Are Jews an Ethnic Minority in British Law? Case Law from the 1980s

Joseph Finlay

Court of Appeal Ruling – July 1982 Lord Denning

The case raises this point of great interest: What is a "racial group" within the Race Relations Act 1976 ? If the Sikhs are a "racial group" no one is allowed to discriminate against any of their members in the important fields of education and employment and so forth. No matter whether the discrimination is direct or indirect, it is unlawful. But, if they are not a "racial group" discrimination is perfectly lawful. So everything depends on whether they are a "racial group" or not.

The statute in section 3(1) contains a definition of a "racial group" . It means a "group of persons defined by reference to colour, race, nationality or ethnic or national origins" . That definition is very carefully framed. Most interesting is that it does not include religion or politics or culture. You can discriminate for or against Roman Catholics as much as you like without being in breach of the law. You can discriminate for or against Communists as much as you please, without being in breach of the law. You can discriminate for or against the "hippies" as much as you like, without being in breach of the law. But you must not discriminate against a man because of his colour or of his race or of his nationality, or of "his ethnic or national origins" . It is not suggested that the Sikhs are a group defined by reference to colour or race or nationality. Nor was much stress laid on national origins. But it is said – most persuasively by Mr. Alexander Irvine, Q.C. – that the Sikhs are a group of persons "defined by reference to ethnic origins" . It is so important that I will consider each word of that phrase.

"Ethnic"

The word "ethnic" is derived from the Greek word "eovos" which meant simply "heathen" . It was used by the 72 Palestinian Jews who translated the Old Testament from Hebrew into Greek (in the Septuagint). They used it to denote the non-Israelitish nations, that is, the Gentiles TA "evos" . When the word "ethnic" was first used in England, it was used to denote peoples who were not Christian or Jewish. This was the meaning attached to it in the great Oxford English Dictionary itself in 1890.

But in 1934 in the Concise Oxford Dictionary it was given an entirely different meaning. It was given as: “pertaining to race, ethnological”. And “ethnological” was given as meaning: “corresponding to a division of races”.

That is the meaning which I – acquiring my vocabulary in 1934 – have always myself attached to the word “ethnic” . It is, to my mind, the correct meaning. It means “pertaining to race” . But then in 1972 there was appended a second supplement of the Oxford English Dictionary. It gives a very much wider meaning than that which I am used to. It was relied uppn by Mr. Alexander Irvine:

“Also, pertaining to or having common racial, cultural, religious or linguistic characteristics, especially designating a racial or other group within a larger system; hence (U.S. colloquial), foreign, exotic”.

As an example of this new meaning, the second supplement refers to a book by Huxley & Haddon called We Europeans. It mentions “the non-committal term ethnic group ” and refers to the “special type of ethnic grouping of which the Jews form the best-known example” . This reference to the Jews gives a clue to the meaning of ethnic.

Why are “the Jews” given as the best-known example of “ethnic grouping” ? What is their special characteristic which distinguishes them from non-Jews? To my mind it is a racial characteristic. The Shorter Oxford Dictionary describes a Jew as “a person of Hebrew race” . Some help too can be found in our law books, especially from the cases of Clayton v. Ramsden (1942) Chancery 1 and (1943) Appeal Cases 320 and Re Tuck's Settlement Trust (1978) Chancery 49 . If a man desires that his daughter should only marry “a Jew” and cuts her out of his will if she should marry a man who is not “a Jew” , he will find that the court will hold the condition void for uncertainty. The reason is because “a Jew” may mean a dozen different things. It may mean a man of the Jewish faith. Even if he was a convert from Christianity, he would be of the Jewish faith. Or it may mean a man of Jewish parentage, even though he may be a convert to Christianity. It may suffice if his grandfather was a Jew and his grandmother was not. The Jewish blood may have become very thin by inter-marriage with Christians, but still many would call him “a Jew” . All this leads me to think that, when it is said of the Jews that they are an “ethnic group” , it means that the group as a whole share a common characteristic which is a racial characteristic. It is that they are descended, however remotely, from a Jewish ancestor. When we spoke of the “Jewish regiments” which were formed and fought so well during the war, we had in mind those who were of Jewish descent or parentage. When Hitler and the Nazis so fiendishly exterminated “the Jews” , it was because of their racial characteristics and not because of their religion.

