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Editorial *Fighting the divisive impact of inequality*

As the long haul out of economic recession begins and people struggle to cope with its impact, the need to address inequality and to strengthen protection against discrimination is greater than ever. Groups that in the best of times are disadvantaged need greater protection. In the past year, unemployment among young people has risen faster than other sections of the working population with one in five young people under 24 years of age not working.

Working Families, a UK work life balance charity, says that, as the economic climate has deteriorated, it has seen a rise in calls to its legal helpline. They suggest that the *'downturn is leading to a rise in discrimination against women, particularly those who are pregnant or on maternity leave… Some employers are showing a blatant disregard for following fair procedures when it comes to redundancy, flexible working and maternity issues.'*

People with disabilities face huge barriers in accessing employment when vacancies are scarce and competition for them is keen, with 53% of disabled people of working age being unemployed, and even higher rates among people with complex disabilities.

Briefing 539 in this issue highlights the relevance of the public sector equality duty to vulnerable groups as a result of spending cuts by public authorities. Such decisions have huge equality implications. The Court of Appeal decision in *Domb v Hammersmith & Fulham* addressed the impact on disabled people of a council's decision to reduce council tax. One consequence of the council making this potentially vote-winning decision was that disabled people had to pay for day care services, which had previously been delivered free of charge. The CA did not quash the decision but the public policy and equality implications were highlighted by Sedley LJ.

We know that equality and non-discrimination employment practices release talent and skills into the workplace and that, contrary to the view that equality legislation places a burden on employers, flexibility and accommodating diversity supports viable and successful businesses.

Looking beyond the workplace, research by Wilkinson and Pickett indicates that societies with *'less economic inequality are more cohesive: community life is stronger, levels of trust are higher and there is less violence... a more equal society benefits the vast majority of the population. A wider recognition of the way we all suffer the costs of inequality will lead to a growing desire for a more equal society.'*

It is important that there is a wider recognition of the costs of inequality among the public as well as decision-makers. There is a concern that the long awaited Equality Bill, which will strengthen and develop equality law in Great Britain, may not survive the pressure on parliamentary time as other, more vote catching, legislation is prioritised in the dwindling period available between the Queen's Speech and the next election. Even if the Bill is passed without losing important provisions, the commencement orders, and the ministerial regulations which will put flesh on its bones, will be at the command of a new government.

Inequality is not just a problem for particular groups; the divisive impact of inequality affects us all. It cannot be ignored or put to one side to wait for better times. We need to lobby politicians of all parties to make the case for equality at all levels. We should be prepared to hold our politicians to account if their policies and decisions move us away from rather than towards a more equal society.

Geraldine Scullion
Editor

The rise of the far right: a challenge for democracy?

In late January or early February 2010 the DLA will host another agenda-setting fund-raising debate at a central London venue.
A panel of speakers drawn from academia, the law, the media and campaigning will discuss this critically important topic, with opportunity for questions and comment.

This is an event not to miss. Watch for further news.

Please see back cover for list of abbreviations

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Religion and health policies in the UK and the European Union member states

Dimitrina Petrova, Director of the Equal Rights Trust reviews issues relevant to the UK debate on health policy and non-discrimination and equality. She focuses on issues which have recently bedevilled policy formulation and highlights how religion has influenced policy on the most controversial issues. She concludes that the challenge to health policy-makers, which is common across the European Union, is to balance fundamental rights such as the right to equality, health and freedom of religion while adhering to secular principles.

The impact of religious doctrine on the law, policy and practice of healthcare is becoming increasingly significant in the European Union. In September 2009, the Network of European Foundations published a report detailing the impact of religion on health policy trends in the European Union, based on a research project implemented by the Equal Rights Trust (ERT).[1] This article outlines a few of the implications of this study for health policy debates in the UK, as they relate to non-discrimination and equality. Due to the number and complexity of the issues covered in the study – from euthanasia to fertility treatment, from belief-based exemptions for doctors to the medication and dietary need of religious patients, from organ donation to contraception and from circumcision to depression and suicide, this article does no more than sketch briefly several relevant policy issues.

Legal and policy context

The religious affiliation of the majority of the population in each EU country is reflected in the cultural approaches built into their healthcare systems. Recent proposals by the European Commission relating to the adoption of a new anti-discrimination directive prohibiting discrimination on a number of grounds, including religion or belief in the area of health,[2] suggest that a broader examination of health policies from the point of view of non-discrimination on grounds of religion or belief is in order. The EC proposals raise questions regarding not only the need for protection from discrimination in healthcare on grounds of religion or belief, but also the extent to which religious freedom rights should be respected or limited in national healthcare, and the extent to which religiously-laden approaches to health issues affect the people of the EU.

Research shows that the main assumption of EU member states' policies in the intersection of religion and health is that *public interest*, however complex and dynamic a concept it may be, is the major principle guiding public policy. Secondly, the articulation and defence of the public interest in a democratic society is achieved by weighing several different, frequently clashing, values (or public goods), including equality, human rights, democracy, economic efficiency, public health and safety, etc. EU member states' health policies try to address some of the core tensions: (a) between fundamental equality and human rights principles (including national models of diversity), on the one hand, and the demands of efficient and cost-effective public health service delivery on the other; and (b) within the equality and human rights framework, weighing rights against other (people's) rights.

Most EU member states, including the UK,[3] have detailed legal provisions which protect individuals from discrimination in healthcare on grounds of religion or belief which protection, unlike in the UK, is combined with a constitutionally enshrined right to health.[4]

1. See D Petrova, J Clifford *Religion and Healthcare in the European Union: Policy Issues and Trends Network of European Foundations Initiative on Religion and Democracy in Europe*, 2009. Available also at http://www.equalrightstrust.org/view-subdocument/index.htm?id=624

2. *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* European Commission, July 2, 2008.

3. Part 2 of the Equality Act 2006 (Discrimination on the Grounds of Religion or Belief) which came into force in April 2007 outlaws discrimination in the area of goods, facilities and services, and public functions on the grounds of religion or belief; see also the Racial and Religious Hatred Act 2006 which entered into force in October 2007 as an amendment to the Public Order Act 1986

4. The constitution of Belgium, for example, provides for everyone 'the right to social security, to health care and to social, medical, and legal aid' and 'the right to enjoy the protection of a healthy environment' (Article 23).

Department of Health guidelines

On January 9, 2009, the Department of Health (DH) issued a guide (the DH guide) for the NHS setting out its legal non-discrimination obligations and elucidating the link between equality in religion or belief and the NHS' health objectives.[5] The guide contains practical advice to NHS organisations to help them comply with equality legislation, understand the role of religion or belief in the context of healthcare, and integrate this knowledge into single equality schemes. In the light of EU policy developments in this area, and its stated purpose to provide practical guidance to the NHS, the document is perhaps too cautious – and the more sensitive and difficult the issues, the more vague and general its language becomes. However, despite the obvious effort the authors made to present a balanced approach, the DH guide could not avoid being attacked on both sides: by those who are opposed to allowing religious influences to shape healthcare policies, and those who insist on taking the religious needs of both health practitioners and patients seriously.

National mechanisms for implementing effective healthcare policies in the context of modern European democracies wishing to accommodate religious diversity aim to balance the right to health, the right to equality and non-discrimination and the right to freedom of religion with other considerations such as available resources.

Conflict of duty

The term 'conflict of duty' means behaviour, not limited to the area of healthcare provision, when a public servant or a professional seeks exemption from personally participating in the delivery of certain services with which they disagree on grounds of religious, moral or other belief.[6] For example, a 'conflict of duty' describes the refusal of administrative personnel to register a marriage between same-sex couples; or the refusal of a clinical assistant to carry out tasks related to animal testing in their workplace. In the context of healthcare, conflict of duty occurs where a healthcare provider refuses to treat individuals in a certain way because of an objection, based on their own religious or other belief, to (a) the treatment for which the patient has been referred to them or which the patient has requested; or (b) the patient as such – for example, because of the sex, sexual orientation or gender identity of the patient.

Under what circumstances is it justifiable for a belief-based exemption to outweigh a healthcare provider's professional duty to the patient?

The DH guide states:

> *…it is also vital to ensure that the personal beliefs of healthcare staff do not adversely affect the care given to patients or their relationships with colleagues and, where possible, that the jobs they are required to carry out do not offend their own religious or other beliefs. An example of this would be a person whose beliefs prohibit abortion being in attendance at a planned termination. These are things that should be discussed from the first days of training and again at induction. The nursing or clinical lead will need to decide what is clinically necessary and what can be determined locally. … Likewise, flexibility should be shown, if feasible, around the types of procedures they will be expected to attend.* [7]

The DH guide is much more straightforward on the issue of conflict of duty when it comes to attitudes to patients.

> *Although some religions embrace trans people, others do not, so NHS organisations may be faced with a situation where a member of staff objects to working with or treating a trans person on the grounds of their religious beliefs. As stated above, anti-discrimination and bullying and harassment policies should be equally applied. Staff should be reminded of equality policies on a regular basis and during annual assessments. … Discriminatory behaviour towards LGBT people (or indeed against anyone for whatever reason) should never be tolerated under any circumstances.*[8]

The National Secular Society (NSS) praised the DH guide for placing responsibility on those healthcare professionals with 'conscientious objections' not to

5. *Religion or belief: A Practical guide for the NHS*. Department of Health, January 2009. It should be noted that in this document, which is part of a series of equality guides produced for the NHS, the DH strongly endorses the position that a single equality approach helps to bring together parallel strands of key systems, e.g. equality impact assessment, data collection etc, needed to respond to the specific duties of the different equality laws. This helps to utilise expertise and scarce resources more effectively. It also contributes to a better understanding of staff and workforce issues and encourages a personalised approach to patient care, treating patients as individuals. A combined approach is expected to minimise 'information request overload' through frequent consultation and ensure that key personnel, such as public health analysts, service managers and administrative and frontline staff, are encouraged to work together to ensure a co-ordinated approach to achieving equality of outcomes (p. 2-3).

6. This issue has also been termed 'religious conscientious objection' – see, for example, EU Network of Independent Experts on Fundamental Rights, Opinion no. 4 – 2005: *The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*. To avoid confusion with the more widespread meaning of refusal to carry arms on grounds of conscience, the ERT study uses the term 'conflict of duty'.

7. Ibid., p. 11, 13.

8. Ibid.

apply for roles where there is likely to be a conflict between their work and their beliefs, and for elevating health and safety above personal religious choice. For example, recent prevention of infection guidance that hospital doctors should be 'bare below the elbow' has been challenged by some people of faith who found it immodest, but the DH guide explicitly shows that health and safety trumps this version of modesty.

In July 2009, the British Medical Association (BMA) decided that doctors who have a conscientious objection to abortion or IVF should make their views clear at the start of any consultation about either procedure. But it rejected a proposal that medical practices should make clear in advance which doctors were willing to provide advice about abortion or IVF. The BMA backed the right of doctors and other healthcare professionals to object on conscientious grounds to carrying out non-emergency lawful procedures where that right is recognised in law, as with abortion and IVF. BMA said doctors with a conscientious objection to abortion or IVF should tell patients they had a right to see another doctor. And it agreed doctors should also have a right of conscientious objection to the withdrawal or withholding of life-supporting medical treatment in patients without capacity. It is thought that there should be no other area in which doctors could refuse to offer treatment. As a rule, national healthcare policies across EU member states permit practitioners and other healthcare providers to refuse treatment or healthcare services for reasons of conflict of duty. But there has been a great deal of opposition, including at European Parliamentary level, to agreements (Concordats) between some EU states (e.g. Italy and Portugal) and the Holy See, which commit states to belief-based exemptions in respect to abortion, artificial or assisted fertilisation, experiments with or handling of human organs, embryos and sex cells, euthanasia, cloning, sterilisation or contraception. In respect of a draft Concordat with Slovakia, EU level campaigning including MEP groups prevented its coming into effect.

Limits on belief-based exemptions

The next question is what scope, limits and safeguards underscore national healthcare policies permitting belief-based exemption from performing certain services? The answer to this question across EU states is not straightforward. One policy approach which appears to be emerging across national policies is that a practitioner's religious belief will only give rise to belief-based exemption if the practice or procedure in question relates to the most fundamental aspect of that person's belief. Therefore, it is deemed justifiable to permit belief-based exemption in laws regulating abortion or euthanasia.[9] It has been suggested, for instance, that medical and health issues which do not require an individual to violate fundamental religious tenets should not be accommodated.

In *Pichon and Sajour v France*[10] the national court held that a pharmacist who refused to sell contraceptives to three women who had received a doctor's prescription was not absolved by moral grounds from the obligation to sell imposed on all traders by the law.

