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What is an English Jew?: The Legal Construction of Jewish Identity Under the UK Equality Act of 2010

Lesley Klaff*

INTRODUCTION

The question of Jewish identity has preoccupied people for centuries.¹ Are Jews a race, a religion, an ethnic minority, or all three? It may surprise readers to learn that the question of Jewish identity was settled as a matter of English law in 1983 in the case of *Mandla v. Dowell Lee*.² The House of Lords held that Jews are both a “racial” and an “ethnic group,” as well as a religious group, for the purposes of the Race Relations Act of 1976 (RRA 1976).³ The RRA 1976 (now superseded) provided protection from direct and indirect discrimination in education, employment, training, housing, and the provision of goods, facilities, and services, to members of a “racial group” but excluded religious groups from its protection as a matter of deliberate legislative policy.⁴ This meant that someone claiming protection from discrimination under the RRA 1976 had to be classed as a member of a “racial group” to get the law’s protection. The RRA 1976 defined “racial group” in section 3 (1) as “a group of persons defined by reference to colour, race, nationality or ethnic or national origins.”⁵ The main issue in the *Mandla* case was whether Sikhs were protected by the Race Relations Act as a “racial group,” and it was in seeking to determine the question of Sikh identity for the purposes of the RRA 1976 that both the Court of Appeal and the House of Lords said that Jews constituted a “racial group” for the purposes of section 3 (1).⁶ This was because Jews could be “defined by reference to their ethnic origins.”⁷

Although the Court of Appeal and the House of Lords came to the same conclusion about the nature of Jewish identity in English law, they did so for different reasons. For Lord Denning in the Court of Appeal, Jews were “defined by reference to their ethnic origins” for the purposes of the statutory definition of “racial group” because they were to be distinguished from non-Jews by a

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¹ See, e.g., ZVI GITELMAN, *The Evolution of Jewish Identities*, in JEWISH IDENTITIES IN POSTCOMMUNIST RUSSIA AND UKRAINE: AN UNCERTAIN ETHNICITY 46, 46–47 (2012).

² *Mandla v. Dowell Lee* [1983] 2 AC 548 (HL) 555.

³ *Id.* at 561–62; see also Race Relations Act 1976, c. 74, § 3(1) (UK), repealed by the Equality Act 2010, sch. 27.

⁴ *Mandla v. Dowell Lee* [1982] 3 All ER 1108, 1109 (citing Race Relations Act 1976, c. 74, pt. 1(3)(1), repealed by the Equality Act 2010, sch. 27).

⁵ Race Relations Act 1976, c. 74, § 3(1) (UK), repealed by the Equality Act 2010, sch. 27.

⁶ See *Mandla*, 3 All ER at 1112–13; *Mandla*, 2 AC at 561.

⁷ See *Mandla*, 3 All ER at 1117; *Mandla*, 2 AC at 558.

“common racial characteristic.”⁸ The “common racial characteristic” that Jews shared was descent, however remotely, from a Jewish ancestor.⁹ This also made Jews members of an “ethnic group.”¹⁰ He reasoned:

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. . . . 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 There is nothing in their culture of 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.¹¹

The House of Lords, on the other hand, did not require a racial characteristic to determine whether a group of people constitute an “ethnic group” for the purposes of the Race Relations Act.¹² Instead, the law lords unanimously laid down a test which placed emphasis on the socially determined historical identity of the group and on the group’s own belief in its historical antecedents.¹³ Lord Fraser enunciated the criteria for “ethnic group” according to several characteristics, two of which were “essential”: (1) a long-shared history of which the group is conscious as distinguishing it from other groups and the memory of which keeps it alive; and (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.¹⁴ Other relevant features of ethnicity, according to Lord Fraser, included a common geographical origin, a common language, a common literature, a common religion, and being a minority within a larger community.¹⁵ In enunciating this test for “ethnic group,” Lord Fraser quoted with approval the test laid down in the 1979 New Zealand case of *King-Ansell v. Police*, which ruled that Jews constitute an “ethnic group” for the purposes of the New Zealand Race Relations Act 1971¹⁶:

The real test is whether the individual or the group regard themselves or 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. . . . a group is identifiable in terms of its ethnic origins if it is a segment of the population

⁸ *Mandla*, 3 All ER at 1112–13.

⁹ *Id.* at 1112.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See Mandla*, 2 AC at 562.

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *King-Ansell v. Police* [1979] 2 NZLR 531, 544 (N.Z.). This case is a persuasive precedent for English courts.

distinguished from others by 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 eyes 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 antecedents¹⁷.

In declaring New Zealand Jews an ethnic group, Judge Woodhouse explicitly recognised Jewish peoplehood. He said that there was a

depth of Jewish history and the unbroken adherence of Jews to culture, traditions, and a mutually intelligible language, as well as a religion, *so that they have maintained a distinct and continuous identity as a people for longer perhaps than any other than the Egyptians . . .* [U]ndoubtedly Jews in New Zealand are a group of persons with ethnic origins of the clearest kind.¹⁸

It is notable that both the Court of Appeal and the House of Lords thought that “ethnic origins” had been included by Parliament in the statutory definition of “racial group” to protect Jews. Noting that “[w]hen Hitler and the Nazis so fiendishly exterminated ‘the Jews’ it was because of their racial characteristics and not because of their religion,”¹⁹ Lord Denning went on to say, “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.”²⁰ Likewise, Lord Fraser noted, “it is inconceivable that Parliament would have legislated against racial discrimination intending that the protection should not apply . . . (above all) to Jews.”²¹

Over the years, *Mandla v. Dowell Lee* and *King-Ansell v. Police* have been consistently cited as authority for the definition of “ethnic group”²² and for the proposition that Jews are a “racial” and an “ethnic group,” as well as a religious group, for the purposes of English anti-discrimination law.²³

In this Article, I will explore the legal construction of Jewish identity as a “protected characteristic” in the Equality Act of 2010 through an examination of two more recent cases, *Fraser v. UCU* (2013) and *Parker v. Sheffield Hallam University* (2016), as well as the Equality and Human Rights Commission’s 2020 investigation into antisemitism in the Labour Party

I. WHY DOES JEWISH IDENTITY IN ENGLISH LAW MATTER? KEY CONCEPTS

¹⁷ *Id.* at 542–43.

¹⁸ *Id.* at 535–36, 539 (emphasis added).

¹⁹ *Mandla v. Dowell Lee* [1982] 3 All ER 1108 at 1112–13.

²⁰ *Id.* at 1113.

²¹ *Mandla v. Dowell Lee* [1983] 2 AC 548, 561.

²² *Comm’n for Racial Equal. v. Dutton* [1989] IRLR 8, 11; *Crown Suppliers (PSA) v. Dawkins* [1991] IRLR 327, 328–27 (UK); *BBC Scotland v. Souster* [2001] IRLR 150, 153; *R v. White* [2001] All ER (D) 158.

²³ *Seide v. Gillette Indus. Ltd.* [1980] IRLR 427, 430; *R (E) v. Governing Body of JFS* [2009] 4 All ER 375, 383; *see, e.g.*, DIDI HERMAN, AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS & ENGLISH LAW 146–7 (Oxford Univ. Press 2011); *Morgan v. Civ. Serv. Comm’n* (13 January 1993) CA Lexis Citation 2405.