There is nothing in their culture or language or literature to mark out Jews in England from others. The Jews in England share all of these characteristics equally

with the rest of us. Apart from religion, the one characteristic which is different is a racial characteristic.

“Origins”

The statute uses the word “ethnic” in the context of “origins” . This carries the same thought. I turn once again to the Shorter Oxford Dictionary. Where the word “origin” is used of a person it means “descent, parentage” . I turn also to the speech of Lord Cross of Chelsea in the case of Ealing London Borough Council v. Race Relations Board (1972) Appeal Cases 342 at page 365 :

“To me it suggests a connection subsisting at the time of birth … The connection will normally arise because the parents or one of the parents of the individual in question are or is identified by descent”.

So the word “origins” connotes a group which has a common racial characteristic. If I am right in thinking that the phrase “ethnic origins” denotes a group with a common racial characteristic, the question arises – Why is it used at all? The answer is given by Lord Cross of Chelsea in the Ealing Borough Council case (1972) Appeal Cases 342 at page 366 :

“The reason why the words “ethnic or national origins” were added to the words “racial grounds” which alone appear in the long title was, I imagine, to prevent argument over the exact meaning of the word “race” .

In other words, there might be much argument as to whether one group or other was of the same “race” as another: but there was thought to be less as to whether it was a different “ethnic group” .

“Racial group”

This brings me back to the definition in the statute of a “racial group” . It means “a group of persons defined by reference to colour, race, nationality or ethnic or national origins”.

The word “defined” shows that the group must be distinguished from another group by some definable characteristic. English, Scots or Welsh football teams are to be distinguished by their national origins. The Scottish clans are not distinguishable from one another either by their ethnic or national origins: but only by their clannish or tribal differences. French Canadians are distinguished from other Canadians by their ethnic or national origins. **Jews are not to be distinguished by their national origins. The wandering Jew has no nation. He is a wanderer over the face of the earth. The one definable characteristic of the Jews is a racial characteristic. I have no doubt that, in using the words “ethnic origins” , Parliament had in mind primarily the Jews. There must be no discrimination against the Jews in England. Anti-Semitism must not be allowed. It has produced great evils elsewhere. It must not be allowed here.**

But the words “ethnic origins” have a wider significance than the Jews. The question before us today is whether they include the Sikhs.

The Sikhs

The word “Sikh” is derived from the Sanskrit “Shishya” , which means “disciple” . Sikhs are the disciples or followers of Guru Nanak, who was born on the 5th April, 1469. There are about 14 million Sikhs, most of whom live in the part of the Punjab which is in India. Before the partition of the province in 1947 half of them lived in that portion which is now Pakistan: but on the partition most of them moved across into India. There was tragic loss of life.

There is no difference in language which distinguishes the Sikhs from the other peoples in India. They speak Punjabi or Hindi or Urdu, or whatever the vernacular may be. There is no difference in blood which distinguishes them either. The people of India are largely the product of successive invasions that have swept into the country. They have intermingled to such an extent that it is impossible now to separate one strain from the other. The Sikhs do not recognise any distinction of race between them and the other peoples of India. They freely receive converts from Hinduism – or vice versa. Not only from outside, but even within the same family. The outstanding distinction between the Sikhs and the other peoples of India is in their religion Sikhism, and its accompaning culture.

This is so marked that Dr. Ballard, who is a lecturer in Race Relations in the University of Leeds, thought it was an ethnic difference. But, if you study his evidence, it is plain that he was using the word “ethnic” in a special sense of his own. For him it did not signify any racial characteristic at all. These are some illuminating passages from his evidence:

“Sikhs, most obviously, are not a race in biological terms. Their origins are extremely diverse, probably more diverse than us English ... I think they are a classic example of an ethnic group because of their distinctive cultural traditions ... We are busy coining lots of new words here. I think ethnicity is the proper word to coin ...”

