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Hard won rights threatened with disappearance into the sunset

In his assessment of the Retained EU Law (Revocation and Reform) Bill in this edition of *Briefings*, Tom Moore warns that, if implemented as drafted, the UK is set to lose swathes of protection from unlawful discrimination. The Bill's purpose is to automatically revoke most retained EU law i.e. EU law as it applied to the UK at the end of the Brexit transition period; it will 'sunset' much of this law by December 31, 2023, unless an active decision is taken to retain it.

The Bill has been roundly condemned as an attack on rights, including employment and equality rights, enjoyed in the UK which are derived from, or reinforced by, EU law. The Scottish and Welsh governments have declared that they will not support it; the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission recommend the government ensures that its provisions relating to human rights and equality will not be implemented in their jurisdiction.

Concerns have also been expressed about the Bill's potential to undermine parliamentary sovereignty as it proposes to empower ministers to make changes to EU retained law via statutory instrument without parliamentary scrutiny. An additional role is envisaged for law officers such as the Attorney General for England and Wales or the Advocate General for Scotland to intervene in court cases, including after the case has concluded, in relation to the interpretation and effect of retained EU law where *'a higher court is considering any argument made by a party to proceedings that the court should depart from retained case law'.*

UK courts will no longer be bound to follow EU case law and will be under a duty to consider the extent to which retained EU case law restricts the proper development of domestic law. The impact of this duty and the ending of the application of EU principles in UK courts is extremely difficult to predict. The President of the Law Society of England and Wales has said that the Bill's *potential impact on legal certainty could be 'devastating'*.

The TUC considers that the 'Bill would be disastrous for working people'. Those most at risk are workers who have struggled to protect their rights such as atypical workers and women. UNISON has condemned it as a 'bonfire of workers' rights' and an 'attack on working women' and the EHRC has expressed concern about its potential impact on workers with the protected characteristics of sex and pregnancy and maternity as the rights at risk, such as maternity and equal pay, and parental leave, disproportionately affect women. As stated during the House of Lords debate: *'Any Bill that proposes to sweep away thousands of pieces of legislation and upend decades' worth of case law poses a threat to women accessing protection from discrimination in the workplace.'*

The government's cavalier attitude to the protection of rights is further illustrated in the report on the judgment in *TP and AR*, two severely disabled claimants who lost significant income when they were required to claim Universal Credit when they relocated to a new local authority. Despite three judicial review claims which confirmed that the Secretary of State for Work and Pensions had unlawfully discriminated against them, the respondent persisted in pursuing the case to the CA where it was firmly and finally, after five years of litigation, brought to an end.

In her analysis of the discrimination aspects of the challenge by *AAA and Others* against the government's policy to remove certain individuals claiming asylum in the UK to Rwanda, Zoe Bantleman reviews the Home Secretary's 'dangerous journey' criterion which the claimants argued, unsuccessfully, results in indirect discrimination on grounds of age, sex and nationality. She highlights the underlying problems with the High Court's view that the young men most affected by the criterion are not affected by reason of their inherent protected characteristics, but instead it is because they choose *'not to make asylum claims before arriving in the UK'*. However, as there is no asylum entry clearance application process to the UK, this choice does not exist in reality.

The DLA considers[1] that the UK's policy of processing asylum seekers in a third country or of denying asylum to those who do not use what the government calls *'safe and legal routes'* is incompatible with its human rights obligations.

The government's blatant disregard for its own human rights and equality law framework is staggering. In relation to the REUL bill, an ideological drive which ignores the consequence of legal uncertainty on businesses, employers and employees alike, and the unnecessary cost and absorption of resources as thousands of pieces of legislation are reviewed, all in the name of removing traces of the EU's contribution to the UK's legal framework is hard to comprehend.

DLA stands with those fighting for the rights of people experiencing human rights abuses or discrimination and supports them in challenging injustice; it joins with the trade unions, the business sectors and many others urging the government to withdraw the REUL Bill and calls for it to be scrapped.

Geraldine Scullion
Editor, Briefings

1 See the DLA's December 2022 submission to the Joint Committee on Human Rights in response to its call for evidence to its 'Human rights of asylum seekers in the UK' inquiry.

Religious discrimination and workplace clothing policies: consistency, comparators, and some persisting confusion?

Laurene Veale, barrister, Cloisters, reviews the recent decision of the Court of Justice of the European Union (CJEU) in *LF v SCRL* C-344/20 ✦ [2022] ECLI:EU:C:2022:774, October 13, 2022, which has brought religious discrimination to the fore once again in a case about a Belgian company's refusal to hire a woman because she was not willing to remove her headscarf at work. The author argues that the CJEU's finding that the employer's exclusionary clothing policy was not direct discrimination, although consistent with previous case law on this same issue, is unsatisfactory. While going some way towards encouraging workplace diversity, the judgment fails to squarely recognise the exclusionary effect of workplace clothing policies or give guidance on when they can be said to go too far. The decision is also difficult to reconcile with the court's more recent case law on direct disability discrimination.

Implications of the CJEU decision

This is the fifth case to come to the CJEU concerning women being denied work because of their hijab.

The judgment is noteworthy both in what it says and what it does not say. It provides welcome clarification on the distinction between religion and belief, and whether national laws treating religious, philosophical and political belief as separate grounds for discrimination provide equivalent or better protection than Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive).

The judgment also brings some clarity on the tricky question of comparators in discrimination claims, and specifically whether intra-group comparisons, such as between workers of different religions, or of the same religion but manifesting it differently, are permissible. However, on the circumstances in which such intra-group comparisons can reveal direct discrimination, the judgment raises more questions than it answers. For example the judgment fails to convincingly set out when less favourable treatment – such as refusing to hire a job applicant because of the manifestation of her religion – will amount to direct discrimination and when it will amount to a neutral policy with different impacts on different applicants.

In relation to indirect discrimination, and in particular the balance between workers' freedom of religion and employers' freedom to conduct business, this case is significant in that it is the first time that the CJEU has expressed a concern to encourage, in the context of workplace clothing policies, tolerance of a greater degree of diversity. It is also the first time that the court has recognised the risk of employers abusing so-called 'neutrality' clothing policies to the detriment of some workers. However, the court did not take the opportunity to provide guidance on which factors can legitimately weigh into this balance. How far can business concerns be taken into account? Putting it bluntly, can an employer rely on the potential loss of Islamophobic customers to justify a policy preventing workers from wearing any religious sign?

The judgment falls short of addressing the criticism which the court's stance on workplace headscarf bans has attracted in recent years. Nevertheless, it opens a fascinating new chapter in the dynamic debate about religious discrimination in the workplace.

✦ [2022] IRLR 70

The facts of the case

The claimant was refused an internship in a social enterprise in Belgium because she had indicated in the recruitment interview that she would not remove her headscarf to comply with the company's so-called *'policy of neutrality'* which required workers *'not to manifest in any way, either by word or through clothing … their religious, philosophical or political beliefs'*. [para 16]

When she realised that this was the reason for the refusal, she offered to wear another type of head covering, but the company maintained its refusal, on the ground that no type of head covering was allowed, not even a cap or hat.

"... the *'religion or belief'* protected characteristic will include spiritual or philosophical beliefs but not political or other beliefs ... religion and belief are two facets of the same protected characteristic..."

This scenario will have been familiar to the CJEU, which has already ruled on four cases – two in 2017 and two in 2021 – in which Muslim women in Belgium, France and Germany were dismissed because they were not willing to remove their hijab at work.

The questions referred by the Belgian court

The Belgian court referred three questions to the CJEU, which can be summarised as follows:

1. Are religion and belief two facets of the same protected characteristic, or are they two distinct characteristics?
2. Does Belgian law, which treats religious, philosophical and political beliefs as three separate grounds of discrimination, lower the level of protection envisaged in the Framework Directive?
3. Does the employer's policy of imposing 'neutral' clothing at work, with the practical effect of prohibiting headscarves, amount to direct discrimination?

This third question was broken down into six sub-questions, which essentially sought clarification about the appropriate comparator. Would it be a worker with no protected belief? Or one with a philosophical or spiritual belief, but no religious belief? Or one who adheres to a religion but who does not manifest it? Or a worker who holds the same religious belief but manifests not by wearing a headscarf but by wearing a beard?

Religion and belief as a single ground of discrimination

The court first specified that the *'religion or belief'* protected characteristic will include spiritual or philosophical beliefs but not political or other beliefs. This is because Article 21 of the EU Charter of Fundamental Rights refers to *'religion or belief'* and *'political or any other opinion'* separately, and Article 1 of the Framework Directive refers only to the former and not the latter. Therefore, *'political or trade union belief'* and *'artistic, sporting, aesthetic or other beliefs or preferences'* do not enjoy protection under the Framework Directive [para 27-28]. EU member states are free to legislate to protect those beliefs (as Belgium, France and Northern Ireland have done – among other jurisdictions – in relation to political beliefs) but that would be outside the scope of the Directive.

In answer to the first and second questions, the CJEU held that religion and belief are two facets of the same protected characteristic, and national laws splitting them as separate grounds of discrimination are not in accordance with the Framework Directive. Why does it matter? The question is not merely one of semantics; it can affect the choice of a comparator. This is key, because different comparators (or different comparison pools in indirect discrimination claims) can yield different outcomes to a discrimination claim.[1]

1 As explained by Advocate General Medina in this case, and by Advocate General Bobek in *Cresco* Case C193/17 [paras 55 and 62].

The Belgian court made the argument (as did Advocate General Medina) that separating the grounds of religion and philosophical or spiritual belief into two distinct grounds of discrimination would enhance protection from discriminatory treatment, since it would allow comparisons between religious workers on the one hand and workers with another type of protected belief on the other. As explained in Advocate General (AG) Medina's Opinion, that would bring to light discrimination which might not be visible if comparison is only between workers with a protected belief and those without [para 41]. On the facts of *LF,* it might be said that if other internship applicants who hold religious beliefs (but don't wear a visible religious sign) can comply with the employer's clothing policy, there is no less favourable treatment of them when compared to applicants without a protected belief, therefore any disadvantage faced by the hijab-wearing applicant cannot be because of religion. Instead, AG Medina argued, if the comparison is between two applicants with a religious belief but one manifests it through clothing and the other does not, unequal treatment resulting from the employer's clothing rule is more likely to be regarded as 'inextricably linked' to the religion of applicants concerned by religious clothing obligations *'given that those employees would be unable to meet the requirements of that rule unless they abandon the observance of the obligations prescribed by their faith.'* [para 42]

In its judgment, the CJEU clarified that:

> *the existence of a single criterion, encompassing religion and belief, does not prevent comparisons between workers motivated by religious belief, on the one hand, and those motivated by other beliefs, on the other; nor does it prevent comparisons between workers motivated by different religious beliefs.* [para 59]

... intra-group comparisons are permissible in EU equality law if they assist in identifying discriminatory treatment.

In other words, intra-group comparisons are permissible in EU equality law if they assist in identifying discriminatory treatment. But, according to the CJEU, the question of comparators is only relevant to direct discrimination claims, which this case was not [para 58]. For this conclusion, the court referred to its previous case law, specifically *Achbita v G4S Secure Solutions NV C-157/15* [2017] ECLI:EU:C:2017:203, March 14, 2017; Briefing 829 [2017]; and the joined cases of *IX v WABE eV* C-804/18 and *MH Müller Handels GmbH v MJ* C-341/19 [2021] ECLI:EU:C:2021:594; Briefing 1004 [2022], July 15, 2021.

The 2017 case of *Achbita*, and the related case of *Bougnaoui v Micropole SA* C-188/15 [2017] ECLI:EU:C:2017:204 March 14, 2017, heard on the same day, concerned women (a receptionist and a design engineer respectively) dismissed for refusing to remove their headscarves at work. The court held that direct discrimination was not made out because the two employers' rules against the wearing of visible signs of political, philosophical or religious beliefs had applied to all workers without distinction. The court maintained this position four years later, in *WABE* and *MJ*, which were again about two women dismissed for refusing to remove their headscarves at work. The CJEU rejected the argument made by AG Sharpston that the employer's clothing policy singles out members of non-Christian religions who regard themselves as obliged to wear mandated religious apparel, and that this *'looks very much like direct discrimination'* on the prohibited ground of religion [para 123 of her Opinion]. The court recognised that the policy was capable of causing *'inconvenience'* to these workers [para 52], but since everyone may have a religion or belief, the rule did not create differential treatment based on a criterion inextricably linked to religion [para 53].

However, the court in *Wabe* accepted that a rule prohibiting the wearing of *'conspicuous, large scale signs'* of religious, political or philosophical belief (as opposed to all signs of such beliefs) could constitute direct discrimination, since such a rule was capable

of being '*inextricably linked to one or more specific religions or beliefs*' [para 73]. In other words, a policy banning conspicuous signs could potentially target some religious manifestations – such as headscarves – over others and therefore might not be said to apply consistently to all without distinction.

