Neutral Citation Number: [2014] EWCA Civ 279

Case Nos: A2/2013/1353
A2/2013/1354
A2/2013/1415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE LANGSTAFF and members
UKEAT 0254 0285 12

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 13th March 2014

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE RYDER and
LORD JUSTICE UNDERHILL

- -

Between :

	ONU	**Appellant**
	- and -	
	AKWIWU & ANR	**Respondents**

Between :

	TAIWO	**Appellant**
	- and -	
	OLAIGBE & ANR	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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James Robottom (instructed by **the Anti-Trafficking and Labour Exploitation Unit, Islington Law Centre**)) for the **Appellant in *Onu***
Jake Dutton of **Waldegraves** for the **Respondents in *Onu***

Robin Allen QC and Christopher Milsom (instructed by **the Anti-Trafficking and Labour Exploitation Unit, Islington Law Centre**) for the **Appellant in *Taiwo***
Mr Olaigbe in person for the **Respondents in *Taiwo***

Hearing dates: 5-7 November 2013

- -

Judgment**Lord Justice Underhill :**

INTRODUCTION

We are concerned with two appeals arising out of broadly similar situations. In both cases the Claimant is a Nigerian woman who came to this country on a migrant domestic worker visa, to work as a domestic servant for a couple living here. Ms Onu was employed by Mr and Mrs Akwiwu (Mr Akwiwu being Nigerian and Mrs Akwiwu Ugandan) and Mrs Taiwo by Mr and Mrs Olaigbe (who were both Nigerian). Both were very badly treated by their employers. In addition to being denied a number of specific employment rights they were subjected to abuse and exploitation of various kinds.

1. 1. With the assistance of the North Kensington Law Centre, and latterly its offshoot, the Anti Trafficking and Labour Exploitation Unit ("ATLEU"), who have supported a number of other such claims, both Claimants brought (separate) proceedings in the Employment Tribunal for racial discrimination, failure to pay the national minimum wage ("the NMW"), breach of the Working Time Regulations 1998 and failure to provide written particulars of employment. Ms Onu also brought claims for unfair dismissal, racial harassment and victimisation.

2. 2. Ms Onu's claim was heard by an Employment Tribunal in Watford chaired by Employment Judge Ryan. Mrs Taiwo's claim was heard by a Tribunal at London South, chaired by Employment Judge Martin. In both cases all the claims were upheld save for, in Ms Onu's case, her claim for victimisation and, in Mrs Taiwo's, her claim for racial discrimination, both of which were dismissed. The total award to Ms Onu was £89,683.38, which incorporated an award of £25,000 for injury to feelings, together with £5,000 by way of "aggravated damages". The award to Mrs Taiwo was £33,228.85.

3. 3. Ms Onu appealed against the dismissal of her victimisation claim. Mr and Mrs Akwiwu cross-appealed against the findings of liability on the discrimination and harassment and NMW claims. Mrs Taiwo appealed against the dismissal of her discrimination claim. The appeals were heard back-to-back in the Employment Appeal Tribunal, the President, Langstaff J, presiding, though separate decisions were given: see [2013] ICR 770 and [2013] ICR 1039.

4. 4. The appeals on the discrimination and victimisation claims gave rise to two important points of principle about the application of the relevant statutory provisions in cases of the present kind:

    (1) *The immigration status point*. In neither case was the Claimant treated in the way that she was because she was Nigerian or because she was black. But in both cases the ET found that the mistreatment occurred because she was (as it was put in *Taiwo*) "a vulnerable migrant worker … who was reliant on the [employers] for her continued employment and residence in the UK". The question is whether discrimination against an employee because he or she is a vulnerable migrant worker constitutes either direct or indirect racial discrimination. The ET in *Onu* held that it constitutes direct discrimination, but in *Taiwo* it was held that it does not constitute either form of discrimination.

(2) *The post-employment victimisation point*. In Ms Onu's case the act of victimisation complained of occurred after the termination of her employment. In the EAT the employers argued that the 2010 Act does not proscribe post-employment victimisation. That point was not taken in the ET, where the victimisation claim was dismissed on the facts.

1. 5. As for the immigration status point, the EAT held that the mistreatment of the Claimants because of their vulnerability as migrant workers did not constitute direct racial discrimination. That meant that the decision in Mrs Taiwo's case was upheld and that the finding of racial discrimination in Ms Onu's case, together with the finding of racial harassment which raised the same issue, was reversed. In both cases the EAT considered but dismissed the claim for indirect discrimination.

2. 6. As for the post-employment victimisation point, the EAT held that post-employment victimisation was indeed proscribed by the 2010 Act. In reaching that decision it declined to follow its earlier decision in *Rowstock Ltd. v Jessemey* [2013] ICR 807. It also overturned the decision of the ET on the facts, holding that on the primary facts found it had been obliged to make a finding of victimisation, and it remitted the claim to the ET for a decision on remedy.

3. 7. Mr and Mrs Akwiwu's appeal on the NMW claim was dismissed.

4. 8. The EAT gave permission to appeal in both cases in relation to the two issues of principle which I have identified. Mrs Taiwo and Ms Onu have duly appealed on the immigration status point, and Mr and Mrs Akwiwu have appealed on the post-employment victimisation point. Although Mr and Mrs Akwiwu's Notice of Appeal purports also to appeal against the NMW decision, the EAT did not grant permission in that regard, and their solicitors have in a letter dated 22.10.13 confirmed that no such appeal is being pursued.

5. 9. The appeals were argued before us together with an appeal in *Rowstock v Jessemey*, to which I have referred above. In our decision in that case handed down on 26 February 2014 we held, having considered the submissions also of counsel in *Onu*, that the 2010 Act does prohibit post-employment victimisation. Accordingly that point is no longer live in *Onu*. That does not, however, mean that Mr and Mrs Akwiwu's appeal on the victimisation claim must be dismissed, since there remains the question whether the EAT was right to overturn the ET's decision on the facts.

6. 10. The issues that we now have to decide are thus as follows:

A. (A) We must decide the immigration status point in both cases.

B. (B) We must decide in Ms Onu's case whether the ET was entitled to dismiss the victimisation claim on the facts.

1. 11. Ms Onu has been represented before us by Mr James Robottom of counsel, who represented her in the ET and the EAT. Mr and Mrs Akwiwu have been represented by Mr Jake Dutton of Waldegraves Solicitors, who also appeared in the EAT but not in the ET. Mr Robin Allen QC, leading Mr Christopher Milsom, has appeared for Mrs Taiwo:

Mr Milsom appeared in the ET and the EAT. Mr and Mrs Olaigbe were represented by a consultant in the ET, though in the EAT they did not appear; before us Mr Olaigbe appeared in person and on behalf of his wife. Both Mr Robottom and Mr Allen and Mr Milsom were instructed by ATLEU, through the Islington Law Centre. I should like to thank whoever was responsible for the very well-presented bundles of documents and of authorities.

