

Equality Act claims, public functions and human rights – when and how

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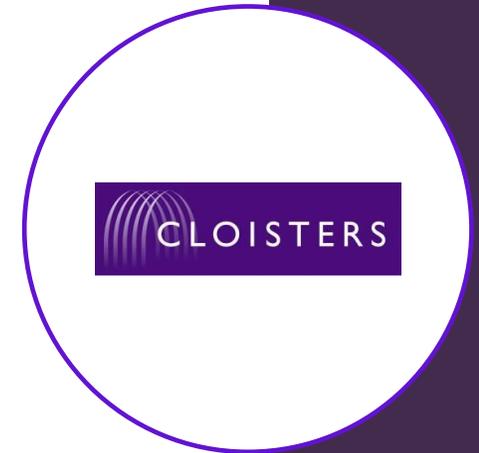
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Social and economic issues and public functions

- Housing
- Health
- Education
- Welfare benefits
- Immigration
- Planning



Consider carefully.....

Why not to introduce equality-based arguments?

Judicial conservatism towards equality-based arguments - Lord Reed in *R (SC) v SSWP* [2021] 3 WLR 428 at [162]:

“In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.”

Importance of carefully selecting when to rely on equality-based arguments.



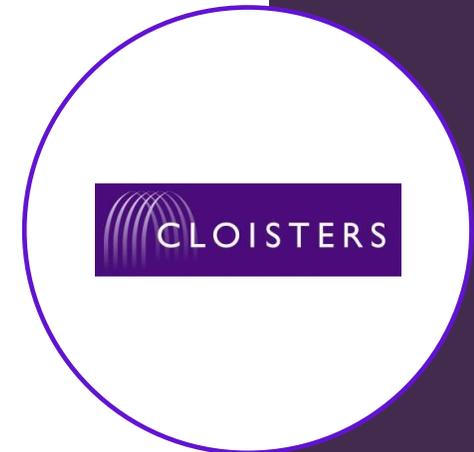
Thinking about equality arguments

Sources of equality / non-discrimination principles:

- Equality Act 2010
- Article 14, ECHR

Thinking steps before bringing an equality-based ground:

1. What is the right venue?
2. Who can bring a claim?
3. What is the right ground?
4. What standard of review applies?



Venue and Admissibility (1)

Forums:

- Part VII civil claims under the HRA and EQA
 - EqA claims before the County Court: *s.114(1) EqA (save for specified claims e.g. education disability)*
 - HRA civil claims can be brought in any court: *s.7(1)(a) HRA & CPR r.711(2)*
- Tribunal systems - HRA interpretation
- Judicial review: remedy of last resort – para 4.1(2) of PD 54A, requires a claimant to refer to any alternative appeal mechanism that exists or that could have been used

Consider: Key Q is whether alternative remedy adequately protects rights/interests of C:

- (a) Does the court / tribunal have the power to deal with the issue?
- (b) Does the claim raise broader policy issues or complex questions of law?
- (c) Is judicial review suited / necessary for the nature of challenge? – s.20/21? 19? PSED?
- (d) Funding prospects
- (e) Remedies available. Are damages a significant issue? No bar
- (f) Timing

R on the application of MM and DM v SoS for Work and Pensions[2012] EWHC 2106 (Admin)



Venue and Admissibility (2)

The EqA, HRA and public functions

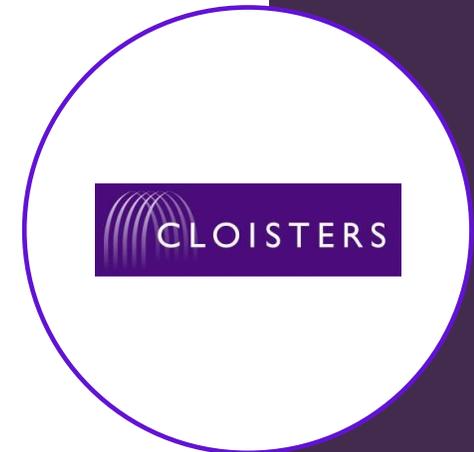
Part 3 of the EqA: Services and Public Functions:

- S.29(6) EqA: “A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation” (see further: R (Roberts) v Metropolitan Police Commissioner [2015] UKSC 79 at [42])
- S.31(4) & 150(5) EqA: “A public function is a function that is a function of a public nature for the purpose of the Human Rights Act 1998”

Overlap with s.6(3)(b) HRA: Public authority includes “any person certain of whose functions are functions of a public nature”. Includes:

- All activities of “core public authorities” (e.g. state departments, local authorities)
- For other entities: (i) body must have functions of public nature; and (ii) particular act in question must not be private act (see s.6(5) HRA).

Useful overview in R (Cornerstone (North East) Adoption and Fostering Service Ltd) v Office for Standards in Education, Children’s Services and Skills [2020] EWHC 1679 (Admin) at [240]-[243]



Venue and Admissibility (3)

Possibility of JRs under Parts 4 (premises) and 6 EqA (education) - obviously must be amenable to JR

Consider exceptions from EqA versus HRA

- There are general exceptions contained in Part 14 of the EqA (relating to statutory provisions; national security; charity; sport and age); with further general exceptions in Schedule 23 relating to statutory authority; religion or belief; and communal and non residential training
- Part 3 does not apply to age in respect of those who are under 18; marriage and civil partnership; harassment in respect of sexual orientation or religion or belief
- Schedule 3 sets out an extensive list of exemptions ranging from judicial functions to immigration and single sex services
- There are also exceptions in respect of the education provisions (single sex, religion and belief and disability in respect of schools; and single sex; religion and benefits and child care in respect of further and higher education).
- The remaining exemptions are unlikely to be relevant

HRA – reservation Schedule 3 Protocol 1 Article 2 (only so far as compatible with the provision of efficient instruction and training – in conformity with own religion and philosophical teaching)



Venue & Admissibility (4)

Art 14: Victim status & the ambit question

For s.6 challenges, s.7 HRA incorporates the Art 34 ECHR **victim status** requirement as the standing threshold in JR.

- But no victim test for invoking ss.3 and 4: *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 at paras 17, 62, 185.
- Covers potential victimhood: *R (Fox v Secretary of State for Education)* [2015] EWHC 3404 (Admin) at para 60.

Where Art 14 is concerned, the subject matter must fall within the **ambit** of another ECHR right: see *In re Mclaughlin* [2018] 1 WLR 4250 at para 17.



Who Is Protected? (1)

Protected characteristics under the EqA

Claimant must be able to invoke one of the exhaustive enumerated protected characteristics in EQA claims – Chapter 1 Protected characteristics:

- *Age – disability – gender reassignment – marriage and civil partnership – race – religion or belief – sex – sexual orientation*

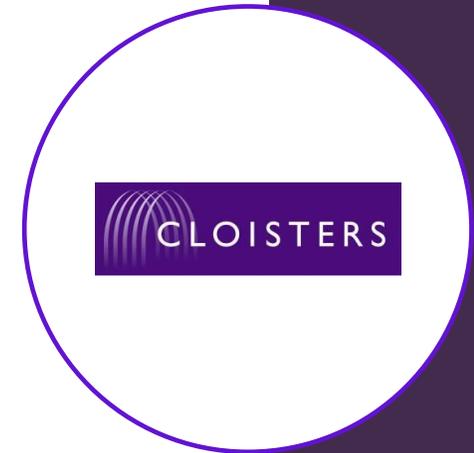


Who Is Protected? (2)

Disability s6

s.1 and Schedule 1 –

- physical or mental impairment
- which has a substantial
- and long term
- adverse effect upon
- the ability to carry out normal day to day activities
- Though threshold is low – substantial meaning more than minor or trivial (s.212) there are nevertheless some difficulties in proving disability and this arises particularly with mental health claims
- see for example *Sullivan v Bury Capital* [2021] EWCA Civ 1694 – long term being particularly problematic



Who Is Protected? (3)

Gender reassignment s7

(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment—

(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

Taylor v Jaguar Land Rover ET Case No. 1304471/2018.