The European Court of Human Rights held the pharmacist's complaint of an unlawful interference with his freedom of religion was inadmissible and that Article 9 of the ECHR *'does not always guarantee the right to behave in public in a manner governed by that belief. The word 'practice' used in Article 9 (1) does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief.'* [11]

Achieving a balance between rights is less clear when the issues at hand invoke tensions regarding non-fundamental, merely accessorial religious beliefs, as in the case of British Muslim medical students who had refused to attend lectures or answer examination questions on topics related to alcohol or sexually transmitted disease. In such a case, the test suggested was whether the conflict of duty related to fundamental religious beliefs which it is reasonable to accommodate, or to accessorial religious beliefs which it is not reasonable to accommodate. However, this fundamentality test in determining what beliefs can be the basis of exemptions is problematic because of its high level of subjectivity.

From the point of view of equality, of great significance in permitting belief-based exemption is the challenge of determining appropriate safeguards and mechanisms to ensure that those patients who are affected are not unduly disadvantaged or denied access

9. See, for example, articles 97 (2) and 97 (3) of the Austrian Criminal Code; section 10 (2) of the Danish Consolidated Act on Induced Abortion; article 9 of Italian Law 194 (22 May 1978) on Abortion. See section 14 of the Belgian Act on Euthanasia 2002.

10. *Pichon and Sajour v. France*, European Court of Human Rights, application number 49853/99, judgment of 2 October 2001.

11. *Pichon and Sajour v. France*, note 9 above. The Court's approach contrasts with the Irish approach which expressly absolves any person from having to sell contraceptives (Clause 11 of the Health (Family Planning) Act 1979).

to the healthcare services to which they are legally entitled. The inclusion of such safeguards is necessary to ensure fairness in healthcare policy and is especially important when formulating healthcare policy on issues such as euthanasia and abortion.

Euthanasia

Of the many policy questions in the EU states regarding active and passive euthanasia, assisted suicide and assisted dying, it seems that the main policy issue is around the question: should barriers to euthanasia be addressed by legislation or by the court system?

The debate on euthanasia and 'assisted dying' has been particularly high-profile in the UK, marked by the House of Lords July 2009 decision in the case of Debbie Purdy. In September, the Director of Public Prosecutions issued new interim guidance on the application of the law on assisted suicide.[12] He stated that assisting suicide has been a criminal offence for nearly 50 years and that his interim policy did nothing to change that. The guidelines outline 16 factors likely to result in prosecution and 13 which would help prevent legal action. But the line between the 'assisted suicide' illegal in the UK and 'assisted dying' as a result of legal medical decisions to hasten or cause death in certain cases is blurred. For example, doctors can give pain-relieving medication, which as a side effect can cause earlier death. The intention of a higher dose of morphine is not to cause death, yet the doctor administering the drug knows that expedited death will be a likely consequence.

In March 2009, the General Medical Council (GMC) published draft guidance advising doctors how to handle decisions about end-of-life care including resuscitation and how they should deal with requests and refusals for life-prolonging treatment. The guidelines advised that doctors should give more respect to wishes of the dying. The advice covered life-threatening conditions, such as heart failure or brain damage as well as a permanent vegetative state. However, it barely mentioned euthanasia or 'assisted suicide'. The draft states that it should not be seen as a substitute for the guidance on the law on assisted suicide which patients seeking to end their lives have recently tried to obtain.[13] Thus, it appears that the existing legal prohibition of euthanasia in the UK, combined with a strong fear of politicising the issue, has had an inhibiting effect on the public debate on the principles on which policy should be based. But public opinion may be moving towards favouring legal change to allow assisted suicide on the ground of an emerging right to die.[14]

Religion, and in particular Catholicism, has been highly influential in framing the debate on euthanasia across the EU states. The 1980 'Declaration on Euthanasia'[15] explains the Vatican's objection to euthanasia which is rooted in concerns regarding the sanctity of life and the nature of human dignity; it applies definitively to active euthanasia, but is less clear on forms of passive euthanasia.

National healthcare policies on passive euthanasia, understood mostly as the withdrawal of lifesaving treatment, is regulated in a number of ways across EU states. A number of states have a clear policy on forms of passive euthanasia. Under the French 'end-of-life' law, for example, doctors are permitted to avoid taking extreme measures to keep dying patients alive.

In most other EU states, however, the national healthcare policy is less established. This lack of certainty places the decision-making function on healthcare policy in the hands of courts. Italy, for example, has recently dealt with the issue of passive euthanasia through the court system, in the matter of the withdrawal of life-support treatment from Eluana Englaro. Ms Englaro's case triggered significant public debate in which both the Vatican and Catholic politicians played an active role.

Where euthanasia is permitted in the EU states, practitioners do not face an automatic obligation to perform euthanasia and can exercise a right to belief-based exemption. This approach needs to be balanced with practical safeguards put in place in order to achieve a fair system.

Robust safeguards and systems are necessary to counterbalance the belief-based exemption of

12. See *Interim Policy for Prosecutors in Respect of Cases of Assisted Suicide*, Issued by the Director of Public Prosecutions, CPS, September 2009. The interim policy is currently in consultation (until December 16, 2009).

13. http://www.gmc-uk.org/CONSULTATION_DRAFT_GUIDANCE.pdf_snapshot.pdf; See also 'Doctors Told to Give More Respect to Wishes of Dying Patients', The Guardian, 6 March 2009: *'While the end-of-life consultation touches on many emotionally difficult subjects, this is not a debate about assisted suicide. Our guidance to doctors on this matter will always remain within the law.'*

14. See *'Peaceful death of couple who said suicide was a human right'*, reporting the pre-suicide criticism of the lack of right to die laws in Britain, by an elderly couple who committed double suicide on November 1, 2009. Evening Standard, November 4, 2009.

15. Sacred Congregation for the Doctrine of the Faith, 'Declaration on euthanasia', May 5, 1980.

physicians who legitimately refuse to perform euthanasia. Policy should ensure that everyone can have access to their legal right to euthanasia. In addition, the right to equality must be respected and balanced with health economy considerations, to ensure that where euthanasia is legal, those who wish to exercise their right to it can do so on an equal basis with others, and not be disadvantaged by social, economic, cultural or religious barriers.

Whether such a balance should be struck through legislation or through the court system is an open policy question. A clear advantage of the former is that economic and social considerations would be factored into any safeguarding mechanism, thereby enabling such barriers to be circumvented. An advantage of the latter is that any decision would be highly influenced by notions of justice. What is plain, however, is that any country which permits euthanasia must operate within a system of legal certainty to ensure that both patients and healthcare practitioners know their legal rights and that subsequent challenges in accessing euthanasia can be foreseen and addressed.

For equality advocates in Europe, the question is whether there is an equality-based argument in favour or against euthanasia? In this author's view, the principle of equality in dignity and rights supports the acceptance of euthanasia, as there is no logic to assert the equal dignity of every person during their lifetime, but then to suspend this principle in respect to the last stages of life.

Organ transplant and donation

The key debate in respect of organ donation in the UK revolved around proposals to introduce 'presumed consent' rules to increase donations. The major concern among medics results from the fact that of the 25% of the general population who are currently on the donor register, a very small percentage are people of Asian and African ethnic origin; this group need disproportionately more transplants and the success of organ transplant has a strong positive correlation with whether organs come from same ethnic group donors.

In practice, healthcare policy across the EU today is consistent with the overlapping secular and religious concern to ensure that informed consent from both living and deceased donors is given prior to transplant.[16] However, significant differences exist with respect to the procedure required by national law for obtaining donor consent.[17]

The general equality issue which arises in respect of policies on this issue is whether people have an equal chance of being well informed and equal opportunity to form their own autonomous decision of becoming, or not becoming, donors.

Accommodating religious needs in hospitals

To realise full and effective equality for everyone in healthcare, irrespective of one's religion, it is necessary to treat people differently according to their different circumstances, to assert their equal worth, and to enhance their capabilities to participate in society as equals.[18] This means that healthcare policy in a democratic society committed to equality and diversity must attempt to accommodate religious difference. But translating the general principle into hospital policies has proven very difficult across the EU, including in the UK which is seen as a leader and a source of good practice in trying to accommodate religious patients and healthcare personnel.

The DH guide is quite clear about the non-acceptability of proselytising in the NHS, as it can constitute religious harassment.[19] The guide cites on this matter the case of *Apelogun-Gabriels v London Borough of Lambeth*[20] in which a Christian man was dismissed for distributing in the workplace religious leaflets containing offensive views on homosexuality. The NSS commended the DH for equating proselytising with harassment, and for recognising that many people hold strong views on not having personal religious beliefs. NSS described the position as a *'welcome change from the usual multi-faith language which ignores those of no faith'*.

The suspension in December 2008 of the nurse Caroline Petrie for having offered to pray for a patient during a visit to her home prompted the Christian Medical Fellowship to state that *'it seems no longer acceptable to express what are really just orthodox Christian beliefs or the exercise of Christian conscience.'*[21]

In July 2009, the BMA's annual conference voted against a motion proposing the right of medical

16. In 2003 the EU emphasised that consent is required from both the living and the deceased donor in all member states. See EC *Human Organ Transplantation in Europe: An overview, Directorate General Health and Consumer Protection,* 2003.

17. EC *'Consultation document: organ donation and transplantation policy at EU level'*, June 27, 2007.

18. See *Declaration of Principles on Equality,* Equal Rights Trust, London, 2008, p 5.

19. *Religion or belief: A Practical guide*, p. 22.

20. *Apelogun-Gabriels v London Borough of Lambeth*, ET case 2301976/05.

21. Christian Medical Fellowship, Statement of February 11, 2009.

professionals to discuss spiritual issues with patients. The latter included the freedom to offer prayer to patients. The motion acknowledged the checks and balances already built into the system – for example, the warning against inappropriate discussion of faith matters in the GMC's guidance on *Personal Beliefs and Medical Practice*. The GMC code suggests that discussing religion can be part of care provided to patients – as long as the individual's wishes are respected.

But the BMA took a position closer to the DH guide warning about proselytising, stating that discussing religion could be interpreted as an attempt to convert which could be construed as a form of harassment. The NSS welcomed the decision: *'The BMA conference has been very sensible in refusing to give this unfettered permission to religious doctors to offer prayers to patients. The restrictions are there for a very important reason - to protect patients from embarrassment, irritation and possible conflict with their doctor.'* [22]

Hospitals, like other public spaces such as schools and universities, have been the subject of much dispute in other EU states regarding the level of association they should have with religion. In one significant recent example, a government-appointed panel in France recommended adopting a charter to keep religion out of hospitals.[23]

Another issue debated in the UK regarding accommodating religious diversity in hospitals concerned *the role and financing of the chaplaincy* in the NHS. The NHS is committed – since its creation – to providing spiritual care: national and local guidelines detail the responsibility of NHS trusts to do this. The DH argues that such provision is the responsibility of chaplaincy teams, and that frontline professionals should simply refer. But views divide on the selection of pastoral workers and particularly on their funding. The NSS has consistently called for chaplaincy and other religious services not to be funded from NHS budgets and suggested that religious groups should fund their own presence in UK hospitals, thus saving the NHS some £40m per year.

Noting the importance that access to religious assistance has for patients of religious belief, either through a chaplain or faith rooms, the policy question across EU states is: should hospitals afford a right to religious assistance as part of hospital policy? If access to religious assistance in hospitals is a right, should access be interpreted to mean funding of the religious services out of the public purse? For secular people who do not think hospitals should pay for religious services with public funds, there is an issue of equity – and this is indeed the main policy dilemma in the area of religious accommodation in hospitals.

Equity between believers and non-believers

In most EU states, there have been political, moral, and increasingly legal debates about the practical implementation of the principle of equitable delivery of public services to all sections of society. In the UK the NSS, while noting positive aspects of the DH guide, said it:

> *represents a nightmare for the already overstretched staff working in hospitals and clinics... Every action must be accompanied by a hundred considerations about whether it will offend someone because of their 'faith'. It isn't the fault of the NHS, of course. The government has burdened everyone with this legal responsibility to tread on eggshells around believers or else risk ending up in court. To be fair, the guidelines do recognise that not everyone is religious, and that the feelings of atheists have as much right to respect as religious people have.... Being considerate of people's beliefs is one thing, but when that consideration becomes a heavy burden and starts to eat into the hospital's valuable time and resources – which are supposed to be for everyone's benefit – it is time to stop and ask questions.'* [24]

But the opposite view is expressed by Muslim representatives, whose list of grievances, and potential claims of indirect discrimination in healthcare, include: (1) male infant circumcision is not broadly available throughout the NHS; although a handful of NHS trusts provide it, most parents are forced into the poorly regulated private sector. (2) Hospitals do not do enough to accommodate Muslims. Those who out of a wish to maintain modesty may prefer to see a clinician of the same sex are not always given the choice, despite the higher numbers of women doctors in the NHS.[25] (3) Better access is required to prayer and ablution facilities for patients and staff in many hospitals. (4)

22. 'Doctors reject faith right call', BBC, July 1, 2009.