The legal construction of Jewish identity is important because it determines the legal protection that Jews are given if they are the victims of antisemitism. With respect to the offence of incitement under the Public Order Act of 1986 (POA1986), for example, a higher degree of protection is given to those who are legally defined as a “racial group” as opposed to those merely defined as a “religious group.” This is because the POA 1986 criminalizes acts “intended” or “likely” to stir up hatred against a “racial group” and provides no freedom-of-expression defence to racial hatred.²⁴ On the other hand, the Act only criminalizes acts *intended* to stir up religious hatred.²⁵ Intentional incitement is more difficult to prove than the lower “likelihood” standard, and a freedom-of-expression defence is available for the expression of religious hatred to allow for discussion, criticism, antipathy, dislike, ridicule, insult, etc., of a particular religion and its adherents.²⁶ Incitement against Jews can be prosecuted as either racial hatred or as religious hatred, depending on the facts of the case.²⁷

With respect to the Equality Act of 2010, which provides protection from discrimination, harassment, and victimisation in the public sector—schools, universities, hospitals, local councils, transport providers, government departments, trade unions, and political parties, for instance—the legal construction of Jewish identity as a “protected characteristic” is important for deciding harassment claims brought by Jewish individuals or groups occasioned by anti-Zionist antisemitism. This is because of the way that the unlawful harassment section, section 26, of the Equality Act is defined. As discussed in the following sections of this Article, anti-Zionist antisemitism will only be found to constitute unlawful harassment of someone who identifies as Jewish under section 26 of the Equality Act where the decision maker, whether it be a court, a tribunal, or a statutory body, finds that the anti-Zionist antisemitism engages their “protected characteristic.” Before considering this point in more detail through a discussion of *Fraser v. University and College Union*, *Parker v. Sheffield Hallam University*, and the Equality and Human Rights Commission’s investigation into antisemitism in the Labour Party, it is necessary to explain the meaning of three key terms that will be used in the discussion. These are “anti-Zionist antisemitism,” “protected characteristic,” and “unlawful harassment” under section 26 of the Equality Act. . A brief explanation of the free speech implications of a claim for unlawful antisemitic harassment under section 26 will also be provided.

A. Anti-Zionist Antisemitism

²⁴ Public Order Act 1986, c. 64, § 18 (UK).

²⁵ *Id.* § 29B (inserted by the Racial and Religious Hatred Act 2006).

²⁶ Public Order Act 1986, § 29J (“Protection of freedom of expression” was inserted by the Race and Religious Hatred Act 2006).

²⁷ See, e.g., *Convictions for Antisemitic Criminal & Terrorist Offences*, CMTY. SEC. TRUST, <https://cst.org.uk/research/prosecutions-for-antisemitism> (last visited Aug.11, 2022).

In England today, anti-Zionist antisemitic sentiment is more openly expressed than classic antisemitism.²⁸ Anti-Zionist antisemitism is expression that purports to be criticism of Israel and Zionism, but which in fact goes beyond legitimate criticism and crosses the line into demonisation and delegitimization. A good guide to the types of expression that can constitute anti-Zionist antisemitism, depending on context, can be found in the examples relating to Israel in the working definition of antisemitism published by the International Holocaust Remembrance Alliance (IHRA) in 2016.²⁹ These include comparing contemporary Israeli policy to that of the Nazis, applying the images and symbols of traditional antisemitism (e.g., the blood libel) to Israel, denying the Jewish people the right to self-determination, applying double standards by expecting a behaviour of Israel that is not expected of any other state, and holding Jews collectively responsible for the actions of the state of Israel.³⁰

B. “Protected Characteristic” Under the Equality Act of 2010

The Equality Act of 2010 (EA 2010) was passed to replace and bring together all existing anti-discrimination legislation, including the Race Relations Act of 1976, into one statute, and to strengthen the existing law on equality.³¹ The EA 2010 gives individuals legal protection from discrimination, harassment, and victimisation in the workplace and wider society in relation to nine personal characteristics.³² These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.³³ These nine personal characteristics are known under the Act as “protected characteristics.”³⁴ Jews are protected under the Act as both a “race” and a “religion or belief” following the decision in *Mandla v. Dowell Lee*. Section 9 of the Equality Act defines “racial group” in the same way as section 3 of the Race Relations Act of 1976 did, as “a group of persons defined by reference to colour, race, nationality, or ethnic or national origins.”³⁵

²⁸ See, e.g., L. Daniel Statetsky, *Antisemitism in Contemporary Great Britain: A Study of Attitudes Towards Jews and Israel*, INST. FOR JEWISH POL’Y RSCH. (Sept. 17, 2017), <https://www.jpr.org.uk/reports/antisemitism-contemporary-great-britain?id=9993>; Daniel Allington & David Hirsh, *The AzAs (Antizionist Antisemitism) Scale: Measuring Antisemitism as Expressed in Relation to Israel and Its Supporters*, J. CONTEMP. ANTISEMITISM 43, 45 (2019); CAMPAIGN AGAINST ANTISEMITISM, ANTISEMITISM BAROMETER 2021 4, <https://antisemitism.org/wp-content/uploads/2022/03/Antisemitism-Barometer-2021-2.pdf>; *Antisemitic Incident Reports*, CMTY. SEC. TRUST, <https://cst.org.uk/research/cst-publications> (last visited Aug. 12, 2022).

²⁹ See *What is Antisemitism? Non-Legally Binding Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/working-definition-antisemitism> (last visited Jan. 17, 2022).

³⁰ *Id.*

³¹ *What is the Equality Act? An Introduction to the Equality Act 2010*, EQUAL. AND HUM. RIGHTS COMM’N, <https://www.equalityhumanrights.com/en/equality-act-2010> (last visited Aug. 3, 2022).

³² Government Equality Office & Equality and Human Rights Commission, *Equality Act 2010: Guidance*, GOV.UK, <https://www.gov.uk/guidance/equality-act-2010-guidance> (last updated June 16, 2015).

³³ Equality Act 2010, c. 15, § 4 (UK).

³⁴ *Id.*

³⁵ Race Relations Act 1976, c. 74, § 3 (UK); see also Equality Act 2010 c. 15, § 9 (UK).

C. “Unlawful Harassment” Under Section 26 of the Equality Act of 2010

Harassment occurs if someone experiences behaviour that makes them feel intimidated, humiliated, or degraded, or that creates a hostile environment for them. Section 26 of the Equality Act defines “harassment” as “unwanted conduct related to a relevant protected characteristic.”³⁶ To qualify as “harassment,” the conduct must “violate the complainant’s dignity” or “creat[e] an intimidating, hostile, degrading, humiliating or offensive environment” for them.³⁷ In deciding whether the conduct has had that effect, the decision maker must take into account the victim’s perception under section 26(4)(a). This is a subjective test which focuses on the victim’s realm of experience.³⁸ The decision maker must then take into account all the other circumstances of the case under section 26(4)(b) and consider whether it was reasonable for the conduct to have had that effect under section 26(4)(c).³⁹ This is an objective test that requires the decision maker to consider whether the victim’s perception is reasonable given all the circumstances.⁴⁰ A claim under section 26 is frequently referred to as a claim for “hostile environment harassment.”⁴¹

D. Unlawful Harassment and Free Speech Implications

The right to freedom of expression is protected by article 10 of the European Convention on Human Rights (ECHR) and section 3 of the Human Rights Act 1998, which brings the ECHR directly into UK domestic law.⁴² Therefore, in any claim for unlawful antisemitic harassment under section 26 of the Equality Act of 2010, the decision maker must consider the free speech implications of the claim.⁴³

In general, conduct or speech should not be regarded as harassment and no action should be taken on it if this would breach the ECHR Article 10 right to freedom of expression of the person whose conduct or speech is in question.⁴⁴ In making this kind of decision, the right to freedom of expression must be weighed against any harmful effects of the conduct or speech, given the context in which the conduct or speech occurred.⁴⁵ Only if the decision maker is satisfied that the harmful effects of the conduct or speech in that specific context outweigh the freedom of expression right of the person concerned can the conduct or speech be

³⁶ *Id.* § 26(1)(a).

