

# UK: Employment Appeal Tribunal on non-EEA nationals

Indian national Ashokvardhan Purohit finished university in the UK and decided he wanted to be a lawyer. So he applied to Osborne Clarke, one of the UK's leading firms. Osborne's like, we suspect, the vast majority of UK companies, has a simple policy: applying for work permits for non-EEA applicants is just too expensive and too much trouble. So it rejected his attempt to make an online application. The Employment Appeal Tribunal says that this is "indirect racial discrimination."

Osborne Clark's policy of "not considering any application for solicitor training contracts from individuals requiring permission from the Border and Immigration Agency (BIA) to work in the UK, i.e. those needing a work permit" was a policy applied extremely widely across UK industry - and, arguably - is a significant part of the point of the work permit system, its complexity and expense.

Osborne Clark's online application system had three preliminary questions, before accessing the application forms proper. One of those was whether he required permission to work in the UK. The response to those that replied that they did was to be sent to page that said "We are sorry but we are unable to accept applications from candidates who require a work permit to take up employment in the UK."

Mr Purohit nevertheless completed an application but received the following response: "Unfortunately we are unable to obtain work permits for trainee solicitor roles and we are therefore unable to proceed with your application."

However, Osborne Clarke had, it said, never actually applied for a work permit for a trainee - but had done so for qualified staff. The Tribunal noted that OC had not provided evidence of any difficulty in those processes.

Osborne Clarke raised the argument that employers across the UK have assumed was the correct answer - to simplify and paraphrase their arguments, it might be said that they argued: we have to give priority to EEA applicants. Even if they are not so well qualified, we have an obligation, if they can do the job, to take them on and train them. This we do. The Immigration Authority makes it plain that non-EEA nationals will be allowed work permits in what amount to exceptional circumstances. We get so many applications from the UK, the EU and the wider EEA that there is always sufficient to fill our places without considering non-EEA nationals. The paperwork in trying to establish that this was not true is extensive, and signing a declaration to

that effect would be making an untrue declaration.

Not good enough, said the Employment Tribunal at first instance, and now the Employment Appeals Tribunal has found the same.

The Tribunal, considered a passage from the Immigration Agency's guidance notes which says "Information about eligibility to work in the UK, which employers are required to obtain under the Asylum and Immigration Act 1996, should preferably be verified in the final stages of the selection process, to make sure the appointment is based on merit alone, and is not influenced by other factors. Employers can apply for work permits and should not exclude potentially suitable candidates from the selection process."

The Tribunal rejected OC's argument that there was no realistic chance of satisfying the Immigration Agency's "stringent eligibility criteria for a work permit." And it found "we do not accept that the BIA policy requires employers to disregard the best candidates because there are inferior candidates that could be employed who are EEA nationals."

Tribunal found that OC's policy was not direct race discrimination, but that it was indirect race discrimination on the grounds of nationality.

The EAT expressly approved the following extracts from the Tribunal's decision

"80. There is nothing tangible to support that assumption and no evidence of any dialogue between the respondent and the BIA to test the assumption that they have made. There is, therefore, nothing that goes to support the assumption that there is no point in applying for a work permit as one will not be provided.

82. We do not accept that it is for the BIA to tell the respondent – a leading international law firm – who is suitable for them to employ in a qualitative sense. It is for the respondent to identify who they consider to be the most suitable – according to their necessarily and properly high criteria – and then to make the case to the BIA for a work permit if they consider there is a case to be made."

The EAT went on to say " Indeed it seems to us that the very detailed nature of their assessment process would provide the level of evidence that could well satisfy the BIA in determining a work permit application."

The EAT considered that the fact that making applications for work permits incurs cost and expense was not relevant: it said " In her oral submissions to us Ms Weir made great play of the large numbers of applicants involved which could involve OC in having to place before the BIA a considerable volume of material in order to try and justify their selection. The Tribunal considered this area at paragraph 61 and in our view clearly formed the view that the results of OC's selection process could indeed provide what the Tribunal described as "credible reasons" to place before the BIA."

Osborne Clarke's appeal was rejected.

The implications for UK business are immense. They can no longer make a blanket exclusion of applicants based on the principle that priority must be given to EEA applicants and that there are sufficient EEA applicants to meet the recruitment requirements.

It means that all businesses must fully consider all applications from anywhere in the world, arguably including them in a selection process that may include paying travel and accommodation and facilities at a selection centre (one implication of the decision is that to allow domestic travel payment only would equally be discriminatory).