23. See 'French panel recommends measures to keep religion out of hospitals', *International Herald Tribune*, January 29, 2009.

24. http://www.secularism.org.uk/walking-on-eggshells-in-the-nhs.html

25. In the Netherlands, guidelines are now in place indicating that individual patients should be given the opportunity to express a preference on the sex of the practitioner, although in cases of emergency the guideline may be overridden. However, providing an opportunity to choose the sex of a healthcare provider, or recognising a patient's right to do so, raises concern that such a policy may violate the right of others – namely the right of healthcare providers to non-discrimination on grounds of sex.

Muslim 'chaplains' need to be established to provide spiritual care. (5) Muslims should be enabled to avoid porcine and alcohol derived drugs. Currently national or local formularies do not routinely flag potentially objectionable drugs or provide advice on suitable alternatives. (6) Despite evidence that many people with long-term conditions modify their treatment regimes during Ramadan, many people do not get detailed advice on how to do this safely. (7) Better mechanisms are needed to advise people on avoiding the health risks associated with the Hajj pilgrimage to Mecca, which is a religious obligation and not a holiday. General practitioners should offer consultations before Ramadan and Hajj to inform their patients. (8) Although the problem has been repeatedly highlighted over many years, Muslims still often face unacceptable delays in having the bodies of deceased relatives released for burial. Training and reform of coroners' services is needed. (9) Change is unlikely to occur without adequate and appropriate representation of faith communities in positions of influence – be they government bodies, research charities, or NHS trusts. Such organisations must ensure that they include Muslims on their boards.[26]

Research on national policies in other EU states shows that in the UK the above issues are much more articulated in the public sphere than elsewhere. Some countries have explicit policies on separate issues, but none has comprehensive good practices. Nevertheless, of greatest concern from the perspective of equality in EU states has been the fact that women of minority religious backgrounds, including in particular migrant women, face the most serious challenges in accessing healthcare treatment such as perinatal examinations, cervical screenings and breast-surgery consultations. Any solution to this policy challenge should require that religious/cultural minority women are provided access to services in a manner which does not violate their dignity or create an overly uncomfortable environment for them. At the same time, this concern must be balanced both with pragmatic economic considerations such as the limited number of female practitioners available, and with the principled consideration that if one can choose a service provider's sex, one might try to extend this right to choose a healthcare provider's ethnicity, religion or other characteristic – a position which would strike at the heart of equality principles and lead to segmentation rather than social cohesion.

The ERT study on the influence of religion on health policy from the perspective of equality covers a number of further issues which have been quite prominent in UK debates (e.g. dietary needs of religious persons, contraception for teenagers, fertility and embryonic research, and circumcision), as well as issues which are sure to return to the agenda sooner or later (abortion) or to become a focus of future interest (mental health diagnosis and treatment of patients with intense religious experience, depression, suicide). It demonstrates that healthcare policy formulation at the national level faces many difficult challenges which are closely connected to non-discrimination and equality. These challenges include managing the influence of religion in developing policy on politicised issues such as euthanasia, as well as balancing religious freedom with other considerations including equality, health economics, and the health and well-being of patients. Emerging Europe-wide policy trends suggest that, while religion plays a significant part in national healthcare policy, it is often outweighed by other competing values.

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26. See Aziz Sheikh, *'Should Muslims have faith based health services?'* British Medical Journal, 2007; 334:74 (13 January), : http://www.bmj.com/cgi/content/full/334/7584/74

Tackling caste and descent-based discrimination – Jews, Hindus and others

Robin Allen QC explores discrimination based on caste and descent and the extent to which this is covered by existing protection against discrimination on grounds of race and religion.

When Mr Patel the principal shareholder of Top Order Ltd, a company owning Indian restaurants, sacked his chef Mr Rajguru for *'spoiling the food and using bad language'* he commenced his letter 'Honoured Sir' and ended with an ingratiating conclusion.[1] The reason for this otherwise surprising discourse was simple – Mr Rajguru was a higher caste Hindu than Mr Patel, so although he was sacking him he felt he had to speak as befitted their relative castes.

This may bring a smile to the face of some readers, but there is another nasty side to such deference; the disdain which some upper-caste Hindus afford to those who are of a lower caste can be utterly demeaning.

Caste-based discrimination

Equality practitioners will quickly recognise that discrimination by reason of caste is an objectionable denial of individuality since it is based on a stigma deriving simply from an accident of birth. After all, Article 1 of the Universal Declaration of Human Rights notes that all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms therein without distinction of any kind.

A person's caste depends on who they are descended from. It is the fact that it is nothing to do with them as a person, but where they came from, that makes it so objectionable – it deprives a person of their human dignity. However caste-based discrimination is not limited to the Hindu community and indeed it and other forms of descent-based discrimination are more widespread than is sometimes supposed. It can be found in West African, North East African and Somalian communities as well.[2] As there are immigrants from these communities in the UK it is likely that such distinctions have been brought here from those communities too. However descent-based distinctions occur elsewhere.

For instance it has not often been realised that the answer to the question 'who you are descended from?' can be very important for some Jews, as the litigation between the child known as E and the Jewish Free School currently before the Supreme Court has brought to light.[3]

Religion v equality

It is obvious that complaints of caste and descent-based discrimination can give rise to conflicts between religions and equality laws. Indeed caste discrimination is often and possibly most typically seen as a form of religious discrimination. There is little doubt that a source of the four-fold division of Hindu castes lies in the Hindu Vedas, and it is well known that system attributed a particular place to the Brahmin priestly class.[4]

Extent of legal protection

So it is worth looking at whether, and how, caste and descent-based discrimination is prohibited in the laws of the United Kingdom.[5]

These are important questions, not only because such discrimination is known to occur within the UK, but also because neither the Equality Bill nor existing prohibitions expressly address caste and descent-based discrimination.

There has been a vigorous debate about the need for such inclusion. For instance CasteWatch UK,[6] founded in 2003, has vigorously campaigned for discrimination on grounds of caste to be specifically included in the Equality Bill, while the Hindu Forum of Great Britain and other Hindu groups have equally strongly argued that it is not necessary to make specific provision.[7] It may well be that this dispute reflects opposition to the proselytising of lower castes by Muslims and Christians as much as anything.

In June, Baroness Andrews, Under Secretary of State

1. The author acted for Mr Rajguru. A partial report of the case is at [1978] ICR 565.

2. See UN Doc. E/CN.4/Sub.2/2003/24, para. 5.

3. The judgment of the Supreme Court is awaited but the Court of Appeal judgment can be found at [2009] 4 All ER 375.

4. See page 24 and also Chapter 5, *A Legal History of Descent – Based Discrimination, in Caste-based Discrimination in International Human Rights Law* by David Keane, Ashgate, 2007.

5. For a much wider consideration of caste discrimination see David Keane *Caste-based Discrimination in International Human Rights Law* Ashgate 2007, and see also Annapurna Waughray *Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law?* Modern Law Review Volume 72: Issue March 2, 2009.

6. See generally http://www.castewatchuk.org/index.htm

7. See http://www.hfb.org.uk/FileServer.aspx?oID=408&lID=0

at the Department of Communities and Local Government, said there was currently insufficient evidence that caste-based discrimination was a problem to add it as a protected characteristic in the Equality Bill.[8] It seems just as likely that it is the government's reluctance to be drawn into a difficult debate, which lies behind its non-inclusion so far.

Nevertheless the government has not actually stated that discrimination on grounds of caste is not already prohibited. Thus in its 2008 White Paper *The Equality Bill – Government Response to the Consultation* it said that it was not intended to introduce specific protection against caste discrimination (or, it added in the same sentence, discrimination against Welsh speakers),[9] though the White Paper does not help to explain how caste (or descent) discrimination should be addressed.[10]

Article 14 ECHR

Certainly the House of Lords has taken the view that discrimination on the basis of birth, caste and descent are outlawed by Article 14 of the European Convention on Human Rights (ECHR). Thus in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, Lord Hoffmann said:

> *Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. …*

However while Article 14 ECHR may be very useful in some situations it does not give free standing rights, and so is of little use unless other Convention rights, such as Article 8 respect for private and family life or Article 9 freedom of thought, conscience and religion, can be invoked.

Principles applying in UK law

Both the Race Relations Act 1976 (RRA) and the Employment Equality (Religion and Belief) Regulations 2003 (RB Regulations) were made to give effect to European law[11] in conformity with international standards. So it is worth considering these first to see if they point as to how the RRA and RB Regulations should be construed.

There is no doubt at all that such descent-based discrimination in all its forms is prohibited in international human rights law. The United Nations Convention on the Rights of the Child of November 20, 1989 enshrined the prohibition on discrimination based on birth. Moreover the United Nations International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD) had already defined racial discrimination in Article 1(1) as meaning:

> *… any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

There had been some doubt as to whether this included caste-based discrimination.[12] It is known that 'descent' was added to ICERD because of problems of identifying what was a person's national or racial 'origin' when that word was used.[13]

However the point has now clearly been resolved by the UN Committee which supervises ICERD; its General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent) stated that caste discrimination was included within 'descent' discrimination. The practical complimentary way in which the different objectionable grounds in Article 1(1) are to be construed is evident from the recitals to that recommendation:

> *…Confirming the consistent view of the Committee that the term 'descent' in article 1, paragraph 1, the Convention does not solely refer to 'race' and has a meaning and application which complement the other prohibited grounds of discrimination.*

The Race Directive 2000/43/EC (the Directive) stated in Recital 3 that it was made in recognition of the prohibitions on racial discrimination in ICERD, so there is a basis for arguing that the concept of race discrimination which is enunciated in the Directive ought to be interpreted consistently with ICERD. On this basis all forms of descent-based discrimination also ought to be acknowledged as being a kind of race discrimination.

Even before the Directive it had been considered that it might be appropriate to construe the RRA consistently with ICERD. The point was raised but not

8. See Hansard H.L. June 1, 2009, Col. WA24.

9. See paragraph 26 of CM 7454, July 2008, http://www.official-documents.gov.uk/document/cm74/7454/7454.pdf

10. Discrimination against Welsh speakers is certainly capable of being indirect race discrimination and could perhaps be seen as direct discrimination on grounds of ethnicity: see e.g. *Williams v Cowell* [2000] ICR 85.

11. Directives 2000/43/EC and 2000/78/EC.

12. The point had been highly contentious for the Indian Government.

13. Op. cit. Chapter 5.

finally decided in the House of Lords in *Mandla v Dowell Lee* [1983] ICR 385, [1983] IRLR 209 where Lord Fraser had to consider what was an ethnic group and whether Sikhs formed one. He adopted a definition of an ethnic group which had been enunciated in New Zealand in *King-Ansell v Police* [1979] 2 N.Z.L.R. 531 by reference to legislation there which had been implemented to give effect to ICERD. He concluded that although it was not necessary to determine whether or not the RRA had *actually* been passed to give effect to ICERD, the construction he gave to the concept of ethnic group in that Act based on *Ansell* was entirely consistent with ICERD.

Defining racial and ethnic origin

More recently, in the leading textbook on comparative European equality law, published as part of the European Commission's Ius Commune project,[14] Professor Janeke Gerrard has commented on the transposition of the Directive across Europe as follows:

> *The Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin, but neither of these terms have been defined or explained. In the legislation of the various Member States, the grounds of race and ethnic origin are also mentioned, but a variety of definitions have been given here. In most Member States, the definition is inspired by the definition of racial discrimination as contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[15] The ECtHR has also used this Convention in interpreting the ECHR[16] and it is probable that the ECJ will be inspired by it if asked to interpret the Racial Equality Directive. … The ICERD's definition of racial discrimination thus covers a number of grounds, i.e. race, colour, descent, national origin and ethnic origin. It is perhaps surprising, considering the impact of the provision and the contents of ICERD, that the Convention does not contain a more substantive definition of race. An explanation for this may be found in the particularly sensitive character of the term 'race'. The principled view is widely expressed that the use of this term in legislation would reinforce the perception that individuals can actually be distinguished according to 'race', even though there is no solid scientific or theoretical basis for this.[17] Moreover, all racist theories are based on the perceived existence of different human races.[18] According to some, the use of the term in legislation might be tantamount to accepting such theories.[19] An alternative terminology is therefore often preferred, such as the terms 'origin' or 'ethnicity'.[20]*

Discrimination on grounds of ethnicity and religion

For these reasons there is a good argument to be made that discrimination on grounds of who you are descended from ought to be seen as a form of discrimination on grounds of ethnicity. As *Mandla* shows, ethnicity includes religious groupings and so the fact that descent-based distinctions are seen as religious rules should not detract from that approach.

