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DLA 20th anniversary

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# Editorial *Shameful response undermines respect for the rule of law*

The refusal of our government to respond adequately to people fleeing persecution and seeking asylum shakes to its foundations our pride in the rule of law and respect for human rights which underpins our shared UK moral and legal traditions. In response to the horrors of the 1939-1945 War the UK and other countries created a framework of international and European rights to ensure that such inhumanity would not be repeated. We have in place an agreed body of international human rights instruments based upon universal minimum rights for all human beings, central to which is the *'right to seek and enjoy in other countries asylum from persecution'.* These rights should be at the core of our government's response to those seeking refuge from conflict in countries such as Syria, Iraq and Afghanistan, or repressive regimes in other countries including Eritrea and Sudan. That government ministers have tried both to deny that they have legal obligations to refugees and asylum seekers and to denigrate those who assert a rights-based approach, is shameful.

In her article on the refugee crisis, Stephanie Harrison QC, outlines the international, European and domestic law relating to the obligations of states to respond to the rights of refugees and asylum seekers, highlighting how this existing extensive legal framework of rights could and should have dictated our government's and other EU states' responses. She highlights in particular Council Directive 2001/55/EC of July 20, 2001 which was implemented by the UK in 2005. The purpose of the Directive *'is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons'.*

The UK government prefers instead to extend to this issue the same deserving/undeserving judgmental approach as it uses in other policy matters, offering to help only those it perceives as in 'genuine need', leaving the remainder, no doubt the vast majority, to rely on the humanity and increasingly overstretched generosity of other European states that recognise their international legal duties, or otherwise to fend for themselves.

The reaction of many ordinary people in the UK and across Europe challenges the government to meet its legal obligations and adopt an approach which would harness the goodwill that thousands have demonstrated in generous gestures and on marches along the streets of our major cities; civil society is offering a basis to found successful sponsorship and integration programmes.

The need for grassroots community-based activism is a theme in *Briefings*; one that was articulated at the DLA's annual conference and which is echoed in the 'anniversaries' article. Speakers and participants at the conference recalled examples of past successful campaigns in the fight for protection against race or disability discrimination; others referred to the need to rebuild community activism in order to challenge government and ensure that the protections enshrined in law are not further undermined.

In the 'anniversaries' article, the former chairs and leading members of the DLA celebrate not only the anniversaries of the first Race relations Act, the Sex Discrimination Act and the Disability Discrimination Act, but also the 20th anniversary of the DLA. One common theme is – there is much to celebrate, but still much to do! Another is the uphill battle to protect, maintain and develop equality law and, critically, to ensure that it is enforced. Law that is unenforced is meaningless, to paraphrase Gay Moon, chair of the DLA from 2001-2002.

The equality legislation we enjoy today came about because of campaigning by dedicated activists supported by lawyers and legislators; and, as Barbara Cohen, chair of the DLA from 2012-2014, points out: the outcome of this was permanent societal change. It is good to be reminded of what we can achieve by working together, whether grassroots community-based activists, lawyers and those affected by discrimination or fleeing persecution, to bring about a change of mind-set in society, one that challenges government to protect and uphold the rights of all of us, including refugees and asylum seekers.

**Geraldine Scullion, Editor**

**Please see page 35 for list of abbreviations**

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**Editor:** Geraldine Scullion geraldinescullion@hotmail.co.uk. Designed by Alison Beanland. Printed by The Russell Press.
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# Refugees: legal rights and moral responsibility – a crisis of humanity?

Stephanie Harrison QC, Garden Court Chambers, outlines international, European and domestic law relating to the obligations of states to respond to the rights of refugees and asylum seekers, highlighting how the existing extensive legal framework of rights could and should have dictated the UK and other EU states' responses to recent events. She refers to the successful Canadian sponsorship scheme and challenges the UK government to uphold its legal obligations, and acknowledge and respond to calls from ordinary people for a humanitarian response.

## Historical background

The UN High Commissioner for Human Rights (UNHCHR), Zeid Al Hussein is right to remind us that we have been here before: in 1938 thirty two countries including the USA[1] and Britain came together in Evian, France to decide how to address the growing numbers of Jews trying to flee Europe as Germany enforced its policy of ethnic cleansing (Juderein) within its borders and beyond.

Despite eight days of hand wringing only the Dominican Republic agreed to take any significant number of Jewish refugees – 100,000. The US and Britain effectively closed the door beyond taking only a few thousand people. France considered itself at 'saturation' point. Australia offered to take 15,000 refugees but over three years, stating fears that any more would import racial problems into Australian society.

It was not the last time the risk of anti-immigrant feeling, bigotry and racism was used to justify the withholding of assistance to the victims of such racial prejudice. The situation is poignantly summed up as a *'world divided into two parts – the places Jews can't live and the places into which they cannot enter'*.[2]

The failure of the world to provide safe passage and refuge to the hundreds of thousands of European Jews and others was, like the current situation, not to be properly categorised as a 'refugee crisis' but a political and moral failure – a crisis yes, but in the humanity of the leadership of the free world, and with such catastrophic humanitarian consequences for those denied a safe haven.

## Current European humanitarian crisis

Here again we have a collective political and moral failure of a number of European states most notably our own, which has and is creating a deepening humanitarian crisis across Europe. The increasing numbers of refugees from Syria and elsewhere was met, not with a collective plan for safe passage and protection, but apparent indifference to their plight even to the loss of life, with increasingly repressive measures being taken over the summer to drive back and keep out the growing number of asylum seekers, with fences, razor wire, check points and armed guards marking out and replacing the open borders of the Schengen[3] free movement zone.

However, unlike 1938, current leaders have the enormous benefit of the hard lessons of these past failures which were learned and acted upon after 1945 with the creation of a body of international human rights instruments based upon universal minimum rights for all human beings. Central to these instruments is the *'right to seek and enjoy in other countries asylum from persecution'*: i.e. to obtain international protection of core fundamental rights if discriminatorily denied it by your own state through Article 14 of the Universal Declaration of Human Rights (UDHR) and the Geneva Convention Relating to the Status of Refugees 1951 (the Refugee Convention).[4]

In the current context, the primary driver of the crisis is in my view not the challenge (significant as it is) of the numbers, but the failure to meet that challenge through implementing, what is now an extensive legal framework of rights that should have dictated the response to the problem of the displacement of millions of Syrians within the country and at its borders in Lebanon, Jordan and Turkey, who between them, have close to four million Syrian refugees. Only a proportion of these refugees are now seeking refuge in Europe along with others displaced and at risk as a result of conflict

1. No US government official in fact attended.

2. Chaim Weizmann

3. The Schengen Agreement established free movement within the 26 of the EU states (excluding the UK and Ireland) removing internal borders between the Member States.

4. The 1951 Convention was limited to refugees in Europe before 1951 and provided a legal status to those who had survived in the countries to which they had fled. The temporal and geographic limitations were lifted by the 1967 Protocol.

in countries such as Iraq and Afghanistan, or repressive regimes in Eritrea and Sudan.

### The right to seek asylum

As indicated above, the cornerstone is the right in international law, guaranteed by A14 of the UDHR, to seek asylum. This was given legal and practical effect by the obligations under the Refugee Convention (and the later 1967 Protocol) which defines the status of the refugee, as someone outside of their country of origin owing to a well-founded fear of persecution (serious harm) for one of the Convention reasons (race, religion, nationality, membership of a particular social group[5] or political opinion (A1A2).

There is no dispute that that those currently fleeing Syria fall within this definition, as do many of the other asylum seekers in transit from countries also in conflict, such as Iraq, Libya, Yemen, Sudan, and Afghanistan.

As asylum seekers, all countries must permit Syrians and others at and within their borders to seek asylum and to determine their claims. Obstacles to the making of such claims through forced removal, razor wire, fences, water cannon, tear gas, pepper spray and now even bullets are all plainly incompatible with the duty under A14 UDHR and the Refugee Convention to permit the claims to be made.

#### *Non-refoulment*

The core refugee protection is that of *non-refoulment* i.e. you cannot return directly or indirectly via third states an asylum seeker to the country of feared harm. *Non-refoulment* is a principle of customary international law and is replicated as an absolute obligation in respect of torture in Articles 3 of the European Convention on Human Rights (ECHR) and the UN Convention Against Torture (UNCAT) and A7 of the International Convent on Civil and Political Rights.

A31 of the Refugee Convention also prohibits the imposition of penalties for illegal entry or presence in host states on those seeking asylum; which places countries such as Hungary in breach with the recent implementation of criminal offences for irregular entry into the country. Hungary's avowed willingness to accept 'Christians' and not Muslim asylum seekers (again with horrifying echoes of the past justification for not accepting Jewish refugees) is a grave and grossly discriminatory violation of these core international law obligations.

### EU legal protection for refugees

Despite moral leadership from some states notably Germany and Sweden, the failure of the EU to respond collectively and decisively in accordance with these international law obligations is all the more dismal because they are fully incorporated into a comprehensive framework of effective refugee protection in EU law through the Procedures,[6] Reception[7] and Qualification Directives.[8] These Directives enshrine the *non-refoulment* obligations and set minimum common standards for fair procedures and humane treatment whilst seeking asylum. These include special measures for unaccompanied children and other vulnerable adults as well as common criteria for identification and recognition for those in need of international protection. A15c of the Qualification Directive provides additional protection in civil war situations for those at risk of indiscriminate harm.

Much emphasis has been placed on the Dublin Regulations,[9] which demand that the asylum seeker claims in the first safe country and must be returned to the country in which he/she first entered the EU. This is a rule of practice which has no root in international law but is in any event always subject to the *non-refoulment* obligation. The country must be a safe country. There must be no risk of onward removal to the country of feared persecution and there must be the opportunity for a fair determination of the claim in humane conditions.

The Court of Justice of the European Union and the European Court of Human Rights (ECtHR) have both concluded that removal to Greece, under the first safe county practice, is incompatible with these core obligations.[10] Applying these principles, the Austrian Federal Administrative High Court has recently blocked Dublin transfers to Hungary.[11] The ECtHR has also issued Rule 39 indications (temporary measures) to

5. Claims based on gender specific forms of persecution generally fall within this broad category.

6. Council Directive (2005/85/EC)

7. Council Directive (2003/9/EC)

8. Council Directive (2004/83/EC)

9. Council Regulation (343/2003)

10. *NS v Secretary of State for the Home Department* [2011] CJEU C-411/10 and MS v Belgium and Greece [2011] EHCR 108.

11. The case (RA2015)18/0113) September 8, 2015 concerns an Afghan woman with five children. One of the key matters was Hungary's practice of summary return to Serbia applying the first safe country practice, but where no effective asylum system is operated. Removals from Belgium and Germany to Hungary have also been suspended. The German courts were particularly concerned about the use of detention and the lack of individualised assessment.

prevent return to Hungary.[12] The UNHCR has also clearly stated that Serbia is not a safe country because of its nascent and inadequate asylum provision.

### Offloading legal and practical responsibility

The practice of first country of asylum, therefore, does not provide any sort of justification for offloading legal and practical responsibility, and this crisis has shown why geography alone should not dictate the extent of the responsibility to refugees, particularly when that burden falls upon those less willing or able to bear it.

Some, like our own government, have sought to push the first country practice beyond European borders to insist that Syrians remain within the region, in particular in Turkey, and have gone so far as to assert that those who leave, are somehow less deserving than those who stay behind.

The reality is that Turkey is not a signatory to the 1967 Protocol and no Syrian will be recognised as a refugee. Only approximately 10% of Syrians are in organised camps. The overwhelming majority remain itinerant, many are homeless and, denied the opportunity of legal employment, are forced to beg or increasingly are falling vulnerable to criminal gangs and people traffickers.

Our wealthy and highly developed country baulks at the integration of a few thousand Syrian refugees, but expects Turkey and other neighboring countries to bear the burden of supporting millions of people.[13] Belatedly, the EU is recognising the significance of this contribution but the three billion Euros now promised to Turkey will not alleviate the existing pressures to move, caused by the insecurity, deprivation and hopelessness of the current situation.

It is clear from the pictures on our television screens that this is not some route out only for the fittest. Those seeking refuge in Europe clearly include families with women, children and the elderly. All have experienced the trauma and hardship of civil war and being forcibly displaced from their homes.

That young men figure heavily amongst the numbers fleeing is hardly surprising: they are best able to survive the journey and to establish a foothold so that the weak and infirm can follow. These are young men who are choosing to try to make a new life for themselves and their families. They are not lining up to fight with pro or anti-government militias, including ISIS; they are the future of Syria – those who want to rebuild lives and not destroy them. It seems particularly bewildering that the Home Secretary in her speech to the Conservative Party should castigate and treat them as the least deserving of sanctuary.

Applying this logic to the 1938 context, it seems Mrs May too would seemingly have denied the MS St Louis the right to dock with its 937 Jewish passengers turned away from ports in Cuba and the USA and returned back to Europe because it too undoubtedly held *'the wealthiest, the luckiest and the strongest'*.[14] Hitler, however, did not make that distinction – all Jews were treated to the same fate. For at least one third of those on the St Louis it was deportation and death. Likewise the bombs raining down on Syria and elsewhere make no such distinction – whoever you are, wrong place, wrong time, and your home and your family or members of it, are gone.

### EU provision for a 'mass influx' of displaced persons

It may surprise many to know that in 2001[15] the EU in fact made specific provision for precisely this situation of actual or imminent 'mass influx' of displaced persons from third countries who are unable to return to their country of origin. This Directive is predicated on the recognition that flight to neighbouring states bordering areas of conflict does not tend to provide durable solutions in long-term conflicts for large numbers of people. This was the experience of the conflicts in Vietnam, Afghanistan, Somalia, Bosnia and Kosovo where large displacements of people sooner or later result in significant numbers seeking refuge in Western Europe, Scandinavia, Canada or the USA, albeit usually only a small proportion of the total number of displaced.

A council decision is required by a qualified majority of member states to declare a situation of mass influx, which would be binding on all member states (A5) and would oblige states to provide temporary protection for

12. In these cases a key issue was also the nature of the reception conditions in Hungary.

13. Turkey has an estimated 1.9 million Syrians within is borders, Jordan with a population of 6 million 600,00 Syrian refugee and in Lebanon its population of 4 million has accommodated 1 million from Syria. This contrast with the estimated 350,000 asylum seekers in Europe with a combined population of over 500 million.