What is puzzling is that, if a clothing policy against large-scale or conspicuous religious signs can be directly discriminatory, why isn't a ban of all religious signs also discriminatory, in that it targets certain religious beliefs (those that come with clothing precepts) over others?[2] As AG Sharpston explained in her Opinion in *Wabe*:

> *It seems to me to follow that a total ban on all religious signs will necessarily discriminate against all religious groups who consider themselves to be obliged to wear mandated religious apparel as compared with (i) members of religions in which specific apparel is not mandated and (ii) those employees who are atheist or agnostic.* [para 122]

The conclusion in *LF*, rejecting the argument that an employer's refusal to hire a hijab-wearing applicant does not constitute direct discrimination, is even more puzzling in light of the CJEU's reasoning in the 2021 case of *VL v Szpital Kliniczny im. dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* C16/19 [2021] ECLI:EU:C:2021:64; Briefing 963 [2021], January 26, 2021 [para 34]. This case was about an employer granting disabled workers a financial allowance if they had applied for a disability certificate after a certain date. The claimant had applied for the certificate before that date and was denied the allowance. The CJEU held that this could amount both to indirect and direct discrimination. The start date for applications could be seen as a neutral criterion applied to all disabled workers without distinction, but having the effect of putting certain workers (those who had applied for certificates before the date) at a disadvantage because of the nature of their disability (for example, a worker with a visible or severe disability might have sought a certificate at an earlier date). That would be indirect discrimination. However, the court also held that the employer's refusal to give an allowance to some workers but not others was less favourable treatment which would amount to direct discrimination if the national court found that the refusal was based on a criterion '*inextricably linked to the disability of the workers who were refused that allowance*'. [para 51] One factor which might indicate that the criterion for the refusal was inextricably linked to their disability was the fact that the disability certificate gave rise to specific rights, which some workers, because of the nature of the disability, may have sought to exercise as early as possible, therefore applying for the certificate prior to the date set by the employer.

If the refusal of the allowance in *VL* was less favourable treatment, the refusal of an internship must surely also be.

It is difficult to see why the court did not apply this reasoning in *LF*. If the refusal of the allowance in *VL* was less favourable treatment, the refusal of an internship must surely also be. The question is then whether the refusal is because of something inextricably linked to the applicant's religion. The wearing of signs or clothing such as a headscarf is a manifestation of religion (as recognised by the court in *Achbita* [para 30] and *Wabe* [para 46]). That manifestation is inextricably linked to religion.

In support of its conclusion that there was no direct discrimination on the facts in *LF*, the court noted that it had not been alleged that the claimant '*has been treated differently from any other worker manifesting his or her religion or religious or philosophical belief through the visible wearing of signs or clothing or in any other way.*' [para 36]

2 AG Medina in her Opinion in *LF*, expressed her disagreement with the conclusion in *Wabe* in this regard: in her view, the court's approach *'diluted the references to differential treatment regarding employees who are not merely manifesting their religion or religious beliefs but observing them by wearing particular clothing.'* [para 50]

But this appears to use the wrong comparator: the appropriate comparator for a direct discrimination claim is someone who does not have the specific protected characteristic said to be the cause of the less favourable treatment, in this case the manifesting of religion through a visible sign or clothing. In *VL*, the court did not ask: has the claimant been treated differently than any other worker who applied for a disability certificate before the employer's specified date? Instead, it compared those disabled workers who were able to comply with the employer's specified date, and those disabled workers who could not, and left it for the national court to decide if the reason for any difference in treatment was inextricably linked to their disability. Applying the same approach in *LF*, it becomes clear that the comparison is between a worker who can comply with the employer's clothing policy and is hired, and a worker who cannot so comply and is not hired. The reason for the difference seems clear: the latter is manifesting her religion by wearing a headscarf, the former is not.

LF therefore leaves the position on direct discrimination in a somewhat unsatisfactory place, since the confusion arising from some of *Wabe* reasoning remains, and there appears to be some inconsistency with the approach in *VL*.

Indirect discrimination: the justification of exclusion

Unsurprisingly, the CJEU in *LF* recognised that the employer's clothing policy could amount to indirect discrimination. But on the question of justification, the judgment in *LF* does not row back on the controversial position – established in *Achbita* and *Wabe* – that the aim for an employer to display to customers '*a policy of political, philosophical or religious neutrality*' is legitimate [para 40] and that preventing workers from wearing clothing deemed to have religious connotations is an appropriate means of achieving this aim (*Achbita* [para 42]).

... the aim for an employer to display to customers '*a policy of political, philosophical or religious neutrality*' is legitimate.

Nevertheless, to be justified, the policy needs to be '*genuinely pursued in a consistent and systematic manner*' (*Achbita* [para 40]) and limited to what is strictly necessary – for example, applying the policy only to customer-facing workers, as was suggested in *Achbita* [para 42]. One factor which might be relevant is whether the employer could have, without '*being required to take on an additional burden*', offered the worker a non-customer facing role instead of dismissing her (*Achbita* [para 43]).

In *Wabe*, the court went somewhat further than *Achbita*, stating that an employer needs to show not just that the policy is genuinely pursued, but also that it responds to a '*genuine need*' on the part of the employer [para 64]. To establish a genuine need, account can be taken of the '*rights and legitimate wishes of customers or users*', for example a parent's '*wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children*' [para 65]. The court also held that '*particular relevance should be attached*' to any evidence that the employer might suffer adverse consequences in the absence of the 'neutral' clothing policy (for example loss of profit) [para 67].

The court received criticism for placing a low bar for employers to justify so-called 'neutrality' clothing policies in the workplace, leaving little room for tolerance of workers who wish to respect certain religious clothing precepts.[3] One criticism was that in permitting an employer's freedom to conduct its business to trump a worker's right to manifest her religion, the court went beyond what is permitted by the International Covenant on Civil and Political Rights (to which all EU countries are signatories). The Covenant allows a restriction to the freedom of religion only if it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

3 For example, see E. Howard, *Islamic headscarves and the CJEU: Achbita and Bougnaoui*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 357.

Freedom to conduct a business is not among the freedoms recognised in the Covenant.

A further criticism is that although the court has emphasised that the freedom to conduct business is recognised in Article 16 of the EU Charter of Fundamental Rights, it is caveated in the Charter as being a freedom to conduct a business '*in accordance with Community laws and national laws and practices*'. Arguably, the Charter therefore does not stop EU equality law limiting the freedom to conduct business in a manner that ensures equality of treatment.

Perhaps in response to these criticisms, the court in *LF* emphasised the significance of the right to freedom of thought, conscience and religion [para 35], and expressed '*the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity*' [para 41]. It also recognised, for the first time, the possibility of '*abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing*' [para 41]. This language is significant in that it puts an emphasis on the desirability of diversity and tolerance in the workplace, a position which might inform the assessment by courts of an employer's justification for the exclusionary effects of its clothing policy. But *LF* does not go so far as specifying when an employer can be deemed to be abusing a 'neutrality' policy, or what factors might indicate such abuse (which would, in all probability, be the same factors indicating that the policy was not genuinely pursued and/or limited to the strictly necessary).

...'the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity'.

Another notable aspect of the judgment in *LF* is that the court does not take up the opportunity to provide guidance on which factors can legitimately be considered when assessing an employer's genuine need for imposing a 'neutrality' clothing policy on its workers. In *Wabe* it was held that the '*legitimate wishes*' of customers can be taken into account, which inevitably leads to the question: what is a legitimate wish? Is it legitimate for a customer to prefer to receive a service only from workers who do not wear any religious signs? Can a business rely on such a preference to restrict its workers' right to the freedom to manifest their religion?

LF also fails to explain what weight may be given, in the balance between freedom of religion and freedom to conduct business, to the potential adverse economic consequences on an employer of the absence of a 'neutrality' policy. Can employers rely on an anticipated (but not actual) loss of business from customers who are not tolerant of religious signs, or worse still, of specific religions? Looking at the facts of *LF*, would the possibility of the company losing Islamophobic customers be enough to tip the balance towards justifying the headscarf ban? Couldn't it be said that this possibility always exists, given that the general public includes people with a range of degrees of tolerance, including, inevitably, very intolerant people?

The principle that businesses can hide behind the prejudices of customers might be said to fly in the face of the principles of equality underpinning the Framework Directive. The CJEU's case law has long made clear that businesses cannot rely on the xenophobic or racist preferences of customers to get away with discriminatory treatment. Nearly 15 years ago, the court in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* C-54/07 [2008] ECLI:EU:C:2008:397 July 10, 2008 found that an employer committed direct discrimination by declaring that it would not employ Moroccan immigrants in line with the preferences of its customers [para 25]. By analogy, would an employer who refuses to hire a hijab-wearing worker, citing as justification the potential loss of customers intolerant of Islamic religious signs, not also be liable for discrimination?

LF does not answer these questions. The judgment merely emphasises that EU law does not stop member states from legislating to ascribe greater importance to the freedom to exercise or manifest a religion or belief than other freedoms, such as for example the freedom to conduct a business [para 52]. This might be said to amount to shying away from addressing the very serious problem raised in *LF*, and which AG Medina succinctly describes in her Opinion:

> *as a consequence of the judgment in WABE, employees observing religious clothing obligations are faced with the dilemma, in the literal sense of the word, of deciding between retaining a job in an undertaking or respecting the obligations prescribed by their faith'.* [para 50]

Many fear, as explained by AG Medina in her Opinion, that if such policies were to be generalised, Muslim women will suffer *'a deep disadvantage to becoming employees'* and a risk of being excluded from the labour market, creating a situation where '*double discrimination is a real possibility*', namely religious and sex discrimination [para 66]. *LF* does little to address this.

Relevance to the UK

CJEU decisions which post-date Brexit are not binding on UK courts but s6(2) of the European Union (Withdrawal) Act 2018 specifies that courts may *'have regard'* to such decisions so far as it is relevant to the matter before them. In practice, this decision will have inevitable relevance to courts in the UK not only in providing some guidance on how the Framework Directive is to be interpreted (implemented in the UK by the Equality Act 2010 (EA)), but also because the judgments touches on fundamental principles of equal treatment at work. UK courts are unlikely to adopt a more lenient approach to assessing the lawfulness of exclusionary clothing policies at work. On the contrary, courts may well go beyond the CJEU's stance, to hold that on a plain reading of the EA, and specifically section 13 which sets out the prohibition of direct discrimination, an employer refusing to hire a worker due to her headscarf amounts to less favourable treatment on the ground of religion or the manifestation thereof.

Conclusion

The judgment in *LF* will come as a disappointment to those hoping for a reversal of the CJEU's position on whether banning religious signs in the workplace can constitute direct discrimination. Despite some welcome clarification on the distinction between religion and belief, and the possibility of intra-group comparisons to reveal discrimination, the court has maintained the position that excluding workers who cannot comply with a 'neutral' clothing at work policy is not directly discriminatory. On indirect discrimination, and specifically when such policies will be justified, the judgment goes some way towards encouraging diversity in the workplace and brings attention to the risk of abuse of such policies to the detriment of some workers. Nevertheless, it leaves many questions unanswered, especially in relation to which arguments an employer might legitimately deploy to justify an exclusionary clothing policy.

Potential impact of the Retained EU Law (Revocation and Reform) Bill on UK discrimination law

Tom Moore, employment solicitor at Cole Khan Solicitors LLP, considers the potential impact of the proposed Retained EU Law (Revocation and Reform) Bill (REUL Bill) on UK discrimination law. As drafted, the Bill, which at the time of publication of *Briefings* is still at the committee stage in the House of Lords, could have a massive impact on anti-discrimination law and lead to a significant loss of protections. The only clear outcome he can foresee at this point is uncertainty for discrimination practitioners and complainants.

Introduction

The REUL Bill gives rise to so many uncertainties. While there are some known unknowns, the impact of this bill – if passed in its current form – will be substantial. It is likely that there will be several unforeseen consequences. One very foreseeable consequence is the loss of protections from discrimination in our domestic law.

This article does not provide a detailed account of the various mechanisms by which EU-derived laws may remain on the statute book beyond 2023, should the government, or other bodies, elect to keep them. Nor does it explore other laws or principles outside of the discrimination sphere which are at risk. There are other publications and groups no doubt which will address the Bill's impact on environmental regulations, the Transfer of Undertakings (Protection of Employment) Regulations or any number of the thousands of other EU-derived rules which are part of our legal system.

We do know what is at risk in terms of EU-derived discrimination law and principles, but we do not know what will come to replace them. Until the government provides further clarification, practitioners of discrimination law can only speculate about what protections might be disappearing. This article will focus on how we have kept EU-derived laws and principles following Brexit, how the REUL Bill proposes to get rid of these, and what specific discrimination laws and principles are at particular risk as a result of the Bill in its present form.

While the Scottish Government considers that the Bill should be withdrawn and the Welsh Government has recommended that the Senedd withholds consent for it, it should be noted that a different scenario applies in Northern Ireland. The Equality Act 2010 (EA) does not apply in this jurisdiction and there are unresolved issues relating to the Northern Ireland Protocol and Northern Ireland's unique constitutional position. The joint position of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland on the REUL Bill is summarised below.

What did the EU give us, and how are we getting rid of it?

Before exploring the mechanics of the REUL Bill, it is important to review how EU law and principles became part of UK jurisprudence.

European Communities Act 1972

When the UK joined the European Communities in 1973, European laws and principles were incorporated into UK legislation through various provisions of the European Communities Act 1972 (ECA). This meant that (what are now known as) EU regulations and directives were brought into domestic law and rulings from the Court of Justice of the European Union (CJEU) were binding.

With this binding jurisprudence came binding principles of EU law which applied in our courts. This includes the principle of supremacy of EU law whereby European law must be given priority over any domestic law of a member state. There is also the *Marleasing* principle under which domestic legislation which implements an EU directive is required to be interpreted consistently with the directive itself. Along with other general principles of EU law introduced into domestic law, the principle of direct effect ensured that EU law could confer rights on individuals which the UK and other member states were bound to enforce.

Since the ECA brought European law into our legal system, individuals and organisations have relied on this developing law to enforce their rights. The UK parliament has introduced primary legislation to ensure that domestic law complies with EU discrimination law. Both strands have developed in tandem.