³⁷ *Id.* § 26(1)(b).

³⁸ *See id.* § 26, Explanatory Notes ¶ 98.

³⁹ *Id.* §§ 26(4)(b)–26(4)(c).

⁴⁰ *See id.* § 26, Explanatory Notes ¶ 99.

⁴¹ *See, e.g.,* Fraser v. Univ. and Coll. Union, Grounds of Compl. ¶ 5 (on file with author); Fraser v. Univ. and Coll. Union, Claimant’s Skeleton Argument ¶ 62 (on file with author); App. to Stage 1 Compl. Form – Faculty Resol. ¶ 7(c) (on file with author).

⁴² *See* The European Convention on Human Rights, art. 10; Human Rights Act 1998, c. 42, § 3 (UK).

⁴³ *See* Equality Act 2010, c. 15, § 26, Explanatory Notes ¶ 99 (UK).

⁴⁴ EQUAL. AND HUM. RIGHTS COMM’N, INVESTIGATION INTO ANTISEMITISM IN THE LABOUR PARTY 26 (2020) <https://www.equalityhumanrights.com/sites/default/files/investigation-into-antisemitism-in-the-labour-party.pdf>.

⁴⁵ *See* Equality Act 2010, c. 15, § 26, Explanatory Notes ¶ 99 (UK).

found to constitute harassment.⁴⁶ However, even if conduct or speech is within the scope of the right to freedom of expression protected by article 10, the conduct or speech may still be sanctioned or restricted where it is proportionate to do so.⁴⁷ This is by virtue of article 10(2), which provides that the right to freedom of expression under article 10 may, “since it carries with it duties and responsibilities, be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society for the protection of the rights of others.”⁴⁸ Accordingly, “[i]n the case of harassment, conduct [or speech] may be regarded as unlawful, and action taken on it, where this is proportionate to protect the rights of others not to have their dignity violated or to be exposed to an intimidating, hostile, degrading, humiliating[,] or offensive environment.”⁴⁹

II. RECENT DECISIONS

The discussion of *Fraser v. The University and College Union*, *Parker v. Sheffield Hallam University*, and the Equality and Human Rights Commission (EHRC) Report into Antisemitism in the Labour Party 2020 will focus on the statutory definition of “harassment” and the legal construction of Jewish identity as a “protected characteristic.” These three examples have been chosen as the only available examples to date of government bodies addressing whether anti-Zionist antisemitism amounts to unlawful harassment of a Jewish complainant under section 26 of the Equality Act. As such, they demonstrate three stages in the development of the legal construction of Jewish identity as a “protected characteristic” under this Act.

A. *Fraser v. The University & College Union* (2013)

Fraser v. The University & College Union, decided by the Central London Employment Tribunal in 2013, took a step back from the judicial recognition in *Mandla v. Dowell Lee* that there is an ethnic and national dimension to Jewish identity. The employment tribunal constructed the “protected characteristic,” that is, the “race[,] . . . religion[,] or belief” of the Jewish complainant under section 26 of the Equality Act as separate from any attachment to Israel and the Zionist project.⁵⁰

The complainant Ronnie Fraser was a retired mathematics lecturer and a member of the University and College Union (UCU).⁵¹ In August 2011, he filed a claim against the union alleging “hostile environment harassment” under the anti-harassment provision of the Equality Act, section 26, and under section 57,

⁴⁶ EQUAL. AND HUM. RIGHTS COMM’N, *supra* note 44, at 25.

⁴⁷ *Id.* at 25–26.

⁴⁸ European Convention on Human Rights, art. 10(2).

⁴⁹ EQUAL. AND HUM. RIGHTS COMM’N, *supra* note 44, at 26.

⁵⁰ Mr R Fraser v. Univ. & Coll. Union [2013] Employment Tribunal (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁵¹ In The Central London Employment Tribunal, *Ronnie Fraser v. The University and College Union*, Grounds of Complaint (Aug.25, 2011), ¶ 2 (on file with author).

which provides that a trade association such as the UCU must not harass a member.⁵² Fraser alleged that the union had harassed him as a Jewish member by engaging in a course of “unwanted” antisemitic “conduct” that manifested itself in acts and omissions informed by hostility to Israel and the Zionist project—in other words, by anti-Zionist antisemitism.⁵³ The ten grounds of his complaint were as follows: (1) the annual boycott resolutions against Israel and no other country in the world; (2) the conduct of debates at which these resolutions were discussed; (3) the moderating of the activists’ lists and the penalizing of anti-boycott activists; (4) the failure to engage with members who raised concerns about antisemitism and the failure to address resignations citing antisemitism as the reason; (5) the dismissive response to the 2006 *Report of the All Party Parliamentary Inquiry into Anti-Semitism*; (6) the failure to meet the Organisation for Security and Co-Operation in Europe’s special representative on antisemitism; (7) the hosting of South African trade unionist, Bongani Masuku, after he had been found guilty of antisemitic hate speech by the South African Human Rights Commission; (8) the dismissive attitude towards the Equality and Human Rights Commission; (9) the repudiation of the European Monitoring Centre on Racism and Xenophobia’s (EUMC) working definition of antisemitism; and (10) the response to Fraser’s letter before action.⁵⁴ In March 2013, the Employment Tribunal unanimously dismissed all ten grounds of Fraser’s complaint as unfounded and mostly time barred.⁵⁵

For Fraser to have been successful in his complaint against the UCU, the tribunal would have needed to recognize that attachments to Israel and Zionism are aspects of contemporary Jewish identity through its construction of “protected characteristic” in section 26 of the Equality Act. This is because of the way “harassment” is defined in section 26 as “unwanted conduct *related to* a protected characteristic,” which has “the purpose or effect of violating . . . [a person’s] dignity,” etc. In other words, there must be a nexus between the “unwanted conduct” complained of and the complainant’s “protected characteristic.”⁵⁶

Given the dicta in *Mandla v. Dowell Lee* explaining why Jews are defined as members of a “racial group” for the purposes of anti-discrimination law, one would expect the connection between being Jewish, and the Jewish ancestral homeland, Israel, to be self-evident to the employment tribunal. Among the determining criteria for membership in a racial group enunciated by the House of Lords were “a long-shared history,” “a cultural tradition” which includes religious observance, and, most relevant here, “*a common geographical origin, or descent from a small number of common ancestors.*”⁵⁷ Moreover, the test enunciated in the New Zealand case of *Kings-Ansell v. Police*, and repeated with

⁵² *Id.* ¶¶ 1–5 (on file with author).