14. The experience of the passengers and crew of the St Louis is told in the book and film: *Voyage of the damned* written by Gordon and Max Morgan Watts

15. Council Directive (2001/55/EC)

a maximum period of one year which can be extended and would continue until safe return to the country of origin is possible (A6).

Full status determination is not required but the individuals status must be regularised and documented (A8), there must be access to employment, self employment or education (A12), provision of housing, social welfare, means of subsistence and health care for those without their own sufficient resources (A13).

The Directive also makes provision for family reunion for those divided by the conflict (A15) and once the temporary protection ends an obligation to facilitate voluntary return to the country of origin (A21). Articles 24-26 provides for burden sharing in the spirit of solidarity and administrative co-operation (A27).

The EU, therefore, always had the legal mechanism to address these challenges. The UK implemented these provisions into our domestic law in 2005.[16] Using these temporary urgent measures should and could have avoided the numbers of those displaced and seeking refuge becoming the current crisis. The UK (and other states) instead preferred to play the politics of fear evoking not a practical solution to meet a compelling humanitarian need and an international response, but a resort to the demonising language of petty xenophobia, referring to the 'swarm', the 'flood' and the 'invasion': the threat of the other.

### Public outrage and calls for humanitarian responses

Whilst that tune – mediated through key tabloids – undoubtedly has an audience, what was clearly not anticipated was the backlash amongst many ordinary people against the inhumanity of the government's front door shut policy and the opposition within the EU to Germany's call for a concerted collective response and burden sharing.

Across Europe, East and West, ordinary people have been turning out to offer a welcome and practical support to the thousands arriving at their borders and in their cities and towns. The harrowing pictures of the body of three year old Aylan Kurdi washed up on the Turkish coast on September 3, 2015 was clearly a turning point in focusing the world's attention on the plight of Syrian refugees and the inadequacy of the response, in the face of such human tragedy.

Over 2,600 people are assessed to have drowned seeking to cross the sea to Europe between January and September 2015,[17] but it was that one picture that captured the horror and futility of the loss of innocent life and tipped concern into public outrage and galvanised demands for change.

Estimates of up to 100,000 people marched through London on September 12, 2015 with one message – refugees ***and migrants*** are welcome here. That, and the ground swell of support didn't change our government's shut door, closed mind policy. Cameron remained steadfast in opposing any burden sharing and cooperation with EU partners.

In an echo of the Australian position at Evian, he proposed 'up to' 20,000 Syrians would be accepted directly from the camps in the region but over a five year period.[18] If anything, the Home Secretary's speech at the Conservative Party Conference has demonstrated a hardening of the anti-refugee/migrant rhetoric and an arrogance to match the heartlessness of the position – even throwing down a gauntlet to 'immigration campaigners' and 'human rights lawyers' that if they persisted in defending the rights of those deemed undeserving by her and her department, this would mean, and justify, further limiting those selected for entry to the UK from the 'deserving' in Syria and elsewhere.[19] Certainly there's to be no common collective European solution but a 'British approach' which would seek to rewrite the Refugee Convention and its fundamental underpinning of minimum universal rights for all.

This marks a low point in the political discourse about human rights protection in the UK, but it cannot overshadow or undermine the significance of the stand taken by many, and for the first time in decades, in support of refugees and migrants.

Ordinary people have made good the promise of the post 1945 human rights instruments by offering assistance, by bringing food, toiletries, clothes and toys to people in makeshift camps in streets, parks, railway stations and at border crossings throughout Europe.

Many, including the UK, have made donations and even offered their homes to accommodate Syrian asylum seekers. Here again there is an alternative response that

16. The Displaced (Temporary Protection) Regulations 2005

17. BBC News: (September 21, 2015): Why is the EU struggling with migrants and asylum?

18. Announcement to Parliament on September 7, 2015.

19. October 6, 2015: *'And my message to the immigration campaigners and human rights lawyers is this: you can play your part in making this happen – or you can try to frustrate it. But if you choose to frustrate it, you will have to live with the knowledge that you are depriving people in genuine need of the sanctuary our country can offer. There are people who need our help, and there are people who are abusing our goodwill – and I know whose side I'm on'.*

could have harnessed this goodwill and utilised it to address the challenges of integrating significant numbers of people. It is not without precedent and practical efficacy. In 1979 in the wake of the Vietnam war, thousands fled Indochina, many like those now fleeing the Middle East, undertaking dangerous boat journeys, in that case to Hong Kong, with the hope of repatriation to a safe and new life in the West.

### Successful models of practical support

In Canada, the response was an innovative initiative of joint sponsorship between the government and private individuals called the Private Sponsorships of Refugees (PSR) Programme. In the first year this saw 60,000 refugees settled in Canada, 30,000 of whom were sponsored by ordinary Canadian citizens or settled residents. Howard Adelmann the founder of the organisation (Operation Life Line) which was instrumental in promoting private sponsorships explained its success by describing how *'Humanitarianism seemed to captivate the political imagination'.*

Many thousands of refugees have since entered Canada through this PSR programme. It has proved an effective tool for settlement, with research showing the advantages for sponsored refugees, for example in access to employment and higher earnings.

Over and above the practical benefit is the invaluable impact on establishing positive relationships based on welcome and support between the refugee and the host community, and as a model for successful integration and cohesion. Lifeline Syria was set up in Canada this year and is pressing for Canada to speed up its efforts to resettle Syrian refugees.

Of course, private sponsorships can never be a substitute for concerted collective government action, but it symbolises the capacity within ordinary people for generosity and empathy for those in need, and is a powerful antidote to the assumptions of the anti-migrant rhetoric that has dominated the political debate and the media coverage of refugee and migration issues for so long. If we had a government seeking to find effective and creative solutions to these problems, then encouraging humanitarianism of this kind amongst UK citizens could certainly have been included as part of the response, given the thousands of people in the UK (and elsewhere in Europe) who pledged to offer a home to Syrian families.

On October 12, 2015, a body of eminent former judges, lawyers and academics, in an open letter to the Prime Minister, called on the government to take urgent action to fundamentally change its position and to accept a fair and proportionate number of refugees from within the EU and Syria and called for the establishment of safe legal routes, an orderly relocation scheme with humanitarian visas, suspension of the Dublin system (save for the family reunification provisions) and fair and thorough procedures for those seeking international protection.[20]

These measures, based on international law obligations offer an immediate practical solution to bring an end to the chaos and the crisis, which is plainly not resolving as winter comes, and the conditions for the refugees deteriorate and the pressures for militarisation and criminalisation of this humanitarian problem grows at Europe's borders and beyond.

20. For the full text see: http://www.bbc.co.uk/news/uk-politics-34502419 and http://www.lawyersrefugeeinitiative.org/#qc

# The distance travelled to secure legal protection

2015 marks the 50th anniversary of the first Race Relations Act 1965 (RRA), the 40th anniversary of the Sex Discrimination Act 1975 (SDA) and the 20th anniversary of the Disability Discrimination Act 1995 (DDA), as well as the 20th anniversary of the Discrimination Law Association. Leading members and previous chairs of the DLA reflect on the development of anti-discrimination law, the work of the DLA and today's challenges to equality rights. They give their personal views based on extensive experience of both campaigning for equality legislation and applying it in their day-to-day work. Common themes include the importance of the cultural change signalled by the passing of the first equality laws and how vital it was in changing mind-sets and society. The writers also stress the importance of activism and the work of dedicated campaigners in achieving change. All acknowledge the need to address continuing challenges such as those presented by government's apparent fomenting of division, reforms which weaken protections, and the lack of resources to ensure effective access to justice. The legacy of our equality laws is to be celebrated and cherished, advanced and protected.

## 1 Why do you think we should celebrate the anniversaries of the RRA, SDA or the DDA?

**Tufyal Choudhury, Lecturer in Law, Durham University, chair of the DLA from 2006-2007:** In the face of the daily struggles against discrimination it is possible to lose sight of the distance that has been travelled in ensuring better legal protection against injustice. The RRA, SDA, and DDA provided the starting point from which today's legal framework has been built and developed. Alongside the direct legal protection, the signal the law sends is important. Although the relationship between law and social attitudes is complex and it is difficult to trace direct cause and effect, all three acts have played a vital role in how we see and understand equality and discrimination on grounds of race, sex and disability, and helped change our culture for the better.

**Karon Monaghan QC, Matrix Chambers, chair of the DLA from 2002-2004:** The early Race Relations Acts reflected an, albeit limited, democratic mandate for challenging some of the most hateful forms of race discrimination. They weren't achieved without a significant fight and, of course, there were significant weaknesses within them but they helped shift the prevailing orthodoxy – that it was ok to treat Black people badly because… well… they were Black. Once the principle of non-discrimination was established, it meant further legislation addressing race, gender and

**Reflections**

**Camilla Palmer: Where are we with equality?**

*'Campaigners need to be patient'* and allow gender equality *'to happen naturally'* says one of the most senior judges about the judiciary. If it takes 50 years that's fine – Lord Sumption says.[2] So, if we follow him, we women should just accept men's place in the judicial hierarchy will continue for another half century; otherwise *'the judiciary and quality of British justice – a terribly delicate organism'* could easily be destroyed.' This statement leaves me speechless. 40 years on from the SDA, this shows just how much more needs to be done to change attitudes and stereotyping of women. Recent research by the EHRC about pregnancy discrimination[3] is also shocking, suggesting that around 54,000 new mothers are forced out of their jobs in Britain each year. This is clearly unlawful discrimination but it is a right without a remedy as few women can afford the tribunal fee – when their income is at a low (Statutory Maternity Pay is only £139.58 per week for most of maternity leave) and their overheads at a high.

ultimately disability was probably inevitable. Just as with the early Race Relations Acts, the importance of the RRA, SDA and DDA lay not just in their ability to deliver justice in individual cases, very important though that is, but in their ability to affect the mind-set of a society – including employers, public authorities, schools, as well as individuals – in which casual stereotyping, exclusion, marginalisation and sometimes outright hostility towards Black people and other minorities were commonplace. At a time when there is a real risk that there will be a row-back on our equality laws, that may well prove to be their greatest legacy.

**Catherine Casserley, barrister, Cloisters Chambers, chair of the DLA from 2007-2009 and from 2011-2012:** The UK had and continues to have some of the most far-reaching discrimination law in the world. The DDA came about as the result of an incredibly passionate and hard fought campaign by disabled people who wanted to challenge the discrimination that they faced (and still face) on a daily basis, not through the paternalist attitudes that had prevailed previously but by means of a rights based framework. The DDA, though not without its flaws, for the first time required employers and others to make positive changes to the way in which they worked and delivered their services to ensure that disabled people could participate. This was a major shift in approach and recognised, in effect, the social model approach to disability – that disabled people are often prevented from participation not by their disabilities, but by the way in which society is constructed.

**Barbara Cohen discrimination law consultant, chair of the DLA from 2012-2014:** When each of these Acts was passed it was as a result of the coming together of campaigns by groups affected by the discrimination with lawyers sharing their concerns and a number of bold legislators. And the outcome, in each case, was permanent societal change. Treatment of ethnic minorities, of women, of disabled people, that previously had been regarded as normal and the impact ignored, could no longer to be tolerated; it was, in fact, unlawful, and victims could use the new law to secure redress. These measures, and their subsequent strengthening through revised legislation and a line of amendments, are among those of which the UK should be most proud.

## 2 What would you highlight about the work of the DLA on its 20th anniversary?

**Sir Geoffrey Bindman QC (Hon) DLA president and founding member; chair of the DLA from 1995-1999:** I am very proud of my contribution to the founding of DLA all those years ago and am immensely impressed by all those who took up the baton of leadership in the years that have followed. Looking back at the development of discrimination law since 1965, I am struck by the number of people who have committed themselves to the difficult and often frustrating task of developing the role of the law in the struggle for equality. It is remarkable to reflect that only fifty years ago the very idea of legal sanctions for discrimination was almost beyond contemplation in Britain. In America criminal sanctions were introduced following the success of the anti-slavery forces in the Civil War but they soon fell into disuse because the dominant white politicians and administrators in the South were reluctant to prosecute and white juries were unwilling to convict their fellow white citizens. In Britain many lived from the profits of slavery (as some do today) and vested interests have continued to oppose effective action to enforce equality in the exercise of economic power. So the extension of anti-discrimination law has remained an uphill battle.

In spite of the obstacles, anti-discrimination law has continued to grow in strength and scope from its very tentative and timid beginnings in 1965 – though in recent years governments have denied it the resources which effective enforcement demands. That is evidently the most severe challenge for DLA at the present time when the need for it is as great as it has ever been.

**Harminder Singh, artist and lecturer in innovation and strategy, Warwick Business School; lay EAT member and chair of the DLA from 1999-2001:** It was my pleasure to chair the DLA during its transition from a collection of interested parties into a fully functioning and financially viable organisation. What I remember most is the energy and time members put into making this a success – amongst some of the other highlights this element might seem banal, however without this social entrepreneurialism the DLA would not exist in its current form.

**Catherine Casserley:** The DLA has played a significant role in bringing together lawyers, academics, trade unionists etc. to share information, to discuss cases and tactics and to campaign around issues that are critical to claimants and their representatives. It is a unique organisation, particularly in an environment when claimant based organisations are shrinking. It has been a voice for those discrimination lawyers who often feel that they are a lone voice.

**Barbara Cohen:** A main achievement of the DLA, from the outset and continuing, is the bringing together of people working in different disciplines who share a commitment to eradicate discrimination using the law as one of the means of doing so. DLA has been able, during these 20 years, to draw on the knowledge and experience of its members in all of its work; this has given it greater strength and authority, with DLA's views increasingly sought by government and parliamentarians.

## Gay Moon solicitor, independent adviser on equality law policy and chair of the DLA from 2001-2002

**Reflections**

***Access to justice is critical***

When I started to work in equality law in 1977 it was still felt publically acceptable and wholly defensible to refuse to employ a woman because she was *'a mother with children'*; indeed the initial ET found that the employer was justified in his actions. The employer defended his actions in the local papers by saying that he had *'nothing against mothers with children, he kept one at home himself'.* Clearly, things have improved considerably since then and no-one would think that it was appropriate to publicly articulate their views in this way any more. However, the recent EHRC research on the treatment of pregnant women shows that discrimination against women having children and wishing to continue to work still persists in a significant minority of workplaces.