(A) THE IMMIGRATION STATUS POINT

THE FACTS

1. 12. I need only summarise very briefly the mistreatment alleged by the Claimants. I take the two cases in turn.

2. 13. *Ms Onu*. Ms Onu began to work for Mr and Mrs Akwiwu in Nigeria in 2007. When they came to the UK in 2008 they applied for a domestic worker visa for her. She worked for them in London (though returning with them to Lagos for some visits) until June 2010. The findings of the ET about her treatment, and the circumstances of her leaving, are helpfully summarised by the EAT at paras. 7-9 of its judgment as follows:

> "... She had responsibility (though not the sole responsibility) for the Akwiwus' older daughter, and was required to cook, clean, launder and iron. She had substantial responsibility for the home. On occasion she had to stay with the younger daughter in hospital. The Respondents took away her passport into their custody. She was paid just £50 per month during the first year of her employment in the UK, and £100 per month (in the UK) and N15,000 (in Nigeria) from 2009, rising to £150 and N35,000 from January 2010. She did not eat with the Respondents socially, though took meals with the children. She did not have appropriate and separate accommodation: at best she shared a room with the younger daughter in her cot. She was not registered with a GP. Generally, she was subject to threats and abuse from the Respondents, though not to such a level as to deter her from returning from Nigeria to the UK on the 4 or 5 occasions on which she did so during the two years of her employment"

I should add to that summary that the Tribunal found that Mrs Akwiwu's mother, who was a lawyer, drafted a contract which Ms Onu signed which contained express terms (a) that if she "absconded" within a year of starting work Mr and Mrs Akwiwu would report her to the police and the immigration authorities; and (b) that they would retain her passport until the termination of her employment, as they in fact did. Ms Onu was told on several occasions during her employment that if she tried to run away she would be arrested and sent to prison, and Mrs Akwiwu called her to watch news stories on the television about immigration issues.

1. 14. *Mrs Taiwo*. Mrs Taiwo was recruited by Mr Olaigbe in Nigeria in 2008. He helped her apply for a Nigerian passport and then for a visa to come to the UK: for the latter purpose he said that Mrs Taiwo had worked for his parents for a number of years before, but that was not true. Entry clearance was at first refused, but after a successful

appeal Mrs Taiwo came to the UK with Mr Olaigbe in February 2010 and lived with him and Mrs Olaigbe and their children until 6 January 2011. On that date she left after having been put in contact with social services. The mistreatment alleged by Mrs Taiwo was identified in the agreed list of issues as follows –

> "i. failing to pay a salary in line with the National Minimum Wage;
>
> ii. onerous working hours;
>
> iii. breach of the Working Time Regulations;
>
> iv. subjecting the Claimant to physical/verbal abuse;
>
> v. restricting access to food;
>
> vi. her working and/or living conditions;
>
> vii. failure to provide a written contract of employment; and
>
> viii. constructive dismissal."

The ET found all those allegations proved. To put a little flesh on those bones, it found that she was paid £200 per month and was "on duty" throughout her waking hours. She was forced to hand back £800 in October 2010. She was given no payslips, and no tax or NI was paid. It found that she was not given enough to eat, so that she lost a lot of weight; that both Mr and Mrs Olaigbe on occasions hit her; and that they regularly shouted at her and made offensive comments about her intelligence and the poverty of her background. She was not permitted to go out on her own, though she went to take the children to playgroup. Mr Olaigbe retained her passport. When she said in mid-2010 that she wanted to go back to Nigeria Mr Olaigbe said that she would have to repay the money they had spent on her.

THE RELEVANT STATUTORY PROVISIONS

1. 15. Inconveniently, the claims straddle the coming into force of the Equality Act 2010 on 1 October 2010, and I need to set out the relevant provisions both of that Act, which is applicable in the case of Mrs Taiwo, and of the Race Relations Act 1976, which is applicable in the case of Ms Onu (save in respect of her victimisation claim, which we are not concerned with at this point).

2. 16. *The 1976 Act*. Section 1 of the 1976 Act at the relevant time read (so far as material) as follows:

> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if —
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or
>
> (b) ...
>
> (1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred

to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but–

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,

(b) which puts or would put that other at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

(1B) The provisions mentioned in subsection (1A) are–

(a) Part II;

(b)-(g) ...

(1C) ...

(2) ..."

Discrimination in the employment field was proscribed by Part II of the Act: I need not set out the specific provisions here. Section 3 read (again, so far as material) as follows:

"(1) In this Act, unless the context otherwise requires—

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

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

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

(3) ...

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

Section 3A defined harassment. I need not set it out in full, but the definition included the requirement that the conduct in question be "on grounds of race or ethnic or national origins".

1. 17. *The 2010 Act*. The structure of the 2010 Act is different. Section 13 (1) defines direct discrimination as follows:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

The various "protected characteristics" are defined in earlier sections. For present purposes we are concerned with section 9, which is headed "race" and reads (so far as material) as follows:

> "(1) Race includes —
>
> (a) colour;
>
> (b) nationality;
>
> (c) ethnic or national origins.
>
> (2) In relation to the protected characteristic of race —
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.
>
> (3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.
>
> (4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.
>
> (5)-(6) ...."

Indirect discrimination is defined at section 19 as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

...
race;
..."

Finally, I should note section 23 (1), which reads:

> "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

1. 18. Despite those differences in the structure, and at some points the wording, of the two Acts it was not argued before us that they were different (in the respects with which we are concerned) in their effect. In particular, it was not contended that the replacement of the terminology of "on racial grounds" by "because of [B's race]" involves any difference of substance; and it seems plain that it does not. Mr Allen reminded us that the underlying EU Directive (Council Directive 2000/43/EC ("the Race Directive")) uses the phrase "on grounds of" (see art. 2.2 (a)). He also referred us to para. 61 of the Explanatory Notes accompanying the Act, which says that the change in language was not intended to "change the legal meaning of the definition but rather is designed to make it more accessible to the ordinary user of the Act". (I am bound to say that I doubt whether that was a realistic ambition: the difficulties of this area of the law reflect the real, and I fear inevitable, difficulty of the concepts involved and are not mitigated by tinkering with the language. But the important point is that the Notes confirm that no change of substance was intended.)

THE WAY THE CLAIMANTS PUT THEIR CASE

1. 19. The Claimants' primary case both before the ET and since is that the mistreatment of which they complained constituted direct discrimination, but they did not – at least at first – formulate it in quite the same way.

2. 20. Ms Onu at para. 40 of her Particulars of Claim contended "no British worker would have been offered such terms of employment, been mistreated or unfairly dismissed (as set out in the body of the claim)". That does not spell out what it was about her "non-British" nationality that led to her being treated differently; but it is clear from the ET's Reasons that what was being said was that her immigration status as a migrant domestic worker made her peculiarly vulnerable to the abuse alleged because she was dependent on the Respondents for her right to work and to remain in the UK.