European Union (Withdrawal) Act 2018

Following the UK's Brexit vote in 2016, the government needed to find a way to divorce itself from the EU legal system. This was done through the European Union (Withdrawal) Act 2018 (the 2018 Act). This was an extremely cumbersome piece of legislation, but its effect was to create a freeze-frame of EU law and incorporate this into domestic law. It was from this platform that the government could decide which bits of EU law it would like to keep, and which bits it would like to tweak or get rid of altogether.

Following the UK's Brexit vote in 2016, the government needed to find a way to divorce itself from the EU legal system.

EU law was copy-and-pasted into the UK statute book by the following provisions:

- s2 of the 2018 Act which kept in '*EU-derived domestic legislation*' – effectively any domestic legislation which was enacted pursuant to the UK's membership of the EU;
- s3 of the 2018 Act which ensured that any EU regulations became part of UK law; and
- s4 of the 2018 Act which essentially caught everything else which might otherwise disappear, for example any directly effective rights contained outside any regulations or directive.

The 2018 Act gave the UK some time and certainty as to the position of EU law, but it was a mere holding position.

Following the 2018 Act, there was pressure from some corners on the ruling Conservative party to speed up the process of divergence from EU law.

Mechanism of the Retained EU Law (Revocation and Reform) Bill[1]

The REUL Bill creates a proposed mechanism for divergence from the selected EU law which has been retained until now by the 2018 Act.

The purpose of the REUL Bill is to allow the UK to get rid of all retained EU law by December 31, 2023 should it so wish.

The Bill uses the language of 'sunsetting' relevant EU law, and at Clause 1, sets out the following default position:

> *1. The following are revoked at the end of 2023 –*
> *(a) EU-derived subordinate legislation;*
> *(b) retained direct EU legislation.*

Subordinate legislation which would be revoked under Clause 1(1)(a) would include EU law which has been preserved, and any statutory instruments derived from EU law.

1 The author acknowledges with thanks Professor Catherine Barnard (Trinity College, Cambridge) and Littleton Chambers' recent panel discussion on this topic, a recording of which can be found here: www.youtube.com/watch?v=TR3zfUMVhp8

Retained direct EU legislation referred to in Clause 1(1)(b) would include any EU regulations which were kept in UK law, and any other rules which were transposed into UK law under s4 of the 2018 Act.

It should be noted that primary legislation will not be affected, so statutes such as the EA which were introduced so as to comply with relevant EU directives, will remain in force after 2023.

There are exceptions to this automatic revocation, and the REUL Bill contains several possible mechanisms which, in effect, would allow the government or other competent authorities (e.g. the devolved governments) to keep, delay the removal of, or amend almost all of the retained law and principles. Investigating these hypotheticals would only give rise to any number of unknown unknowns, so this article will simply focus on what could be removed under the default position, should parliament enact this Bill in its current form, and the government (or other competent authority) elect not to act further.

It is unclear exactly how many individual laws and regulations could be wiped from the statute book if the default position is followed, but the government's own reports suggest these number well over 3000.[2]

In addition, under Clauses 7 (3) and (4) of the Bill, domestic courts are essentially given a reminder that European case law is no longer binding, and are instructed to consider:

> *… the extent to which the retained EU case law restricts the proper development of domestic law.*

With this in mind, domestic courts are nudged to depart from its own (EU-influenced) domestic case law where they consider it right to do so.

Principles of EU Law: what might we be losing in the discrimination context?

… under Clause 4(1) of the REUL Bill the principle of supremacy of EU law will be removed.

Some of the principles of EU law which are set to disappear upon the enactment of the proposed REUL Bill are set out below. By looking at these together, we can see how these principles have informed the fabric of domestic discrimination law and the practical impact that the removal of these principles might have on future cases.

The following principles will be lost:

Supremacy of EU law

First of all, it should be noted that under Clause 4(1) of the REUL Bill the principle of supremacy of EU law will be removed. There will no longer be any clash between what remains of retained EU law and domestic law.

Effectiveness of EU law

There will be no direct effect of EU law under which individuals would have previously been able to enforce clearly identified EU-derived rights. Domestic courts will no longer be required to enforce rights which can be derived from EU treaties.

The Marleasing principle

This principle is derived from the CJEU case of the same name.[3] Its practical impact was to require domestic courts to interpret domestic legislation which implements an EU directive consistently with the object and purpose of the directive itself.

2 www.public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance

3 *Marleasing SA v La Comercial Internacional de Alimentación SA* (1990) C-106/89

General principles of EU law

These general principles of EU law – however vaguely defined – will necessarily be removed. This includes the general principle of equal treatment as set out in the CJEU case of *Mangold v Helm.*[4]

Practical examples of these rights in the discrimination sphere are set out below.

How have these principles informed domestic law?

The above interpretive principles have made their way into domestic jurisprudence, and helped build practical protections from discrimination. For example, the domestic courts' interpretation of Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive) has allowed for the expansion of the definition of disability. In the EAT case of *Paterson v Commissioner of Police of the Metropolis*,[5] Elias P stated:

> *We must read [the relevant domestic legislation] in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment.* [para 67]

Domestic interpretation of the Framework Directive has also helped courts to interpret the EA in other areas such as victimisation. This happened in *Jessemey v Rowstock Ltd*[6] in which the CA relied on the directive to help it determine that the EA should be interpreted so as to ensure that post-employment victimisation was unlawful.

Principles of EU law have also helped expand protections for groups of people who may not otherwise have enjoyed such protection. Throughout the last decades, the rights of 'atypical workers' have been subject to several determinations by the appellate courts. Only in the last few years has the SC in the *Uber*[7] case expanded and clarified the definition of worker by placing reliance on the Working Time Directive.[8]

There is no way of knowing how a domestic court or tribunal will interpret domestic legislation, because there is little in the way of new principles or domestic guidance.

The SC in *Pimlico Plumbers*[9] also relied on EU principles to develop and expand rights for a larger group of individuals. For example, more '*limb (b) workers*'[10] enjoy basic protections from discrimination as a result of this interpretation.

What will replace these interpretive principles, and what will be the effect?

Over the course of decades, domestic courts have relied on these principles when expanding protection from discrimination. The removal of these principles seems most likely to affect those individuals whose status was previously uncertain. There is no way of knowing how a domestic court or tribunal will interpret domestic legislation, because there is little in the way of new principles or domestic guidance.

4 *Mangold v Helm* (2005) C-144/04; Briefing 407 [2006]

5 *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522; Briefing 477 [2008]

6 *Jessemey v Rowstock Ltd* [2014] EWCA Civ 185; Briefing 713 [2014]

7 *Uber BV and others v Aslam and others* [2021] UKSC 5

8 Council Directive 93/104/EC of November 23, 1993 concerning certain aspects of the organization of working time

9 *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29; Briefing 861 [2018]

10 A 'limb (b) worker' refers to s230(3)(b) of the Employment Rights Act 1996. The term distinguishes an employee defined as a 'worker' because they work under a contract of employment from a person who works under any other contract whereby the individual undertakes the work or performs services personally and the other party to the contract is not a client or customer of any profession or business carried on by the individual. 'Worker' status will capture a larger group of people than those with 'employee' status. Worker status provides some forms of protection for individuals who might not otherwise enjoy certain protections from discrimination, which are not afforded to independent contractors and the genuinely self-employed.

Courts will of course still be able to apply any EU law which has been retained, but its interpretation will not be subject to the same principles. Further, courts and tribunals will be free to make their own interpretation of binding domestic jurisprudence which interpreted EU law. This begs the question: to the extent that it relied on principles of EU law, will courts be able to treat parts of binding domestic jurisprudence as non-binding, and elect to take a more 'British' approach to it? It does seem that even where EU law has been preserved, its informing principles of interpretation will be lost.

With the potential loss of an unknown number of EU-derived laws and the interpretive principles which inform them, it is clear that unless more guidance is given, uncertainty will reign. In the absence of positive guidance or legislation, practitioners are unlikely to have clarity for several years. New case law and principles might arise, but there will inevitably be a period of time in which there is no guidance, and everyone is forced to start from a clean slate.

Summary of the NIHRC / ECNI briefing on the Retained EU Law (Revocation and Reform) Bill

The Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland (the Commissions) have identified a number of concerns about the impact of the REUL Bill which are particular to Northern Ireland.

Prior to the UK's departure from the EU in January 2020, the UK Government committed to ensuring that certain equality and human rights in Northern Ireland would continue to be upheld after Brexit. This commitment was set out in Article 2(1) of the Protocol on Ireland/Northern Ireland to the EU Withdrawal Agreement (Protocol Article 2). It derives from recognition by the UK and EU that equality and human rights were the heart of the Belfast (Good Friday) Agreement 1998 (the 1998 Agreement) and are central to the peace process in Northern Ireland and should be protected.

The Commissions have a statutory role in monitoring the implementation of Protocol Article 2 which commits the UK government to ensure *'no diminution of certain rights, safeguards and equality of opportunity protections'* as a result of the UK's withdrawal from the EU. To fall within the scope of Protocol Article 2, the human rights or equality protection relied on must be covered by the relevant chapter of the 1998 Agreement and have been underpinned by EU law binding on the UK on or before December 31, 2020. As a consequence, retained EU law relating to human rights and equality will continue to have particular significance in Northern Ireland.

Not only does Protocol Article 2 enshrine the UK's commitment to ensure 'no diminution' of rights as a result of Brexit, *'including in the area of protection against discrimination'*, but it also includes a commitment to 'keep pace' with future changes in relation to certain EU equality law directives.

The Commissions believe that, without amendment, certain provisions in the REUL create a risk of breach of this international legal commitment.

The Commissions are concerned that providing for automatic repeal/revocation of a large volume of legislation within a short period creates a risk that human rights and equality legislation relevant to Protocol Article 2 would not be preserved, restated or re-enacted in time and that the delegated powers in the Bill present a risk of policy change without due scrutiny. The Commissions advise that failure, within set deadlines, to preserve and/or restate all relevant EU-derived subordinate legislation, and/or failure to identify and preserve or re-enact relevant Retained Direct EU Legislation in Northern Ireland within scope of Protocol Article 2,[1] would result in a breach of the Protocol.

The Commissions make a number of recommendations to preserve all Northern Ireland's human rights and equality legislation; these include a recommendation that the REUL Bill is amended to exclude all legislation insofar as it is effective in Northern Ireland and relates to human rights and/or equality, including all legislation that falls within the scope of Protocol Article 2.

1 The Commissions have produced an initial assessment of Protocol Article 2, how it is engaged and what rights, safeguards and equality of opportunity protections fall within its scope.

Concepts which we might consider to be fairly settled, such as 'disability', '*less favourable treatment'*, and 'worker', could well be up for wholesale redefinition.

Discrimination cases issued from January 2024 in the ET might not be heard until 2025 or later. To obtain any binding precedent, litigants must therefore have the will (and funds) to issue an appeal. It may be much closer to 2030 by the time there is any form of settled case law on these issues. That presents a real challenge for those involved in drafting pleadings in many discrimination claims from January 1, 2024 onwards.

EU laws and directives: what might we be losing in the discrimination context?

Maternity and parental protections

To the extent that maternity and paternity protections are contained within the EA or other primary legislation, these remain safe. However, a significant amount of the detail surrounding these protections is contained within the Maternity and Parental Leave Regulations 1999. On the face of it, it looks like these Regulations would disappear.

Furthermore, with the loss of the Framework Directive, atypical workers and non-employees (who may have more easily fallen within the scope of these protections) may continue to fall outside the scope of non-discrimination provisions within domestic law.

As to health and safety related protections which cover pregnant workers, under the new, proposed regime the Pregnant Workers Directive would also be disappearing. This covers significant detail as to risk assessments for new and expectant mothers in the workplace and this could put pregnant workers at greater risk in the workplace.

... in 2021 38% of women in employment were working part-time, whereas this figure was around 13% for men. Any loss of these protections is likely to have a disproportionate impact on women.

Part-time and fixed-term workers

The default position under the proposed REUL Bill is that the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 will both be disappearing.

Clearly these regulations seek to prevent certain classes of worker from suffering discrimination in respect of their conditions, including pay, entitlement to holidays and leave, and access to other benefits.

According to recent figures, in 2021 38% of women in employment were working part-time, whereas this figure was around 13% for men.[11] Any loss of these protections is likely to have a disproportionate impact on women.

Equal pay

On the face of it, equal pay protections on a broad conceptual level should be safe. We have the Equal Pay Act 1970 and the EA, and these are not going to go away.

However, the direct effect of Article 157 of the Treaty on the Functioning of the European Union seems to have allowed claimants in domestic courts to rely on a broader definition of comparator in equal pay claims than under s79 EA. This expanded definition was relied on successfully by around 6,000 Tesco workers in *K and others v Tesco Stores Ltd.*[12] The test of whether pay conditions are attributable to a 'single source' comes from European law and jurisprudence; such a test may never be applicable under purely domestic law.

11 www.researchbriefings.files.parliament.uk/documents/SN06838/SN06838.pdf at page 7

12 *K and others v Tesco Stores Ltd CJEU C-624/19;* Briefing 988 [2021]

The effect of the removal of EU laws and directives

The clear theme arising from the sunsetting of EU-derived law is that the groups which appear most at risk are those which have struggled to enforce their rights – in particular atypical workers and women. The European legislation which underpinned the protection of their rights is the most likely to disappear under the REUL Bill.