Much has moved on since 1975; we now have laws to prevent discrimination on a much wider range of grounds and the nature and definition of discrimination has been developed to encompass wider discriminatory acts such as, for example, discrimination by association and perception. We now have the single Equality Act that we campaigned for and a Public Sector Equality Duty that includes all the main grounds.

However, what we are increasingly lacking is the means of accessing these rights which we value so highly. The ability to seek advice or get representation on the existence, or not, of legal rights and remedies has been eroded as many CABx, advice centres and Law Centres have closed; ET fees have been introduced and County Court fees have increased; such legal aid as there was has been limited and important procedural changes have been made to make the law less effective such as the removal of discrimination questionnaires and the ET's power to make general recommendations to employer who have been found to be in breach of the Act. In my view laws are simply meaningless unless they are enforceable. To quote one of my heroines, Rt. Hon. Beverley McLachlin, Chief Justice of Canada, '*The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.*'[4]

## 3 What is the greatest challenge to discrimination protection?

**Harminder Singh:** With the recent changes to legal fees, there will be many people who previously would have had access to justice but are now excluded. We can see this in the statistics, where applications to the ET and EAT have collapsed. If this situation continues we may need to think creatively about how cases can be brought.

**Ulele Burnham, barrister, Doughty Street Chambers, chair of the DLA from 2004-2006 and from 2009-2011:**

***Fomenting division***

A government that has shown itself, by a lack of correspondence between its rhetoric on the one hand and its economic and social policies on the other, to be, at best, ambivalent about achieving better equality protection. It appears unable and/or unwilling to recognise the link between inflammatory rhetoric in relation to immigration and terrorism and an increased vulnerability and exposure to a risk of real harm experienced by Muslim and other communities in their daily existences. A recent example of this dissonance was the suggestion by Teresa May at the recent Conservative Party conference that 'uncontrolled' immigration is the most potent threat to social cohesion. Immigration does, of course, place pressure on social care provision. So far so factual. But the spectacle of a Home Secretary appearing to advance the argument that immigration is the main or the sole cause of disharmony between sections of the population is, in truth, far more likely to foment poor relations between disparate communities than either the fact of immigration or its real impact on the ability of the state to adequately provide for those in its care. This we can properly see as rhetoric almost orchestrated to dichotomise those who live here into those who, by being allowed to enter and remain, threaten the social fabric and those entitled to be respected as embodying that fabric. And those who, in the perception of the public at large, fall into the category of 'threats' are largely those very protected groups whose uneven progress in society was intended to be redressed by equality legislation.

There is also another distinct danger evident in the rhetoric of the governing party. That is the danger that utterances which appear to accord with a commitment to real equality – but which stand in stark contrast to both the anti-migrant narrative and the dismemberment of the welfare state – will be believed by a significant part of the electorate. The worry must be that the pro-equality rhetoric may ensure the survival of a government that is not, by its deeds, willing to invest in equality but quite willing to gain electoral advantage by pretending so to be. The vigilance of small 'p' political actors such as the DLA will always be indispensable to the exposure of this mirage.

**Tufyal Choudhury:** The UK law has benefited from being embedded in a wider framework of European law, and so in the coming year the greatest challenge to discrimination protection will come from the EU referendum and the potential of the UK voting to leave the EU.

**Catherine Casserley:** The 'red tape challenge' has seen the EA presented as a burden to business, when equality should be viewed as a way to ensure that every employer has the best people for the job. This approach to equality, coupled with cuts to legal aid, the introduction of tribunal fees, the inability to recover 'after the event' insurance, all mean that there are serious problems for those facing discrimination now and in the future.

**Barbara Cohen:** How ironic it is that today, when we have in GB possibly the strongest anti-discrimination legislation in the world, a range of decisions and actions by recent governments have undermined both the law and the means of enforcing the law so that actual protections are possibly weaker than in previous decades. There is no real protection if anti-discrimination law is not enforced, and we now know that the swingeing cuts to legal aid, the removal of funding for law centres and advice centres and the new and/or increased fees to bring

claims have resulted in far more instances of discrimination remaining unchallenged. More worrying are the laws and policies, based on false fears created by politicians and stirred up by the media, which induce or encourage discrimination. This includes various provisions in the Immigration Act 2014 and the current Immigration Bill and the even more worrying provisions of the Counter-terrorism and Security Act.

## 4 How would you strengthen enforcement?

**Harminder Singh:** Paradoxically the success of lawyers has meant that community based activism has declined and it might be time to reconfigure the relationships between say the legal profession and trade unions so that enforcement places a greater emphasis on group-based protections, whether in the workplace or local communities.

**Catherine Casserley:** Tribunal fees have had a significant effect on enforcement and perhaps the government review will address this. The tribunal powers repealed (s138 (2) EA) were useful at tackling systemic discrimination; whilst the use of broader powers by the EHRC is to be encouraged. So far as non employment discrimination is concerned, if QOCS (qualified one-way costs shifting) applied to discrimination claims, this would go a long way to making it more feasible for individuals to bring claims. Class actions, too, would be useful.

**Camilla Palmer QC (Hon), CEO and principal lawyer at Your Employment Settlement Service (YESS):**

***Preventative action***

What is needed is more emphasis on preventative action at the earliest possible stage to ensure there is no discrimination. Easy to say, difficult to achieve. It is encouraging to see employers competing for awards to be 'best employer of the year', though even if achieved, this does not always trickle down to all managers.

Enforcement is key. But it is not just about bringing a tribunal claim. Few employees want to risk their money, health, reputation and career by going to a tribunal, particularly with a small baby. After 20 years of litigation I gave it up because it is so uncertain, costly, stressful, time-consuming. At YESS we focus on resolving conflict/issues/disputes as early as possible. Employees want that as do employers and it works – though not where the employer refuses to engage (a tiny minority).

We need some imaginative solutions: mandatory transparency in pay and promotion decisions, targets, monitoring, naming and shaming and, of course, the ability to challenge the discriminators in the tribunal and courts. Why not require employers to contact ACAS before they can dismiss a pregnant woman or new mother or disabled worker. Employees have to do so before bringing a claim – why not employers too?

## 5 Who or what group has, or continues to, inspire you?

**Harminder Singh:** I tend to be inspired by individuals who challenge discrimination as it occurs in their daily lives and by doing so educate others about the damaging effect of any discrimination – whether it is within their own religion, inter-faith, between friends, within their workplace … they are supported by the social legitimacy of legislation and the work of organisations we are celebrating … like the DLA.

**Catherine Casserley:** Caroline Gooding, the former DLA executive member, disability rights lawyer and campaigner who died last year and whose immense contribution to equality was highlighted by the DLA in November 2014's *Briefings* was my greatest inspiration in the field of disability rights. I continue to think about her during my work because she is so much a part of it. Many of my clients who experience discrimination – be it harassment because of their sexual orientation or an inability to get into their bank – inspire me because they usually put up with so much before they seek help. They then have to go through an incredibly difficult harsh process to secure an outcome, as well as get on with the rest of their lives. That takes some doing.

1. The DLA chairs have been Geoffrey Bindman (1995-1999), Harminder Singh (1999-2001), Gay Moon (2001-2002), Karon Monaghan (2002-2004), Ulele Burnham (2004-2006, 2009-2011), Tufyal Choudhury (2006-2007), Catherine Casserley (2007-2009, 2011-2012), and Barbara Cohen (2012-2014). The current chair is Catherine Rayner, elected in 2015.

2 Evening Standard, September 21, 2015

3 Pregnancy and Maternity-Related Discrimination and Disadvantage First findings: Surveys of Employers and Mothers, BIS research paper No. 235, EHRC July 2015

4 Justice in our courts and the challenges we face (address to the Empire Club of Canada, 2007)

# Equality rights – where next?

The DLA's October 2015 conference, hosted by Baker & McKenzie, celebrated the 50th anniversary of the first Race Relations Act (RRA), the 40th anniversary of the Sex Discrimination Act (SDA) and the 20th anniversary of the first Disability Discrimination Act (DDA) as well as the 20th anniversary of the Discrimination Law Association. Chaired by Catherine Rayner, chair of the DLA executive committee, the conference provided the opportunity for discrimination practitioners to remember past struggles, celebrate hard won rights and to look ahead to how we retain, develop and expand those rights.

## Keynote address

The DLA was delighted to welcome Judge Brian Doyle, President of the Employment Tribunals of England and Wales who gave the keynote address on the anniversaries of the equality laws addressing a range of issues and concerns for discrimination law practitioners.

## 40th anniversary of the Sex Discrimination Act 1975

Jenny Earle Director of the Prison Reform Trust's Care not Custody programme, celebrated the achievements of the campaigning 'ROWdy' women who would not take no for an answer when fighting for equality.

Pointing out the huge inequality that still persists, Jenny noted that lack of universal childcare for women is still an issue; that two women a week are murdered in the UK by their male partners; more than half (53%) of women in prison report having experienced emotional, physical or sexual abuse as a child, compared to 27% of men, and that it is women, rather than men, who suffer the bulk of welfare cuts and poverty in old age. Referring to a slogan in the 1970s campaign for equal employment rights – 'disaggregate now!' – Jenny noted some persisting employment related issues such as unequal pay, the gender pay gap, women's continuing lack of independent finances, their poverty on motherhood, and over-representation in low paid jobs in sectors such as health and social care.

She said that activists must take the long view, recognising that it is less than 100 years since women were entitled to vote and only 40 years since the SDA became law. She recalled the character assassination unleashed by the press on Margherita Rendel, the first women to bring a claim under the SDA after she was denied promotion. Although women who challenge the establishment are still stereotyped and must be prepared for the long haul, she acknowledged that blatant discrimination is now less common.

For Jenny, the gender equality duty was the landmark step forward and one of the most important advances in promoting equality for women; it is a powerful tool and one which has been successfully used by her organisation, the Prison Reform Trust, to successfully scrutinise and hold authorities to account.

## 50th anniversary of the Race Relations Act 1965

Robin Allen QC, head of Cloisters Chambers, outlined the long history of race equality legislation, which dated from Britain's first steps in writing anti-discrimination law in colonial India and the protection for equal pay for 'persons of colour' contained in the nineteenth century Navy Acts, to the first cases where success was dampened by the award of derisory damages. He reviewed the many equality acts since and urged the audience to focus on what we can do better. Dealing with the changing demographic in the UK is one of the biggest challenges we face, he said. Asked about rising support for the UK Independence Party, Robin argued that the current government's purported support for equality rights – such as recent initiatives around increasing representation of women on boards – is a counter pose to its detestation of human rights which it characterises as bad, external to England, driven by Europe etc. This stance must be faced down, he said.

## 20th anniversary of the Disability Discrimination Act 1995

Professor Anna Lawson, professor of law and director of the Interdisciplinary Centre for Disability Studies, Leeds University, spoke about the long lead up to the DDA which, although only 20 years old, was grounded in analysis and evidence gathering work done in the 1980s by many campaigning groups and individuals including the late Caroline Gooding and others, many of them unsung heroes. She quoted Lord Lester of Herne Hill QC who said the DDA – which the government of the day promoted as an alternative to a much stronger act – had as many holes as a 'particularly leaky colander'. Some

holes, including the requirement on the claimant to prove they have a disability, the definition of disability which is incompatible with Article 1 UNCRPD, the conditions that are specifically excluded from constituting a disability, among others, still persist.

Anna celebrated the anticipatory duty as a creative step in the EA which helps to push forward systemic change; she noted that Japan, Norway and Sweden were among several countries attracted by the UK's anticipatory duty. However, she also highlighted difficulties with implementation and enforcement, including legal aid cuts and tribunal fees which, an October 2015 EHRC report[1] argues, have had a disproportionate impact on disabled people.

The key issues to be developed, she concluded, are enforcement, access to advice and maintaining systemic change; *'Law that is not enforced is not observed; law that is not observed brings all law into disrepute'* she said.

**Developments in discrimination law: where have we come from and where are we going?**

Karon Monaghan QC, Matrix Chambers, argued that where we are going is unclear and depends on political choices made by government, in particular on continued membership of the EU and to an extent, the repeal of the Human Rights Act 1998 (HRA). Karon highlighted the achievement of the enactment of the PSED which, although subject to some row-back by the courts, remains a powerful basis for lobbying on equality issues and challenging the more egregious actions of public authorities.

It is no surprise that many of this year's key equality cases challenged austerity measures as many of the cuts to the funding of services and to local authorities have most profoundly affected the poor including women, disabled people and ethnic minorities. Karon highlighted a number of interesting and important cases dealing with claims against state bodies, where the courts have held that economic or social policies which had a discriminatory impact were justified unless it could be shown they were manifestly without reasonable foundation. She also mentioned cases dealing with other economic or social rights which have addressed discrimination on the grounds of 'immigration status' under the ECHR, and the meaning of 'vulnerable' under the Housing Act 1996. The courts' approaches to indirect discrimination were also outlined.

Karon concluded her review by addressing possible threats to the UK's key equality law sources, namely the EA, the HRA and EU law, including the EU Charter of Fundamental Rights. She considered that, following some changes, the threat to the scope of the EA has receded. The government has stated that it intends to repeal the HRA but even if that happened, a formal link to the European Court of Human Rights continues to exist so long as the UK is a member of the Council of Europe. EU directives and the EU Charter are binding on the UK – for the moment – and the impact of the latter has increased and, she argued, may become the source of *'our most compelling equality rights'* in areas such as employment and occupation, and potentially in non-employment matters.

However, as continuing UK membership of the EU is itself under threat, the future of equality rights protection is precarious. Karon rounded up her presentation warning the audience that it is wishful thinking for practitioners to believe that the common law would fill any gap left by the repeal of the HRA or an exit from the EU.

**Workshops**

The afternoon break out sessions enabled participants to discuss in greater detail developments in, among others, the public sector equality duty, disability and race discrimination law, discrimination law in the workplace, and ET procedure. Other break out topics included understanding transgender; taking cases for people with mental health issues, and managing challenges of faith-based discrimination. Sincere thanks are due to the experts who facilitated these sessions.