3. 21. As for Mrs Taiwo, we do not have her original pleading, but the "Amended Statement of Claim" which was before the ET contended (at para. 36) that "a comparable worker of British national origin/nationality or of non-Nigerian national origin/nationality would not have been subjected to the treatment as set out above". That differs from Ms Onu's formulation by advancing "non-Nigerian" nationality as an alternative ground of the mistreatment alleged – or, to put it in the language of the 2010 Act, that she was mistreated because she was Nigerian. That alternative way of putting it was disavowed before us, and Mr Milsom says that it was not how he put it in the ET; but, as will appear, it seems to have caused some confusion. As regards the first alternative, again the Claimant does not say what it was about her non-British nationality that led to the treatment complained of; but, again, it is clear that her case, like Ms Onu's,

was based on the precariousness of her immigration status.

4. 22. In support of their claims of direct discrimination both Claimants relied in the ET on the decision of the EAT (Judge Reid QC presiding) in *Mehmet v Aduna* UKEAT/0574/06 (30.5.07). That was a case in which a Nigerian student was paid less than the NMW, and without deduction of tax or the provision of payslips, and was fobbed off and eventually dismissed when he tried to have his employment arrangements regularised. The ET found that he was treated as he was "because, as a Nigerian student, he was vulnerable and could be treated less well because of his inferior employment situation, only having limited rights to be employed"; and that this constituted direct discrimination within the meaning of the 1976 Act. The EAT upheld that decision. Its reasoning appears to have been based largely on the burden of proof provisions, and there is no discussion of the basis on which the ET treated the claimant's vulnerable position as justifying a conclusion of direct discrimination.

5. 23. Both Claimants advanced a claim of indirect discrimination by way of fallback. What was pleaded in *Onu* was that Mr and Mrs Akwiwu applied a provision criterion or practice (in the jargon, a "PCP") of "mistreatment of migrant domestic workers", which put "persons of the Claimant's race, ethnic or national origin [NB not "nationality"] at a particular disadvantage" (Particulars of Claim para. 41). In *Taiwo* the pleaded PCP was "the treatment as set out above [i.e. the pleaded mistreatment of Mrs Taiwo] of any person working under [a] migrant domestic visa" (Particulars of Claim, para. 31); this is said to have put Nigerians at a particular disadvantage.

6. 24. Since the Claimants' immigration status is at the heart of the case as put by them, I ought to summarise the formal position relating to it. This was not in fact done explicitly in either the ET or the EAT, but we were helpfully supplied with a note prepared, I think, by Mr Milsom which sets out the relevant provisions of the Immigration Rules (paras. 159A-159H) and the relevant guidance from the Border Force Operations Manual. Substantial changes in the regime for migrant domestic workers were introduced with effect from 6 April 2012, but we are concerned with the previous position. The following points are material:

(1) Entry clearance for domestic workers was given on the basis that the worker had been engaged under a contract of employment to work for a specific employer, with whom, or with whose family, there had been a pre-existing relationship for at least a year. The employer had to be identified and a copy of the contract produced.

(2) Leave to remain would (in a case of the present kind) typically be given for a year but could be renewed.

(3) Although once in the UK a migrant domestic worker could in principle change employer during the currency of his or her leave to remain, they would be required to notify UKBA forthwith of the identity of the new employer and of the reason for the change. It would be a matter for UKBA's decision whether to renew the visa at the end of the relevant period.

Although by reason of point (3) migrant domestic workers were not wholly dependent on their current employers for the opportunity to work and remain in the UK, that would

in most cases be the practical reality, not only because of the likely difficulty of finding another employer but because of the uncertainty about whether leave to remain would be extended in any new employment after the expiry of the current term.

THE REASONING OF THE ET

Onu

1. 25. The reasoning of the ET on Ms Onu's direct discrimination claim is set out at paras. 113-122 of the Reasons. It can be summarised as follows:

(1) At para. 113 the Tribunal summarises Ms Onu's case as being that "her migrant status allowed the respondents to offer her poorer terms of employment than would be given to a British worker … [and] gave them the option to exercise control over the claimant in a way that they would not conceivably have attempted with a worker of British national origin".

(2) At paras. 114-116 it summarises the decision in *Mehmet* (see para. 23 above). At para. 117 it quotes a passage from the judgment of the EAT (Slade J presiding) in *Stockton on Tees Borough Council v Aylott* [2009] ICR 872 discussing the correct approach to the identification of a comparator in a direct discrimination claim.

(3) At para. 118 it summarises Mr Robottom's submissions on various points. The only point that I need note is that he relied on admissions by Mr and Mrs Akwiwu that they would not have treated "an employee of UK national origin who lived and worked within the UK" in the same way.

(4) Para. 119 of the Reasons begins as follows:

> "… the approach of the Employment Appeal Tribunal in Mehmet must be followed as correct. It was not suggested here that Mr and Mrs Akwiwu had antagonism specifically towards the claimant because she was Nigerian but that, because she was Nigerian, they treated her as a migrant worker and as she was a migrant worker, in subjecting her to the detriment we have found the respondents treated her less favourably than they would have treated someone who was not a migrant worker."

The Tribunal then says that such treatment is sufficient to place the burden on the employers to show a non-discriminatory explanation, in accordance with the burden of proof provisions of in section 54A of the 1976 Act, as explained in *Igen Ltd v Wong* [2005] ICR 931 and *Madarassy v Nomura International plc* [2007] ICR 936.

(5) At para. 120 it sets out the explanation given on behalf of Mr and Mrs Akwiwu, which was apparently that they were acting lawfully according to Nigerian law and had no intention to discriminate. It continues, at para. 121:

> "In the tribunal's judgment this explanation, even if it were made

> out on its facts, could not possibly discharge the burden of proof. The questions are: What was the reason for the treatment? Was it in no way whatsoever on the grounds of race? In the circumstances the employers in this case have fallen far short of proving that the treatment was in no way on the grounds of race. The reality is that they treated the claimant precisely in the way in which they did because of her status as a migrant worker which was clearly linked to the claimant's race. The burden of proof having passed under section 54A the respondents failed to demonstrate any reason for the treatment that was in no way associated with race."

1. 26. With respect to the Tribunal, the structuring of its reasoning by reference to the burden of proof provisions is an unnecessary complication. What matters, however, is that it made, at para. 121, a clear finding of fact that Mr and Mrs Akwiwu treated the Claimant in the way that they did "because of her status as a migrant worker which was clearly linked to [her] race". The Tribunal does not spell out what it meant by saying that the mistreatment of Ms Onu was "because of her status as a migrant worker", but it is clear enough in the context of the findings of fact which I have recorded at para. 14 above, and also from its reliance on *Mehmet*. The relevance of Ms Onu's status as a migrant domestic worker was that it made her peculiarly dependent on her employers for the right to work and to remain in the ET and thus gave them the power to behave towards her in a way that would not be tolerated by someone who could readily leave and find work elsewhere. As it was repeatedly put in the submissions before us, her status a migrant domestic worker made her peculiarly "vulnerable".