It is perhaps unlikely that a case would now be defended on the basis that a caste-based distinction was lawful and should be seen to be outside the RRA and RB Regulations. Certainly if it is not covered by the RRA at least in the field of employment it should be covered by the RB Regulations. However it is very likely that cases of apparent caste or descent-based discrimination will come before advisors from time to time and they need to know how to respond to such claims in correspondence or in the preliminary stages of resolving such disputes.

The Supreme Court's judgment in the *JFS* case may give more guidance as to how it should be dealt with, but until then advisors should be confident in characterising such discrimination as merely a specific form of race and religious discrimination.

Robin Allen QC[21]
Cloisters

14. *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* eds: Schiek, Waddington and Bell, published by Hart, 2007.

15. The ICERD definition itself is based on the wording of the Universal Declaration on Human Rights (Art. 2). Other international conventions use similar terminology. See, e.g. the International Covenant on Economic, Social and Cultural Rights (mentioning race, colour and national origin—see Art. 2) and the International Covenant on Civil and Political Rights (also mentioning race, colour and national origin—see Art. 2).

16. See, e.g. ECtHR judgment of September 23, 1994, *Jersild v. Denmark*, Series A, Vol. 298, para. 30 and ECtHR, judgment of December 13, 2005, *Timishev v. Russia*, not yet reported, para. 56.

17. J. Cormack and M. Bell Developing *Anti-Discrimination Law in Europe.* The 25 EU Member States Compared (European Commission, September 2005) 19.

18. Cf. G. Cardinale *The Preparation of ECRI General Policy Recommendation No. 7* in J. Niessen and I. Chopin (eds.) *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden, Martinus Nijhoff, 2004), 84.

19. A. Tyson, *The Negotiation of the EC Directive on Racial Discrimination* in Niessen and Chopin, above n. 19, 113.

20. An example of such use is visible, for instance, in Finland; see Finnish Constitution of 2000, s. 6. See also Scheinin, who explains that the term 'origin' was chosen to reflect race, colour, ethnicity and social origin (M. Scheinin *Constitutional Consistence: Minority Rights and Non-Discrimination under the Finnish Constitution* in M. Scheinin and R. Toivanen *Rethinking Non-Discrimination and Minority Rights* (Turkiv.Abo: Institute for Human Rights, Abo Akademi University, 2004) 2.

21. Robin Allen QC represented the Equality and Human Rights Commission as interveners in the hearing of the appeal in *R(E) v JFS School* between October 27-29, 2009. However the opinions expressed in this article are his own.

Equality Duties: recent cases raise new public policy questions

Barbara Cohen, discrimination law consultant, explores the public policy and equality implications of recent judicial reviews of decisions taken by public authorities and their compliance with the public sector equality duties.

The importance of public sector equality duties and the use of judicial review to challenge failure by public authorities to comply with their race, disability and gender equality duties was discussed by John Halford in Briefing 496 (November 2008). He outlined the principles which the courts were beginning to develop in enforcing these duties. Many of the decisions in 2007 and 2008 turned on whether the authority could show that it had carried out an effective assessment of the likely impact on equality of a proposed policy before deciding to adopt and implement that policy.

In recent cases broader policy issues have been taken into account in terms of compliance with the duty to have due regard to statutory equality matters. Four cases summarised below indicate difficult questions which, as a result of changing policies and changing times, courts may need to consider:

- to what extent do the equality duties apply to individual decisions which are taken in the context of a policy which an authority has adopted or which is binding on the authority?
- does the existence of an over-arching policy or decision relieve a decision-maker of the obligation, in relation to a particular decision, to give specific consideration to the elements of the statutory duties?

Meeting the equality duties in planning decisions

In *R (Isaacs) v Secretary of State for Communities and Local Government* [2009] EWHC 557 (Admin) Mr Isaacs, who is a Gypsy, challenged the decision of the Secretary of State whose inspector had not upheld Mr Isaacs' planning appeal, including on grounds that the decision had been made in breach of the Secretary of State's race equality duty under s71 RRA. In his judgment Elias J referred to the national guidance on providing Gypsy sites in Circular 01/2006 and in particular its recognition of the potential for racial tensions where there are unauthorised encampments; he noted the reference by the inspector to the conflicts identified in the circular in his decision refusing Mr Isaacs' appeal.

In refusing Mr Isaacs' application for judicial review, Elias J distinguished this case from the more usual situations in which to comply with the s71 RRA duty there is need to give specific consideration to race relations implications before making a policy decision. He said *'where a policy has been adopted whose very purpose is designed to address these problems [of race relations], compliance with Section 71 is, in my judgment, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose.'* More would only be required if there are problems additional to those to which the policy is directed, which he did not find in Mr Isaacs' case.

The second case challenging a planning decision as non-compliant with the duty under s71 RRA *R (Harris) v London Borough of Haringey* [2009] EWHC 2329 (Admin), also failed for not dissimilar reasons. In this case Mr Harris challenged a planning decision which he claimed would adversely affect many ethnic minority businesses, and in relation to provision of housing and commercial development would have a disproportionate impact on local ethnic minority communities. The council argued that the application in question had been considered under its Unitary Development Plan, the aim of which was to promote the welfare of communities, including ethnic minority communities, living in the most deprived parts of the borough. The judge was satisfied that the council's RRA duties were central to its overall regeneration policies including for the area in question. He found that the decision on the planning application had been taken within the context of a policy to advance the interests of diversity and race equality including by securing social, economic and physical regeneration. The achievement of the benefits designed to be secured by the council's policies and initiatives complied with the goals in s71.

> *A decision maker – and this includes a planning decision maker – can achieve what is required even if not conscious of its duties under section 71.*
>
> *…[applying Isaacs] This too is a case in which the*

considerations arising under section 71 effectively merge with the matters to which the council had to have regard by virtue of its fundamental duties under the planning legislation to make decisions on applications for planning permission having regard to all material considerations, including the development plan and in accordance with the plan unless material considerations indicate otherwise.

Meeting the equality duties when budgetary cuts already decided

In *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) local residents applied for judicial review of council decisions to reduce funding for welfare rights and advice services from £500,000 to £100,000 on grounds that in taking those decisions the council had failed to have due regard to their race, disability and gender equality duties. The council submitted that it had had to make difficult decisions to achieve the necessary overall budget cut and that after a period of regular cuts to jobs and services *'a reduction to discretionary welfare advice funding was unavoidable.'* While regard had been given to equality considerations, Davis J ruled that *'…general regard to issues of equality is not the same as having specific regard by way of conscious approach to the statutory criteria.'* He found that the council had failed to show that it had given due consideration to the statutory equality criteria in decisions to cut funding by 80% and quashed the two relevant decisions.

In contrast, in *R (Domb) v Hammersmith & Fulham Council* [2009] EWCA (Civ) 941 the Court of Appeal held that the local authority was not in breach of its disability equality duty when it decided to introduce charges for day care services. This decision followed a council decision to reduce council tax by 3% which had inevitable consequences for its social services budget. As the overall budgetary decision had been taken without challenge under the equality enactments, by the time of this decision the only outstanding question was how the necessary savings were to be made, with two options: to impose charges or to restrict availability by raising eligibility criteria.

In his leading judgment Rix LJ considered recent decisions regarding compliance with equality duties and the meaning of 'due regard'. *'…[T]he test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind….'*

He concluded that the council did *'in substance, not just in form, have due regard to the need to eliminate discrimination and to promote equality of opportunity in relation to the relevant equality duties.'* He said that decisions which had already been taken as a part of the budgetary process, such as the decision to reduce the Council Tax, were 'water under the bridge'. He referred to the council's consultation and equality impact assessment and 'countervailing factors' such as the council's budgetary needs, which had to be considered.

Sedley LJ did not disagree, but he brought to the fore the major public law question which lurked behind the matter the court had been asked to decide and which is likely to be an issue again and again in the next months.

'The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: ***can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties?'*** *(emphasis added)*

It is hard to envisage any major public spending cuts that would not have equality implications. So far as the author is aware, no guidance has been issued by any of the departments of government as to the ways in which public authorities will be expected to meet their equality duties – to have due regard to the elements of these duties in identifying the consequences – before taking key budgetary decisions.

Barbara Cohen
Discrimination law consultant

'Likely' – the definition of disability simplified

SCA Packaging Ltd v Boyle (Equality and Human Rights Commission intervening)
[2009] UKHL 37, July 1, 2009

Facts

In one of their last judgments, the House of Lords considered, for the first time, the complex definition of disability in the Disability Discrimination Act 1995 (DDA).

Elizabeth Boyle (EB), a long-standing employee, took issue with her employer's proposal to remove the partition wall which, by separating her office from the larger, noisier stock control room, helped her manage her voice impairment.

For many years she had experienced problems associated with a propensity to develop vocal nodules. Medical treatment had removed the nodules, but she still had to take several measures in her everyday life to prevent the vocal problems from returning.

The failure to resolve her complaint resulted in a disability discrimination claim before the Industrial Tribunal in Northern Ireland, and further claims of discrimination and unfair dismissal followed from the employer's decision to make EB redundant. The IT held a preliminary hearing to determine if EB satisfied the DDA definition of disability. It heard evidence on this question from several medical experts.

The law

S1 DDA defines a disability as:

> *a physical or mental impairment which has a substantial and long-term adverse effect on [a person's] ability to carry out normal day-to-day activities*

S2 DDA extends coverage to people with a past disability.

Schedule 1 DDA contains further provisions explaining, amongst other things, the meaning of the terms impairment, substantial, normal day-to-day

activities and long-term used in s1 DDA.

The interpretation of the word 'likely' used in paragraphs 2 and 6 of Schedule 1 DDA was at the heart of the issues in this case.

Paragraph 2 provides that a person is to be considered disabled for the purposes of the DDA if the impairment is likely to last 12 months, or is likely to recur if the impairment ceases to have a substantial adverse effect upon a person's ability to carry out normal day-to-day activities.

Paragraph 6 permits people whose impairments are controlled by corrective measures or treatment to be defined as disabled people under the DDA if the impairment would be likely to have a substantial adverse effect on the ability of the person to carry out normal day-to-day activities in the absence of such measures or treatment.

House of Lords

In a positive and progressive judgment, the HL unanimously supported the conclusion of the Northern Ireland Court of Appeal that *'likely'* in this context meant *'could well happen'*. This test is to be used for likelihood throughout Schedule 1 DDA, replacing the balance of probabilities test, and thereby overturning previous case law and relevant statutory guidance.

The HL also upheld the IT's decision that EB satisfied the DDA definition of a disabled person applying the provisions of paragraphs 2 and 6 of Schedule 1 DDA.

Implications for practitioners

Lord Hope emphasised the practical benefits of the judgment for people with hidden, fluctuating or controlled conditions when he specifically stated:

> *This case is also important for people who, like Mrs Boyle, are in need of the protection of para 6(1) of Schedule 1. They include those suffering from conditions such as diabetes or epilepsy whose disability is concealed from public view so long as it is controlled by medication. Their disability is insidious. …. It lives with them all the time, as does the awareness that the measures that are taken to treat or correct it may not be wholly effective. Doctors do what they can to prescribe appropriate medication, bearing in mind the likely risk of side effects as well as its effectiveness. But it does not always work, and the precautions that people have to take against that eventuality may in themselves be disabling in a way that is often misunderstood: refraining from driving or operating heavy machinery, for example. In Mrs Boyle's case the management regime which enabled her to live with her voice dysfunction without having further therapy but which an employer might find inconvenient or even irritating was of that character.*

Furthermore, Lord Brown highlighted the connection between the definition of disability and the employer's duty to make reasonable adjustments in the following passage:

> *Assume a serious risk exists that, but for an employee's observance of whatever measures are being taken to treat or correct an impairment (in this case the management regime designed to combat the respondent's propensity to develop vocal nodules), the substantial adverse effects of that impairment would recur, is it really to be said that, unless the risk can be shown to amount actually to a probability, the employer (subject only to ordinary employment law considerations) can simply ignore the employee's condition and take no steps whatever, however ostensibly reasonable, to accommodate the employee's need to continue the treatment measures? To my mind, plainly not.*

On a practical level the judgment demonstrates that using percentage terms in relation to likelihood is unhelpful since it is often difficult, even for medical experts, to accurately predict what would happen in the absence of treatment or corrective measures. In contrast, the fact that a medical professional has prescribed or recommended treatment should be sufficient, in the absence of contrary indications, to establish disability.