The evidence shows that the Sikhs as a community originate from the teaching of Guru Nanak. About the 15th century he founded the religious sect. There were a series of Gurus who followed Nanak, but the tenth and last is most important. Early in the 19th century he instituted major social and cultural reforms and turned the Sikhs into a community. He laid down the rules by which the hair was not to be cut and it was to be covered by a turban. By adopting this uniform Sikhs made their communal affiliation very clear, both to each other and to outsiders. But they remained at bottom a religious sect.

It is sometimes suggested that the Sikhs are physically a different people. But that is not so. In an important book on "The People of Asia" Professor Bowles of Syracuse University, New York, says:

"The difference between Muslims, Sikhs and Hinus are mainly cultural, not biological. Much has been written about the tallness and excellent physique of the Sikhs, qualities often attributed to their well-balanced vegetarian diet. In part this may be true, but the Sikhs are matched in physique by several other Punjab populations – meat-eating as well as vegetarian, Muslims as well as Hindus. Some of the neighbouring Pathan tribesmen are even taller. The Sikh physique is probably due to the fact that many have entered professions that have given them an economic advantage over their compatriots, Indians or Pakistanis. A correlation between nutrition and physique holds throughout the entire subcontinent, but it may be more noticeable in the Punjab, where there is such a variety of merchants and traders".

On all this evidence, it is plain to me that the Sikhs, as a group, cannot be distinguished from others in the Punjab by reference to any racial characteristic whatever. They are only to be distinguished by their religion and culture. That is not an ethnic difference at all.

Conclusion

I have dealt with the evidence at length: because of the differences on the point in the lower courts and tribunals. In our present case the evidence has been more fully canvassed than ever before. It has been most well and carefully considered by Judge Gosling here. I agree with his conclusion that Sikhs are not a racial group. They cannot be defined by reference to their ethnic or national origins. No doubt they are a distinct community, just as many other religious and cultural communities. But that is not good enough. It does not enable them to complain of discrimination against them.

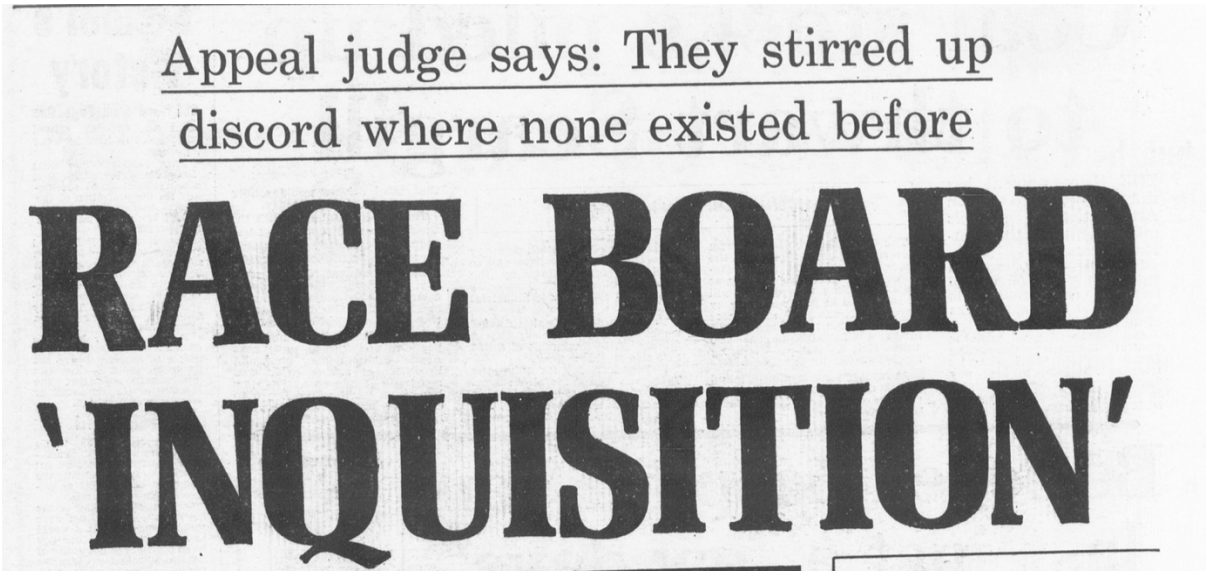
You must remember that it is perfectly lawful to discriminate against groups of people to whom you object – so long as they are not a racial group. You can discriminate against the Moonies or the Skinheads or any other group which you dislike or to which you take objection. No matter whether your objection to them is reasonable or unreasonable, you can discriminate against them – without being in breach of the law.