While from a policymaking perspective, a government may be unlikely to state that its intention is to remove rights from women, a frequent bugbear for some in government is the 'red tape' that EU law is alleged to have introduced into our domestic law. Should the government seek to be seen to promote efficiency and put forward a 'pro-business' agenda, there is a decent chance that rights such as entitlement to holiday pay and working time rights could be removed, and more restrictive equal pay rules may be introduced.

... groups which appear most at risk are those which have struggled to enforce their rights – in particular atypical workers and women. The European legislation which underpinned the protection of their rights is the most likely to disappear under the REUL Bill.

EU jurisprudence: what might we be losing in the discrimination context?

EU jurisprudence has opened the door to expansion of discrimination law beyond that contained in the EA.

Direct discrimination by association

The 2008 case of *Coleman v Attridge Law*[13] introduced the concept of discrimination by association into our domestic law. While this matter referred to the Disability Discrimination Act 1995, the CJEU found that the purpose of the Framework Directive was to combat all forms of discrimination on the grounds of disability. By applying principles of EU law, the court found that the directive should not just apply to those individuals who are disabled, but to those affected by disability.

The outcome of the *Coleman* case was reflected in the wording of the EA, which was interpreted in line with the Framework Directive to include claims of direct discrimination by association. In fact, the EA has extended this principle beyond employment to services and education.

Indirect discrimination by association

In the case of *Chez,*[14] the CJEU opened the door for claims of indirect discrimination by association. In this case, which alleged indirect race discrimination by association, it was determined that the Race Equality Directive 2000/43/EC did not require a complainant to possess a particular characteristic (in this case to be a member of the Romani ethnic group) to succeed in showing less favourable treatment on those grounds. It therefore appeared to bring indirect discrimination by association within the scope of the Race Equality Directive.

This issue is not explicitly covered by the EA and does not enjoy the protection of binding precedent in domestic law. In *Follows v Nationwide Building Society* which concerned a carer facing discriminatory treatment due to her association with her disabled mother, the ET at first instance appeared to rule that, following *Chez*, the EA must be read as prohibiting associative indirect discrimination. However, without binding authority, domestic tribunals will not be bound by this decision, or the ruling in *Chez*.

The loss of EU jurisprudence

The case law cited above provides a small snapshot of the organic and linear progression of domestic discrimination legislation and case law, which has enjoyed a symbiotic relationship with European jurisprudence as its scope has expanded.

13 *Coleman v Attridge Law* [2008] EUECJ C-303/06; Briefing 499 [2008]

14 *Chez Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsias* [2015] IRLR 746, [para 56]; Briefing 762 [2015]

While we don't know how domestic case law on discrimination by association would have progressed without the influence of and relationship with European directives and jurisprudence, we know that this organic progression could now be stopped in its tracks. Should European case law develop beyond *Chez*, UK domestic courts will not be bound to follow it. Nor will courts and tribunals be bound to consider the principles which Employment Judge Emery may have had at the forefront of his mind in *Follows*.

Instead, domestic courts will have to make their own way. Of course, it will be open to them to consider whatever case law they wish, but there will be little in the way of guidance, precedent, or principles of interpretation for judges to follow.

Conclusion – the practical effect of the REUL Bill

The main theme coming out of the REUL Bill is the uncertainty it brings to the field of anti-discrimination law and jurisprudence.

It certainly isn't worth making concrete predictions as this stage, as it remains uncertain whether this Bill will pass in its current form. Even if it does, should a future general election return a non-Conservative majority government, the policy goals of a new government may have a significant impact on how the Bill may be implemented.

However, given what we do know, the default position remains that we are set to lose swathes of protections from discrimination. While any government which is seeking re-election is unlikely to want to actively remove individuals' protections from discrimination, there is no clear signal as to what would replace these protections. As many of the guiding principles for the protections which remain will be taken away from domestic courts, it is currently very unclear how UK discrimination law will be implemented or develop in the future.

DWP's failure to provide transitional protection discriminated against disabled claimants

R (on the application of TP & Ors) (TP and AR No.3) v Secretary of State for Work and Pensions, CA-2022-000398; January 12, 2023

Facts

These cases were brought by two severely disabled individuals (TP and AR) who each lost approximately £180 per month in benefit payments when they relocated and were required to claim Universal Credit (UC). Prior to moving, TP and AR had received legacy benefits including the Severe Disability Premium (SDP) and Enhanced Disability Premium (EDP). They were required to claim UC (a unified benefit which replaces previous entitlements) when they moved to live in local authorities where the new benefit had been rolled out.

A staged approach to transitioning claimants to UC has been adopted, such that, initially, only those making new claims for benefits or who experience one of a set of 'trigger events', are required to move to UC (a process referred to as 'natural migration') pending a process of 'managed migration' by which all other benefit claimants will ultimately be transferred to UC. Those who undergo managed migration will enjoy transitional protection so that their legacy benefit entitlements at the point of migration will be protected and they do not 'lose out' as a result: see regulations 48 – 57 of the Universal Credit (Transitional Provisions) Regulations 2014.

Procedural background

TP and AR's first judicial review (*TP1*) challenged the cliff-edge drop in income they faced. In June 2018, Lewis J ([2018] EWHC 1474 (Admin)) found that there was differential treatment between severely disabled individuals like TP and AR who moved across a local authority boundary and had to claim UC, and those who moved within their local authority and did not lose income because they remained on legacy benefits. He held that this differential treatment had not been objectively justified and was manifestly without reasonable foundation (MWRF), contrary to Article 14 read with Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights (ECHR).

In response (albeit whilst pursuing an appeal), the Secretary of State for Work and Pensions (SSWP) introduced new regulations. On the one hand, regulation 4A of the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 prevented other severely disabled individuals whose circumstances changed after January 16, 2019 from moving onto UC so they would not lose out. On the other hand, regulations 3(7) – 3(8) of the draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 provided that those who had already moved onto UC (like TP and AR) would receive retrospective transitional payments of £80 per month, £100 a month less than they would have received on legacy benefits had they been protected by the SDP Gateway.

TP, AR, and a third claimant (SXC) mounted a second judicial review (*TP2*). In May 2019, Swift J found ([2019] EWHC 1116 (Admin)) that the £100 a month difference was not objectively justified and was MWRF. The new regulations breached Article 14 read with A1P1 and Swift J therefore quashed the transitional payments provisions. The SSWP appealed.

The CA unanimously dismissed the joined appeals on all grounds (*R (TP, AR & SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37). Key findings included that the correct MWRF test had been applied and the burden was on the SSWP to provide sufficient evidence that there was a reasonable foundation for differential treatment. The court reiterated the well-established proposition that costs alone cannot justify discrimination.

The end of the road

The court reiterated the well-established proposition that costs alone cannot justify discrimination.

In response, the SSWP again introduced new regulations. By virtue of regulation 63 and Schedule 2 of the Universal Credit (Transitional Provisions) Regulations 2014[1], the monthly top-up payments (for single SDP recipients like TP and AR) were increased from £80 per calendar month to £120 per calendar month. **However**, the claimants in fact suffered a monthly loss not of £120 per calendar month, but of **at least** £170 per calendar month on migrating to UC. The increase thus reflected the loss of their SDP but not their EDP; TP and AR were still losing out around £60 per calendar month. For joint claimants such as AB and her partner, who subsequently challenged the provision alongside TP and AR, top-up payments increased from £360 to £405, but this also did not reflect their actual loss.

A further judicial review was brought by TP, AR and AB (as a third claimant) and her child (F) on grounds that severely disabled individuals who had to naturally migrate to UC were still being treated materially differently from severely disabled managed migrants whose benefits would be protected at its existing level when they moved to UC. The claim was thus fundamentally about whether the continuing difference in treatment (the remaining shortfall), having twice been found to violate Article 14, was justified.

Holgate J ([2022 EWHC 123 (Admin)] found that it was not. He said:

> *I am not satisfied on the material before the Court that the broad aims of promoting phased transition, curtailing public expenditure or administrative efficiency required the denial of transitional relief against the loss of EDP for SDP natural migrants. Quite apart from that, I reach the firm conclusion that a fair balance has not been struck between the severity of the effects of the measure under challenge upon members of the SDP natural migrants group and the contribution that that measure makes to the achievement of the [Secretary of State for Work and Pension's] aims, a fortiori where there is no connection between the triggering event, the move to a home in a different local authority area, and any rational assessment of the disability needs of a severely disabled claimant.*

Holgate J also found the failure to provide transitional protection against the loss of the lower disabled child element of Child Tax Credit (CTC) constituted unlawful discrimination. It treated AB and F less favourably than legacy benefit claimants entitled to SDP and the lower disabled child element of CTC who had not experienced a trigger event compelling them to claim UC. It also treated them less favourably than legacy benefit claimants who were entitled to SDP and the lower disabled child element of CTC who experienced a trigger event whilst the SDP gateway was in place.

Court of Appeal's refusal of permission to appeal

The SSWP again appealed. In January 2023, in a CA order without an oral hearing, Davies LJ robustly refused the SSWP's application for permission to appeal, noting that

1 Following the decision of Swift J, the SSWP laid SI 2019 No. 1152. First, regulation 7 revoked regulation 4A of the 2014 Regulations (which had prevented other severely disabled individuals whose circumstances changed after January 16, 2019 from moving onto UC so they would not lose out) with effect from January 27, 2021 (see regulation 1(5)). Second, with effect from July 24, 2019, regulation 3(7) inserted a number of provisions into the 2014 Regulations which included regulation 63 and Schedule 2.

the judgment of Holgate J represented the fourth occasion upon which the courts had determined that the SSWP unlawfully discriminated against this particular cohort of severely disabled benefits claimants and that the SSWP was seeking to rely on much of the same evidence and arguments which had been previously rejected by the courts.

Implications for practitioners

The final determination of the SSWP's appeal means that the SSWP must now take steps to implement Holgate J's judgment and remove the identified discrimination. That means adopting provisions which reflect (at least on an approximate basis) the **actual** loss which the claimants have suffered (whether that be SDP **and** EDP for those like TP and AR, or disabled child CTC for those like AB and F).

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ABBREVIATIONS

AC	Appeal Cases
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CTC	Child Tax Credit
DLA	Discrimination Law Association
DWP	Department for Work and Pensions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
EC	European Community
ECA	European Communities Act 1972
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
EDP	Enhanced Disability Premium
EEA	European Economic Area
EHRC	Equality and Human Rights Commission
EIA	Equality Impact Assessment
EJ	Employment judge
ERA	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union
EUWA	European Union (Withdrawal) Act 2018
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HHJ	His/her honour judge
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
J/JSC	Judge/Justice of the Supreme Court
LGBTI	Lesbian, gay, bisexual, trans and gender diverse, intersex
LJ/LJJ	Lord/Lady Justice of Appeal (singular/plural)
LLP	Legal liability partnership
MEDP	Migration and Economic Development Partnership
MoU	Memorandum of Understanding
MWRF	Manifestly without reasonable foundation
PCP	Provision, criterion or practice
PSED	Public sector equality duty
REUL Bill	Retained EU Law (Revocation and Reform) Bill
SC	Supreme Court
SDP	Severe Disability Premium
UC	Universal Credit
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
UNHCR	United Nations High Commissioner for Refugees
WEC	Women and Equalities Committee
WLR	Weekly Law Reports

Planning definition of Gypsies and Travellers unlawfully discriminatory

Smith v Secretary of State for Levelling Up, Housing and Communities & Ors [2022] EWCA Civ 1391; October 31, 2022

Implications for practitioners

The Court of Appeal held that the definition of *'gypsies and travellers'* in the government's *Planning policy for traveller sites (PPTS)* was unlawfully discriminatory.

The case has significant consequences for practitioners representing Gypsies and Travellers in planning cases. Decision-makers will not be able to apply the definition without careful consideration as to whether it would result in unlawful discrimination in that particular case.

The decision will also be of interest to practitioners of discrimination law more widely. The CA confirmed a number of principles of general importance, including that:

- **a discrimination claim brought by an alleged victim such as the appellant, Lisa Smith (LS), is not an *ab ante* challenge (i.e. a challenge to the lawfulness of legislation or policy in the abstract, brought at the outset and before such legislation or policy has been tested in practice), and does not therefore have to overcome the high hurdle applicable to such cases;**
- **when considering whether discrimination is justified, the relevant aim is that of the measure in question and not (for example) the broader policy containing the measure; and**
- **when deciding whether a measure is proportionate, what matters is what happens in practice.**

Facts

PPTS contains the government's policy as to how the need for Gypsy and Traveller sites should be assessed and how applications for planning permission for such sites should be determined. It applies to *'gypsies and travellers'* as defined in Annex 1 of the policy. As originally promulgated in 2012, that definition had been:

> *Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily* ***or permanently****, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.* [emphasis added]

The definition was amended in 2015 to remove the words *'or permanently',* with the result that Gypsies and Travellers who were forced to cease travelling permanently due to ill-health or old age would no longer fall within the PPTS definition and as a consequence could no longer rely upon its policies when seeking planning permission for a caravan site.

LS was a Romani Gypsy who lived with her family in caravans on a privately-owned site with temporary planning permission. In 2016, an application was made for the planning permission to be made permanent. This was refused by the local planning authority. LS appealed to the Secretary of State's Planning Inspector, who dismissed her appeal. The Inspector found that LS could not rely upon the positive planning policy

contained in PPTS because she had ceased travelling for health reasons and did not meet the definition of *'gypsies and travellers'* contained in Annex 1 of that policy.

LS applied for a statutory review of that decision. She argued that the decision was flawed because the definition was unlawfully indirectly discriminatory against elderly and disabled Gypsies and Travellers, who were more likely to have to stop travelling on the grounds of ill-health or old age.