**Panel discussion: where do we go from here?**

The panel discussion was fascinating. Chaired by Robin Allen QC, the panellists included Julie Bishop, Law Centres Network, Omar Khan, Runnymede Trust, Wilf Sullivan, TUC Race Equality Officer and Jemima Olchawski, Head of Policy and Insight at the Fawcett Society.

The panel came to the conclusion that using the law to further equality rights should be a last resort. To improve equality, there is a need to engage politically and from the grassroots. Although the government has recently suggested policies to further equality, there is a danger that it is interested in a public relation's exercise around equality but not in the rights themselves. There is an urgent need to stop the regression of equality legislation, and fight for its enforcement and advancement.

### *Media and education*

Social media provides an opportunity for alternative stories to be heard. The panellists argued that there is a need to be more organised about how the media is approached. The media can be a useful way to educate people on employment rights and collective action; for example, the Law Centre's collaborative 'Just Rights'[2] campaign for fair access to advice for children and young people is testament to successful engagement with the media and politics. The Fawcett Society's 'Views not Shoes'[3] campaign is another example of a strategy which aims to get the media to report female MPs for their opinions, not their looks. The media's prominent role in reporting faith-based discrimination was noted.

The panel agreed that government also has a responsibility to promote positive messages about equality rights.

### *Enforcement*

Panellists and participants agreed that enforcement is one of the most important issues in achieving equality rights. Problems highlighted included successful claimants unable to receive their compensation awards; a fee remission process which is not working; that in the first 12 months of the mandatory Civil Legal Aid Gateway telephone hotline, discrimination cases were reduced by 58%.[4]

### *Strategies*

Name-blind CVs are another strategy to achieve more diversity in the workplace. It was announced on the day of the conference, that, in an effort to reduce bias, universities will be required from 2017 to remove candidates' names from their UCAS application forms. Although this policy has been endorsed by PM David Cameron, Omar Khan warned that Mr Cameron will be reluctant to initiate policies which the business sector may regard as 'red tape'. It is imperative that we pressurise the government to change a situation where BME job applicants on average have to send twice as many CVs as do white applicants. The powerful mobilisation of anti-racist, anti-sexist and anti-ablest activists was one reason the equality legislation of the 1960-80s came into existence. One relevant example of the power to achieve change through mobilisation was the Bristol Bus Boycott in 1963 which challenged the refusal of the Bristol Omnibus Company to employ BME bus crews; following a four-month boycott of the buses by local people, the company backed down.

The panellists commended the implementation of s78 EA, which requires employers to publish gender pay gap figures. However, data on its own is not enough; it does not change minds and cultures. The same race and gender equality statistics have, generally speaking, been maintained for 12 years. The panellists argued for a variety of strategies including the need to build a strong narrative of the contribution of minorities to the UK. Jemima Olchawski urged gender equality targets and quotas be used across employment sectors and backed by sanctions. The root causes of the pay gap should be addressed along with a focus on properly paid paternity leave. Wilf Sullivan emphasised that a renewed focus on public sector equality duties or the imposition of quotas will, without more effort, do little to encourage the private sector to follow suit and many at the conference echoed this sentiment.

Pressure on the government from the bottom-up is required to safeguard and advance our equality rights. As Wilf Sullivan argued, we need to stop thinking about 'what's possible' and start thinking about demands – demands formed into collective action and bargaining. For too long equality has been couched only within the law and legal remedies. We must change that narrative, focus on positive action and addressing poverty, and remember that privilege and advantage are at the heart of maintaining inequality.

In response to a question as to whether the situation would be any different now if the socio-economic status ground in the EA had been implemented, panel members did not believe it would have made any difference. The real issue is class and poverty, not adding another protected characteristic.

The DLA would like to sincerely thank Baker & McKenzie for its support and generosity in hosting the conference and also thank Leigh Day for their generosity in producing the conference packs.

**Geraldine Scullion**
Editor, *Briefings*

1. Equality, Human Rights and Access to Civil Law Justice: a literature review, H Anthony and C Crillery, EHRC research report 99, 2015

2. See http://www.justrights.org.uk

3. See http://www.fawcettsociety.org.uk/our-work/campaigns/election-2015-views-not-shoes

4. See http:/www.publiclawproject.org.uk/data/resources/199/keys-to-the-gateway-an-independent-review-of-the-mandatory-cla-gateway.pdf, page 2. [See also Briefing 733 on the MoJ's 2014 review]

# Indirect discrimination by association

*Chez Razpredelenie Bulgaria AD v Komisia za zashtita ot disckriminatsia*
Court of Justice of the European Union, Case No C-83/14, July 16, 2015

## Introduction

In *Chez* the Grand Chamber of the CJEU was asked to make a preliminary ruling on a range of questions concerning both direct and indirect discrimination. Whilst this briefing concentrates on indirect discrimination issues, the court also gives some useful guidance on the way that the burden of proof should be approached which is worth reading.

## Implications for practitioners

As all discrimination practitioners know, direct discrimination concerns the less favourable treatment of individuals in similar circumstances, where one of them has a protected characteristic which the other does not have and the treatment is on grounds of the protected characteristic. The national and European legal tests focus on the cause of the treatment. Indirect discrimination, by contrast, is discrimination which affects a group of individuals with a shared protected characteristic, where an apparently neutral provision, criteria or practice has a disadvantageous impact on the group. The legal test is focused on the outcome of the treatment or behaviour complained of, and not on the cause.

The question of who benefits from the protection of indirect discrimination has been decided by looking for shared protected characteristics in the pool of those who suffer the disadvantage, and the comparison of the treatment of this group with the treatment of those who do not share the characteristic. The shared protected characteristic has been central to the process of proving that discrimination has taken place or not.

In *Chez*, the CJEU revisit this test, throwing new light onto the nature of indirect discrimination, in a specific and particular context, and find that a claim of indirect discrimination can succeed, even where the person bringing the claim does not share the characteristic which is at the root of the discrimination.

## Facts

The legal questions referred for a preliminary ruling by the national court all arise from an established and adverse practice of the Bulgarian electricity company. The company had for many years been locating their electricity meters for customers at different heights depending on the neighbourhood. Where the neighbourhood had a high proportion of Roma residents, the company situated the electricity meters high on buildings and masts, meaning that the customers could not read them or indeed reach them. In areas where there were not large Roma communities, the meters were placed lower down, where they could be read easily on a regular basis, and customers could work out how much electricity they were using.

The electricity company gave the explanation that the placing of the meters in Roma neighbourhoods was a measure taken to protect the meters from illegal tampering, damage and interference with the electricity. The argument was that the Roma neighbourhoods were ones where there was a specific and known risk of damage that warranted this measure, because the area was a Roma area and this measure prevented it.

The claim in this case was brought by a Bulgarian woman who ran a grocery store in a largely Roma neighbourhood. She argued that the practice was indirectly discriminatory because it disadvantaged the Roma as a group, and was linked to their ethnicity. The novel part of her argument was not only that she too was affected by this practice, which was of course right, but that she was entitled to claim she had been indirectly discriminated against, even though she is not ethnically Roma.

## Grand Chamber judgment

The test for indirect discrimination under the Equality Act 2010 (EA) provides that a person will be discriminated against only if they share the characteristic of the disadvantaged group, and it has been assumed that this is a prerequisite under the EU directives as well, until now. In *Chez*, the court decides that this is not right, and that the claimant can rely on the indirect discrimination provisions despite not sharing the protected characteristic. The court decides that it is enough that the protected characteristic is at the root of the practice, that the practice disadvantages the group and that the claimant is herself also disadvantaged.

The conclusion of the court is derived from a purposive interpretation of the wording of the Race Directive 2000/43/EC (the Directive) and Article 267 of the Treaty on the Functioning of the European Union, and a focus on the protected characteristic of race and ethnic origin that is at the root of the adverse treatment rather than the protected characteristic of the person complaining.

The court notes that whilst the complainant is not herself Roma, she has suffered less favourable treatment on the basis of a factor of Roma origin. It is the fact of Roma origin of the people living in the neighbourhood that caused the company to place the electric meters high up, with the result that she suffered adversely. This cannot be lawful, says the court.

By disassociating the particular disadvantage suffered from a need that the person suffering it has a shared or group characteristic, the court opens up some interesting arguments about who can bring claims and the breadth of protection. In addition, the court notes at paragraph 109, that the Directive precludes a national provision which provides that, in order for there to be indirect discrimination on grounds of race, the particular disadvantage suffered must be brought about by reason of race.

**Comment**

This case may allow further arguments of indirect discrimination by association. In this case, part of the claimant's argument and a factor which the court took note of, was the fact that the claimant had assimilated into the Roma community by living in the neighbourhood. She was physically sharing the disadvantage of the disadvantaged community. It was her association with the Roma community which gave her the legal protection.

The case underlines the purpose of the indirect discrimination provision as protecting anyone who suffers from as a result of a discriminatory PCP. It draws focus back to the outcome of a measure.

However on a cautious note, this case does concern a very specific set of facts, in which the discriminatory intent was both clear, and arguably based entirely on stereotype and prejudice and not on fact or evidence. The court notes that whilst there is an arguable legitimate aim in the case, of protecting the meters and electricity supply, to be justified the electricity company would have to show evidence of actual damage to meters specific to Roma areas, and not merely assert racial stereotypes or suggest that it is common knowledge that Roma people cause damage in this way.

Another note of caution: the judgment may create some difficulties in deciding how the disadvantaged group for indirect discrimination is defined. If people associated with the disadvantaged group are to be included in the relevant pool, this could have the effect of obscuring the disadvantage to the protected group.

**Catherine Rayner**
Bedford Row Chambers

Briefing 763



## Parental leave: securing equality

*Konstantinos Maïstrellis v Ypourgos Dikaiosynis kai Anthropinon Dikaiomaton*
Court of Justice of the European Union, Case C-222/14, July 16, 2015

The Court of Justice rules that national legislation cannot deprive a male civil servant of the right to parental leave on the ground that his wife does not work or exercise any profession.

**Facts**

In late 2010, Konstantinos Maïstrellis (KM), a judge in Greece, applied for nine months' paid parental leave to bring up his child, born that October. His wife was not working.

KM's application was refused by the Minister for Justice, Transparency and Human Rights because the Code on the Status of Judges provided that such leave was granted only to mothers working as judges. Challenging that decision resulted in the Greek Council of State ruling that the Code must, when interpreted in the light of Directive 96/34 (the original Framework Agreement on parental leave) apply to fathers exercising the profession of judge as well as to mothers.

On being referred back to the administrative authorities, in September 2011 the Minister rejected the application again.

This time the reason KM was said not to be entitled was the Civil Service Code which applied also to judges.

763 Although a father was entitled to parental leave in principle, he could not benefit from parental leave if his wife was not working, unless she was unable to meet the child's needs because of serious illness or injury.

The Greek Council of State stayed the proceedings and asked the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether this treatment was compatible with the Parental Leave Directive and the Equal Treatment Directive.

## Court of Justice

The CJEU followed settled case-law on the interpretation of EU law. That requires taking into account not just the wording of the provision at issue but the context in which it occurs and the objectives pursued by the rules of which it is a part.

### *Parental Leave Directive*

Under the Parental Leave Directive (the PL Directive), each parent, individually, is entitled to parental leave. This is a minimum requirement; it cannot be derogated from in national legislation or collective agreements. Nothing in the Framework Agreement annexed to the PL Directive provides that one of the parents can be denied the right to parental leave because of the employment status of his or her spouse.

Part of the context is the objective of the PL Directive: to help reconcile parental and professional responsibilities. This was designed to help implement the objective set by point 16 of the December 1989 Community Charter of the Fundamental Social Rights of Workers:

> *Measures should also be developed enabling men and women to reconcile their occupational and family obligations.*

That same objective led to the right to parental leave being recognised as a fundamental social right and included in the protections of A33(2) of the Charter of Fundamental Rights of the European Union, as amended and annexed to the 2007 Treaty of Lisbon which came into force on December 1, 2009.

The immediate context, found in the general considerations of the Framework Agreement, was that of *'promoting women's participation in the labour force'* and that men should be encouraged to take on an *'equal share of family responsibilities'.*

The CJEU held that from the wording of the Framework Agreement, its objectives and its context, each parent is entitled to parental leave; member states cannot exclude a father from parental leave in a situation where his wife does not work or exercise any profession.

### *Equal Treatment Directive*

Turning to the Equal Treatment Directive (the ET Directive), the CJEU found that under Greek law, the mere fact of being a parent was not sufficient for male civil servants to be entitled to parental leave, whereas it was for women with an identical status.

That effect was inconsistent with the requirement in A3 of the ET Directive to ensure full equality in practice between men and women in working life. Instead, it was liable to perpetuate a traditional division of roles by keeping men in a subsidiary role to women in exercising parental duties.

Further, they pointed out that the Pregnant Workers Directive could not protect this treatment as it in no way constitutes a measure to encourage improvements in the safety and health at work of pregnant workers.

It followed that the exclusion from parental leave of a father whose wife did not work unless she was seriously ill or injured was direct sex discrimination.

## Comment

At the broader level, the approach of the CJEU illustrates the court's dynamic use of the Charter as the starting point for its consideration of EU law. Turning to the subject matter, the shift of focus is welcome. Encouraging fathers to help mothers at home, although part of the objective of the 1996 PL Directive, has had less impact than the need to protect women in connection with the effects of pregnancy and motherhood – see, for example *Hofmann v Barmer Ersatzkasse* (C-184/83) [1984] ECR 3047.

Although the original PL Directive was replaced by the updated Directive 2010/18, which came into force from March 8, 2012, the updating does not materially change the effect of this judgment.

The PL Directive sets out the minimum requirements. Greek parental leave at nine months was significantly longer than the 3 months unpaid leave available under the original Directive. This decision does not require employers to provide leave of nine months, indeed of any length, whether paid or unpaid. However, whatever leave is provided, it must be on an equal basis.

## Implications for practitioners

An area to explore is the possible effect on Shared Parental Leave (SPL). Under SPL, a father is eligible for leave and pay only where the mother has a connection to employment shown by entitlement to maternity leave or

to state maternity allowance. Such a condition arguably continues the traditional division of roles with women as prime carers. Yet SPL itself can be seen to undermine the protection of the Pregnant Workers Directive by enabling a woman to opt to switch to SPL for all but 2 of the 14 weeks maternity leave, thus breaking the link between leave and the protection for her biological status – see *Roca Alvarez v Sesa Start Espana ETT SA* (C-104/09) [2011] 1 CMLR 28.

