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**CHAPTER 1 SECTION 12
RACE RELATIONS (COMPLAINTS)**

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**CHAPTER 1
RACE RELATIONS (COMPLAINTS)
SECTION 12**

1. INTRODUCTION

1.1. A race relations complaint must be related to the immigration decision in order to trigger a right of appeal to the Asylum and Immigration Tribunal (AIT) under section 82 of the Nationality, Immigration and Asylum Act 2002 (NIAA). Where a person complains solely about the treatment he has received and not about the immigration decision itself, there is no right of appeal to the AIT under the NIAA, but it is open to him to take the complaint through the normal departmental complaints channels and to the county court by virtue of section 57 of the RRA.

This section sets out the arrangements that are being put in place to ensure the correct handling of such allegations.

1.2. It is expected that future allegations about unlawful racial discrimination are likely to fall into three principal categories:

- **Decision related allegations** - where it is alleged that the Border and Immigration Agency has discriminated unlawfully on racial grounds in taking a decision on an individual's entitlement to enter or remain in the United Kingdom;
- **Conduct related allegations** - where an allegation of unlawful discrimination is made which relates solely to the conduct of an individual member of staff, for example racial abuse;
- **Decision and Conduct related allegations** - where it is alleged that the Border and Immigration Agency has discriminated unlawfully on racial grounds in taking a decision on an individual's entitlement to enter or remain in the United Kingdom, and that the behaviour of a member of staff in handling the application also amounted to unlawful discrimination which influenced the decision.

2. DECISION RELATED ALLEGATIONS

Where a person alleges that the Border and Immigration Agency has discriminated unlawfully on racial grounds in making an immigration decision (e.g. a decision to refuse a person leave to enter), a right of appeal to the AIT will arise under section 82 of the Nationality, Immigration and Asylum Act 2002. The response to such allegations will be provided by the appropriate Border and Immigration Agency business area (locally at ports or by Border and Immigration Agency Complaints Unit or IS Customer Relations Unit) and will be included in the appeal statement submitted to the AIT. The AIT will hear the case as part of the one-stop process. Further details on this can be found in **Chapter 1 Section 11** of the IDIs.

- 2.2. Where a person alleges that the Border and Immigration Agency has discriminated unlawfully other than in taking a decision on a person's entitlement to enter or remain either on a question of policy or procedure (e.g. in relation to a detention decision, a decision to refuse asylum support or permission to work, a decision to refuse naturalisation as a British Citizen etc.) the complainant will be able to take these allegations to the county court or the sheriff court. The response will be provided by the appropriate Border and Immigration Agency business area in accordance with guidance from Legal Advisers Branch (LAB) and Treasury Solicitors.

3. CONDUCT RELATED ALLEGATIONS

- 3.1. Where an allegation of unlawful discrimination is made which relates solely to the conduct of a member of staff, the complainant may take the case to the county court or the sheriff court. The first notification of a case pursued in the county court or the sheriff court is likely to be the receipt of form RR65 or court summons. Although staff may be named, the case will be brought against the Secretary of State for the Home Department. (RR65 is a questionnaire drawn up by the Commission for Racial Equality (CRE) which is sent by someone who thinks they have been discriminated against to the alleged discriminator. The purpose of the form is to obtain information about the treatment in question, in order to decide whether to bring proceedings and, if proceedings are brought, to present the complaint in the most effective way. The CRE website gives full details and a copy of the form which can be downloaded).
- 3.2. The complainant has 6 months from the date of the action complained of to commence litigation. Notice of proceedings will normally be served on Treasury Solicitors on behalf of the Border and Immigration Agency, but they may sometimes be addressed to a particular individual. Where they are sent to an individual or are sent to the post room in Croydon or at a regional office it is important to ensure that the matter is immediately referred to the IS Customer Relationship Unit (for Immigration Service matters) or to the Border and Immigration Agency Complaints Unit (for matters relating to other parts of the Border and Immigration Agency).
- 3.3. Upon receipt of notice of proceedings the (relevant) complaints unit will initiate a "fact finding" exercise. This will be carried out by members of staff who have been nominated as investigating officers under the Border and Immigration Agency Complaints System. The investigating officer will produce a brief report which will be copied to the member of staff who is the subject of the complaint. **Any investigation report produced will be disclosable in court.** This report will be forwarded by the relevant complaints unit to Treasury Solicitors who will make a recommendation on whether to defend or concede the case. A decision on whether to defend or concede the case will be taken by the relevant complaints unit in consultation with senior management in the relevant business area.
- 3.4. The Directorate is responsible for arranging and taking forward the defence of any such cases or offering a settlement as appropriate on legal advice. The complaints units will ensure that staff concerned in the case are kept informed of any proceedings.