2. 27. At para. 123 the Tribunal records that Mr Robottom had only advanced the claim of indirect discrimination if the claim of direct discrimination were unsuccessful; and it says that in those circumstances it need not deal with it.

3. 28. At para. 127 the Tribunal turns to the claim of harassment. It says – plainly correctly – that its reasoning on the question of "on racial grounds" in the context of the discrimination claim applies equally to the harassment claim.

<u>*Taiwo*</u>

1. 29. The reasoning of the ET on Mrs Taiwo's direct discrimination claim appears at para. 26.7 of the Reasons, which I should set out in full:

> "*Was the Claimant treated less favourably than a hypothetical comparator by reason of race, ethnicity and/or national origin? The Claimant contends that her comparator is a domestic worker of British national origin and that the reason why she was treated less favourably was that she was of non-British national origin.*
>
> i. The Tribunal had some difficulty in accepting the comparator put forward by the Claimant as being an appropriate comparator in this case. A comparator must be someone who is in a similar situation to the Claimant but who does not share the relevant protected characteristic. The relevant protected characteristic is that the Claimant is Nigerian. Her circumstances were that she was a migrant worker subject to

immigration control and from a poor background which made her vulnerable. A domestic worker of British national origin would not be subject to the same immigration controls and would not be under the control of his or her employer in terms of whether their visas are was renewed or not. Therefore the Tribunal finds that the appropriate comparator would be someone who was not Nigerian but was a migrant worker whose employment and residence in the United Kingdom was governed by immigration control and by the employment relationship itself.

ii. There was no evidence and no inference can be made that the Respondents would have treated the Claimant differently had she not been Nigerian. Whilst Mr Olaigbe says that he particularly wanted someone from the Yoruba tribe to care for his children to maintain his cultural heritage, this does not in the Tribunal's view mean that the treatment of the Claimant was because she was Nigerian. It was possible that the Respondents could have decided to employ a Ugandan to preserve the cultural heritage of Mrs Olaigbe. There is no reason to think that a Ugandan would have been treated more favourably than the Claimant. The Tribunal's finding is that the Claimant was not treated in the way that she was because she was Nigerian, or that this had any particular bearing on her treatment. The Tribunal's finding is that the Claimant was treated in the way that she was because she was a vulnerable migrant worker who was reliant on the Respondents for her continued employment and residence in the United Kingdom.

iii. Consequently, the Tribunal's finding is that the Claimant's has not discharged stage one of the burden of proof pursuant to the case of *Igen v Wong* as she has not shown a *prima facie* case that her treatment was because she was Nigerian. Therefore her claim of direct race discrimination must fail.

iv. If the Tribunal is wrong on this, the Tribunal considered what the reason was for the treatment of the Claimant in accordance with *Shamoon*. The Tribunal's finding is that the reason for the treatment was that she was a vulnerable migrant worker who the Respondents were able to control. The Tribunal finds that the Respondents treatment of the Claimant was not necessarily because she was Nigerian, but because she was a vulnerable migrant worker with limited resources open to her."

1. 30. It can be seen that the essential reason for the Tribunal's rejection of Mrs Taiwo's claim was that her mistreatment was the result not of her Nigerian nationality but of her position as "a vulnerable migrant worker who was reliant on the Respondents for her continued employment and residence in the United Kingdom". Since it understood the claim to be based on her Nigerian nationality, it believed that that conclusion was fatal to her case. That, however, ignores the case based on her "non-British" nationality – see para. 22 above – which Mr Milsom says was the way the case was advanced by him in his submissions. I need not try to resolve how this misunderstanding arose; but Mr Allen submits that the finding at the end of para. 26.7 (iii) that the Claimant was

mistreated "because she was a vulnerable migrant worker who was reliant on the Respondents for her continued employment and residence in [the UK]" – which is substantially to the same effect as the finding made by the *Onu* tribunal (see para. 27 above) – meant not that the claim should fail but that it should succeed.

2. 31. At para. 26.11 the Tribunal dealt briefly with the claim of indirect discrimination, which it rejected on the basis that it had heard no evidence about whether "persons of origin in the UK workforce were more likely to be employed on a migrant domestic worker visa compared with persons of non-Nigerian origin in the UK workforce".

THE REASONING OF THE EAT

1. 32. As I have already mentioned, the EAT heard the argument in both appeals back-to-back, and it originally intended to deliver judgments in both on the same occasion; but in the event the decision in *Onu* had to be postponed. The result is that the key passages in the judgment in *Taiwo* dealing with the claims both of direct and indirect discrimination are reproduced, with different topping and tailing but otherwise with only a few marginal changes, in the judgment in *Onu.* I will accordingly deal only with the former, though I will add references to the corresponding passages in the latter.

2. 33. Paras. 1-41 of the judgment in *Taiwo* are essentially introductory. I should note, however, that at paras. 17-22 (pp. 777-8) Langstaff J disapproves the decision in *Mehmet* on the basis that it failed to apply the (then recent) guidance of this Court in *Madarassy* and was accordingly decided *per incuriam.* This passage is reproduced in *Onu* at paras. 41-47 (pp. 1051-3).

3. 34. Langstaff J's reasoning on the direct discrimination claim is at paras. 42-48 (pp. 784-5) and can be summarised, in headline terms, as follows:

(1) At paras. 42-44 he refers to the confusion about whether the Claimant was contending that she had been discriminated against because she was Nigerian or because she was not British: see para. 22 above. Mr Allen submitted that Langstaff J appears to find that only the former case had been advanced and that that was wrong. I am not sure that that is a fair reading of the judgment, but the question is in any event academic because in the following paragraphs Langstaff J avowedly steps back from the minutiae of how the case was put and considers "the overall picture".

(2) At para. 46 Langstaff J accepts that the Claimant's treatment "was … strongly associated with her vulnerability". But, he says, the fact that she was subject to immigration control was only one of several circumstances contributing to her vulnerability, alongside such other factors as her poor socio-economic background, her inability to speak English and her having no other support network – all contributing to an "imbalance of power between the Respondents and the Claimant". He continues:

> "If therefore, she was treated as she was because of her vulnerability, the fact that she was subject to immigration control (as no British national would be) would be a background circumstance, contributing to her vulnerability, but not a reason in

itself for the treatment ... ."

He points out that the mere fact that the Claimant would not be present in the UK unless she had a visa could not itself mean that her immigration status was a "cause" of her subsequent mistreatment in any relevant sense. The corresponding passage in *Onu* is at paras. 48-49 (pp. 1053-4), where Langstaff J adds a reference to the decision of the EAT (Rimer J presiding) in *Martin v Lancehawk Ltd* UKEAT/525/03 (22.3.04).