Finally, the emphasis on the right to parental leave as being an *individual* right suggests that it is independent of status, gender and orientation. Moreover, A33 of the Charter does not refer to 'men and women' but protects the 'family', irrespective of its composition. As such, this judgment is relevant to unmarried parents and to parents in same-sex couples, whether unmarried, married or in a civil partnership.

**Sally Robertson**
Cloisters



## Briefing 764

# Supreme Court sharply divided on justification for benefits cap

*R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* Supreme Court [2015] 1 WLR 1449, March 18, 2015

### Background

The Secretary of State for Work and Pensions issued the Benefit Cap (Housing Benefit) Regulations 2012 (the 2012 Regulations) pursuant to his power under s96 of the Welfare Reform Act 2012. By inserting Part 8A into the Housing Benefit Regulations 2006, the 2012 Regulations introduced a benefit cap that triggers when the total amount of welfare benefits received exceeds an amount equivalent to the net median earnings of all working households.

In the lower courts, three lone parent families, i.e. three mothers who were domestic violence victims and their youngest children, unsuccessfully challenged the cap's lawfulness on the following legal grounds:

1. Contrary to the Human Rights Act 1998 (HRA), the cap breached A14 of the European Convention on Human Rights (ECHR), when read in conjunction with:
   a. A1 of the First Protocol to the ECHR, which protects the right to peaceful enjoyment of one's possessions, and/or
   b. A8 of the ECHR, which protects the right to family life;
2. That in making the 2012 Regulations, the Minister had failed to comply with A3.1 of the United Nations Convention on the Rights of the Child (the UN Convention), which provides: *'In all actions concerning children… the best interests of the child shall be a primary consideration';*
3. Contrary to the HRA, the cap breached A8 ECHR, which protects the right to family life; and,
4. It was irrational at common law.

Only two of the families pursued the matter to the SC. There the challenge focused on whether the cap's indirectly discriminatory effect on women was contrary to A14, when read in conjunction with Protocol 1, taking into account the best interests of the child considerations under A3(1) of the UN Convention.

Throughout the litigation and in all courts, the government conceded that: most non-working households receiving the highest levels of benefit were lone parent households; the parent in most lone parent households was female; and, the cap consequently caused differential treatment between male and female benefit recipients. The government also conceded that the benefits constituted 'possessions' within the First Protocol. However, the government defended the lone parent families' challenge, arguing that the 2012 Regulations were lawful, and in particular any indirect discrimination was legally justifiable.

### High Court

A Divisional Court, composed of Elias LJ and Bean J, dismissed the challenge on all grounds. It held that the 2012 Regulations were a proportionate means of achieving a legitimate aim. The court accepted that the cap interfered with the right to the peaceful enjoyment of possessions under the First Protocol, and that the cap had a disparate

impact on women. The court, however, did not accept that the cap was unlawful. It found that the government's aim sought to introduce greater fairness in the welfare system, and thereby make savings as well as increase incentives to work. It accepted that the Secretary of State had properly accounted for the cap's impact on single parents, larger families and children. The court therefore concluded that the measure was not manifestly without reasonable foundation, which justified its discriminatory effect.

### Court of Appeal

Lords Dyson MR, Longmore and Lloyd Jones dismissed the appeal on much the same grounds as the Divisional Court. It also accepted the cap's indirectly discriminatory impact on women, as well as the First Protocol's engagement. The court noted the government's stated aim was to change the welfare dependency culture by introducing measures that incentivised people to work, such as the cap, which was designed to ensure that those who were able to work would not be 'better off' on benefits. Cognizant that after considerable deliberation, both Houses of Parliament enacted the primary and secondary legislation at issue in this case, the court was mindful of the judiciary's role in such cases, as stated by Lord Dyson MR:

> *The relevant test ... is whether the discriminatory measure is 'manifestly without reasonable foundation'... This is a stringent test because decisions as to the criteria to be applied in the distribution of state benefits are an aspect of political and governmental life in which the court should be very slow to substitute its own view for that of the legislature or executive. That does not mean that such decisions are a no-go area for the courts. The reasons put forward in justification of discriminatory measures must be the subject of careful scrutiny by the courts. They may be found on analysis to lack a reasonable basis ... If that is the case, the courts should not shrink from saying so and granting appropriate relief to those adversely affected. It is relevant to the intensity of the court's review that the 2012 Regulations were approved by affirmative resolution in both Houses of Parliament and a number of the points made by the claimants in support of this appeal were identified and the subject of vigorous debate during the passage of the Bill through Parliament. The Regulations have democratic legitimacy and should be afforded the additional respect which is customarily afforded to judgments about social policy which find expression in legislation: see the MA case [2014] PTSR 584, paras 57 and 82. It has been said (admittedly in a different context) that 'broad social policy … [is] pre-eminently well suited for decision by Parliament…'* [paras 27-28]

The court concluded that the government's fundamental objective of changing the dependency culture was a reasonable basis for the cap; therefore the cap was not manifestly without reasonable foundation and the indirectly discriminatory impact was justifiable.

Whilst it accepted the cap engaged A8, the court did not accept the cap's breach of the lone parent families' freestanding rights under A8. Also dismissed by the court was their irrationality challenge that the Minister had failed to gather sufficient information to ensure his decision was properly informed: rather, the policy and level of the cap had been subjected to detailed parliamentary scrutiny.

### Supreme Court

The SC dismissed the appeal by a 3-2 majority, which consisted of Lords Reed, Carnwath and Hughes, with Baroness Hale and Lord Kerr dissenting. Again the court accepted the differential treatment of women argument under the First Protocol. However, the court found it legitimate that the legislature had chosen to implement the cap to incentivise work, save money and impose a reasonable household benefit limit. The court consequently concluded that the cap was a proportionate means to achieve those aims, i.e. the cap was not manifestly without reasonable foundation. In so holding, Lord Reed stated:

> *… the court is concerned in a case of this kind with the question whether the legislation as such unlawfully discriminates between men and women, rather than with the hardship which might result from the cap in the cases of those most severely affected. In that regard, it is highly significant that no credible means was suggested in argument by which the legitimate aims of the Regulations might have been achieved without affecting a greater number of women than men. Put shortly, since women head most of the households at which those aims are directed, it appears that a disparity between the numbers of men and women affected was inevitable if the legitimate aims were to be achieved.* [para 76]

Of particular focus in the SC was A3(1) of the UN Convention, including the legal status of A3(1). The court examined whether the Secretary of State had failed to treat children's best interests as a primary consideration when enacting the 2012 Regulations, and whether A3(1) was relevant, or even determinative, when assessing the Secretary of State's justification defence.

Lord Hughes found that the Secretary of State adequately considered all child welfare issues that legally required consideration. On the other hand, Lord Carnwath found that the Secretary of State had failed to

demonstrate that the 2012 Regulations were compatible with the government's obligation to treat the best interests of children as a primary consideration. However, whilst accepting that within the context of UN Convention jurisprudence A3(1) can be taken into account as an interpretative tool, Lord Carnwath concluded that A3(1) was not relevant to a discrimination case under the ECHR's A14, which concerned women and their possessions.

### Dissenting judgment

Baroness Hale, providing the lead dissent with Lord Kerr concurring, found that the court had a duty to consider whether the cap constituted unjustified discrimination. She noted that the:

> *… prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children. Furthermore the greater the need, the greater the adverse effect. The more children there are in a family, the less each of them will have to live on.'* [para 180]

She contended that the government had to justify the measure, not its indirectly discriminatory impact, [para 189]. She considered that A3(1) of the UN Convention, in the context of ECHR jurisprudence, required the court to consider whether the Secretary of State had taken proper account of the best interests of the children affected by the cap.

She trenchantly rejected the justification arguments put forward by the Secretary of State:

> *Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, in incentivizing work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it. [para 229]*

Lord Kerr went significantly further, contending that a human rights provision such as A3 of the UN Convention, having been ratified by the government, had direct effect in domestic law. He stated:

> *Why should a convention which expresses the UK's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law? Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim. If the government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard. This is particularly so in the case of the UNCRC. On its website UNICEF has stated: "The CRC is the basis of all of UNICEF's work. It is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights Treaty in history".* [paras 255-256].

### Comment

The case raises a number of important legal issues including: how the ECHR's A14 justification defence operates; the status and applicability of ratified international treaty provisions in domestic law; and, the constitutional role of the judiciary in the post-HRA era, particularly where political issues, such as budgetary constraints, arise.

Whilst eight of the ten judges who heard the challenge found the cap to be justifiable in law, the SC was sharply divided on justification and on the relevance of the UN Convention to that issue. The dissenting judgments of Baroness Hale and Lord Kerr represent judicial activism, favouring utilisation of human rights and equality law to defend the vulnerable in our society and temper some of the more unpalatable effects of fiscal austerity policies implemented by the government.

Finally, and of particular note in current times, is the weight afforded by the court in this case to parliament's deliberations and enactment of the challenged legislation. Such judicial emphasis illuminates the potential legal relevance in future cases of the House of Lords' refusal on October 26, 2015 to endorse the Chancellor's proposed tax credit cuts.

**Michael Potter**
Barrister, Bar Library, Belfast; Cloisters Chambers, London.

# Tribunal fees' appeal

*The Queen on the Application of UNISON v The Lord Chancellor and The Equality and Human Rights Commission (Intervener)* [2015] EWCA Civ 935, August 26, 2015


## Summary

Following a hearing on June 16 & 17, 2015, the Court of Appeal rejected UNISON's appeal against the government's introduction of ET and EAT fees under the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 (S.I. 2013 No. 1893) (the Fees Order).

UNISON is seeking permission to appeal to the Supreme Court.


## Implications for practitioners

As the appeals did not succeed, the status quo remains. However, Underhill LJ, who gave the leading judgment, expressed his concerns about the decline in the number of claims following the introduction of the Fees Order. He said it was *'sufficiently startling to merit a very full and careful analysis of its causes; and if there are good grounds for concluding that part of it is accounted for by claimants being realistically unable to afford to bring proceedings the level of fees and/or the remission criteria will need to be revisited'.*

The government announced on June 11, 2015, that it would review ET fees post implementation (although it was not seeking any public engagement in this exercise). The outcome of this review is expected later in the year and the government has said it will consult on any proposals for reforms to the fees and remissions scheme.

Separately, the Justice Committee Select Committee announced on July 21, 2015 that it was bringing an inquiry into the introduction and levels of courts and tribunals fees and charges and sought written submissions on how fees in the ETs has affected access to justice, and the volume and quality of cases now being brought. The deadline for submissions has been extended and remains open.

## Background

Since fees were introduced in ETs and the EAT on July 29, 2013, claimants have had to pay a fee of up to £1,200 to bring a tribunal claim unless they qualify for fee remission.

UNISON brought two claims for judicial review against the Fees Order, both of which were dismissed by the High Court. The first judgment was handed down by Moses LJ and Irwin J on February 7, 2014 *(R (UNISON) v The Lord Chancellor and The Equality and Human Rights Commission (Intervener)* [2014] EWHC 218 (Admin)), [see Briefing 704]. The second was handed down by Elias LJ and Foskett J on December 17, 2014 *(R (UNISON) v The Lord Chancellor and The Equality and Human Rights Commission (Intervener)* [2014] EWHC 4198 (Admin)). UNISON appealed these decisions and the CA decided to hear both appeals at the same time.

Since the introduction of fees, claims have dropped by 69% overall, although particular categories, as evidenced by Ministry of Justice statistics that were available during UNISON's second high court claim, showed that sex discrimination had dropped by a startling 91% in one quarter compared with the same quarter in the previous year.

## Court of Appeal

UNISON argued that the Fees Order breached the EU principle of effectiveness, was indirectly discriminatory and also breached the public sector equality duty. The CA rejected all three of UNISON's grounds of appeal.

### *Principle of effectiveness*

UNISON argued that the Fees Order had imposed fees which were often greater than the expected compensation even if such claims were successful. This, it argued, was a breach of the well established EU *'principle of effectiveness'*; (see *Levez v TH Jennings* [1999] ICR 521, ECJ at [23]), which states that '*the procedural requirements for domestic actions must not make it virtually impossible, or excessively difficult, to exercise rights conferred by Community law').*

Describing this case as *'troubling'*, the CA expressed a *'strong suspicion that so large a decline* [in claims] *is unlikely to be accounted for entirely by cases of 'won't pay' and* [that] *it must also reflect at least some cases of 'can't pay'.*

Whilst accepting that the drop in claims had been *'dramatic'*, it did not accept that the figures spoke for themselves, as UNISON had argued, nor was it satisfied that *'the introduction of the fees regime has in at least some*

*cases made it not simply unattractive but in practice impossible to pursue a claim'.*

Although the CA accepted that some claimants may not be able to afford fees, it was of the view that they could still obtain remission and therefore concluded that there was no breach of the principle of effectiveness.

### *Indirect discrimination*

The CA did not accept that Fees Order indirectly discriminated against women. The court accepted that more women than men brought sex discrimination claims, and that higher fees were charged for Type B claims. However, it said, Type B claims also included other claims, and not just sex discrimination cases, and so rejected this limb of the appeal.

### *Public sector equality duty*

The CA also rejected UNISON's third limb of appeal, that there had been a breach of the public sector equality duty (PSED).

It said that the equality impact assessment did consider the differential impact on women and that even though it incorrectly predicted that 53% of all claimants bringing claims would qualify for any kind of remission as opposed to the actual figure of 3.87%, there still was no breach of the PSED.

The CA also did not think that the Lord Chancellor's failure to consult on the actual principle of introducing fees or the failure to consider the level of fees compared to the awards, or the problems with enforcement, did not breach the PSED. Also the court did not agree that the Lord Chancellor's failure to enquire about the likely impact on different protected groups was a breach of the duty, since such a prediction was unreliable. In addition, the court said that UNISON had made an 'unfounded assumption' that women were not in equal receipt of household income and this in itself did not invalidate the equality impact assessment.