4. ASSISTANCE TO STAFF INVOLVED IN LEGAL PROCEEDINGS

- 4.1. Border and Immigration Agency staff may be required to appear before the court in the event that they are the subject of an allegation of racial discrimination or a witness to

matters covered by an allegation. Where staff are required to attend court they may be supported by line managers, the complaints units and Treasury Solicitors. Prior to any court hearing, Treasury Solicitors may brief staff required to appear in court on what to expect. Treasury Solicitors may also assist with the drafting of any witness statements or responses to questions asked by the complainant. Chapter 7 of the Staff Handbook gives details of how staff should behave in such circumstances.

5. BURDEN OF PROOF

- 5.1. The burden of proof in proceedings relating to direct or indirect discrimination or victimisation before a county court or sheriff court is the same as in corresponding proceedings before an employment tribunal.
- 5.2. In a case involving **direct** discrimination, the complainant must, in the first instance, to provide sufficient evidence to show, on the balance of the probabilities, that he or she has been treated less favourably than another person in a comparable position was or would have been treated, in circumstances suggesting that the reason for the treatment was based on colour, race, nationality or ethnic or national origins.
- 5.3. As regards **indirect** discrimination the complainant must, in the first instance, to produce evidence to show, on the balance of the probabilities, that the respondent applied a condition or requirement to him which applied or would apply equally to persons not of the same racial group as the complainant, but with which the complainant, to his or her detriment, failed to comply, and which such thing a considerably smaller proportion of persons of the complainant's racial group than of persons not of that group can comply with. It is then for the respondent either to seek to rebut this evidence or to show that the condition or requirement is justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied. Section 57ZA of the Race Relations Act refers to harassment and to indirect discrimination on grounds of race or ethnic or national origins and which cannot be shown to be a proportionate means of achieving a legitimate aim, and states that if the claimant proves facts from which the court could conclude in the absence of an adequate explanation that such an act of discrimination or harassment was committed, the court shall uphold the claim unless the respondent proves that he or she did not commit the act concerned.
- 5.4. In a case involving direct or indirect discrimination or victimisation, where the respondent does not dispute the alleged discrimination but claims that it is not covered by the RRA (e.g. that an exception applies to it), it is for him or her to show that this is so. Having heard all the evidence made available at the hearing, the court will decide the case on the balance of probabilities.

6. REMEDIES

- 6.1. Where a county court or a sheriff court finds in favour of the complainant, it may award any of the following remedies:
 - (a) an order declaring the rights of the parties;
 - (b) an injunction or order;
 - (c) damages.

Awards under (c) may consist of damages for financial loss (for example loss of earnings) sustained by the claimant for which it is possible to make substantially precise calculations and also any damages for any non-financial loss (for example, a consolatory payment for distress, injured feelings etc) which cannot be precisely calculated.

7. COSTS

- 7.1. In county court or sheriff court actions costs are usually awarded against the losing party. If there is such an award against the Border and Immigration Agency, payment must be approved in accordance with current delegated authorities. Directors are authorised to approve an applicant's costs up to £20,000. This may be sub-delegated in full, at their discretion, to appropriate named officers down to SDO level. Cases involving payments of more than £20,000 must be referred to Accounting and Finance Unit for approval on the basis of a submission cleared by Finance and Planning Directorate.