(3) At para. 47 he says that "vulnerability is not indissociably linked with migrant status", since it can exist without it. The Claimant's status as a migrant domestic worker was only one element in her vulnerability. He concludes, at para. 48:

> "We conclude that the factual cause of the unfavourable treatment of the claimant was not indissociably linked to immigration status ... . Mr. Milsom himself accepts that if that is our conclusion, the appeal under this head must fail. It does."

The corresponding passage in *Onu* is at para. 50 (pp. 1054-5). The language of "indissociability" comes from the jurisprudence of the CJEU to which I refer at para. 49 below and which Langstaff J discusses.

1. 35. As for indirect discrimination, Langstaff J was, understandably, critical of the ET for proceeding as it did (see para. 31 above) to address the question of disproportionate impact without first identifying the PCP that the Respondents had applied: see paras. 49-51 of his judgment. However, he concluded that the appeal had to be dismissed because the pleaded PCP advanced by Mr Milsom, namely "the mistreatment of migrant workers" was unsustainable. He said, at para. 53:

> "We cannot accept such a PCP as he contended for. The reason is that the definition of this PCP inevitably answers the question to be posed: it is entirely circular. Where the issue is whether mistreatment has been caused to a person because of the application of a PCP, it is pointless to argue that the PCP is "mistreating" the person. Equally, the PCP will only apply to those who are migrant workers: it is not on the face of it a neutral criterion which disadvantages some of those to whom it applies disproportionately when compared to others to whom it applies. This cannot be a proper PCP in the circumstances. There is no room for one racial group to whom the PCP applies to be disproportionately adversely affected compared to another racial group, for the very definition states that each is mistreated. It commits the error of assuming that because treatment is obnoxious it is also discriminatory."

The corresponding passage in *Onu* is at paras. 54-55 (p. 1055).

1. 36. Accordingly Mrs Taiwo's appeal as regards her discrimination claim was dismissed, and Mr and Mrs Akwiwu's appeal as regards Ms Onu's claims of discrimination and harassment was allowed and those claims were dismissed.

THE APPEAL

1. 37. As regards direct discrimination, both Mr Allen and Mr Robottom submitted that the reasoning of the EAT was flawed and that the factual findings reached by both ETs necessarily meant (though the Tribunal in *Taiwo* had failed to appreciate it) that the claims were well founded. I will deal with their particular submissions in the course of my reasoning below. Mr Dutton defended the reasoning of Langstaff J and Mr Olaigbe adopted his submissions.

2. 38. Although in their skeleton argument Mr Allen and Mr Milsom sought to maintain Mrs Taiwo's alternative case of indirect discrimination, under gentle pressure from the Court Mr Allen acknowledged that it was unsustainable. Mr Robottom made no such concession, and the issue accordingly remains live in Ms Onu's case.

DISCUSSION AND CONCLUSIONS

Direct Discrimination

1. 39. The starting-point for my consideration of the issues must be the statutory language. But that gives rise to a preliminary difficulty about what language to use. As already noted, we are concerned with different statutes in the two cases, which use different words even though it is clear that the intended effect is the same. I prefer to focus on the language of section 1 of the 1976 Act. This is not just out of a preference for the familiar. The older version has the advantage that the terminology of "grounds" corresponds to the language of the Race Directive; and it can be related directly to the guidance which already exists in the case-law. There is also the problem that the noun which corresponds to the phrase "because of" would seem (at least etymologically) to be "cause"; and although it is true that in one obvious sense the test required by section 13 (1) is one of causation I see considerable force in Lord Nicholls' *dictum* that "causation is a slippery word" and is best avoided in this context (see *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, at para. 29 (p. 1072 B-E)). I will therefore stick with "grounds". I will, however, permit myself sometimes to use the word "reason": the phrase "by reason that" is used elsewhere in the 1976 Act and it has been authoritatively held that in this context they are synonymous: see *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877, at p. 886A.

2. 40. The question therefore is whether the Claimant in either case has established that the mistreatment found by the ET was on the grounds of her nationality. (I note by way of anticipation that it is not necessary that they show that their nationality was the only "ground" for that treatment: it is enough if it is a significant part – see para. 42 below.) Both Tribunals made explicit findings – see paras. 27 and 31 above – that the Claimant was treated in the way that she was because of her status as a migrant domestic worker and her consequent vulnerability – for short, because of her "immigration status". But that gives rise to two questions:

   (a) Can those findings truly be treated as findings that their immigration status constituted the "grounds" of the Claimants' mistreatment within the meaning of section 1 (1) (a) of the 1976 Act – or (since here at least I should identify the language of both statutes) as findings that their mistreatment was "because of" their immigration status within the meaning of section 13 (1) of the 2010 Act ?

(b) If so, can their immigration status, in the sense identified above, be equated with their nationality ?

I will refer to those as "the 'grounds' issue" and "the nationality issue". I take them in turn.

The "Grounds" Issue

1. 41. What constitutes the "grounds" for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in *Nagarajan* called his "mental processes" (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had "a significant influence". Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in *Nagarajan*: see pp. 885-6.

2. 42. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in *R (E) v Governors of the JFS* [2010] 2 AC 728, at paras. 61-64 (pp. 759-760), though it is to be found in the earlier case-law: I would venture to refer to my own judgment, sitting in the EAT, in *Amnesty International v Ahmed* [2009] ICR 1450, at paras. 32-35 (pp. 1469-70).

3. 43. The present case is plainly not of the "criterion" type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it.

4. 44. In my view it is adequately clear from the findings of the ETs in both cases, as set out at paras. 27 and 31 above, that the Respondents were indeed influenced by the Claimants' immigration status in treating them as they did. As for Ms Onu's case, the findings of primary fact show that Mr and Mrs Akwiwu were very conscious of the vulnerability of her position as a domestic worker, and they took pains to ensure that she was aware of it too. The ET's conclusion (Reasons para. 121) that they "treated [her] … in the way in which they did because of her treatment her status as a migrant worker" is plainly intended as a finding about their mental processes. As for Mrs Taiwo, the ET's conclusion – that is, the findings at paras. 26.7 (ii) and (iv) of the Reasons – is not supported in the same way by findings of primary fact showing the mental processes of the Respondents. But the natural reading of the statement that "the reason for [the Claimant's] treatment was that she was a vulnerable migrant worker who the Respondents were able to control" is that the Respondents were aware of that vulnerability and more or less consciously taking advantage of it.

5. 45. It is true that the relevance of the Claimants' immigration status as found by the Tribunals was not that it was *in itself* the primary reason for mistreating them. The Respondents were hardly likely to have hostility to, or prejudice against, holders of domestic worker visas as such: rather, the Claimants' vulnerability deriving from their immigration status afforded an opportunity to mistreat them for other reasons. That may be a distinction from the more ordinary case where a conscious or subconscious prejudice against, say, women or people of a particular race is the immediate reason for the act complained of. But I do not think that that distinction makes a difference to the analysis. As long as the Claimants' immigration status significantly influenced the Respondents' mental processes, that is enough.