The reduction in the likelihood threshold clearly means it is now easier for people with controlled and fluctuating conditions to prove they are disabled people under the DDA.

There is now less incentive to contest the question of disability given its connection to reasonable adjustments and the HL's disapproval of having split hearings. Employers would be wise to instruct medical and occupational experts very carefully in light of this case; they would be best advised to proceed to consider the substantive matters in any given case on the assumption that a disability exists, unless it is very clear this assumption is not correct.

Sarfraz Khan
Lawyer, Equality and Human Rights Commission

From *Mandla* to *JFS* and *Grainger*: 30 years at the cutting edge of discrimination law

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Bindmans LLP has unrivalled expertise in litigating equality cases in the Employment Tribunal, High Court and County Courts. We brought the first House of Lords cases under the Race Relations Act to ensure its protection embraced Sikhs *(Mandla)* and people discriminated against for not being British *(Orphanos)*. We established compensation under the Sex Discrimination Act should not be limited by statute *(Marshall)*. The first positive equality duty cases were taken for our clients *(Elias* and the Alzheimer's Society in *Eisai)*. We took the very first case to the UK's new Supreme Court to establish that children from mixed ethnic backgrounds should not be barred from Jewish schools on racial grounds *(JFS)*. Other recent highlights include:

- *Grainger PLC v Nicholson* – the landmark case giving guidance on non-religious beliefs protected by anti-discrimination law and establishing that environmental beliefs are capable of protection under the 2003 Religion or Belief Regulations
- *RJM v Secretary of State for Work and Pensions* – the leading House of Lords authority on the scope of Article 14 – we prepared a decisive intervention on behalf of the EHRC
- *R (Lunt) v Liverpool City Council* – the first public functions case under the DDA, finding a taxi licensing policy in breach of the duty to make reasonable adjustments
- *Aziz v the Crown Prosecution Service* – race discrimination in the CPS

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Choosing the relevant comparison pool

Somerset County Council v Pike [2009] EWCA Civ 808, July 28, 2009

Implications for practitioners

The comparison pool in indirect discrimination cases should be formed so as to test the claimant's case.

Facts

Mrs Pike (P) was a teacher who had taken early retirement due to ill health. She later returned to work part-time. This part-time work would normally have increased the value of her pension. The applicable rules, however, meant that part-time work did not provide any contribution where a teacher was already being paid a pension.

This contrasted with those returning to full-time work who would receive contributions, regardless of whether they were already receiving a pension.

Employment Tribunal

P regarded this as indirect sex discrimination because more women than men would choose to return to work part-time. She brought a tribunal case on this basis.

The ET decided to strike out her claim on the basis that she could not establish that she had suffered a disproportionate impact. This decision rested on the tribunal's view of the applicable pool. This, the ET decided, was all teachers since *'the requirement not to be in receipt of a retirement pension and to be teaching part-time in order to be eligible for membership of the Teachers' Pension Scheme is applied to all members of the teaching profession.'*

With such a wide pool, the statistical disparate impact was extremely small – only 0.3%. The ET accepted that if it had identified a narrower pool of those who had retired, received a pension, and then returned to work, it would have found a disproportionate impact.

Employment Appeal Tribunal

The EAT overturned the ET's decision on the appropriate pool. The EAT found that members of the scheme who had not retired, and those who had retired but not returned to work, were both irrelevant. Neither group was affected by the distinction between full-time and part-time return in respect of pension entitlements.

The appropriate pool was those returning to work after beginning to receive a pension. On this analysis, significantly more women than men were affected.

Court of Appeal

The CA upheld the EAT. In doing so, they considered the application of the House of Lords judgment in *Rutherford v Secretary of State of Trade and Industry* (No. 2) [2004] ECWA Civ 1186 as well as the subsequent CA cases of *BMA v Chaudhary* [2007] IRLR 800 and *Grundy v British Airways PLC* [2008] IRLR 74.

The basic approach for the tribunal, the CA concluded, was to identify a comparison that illuminated the critical question in the case. The pool should be tailored to this end. Too narrow a pool would mean no real comparison could be made, while too wide a pool would introduce people who had no real relevance.

In P's case, the tribunal's pool did not assist it with the essential question of whether female returners were likely to be disadvantaged compared with male returners. The EAT was right to focus on those actually returning to work.

Comment

The CA's advice to steer clear of the devil, while avoiding the deep blue sea as well, may be easier to formulate than to follow.

The key point in this case for practitioners is the CA's emphasis on identifying the appropriate pool to test the claimant's case. It is easy for discussions of indirect discrimination pools to become overly philosophical and abstract. The CA's practical approach of working out which pool will prove, or disprove, the claimant's case is therefore welcome.

Michael Reed
Free Representation Unit

Significant judgment on equal pay liability and TUPE transfer

Gutridge and Others v Sodexo [2009] EWCA Civ 729, July 14, 2009

Implications for practitioners

This decision has significant implications for transferees under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). Where there is a successful equal pay claim under the Equal Pay Act 1970 (EqPA) after a TUPE transfer which relates to a pre-transfer difference in pay, transferees will have a potential liability of up to six years' pay arrears as well as having to pay the higher rate of pay on an ongoing basis.

This applies even if the transferee never employed those employees with whom the EqPA comparison is made, and were not aware of any breach of the EqPA by the transferor. Transferees may not have indemnity against such liabilities, which might not manifest themselves until several years after a transfer has taken place. Moreover, transferees could have evidential difficulties when defending such a claim. However, unless a claim is brought within six months of a transfer, the scope of transferees' liability will be limited to claims in respect of the post-transfer period.

Facts

The appellant employees (the appellants) were female cleaners employed by North Tees and Hartlepool NHS Trust (the Trust) prior to July 1, 2001. They worked at Hartlepool General Hospital. On July 1, 2001, they were transferred to work for Sodexo (S) under a privatisation or contracting out arrangement. Several years after the transfer the appellants brought proceedings under the EqPA in which they compared themselves with male maintenance assistants who worked at the hospital but had not been transferred to work for S. The six-year period for which the appellants sought equal pay spanned the date of transfer of their employment from the Trust to S.

S argued that the appellants' claims were time-barred because the time for bringing an equal pay claim based on comparison with the male maintenance assistants expired six months after the transfer, as a claim under the EqPA had to be brought within six months of the last day on which the appellants were *'employed in the employment'*.

Employment Tribunal

The ET held that the effect of TUPE was to transfer to S the Trust's liability to pay the appellants at a higher rate, and to deem that they had always been employed by S. Therefore, as they were still employed by S when they made their claims, time had not begun to run against them for limitation purposes.

Employment Appeal Tribunal

The EAT upheld the decision in respect of the part of the claims relating to the post-transfer period, but held that in relation to the pre-transfer period, claims had to be brought within six months of the transfer and the appellants' claims were therefore time-barred.

Court of Appeal

The appellants appealed on the grounds that the EAT was wrong to hold that their claims were time-barred. They said the ET had been right in holding that the employment to which the claims related for the purposes of the EqPA was the single period of employment which covered their employment both with the Trust and with S.

S cross-appealed on the grounds that once the appellants were no longer in the same employment as their male comparators they lost their right to equal pay.

The CA dismissed the appeal and cross-appeal. It held that an employee has the same, but cannot have any greater, rights against a transferee than a transferor. The appellants' rights against the transferor (i.e. in respect of the pre-transfer period) were limited to making a claim within six months of the transfer, so this was the contractual right which transferred to the transferee. The appellants' rights against the transferee regarding the pre-transfer period were therefore also limited in this way. It also held that common employment with a comparator was necessary to establish a contractual term as to a higher rate of pay, but was not necessary to maintain such a right.

Comment

Wall LJ, who gave the leading judgment, was unhappy with the consequences which would have flowed from holding that the claims with respect to the pre-transfer period were not time-barred, saying at paragraph 75 of his judgment that this would mean that a claim could be brought against a transferee under the EqPA many years after a transfer *'in relation to acts done, many years*

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earlier, by the transferor, about which the transferee may know nothing, and which, evidentially, he she or it may well have no evidential or other means of challenging.' However, the decision will have this consequence to a significant extent.

The decision tries to strike a balance between adequately protecting the rights of claimants under the EqPA who have been subject to a TUPE transfer and trying to ensure that TUPE transferees are not exposed to too many hidden surprises. However, TUPE exists to protect claimants from being disadvantaged by transfers of their employment. There is a six-year limit to transferees' liability for pay arrears, and transferees could still be subject to 'surprise' claims to a considerable extent. It would therefore have been more satisfactory if the CA had endorsed the aim of TUPE and sustained protection for claimants by holding that the appellants' claims in respect of the pre-transfer period were not time-barred.

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Necessary discovery of confidential documents

Canadian Imperial Bank of Commerce v Beck [2009] EWCA Civ 619, June 26, 2009

Implications for practitioners

On the vexed question of obtaining corroborative evidence in discrimination claims the judgment in the case of *Beck* has given some cause for claimant optimism.

Facts

Mr Beck (B) worked for Canadian Imperial Bank (the Bank) but was made redundant in May 2008. B is German and had been recruited in London. His claim alleged discrimination under s1(b) and/or 1A of the Race Relations Act 1976 (RRA) in that he was treated less favourably on the grounds of his nationality and/or national origin than his fellow Canadian employees, who had been employed in Canada.

Employment Tribunal

B had managed to obtain material which was potentially corroborative of his allegations from two sources: the first was a statement from a relatively senior former employee of the Bank; and the second was a note of a conversation and an email between two senior employees from an earlier (and unrelated) grievance raised by another employee. This information tended to indicate that there was a policy of favouring Canadian employees in redundancy exercises. The question was whether an order for discovery should be made that the Bank should disclose (i) all the documentation from the grievance proceedings and (ii) all correspondence between senior employees regarding the decision to offer guarantees and/or redeployment to its employees.

The ET had originally refused the request for disclosure without giving written reasons, but – the CA presumed – on the basis of lack of relevance.

Employment Appeal Tribunal

The EAT allowed the appeal and Judge McMullen's comments referred to the fact that where the allegation is one of a provision, criterion or practice it is indeed relevant to look at what 'leading lights' within the respondent company say and do.

Court of Appeal

By the time of the CA hearing, the Bank had complied with the first order (relating to the grievance proceedings). The CA (Wall LJ) referred to *Science Research Council v Nasse* [1979] ICR 921, and noted from that judgment firstly the point that the right of discovery and inspection of documents is *'of particular importance in cases of alleged discrimination'* and the right to issue questionnaires does not affect that importance. Secondly he noted that the meaning of 'necessary' should include situations where the documents would have the effect of substantially bolstering the claimant's chances of success. Wall LJ went on to make the following statement:

> *The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor but is not, of itself, sufficient to warrant the making or an order. The document must be of such relevance that disclosure is necessary for the fair*

disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure.

Wall LJ noted that the issues raised in the case before him were not simply challenges to the exercise of judicial discretion on an interlocutory point, but involved an incorrect application of the principle set out in *Nasse*. The CA found that the documents sought to be disclosed were clearly of relevance to the pleaded case, and the fact that they were confidential did not confer immunity on them. The decision of the ET had been 'plainly wrong' and was rightly reversed on appeal. He said that the request was not a fishing expedition as there was a 'powerful basis' for the claimant to be seeking the documents, and went on to dismiss the Bank's pleas that there would be substantial difficulties in retrieval. This was a matter for the Bank and its methods of archiving records were not a matter which should affect the decision. The CA therefore dismissed the appeal.

Comment

Although most discrimination claimants do not have the advantage of finding a 'smoking gun' as Mr Beck did, this case does provide support to those who have more than a mere suspicion that a respondent is not coming clean about a discriminatory provision, criterion or practice.

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Briefing 544

Default retirement age held to be lawful

R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills (the Equality and Human Rights Commission and HM Attorney General intervening) [2009] EWHC 2336 (Admin), September 25, 2009

Implications for practitioners

The High Court has ruled that the Employment Equality (Age) Regulations 2006 (the Age Regulations) are compatible with the Equal Treatment Framework Directive 2000/78/EC (the Directive). As a result, claims of age discrimination based solely on the argument that the statutory retirement procedure under the Age Regulations is not compatible with the Directive are no longer sustainable. The government has decided to move its review of the default retirement age (DRA) forward to 2010. It is likely that there will soon be significant changes to the DRA which will affect both employers and employees.