UNISON continues to oppose the introduction of these high fees which has made it virtually impossible for workers to bring their legitimate claims to tribunal. Following refusal of permission to appeal by the CA, UNISON is applying directly to the SC for permission to appeal.

**Shantha David**
Solicitor, Legal Officer
s.david@UNISON.co.uk

## Briefing 766



# Far reaching decision on use of secret evidence

*Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776, July 21, 2015

### Introduction

This is the first case heard in the senior courts since the Supreme Court case of *Home Office v Tariq* [2011] UKSC 35 in 2011 [see Briefing 612], concerning closed material procedures in the ET. Mr Kiani (K) is a British Pakistani Muslim who was employed by the Home Office as an Immigration Officer until he was dismissed in 2010.

### Facts

On March 19, 2008 K was suspended from duty with immediate effect pending review of his security vetting status. On June 27, 2008 his security clearance was revoked with immediate effect. K appealed to the Permanent Secretary of State for the Home Office on July 12, 2008. The appeal was unsuccessful and he was dismissed in 2010.

### Employment Tribunal

K lodged ET claims alleging discrimination on the grounds of race and religion, and unfair dismissal respectively. The respondent relied on reasons of national security in its defence.

At a case management discussion EJ Potter made interim orders under rule 54 of the Employment Tribunal's Rules of Procedure 2004 (the 2004 Rules) that K and his representatives should be excluded from the secret hearings and that the secret material should not be disclosed to him or his representatives.

K applied to the ET for an order to address the lack of substantive disclosure from the respondent and the extent to which his A6 rights to a fair trial under the European Convention on Human Rights (the ECHR) had been complied with. He also later relied on the EU right to effective judicial protection in the light of the CJEU case of *ZZ (France) v SS Home Department* [2013]

QB 1136 [GC].

K's application under A6 was considered in open court but EJ Snelson held on August 23, 2013 that the absence of any substantive disclosure to K was compatible with the ECHR.

### Employment Appeal Tribunal

K appealed to the EAT arguing that EU law, in the light of *ZZ*, required that he be provided with a sufficient 'gist' of the secret allegations to enable him to give effective instructions to his legal representatives.

His argument was bolstered by the judgment of Collins J in *Bank Mellat v HM Treasury* [2014] EWHC 3631 (Admin) ruling that the principle in *ZZ* was of general application where EU law was engaged.

While Langstaff J dismissed the appeal on November 21, 2014, he acknowledged the importance of the argument by granting permission to appeal to the CA.

### Court of Appeal

The appeal was heard by LJ Dyson (Master of the Rolls), LJ Lewison and LJ Richards on July 6, 2015.

The appellant appealed on the following grounds:

1. The EAT failed to apply what is said to be the principle in ZZ, namely that where a national authority interferes with rights guaranteed by EU law and material is withheld concerning the excluded person's treatment by that authority, the excluded person is entitled to a minimum level of disclosure 'in all circumstances' by being informed of the essence of the grounds for that treatment;
2. There was insufficient material to justify the conclusion that the ET and EAT had engaged in a 'balancing exercise' which was compliant with EU law and the ECHR; and
3. That the ET was obliged to make its own assessment of whether a fair trial was possible rather than deferring this to K when he was in no position to make such an assessment.

In the extremely disappointing judgment, the CA dismissed K's appeal on all three grounds. The CA rejected the argument put forward by K that *ZZ* created a principle and found that EU law does not adopt a more rigorous standard than the ECHR. It held that EJ Snelson *'did conduct the necessary balancing exercise and did have regard to the closed material. He did not misdirect himself.'* [para 52]. Lastly, the court decided that it is solely the appellant's decision as to whether to withdraw the claim if he is '*in no position to form a view as to the prospects of… succeeding in his discrimination claims.'* [para 55]

### Implications for practitioners

Practitioners will note the following important points arising from this case;

1. The courts have been unwilling to intervene in the interests of individuals and their right to a fair trial when faced with the procedural wall of secrecy;
2. Currently, excluded persons are not entitled to know the essence of closed material and currently no principle is deemed to have arisen from the case of ZZ or any other EU law;
3. That the individual complainant must make the decision of whether to withdraw their claim without the benefit of knowing the essence of the claim, whatever the implications of this may be;
4. Public authorities are being allowed to hide behind closed material procedures even where there is suggestion that the material is not of national importance.

### Final comment

The impact of this case is far reaching in giving the green light to public authorities to continue to rely on secret evidence in all civil proceedings. How can such a state of affairs, where individuals are forced to either litigate their case without any disclosure or simply withdraw their case, be just?

Further, with the ability of public authorities to keep key documents secret, how can there be the proper level of scrutiny necessary to ensure fair and just public administration?

In essence the judgment is yet another missed opportunity for the judiciary to intervene and scrutinise the notion that closed material proceedings are compatible with the right to a fair trial. K is seeking leave to petition the SC.

**Shazia Khan & Daniel Zona**
Bindmans LLP

# Compulsory retirement

*Chief Constable of West Midlands Police and others v Harrod and others*

[2015] UKEAT/0189/14; July 8, 2015

## Background

Police officers are office holders, not employees. Consequently, they have significant security of tenure: provided they are not found guilty of misconduct or proven to lack capability, their office will terminate only within the limited circumstances prescribed in the Police Pensions Regulations 1987 (PPR). At the relevant time regulation A19 PPR provided that:

1. *This Regulation shall apply to a regular policeman… who if required to retire will be entitled to receive a pension of an amount not less than two-thirds of his average pensionable pay…*
2. *If a police authority determine that the retention in the force of a regular policeman to whom this Regulation applies would not be in the general interest of efficiency he may be required to retire on such date as the police authority determine.*

To be entitled to a pension of two-thirds of their average pensionable pay an officer would, generally, need to be aged 48 or over with at least 30 years' service.

## Facts

Following the election of the Coalition Government in 2010, and the subsequent Comprehensive Spending Review, police forces were required to make 20% budgetary cuts over four years. Given that approximately 80% of police expenditure related to staffing, police forces looked to reduce staff numbers in order to save costs.

Seven police forces decided to retire all officers who were eligible under A19, unless their particular skills could not be replaced immediately.

A large number of police officers brought claims in the ET asserting that the forces' use of A19 constituted age discrimination. Test cases against five forces were heard together.

## Employment Tribunal

The ET held that the forces' use of A19 amounted to indirect age discrimination and could not be objectively justified.

The claimants argued that the sole ground for the application of A19 was cost and, as a wish to save money cannot, on its own, amount to a legitimate aim capable of justifying indirect discrimination (see *Cross and others v British Airways plc* [2005] IRLR 423), their claims should succeed. The ET rejected this argument. It held that although cost was the *'precipitating'* factor, cost saving and efficiency were not the same thing (even though intimately related) and *'the aim of increasing efficiency was a legitimate aim.'*

However, the ET held that the use of A19 was not proportionate. Amongst other things, it found that:

- the discriminatory impact arose from the policy of applying it to a whole cohort of officers, which had the effect of removing an entire group from the workforce; and
- there were less discriminatory means of achieving the aim of increased efficiency (e.g. part-time working, career breaks and voluntary retirement).

The forces appealed.

## Employment Appeal Tribunal

The EAT allowed the appeal and substituted a finding that the use of A19 was objectively justified.

The key issue was whether the use of A19 was a proportionate means of achieving a legitimate aim, which involved *'determining what the aim was which the forces actually had in mind when taking the steps complained of'*. The EAT held that it could be said, broadly, that the aim was efficiency and, potentially, certainty.

It went on to find that the ET had failed to apply the principles in *HM Land Registry v Benson* and others [2012] IRLR 373 and *West Midlands Police v Blackburn* [2008] ICR 505 by, in effect, considering whether the use of A19 was absolutely necessary, as opposed to a reasonably necessary means of achieving the forces' aim. The EAT criticised the ET's decision to *'manufacture a different scheme'* and stated that it had:

> *wrongly concentrated on the process, and reasoning, adopted by the forces when deciding to utilise A19, rather than enquiring whether…the use of A19 was proportionate (and hence justified, objectively).*

The EAT held that the ET had applied too stringent a standard of scrutiny and this was partly because it had

failed to engage with the fact that parliament had chosen to make A19 in the terms it did. The ET had thought, wrongly, that A19 was intended to provide security of tenure, and did not recognise the social policy aim of ensuring that compulsory retirement was restricted to those who had a financial cushion (in the form of an immediate pension entitlement).

The EAT also found that although the ET was right to conclude that discrimination potentially occurred when the forces chose to use regulation A19, it did not focus on the fact that what was discriminatory was inherent in regulation A19 and *'there was nothing inherently discriminatory in the practice of the forces independently of that within the terms of A19 itself'*.

**Comment**

Langstaff J's judgment was emphatic. He saw *'no tenable argument for holding use of A19 to be anything other than appropriate and reasonably necessary.'*

He was critical of the approach taken by the ET, particularly in putting forward *'supposed alternatives'* of which two out of three were, in his view, *'entirely speculative'*.

This is a useful reminder to practitioners to avoid adopting a *'substitution mind set'* when considering objective justification and, instead, focus on the key issue of whether what is done is reasonably necessary to achieve a legitimate aim.

Interestingly, Langstaff J added a post-script to his judgment in which he suggested 'tentatively' that the case should have been brought as a direct discrimination claim, as opposed to an indirect discrimination claim. He explained that the criterion in this case was not *'apparently neutral'*; rather it *'inevitably distinguished'* between those under 48 and those over 48 in that those under 48 could not be retired by application of A19 whereas, depending on length of service, those over 48 could be. He observed that where a criterion inevitably distinguishes on the basis of age, to apply it is to discriminate directly.

It is important to note that both indirect and direct age discrimination can be objectively justified. However, a slightly different analysis applies to the justification of direct discrimination in that the legitimate aim must include a *'social policy'* element. Nevertheless, given the social policy aims identified by the EAT in this case, the outcome might well have been the same if the claim had been brought as a direct discrimination claim.

**Peter Nicholson**
Solicitor, Spearing Waite LLP
peter.nicholson@spearingwaite.com



## Health and safety reasons can amount to justification for indirect discrimination in relation to religious dress

*Begum v Pedagogy Auras UK Ltd t/a Barley Lane Montesorri Day Nursery,* UKEAT/0309/13/RN, May 22, 2015

**Facts**

Miss Begum (B), a practising Muslim, had applied for an apprenticeship with the respondent nursery (the Nursery). It was her habit to wear a jilbab (a covering of the body excluding face and hands, of ankle length). She had attended a half-day assessment at the Nursery at which she met Mrs Jalah (J), manager, and Ms Diaz, assistant manager. During an interview at the end of the assessment J offered the apprenticeship to B and discussed the dress code with her. J recalled that when B was seated her jilbab was long enough to reach over her shoes. J therefore asked that B should wear a shorter jilbab for health and safety reasons – she considered that the length of the jilbab worn to the interview might cause a tripping hazard that was a risk to B, her co-workers and to children. B did not appear offended or taken aback by this suggestion at the time. However she later complained that the request was insulting and indirectly discriminatory. She claimed that the request had been for her to wear a knee length jilbab and in the ET1 maintained that she had been told that she could not work at the Nursery if she was dressed in the length of jilbab she wore at the interview.

25% (four in number) of the Nursery's staff were Muslim; the ET heard evidence that at least one wore an ankle length jilbab.

**Employment Tribunal**

B complained of indirect discrimination on the grounds of religion. The PCP relied upon by B at the hearing was a refusal by the Nursery to allow the wearing of an ankle

length jilbab. However in a response to a *Burns-Barke* request (a procedural request whereby prior to its hearing of the appeal, the EAT requests the ET to clarify or supplement its reasons), the ET clarified that it was of the view that the PCP applied to B, along with all other staff, was that they should not wear any garment that could present a tripping hazard. The ET looked at the PCP and determined that the requirement for garments that did not present a tripping hazard did not cause a detriment to Muslim women: all four of the other Muslim employees were able to comply.

The tribunal heard evidence from the relevant parts of the Qu'ran and Hadith, which referred to the covering being from neck to ankle but not to a garment that reached to the floor. The ET ultimately determined the matter on the facts in that it found there had been no discrimination because B had not been told – contrary to the account she gave in evidence – that she could not wear a jilbab of appropriate length. It was held that J had treated the matter appropriately in relation to the potential health and safety risk. The ET went on to note that if it was wrong and B was disadvantaged by the PCP, it considered that the health and safety requirement was a proportionate means of achieving a legitimate aim.

### Employment Appeal Tribunal

The first four grounds of appeal related to findings of fact about the ET's enquiry into the length of the jilbab and the PCP. The EAT was able to determine the latter point following receipt of the responses to the *Burns-Barke* request, following which it was satisfied the ET had correctly identified the PCP as – *'a requirement that staff dress in ways that did not endanger their health and safety, or that of their colleagues or children in their care'.*

The EAT reminded itself of the principle set out in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110: in relation to the justification defence the respondent had to demonstrate that the means for achieving the legitimate aim should (a) correspond to a real need on the part of the undertaking; (b) be appropriate with a view to achieving the objective in question, and (c) be necessary to that end. It noted that the case turned on its facts in that the PCP and the length of the jilbab and the alleged instructions were all findings that the ET had made in favour of the Nursery. It noted that there had been some confusion in the evidence e.g. about what was meant by ankle length, however overall the perversity argument failed as B had not reached the high threshold set by *Yeboah v Crofton* [2002] IRLR 634 (CA).

The appellant argued that the PCP was not defined with sufficient care, and it was only because of the response to the *Burns-Barke* request that the EAT was able to clarify what the PCP was. The EAT noted *'A PCP may be informal and there is no conceptual difficulty with a PCP formulated as the ET did in this case.'* (para 75).

The justification decision was not challenged on appeal (para 63) and the EAT noted that *'The PCP was not wrong or unreasonable, and in our opinion is patently not so.'* (para 74). The EAT considered that the regard the ET had for J's experience was key in determining whether the imposition of the PCP in all cases was justified.