The Nationality Issue

1. 46. I should record by way of preliminary that it was common ground before us that discrimination on the grounds of being of a nationality other than British falls within the terms of the Act. That is plainly correct.

2. 47. Mr Allen and Mr Milsom (whose submissions on this aspect Mr Robottom adopted) submitted in their skeleton argument that "… immigration status (in the sense used in this case) and nationality are intimately associated"; and that, that being so, discrimination on the grounds of the former should be treated as discrimination on the grounds of the latter.

3. 48. I do not accept that submission. It is now well-established that discrimination on a particular ground will only be treated as discrimination on the grounds of a protected characteristic if that ground and the protected characteristic exactly correspond. That was decided by the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783. The case concerned provisions in the legislation relating to the state pension which limited entitlement to persons habitually resident in the "common travel area" (broadly, the British Isles). No-one could be treated as so resident unless they had a right to reside in the common travel area. Such a right would be enjoyed by all UK nationals, but there would nevertheless be some UK nationals who nevertheless did not qualify because they were not habitually resident. The issue was whether those provisions constituted unlawful discrimination on grounds of nationality contrary to the governing EU Directive (EEC/1408/71). The Supreme Court, following its reading of the decision of the CJEU in *Bressol v Gouvernement de la Communauté Française* (C-73/08) [2010] ECR I-2735 and the opinion of Advocate-General Jacobs in *Schnorbus v Land Hessen* (C-79/99) [2000] ECR I-10997, held that the provisions were indirectly, but not directly, discriminatory. The reason why they were not directly discriminatory was that there was no exact correspondence between the protected characteristic and the criterion used in the provisions: although it would be much easier for UK nationals than others to meet the habitual residence requirement, not all would do so – see the judgments of Lord Hope at paras. 25-35 (pp. 794-8) and Lady Hale at paras. 88-92 (pp. 813-5). That conclusion is of course in line with the reasoning of the well-known decisions in *James v Eastleigh Borough Council* [1990] 2 AC 751 and *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213. In the former, direct discrimination was found because there was an exact correspondence between gender and pensionable age; and in the latter it was not found because there was no exact correspondence between nationality and place of birth.

4. 49. There is no such exact correspondence in the present case. It is essential to remember that the ground on which the Respondents were held to have discriminated

was, specifically, that the Claimants were migrant domestic workers, with the peculiar dependence on their employers that is a consequence of that status: see para. 41 above. That is what Mr Allen and Mr Milsom were acknowledging by referring to "immigration status (in the sense used in this case)". To say that their immigration status (in that sense) is "intimately associated" with their non-British nationality – or, as the Tribunal in *Onu* put it, that the two are "linked" – is to say no more than that only people with non-British nationality are migrant domestic workers. That is obviously so; but what matters is that not all non-British nationals working in the UK are migrant domestic workers or share an equivalent vulnerability. There are very many non-British nationals working in the UK whose conditions of leave to enter or remain permit them to work freely and entail none of the peculiar vulnerability of those whose right to work is in practice dependent on their current employer.

5. 50. Mr Allen sought to distinguish *Patmalniece* on the basis that it was a different kind of case from the present and recommended us instead to be guided by the decision in the *JFS* case. But I can see no relevant distinction. It is true that *Patmalniece* was not concerned with a provision of domestic law but rather with the proscription of discrimination in an EU directive. But the relevant principles should be the same, and the members of the Court referred indifferently to the EU and the domestic case-law on the nature of direct discrimination. *Patmalniece* has indeed since been applied by the Supreme Court in the context of the Equality Act, in *Preddy v Bull* [2013] UKSC 73, [2013] 1 WLR 2514: see *per* Lady Hale at paras. 18-24 (pp. 3748-9). It is also true that *Patmalniece* was a case of a discriminatory statutory criterion, in which no question of the mental processes of the putative discriminator arose, but I cannot see why that should make a difference: whichever form the grounds for the impugned treatment take, the question is whether they correspond to the grounds proscribed by the Act.

6. 51. In their skeleton argument Mr Allen and Mr Milsom sought to rely on the decision of this Court in *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505. In that case the claimant was a mother who was a British citizen and consequently had a "right of abode" in the U.K. She had a daughter who was not a British citizen and had no right of abode on any other basis and who was consequently (by virtue of statutory provisions which I need not trace my way through) "subject to immigration control". She claimed accommodation from the Council under Part VII of the Housing Act 1996 on the basis that she was a person with priority need because her daughter was dependent on her. Section 185 (4) of the Act required the Council to disregard in its assessment any dependant who was "a person from abroad who is not eligible for housing assistance". Section 185 (2) provided that persons subject to immigration control were not eligible for housing assistance unless they fell into one of a number of prescribed classes, which did not cover the claimant's daughter. The Council accordingly felt obliged not to recognise the claimant as being in priority need. This Court held (by a majority) that section 185 (4) did not comply with article 14 of the European Convention of Human Rights. The claimant put her case on the basis that she was being discriminated against because of her daughter's nationality, which was the reason why she was subject to immigration control. But Sedley LJ preferred to proceed on a broader basis. He recognised that her nationality was only part of the ground on which the claimant's daughter was excluded from consideration; but he said, at para. 51 (p. 524F), that it was "more consonant with the purpose of article 14 not to try to isolate or prioritise one of a complex of factors defining the individual's status, but to address the complex itself". That might at first sight appear to assist the Claimants. But that course was open to Sedley LJ because he was concerned with article 14, which is not drafted exclusively by reference to particular prohibited characteristics and gives the court flexibility as to how to define the "status" which is the ground of discrimination. The way that the 2010 Act (reflecting the underlying Directives) is drafted does not

permit of such an approach. Accordingly I cannot regard *Morris* as advancing the argument, and indeed both Mr Allen and Mr Robottom accepted as much in the course of their oral submissions.

7. 52. A substantial part of the submissions of counsel for both Claimants was directed to challenging the reasoning of Langstaff J which I have summarised at para. 35 above. I need not address those challenges in detail, since I have reached my conclusion by my own route, which does not, I think, exactly correspond to his. But I should briefly deal with two criticisms.

8. 53. First, Mr Allen and Mr Milsom in their skeleton argument were critical of what they said was Langstaff J's characterisation of Mrs Taiwo's immigration status as a "background circumstance" forming no part of the Respondents' reason for treating her as they did. But that is a misunderstanding of what he was saying. The "background circumstance" which he identified was the fact that the claimants were *subject to immigration control*, i.e. simply that they needed leave to enter, and remain in, the UK: he was not referring to their *immigration status* in the particular sense in which that phrase has been used in this litigation. He was making the point that if, as he had held, their vulnerability was not itself a proscribed ground, it could not assist the Claimants to prove that they would not have been in the country in the first place if they had not received visas. It is of course trite law that that kind of "but for" causation is not enough.