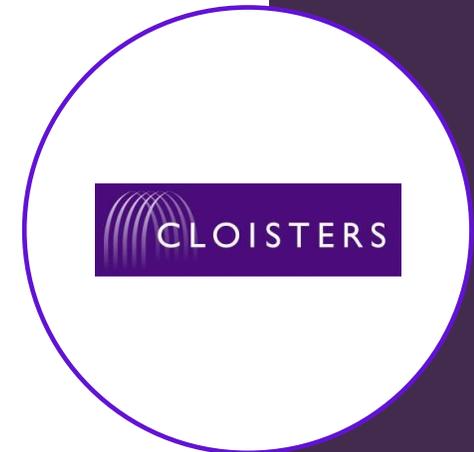


Who Is Protected? (4)

Protected statuses under Art 14

A wider range of statuses can be protected under Article 14:

- Enumerated statuses: “*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”
- Core statuses or “suspect grounds” requiring greater scrutiny (“weighty reasons” – see later:
 - Sex: *Konstantin Markin v Russia* [GC] No. 30078/06, 22 March 2012 at para 127.
 - Race: *DH v Czech Republic* [GC] No. 57325/00, 13 November 2007 at paras 176, 196.
 - Approach has been extended to other statuses at times: *R (SC) v SSWP* [2021] 3 WLR 428 at [103]-[112]
- Discrimination by association: *Molla Salli v Greece* [GC] no.20452/14, 18 June 2020, at para 134.
- Combined statuses: *BS v Spain*, no.47159/08, 24 October 2012.



Who Is Protected? (5)

Other status under Article 14

Concept of “other status” adds flexibility and breadth to scope of Art 14:

- Age: *Schwizgebel v Switzerland* no. 25762/07, 10 September 2010.
- Homelessness: *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311 at para 41.
- Victims of trafficking: *R (JP and BS) v Secretary of State for the Home Department* [2020] 1 WLR 918 at [146] and [150].

Are there limits? Discussed in *R (SC) v SSWP* [2021] 3 WLR 428 at [67]-[71]

- Child with two or more siblings as a status?
- Status can't be defined solely by reference to difference in treatment, but need not have independent social or legal significance



Who Is Protected? (6)

Disability under Article 14

Disability and various health impairments a protected “other status”: *Kiyutin v Russia*, no.2700/10, 10 March 2011 at [57]:

“Although Article 14 does not expressly list a health status or any medical condition among the protected grounds of discrimination, the Court has recently recognised that a physical disability and various health impairments fall within the scope of this provision (see Glor, §§ 53-56, and G.N. and Others, § 119, both cited above). The Court notes the view of the United Nations Commission on Human Rights that the term “other status” in non-discrimination provisions in international legal instruments can be interpreted to cover health status, including HIV infection (see paragraph 29 above). This approach is compatible with Recommendation 1116 (1989) of the Parliamentary Assembly of the Council of Europe, which called for reinforcement of the non-discrimination clause in Article 14 by including health among the prohibited grounds of discrimination (see paragraph 31 above) and with the United Nations Convention on the Rights of Persons with Disabilities which imposed on its States Parties a general prohibition of discrimination on the basis of disability (see paragraph 32 above). Accordingly, the Court considers that a distinction made on account of an individual’s health status, including such conditions as HIV infection, should be covered – either as a disability or a form thereof – by the term “other status” in the text of Article 14 of the Convention.”

- No exhaustive definition.
- Broad scope, covering health impairments which may not have longevity or substantial adverse effects to satisfy s.6 EqA.



Who Is Protected? (7)

Gender Identity under Article 14

Several cases before the ECtHR have addressed transgender issues: e.g. *Christine Goodwin v The United Kingdom* [GC] no28957/95, 11 July 2002.