### Comment

Although largely turning on its facts, this case provides a useful illustration of the EAT's stance where there is a direct conflict between a health and safety rule and a right to wear religious dress. The EAT did not refer directly to the European Court of Human Right's (ECtHR) judgment in the case of *Chaplin* (one of four cases in *Eweida v United Kingdom* (48420/10) [2013] IRLR 231 [see Briefing 663]), which dealt specifically with a conflict between religious freedom under Article 9 and health and safety. In that case it was determined that managers (in that case the hospital managers) were far better placed to assess health and safety risks than the courts were, and that the reason of health and safety was '*inherently of a greater magnitude*' than other reasons when considering whether a requirement for alterations to jewellery wearing (and presumably also to religious dress) amounted to justification or not. However despite not citing *Chaplin*, the EAT echoed the approach of the ECtHR by making particular reference to the ET's firm acceptance of J's evidence on the health and safety issues (paras 11-12 and 14), and it stated that the ET was entitled to reach the conclusion on this point that it did (para 74). It may be true to say that some respondents will use health and safety reasons unjustifiably to deprive a claimant from manifesting his or her religious beliefs through dress and jewellery wearing. However it's clear that where a respondent puts forward a firm and credible health and safety justification defence, they are currently likely to succeed.

Note also in relation to health and safety and religious dress the recent (October 1, 2015) extension of the exemption to the requirement for head protection for turban-wearing Sikhs to all workplaces, not just construction sites (s6 Deregulation Act 2015 amending s11 Employment Act 1989).

**Sophie Garner**
St. Phillips Chambers

# Disabled employee to be TUPE'd was an 'applicant' under the Equality Act

*NHS Direct NHS Trust (now known as South Central Ambulance Service NHS Foundation Trust) v Gunn,* UKEAT/0128/14/BA, May 14, 2015

## Facts

The claimant in this case Ms Gunn (C) was employed with the Shropshire Doctors Cooperative Ltd (Shropshire Doctors), which provided a 111 telephone service for the NHS. In March 2013 the 111 services were to transfer to the NHS Direct NHS Trust (R) and this amounted to a 'service provision change' for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Before the transfer, R stated that all of its employees had to work a minimum of 15 hours per week. C suffered from rheumatoid arthritis, which amounted to a disability, and limited her hours to 8.5 hours per week. She offered to work 10 hours post transfer but R refused. Consequently, C refused to transfer. After the transfer Shropshire Doctors were able to continue to employ C in an alternative role but her hours and pay were reduced. C claimed that R had discriminated against her because of disability. R applied to strike out the claim but the ET found in C's favour on the basis that she had been an 'applicant' under the Equality Act 2010 (EA) and was therefore entitled to claim.

R appealed arguing that C could not have been an applicant because her employment on the same terms had been guaranteed by R post-transfer. The EAT upheld the ET's decision but for different reasons. It found that R had contemplated ceasing work at Shropshire Doctors and this had created a potential redundancy situation. In those circumstances it had been correct for R to offer C alternative employment and C had been an applicant for the purposes of the EA. The appeal was dismissed.

## Employment Tribunal

C claimed in the Birmingham ET that when R refused to agree to allow her to work 10 hours per week after the TUPE transfer, it was threatening to remove a reasonable adjustment that Shropshire Doctors had put in place because of her disability. By doing this R was discriminating against her by failing to make a reasonable adjustment.

The refusal to allow C to work 10 hours per week instead of 15 resulted in her deciding not to transfer. Remaining with Shropshire Doctors would remove the risk of being dismissed by R after the transfer and was therefore a safer option for C. However, refusing to transfer meant that she was unable to benefit from the advantages that being employed by R would have brought including training opportunities.

R applied for strike out arguing that C did not come within the classes of employees protected from discrimination under ss39 to 52 EA. Plainly C was not an employee of R (she had been and remained an employee of Shropshire Doctors) so the question for the ET was whether she was an 'applicant' falling within s39 EA.

S39(1) provides:

> *An employer (A) must not discriminate against a person (B)*
>
> *a) in the arrangements A makes for deciding to whom to offer employment;*
>
> *b) as to the terms on which A offers B employment;*
>
> *c) by not offering B employment.*

Employment Judge Woffenden found that C had requested certain terms of employment and in response R had offered certain terms. R was an 'employer' and C was an 'applicant' and therefore she found that the claim fell squarely within s39. It was irrelevant that the offer took place in the context of a TUPE transfer. At para 25 of the written reasons she concludes:

> *The fact was an offer was made and it would appear, though I make no finding of fact, it contributed to, or was the cause of the claimant objecting to the transfer. The construction entirely accords with Article 5 of the Equal Treatment Directive to enable disabled person (sic) to have access to, participate in, or advance in employment.*

## Employment Appeal Tribunal

R appealed arguing that a transferee in a TUPE transfer must accept the transferring employment contract as it stands, and accordingly it does not offer that employment. Because C had objected to the proposed transfer, she could not also be an applicant to the role to be transferred.

The Secretary of State for Education intervened, supporting R with an argument that transferee organisations are not under an obligation to negotiate or change the terms of employment of the employee's transferring. This entailed no obligation to consider or make reasonable adjustments. Such obligations would only arise after the transfer. On this basis the Secretary of State argued that the ET's interpretation of s39(1) EA, if accepted, would place an unacceptable burden on transferees to negotiate terms and consider reasonable adjustments before transfers, and this was impractical and would likely affect the viability of transfers.

C argued among other things that when R announced that it required employees to work a minimum of 15 hours per week, it was *'making arrangements for deciding who should be offered employment'* under s39(1)(a)EA because it was implicit in the announcement that persons who did not meet that requirement would not be employed. Additionally, the judge had been right not to interpret 'applicant' restrictively. Article 27 of the Employment Equality Directive (2000/78/EC)(the Directive) was intended to have as wide a scope as possible to prohibit disability discrimination in the employment context.

The EAT identified the central question in the case as '*whether an employee about to be transferred under TUPE was in any relevant sense being made an offer of employment within section 39(1)(a), (b) or (c) of [the Equality Act] 2010'*. Having regard to regulation 4(1) TUPE which provides that a transferred contract *'…shall have effect after transfer as if originally made between the person so employed and the transferee'*, the EAT observed that:

> *so far as the terms and conditions of her employment were concerned, the claimant was in exactly the same position vis-à-vis her employer when employed by Shropshire Doctors pre-transfer than she would be if she had been employed by NHS Direct post-transfer.*

C's contract provided for a minimum of 8.5 hours of work per week and accordingly she was vulnerable pre- and post-transfer equally to an increase in her hours. Therefore, it was her employer's inclination that was going to change, not her contract.

The implication of this observation was twofold: first, in this case R had not offered a fresh contract in the form of C's current contract, which would be preserved in any event under reg4(1) TUPE, and she was not an applicant for that employment; and second, an employee transferring under TUPE would not normally be regarded as an applicant for the employment to which they are transferring.

### The 'new point' in EAT

A second phase of argument ensued after the judge fixed upon a key email in the bundle. The email sent in January, prior to the transfer, addressed C's request to work 10 hours. It stated that R was putting C in a *'redundancy situation'* by discontinuing work at her place of work, and was offering C *'suitable alternative employment of 15 hours per week at their Dudley site'*. The email appeared to distinguish an offer of a new contract based on C's likely redundancy after the transfer. The judge sought further submissions on this and five months later an oral hearing took place.

R objected to the EAT considering the point and argued among other points that the email incorrectly represented the situation as a redundancy situation and incorrectly framed the post-transfer employment as *'suitable alternative employment'*; the situation was a straightforward TUPE transfer and the employment referred to was simply C's continuing contract. This and several other related matters were factual in nature and needed to be considered fully by the ET.

The EAT disagreed, finding that any additional facts to be determined needed to be relevant to the central point of the argument which was, *'that NHS Direct showed at the time that it thought there was a redundancy situation, and therefore made the claimant an offer of suitable alternative employment'*. The factual matters referred to by R had no bearing on the central argument. The EAT accepted C's submission that the facts gave rise to a discrete issue of law which the EAT had jurisdiction to decide.

The EAT was satisfied that R had identified a potential redundancy situation affecting C and had made an offer of suitable alternative employment. There was nothing in TUPE preventing a future transferee from making such an offer and indeed it was good employment practice to recognise potential redundancies and offer alternatives in advance.

This being the case, the EAT found that an offer of employment had been made and C was an applicant for the purposes of s39(1) EA. The EAT reached the same decision as the ET but via a different route; whether or not C had requested 'certain terms' and an offer had been made in response was irrelevant.

### Significance of the decision

Two important points arise from this case. First, in normal circumstances, an employee whose contract is to be transferred under TUPE, will not be treated as being offered employment by the transferee because the pre-

769 and post-transfer contract will be the same by function of reg 4(1) TUPE.

Second, as pointed out by C, the Directive (which is to be read in accordance with the UN Convention on the Rights of Persons with Disabilities (see *H K Danmark v Dansk almennyttigt Boligselskab* [2013] ICR851 at paragraphs 28 to 32 [see Briefing 674]), calls for a very wide-ranging prohibition on disability discrimination in the employment context. This means that the disability-related provisions of the EA should be interpreted widely, not restrictively. Although this was not evidently determinative in the EAT's decision, the spirit of the point was carried through Judge Langstaff's reasons and present in his concluding sentence, which reads:

> *Though it is no part of the [ET's] reasoning which persuaded me, I am pleased this should be so since the focus of this case will then not be on whether the claimant qualifies to complain of discrimination (irrespective of whether it occurred or not) but on whether the making of the offer was discriminatory, a matter in which both parties are bound to have a real interest.*

The approach of Judge Langstaff accords with the well-established judicial principle that the proper determination of discrimination claims is in the public interest and except in exceptional circumstances such claims should proceed to be decided on their merits.

**Nick Fry**
Associate, Bindmans LLP

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## Territorial reach of the Equality Act 2010

*Hottak & Anor, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence* [2015] EWHC 1953, July 8, 2015

### Facts

The claimants, Mohammed Rafi Hottak and AL (MRH & AL) are Afghan nationals who were employed as interpreters by the British Government (the BG). They worked and lived in Afghanistan. Following the decision to withdraw forces from the area, the BG wanted to provide protection for locally serving employees who were considered to be at risk of intimidation from enemy forces because of their work. They also wanted to reward them for their services. The BG introduced two policies for its employees in Afghanistan, one aimed at protecting local employees at risk of intimidation and the other to reward service. This was known as the 'Afghan scheme'. The BG also introduced a redundancy scheme for Iraqi employees and former employees, the 'Iraqi scheme'. There was no separate scheme to protect Iraqi workers at risk of intimidation, although the Iraqi scheme did take account of this.

#### *The Afghan scheme*

The Afghan scheme was comprised of an 'intimidation policy' and a redundancy policy. The intimidation policy applied to locally employed staff serving from 2001, regardless of their nationality. It provided for relocation both within Afghanistan and the UK, where it was assessed that measures in place to meet the risk of intimidation were insufficient. Depending on the level of risk, an employee would be eligible for funding to relocate within Afghanistan, the UK or another country.

Under the redundancy policy, compensation was payable to employees who were employed on December 19, 2012 and made redundant after that date. Compensation was also payable to former employees who suffered serious injury whilst in combat. The financial package provided for up to a maximum of 18-months salary. In addition, financial support was made available for training and education for up to five years. Relocation to the UK was also available to Afghan national employees engaged in the 'most dangerous tasks', which regularly took them outside protected bases and onto the front line.

#### *The Iraqi scheme*

The Iraqi scheme provided for a redundancy payment for employees who considered themselves to be at risk of intimidation; there was no equivalent intimidation policy. The redundancy policy comprised of 12-months salary plus 10% of the basic award for dependents up to a maximum of 18-months salary. It also provided for relocation to the UK for employees who were in

employment on or after August 8, 2007 with at least 12-months service as at October 16, 2010. Former employees employed after January 1, 2005 who had completed 12-months service could apply for resettlement in the UK if they were living outside of Iraq.

The claimants believed the Iraqi scheme was more generous compared to the Afghan scheme, particularly in relation to the relocation elements.

### High Court (Administrative Division)

MRH & AL sought judicial review of the Afghan scheme on the grounds that it was directly and or indirectly discriminatory because of race contrary to ss39(2)(b) – provision of benefits, facilities or services and 29(6) – exercise of a public function – of the Equality Act 2010 (EA). Alternatively, they claimed that the scheme was discriminatory under the common law. They further claimed a breach of the public sector equality duty (PSED).

The case was heard before LJ Burnet and Mr Justice Irwin. LJ Burnet delivered the judgment rejecting the discrimination claims but upholding, in part, the claim for breach of the PSED.

#### *Discrimination claims*

The court found that MRH & AL were not employees for the purposes of the EA. Following the principles set down by the House of Lord's in *Lawson v Serco Ltd* [2006] ICR 250, and the Supreme Court in *Duncombe v Secretary of State for Children, Schools & Families* (No2x) [2011] UKSC 36; [2011] ICR 1312, LJ Burnet considered that MRH & AL could not show that their employment had sufficient connection with the UK. In reaching that conclusion, LJ Burnett noted that:

- MRH & AL's contracts of employment were solely governed by Afghan law;
- the terms of the contract were incompatible with UK employment law;
- MRH & AL were paid in $US;
- income tax was not payable;
- MRH & AL were expected to give British forces their 'undivided loyalty';
- MRH & AL had no physical contact or connections with Britain; their only connection to the UK was that their employer was the BG;
- when not working, MRH & AL went home and lived in Afghanistan;
- MRH & AL were not operating in an international enclave;
- MRH & AL's position was not distinguishable from that of a *'locally employed member of staff working in the British embassy'.*

#### *Public sector equality duty*

LJ Burnet accepted that the formulation of the Afghan scheme was a public function and since there were no territorial limitations the BG was obliged to comply with the PSED, at least in relation to ss149(1)(b) and (c). However, s149 (1)(a) was not relevant because *'... neither section 39(2) nor 29(6) is in play...'* LJ Burnet concluded that the intimidation policy did not raise any issues with regards to ss149(1)(b) or (c).

Further s149(1)(b) did not apply to the immigration aspects of the scheme. The court disagreed with the claimants that the Afghan scheme should be quashed simply because the BG failed to carry out an equality analysis when it was being formulated. LJ Burnet was concerned that to quash the scheme in its entirety (or either of the policies) would have a detrimental impact on potential beneficiaries of the intimidation policy and or those who were in receipt of the training package. Equally, he considered that *'... a mandatory order requiring a fresh analysis ... would serve no useful practical purpose.'*

The judicial review was successful in so far as it related to the BG's failure to have 'due regard' when formulating the policy.