Facts

Prior to the commencement of the Age Regulations in 2006, Age Concern England commenced proceedings for judicial review (Age Concern England subsequently became part of a new organisation Age UK), arguing that the regulations did not properly implement the Directive. They challenged the provisions for justification of direct age discrimination in regulation 3 and the exception set out for retirement of employees at age 65 in regulation 30. The High Court (HC) made a preliminary reference to the ECJ on questions relating to the Directive.

European Court of Justice

The ECJ rejected the argument that the government was required to expressly state in the Age Regulations its policy justification for regulations 3 and 30. However, the ECJ held that the underlying aim of the national measures must be identifiable from the general context. This would allow the courts to identify and review the legitimacy of the aim and ensure that it was implemented through appropriate and necessary means. This was consistent with C-411/05 *Palacios de la Villa* [2007] ECR I-8531 where the ECJ held that as member states were afforded a measure of discretion in the way they transposed the principles of the Directive, there was no requirement to set out the precise circumstances in which age discrimination could be justified within national legislation.

The ECJ noted that the principles which would justify derogation from the prohibition on age discrimination would be public social policy objectives relating to employment policy, the labour market and vocational training. While these objectives were separate from the private interests of employers, the ECJ stated that *'it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.'*

High Court

On referral back to the HC, the claimant argued that regulation 3, which permits justification of age discrimination, delegated the identification of social aims to private employers. In addition, it was argued that the social policy reasons relied on for the derogation were not sufficiently certain. The HC accepted the government's submission that the social policy was that of preserving confidence and integrity in the workforce and this aim was sufficiently clear and precise to comply with the requirements of the Directive. The HC concluded that the explanatory notes to the Age Regulations and the consultation process showed that the government held genuine social policy concerns in relation to the integrity of the labour market and these concerns were legitimate. The government was not required to list the social policy justifications within the Age Regulations and the flexibility given to employers by the Regulations was a means of advancing the government's social policy aim.

The claimant also argued that the decision to remove retirement cases from the scope of the prohibition on discrimination was arbitrary and the government had not proved the existence of a legitimate social policy aim for regulation 30. Furthermore, the use of a DRA was not a proportionate means of achieving the aim and if there was to be a DRA, the choice of 65 was disproportionate.

Mr Justice Blake found that the government had proved that the decision to implement the DRA and regulation 30 was based on the social policy aim of maintaining confidence in the labour market. While some respondents in the consultation process expressed concerns about addressing diminishing competence in older staff without damaging their dignity, this was not the government's aim in adopting these provisions. Mr Justice Blake stated that *'in any event, social perceptions are a factor that the government may take into account in implementing the directive as long as its core principles are not undermined.'* The HC also found that the decision to adopt a DRA was not a disproportionate way of achieving the aim of preservation of labour market confidence. Retirement at 65 was not compulsory but allowed the employer to make a choice when the DRA was reached. It was noted that many member states use mandatory or designated retirement ages.

It was in relation to the choice of 65 as the DRA, that the HC felt the claimant's arguments carried the most weight. The evidence presented in the consultation process did not highlight particular problems with employees between the ages of 65 and 70 and the government was also in the process of raising the state pension age to 68. Mr Justice Blake stated *'if Regulation 30 had been adopted for the first time in 2009, or there had been no indication of an imminent review, I would have concluded for all the above reasons that the selection of age 65 would not have been proportionate.'*

However, the starting point for the review was the position in 2006, when the Age Regulations were adopted. In addition, it was not for the court to identify an appropriate DRA. During the consultation process, few respondents were arguing for a DRA of 68 or 70 and the government was entitled to an appropriate margin of discretion in selecting and monitoring a DRA. For these reasons, the HC held that the Age Regulations were not *ultra vires* and the claim failed.

Comment

This decision was unsurprising to many after the ECJ's decision in *Palacios de la Villa*.

On October 2, 2009, an Employment Tribunal Direction lifted the stay on claims raising issues regarding regulation 30 of the Age Regulations. Employees whose claims have been stayed pending the outcome of this case are likely to face requests from respondents to withdraw or applications for strike out as claims based solely on the challenge to regulation 30 are now bound to fail.

For the moment, employers can rely on the statutory retirement procedure set out in schedule 6 of the Age Regulations when retiring employees at or above the DRA. However, the Regulations and the DRA will be reviewed and amended sooner than previously anticipated. In light of Mr Justice Blake's comments that the decision may have been different if the government had not announced the review of the DRA and his statement that '*the review must give particular consideration to whether the retention of 65 can conceivably now be justified,'* employers are likely to lose the right to retire employees at the age of 65 next year. The government has called for evidence on the DRA for their review next year and submissions must be presented to the Department for Business, Innovation and Skills by February 1, 2010.

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Disability discrimination, public authority decision making and taxis

R (on the application of (1) Alma Lunt (2) Allied Vehicles Ltd) v Liverpool City Council (Defendant) and the Equality and Human Rights Commission (Intervener) [2009] EWHC 2356 (Admin), July 31, 2009

Implications for practitioners

Blake J's judgment contains a number of important statements on the scope of the duties on public authorities under ss21B-21E on the Disability Discrimination Act 1995 (DDA), in particular the duty to take reasonable steps to ensure a practice, policy or procedure does not make it impossible or unreasonably difficult for disabled people to receive a benefit intended to be conferred. It also confirms the suitability of judicial review as a means of bringing a direct discrimination claim in an appropriate case, and the relevance of a material error of fact to compliance with the 'due regard' duty under s49A DDA.

Facts

The first claimant, Alma Lunt (AL), is a disability campaigner in Liverpool and a wheelchair-user. Although AL uses taxis regularly, she cannot be secured in a London-style taxi because of the limited space for turning a wheelchair. Liverpool City Council (the Council) restricts the type of taxis that can be used to London-style 'TX' type taxis, meaning that she has no choice but to travel in taxis sideways, without a seatbelt, which is both uncomfortable and unsafe.

In 2007 the second claimant, Allied Vehicles (AV), applied to the Council for approval of its wheelchair accessible taxi, the 'E7', which is already licensed as a taxi in most cities in the UK. AL and other disabled people in Liverpool were impressed with the E7, which can securely carry larger wheelchairs with space for more than one ambulant companion, and supported the application. They informed the Council's licensing officer about the serious problems they and other wheelchair users faced in using the existing taxis in Liverpool. However, the Council's licensing committee refused to approve the E7, relying in part on an equality impact assessment which asserted that the existing fleet of taxis in Liverpool (which is similar to that in London) was already 'wheelchair accessible'.

The claimants argued that the decision was unlawful because: (1) the Council had failed to comply with its duty under s21E(2) DDA to take reasonable steps to ensure that its taxi licensing policy did not make it impossible or unreasonably difficult for disabled people to receive the benefit intended to be conferred; and (2) it had failed to discharge its statutory duty under s49A DDA to have due regard to the need to promote equality of opportunity for disabled persons and to encourage their participation in public life. Separately, the claimants argued that the decision was based on a material error of fact, was unfair, and that the defendant's taxi licensing policy was contrary to article 28 of the Treaty establishing the European Community (EC Treaty) as an unjustified restriction on the free movement of goods.

High Court

The judge rejected the defendant's argument that the challenge under s21E DDA was unsuitable for judicial review and had to be brought by way of a damages claim in the County Court, for three reasons. First, DDA schedule 3, paragraph 5 preserves a right to apply for judicial review in respect of an act which is unlawful under Part 3 DDA. Second, comparable race discrimination authorities demonstrate that a challenge can be made by way of judicial review even where there is a factual dispute *(R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 and *R(E) v Governing Body of the JFS* [2008] EWHC 1535/1536 (Admin)). Third, the factual dispute in this case (about what was said in consultation) did not prevent the challenge proceeding because it was clear that there was documentary evidence before the licensing committee that some wheelchair users could not access London taxis for space reasons and the licensing officer must have seriously misunderstood the issue and should have investigated further. The court could intervene where there had been a procedural failure to explore a relevant question fairly and effectively, or having explored it, a public authority based its decision on a critical factual question that proved to be wrong *(E v the Secretary of State* [2004] EWCA Civ 49; [2004] QB 1044).

Ultimately, the decision should be quashed because it was based on a fundamental misunderstanding as to the true factual position: the defendant had erroneously believed that: (1) all of the existing fleet of 1400 London-style taxis in Liverpool was 'accessible' to

all wheelchair users generally; (2) reported problems as to the securing of wheelchairs were exclusively the result of driver error; and (3) it was dealing merely with a wish or preference of wheelchair users for greater choice, rather than something which thwarted their ability to access the benefits provided by the licensing regime altogether.

The judge also rejected the defendant's argument that it was entitled to conclude that its taxi fleet was accessible to 'wheelchair-users as a class' to avoid triggering the duty to make adjustments in accordance with s21E DDA. The judge found that the evidence before the licensing committee showed serious difficulties for a class of wheelchair users, of whom some, like AL could not access a safe and secure position in a London-style taxi at all. It was not necessary to show that there was a denial of access to a benefit for *'wheelchair users as a whole... undifferentiated as to the size of the chair or the particular disability that may distinguish one group of wheelchair users from another'.*

The factual error was also fatal under s49A DDA, since the true factual position was a mandatory relevant consideration under s49A DDA and at common law: the licensing committee therefore could not lawfully exercise its discretion if it did not properly understand the problem, its degree and extent.

Comment

The decision confirms the importance of the duties on public authorities under ss21B-21E DDA, including the duty to make reasonable adjustments to any practice, policy or procedure falling within s21E DDA. It is perhaps all the more important given the restrictive approach taken to disability discrimination in *London Borough of Lewisham v Malcolm* [2008] 1 AC 1399.

In setting out the legal principles to be applied, the judge adopted a 'six step approach' which a public authority should use under ss21B and 21E DDA, and endorsed submissions by the Equality and Human Rights Commission regarding the importance of access to public transport by people with disabilities if the policies and purposes of the DDA are to be promoted and not frustrated. Referring to Sedley LJ in *Roads v Central Trains* [2004] EWCA Civ 1541, the judge confirmed that the duty to make reasonable adjustments to the taxi licensing policy in this case was *'not...a minimal duty, but seeks broadly to put the disabled person as far as reasonably practicable in a similar position to the ambulant user of a taxi'.*

Separately, the judge found that the refusal to license the E7 taxi was contrary to article 28 EC Treaty and observed that the test for justification of a failure to take 'reasonable steps' under s21D DDA was similar to the strict test applicable under article 28 EC Treaty: in this case it would only have been lawful if shown by relevant evidence to have been justified on grounds of public safety, and to be proportionate, i.e. the least restrictive alternative to achieve that legitimate aim.

The case will have significant repercussions for the licensing of taxis in cities which still restrict the type of licensed taxis to the London-style taxis (including in London itself) and is likely to be of assistance to disabled people and others campaigning for better access to public transport. More generally, it reinforces the significance of the legal responsibilities on local authorities to consider disabled people and their interests when making decisions that affect them, to ensure that the legislative purpose of the DDA – to ensure substantive equality – is not frustrated.

At the time of writing, Liverpool's officers had just reported to their licensing committee that it had no real alternative but to license the E7. Mrs Lunt and others in her position are hopeful that the long fought for u-turn in licensing policy is about to take place.

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Dismissal of disabled employee is discrimination in breach of the reasonable adjustment duty

Fareham College Corporation v Walters [2009] UKEAT 0396/08/1405, May 14, 2009

Implications for practitioners

The decision of the House of Lords in *Malcolm v Lewisham London Borough* rendered disability-related discrimination – used most commonly in cases of dismissal – of no more use than direct discrimination. Whilst there was nothing to prevent an employee arguing that there had been an unlawful dismissal – discrimination being a breach of the reasonable adjustment provisions under section 3A(2) – this had previously been unnecessary and there was no case law on it. *Walters* makes it clear that this can be claimed: it also rejects absolutely the argument raised by the respondent, that the comparator for the purpose of *Malcolm* has some relevance to the duty to make reasonable adjustments.

Facts

Ms Walters (W) was employed by the respondent (R) as a lecturer. She became unwell and was absent because of sickness in February 2006. At a meeting arranged to discuss her absence, in July, she expressed a desire to return to work on a phased basis. It was decided though that further reports would be obtained, after which there would be another meeting. The occupational health report produced for the second meeting suggested that W might be able to consider a phased return to work in September, but that it was unlikely that she would be fit to return to her full role/hours before the beginning of 2007.

Another meeting was held in September, prior to which W had been informed that dismissal was one of the options to be considered. At this meeting, R was informed that W had been diagnosed with fibromyalgia. The possibility of W returning to work in January 2007 on a part-time basis was discussed but the decision was then taken to dismiss W.

Employment Tribunal

W brought a complaint of disability discrimination to the ET on the grounds of failure to make reasonable adjustments and disability-related discrimination. She also complained of unfair dismissal and breach of contract in relation to holiday entitlement. The tribunal upheld W's claims.

