendments were passed. In 1865 the Thirteenth Amendment abolished slavery. In 1868 the Fourteenth Amendment (among other things) guaranteed against the States the “equal protection of the laws.” What that means is something to which I will have to return. In 1870 the Fifteenth Amendment prohibited racial discrimination in the exercise of the right to vote.

⁸ R. Singh, ‘Equality: the Neglected Virtue’ [2004] EHRLR 141.

19. As well as those laws, which operate at the constitutional level, the US Congress enacted a number of statutes seeking to prohibit racial discrimination at the non-constitutional level. The Civil Rights Act of 1866 conferred what might be regarded as the most basic rights on newly freed slaves, for example the right to form contracts and to own property. These were “civil” rights in the truest original sense, things that most of us hardly even think about, they seem so obviously to be an incident of what each of us is entitled to do as a person. But of course many human beings had until 1865 not been recognised in the US as persons at all: they had themselves been regarded as chattels, a piece of property to be bought and sold.
20. The issue of racial discrimination often arose in the context of segregation on America’s early railroads. Even before the Civil War, courts had been required to consider the issue and had held that railroads were bound by the common law requirement that public carriers should accept all customers subject only to reasonable regulations imposed for public convenience. However, racial segregation in railway carriages was generally considered to be a reasonable regulation. According to Michael J. Klarman, “the prevailing view of courts was that [segregation] qualified as a reasonable policy.”⁹
21. In 1865 Massachusetts became the first state to forbid racial discrimination in public accommodations. In 1875 the US Congress enacted legislation (the Civil Rights Act of that year) which was generally understood to forbid segregation by common carriers but the Supreme Court invalidated it in 1883. However, segregation did not come to either the railways or to other forms of public

⁹ From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (OUP, 2004), p.17.

transportation quickly or uniformly across even the Southern States. Florida enacted the first state railroad segregation law in 1887 and was followed by other states. Segregation of streetcars began in earnest in 1900 and had become well established by 1906.

22. As Michael Klarman observes segregation in schools and in railway travel were not necessarily the same issue.¹⁰ Black people had been almost universally excluded from public (in other words state) schools even at the time of the Fourteenth Amendment after the Civil War. As I have mentioned the Fourteenth Amendment guarantees the “equal protection of the laws”. 19th century public education had been more segregated than railroad transportation. Even before the Civil War and even in northern states black people had either been excluded altogether from public schools or had been segregated. Massachusetts was the only state which forbade school segregation by law. Other northern states did so in the 1870’s and 1880’s. As has often been pointed out, even the US Congress which enacted the Fourteenth Amendment was itself segregating public schools in the District of Columbia, for which Congress is responsible, since Washington DC is not within the territory of any of the states.
23. Another of the important constitutional amendments passed in the aftermath of the Civil War was the Fifteenth Amendment, which provides that the right of citizens to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” This was not wholly without teeth. For example, in 1904, a court in Georgia invalidated a law forbidding black people from voting in municipal elections.¹¹ It would

¹⁰ *Ibid.*, p.19.

¹¹ *Ibid.*, p.33.

also be a mistake to assume that, in the years immediately after the end of the Civil War, black people (most of whom had formerly been slaves) were immediately subject to disfranchisement. In fact the process took much longer and was initially uneven. In 1880 a majority of black people were still voting in most southern states. Black people held office in the state legislatures. In some areas black voters were in fact in the majority. However, the political participation of black people in southern states declined dramatically after 1890. A number of legal measures were deployed to achieve this end. Most southern states adopted literacy tests, which had a disproportionate effect on black people even if they were applied fairly, given the higher rates of illiteracy among them. These were reinforced by “understanding clauses”, which required a person to understand a constitutional provision which was read to them. Other devices that were used included “grandfather clauses”, which exempted a person from literacy tests if they would have been eligible to vote before 1867 and sometimes required a voter to have been a former soldier or their descendant. Some states adopted a poll tax of one or two dollars.

24. The issue of segregation in public schools never in fact came before the US Supreme Court at the relevant time. The issue of segregation in the railways did come before the Supreme Court and in *Plessey v Ferguson*¹² the Supreme Court by a majority of 7-1 infamously upheld such segregation laws. The Supreme Court announced the notorious doctrine of “separate but equal”: in other words it held that mere segregation of accommodation on the railways did

¹² 163 US 537 (1896).

not render accommodation for black people unequal. Justice Harlan dissented. Interestingly he had himself been a slave owner.