9. 54. Secondly, there was some criticism of the basis on which Langstaff J. felt able to set to one side the decision in *Mehmet*: see para. 34 above. That is a non-issue in this Court. I would disapprove *Mehmet* on the straightforward basis that the EAT was wrong to endorse, as it implicitly did, the ET's conclusion that mistreatment of the claimant on the grounds of his vulnerability as a person on a student visa constituted mistreatment on the grounds of his nationality.

10. 55. It will be noted that I have not in my reasoning thus far said anything about the "hypothetical comparator", although this featured a good deal in the reasoning of both ETs. The present case is a good example of the wisdom of the point made by Lord Nicholls in his speech in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 (paras. 8-12, at pp. 341-2) that in many cases it is more straightforward to address the question of the reason for the treatment complained of, which will then in practice provide the answer to the question whether a comparator without the protected characteristic would have been treated in the same way.

Conclusion on Direct Discrimination

1. 56. Accordingly the Claimants get over the first hurdle but fail at the second. I do not believe that their mistreatment can be said to have been on the grounds of their nationality.

<u>Indirect Discrimination</u>

1. 57. I can take this shortly. The PCP pleaded on behalf of Ms Onu – "the mistreatment of migrant domestic workers" – is neither a provision nor a requirement nor a practice,

however widely those terms are construed. But the point is not just verbal. The factual situation in this case has nothing to do with the kind of mischief which the concept of indirect discrimination is intended to address. All that happened is that Mr and Mrs Akwiwu committed a number of particular acts of mistreatment against Ms Onu. If those acts do not constitute direct discrimination because the relevant ground was absent, they cannot be converted by some process of abstraction into the application of a discriminatory PCP. In his skeleton argument Mr Robottom, no doubt recognising the unviability of the pleaded PCP, sought to break it down into a series of particular PCPs – such as "a requirement to work an average of 83 hours per week" or "a policy of retaining an employee's passport". But this simply reproduces the same error in little: it is an artificial attempt to generate a PCP out of a series of specific acts against a particular employee.

DISPOSAL

1. 58. I would for the above reasons dismiss the appeals of both Mrs Taiwo and Ms Onu against the decisions of the EAT as regards their claims of race discrimination and (in the case of Ms Onu) harassment.

2. 59. Counsel for both Claimants devoted parts of their written submissions to explaining the extent and seriousness of the problem of the exploitation of migrant domestic workers, and we were referred to various international instruments including the Council of Europe 2005 Convention on Action against Trafficking in Human Beings, together with its Explanatory Report. Victims of trafficking and labour exploitation do of course have remedies available to them in so far as their treatment involves breaches of the general law and, more particularly, of the UK's employment protection legislation; and both Ms Onu and Mrs Taiwo have received substantial awards quite apart from their discrimination claims. But those awards do not constitute compensation for the general distress or (to use the inappropriately anodyne conventional label) "injury to feelings" caused by a prolonged period of abuse and exploitation. What ATLEU seeks to achieve by having the abuse and exploitation of migrant domestic workers recognised as race discrimination is a legal basis on which such awards could be made in the employment tribunal under section 124 (6), read with section 119 (4), of the 2010 Act. I have some sympathy with that aim, but for the reasons which I have given I do not believe that it is achievable without an unacceptable distortion of the effect of the statutory provisions.

(B) MS ONU's VICTIMISATION CLAIM

1. 60. Section 27 of the 2010 Act reads, so far as material for present purposes, as follows:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b)-(e) ...

(3)-(5) …"

Article 8 of the comprehensively titled Equality Act 2010 (Commencement no. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 provides that the references in section 27 to "this Act" include reference to a "previous enactment", which is defined at article 1 as including the 1976 Act.

1. 61. We have held in our judgment in *Rowstock v Jessemey* (see para. 10 above) that victimisation of a former employee arising out of, and closely connected with, the former employment relationship is proscribed by the 2010 Act.

2. 62. The act of victimisation of which Ms Onu complained consisted of two threatening telephone calls which she said that Mr Akwiwu made to her sister. The evidence was recounted by the ET at para. 92 of his Reasons as follows:

> "The evidence of the claimant's sister, Eucharia Adonu was that she received a call on 11 January 2011 from Mr Akwiwu's driver in Nigeria saying that Mr Akwiwu needed to speak to her. It is clear from the telephone records produced that this call took place not on 11 but on 13 January 2011 and nothing in particular turns on the date. Ms Adonu's testimony in her witness statement was to the effect that he reported that Ms Onu, the claimant, had sued him and that if she thought things would end there she was wrong. It is alleged that he said to Ms Adonu that the claimant was going to suffer for it and then a few minutes later, after the line went dead, he phoned back and said that there would be [no] trouble for the claimant and for her so that she should get her sister to stop. She terminated the call. … It is of note that at no point does Ms Adonu say that Mr Akwiwu, in those telephone calls, referred to the fact that the claims made in the tribunal by the claimant contained allegations of discrimination of any sort."

(The "no" which I have square-bracketed must be a slip.) Mrs Adonu's account of the conversations as there recorded came entirely from her witness statement: she did not give oral evidence. Mr Akwiwu in his evidence accepted that he had spoken to her on two occasions but denied that he had made the threats alleged. (It will be noted that the threat which is the basis of the claim was made not to Ms Onu but to her sister. That would only constitute a detriment to her if the threat was communicated to her. The Tribunal makes no finding about how or when that occurred; but the common-sense assumption must be that her sister told her about it soon after the event.)

1. 63. The Tribunal gave its reasons for dismissing the claim at para. 134, as follows:

> "Turning to the allegations made in the second complaint of victimisation and harassment, the tribunal found that this was not made out. The reason for that lies in the imprecision in Ms Eucharia Adonu's evidence. Taking the evidence of the claimant at its highest, that suggests that it was the commencement of proceedings that caused the first respondent to issue the threats in the first telephone call. However, those proceedings were not solely proceedings about discrimination related matters. They

were proceedings, as we have found, about a number of other claims as well. In the absence of any specific reference to race discrimination matters in the telephone calls, and on the evidence of Mrs Adonu, taken at its highest, there was no such reference, the claimant has not established that the reason for the threats was because she had commenced proceedings for breach of the Race Relations Act 1976. In those circumstances, that claim cannot be upheld."

1. 64. The EAT upheld Ms Onu's appeal. Langstaff J. gave its reasons at paras. 108-111 of his judgment (pp. 1066-7). At para. 110 (p. 1066 F-H) he says:

> "A realistic approach must be taken to any situation in which it is said a protected act has occurred. In a conversation threatening retaliation if an action is not withdrawn there may be no reference to the subject matter of the claim—the nature of it must be known to the parties, for there would be no other purpose in seeking its withdrawal. If the claim includes reference to allegations under the Equality Act 2010 then we do not see it as a precondition for the threat to be actionable that in the course of making it the perpetrator should expressly refer to that fact. In context, here, Mr Akwiwu plainly knew of an action having been brought. Although it covered more than a breach of the Equality Act, it covered that too. The fact that he did not single out the Equality Act aspect for specific mention when making a threat does not mean that his action was not taken, at least in part, in response to the bringing of proceedings under that Act. Unless the suggestion that there has been an allegation by reference the Act can be discounted as being of such trivial significance, on the particular facts, as in substance to have amounted to no claim at all, then any detriment suffered from an act in response to the bringing of the claim is to be attributed to the bringing of the protected act. The allegation would have caused or contributed to the act in response."