#### *Court's observations on the discrimination claims*

Holding that MRH & AL's employment was outside the scope of the EA, the court did not have to make a finding on the discrimination claims; however, it offered some observations on the points.

In relation to the claim under s29(6), LJ Burnet, considered that MHR & AL's claim could not succeed because s28 precluded claims under s29 if they can be brought under another part of the EA, in this case Part 5 (work). Thus, since MRH & AL's claim fell outside the scope of s39 (2), they could not then seek to rely on s29, *'such a result would be at least anomalous and cannot ... have been within the contemplation of Parliament.'*

The court further rejected the common law argument for discrimination. In its view the two schemes should not be treated alike because they were substantially different and served different purposes.

### Comment

The court's interpretation of the territorial scope of the EA is consistent with the previous Race Relations Act 1976. In many ways, the new test may have the scope to go further, as LJ Burnet suggested it might. The claimants

770 had argued that the territorial reach in discrimination cases should be wider than ordinary employment rights. LJ Burnet rejected this argument in his decision, but did not rule out the possibility that there may be circumstances in which the territorial scope might be wider *'... where the application of the 2010 Act to the employment could conflict with local laws and customs. Should such a case arise, the issue will need consideration.'*

There may be some merit in the claimants' proposition. Dismissing an employee because of a protected characteristic is insidious compared to dismissing an employee for, say, gross misconduct. The law already recognises differences between non-discrimination and general employment rights – for example, the length of service requirement for unfair dismissal does not apply to discriminatory dismissals. There is therefore no reason why a broader approach should not be adopted in discrimination cases.

### Implications for practitioners

#### *Employees of British employers working abroad*

The decision provides useful guidance on the approach to be taken in cases of discrimination against peripatetic or expatriate workers. It will be easier to establish whether such a worker can rely on the EA, although it does not necessarily mean that a worker who is unable to show a 'sufficient' connection to the UK will automatically be precluded from making a discrimination claim. Practitioners will need to look very closely at not only the circumstances of the employment but the wider societal context.

#### *Public sector equality duty*

The law is clear that the 'due regard' duty *'must be fulfilled before and at the time when a particular policy is being formulated.' (R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [see Briefing 702]). However, there may be circumstances in which a court may consider that it would be inappropriate to quash a decision or policy on the basis that a public authority did not have 'due regard' at the outset. Much would depend on the implications for doing so.

The court has given leave to appeal the decision; the appeal will be heard in March 2016.

**Esther Maynard**
Freelance equality and diversity consultant

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## Failure to produce an anti-poverty strategy

*The Committee on the Administration of Justice's Application* [2015] NIQB 59, June 30, 2015

### Implications for practitioners

The Northern Ireland High Court has ruled that the Northern Ireland Executive acted unlawfully by failing to fulfil its statutory duty to adopt a strategy setting out its proposals for tackling poverty, social exclusion and patterns of deprivation based on objective need. The decision is a rare, if not unique, example of a court ordering a government department to strategise in an objectively verifiable manner. It might serve as a useful precedent for campaigners who in other settings are seeking to hold public bodies to account for not developing effective strategies to reduce socio-economic inequalities.

### Facts

In October 2006, as part of the St Andrews Agreement, the UK government promised to publish an Anti-Poverty and Social Exclusion Strategy to tackle deprivation in all communities of Northern Ireland based on objective need. The strategy was to have built on existing initiatives concerning neighbourhood and community renewal and was then to have been taken forward by the new Northern Ireland Executive (the current one was in suspension). To give legal force to these promises, s28E of the Northern Ireland Act 1998, inserted by s16 of the Northern Ireland (St Andrews Agreement) Act 2006, explicitly stated that the Executive *'shall adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need'.*

Early in 2007 an 86-page document entitled *Lifetime Opportunities: Government's Anti-Poverty and Social Inclusion Strategy for Northern Ireland* was published. Its Foreword was written by the Secretary of State for Northern Ireland, who referred to it as a British government document, even though the title page says that it was produced by the Office of the First Minister and Deputy First Minister (OFMDFM) in conjunction with all other Northern Ireland government departments. The document carried the OFMDFM's logo and appeared on its website. At several points it recognised the need to target policies and programmes at those in greatest objective need.

The difficulty facing the Committee on the Administration of Justice (CAJ), the most prominent human rights and equality NGO in Northern Ireland, was that it could not work out if the OFMDFM had in fact been applying an anti-poverty and social inclusion strategy based on objective need. An OFMDFM official informed the CAJ that in November 2008 the Executive had formally adopted *'the broad architecture and principles of Lifetime Opportunities as the basis of its strategy',* but in response to a Freedom of Information Act request the department admitted that it held no information regarding the definition of objective need.

## High Court

In trying to discern whether OFMDFM had fulfilled its obligation to produce a strategy based on objective need, Treacy J based himself on the Oxford English Dictionary's definition of 'strategy', which sees it as *'a plan of action designed to achieve a long-term or overall aim'.* While he acknowledged that the Executive had formally adopted *'the architecture and principles'* of Lifetime Opportunities, and had later adopted other *'initiatives / policies / interventions / frameworks'*, the judge concluded that the Executive's so-called strategy was 'inchoate', a word which most dictionaries define as *'just beginning'*, *'not yet fully developed'* or *'rudimentary'.*

What the judge said he had been looking for was a *'road map'*, a *'guide, to set a course',* something capable of *'providing policy level guidance to the stakeholders charged with achieving its goals'.* He added:

> *that strategy must be identifiable, it must be complete, it must have a start, a middle and an end, it must aim to be effective, its effectiveness must be capable of measurement and the actions which are taken in attempting to implement that strategy must be referable back to that overarching strategy.*

## Comment

The case represents a remarkable victory for the CAJ and arguably takes the law further than it has already reached. In the English High Court case of *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin) Singh J ruled that the Secretary of State had acted unlawfully in preparing a national poverty strategy without first complying with the statutory duty, imposed by s10(1) of the Child Poverty Act 2010, to request the advice of the Child Poverty Commission. No such advice had been sought because no such Commission had been created, despite s8 of the 2010 Act asserting *'[t]here is to be a body called the Child Poverty Commission'* and making further provision for it elsewhere in the Act.

The CAJ relied on this precedent when arguing its case in the Northern Ireland High Court. But in the CPAG case the government's failure did not lie in neglecting to produce a strategy but in neglecting to consult properly before doing so. In persuading the judge that in its case there was no strategy in the first place, the CAJ probably achieved more than it set out to do. Despite the considerable documentation which the OFMDFM produced to show that it had thought about and acted upon plans for reducing poverty and promoting social inclusion, the CAJ persuaded the judge to demand more from the department. So unconvinced was he that a strategy existed at all that he relegated to obiter dicta his views that whatever plans did currently exist could not be said to be based on objective need.

The decision does not so much take the law on judicial review of policy-making any further as provide an excellent example of the power of the existing law to embarrass a government and force it to keep its policy-making promises. The Northern Ireland Executive is not appealing the decision, so we await with interest the strategy document which will now have to emerge and the criteria for objective need which will have to lie at its base.

**Brice Dickson**
School of Law, Queen's University Belfast
b.dickson@qub.ac.uk

# Employment Law: An Adviser's Handbook

11th edition, Tamara Lewis, September 2015, £45; Legal Action Group, www.lag.org.uk


*Employment Law: An Adviser's Handbook* was the first employment book I ever picked up when I was first a Free Representation Unit volunteer. Now I'm the Legal Officer there, it's the first book I recommend to volunteers taking on their first case. It remains the best one-volume book on employment law.

But, to be honest, I'm not sure that a conventional review of the 11th edition is particularly useful. Most readers are probably already familiar with *Employment Law*. If, like me, you find it indispensable, you probably already have your copy. If you're not already familiar, then all you really need to know is that it does what the title suggests – cover employment law, from the perspective of a claimant adviser – and that it's very good indeed.

Instead, I hope to say a little about why it is so good, both because it's an achievement worth celebrating and admiring, but also worth thinking about.

As the book readily acknowledges, it's not possible to cover the whole of employment law in a single volume. Yet it is remarkable how much is dealt with. More narrowly focused works undoubtedly contain more detail. And the comprehensive loose-leaf bible *Harvey on Industrial Relations and Employment Law* comes close to its aim of encompassing all that there is to know about employment law in a single place.

But a new adviser or someone dealing with an unfamiliar area of law will often get further, quicker, with *Employment Law* than a more specialist text. It will always give you a basic understanding of the law and how it works in practice – something which is not always the case in other legal tomes.

Even as a more experienced lawyer it is remarkable how often it contains the answer you need in a pinch. This is partly because of the clear succinct writing. But it is also thanks to Tamara's judgment and practical experience. As well as knowing the law, she knows the problems that advisers deal with, day-to-day, and writes accordingly.

The author's practical experience and insight is equally apparent – and equally valuable – in the sections dealing with tribunal procedure. She doesn't assume previous knowledge or experience (for example, the inexperienced are reassured that lawyers attending the tribunal don't wear wigs). These chapters are focused on the practical nuts and bolts of the tribunal – what to expect and what to do to make the process work. Again, the focus is on the most important points and most common situations.

But underlying the writing and the experience is something else; an attitude about employment law and advising on it that is every bit as valuable as the legal contents. That attitude is simply that the reader – be they an inexperienced lawyer, trade union representative, advice centre worker or litigant in person – is a sensible person who can understand the law and the tribunal process if it's put to them clearly.

That attitude is all too rare. Too often legal writing is either closed to anyone outside the legal clerisy or self-consciously translated into a dumbed down version. It's easy to call for complicated law to be put into 'plain English'. It's much harder to actually do so.

*Employment Law: An Adviser's Handbook* is one of the best examples of genuine legal plain English. It puts complex and difficult law as simply as it can be put, but no simpler. By making it simple it demystifies it and gives us all confidence that we can cope with it. But, at the same time, it doesn't shy away from the difficult parts of the law in all their complexity - and gives us the same confidence to grapple with them. It sets a high standard that we can all aspire to meet, not only in our advisory and tribunal work, but also our thinking and writing about employment issues more generally. For that, as well as its considerable practical value, it is to be celebrated.

**Michael Reed**
Free Representation Unit

## Verbal harassment

On October 29, 2015, the Southend County Court upheld an anonymous claimant's complaint of harassment on grounds of sexual orientation in an EA case brought against a service provider for the homophobic actions of its staff. When the claimant asked for a refund on some patio locks, the shop assistant began to abuse him. The judge accepted his evidence that the shop assistant *'blew a sarcastic kiss'* at him as he left the shop – implying he was gay. The shop assistant followed this up with repeated mocking gestures on about 20 further occasions.

In a Unity Law press release barrister Catherine Casserley, who represented the claimant, said: *'So far as I am aware, this was the first case of discrimination by a service provider, where all the acts of discrimination were gestures not words. The case also shows that the Equality Act 2010 can protect people against acts of discrimination that occurred even after they stop being customers of the business in question.*' The judge awarded the claimant £7,500 compensation. For more information and a transcript of the judgment contact Unity Law, email:chris.fry@unity-law.co.uk.

## Caste discrimination

In *Tirkey v Chandok* the Cambridge Employment Tribunal, upheld Ms Tirkey's (T) complaint of harassment on grounds of race and indirect discrimination on grounds of religion; it also upheld her complaint of unfair dismissal and numerous breaches of her employment rights. The ET referred to the earlier ruling of the EAT [see Briefing 743] that while caste does not exist as an autonomous concept under S9 EA, 'ethnic origins' is *'a wide and flexible phrase and covers questions of descent, at least some of those situations which would fall within an acceptable definition of caste would fall within it'*. The ET held that the reason for T's treatment was because she *'was a low caste, Indian national, who could not speak English and by upbringing and by her inherited position in Indian society expected and was expected by others to do nothing more than serve others'*. T was awarded nearly £184,000 in unpaid wages, with damages on other grounds to be assessed at a later hearing. See case number: 3400174/2013, September 17, 2015.

### Abbreviations

| | |
|---|---|
| ACAS | Advisory, Conciliation and Arbitration Service |
| BME | Black and minority ethnic |
| CA | Court of Appeal |
| CJEU | Court of Justice of the European Union |
| CPAG | Child Poverty Action Group |
| CV | Curriculum vitae |
| DDA | Disability Discrimination Act 1995 |
| DLA | Discrimination Law Association |
| EA | Equality Act 2010 |
| EAT | Employment Appeal Tribunal |
| ECHR | European Convention on Human Rights |
| ECR | European Court Reports |
| ECtHR | European Court of Human Rights |
| EHRC | Equality and Human Rights Commission |
| EHRR | European Human Rights Reports |
| EJ | Employment Judge |
| ET | Employment Tribunal |
| ET1 | Employment Tribunal claim form |
| EU | European Union |
| EWCA | England and Wales Court of Appeal |
| EWHC | England and Wales High Court |
| HRA | Human Rights Act 1998 |
| ICR | Industrial Case Reports |
| IRLR | Industrial Relations Law Report |
| LJ | Lord Justice |
| LLP | Legal liability partnership |
| MoJ | Ministry of Justice |
| MR | Master of the Rolls |
| NGO | Non-governmental organisation |
| NIQB | Northern Ireland Queen's Bench |
| OFMDFM | Office of the First and Deputy First Minister |
| PCP | Provision, criterion or practice |
| PSED | Public sector equality duty |
| PSR | Private Sponsorships of Refugees Programme |
| QC | Queen's Counsel |
| QOCS | Qualified one-way costs shifting |
| RRA | Race Relations Act 1965 |
| SC | Supreme Court |
| SDA | Sex Discrimination Act 1975 |
| SPL | Shared parental leave |
| TUPE | Transfer of Undertakings (Protection of Employment) Regulations 2006 |
| UCAS | Universities and Colleges Admissions Service |
| UDHR | Universal Declaration of Human Rights |
| UKSC | United Kingdom Supreme Court |
| UNHCHR | United Nations High Commissioner for Human Rights |
| UNHCR | United Nations High Commission for Refugees |
| UNICEF | United Nations International Children's Emergency Fund |
| WLR | Weekly Law Reports |

# Briefings