25. Voting restriction laws which were not on their face discriminatory were upheld by the Supreme Court, for example in *Williams v Mississippi*.¹³ On this occasion even Justice Harlan joined the opinion of the Court. As a result of such measures black voting was reduced virtually to nil by around 1900. So things remained until the 1950's.

26. On 17 May 1954, in what is arguably the most famous decision ever handed down by the US Supreme Court, the Court held in *Brown v Board of Education of Topeka, Kansas*¹⁴ that racial segregation in public schools is inherently unequal and so violated the Equal Protection Clause of the Fourteenth Amendment. It rejected the *Plessey* doctrine that there could be facilities which were separate but equal. The Court held, on the basis of social science data which was put before it in the form of a "Brandeis brief" that racial segregation in schools imposed a badge of inferiority on black children. That was the reason why they were being kept segregated from white children at school. In giving the unanimous judgment of the Court, Chief Justice Warren famously pronounced that:

"We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."¹⁵

¹³ 170 US 213 (1898).

¹⁴ 347 US 483 (1954).

¹⁵ At 495.

27. As I have mentioned, the District of Columbia is not a State and therefore is not bound by the Fourteenth Amendment. In fact there is no equal protection clause which on its face binds the Federal Government of the US. For that reason, in the companion case of *Bolling v Sharpe*,¹⁶ the Supreme Court held that the Due Process clause of the Fifth Amendment impliedly imposes the duty of equal treatment on the Federal Government also. In that way the Supreme Court was able to hold that racial segregation in the public schools in Washington DC was also unconstitutional just as it was in the States.
28. The way in which *Brown v Board of Education* came to be decided is itself a fascinating story which I do not have time to recount this evening. Anyone interested in the subject should read the Pulitzer prizewinning account of it by Richard Kluger, *Simple Justice* (first published in 1975).¹⁷ The decision owed much to the ingenuity, hard work and courage of the team of lawyers, led by Thurgood Marshall, of the NAACP. *Brown* represented the culmination of decades of careful strategic thinking and litigation. In due course, Thurgood Marshall was appointed by President Johnson to be the first African-American judge on the US Supreme Court.
29. So we see in American history that the law on racial segregation went from permitting it to take place in the middle of the 19th century, to requiring it to take place from about 1890, to prohibiting it in the middle of the 20th century.
30. The mere fact that a court has spoken, even the highest court in the land, does not necessarily mean that its orders will be complied with on the ground. The

¹⁶ 347 US 497 (1954).

¹⁷ (Penguin Random House, 2004).

difficulties which were encountered in the implementation of the decision in *Brown* and subsequent decisions of the US Supreme Court in the 1950's and 1960's are well known. For example, at Little Rock, Arkansas in 1957 President Eisenhower had to send in the National Guard to ensure that black school children could go to school as ordered by the courts.

31. The constitutional case law of the US Supreme Court of that era culminated in a decision in 1967: *Loving v Virginia*.¹⁸ With hindsight it seems almost incredible now that it was only some fifty years ago that the US Supreme Court finally struck down what were called anti-miscegenation laws, in other words laws which made it a criminal offence for persons of different racial origins to marry. The case of *Loving* has been depicted in at least two films, the most recent of which was made in 2017.
32. So that was what occurred at the constitutional level in the US in the post-war era. At the non-constitutional level the campaign to achieve an end to racial discrimination led to the enactment by Congress of the Civil Rights Act of 1964. At that time this was the most comprehensive legislation of its kind that I am aware of anywhere in the world. It prohibited racial discrimination in such areas as employment, housing and the provision of goods and services to the public.
33. In due course, in caselaw interpreting the Civil Rights Act, the US Supreme Court held that it prohibited what became known as “indirect” discrimination as well as direct discrimination.¹⁹ The legal concept of indirect discrimination went on to influence the law both in the United Kingdom and in the European

¹⁸ 388 US 1 (1967).

¹⁹ *Griggs v Duke Power* 401 US 424 (1971).

Union. It is now a familiar concept to us. Essentially it prohibits measures which on their face are racially neutral but which have a disproportionate impact on a particular racial group unless that difference of treatment can be objectively justified.