1. 65. The Notice of Appeal challenges the reasoning of the EAT on two bases, which were effectively developed by Mr Dutton in his oral submissions. I take them in turn.

2. 66. Mr Dutton's first point was that on a true reading of para. 134 of the Reasons what the ET was saying was that it did not accept the evidence of Mrs Adonu – or, perhaps more accurately, that it was not sufficient to discharge the burden of proving that Mr Akwiwu had made the threat in question. He drew attention to para. 16 of the Reasons, which reads follows:

> "The evidence of the claimant's sister, Mrs Adonu, was of limited assistance to the tribunal. Partly this was because she was not able to attend the tribunal, being based in Lagos, Nigeria, but also because her witness statement itself was not specific enough, as will be seen afterwards, to support the claimant's case for victimisation."

1. 67. That is not in my view a correct reading of the Tribunal's reasoning. Its point was not that it could not rely on Mrs Adonu's evidence as far as it went but rather that

because she did not say that Mr Akwiwu had referred to the fact that the proceedings were for discrimination was no evidence that that was part of the reason for the threat. That is clearly what is being said in para. 134, and indeed in paras. 16 and 92 (see in particular the last sentence). I think it is reasonably clear that the ET accepted Mrs Adonu's evidence as far as it went – it found in terms elsewhere that Mr Akwiwu was not a witness of truth – but that it believed that it did not go far enough. I will return presently to whether it was right about that, but at this stage the only point is that its reasoning is not what Mr Dutton attributed to it.

2. 68. Mr Dutton's second point, by contrast to his first, reflects, and seeks to uphold, the actual reasoning of the Tribunal. He focused on the requirement of section 27 (1) that the act complained of is done *because* B has done a protected act; and he submitted that in the present case that necessarily meant that it had to be proved that Mr Akwiwu knew or believed that Ms Onu had brought proceedings *under the 1976 Act* (see sub-section (2) (a), read with the 2010 Order) – i.e., in practice, that her case included a claim of racial discrimination. He accepted that it was clear, if Mrs Adonu's evidence was accepted, that Mr Akwiwu knew that she had brought proceedings; but it did not follow, and there was no evidence, that he knew that they included a discrimination claim: that was the point which the Tribunal had been concerned to make when it drew attention to the fact that Mrs Adonu did not record any reference by him to such a claim. The EAT was wrong to say that "the nature of [the subject matter of the claim] must be known to the parties, for there would be no other purpose in seeking its withdrawal". That was a *non sequitur*: a respondent could want a claim withdrawn without having familiarised himself with its detailed nature. The averment – express or implicit – that Mr Akwiwu was aware of the particular nature of the claims required to be proved by evidence, and that had not happened.

3. 69. Those submissions are correct up to a point. I agree with Mr Dutton that for a respondent to be liable he must at least know (or believe) that a claim of a kind provided for in the Act is part of the proceedings. If he does not, I do not see how he can be said to be doing the act complained of *because* a claim under the Act is being made: it must be shown that the fact that such a claim has been brought has operated on his mind in some way. (That view is supported by the decision of this Court in *Aziz v Trinity Street Taxis Ltd* [1988] ICR 534: see *per* Slade LJ, delivering the judgment of the Court, at pp. 546-8.)

4. 70. However, that brings us back to the factual question of what Mr Akwiwu did know or believe, and of what evidence about that was required. In my view, other things being equal, the probability must be that a respondent to proceedings who is aware that they have been brought will be aware of the broad nature of the claims made in them; and the Tribunal should have taken that as its starting-point. That probability is reinforced in the present case by the fact that the Statement of Claim started with a summary which contained two explicit references to racial discrimination, together with other references to discrimination and harassment, all "pursuant to … the Race Relations Act 1976": there is thus no question of the nature of the claims having to be analysed by a lawyer. In those circumstances the evidential burden was on Mr Akwiwu to rebut the common-sense presumption that he knew at least that much. It was common ground before us that this aspect had not been explored with Mr Akwiwu in evidence at all, either in chief or in cross-examination. That being so, the Tribunal had to proceed on the basis that he knew what it could reasonably have been expected that he would know, namely that part of the claim against him and his wife was a claim of racial discrimination.

5. 71. Once that point is reached, it is clear that Langstaff J's observations quoted at para. 64 above are unimpeachable. Save in very particular circumstances, where a putative victimiser acts in response to the bringing of proceedings against him, he can be taken to be responding to – or, in the statutory language, acting "because of" – all the elements in those proceedings.

6. 72. I would accordingly uphold the decision of the EAT that the ET was wrong to dismiss Ms Onu's victimisation claim. The claim will have to be remitted to the ET for a decision on remedy. I would hope, however, that a further hearing will not be necessary. While I can understand why it was thought necessary to bring the victimisation proceedings, the fact remains that this was a single incident, that the threat made was very unspecific and that it was not made directly to Ms Onu. Although of course we do not know the full circumstances, I should be surprised, based on what we do know, if the ET felt that any very large award was justified. I would hope that a sensible compromise could be reached.

Lord Justice Ryder:

1. 73. I agree and would only add the following in relation to the discrimination claims. It is important to separate out discrimination from the fact that the Claimants in each of the appeals were very badly treated by their employers. That is an undeniable fact as summarised by my Lord, Underhill LJ at [14] and [15]. The discrimination claims were pursued on the basis that each of the Claimants was a "vulnerable migrant worker … who was reliant on the [employer] for her continued employment and residence in the UK". The question is whether that constitutes direct or indirect discrimination on the ground of race. I have also come to the conclusion that it does not. That conclusion may seem counter-intuitive to the "ordinary user of the Act" who the Explanatory Notes memorably record should find the language of the Act "more accessible".

2. 74. In treating the Claimants as they did, the Respondents were undoubtedly influenced by the Claimants' immigration status. That is a conclusion that incorporates the vulnerability of the Claimants arising out of their immigration status and the mental processes which led the Respondents to act in the way that they did. The Respondents used the opportunity presented by the vulnerability of the Claimants to mistreat them. That said, I have come to the conclusion that mistreatment on the ground of immigration status and discrimination on the ground of a protected characteristic are not indissociably linked, that is there is no exact correspondence between the treatment that is the alleged discrimination and the protected characteristic.

3. 75. I would endorse my Lord's guidance at [56] relating to the wisdom of highlighting the reason for the treatment complained of rather than the 'hypothetical comparator'. An emphasis on the former is more likely in practice to answer the question whether a comparator without the protected characteristic would have been treated in the same way.

Lord Justice Maurice Kay:

1. 76. I agree with both judgments.