No doubt the Sikhs are very different from some of those groups. They are a fine community upholding the highest standards, but they are not a "racial group" . So it is not unlawful to discriminate against them. Even though the discrimination may be unfair or unreasonable, there is nothing unlawful in it.

In our present case the headmaster did not discriminate against the Sikhs at all. He has five Sikh boys in his school already. All he has done is to say that, when the boy attends school, he must wear the school uniform and not wear a turban. The other Sikh boys in

the school conform to this requirement. They make no objection. Mr. **Mandla** is, I expect, strictly orthodox. He feels so strongly that he insists on his son wearing his turban at all times. But that feeling does not mean that the headmaster was at fault in any way. He was not unfair or unreasonable. It is for him to run his school in the way he feels best. He was not guilty of any discrimination against the Sikhs, direct or indirect.

I cannot pass from this case without expressing some regret that the Commission for Racial Equality thought it right to take up this case against the headmaster. It must be very difficult for educational establishments in this country to keep a proper balance between the various pupils who seek entry. The statutes relating to race discrimination and sex discrimination are difficult enough to understand and apply anyway. They should not be used so as to interfere with the discretion of schools and colleges in the proper management of their affairs.


Appeal judge says: They stirred up discord where none existed before

RACE BOARD 'INQUISITION'

Tony Blair, 1982: 'The Court of Appeal's decision may simply reflect the fact that Jews carry greater weight with the British establishment than Sikhs. Other ethnic minorities are more likely to find themselves lumped with the Sikhs than the Jews.

House of Lords Ruling; March 1983, Lord Fraser

.My Lords, the main question in this appeal is whether Sikhs are a "racial group" for the purposes of the Race Relations Act 1976 ("the Act of 1976"). For reasons that will appear, the answer to this question depends on whether they are a group defined by reference to "ethnic origins."

…**"Ethnic origins"**

Racial group is defined in section 3 (1) of the Act which provides:

“‘racial group’ means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.”

It is not suggested that Sikhs are a group defined by reference to colour, race, nationality or *national* origins. In none of these respects are they distinguishable from many other groups, especially those living, like most Sikhs, in the Punjab. The argument turns entirely upon whether they are a group defined by “ *ethnic* origins.” It is therefore necessary to ascertain the sense in which the word “ethnic” is used in the Act of 1976. We were referred to various dictionary definitions. The *Oxford English Dictionary* (1897 ed.) gives two meanings of “ethnic.” The first is “Pertaining to nations not Christian or Jewish; gentile, heathen, pagan.” That clearly cannot be its meaning in the Act of 1976, **because it is inconceivable that Parliament would have legislated against racial discrimination intending that the protection should not apply either to Christians or (above all) to Jews**. Neither party contended that that was the relevant meaning for the present purpose. The second meaning given in the *Oxford English Dictionary* (1897 ed.) was “Pertaining to race; peculiar to a race or nation; ethnological.” A slightly shorter form of that meaning (omitting “peculiar to a race or nation”) was given by the *Concise Oxford Dictionary* in 1934 and was expressly accepted by Lord Denning M.R. as the correct meaning for the present purpose. Oliver and Kerr L.JJ. also accepted that meaning as being substantially correct, and Oliver L.J. *[1983] Q.B. 1* , 15H said that the word “ethnic” in its popular meaning involved “essentially a racial concept — the concept of something with which the members of the group are born; some fixed or inherited characteristic.” The respondent, who appeared on his own behalf, submitted that that was the relevant meaning of “ethnic” in the Act of 1976, and that it did not apply to Sikhs because they were essentially a religious group, and they shared their racial characteristics with other religious groups, including Hindus and Muslims, living in the Punjab.

