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THE MEANING OF RACIALLY AGGRAVATED CRIME: A NEW DECISION FROM THE HOUSE OF LORDS

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On 1st February 2007, the House of Lords gave a decision on the case of R v Rogers.[1] The decision was taken unanimously by a panel of five judges. The main judgment was that of Baroness Hale of Richmond.

Facts:

The appellant, Mr Rogers, being incapacitated by arthritis, was riding a mobility scooter along the pavement on his way home from a public house. An altercation took place as he tried to get past three young Spanish women, who were then pursued by him in an aggressive manner into a local kebab house where they had taken refuge. It was established at the jury trial that Mr Rogers had used threatening, abusive or insulting words or behaviour, intending them to fear immediate unlawful violence or to provoke it. In itself this would have constituted an offence contrary to Section 4 of the Public Order Act 1986. However, in the course of the altercation, the appellant had called the victims "bloody foreigners," telling them to "go back to your own country." At first instance it was held that this rendered Mr Rogers guilty of a crime contrary to Section 31(1)(a) of the Crime and Disorder Act 1998, which creates a racially aggravated form of the offence created by Section 4 of the 1986 Act, the consequence of the former being a higher penalty.[2] This decision was confirmed on appeal. A further appeal was instituted to the House of Lords, leave to appeal having been granted by the House of Lords itself.[3]

Judgment:

Section 28(1) of the Crime and Disorder Act 1998 provides that an offence is racially or religiously aggravated if either of two different circumstances exists, namely:

> (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim hostility based on the victim's membership (or presumed membership) of a racial or religious group; or
> (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

"Racial group" is then defined by Section 28(4) as 'a group of persons defined by reference to race, colour nationality (including citizenship), or ethnic or national origins.'

Because the appellant had not called the victims "bloody Spaniards" but "bloody foreigners", it was argued by his counsel that he had not shown hostility towards a particular group, but to foreigners as a whole and that this amounted to xenophobia which was not the same as hostility to a racial group.[4]

The House of Lords disagreed, making the following points:

- The definition of racial group in Section 28(4) of the 1998 Act clearly goes beyond groups defined by their colour, race or ethnic origin. It encompasses both nationality (including citizenship) and national origins.[5]

- The language of Section 28(4) suggests that it is not true to say that the group must necessarily be defined by what it is than by what it is not: whether the group is defined exclusively (by reference to what its members are not) or inclusively (by reference to what they are), the criterion by which the group is defined, (here nationality), is the same.[6]

[1] [2007] UKHL 8, available at http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070228/rogers.htm.
[2] See paragraphs 4 and 7 of the judgment.
[3] See R v Rogers CA (Crim Div) [2005] EWCA Crim 2863.
[4] See paragraph 8 of the judgment.
[5] Baroness Hale explained that this wide definition owed its existence to amendments that took place in response to the decision in *Ealing London Borough Council v Race Relations Board* [1972] AC 342 where a majority of the House of Lords 'declined to interpret "national origins" in the list of prohibited grounds of discrimination under the Race Relations Act 1968 so as to include "nationality": discriminating against the non-British was allowed. Following this decision, the list of prohibited grounds was deliberately expanded in the Race Relations Act 1976 so as to include nationality. The list of grounds contained in the 1976 Act was adopted for the purposes of defining racial groups in the 1998 Act.' See paragraph 9.
[6] See paragraph 10.

- This approach makes sense in policy terms. The law is seeking to attack racism and xenophobia, which both seek to deny equal respect and dignity to people who are seen as "other". This is damaging not only to the victims themselves but to the community as a whole, as it encourages the exclusion from the community of members of certain groups solely by reason of that membership, something they can do nothing about.[7]

- In order for an offence to be racially aggravated, it is not required that particular words be used by the offender, but only that hostility be demonstrated towards the victim based on the victim's membership of a racial group, or that such hostility be the motivation of the offence. 'Fine distinctions depending upon the particular words used would bring the law into disrepute.'[8] In each case, it is not the use of specific words, but the context which will 'illuminate what the conduct shows.'[9] In fact it was indicated that the prohibited hostility could be demonstrated without the use of any words at all, and simply, for instance, through the wearing of racist symbols (e.g. the swastika).[10]

- The ability of the prosecution to charge the accused with an offence under the Crime and Disorder Act 1998 requires the "fact finders" (here the jury) to consider directly whether the accused is guilty of a racially aggravated offence (here a breach of Section 31(1) of the Crime and Disorder Act 1998) rather than simply the basic offence (here a breach of Section 4 of the Public Order Act 1986).[11] Thus, where the 1998 Act applies, the racial overtones of an offence are addressed as part of the offence itself rather than merely by sentencing guidelines which guide the judge towards a more severe sentence. In other words, in these cases, the decision regarding racial aggravation will be taken by the jury and not by the judge as part of the sentencing process.[12]

[7] See paragraph 12

[8] See paragraph 13.

[9] See paragraph 14. Examples referred to by Baroness Hale include *Director of Public Prosecutions v M* [2004] EWCA 1453 (Admin) where the Divisional Court held that, depending on the context, "bloody foreigners" could demonstrate hostility to a racial group; *Attorney General's Reference No 4 of 2004* [2005] EWCA Crim 889 where the Court of Appeal held that "someone who is an immigrant to this country and therefore non-British" could be a member of a racial group for the purpose of the 1998 Act and *R v White (Anthony)* [2001] EWCA Crim 216 where it was held that "African" could demonstrate hostility to a racial group, because it would generally be taken to mean black African.

[10] See paragraph 13.

[11] This discussion arose in connection with the consideration of *Director of Public Prosecutions v Pal* [2000] Crim LR 756.

[12] See paragraphs 15 and 16

Comment:

The case is important in that the House of Lords took the opportunity to discuss in some detail the spirit behind the relevant provisions of the Crime and Disorder Act 1998.[13] The Court emphasised that the law does not simply require the avoidance of particular words or phrases widely recognised as derogatory or offensive.[14] It is not, in other words, concerned with issues of political correctness, but with the sentiments of racism and xenophobia themselves where they inspire or accompany criminal behaviour. Therefore, the test whether racist or xenophobic hostility was demonstrated, or indeed formed the motivation of the crime, does not depend on the particular words used by the offender, but on the context within which the offender's criminal conduct occurred.

The court referred to Ivan Hare's article on "Legislating Against Hate – The Legal Response to Bias Crimes"[15] in order to explain the justification for treating racially or religiously aggravated versions of certain crimes more severely than the basic versions, describing the aggravated versions as 'of a qualitatively distinct order of gravity.'[16] The 1998 Act creates separate aggravated versions of the basic crimes, so that the prosecution will charge the accused directly with an aggravated offence, and the "fact finders" will consider the evidence regarding racial aggravation as part of their consideration of the facts. Thus the racial or xenophobic sentiments associated with the crime will be treated as forming part of the "quality" of the crime. This is different from merely issuing sentencing guidelines which empower the judge to give a higher sentence where there is racial aggravation: though the practical result may in many cases turn out to be the same for the accused, the consideration of racial or xenophobic behaviour or motivation by the fact finders, who determine the guilt or otherwise of the accused, emphasises the criminal quality and social unacceptability of such behaviour.

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[13] See especially paragraphs 5 and 9 to 17.

[14] Baroness Hale gave "paki" and "wog" as examples. See paragraph 13.

[15] (1997) 17 OJLS 415, 416-417. See paragraph 5 of the judgment.

[16] Ibid.