Having refused R an adjournment of the remedies hearing pending its appeal, and on the basis that one of its witnesses could not attend W was awarded £5,500 in respect of injury to feelings, £16,731 for disability discrimination, £1,120 for unfair dismissal and £2,884 for breach of contract (the remedies judgment). The ET declined to make a deduction on the principles outlined in *Polkey v A E Dauton (or Dayton) Services Ltd* [1987] 3 All ER 974). R appealed against both the liability and the remedies judgment.

Employment Appeal Tribunal

R appealed on the following grounds: (i) the tribunal had erred in relation to the finding of failure to make reasonable adjustments, because it had failed properly to consider the comparative exercise required; (ii) the tribunal had erred in relation to its finding on disability-related discrimination and its approach to less favourable treatment and the comparator; and (iii) given its factual findings, the tribunal had erred in failing adequately to explain its conclusions as to the employer's failures which had led, inter alia, to the finding of unfair dismissal. Perversity was also argued. R also appealed the breach of contract finding, the remedies hearing and its finding.

The EAT dismissed the appeal. In relation to the first ground, and the comparative circumstances for the purposes of the duty to make reasonable adjustments, the EAT held that when considering a breach of the duty to make adjustments, there were circumstances in which it would not be necessary for the tribunal to identify the non-disabled comparators. In many cases the facts would speak for themselves and the identity of the non-disabled comparators would be clearly discernible from the provision, criterion or practice found to be in play. The more general comparative exercise required in a reasonable adjustments claim, involving a class or group of non-disabled comparators, differed from that which was understood and applied in the individual, like-for-like comparison required in cases of direct sex or race discrimination or in disability-related discrimination claims.

In the instant case, it had not been necessary for the employee to satisfy the tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated

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differently. To hold otherwise would defeat the purpose of the disability discrimination legislation. In the circumstances, there had been no error of law in the tribunal's reasoning in relation to the reasonable adjustments claim, and the necessary comparative exercise.

There was no need to consider the *Malcolm* arguments on disability-related discrimination, as the dismissal had itself been an unlawful act of disability discrimination by reason of the failure to make reasonable adjustments.

No error of law had been demonstrated in the tribunal's decisions on any of the issues, and nor had any of those decisions been perverse. The remainder of the grounds were also dismissed.

Comment

Since *Malcolm*, claimants have in any event had to rely far more heavily on reasonable adjustment claims and to ensure that any claim that would previously have been articulated as a claim for disability-related discrimination is, instead, framed as a failure to make reasonable adjustments. This judgment confirms that a claim for a discriminatory dismissal can be made based on a failure to make reasonable adjustments (i.e. breach of section 4(2)(d), discrimination within the meaning of section 3A(2)), rather than having to rely upon the now effectively defunct disability-related discrimination.

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Discrimination by association

EBR Attridge Law LLP (formerly Attridge Law) v Ms S Coleman UKEAT/0071/09/JOJ
October 30, 2009

Facts

Ms Coleman (C) began her claim in the ET against her former employers Attridge Law – now EBR Attridge Law LLP (AL) in August 2005. She claimed she had suffered direct discrimination and harassment contrary to the Disability Discrimination Act 1995 (as amended) (DDA) not because she is disabled but because of the disability of her son, of whom she is the principal carer (referred to as 'associative discrimination').

Litigation history

In May 2006 the ET judge, Judge Stacey, held that a reference should be made to the ECJ to ask whether associative discrimination fell within the provisions of the Framework Directive 2000/78/EC (the Directive). On appeal by AL the EAT upheld the decision to refer this question to the ECJ. In July 2008 the ECJ held that associative discrimination did fall within the terms of the Directive, ECJ Case C-303/06. (See DLA Briefing 499, November 2008)

Employment Tribunal

C's case came back to the ET. In her judgment in November 2008 Judge Stacey held that the DDA could be so construed as to apply to associative discrimination and accordingly the ET had jurisdiction to consider Ms Coleman's claim. Judge Stacey concluded that she was obliged to interpret the DDA to conform with the effect of the Directive as declared by the ECJ, and, in order to do so, it was necessary for her to interpolate words into relevant sections of the DDA. In her judgment she indicated the words she was supplying into sections 3A(5) – direct discrimination, 3B – harassment and 4 – employers: discrimination and harassment.

Employment Appeal Tribunal

AL appealed to the EAT. They challenged the decision that the ET had jurisdiction to hear C's claim on two grounds:

- that the ET judge had 'distorted and rewritten' the DDA by reading words into it so as to outlaw associative discrimination, and
- that the Directive could in any event have no effect on the interpretation until December 2, 2006, the final date in the Directive for implementation by member states.

This appeal failed on both grounds.

On the first ground, Underhill J referred firstly to the principle of EU law established in *Marleasing SA v La Commercial Internacionial de Alimentacion SA* [1990] ECR 1-4134 that member states should *'so far as possible'* interpret domestic legislation in order to

give effect to the state's obligations under EU law. He noted that *'pursuant to that obligation a court or tribunal can in some circumstances go beyond the traditional strict limits of statutory construction and can read words into a statute in order to give effect to EU legislation which the statute was evidently intended to implement'*.

Accepting, as put forward on behalf of C, that the duty under s3(1) of the Human Rights Act 1998 to read and give effect to UK legislation in a way which is compatible with Convention rights *'so far as it is possible to do so'* is analogous to that under EU law. After careful consideration of the House of Lord's decision in *Ghaidan – Godin-Mendoza* [2004] 2AC 557 which was concerned with the extent of the s3(1) duty he concluded that:

> *…there is nothing 'impossible' about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but the speeches in Ghaidan make clear, that is not in itself impermissible. The real question is whether it would do so in a manner which is not 'compatible' with the underlying thrust of the legislation... In Ghaidan the majority were prepared to interpret the words 'wife or husband' in Schedule 1 of the Rent Act 1977 as extending to same sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however literally construed; but the implication was necessary in order to give effect to Convention rights and it went 'with the grain of the legislation'... The proscription of associative discrimination is an extension of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination 'on the ground of disability' still remains central.*

He therefore proposed that additional words should be read into the DDA as follows:

To s3A add a sub-section (5A):

> *(5A) A person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person.*

To s3B add a sub-section (3):

> *(3) A person also subjects a person (A) to harassment where, for a reason which relates to the disability of another person (B), he engages in unwanted conduct which has the purpose or effect of –*
> *a) violating A's dignity, or*
> *b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.*
> *Subsection (2) applies to this sub-section, save that the relevant perception is that of A.*

To add in the introductory words to s4(1) and (2) the phrase underlined below:

> *It is unlawful for an employer to discriminate against a disabled person – <u>or in a case falling within s3A (5A) any person –</u> ….*

And likewise s4(3) (a) and (b) would include after 'a disabled person' the phrase *'or in a case falling within s3B(3), any person …'*

He explained that he had not used the term 'associative discrimination' to avoid the risk of tribunals being bogged down in discussion of what does or does not amount to an 'association', when the essence of what matters is that a person suffers adverse treatment on the proscribed ground of disability and the disability is not their own.

He also rejected the second ground of appeal, holding that the court's *Marleasing* duty applied at the moment the regulations came into force in 2004, rather than the deadline for implementation on December 2, 2006 as AL had submitted.

He therefore remitted the case to the ET to consider 'at last' the merits of C's substantive claim.

Comment

As the judge concluded, with the question of jurisdiction now resolved, Ms Coleman's case can now be heard. More importantly this decision should enable others, who have been subjected to less favourable treatment or harassment because of the disability or age or sex or gender reassignment of another person, to seek redress under the relevant equality enactment.

It will be interesting to see whether, and in what circumstances, this decision will open the door to protection against discrimination for carers, such as carers of disabled people, older people or children. It is important to note, however, that the words read into the DDA by the judge do not impose a duty on an employer to make 'reasonable adjustments' (such as allowing part-time working) under the DDA for carers or others associated with a disabled person – the decision affects only claims of direct discrimination and harassment.

It is unlikely that the words interpolated into the DDA will live on beyond the enactment and coming into force of the Equality Bill. The explanatory notes to the Equality Bill state that the formulation of direct discrimination in Clause 13 removes the current specific requirement for the victim of the discrimination to have one of the protected characteristics. Thus, unlike the DDA which in s3A (5)

defines direct discrimination as 'on the ground of the disabled person's disability', direct discrimination in the Equality Bill is 'because of a protected characteristic' where 'because of' is intended to have the same meaning as 'on grounds of'. The explanatory notes include one example of 'associative discrimination' as coming within this broad definition.

It is, of course, likely that over time provisions in this new legislation may also be referred to the ECJ and may indeed require other words to be read into UK legislation to give full effect to EU law. For that reason the argument and analysis in this case will continue to be valuable.

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DDA does not protect CAB volunteers

X v Mid Sussex Citizens Advice Bureau & Lyn Challis [2009] UKEAT 0220/08/3010
October 30, 2009

Implications for practitioners

This case considers whether a volunteer worker with the Citizens Advice Bureau was protected under the discrimination acts and whether the effect of Council Directive 2000/78/EC, the Employment Equality Directive (ED), is to extend protection to voluntary workers without a contract.

Facts

X applied to be a volunteer with the Mid Sussex Citizens Advice Bureau (CAB) on April 28, 2006. She indicated that she would work for 4-5 hours per week. She signed a volunteer agreement on May 12, 2006 which was described as being *'binding in honour only ...not a contract of employment and not legally binding'*. X, who was disabled, had a number of academic and practical qualifications in law and undertook a wide range of advice work duties.

Although no attendance records were kept for volunteers, she did not attend on 25-30% of the days that she was expected and no objection was ever taken to this or to her changing the days she came in.

It is not automatic that any volunteering will lead to any paid job or employment with the CAB. All paid jobs are advertised externally and volunteers are not given any preferential treatment in relation to these.

X was asked to cease to attend as a volunteer and consequently she brought a discrimination claim under the Disability Discrimination Act 1995 (DDA).

Employment Tribunal

The ET considered as a preliminary issue whether X's work as a volunteer was protected by the DDA. They found that X was a volunteer, that there was no binding contract between her and the CAB, that she was under no obligation to provide any services to the CAB and that she was not an employee. X argued that the volunteering arrangements under which she was providing her services to the CAB were *'for the purpose of determining to whom [the CAB] should offer employment'*. She pointed out that the experience of volunteering would be of great advantage when seeking a paid position with the CAB. The ET found that whilst this might be a by-product of volunteering this was not the *'sole, dominant or indeed any part of the actual purpose of the arrangement'*.

The ET therefore concluded that they did not have jurisdiction under the DDA to consider her complaint of disability discrimination and that the ED did not apply to this case. X appealed to the EAT.

Employment Appeal Tribunal

X argued that the terms of the ED requires member states to put in place legislation which provided protection from discrimination for certain types of volunteers, that the UK government had not complied with this requirement and that therefore that the DDA should be interpreted as including protection for these volunteers.

The case principally concerned the application of article 3(1) of the ED which specifies that the directive shall apply to *'conditions for access to employment, to self-employment or to occupation...'* It was argued that this meant that the DDA s4(2) should be construed so as to include some voluntary work.

The DDA s4(2)(d) provides that:

> *It is unlawful for an employer to discriminate against a disabled person whom he employs...*

(d) by dismissing him, or subjecting him to any other detriment...

'Employer' and 'employs' are defined by reference to the definition of 'employment' at DDA s68:

'Employment' means subject to any prescribed provision, employment under contract of service or of apprenticeship or contract personally to do any work, and related expressions are to be construed accordingly.

The EAT identified a number of areas of common ground:

1. This is not a case about the position of all voluntary workers. Some are already protected.
2. Any new interpretation of the DDA is likely also to affect the interpretation of all the other anti-discrimination legislation.
3. It is public policy that volunteering by and for disabled people should be encouraged.
4. The volunteering sector is substantial. The NCVO statistics from 2007/8 show that 73% of adults took part in a voluntary activity, 43% of these were formal volunteering arrangements and 27% of them gave their time at least once a month.
5. The ED does not have direct or vertical effect i.e. it is not directly enforceable against non-governmental bodies such as the CAB; it is only directly enforceable against the government or an organ of government.
6. The ECJ in *Allonby v Accrington & Rossendale College & ors* [2004] ICR 1328 said that the term worker *'cannot be defined by reference to the legislation of the Member States but has a community meaning. Moreover, it cannot be interpreted restrictively'*. The ECJ in *Kurz v Land Baden-Württemberg* [2002] ECR I-10691 said that the concept of worker:

   must be defined in accordance with objective criteria which distinguish an employment relationship by reference to the rights and duties of the persons concerned. In order to be treated as a worker, a person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale to be regarded as purely marginal and ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.
7. Until now it has been consistently assumed that, unless they have contracts, voluntary workers are not protected by UK anti-discrimination provisions.