⁵³ Mr R Fraser v. Univ. & Coll. Union, The Claimant’s Skeleton Argument for hearing on Oct. 29, 2012, in the Central London Employment Tribunal, Claim No. 2203290/2011 (on file with author).

⁵⁴ *See id.*

⁵⁵ Mr R Fraser v. Univ. & Coll. Union [2013] Employment Tribunal (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁵⁶ *Id.* at 11–12 (emphasis added).

⁵⁷ *Mandla v. Dowell Lee* [1983] 2 AC 548, 562 (UK) (emphasis added).

approval in the House of Lords, was “whether the individual 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.”⁵⁸ Fraser’s lawyer, Anthony Julius, explained Jewish identity to the tribunal as follows:

[The complainant] has a strong attachment to Israel. This attachment is a non-contingent and rationally intelligible aspect of his Jewish identity. It is an aspect, that is, of his race and/or religion or belief . . . The fact that not all Jewish people have the same views does not prevent it from being an aspect of the protected characteristic. A significant proportion of Jewish people have an attachment to Israel which is an aspect of their self-understanding as Jews, or Jewish identity.⁵⁹

The tribunal accepted that the “related to” test in section 26 denotes a “loose associative” connection between the behaviour under consideration and the protected characteristic and that it does not require a “causative” connection.⁶⁰ This means that the unwanted conduct does not need to be “because of” the protected characteristic” but only broadly related to it.⁶¹ Acknowledging the wide interpretation Parliament intended by using the words “related to” in the statutory section, the Tribunal declared that “it seems to us that the practice of repeatedly criticising the actions and policies of the United States could certainly be seen as ‘related to’ race.”⁶²

Nevertheless, the tribunal went on to conclude that, “[i]t seems to us that a belief in the Zionist project or an attachment to Israel . . . is not intrinsically a part of Jewishness.”⁶³ In other words, the tribunal refused to find any “loose associative connection” between Israel and Zionism and being Jewish. This amounted to a construction of “protected characteristic” for the purposes of the Equality Act that denied the racial, ethnic, and even religious dimensions of being Jewish that had been recognized in *Mandla v. Dowell Lee* and *Kings-Ansell v. Police*. Indeed, dicta by Judge Woodhouse in the *Kings-Ansell* case had explicitly acknowledged Jewish peoplehood.⁶⁴ The concept of “Jewish peoplehood” recognizes that Jewish people are aware of, and identify with, the Jewish collective via various common components such as religion, culture, and historical connection to Israel as their ancestral homeland.

The tribunal’s conclusion that there was no nexus between Zionism and Israel, on the one hand, and Fraser’s Jewish religious and racial status, on the other, was based on its characterisation of “Zionism” and “anti-Zionism” as mere “political” ideologies which are unrelated to, and independent of, a person’s race

⁵⁸ *King-Ansell v. Police* [1979] 2 NZLR 531, 542 (N.Z.) (emphasis added).

⁵⁹ *Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶ 18 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁶⁰ *Id.* ¶ 32.

⁶¹ *Id.* ¶ 33.

⁶² *Id.* ¶ 35.

⁶³ *Id.* ¶ 150.

⁶⁴ *King-Ansell v Police* [1979] 2 NZLR 531, 539 (N.Z.) (Woodhouse, J.).

or religion.⁶⁵ Such a characterisation amounted to a wholesale acceptance of the argument advanced by the UCU that many different positions are taken on the Israel-Palestine conflict, and specifically on the academic boycott of Israel, and that these are political positions that tend to be associated with distinct political groups.⁶⁶ As Jews belong to many such groups, it follows that any disagreements between the groups are political and do not touch on any “protected characteristic,” that is, on any religious or racial identity under the Equality Act.⁶⁷

It is the case that some of the pro-boycott witnesses called by the UCU were Jewish, while some of the anti-boycott witnesses called by Fraser were Christian, Muslim, or some other faith.⁶⁸ Referring to a pro-boycott witness for the UCU as Jewish,⁶⁹ the tribunal said:

“[Fraser’s] main contention is that the conduct of which he complains was inherently discriminatory in that it consisted of acts and omissions concerning the conflict between Israel and Palestine and so ‘related’ to *his* (although of course not every Jew’s) Jewish identity and, as such, *his* Jewish race and/or religion or belief.”⁷⁰

It was then a short step for the tribunal to conclude that “a belief in the Zionist project and an attachment to Israel is not intrinsically a part of Jewishness.”⁷¹

In coming to this conclusion, the tribunal ignored Julius’s argument that hostility to Israel engages Fraser’s protected characteristic. Julius explained to the tribunal that the majority of British Jews have an affinity with Israel and the Zionist project because they regard Israel as their ancestral homeland and assume an obligation to support it and to ensure its survival.⁷² This affinity does not equate to unconditional or unstinting support for the government of Israel or its policies but, rather, amounts to a sense of connection to, or an affiliation with, Israel and a sense of its importance in the context of Jewish history and the

⁶⁵ Mr R Fraser v. Univ. & Coll. Union [2013] Employment Tribunal, ¶¶ 50–55, 150 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁶⁶ Anthony Julius’s Closing Speech for the Claimant in Mr R Fraser v. University & College Union 2 (Nov. 16, 2012) (on file with author). *Mr R Fraser v. Univ. & Coll. Union*, The Respondent’s Outline Opening Submissions in the Central London Employment Tribunal, Claim No. 2203290/2011, ¶¶ 96–107 (on file with the author); The Respondent’s Outline Closing Submissions in the Central London Employment Tribunal, Claim No. 223290/2011, ¶ 3 (8)(i) (on file with author); Anthony Julius’s Closing Speech for the Claimant, 16 November 2012, at 2 (on file with author).

⁶⁷ Mr R Fraser v. Univ. & Coll. Union [2013] Employment Tribunal, ¶ 54 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁶⁸ Mr R Fraser v. Univ. & Coll. Union, Claimant’s Skeleton Argument, for hearing on 29 October 2012 (on file with author); David Hirsh, *Ronnie Fraser v. UCU*, in *CONTEMPORARY LEFT ANTISEMITISM* 154, 157 (Routledge, 2017).

⁶⁹ Mr R Fraser v. Univ. & Coll. Union [2013] Employment Tribunal, ¶ 130 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁷⁰ *Id.* ¶ 150.

⁷¹ *Id.* ¶ 150.

⁷² The Central London Employment Tribunal, *Ronnie Fraser v. The University and College Union*, Grounds of Complaint (Aug. 25, 2011), ¶ 8 (on file with author) (hereinafter GoC); Anthony Julius’s Closing Speech for the Claimant, 16 November 2012, at 2 (on file with author) (hereinafter CCS).

persecution of the Jewish people.⁷³ It is for this reason that hostility towards Israel engages Jews not only in conventional political terms, but also because an attachment to Israel is an aspect of their identity.⁷⁴ It is in this way, Julius argued, that hostility to Israel engages Fraser's protected characteristic.⁷⁵

The tribunal further ignored the argument that the fact that a range of views on Israel exist within the body of Anglo-Jewry does not override the argument that Fraser's protected characteristic is engaged when Israel is demonised. Julius countered the UCU's "range of views" argument by explaining that the existence of a group of Jews who are hostile to Israel and Zionism is not evidence for the proposition that an attachment to Israel is not an aspect of contemporary Jewish identity. These Jews are either marginal or non-normative, or the form their protected characteristic takes is in their hostility to Israel or Zionism.⁷⁶

In rejecting Julius's argument that Fraser's protected characteristic is engaged when Israel is demonised because an attachment to Israel is an aspect of Jewish identity, the tribunal said it could find no authority for the proposition that legal protection also attaches to "a particular affinity or sentiment not inherent in a protected characteristic but said to be commonly held by members of a protected group."⁷⁷ There was no relevant authority because the Fraser case was the first of its kind under section 26 of the Equality Act of 2010. It was within the power of the tribunal to stipulate that an "affinity or sentiment" fell within the scope of the protected characteristic because of the ample evidence that Jews regard themselves as having a particular historical identity that connects them to Israel. Moreover, this is the reason the law defines Jews as a "racial group" following the test laid down in *Mandla v. Dowell Lee*.