34. Curiously (at least to an outsider) the concept of indirect discrimination has been held to be inapplicable in the US constitutional context. In *Washington v Davis*²⁰ the US Supreme Court held that the Equal Protection clause of the Fourteenth Amendment does not prohibit indirect racial discrimination, only direct.

35. Staying with the constitutional level for a moment, in the meantime, during the Second World War, the US Supreme Court had decided one of the most notorious cases in its history: *Korematsu v United States*.²¹ This was a majority decision of 6-3 judges. In that case the Court upheld the Executive Order by which the President detained American citizens of Japanese descent in detention camps in the United States. The minority included Justice Murphy and Justice Jackson, both of whom had served as Attorney General in the administration of President Franklin D. Roosevelt, the same President whose executive order was now under challenge.

36. Justice Murphy said:

“I dissent ... from this legalisation of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. ... It is utterly

²⁰ 426 US 229 (1976).

²¹ 323 US 214 (1944).

revolting among a free people who have embraced the principles set forth in the constitution of the United States.”²²

37. *Korematsu* continued to be a highly controversial decision right up to this year, when it was finally overruled by the unanimous decision of the US Supreme Court in *Trump v Hawaii*.²³ Although the actual decision in that case, which upheld the ban on entry into the US of people from certain countries, most of which have a majority of Muslim citizens, has itself provoked controversy, and was decided by a narrow majority of 5-4 judges, it is important to recognise that the Court unanimously held that its previous decision in *Korematsu* had been wrongly decided on the day that it was decided and ever since. The wrong that was done during the Second World War has at long last been recognised by the highest court in the US.

Legislation in the UK

38. It was against that international background, in particular in the USA, that the first Race Relations Act was passed by Parliament in this country in 1965. The British statute was much more limited than the US Civil Rights Act of the previous year. It was limited in its scope; limited as to who could take action under it; and limited in respect of the remedies which could be granted by the courts.

²² At 242.

²³ 585 US – (2018).

39. The 1965 Act did not cover areas of social activity such as housing or employment. It applied to what it called “places of public resort”, including hotels and restaurants but it did not apply to private boarding houses. It did not apply to shops.
40. The grounds on which discrimination were prohibited were colour, race, and ethnic or national origins. It was subsequently held by the House of Lords in *Ealing London Borough Council v Race Relations Board*²⁴ that the phrase “national origins” did not include nationality. Later, as we shall see, in 1976 Parliament amended the law to include discrimination on the ground of nationality. The phrase “ethnic origins” was later still construed by the courts to include both Sikhs and Jewish people.²⁵
41. Under the 1965 Act it was not possible for an individual to enforce the obligations created by it directly. Rather there was a body called the Race Relations Board which was set up to monitor the work of local conciliation committees. Where discrimination continued, the matter could be referred to the Law Officers, who could apply for an injunction from the court. The Act made clear that it did not create any criminal liability.
42. The Act was strengthened in 1968 but substantially widened in the Race Relations Act 1976. As I have mentioned, nationality was added as a prohibited ground of discrimination. The scope of the Act was extended to cover employment, education and the provision of goods and services. Furthermore, Parliament adopted the concept of indirect discrimination which had been

²⁴ [1972] AC 342.

²⁵ *Mandla v Dowell-Lee* [1983] 2 AC 548; *R (on the application of E) v Jewish Free School* [2010] 2 AC 728.

developed in American caselaw. Finally, the 1976 Act conferred rights on individuals and enabled them to obtain a range of remedies from either the County Court or what was then called the Industrial Tribunal, now the Employment Tribunal. Those remedies included compensation, including compensation for injury to feelings.

43. The Race Relations Act 1976, as originally enacted, did not apply to barristers. The Act was not extended to cover barristers, for example the way in which barristers' clerks distributed work to members of chambers, until 1991, with the coming into force of the Courts and Legal Services Act 1990.
44. As you will appreciate, what I have said so far about the legislation against racial discrimination in this country essentially covered what I have described earlier as non-constitutional issues. The legislation did not apply to actions of the state itself when exercising public functions. This was made clear in a decision of the House of Lords called *Amin*,²⁶ in which it was held that the provision of services to the public did not include the performance of public functions which only the state provides, for example the legislation did not apply to the exercise of immigration functions. Although that was a case under the Sex Discrimination Act 1975, the provision that fell to be construed in that case had an equivalent in the Race Relations Act.
45. This was all to change in 2000, when Parliament enacted the Race Relations (Amendment) Act to implement some of the key recommendations made by Sir William MacPherson after the Stephen Lawrence Public Inquiry in 1999. The amended Act prohibited racial discrimination by public authorities in the