High Court

LS's application was dismissed by Pepperall J at first instance. The judge held that although the definition was discriminatory – as conceded by the Secretary of State – the discrimination was justified and thus lawful.

Court of Appeal

LS appealed against that decision and the CA allowed her appeal on all grounds.

Pepperall J had held that the test which applies to *ab ante* challenges, as set out in *Christian Institute and others v Lord Advocate* [2016] UKSC 51, applied to LS's application and that she faced a *'high hurdle'* in making out her case. The CA found that this was wrong: LS was not bringing an abstract or theoretical challenge because she was personally affected by the policy definition and therefore the *ab ante* test did not apply. The Secretary of State had conceded that the definition was discriminatory and therefore the burden was on him to justify the discrimination [para 59].

The CA also held that the judge had been wrong to find that LS could not rely on race discrimination. Race had been an *'inherent element of this case from the outset'* [para 62].

... the effect of the definition was unlawfully discriminatory and therefore the decision to refuse her planning permission must be quashed.

In addition, the CA held that the judge had erred in his treatment of the legitimate aim by focusing too much on the aim of PPTS as a whole rather than the aim of the definition. Moreover, there was uncertainty *'about what the aim actually was or was said to be'* [para 81].

Finally, the CA concluded that the judge had also erred in respect of the proportionality exercise. Whether *'the planning system "taken as a whole is capable of being operated" in an appropriate way'* was not the correct test: what matters was how the planning system operated in practice [paras 114 and 115].

The CA proceeded to determine for itself whether the definition was justified and found that it was not.

First, it was not in pursuit of a legitimate aim. Whilst the stated aim was fairness, the evidence did not demonstrate that this was in fact the objective of the measure. The *'acknowledged likely effect'* of the definition change was to *'reduce the number of Gypsies and Travellers who can obtain permanent or temporary planning permission'*, which could not be a legitimate aim [para 99].

Second, in any event the measure was not proportionate. The harshness of the measure was *'clearly spelt out'* in the government's own S149 EA public sector equality duty analysis, which showed that:

- The definition change could separate family members from each other;
- Those most likely to be affected were the elderly and disabled and also (potentially) women;
- There was a risk of an increase in homelessness and unauthorised camping.

The CA concluded that *'in its application to* [LS's] *appeal before the inspector',* the effect of the definition was unlawfully discriminatory and therefore the decision to refuse her

planning permission must be quashed. As to future cases where the definition was engaged, the court stated that:

> *… it will be for the decision-maker – whether a local planning authority or an inspector – to assess when striking the planning balance what weight should be given, as material considerations, to the relevant exclusion and to such justification for its discriminatory effect as obtains at the time, and also to undertake such assessment as may be required under Article 8 of the Convention.* [para 139]

Comment

The CA's decision means that the definition cannot now be applied routinely and without consideration of whether it is unlawfully discriminatory. Indeed, in light of this decision it is hard to see how the definition can lawfully be applied in other cases where elderly and disabled Gypsies and Travellers are seeking planning permission for a Traveller site.

It may also be difficult to apply the definition even in other cases. In one post-*Smith* decision by a Planning Inspector (Appeal Ref: APP/V1505/W/21/3266538, 14 December 2022), the Inspector observed:

… the decision will have significant implications for local planning authorities' assessments of need.

> *There is justification for the site to be occupied by Gypsies and Travellers to safeguard the supply of the site for this purpose and as such a condition is necessary to restrict occupation. In order to avoid discrimination to the elderly or disabled, the condition should include those Gypsies and Travellers who have ceased to travel permanently. Even though I am not aware that any of the current occupants have ceased to travel due to age or disability, that may not always be the case and to apply such a condition restricting their occupation of the site would, in the light of the 2022 judgement, be unlawfully discriminatory.*

In addition to this, the decision will have significant implications for local planning authorities' assessments of need. Assessments which are based on the 2015 definition may have excluded Gypsies and Travellers on a basis which was unlawfully discriminatory and may thus have significantly underestimated the required number of pitches.

As another Inspector stated (Appeal Ref: APP/L1765/W/21/3271015):

> *35. However, the recent Court of Appeal decision, the thrust of which found that the PPTS definition change in 2015 was unlawfully discriminatory, is an important material consideration. The PPTS 2015 remains extant policy, and it remains uncertain what the full repercussions of the recent caselaw will be. Nevertheless, it is likely to have implications for how needs assessments should be conducted in the future and casts considerable doubt on whether previous needs assessments based upon the PPTS 2015 definition can be taken as an accurate reflection of need without being tainted by discrimination.*
>
> *36. Therefore, although the balance of evidence presented to me does not clearly demonstrate that the Council has a shortfall of pitches against the targets in the development plan, that evidence and policy is predicated upon a definition of gypsies and travellers that has been severely undermined by recent caselaw.*

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EAT overturns ET's finding of marital status discrimination

G Ellis v K Bacon and Other [2022] EAT 188; November 22, 2022

Implication for practitioners

Employment tribunal cases involving marital status discrimination are relatively rare. The Ministry of Justice's statistics on employment tribunal claims from 2007/8 to 2021/22 provide no figures for compensation awarded in claims involving discrimination because of the protected characteristic of marriage or civil partnership.[1] In this case, the EAT made clear that marital status discrimination only protects a person from less favourable treatment because of the fact that they are married (or in a civil partnership), as opposed to any less favourable treatment because of who it is that they are married to (or in a civil partnership with). The EAT's decision is an important reminder of the need to choose an appropriate comparator in discrimination claims.

Facts

Ms Kirsty Bacon (KB) joined Advanced Fire Solutions Limited as a bookkeeper in 2005. She married the managing director and majority shareholder of the company, Mr Jonathan Bacon (JB), and became a director and shareholder. Mr Graham Ellis (GE) joined the company in August 2017. In the same month, KB informed JB that she wished to separate. KB was subsequently suspended from the company in January 2018 and dismissed by GE in June 2018. She brought a complaint to the ET.

Employment Tribunal

The ET held that GE had sided with JB in relation to the marital dispute between him and his wife and that GE had treated KB less favourably because of her marital status as a wife to JB by removing her directorship, not paying her dividends, reporting her to the police, and suspending and dismissing her on spurious grounds.

GE appealed to the EAT against the ET's findings that KB's claims against him for direct marital discrimination were well founded. He argued that the ET had failed to properly address the issue of whether it was her marital status which was the cause of the treatment as opposed to the fact that she was married to JB. He also argued that the ET had failed to consider the appropriate hypothetical comparator, namely someone in a close relationship with JB but not married to him, and to ask itself whether such a person would have been treated differently to KB.

Employment Appeal Tribunal

The EAT allowed GE's appeal and agreed that the ET had failed to construct the appropriate hypothetical comparator when considering KB's marital status discrimination claim.

The EAT agreed that in a case of discrimination because of marriage, the appropriate comparator would usually be someone in a relationship akin to marriage but who was not actually married. The EAT held that the issue in this case was whether GE treated KB in the unfavourable ways that had been identified by the ET because she was married.

1 www://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/112

The question was not whether she had been badly treated because she was married to a particular person. The EAT decided that the ET should have considered whether an unmarried woman whose circumstances were otherwise the same as KB's, including being in a close relationship with JB, would have been treated differently.

The EAT acknowledged that KB was very badly treated by GE, amongst others, and confirmed that the ET's findings in that respect could not be challenged. The EAT allowed the appeal *'with a very heavy heart'* and also sympathised with KB in relation to being badly treated by the endemic delays in the ET system at the moment.

Comment

In considering the appropriate hypothetical comparator, it is interesting to note that the EAT referred to an unmarried woman whose circumstances were otherwise the same as KB's, including being in a close relationship with JB. Considering that KB and JB were separated and that the EAT recognised the 'marital dispute' between KB and JB as the reason for the less favourable treatment of KB by GE, it is arguable that a more appropriate hypothetical comparator would have been an unmarried woman whose circumstances were otherwise the same as KB's, including being in the process of separating from having been in a close relationship with JB. Would such a hypothetical comparator have been treated any differently to KB?

The decision also highlights the relatively limited protection against discrimination that the protected characteristic of being married or in a civil partnership offers.

The EAT's judgment in this case is a reminder that a person who is married or in a civil partnership is protected from less favourable treatment because of their marital status even in circumstances where they are separated from their spouse or civil partner (provided the reason for the discrimination is the fact of their marital status rather than the fact of who they are married to or in a civil partnership with). The decision also highlights the relatively limited protection against discrimination that the protected characteristic of being married or in a civil partnership offers. A person with any other marital status is not protected from less favourable treatment because of their marital status (for example, being single, in a relationship but not married or in a civil partnership, engaged, divorced, formerly in a civil partnership that has been dissolved, widowed, etc.). Depending on the facts of the less favourable treatment in any particular case, however, discrimination because of a person's particular marital status may well lead to some other cause of action (for example, age or sex discrimination).

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Settling future claims under the Equality Act, who knew?

Charles Melvin Bathgate v Technip UK Limited & Others ✦ [2022] EAT 155; October 7, 2022

Facts

Mr C Bathgate (CB) was employed by Technip Singapore PTE Ltd as a chief officer. He worked on a vessel called 'Deep Blue' from August 19, 2008 until shortly before he was made redundant. Deep Blue was registered in the Bahamas and operated, in the main, outside UK or EEA waters. CB's last period on Deep Blue ended on June 8, 2016 after which he worked onshore until December/January 2017 when the respondents, the vessel's owners and his employer (the EAT made no distinction between the three respondents) began a redundancy process. CB accepted voluntary redundancy, with advice from a solicitor, and his employment ended on January 31, 2017. He had been employed for 19 years.

The enhanced terms of the settlement agreement (the Agreement) included provision for an 'additional payment' which was calculated through collective agreement with the relevant unions. The precise provisions for this additional payment were still in discussion at the point of CB's termination. CB was of the impression he was due to receive the additional payment in due course.

On March 1, 2017, after the Agreement was executed, the respondents decided that the additional payment would not be paid to employees aged over 61 at the time of dismissal. This meant CB would not receive the additional payment.

CB considered this amounted to direct and/or indirect age discrimination under the Equality Act 2010 (the EA). It was accepted the reason CB was not paid the additional payment was because of his age but the respondents defended the claim on two jurisdictional grounds. Firstly, they argued that CB had compromised his claim by signing the Agreement, and secondly, that the EA did not extend to CB in his capacity as a seafarer.

Employment Tribunal

The ET found that the settlement agreement constituted a full and final settlement of all claims.

The ET considered common law principles which provides that parties can settle claims of which they have, and can have, no knowledge at the time of settlement through language which is *'plain and unequivocal' (Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849).

The ET relied upon a list of claims, including age discrimination, which was contained within the Agreement, along with a blanket waiver which referred to *'all claims … of whatever nature (whether past, present or future and whether under contract, statute …)'.*

Accordingly, the ET found that CB had settled his claim for age discrimination which arose when he was not paid the additional payment on the grounds of his age.

Turning to issues of jurisdiction, the respondents argued that CB could not bring a claim under the EA as he worked on a Bahamas registered ship which operated outside the

✦ [2023] IRLR 4

UK and EEA waters. It was put forward that he was a seafarer under s81 of the EA, which applies to work on ships and hovercrafts, and to seafarers under Part V EA (which applies the anti-discrimination provisions of the EA to work) *'in such circumstances as are prescribed').*

If it was found he was a seafarer, then the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (the Regulations) applied. The Regulations exclude certain persons, including seafarers, from the scope of the EA so as to give effect to the United Nations Conventions on the Laws of the Seas which prevents the UK from applying its laws to vessels flying another country's flag. CB argued that because he was onshore at the time of his termination, he was not a seafarer.

The parties had agreed that s108(1) EA (relationships that have ended) applied. This was because the claim related to discriminatory acts which took place after employment had ended but which were closely connected to employment.

However, the ET found that s81 EA had no application where employment had ceased; it considered that s81 was silent on whether it covered claims under s108 and it would have been explicit had it been intended that post-employment claims would be covered. As such the ET considered it was not required to decide whether it had jurisdiction on this point.

The ET found that there was no specific provision in the EA in respect of territorial claims under s108. The ET therefore approached this aspect of the claim by following the higher courts' approaches to the territorial scope of the unfair dismissal provisions under the Employment Rights Act 1996 in common law. The respondents conceded that such an approach would bring the claim within the territorial scope of the EA. Accordingly, the claim could proceed on the basis that had the discriminatory act occurred during employment, it would have contravened the EA.

... s147 of the EA prevented settlement of claims before their existence was known.

Both later successes for CB were, of course, overshadowed by the ET's earlier finding that he had compromised his claim as part of the settlement agreement. Accordingly, his claim failed.

Employment Appeal Tribunal

CB appealed and the respondents cross appealed.

On the first point the EAT ruled that the Agreement could not settle CB's claim of age discrimination, overturning the decision of the ET.

Having reviewed leading authorities on the common law position, the EAT considered that the EA, having been laid down by parliament, could not be overruled by case law. It was held that s147 of the EA prevented settlement of claims before their existence was known.

S147 EA provides:

> *S147(2) A qualifying settlement agreement is a contract in relation to which each of the conditions in subsection (3) is met.*
>
> *S147(3) Those conditions are that:*
>
> *(a) the contract is in writing,*
>
> *(b) the contract relates to the particular complaint,*
>
> *(c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal) …*

The words *'the particular complaint',* under s147(3)(b) limited settlement to claims which were known to the parties at the time of entering the agreement. At the time of entering the Agreement, CB did not, and could not, have known that the respondents would discriminate against him on the basis of his age by not making the additional payment. His right of action did not accrue until after he had left employment and, on this basis, he was free to pursue this claim.