The tribunal's unwillingness to find the required nexus, or "loose associative connection," between Israel and Fraser's Jewish religious and racial status reflects a hostility to Fraser's claim. The tribunal characterised the claim as a dishonest attempt to play the "antisemitism card" to abrogate free political speech in the union for the sole purpose of shielding Israel from criticism. In ruling against Fraser, the tribunal said, "We greatly regret that the case was ever brought. At heart, it represents an *impermissible attempt to achieve a political end by litigious means*. It would be very unfortunate if an exercise of this sort were ever repeated."⁷⁸ It continued, "We are also troubled by the implications of the claim. Underlying it we sense a worrying disregard for pluralism, tolerance[,] and freedom of expression."⁷⁹ Evidence of the tribunal's antipathy for Fraser's claim is elaborated in the Subsection B on *Parker v. Sheffield Hallam University*, below.

⁷³ The Central London Employment Tribunal, *Ronnie Fraser v. The University and College Union*,), GoC ¶ 8 (on file with author); CCS at 2 (on file with author).

⁷⁴ The Central London Employment Tribunal, *Ronnie Fraser v. The Univ. and Coll. Union*, , ¶ GoC 10 (on file with author); CCS at 3 (on file with author)

⁷⁵ CCS at 2–5 (on file with author)

⁷⁶ *Id.* at 3–4.

⁷⁷ *Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶ 18 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁷⁸ *Id.* ¶ 178 (emphasis added).

⁷⁹ *Id.* ¶ 179.

In sum, by ruling that Zionism is a political ideology or movement that is unconnected to race or religion and that Israel is not intrinsically a part of Jewishness, the tribunal gave permission to anti-Zionists to characterise Zionism as a uniquely racist ideology and Israel as a uniquely evil state which ought not to exist, while denying Jews the prospect of a successful claim for antisemitic harassment under section 26 of the Equality Act. Fortunately, the decision did not set a precedent because the tribunal was only a trial court, and the case was never appealed.

B. Parker v. Sheffield Hallam University (2016)

The Office of the Independent Adjudicator for Higher Education (OIA) was the next body to address the issue of Jewish identity through the construction of “protected characteristic” in the Equality Act of 2010. The OIA is a statutory body that was set up under the Higher Education Act of 2004 to review the handling of student complaints by universities.⁸⁰ It conducts such reviews in accordance with the law and relevant sector guidance but does not act as a court.⁸¹ Where the OIA finds that a student complaint is “Justified” or “Partly Justified,” it will make “Recommendations” and send them to the student and the university along with its “Complaint Outcome.”⁸² The university will be expected to fully comply with the OIA’s Recommendations and the OIA will monitor it for compliance.⁸³ Occasionally, the OIA will also require the university to pay the student compensation.⁸⁴ *Parker v. Sheffield Hallam* was not a court case but a student complaint that was pursued within the university and then appealed to the OIA.

As with *Fraser v. UCU*, the complaint was brought under section 26 of the Equality Act of 2010 for antisemitic hostile environment harassment of a Jewish student occasioned by anti-Israel activity on campus. This case therefore raised the issue of whether disproportionate hostility to Israel, or anti-Zionist antisemitism, can constitute the harassment of someone who identifies as Jewish under section 26 of the Equality Act of 2010.

The complaint was brought in May 2015 by a Jewish student named Christopher Parker. The student alleged that Sheffield Hallam University (the “University”) tolerated anti-Israel activity on campus that crossed the line from legitimate criticism of Israel into antisemitism and harassment.⁸⁵ The student complaint listed Facebook posts and tweets by the University’s Student Palestine Society (“PalSoc”) that, Parker argued, went beyond the right to free speech and created a hostile environment for him.⁸⁶ These posts accused Israel and Israelis

⁸⁰ See *What Happens When a Student Complains to Us?*, OFF. OF THE INDEP. ADJUDICATOR, <https://www.oiahe.org.uk/about-us/reviewing-complaints/what-happens-when-a-student-complains-to-us/#:~:text=The%20student%20submits%20their%20complaint,as%20soon%20as%20we%20can> (last visited Aug. 12, 2022).

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See Complaint from Christopher Parker to Sheffield Hallam Univ., (May 14, 2015) (on file with the author).

⁸⁶ See *id.*

of genocide, deliberately killing Palestinian children, deliberately killing other Palestinian civilians, war crimes, atrocities, using chemical weapons, ethnic cleansing, inhumanity, cruelty, behaving like Nazis, sexual and other abuse of Palestinian children (including abduction and human trafficking), stealing Palestinian organs, being racists and fascists, and rejoicing in Palestinian deaths.⁸⁷ For example, one specific social media post listed in the complaint read:

One of the most sophisticated, nuclear powered, technological[ly] advance[d] armies in the world is committing monstrous atrocities; it has dropped bombs [on] disability shelters killing those seeking safety within, it has made targeted airstrikes on family homes killing entire families in cold blood, it is slaughtering children who are arriving to hospital “in bits.”⁸⁸

Parker complained that these posts contributed to an intimidating campus climate⁸⁹ and, *inter alia*, that he felt “intimidated and afraid to mention Israel on campus or to wear my Star of David or my skull cap for fear of being picked on.”⁹⁰

However, despite an evidence file spanning 154 pages, Sheffield Hallam University dismissed Parker’s complaint in February 2016.⁹¹ The University found that evidence of antisemitism from Parker’s complaint was “not conclusive” and suggested that Parker was conflating criticism of Israel with anti-Jewish prejudice.⁹² The University categorised all PalSoc’s social media output as merely “controversial and provocative” and as “offensive to some people, in particular those who have strong opposing views about the issues involved.”⁹³

Parker appealed to the OIA in May 2016, and it handed down its decision in October 2016 in a document known as the OIA Complaint Outcome. The OIA decided that it was not satisfied that the University engaged adequately with Parker’s complaint that certain tweets and posts by PalSoc had led him to feel harassed and intimidated and upheld this part of his appeal as “Justified.”⁹⁴

The decision of the OIA marked a welcome step forward in the development of the legal construction of Jewish identity to include an attachment to Israel. It did this without explicitly discussing the “related to” requirement in the definition of “harassment” in section 26 of the Equality Act. In other words, there was no explicit discussion of the connection between Israel and Jewish religious or racial status. The nexus was simply assumed to exist.