8. APPEALS

- 8.1. There is a right of appeal to the Court of Appeal against a decision of a county court, and to the Court of Session against a decision of a sheriff court.

9. DECISION AND CONDUCT RELATED ALLEGATIONS

- 9.1. Where there is an allegation that the Border and Immigration Agency has discriminated against an individual unlawfully on racial grounds both in terms of:

- taking an immigration decision (e.g. a decision on a persons' entitlement to enter or remain in the United Kingdom), and
- the behaviour of an individual member of staff involved in the decision

then there is an entitlement to appeal to the AIT under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The county court and the sheriff court have no jurisdiction to consider decision and conduct related allegations, although if the AIT upholds an allegation of unlawful discrimination the case can be "exported" to the civil courts for consideration of the award of damages.

- 9.2. It is expected that in the majority of cases the Border and Immigration Agency will be able to issue a standard response to decision and conduct related allegations either in the explanatory statement or reasons for refusal letter. These allegations will be dealt with by the Border and Immigration Agency Complaints Unit or locally at ports of entry and other immigration offices. Please see **Chapter 1 Section 11 Annex HH** and **HH1**.

- 9.3. In the event that there is a detailed allegation that a member of staff has discriminated against a complainant in his or her conduct, this must be forwarded to either the IS Customer Relations Unit (for complaints relating to the Immigration Service) or to the Border and Immigration Agency Complaints Unit (for complaints relating to other parts of the Border and Immigration Agency). The complaints units will co-ordinate such cases and will give priority to them. **It is imperative that senior managers involved ensure that absolute priority is given to the investigation of allegations of racial**

discrimination by the investigating officer to whom the case is allocated, and that the investigation report is completed without delay.

- 9.4. A “fact finding” report from the investigating officer will be appended to the appeal statement. **It is important that all staff who receive notification of appeals confirm whether the notice of appeal contains any detailed allegation that the decision or conduct of staff was discriminatory, and that such cases are brought to the immediate attention of either the IS Customer Relations Unit (for cases relating to the Immigration Service) or the Border and Immigration Agency Complaints Unit (for cases relating to other parts of the Border and Immigration Agency).**
- 9.5. Where the investigating officer finds that there is a justified allegation that the member of staff who is the subject of the complaint discriminated against the complainant then the appellant should be invited to withdraw their appeal. If the appellant chooses not to withdraw the appeal, the AIT will be required to determine it. Please also refer to Chapter 1 Section 11 for detailed advice on case consideration and procedures.
- 9.6. Prior to November 2006 an appeal was treated as abandoned if the appellant left the UK or was granted leave to enter or remain in the UK. This changed with section 9 of the Immigration, Asylum and Nationality Act 2006 came into force. This amended the 2002 Act such that an appellant can choose to continue with an appeal brought on grounds that the decision was unlawful under the Race Relations Act even if he is granted leave to enter or remain. However, to continue with an appeal in those circumstances, the appellant must give notice that he wishes to do so within 28 days of the grant of leave to enter or remain.
- 9.7. Determinations in which the complaints units have been involved should be forwarded to the relevant complaints units.

10. DISCIPLINARY MATTERS

- 10.1. Where an investigation into an allegation of unlawful racial discrimination produces evidence that a member of staff has willfully and deliberately acted in breach of the standards of conduct and departmental procedures such as to behave in a manner made unlawful by the Race Relations Act, the matter will be referred to the employee's line manager for consideration of disciplinary action under the discipline procedures contained in the Staff Handbook (Chapter 4).
- 10.2. The employee's line manager will not see those cases where an investigation identifies that a member of staff was acting fully in accordance with instructions and guidance and was acting professionally even though unlawful racial discrimination may have been the consequence.

Contact points:

**IS Customer Relations Unit
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Tel: 0208 745 2350

The Border and Immigration Agency Complaints Unit
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Wellesley Road
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