On jurisdiction, the EAT held that s81 EA could apply to CB insomuch as he was a seafarer under the EA. The EAT reasoned that 'on board' did not mean he could only be a seafarer when on board a ship, but he was a seafarer because the work he did was on board a ship. Since he had worked on a ship for most of his career, he did not lose his status as a seafarer merely because at the end of his career, prior to redundancy, he was on shore.

The EAT considered that the silence of s81 EA with regards to post-employment rights was not significant. The wording of s108 EA makes the measure of a person's post-employment rights dependent upon his employment rights. It found that in the current case, CB did not have the right he now relied upon before his termination and so he could not have such a right after termination; his post-employment rights could be no greater than they had been during employment.

Accordingly, since CB had no right to claim for age discrimination during employment (as he was found to be a seafarer on a non-UK registered ship which sailed outside UK and EEA territorial waters) he was outside the jurisdiction of the EA and he did not acquire that right after his employment ended.

... parties should be aware that any general waiver...will not be sufficient to settle claims under the EA which arise in the future and of which the employee is not aware at the time of agreement.

Implications for practitioners

The EA and the common law differ in a fundamental aspect. The common law allows for parties to settle claims of which the employee does not and could not have knowledge at the time of entering an agreement; however the EA does not. Accordingly, parties should be aware that any general waiver (which includes the ubiquitous list of a series of legislation so commonly found in settlement agreements) will not be sufficient to settle claims under the EA which arise in the future and of which the employee is not aware at the time of agreement.

Of course, employers will likely still utilise this approach. This is on the basis that they may still waive unknown claims from a contract law perspective, and may also deter claimants from pursuing claims under the EA due to lack of knowledge of this protection. Therefore, careful consideration should be given to what is listed in a settlement agreement as a 'particular complaint' and what falls under a general waiver.

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Protected belief insufficient to remove the qualification period for claiming unfair dismissal when detriment is not related to the context of a person's political opinion

Scottish Federation of Housing Associations v Polly Jones✦ [2022] EAT 114; July 21, 2022

Facts

The claimant (PJ) was employed by the Scottish Federation of Housing Associations (the Association). She was the head of membership and policy in the Association which represents housing associations in Scotland. Her employment contract included a term under the heading 'political activity' which stated that as an employee she was not allowed to have a formal role within a political party.

On October 4, 2019 PJ informed her employer that she wished to stand for Scottish Labour in the forthcoming general election. On October 11, 2019 the Association's board advised that it did not consent to her standing and PJ, who needed to remain with her employer for financial reasons, withdrew her candidature.

PJ was dismissed by letter dated November 14, 2019. The Association gave a variety of reasons for her dismissal but did not mention the request for permission to stand for Scottish Labour.

PJ lodged tribunal proceedings claiming unfair dismissal and religion or belief discrimination.

Employment Tribunal

The Employment Judge (EJ) held a preliminary hearing to determine the issues; these included:

1. Does s108(4) of the Employment Rights Act 1996 (ERA) apply to the claim?
2. Is PJ's belief that '*those with the relevant skills, ability and passion should participate in the democratic process*' a protected belief within the meaning of the Equality Act 2010 (EA)?

It was agreed at the preliminary hearing that if PJ had been adopted as Scottish Labour's candidate in the general election this would be considered a 'formal role'.

PJ also accepted that she was not dismissed due to being a member of a particular political party or because of her political opinions, but because she had asked to stand for candidature.

Section 108(4) ERA

S108(4) ERA provides an exception to the requirement under s94(1) ERA for an employee to be continuously employed for two years in order to qualify for the right not to be unfairly dismissed.

S108(4) provides that s94(1) does not apply *'if for the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliations'.*

✦ [2022] IRLR 822

At the preliminary hearing the EJ decided that PJ was entitled to bring this claim.

In the full tribunal hearing it was concluded that the words 'relates to' in s108(4) ERA meant that even though her political opinions and affiliation to the Scottish Labour Party had nothing directly to do with her dismissal, they were nevertheless related to her dismissal since without such opinions and affiliation she would not have sought to stand as a candidate. Therefore, although her opinions and affiliation with the Scottish Labour Party had an indirect relationship with her dismissal, this was sufficient to bring her within s108(4).

Protected belief

PJ asserted that her belief that '*those with the relevant skills, ability and passion should participate in the democratic process*' was a protected philosophical belief under the EA. This belief was articulated in support of PJ's claim for discrimination.

The EJ accepted that this was a protected belief under the EA as it met the *Grainger* test (from *Grainger plc v Nicholson* [2010] IRLR 4; Briefing 549 [2009]) which was agreed between the parties as the appropriate test in this area.

... the EAT judge stated that he was not persuaded that a literal interpretation of the words 'related to' was appropriate.

The *Grainger* criteria are that:

1. The belief must be honestly held.
2. It must be a belief as distinct from an opinion or viewpoint based on the present state of information available.
3. It must be a belief as to a weighty and substantial aspect of human life and behaviour.
4. It must attain a certain level of cogency, seriousness, cohesion and importance.
5. It must be worthy of respect in a democratic society.

The ET found that the dismissal was both unfair and discriminatory.

Employment Appeal Tribunal

The Association was given permission to appeal the ET's decisions on the application of s108(4) ERA, discrimination and unfair dismissal.

S108(4) ERA

The case was compared with and distinguished from the case of *Redfearn v United Kingdom* [2013] IRLR 51; Briefing 664 [2013]. In *Redfearn,* the claimant (a bus driver) had been dismissed due to his membership of the British National Party. It was found that this affiliation caused 'operation issues' for his employer due to his passengers finding his opinions offensive. This was enough in the *Redfearn* case for the dismissal to be 'related to' the claimant's opinions and affiliation. The EAT distinguished PJ's case on the basis that she had not been dismissed due to her membership of the Scottish Labour Party but because of her intention to stand in the general election.

It was accepted that, but for her candidacy for Scottish Labour, she would not have been dismissed. In that sense it was said that her dismissal was related to her opinions and affiliation but the EAT judge stated that he was not persuaded that a literal interpretation of the words 'related to' was appropriate. It was therefore held that PJ's political opinions and affiliation were not sufficiently proximate to the purpose of s108(4) to come within its scope. It was said that s108(4) was designed to address the mischief of dismissals arising from the context of a person's political opinions and not the identity of the party with which the person is affiliated.

This part of the appeal was therefore allowed.

Protected belief

The Association submitted that the EJ had fallen into error when assessing the cogency and cohesion limb of the *Grainger* test in relation to PJ's belief. It also submitted that her statement of belief lacked precision or focus.

The ET had held that the belief was coherent and cogent because it was simple to understand and was expressed in a short statement. The EAT agreed with the EJ and went on to say whilst beliefs that are cogent and coherent are usually capable of brief expression, it must be acknowledged that some beliefs are complex or nuanced.

It was accepted that whilst the phrase *'... should participate in the democratic process'* is somewhat nebulous, the sentiment that lies behind it is easy to understand. Therefore, the EAT judge stated that he would be reluctant to discount it as unworthy of protection. It was also said that in reality what the Association was challenging was the EJ's assessment of the facts and therefore this was a perversity appeal.

Whilst there was some commentary on the lack of explanation in the ET judgment, the EAT felt that on balance the ET's ruling was correct and therefore this aspect of the Association's appeal should fail.

Permission was given for PJ's discrimination claim to proceed to a full hearing.

Comment

Given that the EAT confirmed that PJ's belief met the *Grainger* criteria, and that s108(4) ERA was designed to protect dismissals arising from the context of a person's political opinions, it is difficult to understand why it did not protect the claimant. Being prevented from bringing an unfair dismissal complaint in this context is arguably incompatible with the EA. The EAT found that PJ's political opinions and affiliation were not the reason or the principal reason for her dismissal. However, if the neutrality clause had not appeared in her contract, this might have resulted in a different decision being made in relation to her dismissal claim.

Despite PJ being given permission to proceed to a full hearing, and the Association not admitting any fault, it is understood that an out-of-court settlement has been agreed between the parties. PJ, supported by Unison, felt that the determination that her belief was worthy of protection was enough to prevent her taking further action. Her settlement was split between three charities.

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Substantial disadvantage must be caused by disability

Hilaire v Luton Borough Council ✦ [2022] EAT 166; November 23,2022

Facts

Mr Julian Hilaire (JH) worked in Luton Borough Council's youth support department. In May 2013 the department began a process of restructuring because of reductions in central government funding, including the replacement of 25.6 full-time equivalent existing positions with 17 full-time equivalent new positions. JH's post was among those to be removed. All the holders of posts like JH's would have to apply for positions in the new structure, and during the consultation the council and the unions agreed to use interviews alone to choose who would be appointed to the new posts. There had been a proposal to use a system of scoring against redundancy selection criteria, as well as interviews, but that was rejected by two of the unions.

JH had been off sick with stress since November 2012 and remained off sick until the end of his employment. Beginning in 2011 he had raised a number of grievances and he believed that the council's treatment of him was the reason he was unwell. A complaint of bullying and harassment was still being investigated at the time the redundancy consultations started. The ET found that by September 2013 he was disabled by reason of depression and that the council knew this. He was experiencing low mood, problems with memory and concentration, lack of motivation and persistent difficulty in normal social interaction.

The deadline for applications for the new posts was August 12, 2013 but was extended to August 23, 2013 for JH, and he was given some support in completing the application form. He was invited to interview on September 4, 2013 but provided a sick note and said he would not be well enough to attend any meetings or interviews.

The council asked JH when he would be able to attend interview and reminded him when he did not respond. Thirteen candidates had already been interviewed and were waiting for the outcome, so he was given a deadline of September 23, 2013. On September 20, 2013 JH told the council he was too ill to attend at all.

On September 27, 2013 he attended a formal meeting appealing against a written warning for sickness absence.

On October 3, 2013 he emailed the council and said:

> *Even if I wasn't off sick with work related stress, causing depression, I still would not have attended this interview… the reason for this is, I have emails relating to me with discriminatory content from… management and HR conspiring to dismiss me… which shows I was never going to be supported or helped… to return to work.* [EAT judgment, para 7]

Law

Under s20(3) of the Equality Act 2010 (EA), where an employer's provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

According to the Equality and Human Rights Commission Statutory Code of Practice for employment:

✦ [2023] IRLR 122

> *The duty to make reasonable adjustments is a cornerstone of the* [EA] *and requires employers to take positive steps to ensure that disabled people can… progress in employment. This goes beyond simply avoiding treating disabled workers* [and] *job applicants… unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.* [para 6.2]

The question of whether there is a substantial disadvantage is a question of fact for the ET, and it is for the claimant to show both that there is a substantial disadvantage and that it is because of the disability.

A step is only one which it is reasonable for an employer to have to take if that step would in fact alleviate or avoid the disadvantage.

Employment Tribunal[1]

The ET found that the council had applied a PCP of requiring JH to attend an interview in order to be considered for one of the new positions, but it said that the requirement did not put him at a substantial disadvantage.

That was for two reasons: first, because he had been able to attend other meetings with the council during his sickness absence, including the appeal meeting on September 27, 2013; second, because he had made clear he did not want to attend and would not have done so even if he had been well enough.

The ET also held that the council had given consideration to JH's health and provided him with additional support during the application process and that there were no further adjustments it would have been reasonable for the council to have to make.

Employment Appeal Tribunal

Properly understood, a requirement to attend an interview is a requirement to attend and participate effectively.

The EAT held that the PCP was not simply a requirement that JH attend an interview but that he attend and participate in it. The ET was therefore wrong to consider only whether JH could have attended an interview without also considering whether he would have been able to participate effectively. The ET had found that he had problems with memory, concentration and social interaction, and it should have gone on to consider whether those would have placed him at substantial disadvantage in participating effectively.

That finding did not mean that JH's appeal would succeed however. The ET was entitled to find that JH did not want to attend the interviews and that was not because of his disability – it was because he had lost confidence in the council and believed the process was just a way to disguise the reason for his dismissal. His failure to comply with the PCP was because of that choice and not because of an effect of his disability.

On that basis JH's appeal could not succeed, but the EAT went on to consider whether the ET was right to find that it was not reasonable for the council to have to make any other adjustment.

JH suggested a number of adjustments that he said could have been made, but the only one which would have addressed the disadvantage of having to participate in an interview was slotting him straight into a role in the new structure.

The EAT agreed with the ET that that would not have been a reasonable step for the council to have to take, observing that *'making a reasonable adjustment is not a vehicle for giving an advantage over and above removing the particular disadvantage'* [para 33]. This was not a case where there was a vacancy available which JH could have

1 *Hilaire v Luton Borough Council* ET 3400431/2014; November 5, 2019

been slotted into without any impact on others: that could in some circumstances be a reasonable adjustment. Here, however, there was a collective redundancy process affecting thirteen other employees, at least some of whom would also be unsuccessful in obtaining a new post. In those circumstances slotting in was not a reasonable step for the council to **have** to take.

Implications for practitioners

This case provides a useful reminder that the comparison in s20 EA between a disabled person and persons who are not disabled is a causal requirement: a claimant must show that the substantial disadvantage they suffered was caused by their disability and not by something else.

It also confirms that PCPs should be read realistically and not too narrowly. Properly understood, a requirement to attend an interview is a requirement to attend and participate effectively.

However, this case also provides a caution that there will be limits to the requirement to take positive steps in relation to a disabled person, particularly in the context of a process applied to a number of people where those others would be negatively affected.