In coming to its finding that it was reasonable for certain expressions of hostility to Israel to engage the “protected characteristic” of a student who identifies as Jewish, the OIA discussed three issues: free speech, the *Macpherson*

⁸⁷ *Id.* ¶ 68.

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 209.

⁹⁰ *Id.* ¶ 188.

⁹¹ Response from Liz Winders, Sec’y and Registrar, Sheffield Hallam Univ., to Christopher Parker (Feb. 29, 2016) (on file with the author).

⁹² *Id.* ¶ 16.

⁹³ *Id.* ¶ 18.

⁹⁴ Response from the Office of the Independent Adjudicator for Higher Education to Christopher Parker ¶ 47 (Oct. 5, 2016) (on file with author).

principle, and the definition of antisemitism. As we shall see, the reasoning of the OIA was very different to that of the *Fraser* tribunal.

i. Free Speech

On the issue of free speech, the OIA noted that special legal status applies to the promotion of free speech and freedom of enquiry within universities and colleges under the Education (No. 2) Act of 1986 and the Education Reform Act of 1998.⁹⁵ This, said the OIA, requires universities to be tolerant of the expression of a wide range of views, and this includes the students' right to criticise a particular political regime or to express views on a contentious topic.⁹⁶ But the OIA noted that this duty to do all that is reasonably practicable to ensure freedom of speech within the law has to be balanced against the universities' responsibility to ensure that staff, students, and visitors to the university are protected from discrimination, harassment, and victimization and to foster good relations by having due regard to the need to tackle prejudice and promote understanding.⁹⁷ This is by virtue of section 149 of the Equality Act of 2010.

While the OIA recognised that there were competing rights, such as the right of the Jewish student complainant not to be harassed, that had to be balanced against the right to freedom of speech, the *Fraser* tribunal had done no such thing. On the contrary, it had implicitly characterised Fraser's case as one of Jewish particularism versus the universal right to freedom of expression and concluded that "the narrow interests of [Fraser] must give way to the *wider public interest* in ensuring that freedom of expression is safeguarded."⁹⁸ This reasoning suggests that freedom of expression cases will, and indeed should, always work against the Jewish complainant. This approach contradicts the spirit of anti-discrimination law, whose broad definition of "racial group" was designed to cast the net of protection as widely as possible to protect those in society who are vulnerable to discrimination.⁹⁹ This must include Jews. As noted by Lord Denning and Lord Fraser in *Mandla v. Dowell Lee*, it is inconceivable that Parliament did not intend to protect Jews from antisemitism.¹⁰⁰ It is fortunate that the *Fraser* tribunal's decision had no precedential value, and that the OIA did not feel compelled to follow it.¹⁰¹

ii. The *Macpherson* Principle

Further, unlike the *Fraser* tribunal, the OIA stressed the importance of the *Macpherson* principle in relation to the subjective test in the statutory

⁹⁵ *Id.* ¶ 33.

⁹⁶ *Id.*

⁹⁷ *Id.* ¶ 34.

⁹⁸ *Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶ 156 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

⁹⁹ JENNIFER BROWN, HOUSE OF COMMONS LIBRARY, AN EARLY HISTORY OF BRITISH RACE RELATIONS LEGISLATION (2018), <https://researchbriefings.files.parliament.uk/documents/CBP-8360/CBP-8360.pdf>.

¹⁰⁰ *Mandla v. Dowell Lee* [1982] 3 All ER 1108, 1112–13; *Mandla v. Dowell Lee* [1983] 2 AC 548, 561.

¹⁰¹ The OIA did not refer to the *Fraser* decision in its Complaint Outcome, and it is unclear whether the OIA was even aware of it.

definition of “harassment” in section 26 of the Equality Act. The *Macpherson* principle states that a racist incident should be defined by the victim and is therefore highly relevant to the subjective test for harassment.¹⁰² The subjective test relates to section 26(4)(a), which provides that the court must take into account the victim’s perception in deciding whether the unwanted conduct has violated the victim’s dignity, etc., so as to qualify as unlawful harassment. This means that when a person reports an experience of racism, their perception of the experience is an important consideration. They should be listened to carefully, and assumed to be right, until an informed judgment can be made. As the OIA stated, “when deciding whether harassment has occurred, the perception of the person who is the recipient of the behaviour is of particular importance.”¹⁰³ In addition, the OIA noted that Sheffield Hallam University’s definition of “harassment” in its anti-harassment policy echoed the definition in section 26 of the Equality Act and that the University’s procedure highlighted the importance of the recipient’s perception of the behaviour, whether the harassment was intended by the perpetrator or not.¹⁰⁴

The OIA accordingly paid particular attention to the impact of PalSoc’s social media activity on Parker. Parker stated in his complaint that he felt intimidated and afraid to mention Israel on campus or to wear his skull cap for fear of being picked on and that he could not be open about his Jewish identity.¹⁰⁵ He had also felt unable to attend lectures during Israel Apartheid Week in 2013 and 2014 because of a flare up of a health condition caused by stress and anxiety.¹⁰⁶ The OIA quoted from Parker’s complaint:

Hate speech is recognised by the fear which it generates, and I feel threatened by the campaigning of PalSoc and in particular its output on Facebook and Twitter, which are based on lies and half-truths about Jews, invoking blood libel motifs, stereotypes and defamations on campus and online, creating a threatening mob mentality . . . The nature of the behaviour that PalSoc engaged in . . . has been threatening, abusive, and insulting and contributes to an intimidating campus climate where students feel they cannot speak their mind . . .¹⁰⁷

The OIA then said, “[i]n our view, the above statements required the University to give careful consideration to whether, *as a student identifying as Jewish*, PalSoc’s activities had caused harassment to Mr Parker by violating his dignity, or creating an intimidating, hostile, degrading, humiliating[,] or offensive environment [for him].”¹⁰⁸

¹⁰² SIR WILLIAM MACPHERSON OF CLUNY, *THE STEPHEN LAWRENCE INQUIRY* 362 (1999), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf.

¹⁰³ Response from the Off. of the Indep. Adjudicator for Higher Educ. to Christopher Parker ¶ 35 (Oct. 5, 2016) (on file with author).

¹⁰⁴ *Id.* ¶ 36.

¹⁰⁵ *Id.* ¶ 37.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 38 (emphasis added).

Further, in addressing the University's finding that Parker's complaint conflated antisemitism with anti-Zionism and that PalSoc's activities were merely "controversial and provocative," the OIA said:

We accept that there is often a fine line between provocative or emotive material which some people might find offensive, and material which might reasonably cause a person to feel harassed. We also accept that none of the Tweets or Facebook posts highlighted by Mr Parker in his evidence file was directed at him personally; nor does any appear overtly to refer to Jews or the Jewish faith. . . . We are not satisfied, however, that the University properly turned its mind to the question of whether Mr Parker *as a student identifying as Jewish was likely to have felt harassed as a result of some of the material*.¹⁰⁹