My Lords, I recognise that “ethnic” conveys a flavour of race but it cannot, in my opinion, have been used in the Act of 1976 in a strictly racial or biological sense. For one thing**, it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend upon scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist**). The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the word in some more popular sense. For another thing, the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial. I respectfully agree with the view of Lord Simon of Glaisdale in *Ealing London Borough Council v. Race Relations Board [1972] A.C. 342* , 362, referring to the long title of the Race Relations Act 1968 (which was in terms identical with part of the long title of the Act of 1976) when he said:

“Moreover, ‘racial’ is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word ‘race’ is biologically at all relevant to the species amusingly called homo sapiens.”

A few lines lower down, after quoting part of section 1 (1) of the Act, the noble and learned Lord said:

“This is rubbery and elusive language — understandably when the draftsman is dealing with so unprecise a concept as ‘race’ in its popular sense and endeavouring to leave no loophole for evasion.”

I turn, therefore, to the third and wider meaning which is given in the *Supplement to the Oxford English Dictionary* (1972). It is as follows: “pertaining to or having common racial, cultural, religious, or linguistic characteristics, esp. designating a racial or other group within a larger system; …” Mr. Irvine, for the appellants, while not accepting the third (1972) meaning as directly applicable for the present purpose, relied on it to this extent, that it introduces a reference to cultural and other characteristics, and is not limited to racial characteristics. The 1972 meaning is, in my opinion, too loose and vague to be accepted as it stands. It is capable of being read as implying that any one of the adjectives, “racial, cultural, religious, *or* linguistic” would be enough to constitute an ethnic group. That cannot be the sense in which “ethnic” is used in the Act of 1976, as that Act is not concerned at all with discrimination on religious grounds, Similarly, it cannot have been used to mean simply any “racial *or other* group.” If that were the meaning of “ethnic,” it would add nothing to the word group, and would lead to a result which would be unacceptably wide. But in seeking for the true meaning of “ethnic” in the statute, we are not tied to the precise definition in any dictionary. The value of the 1972 definition is, in my view, that it shows that ethnic has come to be commonly used in a sense appreciably wider than the strictly racial or biological. That appears to me to be consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word “ethnic” still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in

my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3 (1) : "references to a person's racial group refer to any racial group into which he falls." In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group. This view does not involve creating any inconsistency between direct discrimination under paragraph (a) and indirect discrimination under paragraph (b) . A person may treat another relatively unfavourably "on racial grounds" because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous.

Finally on this part of the argument, I think it is proper to mention that the word "ethnic" is of Greek origin, being derived from the Greek word "ethnos," the basic meaning of which appears to have been simply "a group" not limited by reference to racial or any other distinguishing characteristics: see *Liddell and Scott's Greek-English Lexicon* , 8th ed. (Oxford 1897). I do not suggest that the meaning of the English word in a modern statute ought to be governed by the meaning of the Greek word from which it is derived, but the fact that the meaning of the latter was wide avoids one possible limitation on the meaning of the English word.

My Lords, I have attempted so far to explain the reasons why, in my opinion, the word "ethnic" in the Act of 1976 should be construed relatively widely, in what was referred to by Mr. Irvine as a broad, cultural/historic sense. The conclusion at which I have arrived by construction of the Act itself is greatly strengthened by consideration of the decision of the Court of Appeal in New Zealand (Richmond P., Woodhouse and Richardson JJ.) in *King-Ansell v. Police [1979] 2 N.Z.L.R. 531* . That case was discovered by the industry of the appellants' counsel, but unfortunately not until after the Court of Appeal in England had decided the case now under appeal. If it had been before the Court of Appeal it might well have affected their decision. In that case the appellant had been