²⁶ *R v Entry Clearance Officer, Bombay, ex p. Amin* [1983] 2 AC 818.

exercise of their public functions. The Act also introduced an amended version of section 71, which has become known as the “Public Sector Equality Duty”, which has now found its way into the Equality Act 2010, in section 149, and applies to a range of other protected characteristics under that Act. The Public Sector Equality Duty is a positive duty. It requires public authorities to have due regard to the need to promote equality of opportunity. It was intended to meet the problem of “institutional racism” which had been identified in the Stephen Lawrence Inquiry Report by ensuring that the potential impact of policies and decisions on ethnic minorities was not overlooked.

46. The Public Sector Equality Duty was described as being an important one and “a salutary requirement” by Lady Justice Arden in the case of *Elias* in 2006.²⁷ In that case I was leading counsel for Diana Elias, who was one of the most interesting clients I ever had. She was in many ways a child of the British Empire. Her family were Jewish and had gone from what was then called Mesopotamia to settle in southern India, where she was born. She could speak Hindi – much better than me. Later her family moved to Hong Kong, which is where they were when the Japanese captured it in late 1941. Some British inhabitants were able to escape to Australia but at that time Australia practised racial discrimination in who would be admitted and so people who were not classified as being of European origin were prevented from reaching Australia. Diana Elias and her family were among those civilians who were interned by the Japanese. Unspeakable things happened at the internment camp. Of course

²⁷ *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at para. 274.

they were British subjects, which is why they were interned by the Japanese, who were at war with the British Empire.

47. After the War Diana Elias came to the UK and became a British citizen. She had a family here. In the early part of this century the British Government introduced an *ex gratia* compensation scheme for British subjects who had been interned by the Japanese in the Far East during the Second World War. You might have thought that Diana Elias was exactly the sort of person who would qualify for that compensation. But No. The Government's scheme provided that in order to qualify a person had to have been born in the UK or have at least one parent or grandparent who had been born in the UK. That was how the Government decided who counted as "British" for this purpose. As Diana Elias put it in her witness statement, she was British enough to be interned but not British enough to be compensated.
48. Her claim for judicial review succeeded in the High Court on the ground that the Secretary of State's policy constituted indirect racial discrimination. The Secretary of State's appeal was dismissed by the Court of Appeal, Lord Justice Mummery giving the lead judgment.
49. Even with those legislative amendments which extended the reach of the racial discrimination legislation to the exercise of public functions, we still did not have in this country the equivalent of constitutional protection against for example discrimination in legislation itself. However, in one sense that has changed since the coming into force of the Human Rights Act 1998. As is well known, this gives effect in domestic law to the main rights to be found in the European Convention on Human Rights. Those rights include the right to equal

treatment in the enjoyment of other Convention Rights, which is in Article 14. Accordingly, it has become possible for even primary legislation to be scrutinised against the standards of the Convention, albeit that the remedy which can be granted is a declaration of incompatibility rather than (as would be possible for example in the US) a power to strike down primary legislation.

50. An example of such a declaration of incompatibility being granted where legislation was found by the House of Lords to be incompatible with the prohibition of discrimination on grounds of nationality can be found in the so called “Belmarsh” case *A v Secretary of State for the Home Department*.²⁸ In that case, which followed the enactment of emergency legislation passed after the attacks of 9/11, which conferred power on the Secretary of State to authorise the detention of suspected international terrorists but only if they were foreign nationals, the House of Lords held (by a majority of 8-1) that Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the Convention rights. In giving the lead speech, Lord Bingham of Cornhill said that the legislation was discriminatory on grounds of nationality and that discrimination was not objectively justified.
51. Parliament then amended the 2001 Act to remove Part 4 and replaced it in 2005 with a system of “control orders”, a system which itself has subsequently been repealed and replaced by TPIMs under the Terrorism Prevention and Investigation Measures Act 2011.
52. The Race Relations Act has now been replaced by the single Equality Act 2010. There is no longer a Commission for Racial Equality, which had been created

²⁸ [2005] 2 AC 68.

by the 1976 Act. Instead, since 2007 there has been a single Equality and Human Rights Commission, which is now responsible for all the protected characteristics in the 2010 Act, not only race but sex, disability and so on.