In contrast, the employment tribunal denied Fraser's subjective experience of antisemitism within the UCU. When focusing on his experience as required by the subjective test in section 26(4)(a), the tribunal gave the statutory language a strict, narrow construction and declared that an effect amounting to "harassment" had not been made out by Fraser, who used words such as "upsetting," "disappointment," "troubled," "hurt," "saddened and amazed" to describe the effect the union's conduct had on him.¹¹⁰ The tribunal thought that these words indicated "minor upsets" caused by "trivial acts" rather than antisemitic harassment.¹¹¹ Further, the *Fraser* tribunal did not consider the application of the *Macpherson* principle at all. The only reference made to *Macpherson* was when the tribunal dismissed as "glib" and "unhelpful" the evidence given by parliamentarian, Denis MacShane, who had been called as a witness for Fraser,¹¹² the tribunal remarked, "[f]or Dr MacShane, it seemed that all answers lay in the *Macpherson Report* (the effect of which he appeared to misunderstand)."¹¹³ Disregarding the application of the *Macpherson* principle makes it unlikely that an effect amounting to harassment will be made out where a Jewish complainant complains about anti-Zionist antisemitism and was consistent with the tribunal's refusal to find a connection between Israel and Jewish identity.

iii. The Definition of Antisemitism

Finally, on the issue of antisemitism, the OIA noted that one of the outcomes that Parker had sought as a result of his complaint was Sheffield Hallam University's adoption of the European Union Monitoring Centre (EUMC) on Racism & Xenophobia's working definition of antisemitism, as a means to

¹⁰⁹ *Id.* ¶ 40 (emphasis added).

¹¹⁰ *Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶ 158 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

¹¹¹ *Id.* ¶ 38.

¹¹² *Id.* ¶ 148.

¹¹³ *Id.*

identify antisemitism on campus.¹¹⁴ The University had dismissed Parker's request as a "policy matter," which was beyond the scope of his complaint.¹¹⁵ The OIA decided that the University ought reasonably to have engaged with the EUMC Definition in its consideration of Parker's complaint because:

It was, in our view, relevant to the question of whether material which purportedly was criticising the (alleged) actions of the Israeli state "crossed the line" from being merely offensive or inflammatory to Mr. Parker, to amounting (or potentially amounting) to material which might reasonably be perceived to be antisemitic and likely to cause Mr Parker, as a student identifying as Jewish, to experience harassment.¹¹⁶

This reasoning amounts to an endorsement by the OIA of a definition of antisemitism that recognizes that hostility to Israel can, depending on the circumstances, be antisemitic. This implicitly recognises that an affinity with the State of Israel is an aspect of contemporary Jewish identity.

The *Fraser* tribunal, on the other hand, refused to rule on a meaning or definition of antisemitism on the grounds that there were legitimately held differences of opinion on what constitutes antisemitism.¹¹⁷ The tribunal reasoned that the range of views presented to the tribunal, including where the line should be drawn in relation to when criticism of Israel becomes antisemitic, is the "stuff of political debate."¹¹⁸ The tribunal's refusal to settle on a definition of antisemitism was curious given the fact that Fraser's claim was a claim for unlawful *antisemitic* harassment. As the House of Commons Home Affairs Committee reported, "[I]t [is] extremely difficult to examine the issue of antisemitism without considering what sorts of actions, language and discourse are captured by the term."¹¹⁹ Given the tribunal's attitude to Fraser's case, one might conclude that its refusal to rule on a definition of antisemitism, and in particular on the EUMC Definition which Fraser urged on it, amounted to a denial of Israel-related antisemitism. This again was consistent with the tribunal's refusal to find a connection between Israel and Jewish identity.

¹¹⁴ Response from the Off. of the Indep. Adjudicator for Higher Educ. to Christopher Parker ¶ 41 (Oct. 5, 2016) (on file with author). (The EUMC Working Definition of Antisemitism, promulgated in 2005, was adopted by the International Holocaust Remembrance Alliance (IHRA) in 2016 and is now known as the IHRA Working Definition of Antisemitism.).

¹¹⁵ Response from Liz Winders, Sec'y and Registrar, Sheffield Hallam Univ., to Christopher Parker ¶ 25 (Feb. 29, 2016) (on file with the author).

¹¹⁶ Response from the Off. of the Indep. Adjudicator for Higher Educ. to Christopher Parker ¶ 41 (Oct. 5, 2016) (on file with author).

¹¹⁷ See *Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶ 52 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

¹¹⁸ See *id.* ¶ 53–54.

¹¹⁹ HOUSE OF COMMONS HOME AFFS. COMM., ANTISEMITISM IN THE UK ¶ 12 (2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/136/136.pdf>.

C. The Report of the Equality and Human Rights Commission into Antisemitism in the Labour Party 2020.

The Equality and Human Rights Commission (“Commission”) is a statutory body with powers vested in it by the Equality Act of 2006 (the “2006 Act”) to enforce compliance with equality laws, including the Equality Act of 2010.¹²⁰ The EHRC’s legal construction of Jewish identity as a “protected characteristic” gave explicit recognition to Jewish peoplehood in a way that was denied by the *Fraser* tribunal and only implicitly acknowledged by the OIA.

The Commission carried out an investigation into the Labour Party under section 20(1)(a) of the 2006 Act following complaints made to it about antisemitism in the Labour Party by Campaign Against Antisemitism and the Jewish Labour Movement.¹²¹ The purpose of the investigation, which was launched in May 2019, was to decide whether the Labour Party had committed unlawful acts of discrimination, victimization or harassment under the Equality Act of 2010 against its Jewish members.¹²² The Commission reported on October 29, 2020, that the Labour Party had unlawfully harassed its members contrary to section 101(4)(a) of the Equality Act related to race (Jewish ethnicity) through the acts of its agents.¹²³ The Commission also found that the Labour Party had unlawfully indirectly discriminated against its Jewish members related to the party’s policy or practice of political interference in antisemitism complaints and of failing to provide adequate training for those handling complaints of antisemitism.¹²⁴ However, this discussion will focus solely on the Commission’s finding of harassment as it bears upon the legal construction of Jewish identity.

As with the OIA in the Parker appeal, the EHRC did not discuss the “related to” requirement in the definition of “harassment” in section 26 of the Equality Act and did not explicitly consider the connection between Israel and Jewish religious or racial status. The nexus between Israel and Jewish racial status, or ethnicity, was simply taken for granted. The Commission said, “Our investigation focused on whether the Labour Party committed unlawful acts of discrimination or victimisation relating to race or religion, or *harassment relating to race*.”¹²⁵ There was no explanation for the Commission’s distinction between race and religion, but it implicitly treated Jewish people as an ethnic or national group and Judaism as a religion, as was confirmed when the Commission stated, “Protected racial characteristic means Jewish ethnicity. . . . Protected religion or belief characteristic means Judaism. . . .”¹²⁶ This permitted the Commission to focus specifically on the racial dimension of being Jewish for the purpose of considering “harassment” under section 26 of the Equality Act. It accordingly defined harassment as “unwanted conduct *related to race*, which has

¹²⁰ Equality Act 2006, c. 3, §§ 1, 8(1)(d)–(e) (UK).

¹²¹ EQUAL. AND HUM. RIGHTS COMM’N, *supra* note 44, at 5.

¹²² *Id.*

¹²³ *Id.* at 102–04.

¹²⁴ *Id.* at 102–03.

¹²⁵ *See id.* at 21.