convicted by a magistrate of an offence under the New Zealand Race Relations Act 1971 , the offence consisting of publishing a pamphlet with intent to incite ill-will against Jews, "on the ground of their ethnic origins." The question of law arising on the appeal concerned the meaning to be given to the words "ethnic ... origins of that group of persons" in section 25 (1) of the Act. The decision of the Court of Appeal was that Jews in New Zealand did form a group with common ethnic origins within the meaning of the Act. The structure of the New Zealand Act differs considerably from that of the Act of 1976, but the offence created by section 25 of the New Zealand Act (viz. inciting ill-will against any group of persons on the ground of their "colour, race, or ethnic or national origins") raises the same question of construction as the present appeal, in a context which is identical, except that the New Zealand Act does not mention "nationality," and the Act of 1976 does. The reasoning of all members of the New Zealand court was substantially similar, and it can, I think, be sufficiently indicated by quoting the following short passages. The first is from the judgment of Woodhouse J. at p. 538 where, after referring to the meaning given by the *Supplement to the Oxford English Dictionary* (1972), which I have already quoted, he says: ***392**

"The distinguishing features of an ethnic group or of the ethnic origins of a group would usually depend upon a combination, present together, of characteristics of the kind indicated in the *Supplement*. In any case it would be a mistake to regard this or any other dictionary meaning as though it had to be imported word for word into a statutory definition and construed accordingly. However, subject to those qualifications, I think that for purposes of construing the expression 'ethnic origins' the 1972 *Supplement* is a helpful guide and I accept it."

Richardson J. said, at p. 542:

"The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group."

And the same learned judge said, at p. 543:

"a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eves of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

My Lords, that last passage sums up in a way upon which I could not hope to improve the views which I have been endeavouring to express. It is important that courts in English-speaking countries should, if possible, construe the words which we are considering in the same way where they occur in the same context, and I am happy to say that I find no difficulty at all in agreeing with the construction favoured by the New Zealand Court of Appeal.

There is only one respect in which that decision rests upon a basis that is not fully applicable to the instant appeal. That appears from the long title of the New Zealand Act which is as follows:

“An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination .”

Neither the Act of 1976 nor its predecessors in the United Kingdom, the Race Relations Acts 1965 and 1968 , refer to the International Convention on the Elimination of All Forms of Racial Discrimination (1969) (Cmnd. 4108). The Convention was adopted on March 7, 1966, and was signed by the United Kingdom on October 11, 1966, subject to reservations which are not now material. It was not ratified by the United Kingdom until March 7, 1969. Under the Convention the States Parties undertook, inter alia, to prohibit racial discrimination in all its forms, and to guarantee the rights of everyone “without distinction as to race, colour, or national or ethnic origin” of equality before the law, notably in certain rights which were specified including education (article 5 (e) (v)). The words which I have quoted are very close to the words found in the Act of 1976 and in its predecessors in this country, and they are certainly quite consistent with these United Kingdom Acts having been passed in implementation of the obligation imposed by the Convention. But it is unnecessary to rely in this case upon any special rules of construction applicable to legislation which gives effect to international conventions because, for the reasons already explained, a strict or legalistic construction of the words would not, in any event, be appropriate.

The respondent admitted, rightly in my opinion, that, if the proper construction of the word “ethnic” in section 3 of the Act of 1976 is a wide one, on lines such as I have suggested, the Sikhs would qualify as a group defined by ethnic origins for the purposes of the Act. It is, therefore, unnecessary to consider in any detail the relevant characteristics of the Sikhs. They were originally a religious community founded about the end of the 15th century in the Punjab by Guru Nanak, who was born in 1469. But the community is no longer purely religious in character. Their present position is summarised sufficiently for present purposes in the opinion of the learned judge in the county court in the following passage:

“The evidence in my judgment shows that Sikhs are a distinctive and self-conscious community. They have a history going back to the 15th century. They have a written

language which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than of Hindus. They were at one time politically supreme in the Punjab."

The result is, in my opinion, that Sikhs are a group defined by a reference to ethnic origins for the purpose of the Act of 1976, although they are not biologically distinguishable from the other peoples living in the Punjab. That is true whether one is considering the position before the partition of 1947, when the Sikhs lived mainly in that part of the Punjab which is now Pakistan, or after 1947, since when most of them have moved into India. It is, therefore, necessary to consider whether the respondent has indirectly discriminated against the appellants in the sense of section 1 (1) (b) of the Act. That raises the two subsidiary questions I have already mentioned.