53. The Race Relations Act 1976 was an important piece of legislation in this country. It conferred legal rights on individuals and provided for potentially strong remedies to be granted by courts and tribunals. That does not mean that Parliament had some kind of magic wand, which has created an equal society in our country. Nevertheless, the Act did set out what kind of society we wish to be.
54. When people look around them there is sometimes frustration that the equality legislation in this country has not brought about the equal society that it appeared to promise. I think the reason for this may lie in part in the difference between racial discrimination and racial equality. Making discrimination unlawful does not necessarily lead to equality. There may be many reasons for this: educational, economic and cultural. There are perhaps also limits on what the law alone can achieve.
55. The first reason for this is the risk of unconscious bias. It can often be difficult to prove that there has been discrimination on racial grounds. As Lord Nicholls said in *Nagarajan* few people are prepared to admit, even to themselves, that they have views which are based on racial prejudice.²⁹ He said:

“All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. ... We do not always recognise our own prejudices. Many people are unable, or unwilling, to admit

²⁹ *Nagarajan v London Regional Transport* [2000] 1 AC 501, at 511-512.

even to themselves that actions of theirs may be racially motivated.”

56. We have all become much more aware of the concept of unconscious bias. We all have unstated assumptions we make about the world around us and the people we come across. Judges now receive training about the risk of unconscious bias.
57. The second reason I would suggest is that there are limits to what discrimination law can do to achieve true equality because the causes of inequality may be much more structural ones in wider society which are beyond the control of an individual.
58. The model of discrimination law which is reflected in the Race Relations Act 1976 and its successor, the Equality Act 2010, is one that has the following features. It enables an individual to complain about an individual act of racial discrimination in a relevant field of human activity which is within the scope of the Act, for example employment, education or housing. It requires there to be unfavourable treatment of that individual as compared to an actual or hypothetical comparator and it requires that less favourable treatment to have been on racial grounds.
59. As Professor Sandra Fredman puts it in her book Discrimination Law:
- “... racism and other forms of discrimination extend far beyond individual acts of prejudice. Such prejudices are frequently embedded in the structure of society, and cannot be attributed clearly to any one person.”³⁰

³⁰ (2nd ed., OUP, 2011), p.14.

60. Essentially we have a model of law which seeks to guarantee equality of opportunity, in other words legal equality. It is a very important model and its importance should not be under-estimated. One only has to recall what went before, in the 1960s, to appreciate the value of such a prohibition on discrimination. Those who have felt the humiliation of discrimination know only too well the importance of prohibiting it as a matter of law.
61. However, equality of opportunity, important though it is, simply means that, once a person is in a race, the best person will win. What it does not address is the question: who is in the race in the first place and how do you get there?
62. There may be larger forces at work, which are well beyond the capacity of any individual to do anything about. They may be economic. For example, the fact that estate agents can no longer lawfully discriminate against a person on racial grounds does not mean that that person will have the money to buy a house in an expensive area.
63. Some statistics which have been published by the government may be of interest in this context.³¹ UK households were divided into five equally sized groups or “quintiles”, based on their income. The average household income ranged from £9, 100 in the lowest quintile to £45, 900 in the highest quintile (after housing costs were deducted). Over half of households from the Asian, black and other minority ethnic groups fell into the two lowest income quintiles. 42% of white British households fell into the two highest quintiles, this being the highest

³¹ As at 16 August 2018, available on www.gov.uk under the heading ‘Ethnicity facts and figures.’

percentage of all ethnic groups. Only 20% of black people fell into the two highest quintiles, this being the lowest percentage of all ethnic groups. The reasons for these differences in income are complex and well beyond my expertise and the remit of this lecture. However, such differences of income may form one of the structural features of our society which I have mentioned.

Conclusion

64. Let me conclude. The Race Relations Act and its current counterpart in the Equality Act had a purpose and effect which went beyond the mere creation of legal rights and duties, important though that was. It was a piece of social legislation which had an important symbolic effect in setting out what Parliament regards as a fundamental value in our society. Parliament sent out a very clear message that racial discrimination would not be tolerated in this country and that the principle of racial equality is fundamental to our society.

The Rt. Hon. Sir Rabinder Singh

Lord Justice of Appeal