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Guidance on the burden of proof in discrimination claims

Field v Steve Pye And Co. (Kl) Limited ✦ [2022] EAT 68; May 5, 2022

Facts

Mrs A Field (AF) had been employed as an accounts assistant by Steve Pye & Co (SP). She was disabled for the purposes of s6 Equality Act 2010 (EA) due to her arthritis, carpal tunnel syndrome and ankylosing spondylitis.

AF made a flexible working application to SP because her disability began to cause her considerable difficulties when she was driving herself to the office. She requested to work from home as and when necessary for her disability. However, this request was refused by SP on the basis that it was not in the best interests of the business.

AF was then absent for a period due to personal reasons and a flare up of her carpal tunnel syndrome. At this point, Mrs Pye (P), SP's company secretary, sent a letter to AF raising concerns about her attendance and performance for the first time. AF replied by reiterating her request to work from home in a formal written request for reasonable adjustments.

An injury caused by a fall extended AF's period of absence. In response to this, SP organised an *'informal welfare meeting'* to be held at AF's house. At this meeting, AF was offered £2,000 to resign.

AF raised a grievance in which she complained about SP's refusal to let her work from home, the letter from P raising concerns in response to her sickness absence, and the welfare meeting in which she was offered money to terminate her employment.

SP's initial response to the grievance was to gather statements from employees in respect of AF's performance. SP subsequently offered to make temporary adjustments for AF to work flexibly, which were to be reviewed every four to six weeks. AF did not accept this offer and resigned for the reasons outlined in her grievance.

AF brought claims of direct disability discrimination, a failure to make reasonable adjustments, discrimination arising from a disability, victimisation and harassment.

Employment Tribunal

The ET dismissed all the claims based on factual findings that the relevant acts were either not done or not done for discriminatory reasons.

For example, in dismissing the direct disability discrimination claim, the ET found no evidence that AF was refused permission to work from home unlike some of her work colleagues. The ET also found that P's letter raising concerns about AF's performance was not because of her disability and held that AF was not treated any differently to an absent employee who was not disabled. The ET did not uphold AF's allegations that the offer of money to resign and the offer of temporary adjustments amounted to direct discrimination on the basis that these acts would have taken place for a non-disabled person who was absent for a similar period.

Employment Appeal Tribunal

AF appealed to the EAT on the basis that the ET had erred in law in failing to properly apply the burden of proof provisions under s136 EA. AF contended that in doing so, the ET failed to consider significant evidence which would have shifted the burden of proof.

✦ [2022] IRLR 948

S136 EA reads as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

The EAT began by noting the two-stage approach to this provision adopted in *Igen Ltd v Wong* [2005] ICR 931; Briefing 368 [2005]. First, the claimant must demonstrate facts from which a tribunal could conclude that an employer has committed an act of discrimination. Once this is shown, the burden of proof switches to the employer who must demonstrate that the impugned treatment was in no sense whatsoever discriminatory [para 36].

The EAT doubted the utility of this simplified approach in circumstances where there is more room for doubt as to the facts leading to a conclusion of discrimination.

The EAT acknowledged that in more straightforward cases, an ET could go straight to the second stage (the 'reason why' question) and make a factual finding as to whether the respondent had a non-discriminatory reason for the treatment (*Hewage v Grampian Health Board* [2012] UKSC 37; Briefing 653 [2012]). The EAT cautioned that an ET should explain why it had done so and why the evidence that was suggestive of discrimination was not considered at the first stage [para 42].

The EAT doubted the utility of this simplified approach in circumstances where there is more room for doubt as to the facts leading to a conclusion of discrimination [paras 43-44]. In a scenario where there are no such facts and the employer can establish a non-discriminatory reason for the treatment, skipping to the second stage would be of little gain. The claim would simply fail at stage 1 of the *Igen* test because the claimant would not be able to show evidence suggesting discrimination.

Where there is such evidence, but the employer establishes a non-discriminatory reason for the treatment, the EAT still had difficulty in seeing the advantage of skipping straight to the second stage. The EAT considered that, where there is evidence which could indicate discrimination, there is merit in an ET properly grappling with all the evidence at the first stage and deciding whether it is sufficient to switch the burden of proof.

The EAT held that this was not done in the instant case [paras 47-49]. The EAT concluded that the ET only briefly referred to the burden of proof when setting out the law in respect of direct discrimination but otherwise failed to engage with s136 at all. The ET provided no reason for skipping to stage 2 in concluding that AF's treatment was for non-discriminatory reasons. This overlooked significant evidence which may have indicated discriminatory treatment. The appeal was therefore upheld.

Comment and implications for practitioners

This decision illustrates that the burden of proof requires careful evidential consideration from a tribunal, especially when there is room for doubt as to the facts necessary to establish discrimination. Even though it may be legitimate to jump to the second stage of *Igen* when considering the application of s136 EA, the EAT's judgment demonstrates that it would rarely be wise to do so.

The EAT recommended that claimants should state in closing submissions the evidence which they propose should shift the burden of proof [para 46]. An ET should then grapple with all the evidence to assess whether it is sufficient to do so. They should not incorporate it into an overall assessment and make general positive findings that there was a non-discriminatory reason for the disputed treatment [para 41]. If there is evidence which is overlooked in this manner, the ET is likely to have erred in law in its approach to s136 EA.

Yaade Joba
Paralegal, **Leigh Day**

The government's Rwanda policy: is discrimination justified?

AAA and Others v Secretary of State for the Home Department [2022] EWHC 3230 (Admin); December 19, 2022

Implications for practitioners

In *AAA and Others* the High Court ruled on the legality of the government's 'Rwanda policy' to involuntarily remove certain individuals claiming asylum in the UK to the Republic of Rwanda. Once removed, an individual's asylum claim is to be determined under Rwandan law, and, even if recognised as a refugee by Rwanda, there is no route created for such refugees to return to the UK.

This is the first substantive decision in litigation of intense public controversy and relevance for the future of the asylum framework. It is likely to be closely monitored by other jurisdictions, including the Netherlands and Denmark, which are considering or have negotiated similar agreements.

While the HC decision may appear to be a win for the government as the broader challenge to the policy failed at this first stage, the implementation of the plan requires the Home Secretary to properly consider the particular circumstances of each individual. This resource-intensive scrutiny was not conducted by the Home Secretary for eight of the individual claimants whose flawed decisions on inadmissibility, removal, and/or human rights were quashed and must be remade.

Permission to appeal on multiple grounds to the CA was granted by the HC on January 16, 2023. Therefore, the ultimate implications of this litigation for practitioners, particularly in immigration and asylum law, remain to be seen. However, it is noteworthy that permission to appeal on the discrimination ground was refused by the HC.

Facts

The Migration and Economic Development Partnership (MEDP) between the UK and Rwanda is set out in a Memorandum of Understanding (MoU) signed in Kigali on April 13, 2022.

In May and June 2022, the Home Secretary decided that asylum claims of 47 men were inadmissible and that they should be removed to Rwanda. Removal directions were set for a charter flight to Rwanda, scheduled for June 14, 2022. Days before the flight was due to take place, the Administrative Court heard and refused applications for interim relief. However, on the same day as the scheduled flight, one of the claimants was granted an interim measure by the European Court of Human Rights preventing his removal *'until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings'*. Therefore, no removals to Rwanda have taken place on or since June 14, 2022.

Eight judicial review claims challenged the government's Rwanda plan. The first claim was brought by five individuals and three organisations (The Public and Commercial Services Union, Detention Action, and Care4Calais); the United Nations High Commissioner for Refugees (UNHCR) intervened. Each of the subsequent six claims was brought by an individual claimant. Most individual claimants were challenging the Home Secretary's decisions that their asylum claims were inadmissible, or certifying that their human rights claims were clearly unfounded. The final claimant, Asylum Aid, argued the procedure

followed by the Home Office to take decisions was systemically unfair. In all of the claims there was one defendant – the Home Secretary.

High Court

The generic grounds

Lewis LJ and Swift J considered a number of questions in deciding the generic grounds of challenge. These included whether the:

- assessment that Rwanda is a safe third country was legally flawed;
- Home Secretary had abused her legal powers to certify decisions;
- scheme in paragraphs 345A – D of the Immigration Rules is contrary to the Refugee Convention, or retained EU law;
- Immigration Rules had been misunderstood or misapplied;
- data protection rules had been breached; and the
- procedure was systemically unfair.

Of particular interest in relation to the discrimination claims, the HC asked:

- was the Inadmissibility Guidance the cause of discrimination on grounds of nationality, age, sex, and disability? Did it promote discrimination against persons who make claims for asylum, as opposed to those who seek leave to enter the UK on other grounds?
- when formulating her Rwanda policy, did the Home Secretary fail to comply with the requirements of the public sector equality duty (PSED) in s149(1) of the Equality Act 2010 (EA)?

...the inadmissibility and removal decisions were not unlawful by reason of any of the generic grounds of challenge ...

The court's conclusion was that the inadmissibility and removal decisions were not unlawful by reason of any of the generic grounds of challenge, including the general claim of procedural unfairness.

UNHCR provided evidence in the form of witness statements to the court, which were relevant to the court's consideration of the reasonableness of the Home Secretary's assessment and conclusion that Rwanda is a safe third country. To UNHCR's knowledge there had been five occasions in which a person (from Libya, Syria or Afghanistan) had made an asylum claim at Kigali Airport in Rwanda, which had not been accepted as a valid claim. The persons were refused entry to, and ultimately removed from, Rwanda. This, UNHCR argued, was evidence of discrimination *'against those who are not nationals of neighbouring states and, especially, against persons from middle eastern countries'* [para 53(1)]. Additionally, UNHCR noted it was aware of two occasions when the Rwandan government refused to interview asylum claimants and suggested it may discriminate against asylum claimants who are LGBTI.

Unfortunately, despite UNHCR's mandate, fieldwork, unique knowledge and expertise, the court did not pay 'special regard'[1] or accord 'special weight' to UNHCR's factual evidence and value judgments. Instead, it found that the Home Secretary was entitled to rely on the assurances contained in the MoU which was supplemented by two *Notes Verbales* regarding the asylum process and the support for transferred individuals.

The HC also found that the Public and Commercial Services Union, Detention Action, and Care4Calais did not have standing to pursue the generic complaints.

The individual claims

Although the challenges on the generic grounds failed, the HC found '*the way in which the Home Secretary went about the implementation of her policy in a number of the*

1 *R (EM (Eritrea)) v Secretary of State for the Home Department* [2013] 1 WLR 576, para 41

individual cases before us, was flawed' [para 438]. The HC quashed the Home Secretary's decisions taken in relation to eight individual claimants. To this extent, the judicial review claims succeeded.

The discrimination claims

Three individual claimants made discrimination claims. All failed.

Claimant SAA relied on Article 14 of the European Convention on Human Rights (ECHR), arguing the dangerous journey criterion for eligibility for removal to Rwanda in the Home Secretary's *Inadmissibility: safe third country cases* guidance indirectly discriminates on grounds of age, sex, and nationality.

The guidance defines a dangerous journey as one able or likely to cause harm or injury, which the guidance states would include travel on small boats or clandestinely in lorries. Those arriving in small boats tend to be young, male, and prior to the hearing had predominantly been from Iraq, Iran, Syria, Sudan or Afghanistan. In fact, the Home Office's Equality Impact Assessment (EIA) of the MEDP accepts these factual premises. The HC noted that all the claimants, with one exception, were young men, and accepted that young men are *'at least in the short term'* the *'most likely'* to be the subject of the removal decisions.

The HC held the dangerous journey criterion is justified and proportionate to the Home Secretary's objective *'to protect refugees from exploitation by criminal gangs who, for example, organise the small boat crossings'*.

The HC held the dangerous journey criterion is justified and proportionate to the Home Secretary's objective *'to protect refugees from exploitation by criminal gangs who, for example, organise the small boat crossings'* [para 154].

The HC noted that the Rwanda policy excludes unaccompanied children seeking asylum, and that families, the Home Secretary states, 'for now', will only be removed with their consent. As a matter of generality, the court considered the Home Secretary had 'good reason' to treat families differently from lone adults given that the Rwanda policy is a 'new departure' [para 154].

SAA also argued that the dangerous journey criterion had been applied inconsistently, as it did not apply to those who, since February 2022, fled Ukraine after Russia's invasion of that country. The HC found that this contention did not give rise to a 'viable claim' because it rests on a 'flawed comparison' [para 152]. Those fleeing Ukraine were not inadmissible but had entered the UK under the Ukraine Family Scheme and the Ukraine Sponsorship Scheme (Homes for Ukraine), and it was *'not unlawful for the Home Secretary to make special provision for persons coming from Ukraine'* [para 152].

Claimant AB argued that being an asylum claimant is a relevant 'other status' for the purposes of an Article 14 claim, which was not disputed by the Home Secretary. He argued that it would be discriminatory for the policy to only apply to persons claiming protection under the Refugee Convention, but not those who make no asylum claim but who argued removal would breach their human rights. The HC accepted the Home Secretary's submission that the difference in treatment would not arise in practice between Article 2 and 3 ECHR claims and asylum claims, and that she is entitled to formulate her policy to *'meet what happens in practice'* [para 159]. Other human rights claims, the Home Secretary argued and the court accepted, which in the immigration sphere would predominantly be Article 8 ECHR claims, are of a different nature *'such that the difference in treatment does not comprise unlawful discrimination'* [para 158].

Claimant ASM relied on Article 14 ECHR, and s19 EA, arguing the 'MEDP scheme' entails indirect discrimination on grounds of race and disability.

In relation to Article 14, the court held the claim failed for the same reasons as those of SAA and AB.