Other status capable of covering all aspects of sexual orientation and gender identity: *Identoba and Others v Georgia*, no.73235/12, 12 May 2015 at [96].

- Subject to longevity of *Taylor v Jaguar Land Rover*, Art 14 would cover broader spectrum of identities than s.7 EqA.
- No need to be proposing or be undergo a process of gender reassignment.
- Gender fluid, non-binary and intersex persons within scope



Types of Discrimination and prohibited conduct(1)

EQA overview

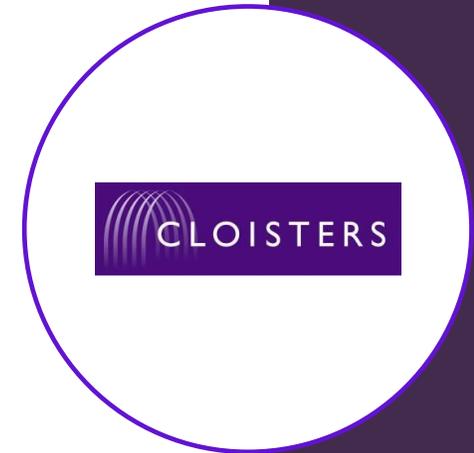
- s. 13 – DD – less favourable treatment because of PC than would treat others
- s. 15 – unfavourable treatment because of something arising in consequence of disability
- s. 19 – indirect discrimination
- s. 20/21 – failure to make reasonable adjustments – pc; auxiliary aid; physical features
- Harassment also prohibited – s.26; and victimization – s.27
- s. 149 – public sector equality duty



Types of Discrimination (2)

Direct Discrimination – s.13 EqA

- Because of protected characteristic: see *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and Ors* [2010] IRLR 136 or *Nagarajan v London Regional Transport* [1999] ICR 877
- No justification
- No requirement to possess protected characteristic in order to claim discrimination (and so association and perception covered)
- s.14 on combined discrimination has not been brought into force,
- (though see *Ministry of Defence v DeBique* [2009] UKEAT 0048/09/1210 at paras 164-170 combined discrimination in indirect discrimination)



Types of Discrimination (3)

Indirect Discrimination – s.19 EqA

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) *In relation to the protected characteristic of disability—*

- *(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
- *(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability*



Types of Discrimination (4)

Discrimination Arising from Disability

– s.15 EqA

- Much broader than s.13
- Requires the “something arising in consequence of” disability to be causative of the unfavourable treatment
- (see *Grosset v City of York* [2018] EWCA Civ 1105);
- Can be justified (proportionate means of achieving a legitimate aim) – the treatment that must be justified
- No discrim if D shows no knowledge/constructive knowledge



Types of Discrimination (5)

Duty to Make Reasonable Adjustments

– ss.20 / 21 EqA

s.20 sets out an overarching duty to make adjustments – individual schedules set out the detail of the duty as applicable to each part of the EqA

- (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.



Types of Discrimination (6)

Duty to make reasonable adjustments

Schedule 2

2. (1) A must comply with the first second and third requirements

(2) The reference in s.20(3) (4) or (5) to a disabled person is to disabled persons generally

(3) Section 20 has effect as if in subsection (4) for “to avoid the disadvantage” there were substituted (a) to avoid the disadvantage or (b) to adopt a reasonable alternative method of providing the service or exercising the function

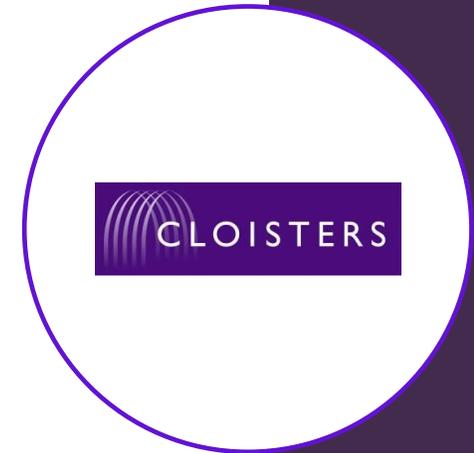
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(5) Being placed at a substantial disadvantage in relation to the exercise of a function means –

- (a) If a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit or
- (b) If a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment

.....