"Can comply"

It is obvious that Sikhs, like anyone else, "can" refrain from wearing a turban, if "can" is construed literally. But if the broad cultural/historic meaning of ethnic is the appropriate meaning of the word in the Act of 1976, then a literal reading of the word "can" would deprive Sikhs and members of other groups defined by reference to their ethnic origins of much of the protection which Parliament evidently intended the Act to afford to them. They "can" comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules. On the other hand, if ethnic means inherited or unalterable, as the Court of Appeal thought it did, then "can" ought logically to be read literally. The word "can" is used with many shades of meaning. In the context of section 1 (1) (b)(i) of the Act of 1976 it must, in my opinion, have been intended by Parliament to be read not as meaning "can physically," so as to indicate a theoretical possibility, but as meaning "can in practice" or "can consistently with the customs and cultural conditions of the racial group." The latter meaning was attributed to the word by the *Employment Appeal Tribunal in Price v. Civil Service Commission [1978] I.C.R. 27* , on a construction of the parallel provision in the Sex Discrimination Act 1975 . I agree with their construction of the word in that context. Accordingly I am of opinion that the "No turban" rule was not one with which the second appellant could, in the relevant sense, comply.

"Justifiable"

The word "justifiable" occurs in section 1 (1) (b)(ii) . It raises a problem which is, in my opinion, more difficult than the problem of the word "can." But in the end I have reached a firm opinion that the respondent has not been able to show that the "No turban" rule was justifiable in the relevant sense. Regarded purely from the point of view of the respondent, it was no doubt perfectly justifiable. He explained that he had no intention of discriminating against Sikhs. In 1978 the school had about 300 pupils (about 75 per cent. boys and 25 per cent. girls) of whom over 200 were English, five were Sikhs, 34

Hindus, 16 Persians, six negroes, seven Chinese and 15 from European countries. The reasons for having a school uniform were largely reasons of practical convenience — to minimise external differences between races and social classes, to discourage the "competitive fashions" which he said tend to exist in a teenage community, and to present a Christian image of the school to outsiders, including prospective parents. The respondent explained the difficulty for a headmaster of explaining to a non-Sikh pupil why the rules about wearing correct school uniform were enforced against him if they were relaxed in favour of a Sikh. In my view these reasons could not, either individually or collectively, provide a sufficient justification for the respondent to apply a condition that is prima facie discriminatory under the Act.

An attempted justification of the "No turban" rule, which requires more serious consideration, was that the respondent sought to run a Christian school, accepting pupils of all religions and races, and that he objected to the turban on the ground that it was an outward manifestation of a non-Christian faith. Indeed he regarded it as amounting to a challenge to that faith. I have much sympathy with the respondent on this part of the case and I would have been glad to find that the rule was justifiable within the meaning of the statute, if I could have done so. But in my opinion that is impossible. The onus under paragraph (ii) is on the respondent to show that the condition which he seeks to apply is not indeed a necessary condition, but that it is in all circumstances justifiable "irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied;" that is to say that it is justifiable without regard to the ethnic origins of that person. But in this case the principal justification on which the respondent relies is that the turban is objectionable just because it is a manifestation of the second appellant's ethnic origins. That is not, in my view, a justification which is admissable under paragraph (ii) . The kind of justification that might fall within that provision would be one based on public health, as in *Panesar v. Nestle Co. Ltd. (Note) [1980] I.C.R. 144, where the Court of Appeal* held that a rule forbidding the wearing of beards in the respondent's chocolate factory was justifiable within the meaning of section 1 (1) (b) (ii) on hygienic grounds, notwithstanding that the proportion of Sikhs who could [sc. conscientiously] comply with it was considerably smaller than the proportion of non-Sikhs who could comply with it. Again, **it might be possible for the school to show that a rule insisting upon a fixed diet, which included some dish (for example, pork) which some racial groups could not conscientiously eat was justifiable if the school proved that the cost of providing special meals for the particular group would be prohibitive**. Questions of that sort would be questions of fact for the tribunal of fact, and if there was evidence on which it could find the condition to be justifiable its finding would not be liable to be disturbed on appeal.

But in the present case I am of opinion that the respondents have not been able to show that the "No turban" rule was justifiable.