In relation to s19, the HC held the claim for indirect discrimination could not be pursued under the EA, as neither s19 nor s20 give rise to a free-standing claim of discrimination. Assuming the operative provision to be s29(6), the court found the exception in paragraph 1 of Schedule 23 to the EA (which exempts acts authorised by statute or the executive) applied to any discrimination done because of a person's nationality.

On the disability ground, ASM argued that *'persons claiming asylum having travelled across Europe and reached the United Kingdom by a dangerous journey are more likely to have mental illnesses amounting to a disability than those reaching the United Kingdom by different means'* [para 163]. The HC stated there was no evidence to that effect, but even if the contention was made out, a person who suffers from mental illness would not be prejudiced. The prejudice would arise from a lack of care, and one premise of the UK's agreement with Rwanda is that appropriate care will be available. If it were not available, it is to be expected the human rights claim of the person would succeed.

The public sector equality duty

Claimant ASM also argued that the Home Secretary failed to comply with the s149 EA PSED because the EIA:

- did not address concerns in the Home Secretary's May 2022 Rwanda assessment documents that the rejection rate for asylum claims made by individuals from middle-eastern countries appeared higher than those made by individuals from other countries, and that even those with successful asylum claims may find it difficult to integrate into Rwandan society;
- focused on circumstances in Rwanda, rather than considering the impact of the removal process, particularly for individuals suffering from mental illness amounting to disability;
- post-dated the MoU and *Notes Verbales*, and was a *'rearguard action'* rather than genuine compliance.

... the exception in paragraph 1 of Schedule 23 to the EA (which exempts acts authorised by statute or the executive) applied to any discrimination done because of a person's nationality.

The court disposed of these arguments in four brief paragraphs.

It held that the timing of the EIA did not show any failure to meet the PSED. It was published at the same time as the Home Secretary's Rwanda assessment documents. The court accepted the evidence of the Home Secretary that work on the EIA began in February 2022, continued in tandem with the MoU negotiations, and informed the substance of the terms sought during those negotiations. From this, the court concluded the Home Secretary did have regard to the s149(1) criteria when formulating the Rwanda policy.

The other two criticisms were held to be insufficient to reach the conclusion that the Home Secretary failed to comply with her duty. The duty does not require *'exhaustive consideration of all possible matters'*; the EIA shows 'thorough consideration' of how the MEDP might affect persons with protected characteristics [para 175].

Although the removal process was not specifically addressed in the EIA, the court said the exercises would be undertaken in the 'usual way', and there was no suggestion the process gave rise to *'any unique considerations'.*

The court interpreted the issue of integration into Rwandan society, including following a successful claim, as one of *'how the system in Rwanda for dealing with asylum claims might work'* [para 177]. The EIA states that, where the assessment documents raise equalities concerns, mitigations have been put in place, including *'ongoing monitoring of the end-to-end operation'* under the MoU, *'which provides assurance that each individual and their claim will be treated in accordance with international standards'*.

Considering the matter *'in the round'*, the court was satisfied that the Home Secretary complied with her duty.

Comment

While the discrimination grounds were dealt with briefly in only four of the 139 pages of the judgment, it is worth delving deeper into the HC's reasoning as it begins to reveal the systemic issues underpinning the plan.

Such young men could not have made asylum claims in the UK *before* arriving in the UK.

For example, there is an interesting passage in relation to SAA's first ground, that the dangerous journey criterion results in indirect discrimination on grounds of age, sex and nationality:

> *The dangerous journey criterion is not specifically directed to young men. It is not a criterion that they meet by reason of any inherent characteristic. Rather, it applies to them by reason of choices they have made: (a) not to make asylum claims before arriving in the United Kingdom (the premise here must be inadmissibility decisions have been correctly and lawfully made); and (b) to travel to the United Kingdom by unauthorised and clandestine means.* [para 155]

It is unclear what the court means by choice (a). There are three possible interpretations. First, that such young men should have made an asylum claim **to the UK** before arriving in the UK. Second, that they should have made an asylum claim **to another country**, before arriving in the UK. Third, that they should have made an asylum claim to another country, and not ever arrived in the UK to claim asylum here.

If the first interpretation is correct, this runs to the core of the problem behind the policy. Such young men could not have made asylum claims in the UK **before** arriving in the UK. There is no asylum entry clearance application to the UK. Nationals of countries that feature on the visa national list require entry clearance before they travel to the UK, and there are carriers' liability implications which inhibit the ability of such nationals to travel directly to the UK.

There are limited *'safe and legal routes'*. Many are bespoke, nationality specific, and/or suffer from limitations and restrictions. As for the broader '*safe and legal'* routes, from January to December 2022, only 887 individuals were resettled on the UK Resettlement Scheme, four under the Mandate Scheme, and 272 under Community Sponsorship (see Asylum applications, initial decisions and resettlement, Asy_D02). The current Home Secretary, Suella Braverman MP, was questioned by Tim Loughton MP on this very matter, on November 23, 2022 in the Home Affairs Committee. In a similar vein, three weeks later, the current Lord Chancellor and Justice Secretary, Dominic Raab MP, was questioned by the Joint Committee on Human Rights. Neither could provide a cogent response as to how persons without a bespoke route might lawfully arrive to claim asylum in the UK.

If the second interpretation is correct, if individuals had made claims in safe third countries before arriving in the UK, that would not free them from the inadmissibility process. Rather, their asylum applications in a safe third country would assist the Home Secretary in proving the inadmissibility requirement in paragraph 345A(iii)(a) of the Immigration Rules had been met.

If the third interpretation is correct, then (a) is poorly phrased. What the court meant was that such individuals should have claimed asylum in a country that is not the UK, not *'before arriving in the UK'*, but *'without arriving in the UK'*. Doing so would have obviated the need for them to arrive in the UK. This burden- and responsibility-shifting to other states, through which a person passes **en route** to the UK, due to the UK's

geography, underlies this policy of externalising obligations. It places in a position of privilege those non-visa national refugees who are able and can afford to fly or cruise directly to the UK without passage through a European country. They are insulated from the inadmissibility regime that guards access to territorial asylum.

Nevertheless, the court's view appears to be that young men (including those of certain national origins) do not suffer disproportionately prejudicial effects from the dangerous journey criterion.

It is difficult to know from the judgment how the second part of SAA's challenge, in relation to the inconsistent application of the policy to individuals fleeing Ukraine, was pleaded before the court. It is described at one point as SAA contending that *'the dangerous journey criterion has not be [sic] applied consistently because it has not been applied to those who, since February 2022, have fled from Ukraine following the Russian invasion of that country'* [para 151].

The HC summarily rejected the claim's viability on the basis that it rests on a 'flawed comparison'. While it is true that the hundreds of thousands of individuals have been granted leave to enter or remain on the bespoke Ukraine Family Scheme and Homes for Ukraine Scheme, that is only part of the picture. Theoretically, there are persons fleeing Ukraine, since February 2022, who would be inadmissible if they claimed asylum; for example, those who did not arrive directly in the UK, but perhaps fled Ukraine to neighbouring countries and entered the UK without entry clearance, crossing the land border in Ireland, before claiming asylum in the UK. From the Home Office's statistics for the year ended December 2022, there were 76 cases of Ukrainians claiming asylum and 53 initial decisions: two were refused, three were granted refugee permission, three were granted humanitarian protection, and the remainder were withdrawn by the individuals. It is unclear if any were issued notices of intent to remove them to Rwanda. There remains a question as to how the criterion might be applied, for example, whether the Home Secretary could describe their journey as 'dangerous', and whether it would result in any difference in treatment.

... the Home Secretary revealed her willingness to adapt the agreement with Rwanda and the Inadmissibility Guidance.

In AB's Article 14 claim, it is worth noting that the Home Secretary relied on a technicality. The technicality was brought in by a Statement of Changes HC 17 laid on May 11, 2022, but which came into effect on June 28, 2022, after AB's judicial review claim was brought on June 10, 2022. The Home Secretary treats a person who makes a claim that removal would give rise to a real risk of Article 2 or 3 ECHR ill-treatment as a claim for humanitarian protection. Under the technicality introduced in paragraph 327EC of the Immigration Rules, any claimant for humanitarian protection is *'deemed to be an asylum applicant and to have made an application for asylum for the purposes of these Rules'.* Based on this, the Home Secretary argued the difference in treatment between persons seeking asylum and persons making human rights claims would not arise in practice.

Crucially, it should be noted, in response to this ground, the Home Secretary revealed her willingness to adapt the agreement with Rwanda and the Inadmissibility Guidance:

> *... were the position to change such that the same class of persons ceased to make asylum claims but claimed leave to enter the United Kingdom for other reasons, she would consider adapting the MEDP and the Inadmissibility Guidance to meet those circumstances.* [para 159]

This flexibility of the arrangements with Rwanda was recently accepted by the government, and confirmed by Lord Murray of Blidworth, Parliamentary Under-Secretary of State for the Home Office, in a debate in the House of Lords on February 6, 2023:

> *As indicated in the Government's response to the International Agreements Committee's report, the Government's decision to use a memorandum of understanding – a non-legally binding instrument – has the benefit of allowing the detail of the partnership to be flexible. The technical details may be adjusted quickly if needed with the approval of both partners.*

Such room for flexibility and adaptability in the partnership seems at odds with significant weight being placed on the assurances contained in the MoU and the supplementary *Notes Verbales.* The assurances were the basis for the HC's decision that individuals who suffer from mental illness would not be prejudiced in Rwanda as adequate care would be available. The assurances were also relevant to the court's decision that the Home Secretary was entitled to conclude that there were sufficient guarantees to ensure that persons relocated to Rwanda – including those UNCHR identified might face discrimination in Rwanda – would have their asylum claims properly determined there, did not run a risk of refoulement, and that Rwanda was a safe third country.

This space continues to be one of shifting sands, with appeals pending before the CA, a further immigration bill to be laid before parliament imminently, and the inherent malleability of the UK's partnership with Rwanda. This first judgment in the litigation only further reveals the contradiction at the heart of these plans. Those who do not, and cannot, claim asylum in the UK before their arrival, who have no other way of arriving but in a manner the Home Secretary may describe as dangerous, face the obdurate single-minded plan of involuntary removal to Rwanda – a plan built on flexible assurances.

Zoe Bantleman
Legal Director
Immigration Law Practitioners' Association

NEWS

Topics for forthcoming DLA practitioner group meetings

- Equality and Human Rights Commission:
  presentation on the Commission's legal support scheme (funding for race discrimination cases) and strategic plan
- Louise Price, barrister, Doughty Street Chambers:
  using international law to advance equality principles
- Martina Murphy; barrister, 12 King's Bench Walk, and John Horan, barrister, Cloisters: reasonable adjustments in courts and tribunals
- Chris Milsom, barrister, Cloisters:
  the relationship between caste and class discrimination

Dates and times to be advised; details will be circulated by DLA admin; contact: info@discriminationlaw.org.uk

Missed opportunity on protection from menopause discrimination in the workplace

The government has responded to the Women and Equalities Committee's (WEC) report on menopause and the workplace, rejecting five of the committee's recommendations outright, including the recommendation to consult on making menopause a protected characteristic under the Equality Act 2010 (EA) and pilot a specific menopause leave policy. Published on January 24, 2023 the government's response was described as a *'missed opportunity to protect vast numbers of talented and experienced women from leaving the workforce'* by the WEC chair Caroline Nokes MP.

DLA members will recall the practitioners' group meeting on September 7, 2021 which was held for the specific purpose of gathering members' views on the topic of menopause discrimination which fed into the DLA's response to the WEC's call for evidence to its inquiry into *Menopause and the Workplace*. See Briefing 1015 [2022].

The DLA evidence and recommendations to the WEC included:

- The concept of the workplace' or 'work' is not gender-neutral concept. Historically, the way in which work places and work practices have been designed creates barriers for women affected by the menopause. The model of work has traditionally been based on masculine needs and on the tacit assumption that a worker will be a male worker.
- Menopause should not be viewed as analogous to an illness or impairment. It is an important part of a woman's life cycle.

The WEC used the evidence to support its proposal that the government makes menopause a protected characteristic under the EA. It also proposed that s14 EA be enacted to provide for dual characteristics discrimination. The government has now rejected the committee's proposals for changes to be made to the EA.

Despite the government's refusal to accept the proposal, it is reported that some progress has been made in some UK work places to support people experiencing menopause. Jo Brewis, Professor of People and Organisations at The Open University Business School has *reported that*:

> *10% of organisations had support for menopausal staff in place in summer 2018, but 2022 data from the Chartered Institute of Personnel and Development indicates that 30% now offer some kind of awareness raising, guidance, training for managers or a policy.*
>
> *Efforts to support those going through the menopause at work are so important. Not least because there are now some 4.5 million cis women of menopausal age in the UK workforce, according to the Office for National Statistics. And, as psychotherapist and writer Tania Glyde rightly points out, some transgender men and non-binary people will also experience menopause.* (Open University, 2023)

Challenge to decision to deny homeless person cost of living payment

Law Centre Northern Ireland is challenging a decision to deny a homeless client access to the Low Income Cost of Living Payment. The client would have been entitled to this payment had she not been homeless and living in temporary accommodation.

Law Centre Northern Ireland will argue that it is irrational to deny access to this payment to someone on a low income who would otherwise be eligible for it just because they had been placed in temporary accommodation after becoming homeless. The judicial review will ask the High Court to address the lawfulness of the difference in treatment between low-income benefit recipients who live in temporary accommodation and those who are in settled accommodation.

Law Centre Northern Ireland is taking the action to defend the client's human rights and protect her from discrimination based on her property status.