No requirement to alter the nature of the service; to take a step which A has no power to take



Types of Discrimination (7)

Other unlawful conduct

Public Sector Equality Duty – s.149

Harassment s.26

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Subsections 2 and 3 – sexual /gender reassignment harassment



Types of Discrimination (8)

Art 14 Overview

A single non-discrimination clause:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ECtHR has breathed life into clause through interpretation, covering:

- **Direct discrimination**
- **Two forms of indirect discrimination**
- **Duty to provide reasonable accommodation**

What's missing?

- DAD? Unclear whether Art 14 would extend to a quasi-DAD claim.
- PSED



Types of Discrimination (9)

Direct discrimination

As per *In re Mclaughlin* [2018] UKSC 48 at [15]:

1. Has there been a difference in treatment between persons in an analogous situation?
2. Is that difference of treatment on the ground of one of the statuses?

“Persons in an analogous or relevantly similar situation”

- Doesn't require comparator groups to be identical
- Case-by-case having regard to specific nature of complaint and context
- E.gs: Remand prisoners and convicted prisoners in relation to conjugal visits: *Varnas v Lithuania*, no. 42615/06, 9 December 2013 (compare to *R (Stott) v Secretary of State for Justice* [2018] UKSC 59) - Men and women as regards parental leave: *Konstantin Markin v Russia* [GC] No. 30078/06, 22 March 2012

There has been little substantial analysis of the “on the ground of” criterion in the ECtHR's case law.



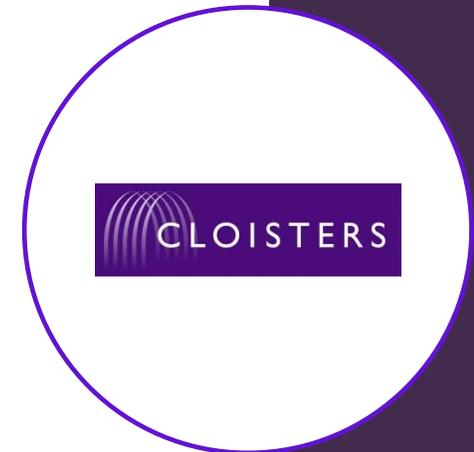
Types of Discrimination (10)

Indirect discrimination under Art 14

Two distinct forms:

- **Thlimmenos discrimination:** Failure to treat differently persons in relevantly different situations (*Thlimmenos v Greece*, no.34369/97, 6 April 2000).
- **Classic indirect discrimination:** Disproportionately prejudicial effects of a general policy of measure (*DH and Others v Czech Republic* [GC] no. 57325/00, 14 November 2007 at para 184).

Distinction recognised by domestic courts: see *R (Vincent) v SSWP* [2020] EWHC 1976 (Admin) at paras 17-24 for discussion.



Types of Discrimination (11)

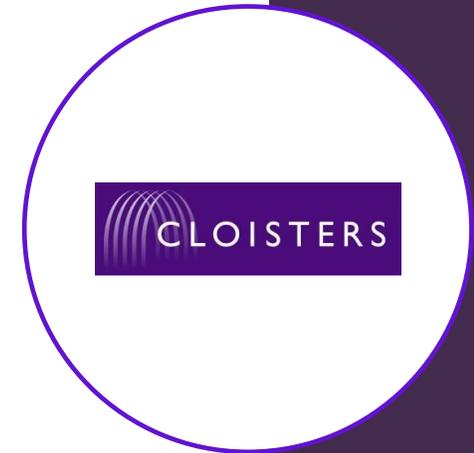
Duty to Provide Reasonable Accommodation