¹²⁶ *See id.* at 124.

the purpose or effect of violating a person's dignity, or creates an intimidating, hostile, degrading, humiliating, or offensive environment for them."¹²⁷

Through its construction of a protected characteristic as Jewish "race" or "ethnicity" for the purposes of "harassment" under section 26, the Commission was able to recognise antisemitic harassment occasioned by expressions of hostility to Israel, or anti-Zionist antisemitism. In so doing, it addressed the question of free speech, the *Macpherson* principle, and the definition of antisemitism.

i. Free Speech

Having explained the law on freedom of expression under article 10 of the ECHR and section 3 of the Human Rights Act 1998, the Commission went on to note that while speech does not lose the protection of article 10 just because it is offensive, provocative, or insulting, the ECHR does not protect racist speech.¹²⁸ This is because such speech negates, or is incompatible with, the fundamental values of tolerance, social peace, and non-discrimination guaranteed by article 17 of the ECHR.¹²⁹ The Commission noted that racist speech may include antisemitic speech and Holocaust denial, based on certain decisions by the European Court of Human Rights.¹³⁰ It was within this context that the Commission stated that "[a]rticle 10 will protect Labour Party members who, for example, make legitimate criticisms of the Israeli government. . . . It does not protect criticism of Israel that is antisemitic. . . . Where we refer to legitimate criticism of Israel throughout the report we mean criticism that is not antisemitic."¹³¹

The Commission gave examples of criticism of Israel which, it said, did not warrant the free speech protection of article 10 because they went beyond legitimate criticism of Israel and were therefore antisemitic. These included comments by Member of Parliament (MP) Naz Shah in 2015 that Israel should be relocated to the United States, her social media post likening Israeli policies to those of Hitler, and Ken Livingstone's support for those comments.¹³² Significantly, the Commission also found that responding to complaints of antisemitism by labelling them as "fakes" or "smears" was a denial of antisemitism, which amounted to the unlawful harassment of Jewish members.¹³³ This denialist narrative, known as the Livingstone Formulation, is frequently related to Israel and has become a contemporary antisemitic trope.¹³⁴ The Livingstone Formulation does not, therefore, enjoy free speech protection under article 10 of the ECHR.

¹²⁷ See *id.* at 22 (emphasis added).

¹²⁸ See *id.* at 25–27.

¹²⁹ *Id.* at 26.

¹³⁰ See *id.*

¹³¹ *Id.* at 27.

¹³² See *id.* at 28–30.

¹³³ See *id.* at 28–29.

¹³⁴ See David Hirsh, *Accusations of Malicious Intent in Debates About the Palestine-Israel Conflict and About Antisemitism*, 1 *TRANSVERSAL* 47, 47 (2010).

Other types of antisemitic conduct that the Commission found to amount to the unlawful harassment of Jewish members of the Labour Party included the allegation that Jews are part of a wider conspiracy; that Jews control others; and that Jews manipulate the political process, including the Labour Party, as well as statements referring to Jews as a “fifth column,” diminishing the significance of the Holocaust, and expressing support for Hitler and the Nazis.¹³⁵ While these are classic antisemitic tropes not directly related to Israel, they have become part and parcel of the broader anti-Zionist narrative and are often included alongside illegitimate criticism of Israel.

The Commission also discussed the antisemitic speech and conduct on social media by ordinary members of the Labour Party for whom the Labour Party could not be responsible under the Equality Act because they did not hold any office or role within the Labour Party.¹³⁶ These included claiming that complaints of antisemitism had been manufactured by the “Israel lobby,” blaming Jews for the actions of the State of Israel, accusing British Jews of greater loyalty to Israel than to Britain, using the term “Zio” to refer to Jews, and accusing Jews of crying antisemitism in bad faith to prevent Israel from being criticised.¹³⁷ These were examples of Israel-related antisemitism which did not warrant the free speech protection of article 10.¹³⁸

The Commission’s finding that the use of these antisemitic tropes amounts to the unlawful harassment of Jews means that these tropes are not entitled to free speech protection. It is a clear indicator that these tropes amount to racist speech rather than speech that is merely upsetting, provocative, offensive, or controversial, as was claimed by both the *Fraser* tribunal¹³⁹ and Sheffield Hallam University.¹⁴⁰

ii. The *Macpherson* Principle

The Commission endorsed the Labour Party’s compliance with the *Macpherson* principle in assessing antisemitic conduct and in deciding how to deal with it and was critical of the party for not having adopted it until 2018.¹⁴¹ Taking the point of view of the victim as the starting point for recording and investigating complaints of antisemitism allows for the possibility that an attack on Israel can amount to unlawful antisemitic harassment and implicitly acknowledges attachment to Israel as an aspect of contemporary Jewish identity for the purposes of the construction of “protected characteristic” under section 26 of the Equality Act. The Commission’s discussion of the *Macpherson* principle, by which all complaints of racism should, in the first instance, be recorded and

¹³⁵ EQUAL. AND HUM. RIGHTS COMM’N, *supra* note 44, at 28, 31.

¹³⁶ *Id.* at 31.

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See Mr R Fraser v. Univ. & Coll. Union* [2013] Employment Tribunal, ¶¶ 38, 155 (Reserved Judgment), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/eemployment-trib-fraser-v-uni-college-union-judgment.pdf>.

¹⁴⁰ Response from Liz Winders, Sec’y and Registrar, Sheffield Hallam Univ., to Christopher Parker (Feb. 29, 2016) (on file with the author).

¹⁴¹ *See* EQUAL. AND HUM. RIGHTS COMM’N *supra* note 44, at 35.

investigated as such when they are perceived by the complainant, or a third party, as an act of racism is consistent with the Commission's recognition that antisemitism is often an Israel-related phenomenon.

iii. The Definition of Antisemitism

The Commission's discussion of the range and volume of antisemitic conduct across the compliant sample provides clear cut examples of antisemitism under the IHRA definition. Indeed, the Commission stated that its findings were consistent with IHRA;¹⁴² that it "may have regard to the [IHRA]'s working definition of antisemitism and associated examples[;]"¹⁴³ and that the unwanted conduct meets the definition of "harassment" and would also meet the IHRA definition and examples.¹⁴⁴ The Commission clearly understood and recognised that antisemitism is frequently an Israel-related phenomenon and treated Jewish people as an ethnic or national group for the purposes of "harassment" under section 26 of the Equality Act. This allows for the possibility that an attack on Israel can amount to the unlawful harassment of a Jewish person because it engages his Jewish ethnic identity. This decision is surely in line with the dicta in *Mandla v. Dowell Lee* about the nature of Jewish identity under English law.¹⁴⁵

CONCLUSION

While the EHRC gives recognition to an affinity with Israel as an aspect of Jewish identity through its construction of "protected characteristic" for the purposes of section 26 of the Equality Act, we should exercise caution in claiming that this construction amounts to a general principle of law. This is because the Commission's decision does not set a binding precedent. It is merely persuasive as it is the decision of a statutory body rather than an appeal court. Nevertheless, what these three cases demonstrate is the gradual willingness by those adjudicating antisemitic harassment claims once again to recognise the broader ethnic and national dimension to Jewish identity, as first identified in *Mandla v. Dowell Lee* in 1982. This opens the door to the possibility of successful claims for unlawful harassment under section 26 of the Equality Act occasioned by antisemitic anti-Zionist expression.

¹⁴² *Id.* at 116.

¹⁴³ *Id.* at 125.

¹⁴⁴ *Id.* at 116.

¹⁴⁵ See *Mandla v. Dowell Lee* [1982] 3 All ER 1108, 1112–13; *Mandla v. Dowell Lee* [1983] 2 AC 548, 562.