As per *GL v Italy*, no.59751/15, 10 September 2020 at [62]:

62. The Court thus considers that Article 14 of the Convention must be interpreted in the light of the requirements set out in the aforementioned texts, and in particular the CRPD (see paragraph 26 above). According to this instrument, the "reasonable accommodations" that persons with disabilities are entitled to expect are **"necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden" made "according to the needs in a given situation" to ensure to such persons "the enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms"** (Article 2, paragraph 26 above), and discrimination on the basis of disability "includes all forms of discrimination, including the denial of reasonable accommodation". **Reasonable accommodation measures are intended to correct factual inequalities** (see paragraph 26 above, see also, *mutatis mutandis*, *Çam*, cited above, §§ 65 and 67, and *Şanlısoy v. Turkey* (dec.), no. [77023/12](#), § 60, 8 November 2016).

The ECtHR's approach has been to refrain from defining what constitutes reasonable accommodation in a given context but gives a degree of deference to national authorities.

What has been important is whether authorities have approached the question with "great care" and conducted an individual assessment: see *Enver Sahin v Turkey*, no.23065/12 at [61]-[65].



Burdens of Proof & Standards of Review (I)

Burdens of proof under the EqA

Burden of proof – s.136 EQA:

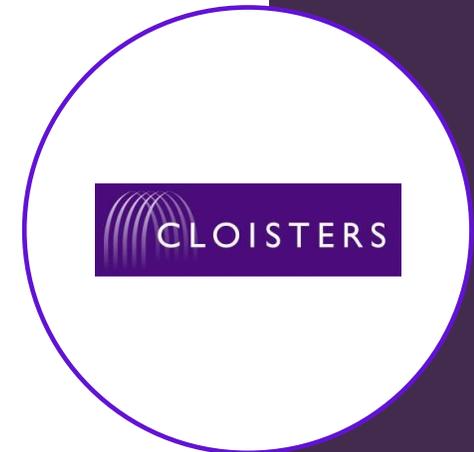
- C must establish primary facts from which court can find discrimination on BOP (inc. by inference and absent explanation)
- Burden then shifts to D to show on BOP no discrimination
- *Igen v Wong* -[2005] EWCA Civ 142
- *Project Management Institute v Latif* UKEAT 0028/07/CEA
- *Finnigan v Chief constable of Northumbria* [2013] EWCA Civ 1191



Burdens of Proof & Standards of Review (2)

Justification under the EqA

- No justification for DD – either because of PC or not
- Indirect discrimination - correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end; do the ends justify the means (striking a balance). It is the pcp to be justified (rather than treatment) confirmed *Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558
- No justification for s.20/21. Whether there's a breach rests on the reasonableness of the putative adjustment.
- Objective approach (see *Finnigan, R on the application of VC v SoS for Home Department* [2018] EWCA Civ 57; *Rowley at e.g. 29*); and *burden shifts once duty shown to apply and potential steps shown*
- No margin of appreciation or *Wednesbury* standard
- PSED relevance to reasonable adjustments;



Burdens of Proof & Standards of Review (3)

Burdens of proof under Art 14

General position is that claimant bears burden of proof, but very flexible approach.

As per *Timishev v Russia* no.55762/00 & Anor, 13 December 2005 at [39]:

“it adopts the conclusions that are, in its view, supported by the free evaluation of all evidence [...] proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.”

ECtHR has made use of burden shifting in its approach to certain Art 14 cases:

- Where information lies wholly or partly in the knowledge of authorities, burden can be placed on authorities to provide satisfactory and convincing explanation for difference in treatment: *DH v Czech Republic* [GC] no.57325/00, 13 November 2007 at [179].
- If applicant can show on basis of undisputed statistics a certain group is disproportionately affected by a policy, burden on authorities to show this is the result of objective factors unrelated to discrimination: *DH* at [180].

In any event, if prima facie case of discrimination established, onus is on State to provide justification: *Timishev* at [57].



Burdens of Proof & Standards of Review (4)

The Objective Justification Test

What has to be justified is the difference in treatment, not the measure: *A v SSHD* [2004] 2 AC 68 at [68].

Is there an objective justification?

- Does the differential treatment pursue a legitimate aim? And
- Is there a reasonable relationship of proportionality between the means and aim?

Glosses have been added to the test in certain cases:

- The MWRP test applies where allocation of scarce public resources: *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 at §§70-71.
- Anxious scrutiny and “*very weighty reasons*” required in cases where suspect grounds a ‘special feature’: *DH*.

Ultimately, multi-factorial approach and important not to get caught up on rigid distinctions. Strictness of standard of review depends on all circumstances including: (1) ground and nexus to that ground; (2) policy area; (3) COE consensus; (4) impact on individual.

Discussion of the above found in *R (SC) v SSWP* at [98]-[116].



Burdens of Proof & Standards of Review (5)

The Margin of Appreciation?

States enjoy MoA in assessing whether and to what extent differences in treatment can be justified. Scope varies in circumstances: *Fabian v Hungary* [GC] no.78117/13, 5 September 2017 at [114].

Does the MoA apply on the domestic level in the same way as in Strasbourg?

- Previous suggestions domestic courts could find breach at domestic level even if ECtHR would consider it within MoA.
- Disapproved in *R (Elan-Cane) v SSHD* [2022] 2 WLR 133: Rights have same content at domestic and European level. If acts/omissions within MoA under the ECHR there could be no breach of HRA.

Scope of MoA will rest on similar factors and is closely connected to proportionality assessment within the objective justification test.

Supreme Court decision in *In re H-W (Children)* [2022] 1 WLR 3243 at [48]-[51] decided appellate courts in HRA claims are not to undertake the proportionality exercise anew. Only tasked with reviewing application by first instance judge.



Other Sources of Law?

Interpretation of ECHR, HRA and EQA can be influenced by relevant principles and sources of international law:

- General principle of presumption of domestic legislative compatibility with international law: *R (JS) v SSWP* [2015] 1 WLR 1449 at para 137.
- International HR treaties (e.g. UNCRC, UNCERD, CEDAW, and CRPD) influential through HRA and ECHR: *R (DA) v SSWP* [2019] 1 WLR 3289 at para 78.
- This includes the interpretations of IHRL treaties through UN treaty bodies: *R (E) v Governing Body of JFS* [2010] 2 AC 728 at para 81.

UNCPRD committee & other UN treaty bodies as potential complaints mechanisms



Remedies

EqA:

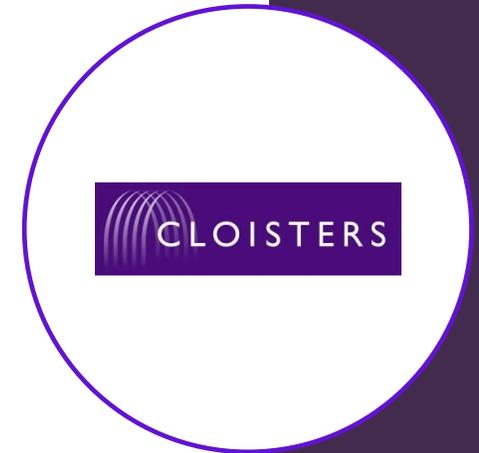
- s.119: county court can grant any remedy granted by High Court/in JR
- Damages – on Vento Scale – as applied to EqA in non employment in *Durrant v Chief Constable of Avon and Somerset [2017] EWCA Civ 1808*
- Injunctive relief/declaration (can include interim relief)

HRA:

- S.8 HRA: Remedy has to be just, necessary and appropriate to give victim “just satisfaction”, taking into account Art 41 ECHR.
- ‘Restitutio in integrum’ – place individual in position they would have been but for breach
- Compensation for pecuniary loss usually awarded
- Non-pecuniary damages discretionary and declaration can be considered sufficient just satisfaction



Questions?



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