X's counsel based his argument on the use of the word 'occupation' within the definition of the scope of the directive. He argued that it must refer to something which is not employment or self employment. He did not argue that all voluntary workers were covered by the concept of 'occupation'. This led to a discussion of the possible concept of 'qualifying voluntary workers' who would carry out an occupation defined as:

the carrying out of a real and genuine activity, which is more than marginal in its impact upon the person or entity for whom such activity is carried out and which is not carried out for remuneration or under any contract.

Mr Justice Burton then criticised this definition saying that an activity which was 'more than marginal in its impact' could include a very small contribution which was highly valued by its receiver such as the situation of a surveyor spending two hours a year checking a church bell.

Mr Justice Burton went on to consider the possible mechanics of amending the definition of 'worker' in the DDA to include those engaged in an occupation before concluding that this was not the correct approach and would leave the law undesirably vague. He decided that the scope of the ED did not cover X's situation and therefore refused to make a reference to the ECJ and dismissed the appeal.

Comment

Unfortunately the focus of the argument in this case appears to have been on the definition of 'worker'. There appears to have been inadequate consideration of the meaning of the concept of 'occupation' within the ED. It may be that a reference to the ECJ would provide clarification of this point.

The judge concluded that volunteers in similar circumstances to X were not within the scope of the ED. Although he did not need to consider whether or not the DDA was inconsistent with the ED, he nevertheless did so and decided that he would not be persuaded to write into the DDA the additional words 'or occupation' whenever there was a reference to employment in Part II.

This part of the judgment is therefore strictly *obiter dicta* and is not to be taken as the last word on the subject. It is possible that there are circumstances in which a person is in an 'occupation' for the purposes of the ED, but yet it is not clear that he or she is within the scope of the DDA as it was passed by parliament. In those circumstances this issue may need to be reconsidered.

Gay Moon
Equality and Diversity Forum

When does a 'philosophical belief' afford the believer protection from discrimination in the workplace?

Grainger plc and ors v Nicholson UKEAT/0219/07/ZT, November 3, 2009

Key issues

At a hearing in the Employment Appeal Tribunal on October 7, 2009 Mr T Nicholson's (TN) former employers, Grainger plc (G) sought to persuade the tribunal that TN's beliefs on climate change and the environment did not amount to a philosophical belief which afforded him protection from discrimination under the Employment Equality (Religion or Belief) Regulations 2003 (RB Regulations). The key issue for the tribunal was what constitutes a philosophical belief in law for the purposes of the RB Regulations?

Facts

TN was dismissed from his position as Head of Sustainability at G in July 2008 having worked for the company since June 2006. Grainger maintained that TN had been made redundant and was fairly dismissed on that ground. TN however, considered that he had been discriminated against and dismissed unfairly in contravention of the RB Regulations, because of his asserted belief about climate change. Alleging unfair dismissal, religion and belief discrimination and detriments for whistle blowing, TN issued proceedings in the Employment Tribunal.

Employment Tribunal

At the outset of those proceedings, the order was made for a Pre-hearing Review (PHR) to determine the contested matter of whether or not TN's beliefs on man-made climate change and the environment could constitute a philosophical belief for the purposes of his claim of unlawful discrimination under the RB Regulations.

On his belief that carbon emissions must be cut in order to avoid catastrophic climate change, TN stated at the PHR:

> *It is not merely an opinion but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears ... I fear very much for the future of the human race, given the failure to reduce carbon emission on a global scale.*

On March 18, 2009 the judge found in TN's favour. G appealed the decision principally on the grounds that TN's belief in climate change was a political (rather than philosophical) view and that the decision of the ET was inconsistent with the EAT decision in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

Employment Appeal Tribunal

Leading counsel were instructed by both sides: John Bowers QC for G and Dinah Rose QC with Ivan Hare for TN. Considering the commentary in Hansard on the removal, by the Equality Act 2006, of the word similar from regulation 1, *'belief means any religious or [similar] philosophical belief'*, the EAT set out the three main issues between the parties.

First, to what extent is a belief required to be similar, if at all, to a religious belief to qualify for protection under the RB Regulations? Second, what limits, if any, should be placed on the meaning of 'philosophical belief' for the purposes of the regulation. In this regard, G argued that there are, or should be, at least three limits on the concept of the philosophical belief: (a) the belief must be 'settled', part of a system of beliefs; and/or (b) it must be philosophical, not political; and/or (c) it must not be a scientific belief. Third, whether authorities relating to Article 9 (freedom of thought, conscience and religion) and Article 2 of Protocol 1 (right to education) of the European Convention on Human Rights (ECHR) are relevant and to what extent.

In determining these issues the EAT considered among others, the following cases: *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (as regards limits on the definition of philosophical belief) and *Campbell and Cosens v United Kingdom* [1982] 4 EHRR 293 and *(Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 249 (as regards Article 9 ECHR). It was the latter two judgments which the judge applied when he set out at paragraph 24 of his judgment the limitations applicable to the definition of *'philosophical belief':* The five limitations or criteria are stated as follows:

1. The belief must be genuinely held.
2. It must be a belief and not, as in *McClintock*, an opinion or viewpoint based upon the present state of information available.
3. It must be a belief as to a weighty and substantial

aspect of human life and behaviour.
4. It must attain a certain level of cogency, seriousness, cohesion and importance.
5. It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of *Campbell* and paragraph 23 of *Williamson*).

As regards the question of a philosophical belief's similarity to a religion, the EAT considered the argument that a qualifying philosophical belief should be one which is shared by others. Applying the EAT decision of *Eweida v British Airways plc* [2009] ICR 303, the judge concluded that *'it is not a bar to a philosophical belief being protected by the Regulations if it is a one-off belief and not shared by others…'* provided that it satisfied the criteria above.

As to the criticism that TN's belief was political and therefore not one qualifying for protection under the RB Regulations, the EAT concluded that there was no provision in law to support this and found that, provided the criteria above (particularly 5) were satisfied, there was no risk that objectionable (e.g. racist or homophobic) political philosophies/beliefs would be allowed to come within the protection of the RB Regulations.

As regards G's argument that *'philosophical beliefs'* must not be based on science, the EAT considered the conflict in the realm of education between Creationists and Darwinists, asserting that Darwinism is both clearly capable of being a 'philosophical belief' as well as being based on science.

The appeal was dismissed and the decision of Employment Tribunal upheld. A belief in man-made climate change, and the alleged resulting moral imperatives, is capable, if genuinely held, of being a philosophical belief.

The judge was also careful to add in his judgment that at any full hearing, a philosophical belief proposed to qualify for protection under the RB Regulations will need to be tested through evidence and cross examination and where relevant, by reference to the criteria set out above.

Implications for practitioners

Practitioners need to consider a number of implications. The first of these, is the fact that the EAT has given a fairly wide interpretation to the meaning of 'philosophical belief'. Beliefs in political ideologies such as Communism, Marxism, Socialism, and free-market Capitalism were specifically cited in the judgment as philosophical beliefs which might be capable of qualifying for protection. It is also significant that the decision was underpinned by Article 9 of the ECHR and Council Directive 2000/78/EC of 27 November 2000 as interpreted in the case law.

When considering whether a belief is within the meaning of the RB Regulations, practitioners will need to take into account the five-fold test and consider whether they are capable of being satisfied evidentially. They will also need to bear in mind that the EAT was conscious in this case of beliefs which impinge upon fundamental rights. These are expected to be excluded from protection by the RB Regulations on account of the fifth criteria which prohibits beliefs which are not *'worthy of respect in a democratic society'*, are *'incompatible with human dignity'* or *'conflict with the fundamental rights of others'*. For example this is likely to exclude philosophical beliefs which advocate violence or hatred of others.

Shah Qureshi (solicitor for Tim Nicholson)
Nicholas Fry
Bindmans LLP

UN Human Rights Committee: racial profiling is a violation of the UN Covenant on Civil and Political Rights

In a case filed by a Spanish national, the UN Human Rights Committee has ruled that the use of physical or ethnic characteristics to trigger or to target police identity checks is discrimination and a violation of Article 26 of the UN International Covenant on Civil and Political Rights (ICCPR).

The facts in *Williams v Spain* are, unfortunately, not exceptional. Ms Williams, who is black, was singled out by the Spanish police when travelling with her husband and her son. She was asked by a National Police officer to produce her identity documents. No other passengers, including her husband and her son, were asked to produce identity documents. When she asked why she had been targeted for an identity check the officer replied that the Ministry of the Interior ordered the National Police to conduct identity checks, particularly of 'persons of colour'. Ms Williams produced her documents and recorded the officer's number.

Ms Williams complained to the National Police where her complaint was dismissed as not disclosing any crime. She complained to the Ministry of the Interior arguing that stopping people based on race or ethnicity when carrying out identity checks contravened Spanish and EU legal norms against discrimination and protecting freedom of movement. When the Ministry rejected her complaint she appealed to the National Administrative Court. The court rejected her appeal finding that there was a duty to produce identity documents, the police were authorised to demand identification from foreigners and because Ms Williams belonged to *'the black race'*, she was more likely to be a foreigner.

Ms Williams appealed to the Spanish Constitutional Court alleging a violation of the prohibition of discrimination in the Spanish Constitution and Article 14 of the European Convention on Human Rights. By a majority the Constitutional Court rejected her appeal. The court explained: *'[T]he police action used the racial criterion as merely indicative of a greater probability that the interested party was not Spanish. None of the circumstances that occurred in said intervention indicates that the conduct of the acting National Police officer was guided by racial prejudice or special bias against the members of a specific ethnic group, as alleged in the complaint.'*

After some time, assisted by the Open Society Justice Initiative, Women's Link Worldwide and SOS-Racismo Madrid, Ms Williams filed a complaint to the UN Human Rights Committee alleging that her treatment violated provisions of the ICCPR. The arguments put forward on her behalf included:

- the prohibition of race discrimination is recognised in all international and European human rights instruments creating an obligation on states to ensure that it does not occur, in accordance with Article 26 ICCPR
- international law prohibits both direct and indirect race discrimination
- police officers are agents of the state with the above obligation
- the law enforcement practice of relying on generalisations about race, ethnicity or national origin rather than specific objectively identified evidence is a form of race discrimination which violates human rights law.

The UN Human Rights Committee accepted Ms Williams' application despite the fact that it was submitted more than 5 years after the rejection of her appeal by the Spanish Constitutional Court. There is no deadline for the submission of claims to the Committee, and the Committee was satisfied that, in this case, the elapse of time did not constitute an abuse of the process.

On the substantive issue the Committee ruled:

7.2 …it is generally legitimate to carry out identity checks for the purposes of protecting public safety and crime prevention or to control illegal immigration. However, when the authorities carry out these checks, the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal

situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted.

7.4 …In this case….the Committee can only conclude that the petitioner was singled out only because of her racial characteristics, and this was the decisive factor for suspecting unlawful conduct. The Committee recalls its jurisprudence that not all differential treatment constitutes discrimination if the criteria for differentiation are reasonable and objective and if the goal is legitimate under the Covenant. In this case, the Committee finds that the criteria of reasonableness and objectivity were not met….

8. …the Human Rights Committee considers that the facts before it reveal a violation of Article 26, read together with Article 2, paragraph 3 of the Covenant.

Comment

The UK ratified the ICCPR in 1976 and is thereby bound by its provisions and in particular Article 26 which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 imposes an obligation on all signatory states to ensure that any person whose rights under the covenant are violated shall have an effective remedy *'notwithstanding that the violation has been committed by persons acting in an official capacity',* that a person's right to such remedy shall be determined by competent judicial, administrative, legislative or other competent authority, and that remedies shall be enforced.

The UK government will no doubt be aware of the decision in the *Williams* case; it has obvious implications for agents of the state, notably police and immigration officers who have comparable powers to stop and question individuals for purposes of public safety, crime prevention and immigration control.

The UK has not signed the Optional Protocol to the ICCPR under which the competence of the UN Human Rights Committee to consider petitions from individuals claiming violation of their ICCPR rights by the UK government, would be recognised. Therefore cases of racial profiling by UK state agencies cannot be considered by the UN Committee; such cases can, of course, be considered by our domestic courts as well as by the European Court of Human Rights, both of which will be expected to take account of decisions by the UN Committee.

Further, any new claims in the UK courts will need to be considered in the light of the House of Lords decision in *Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55. In that case the CA had been prepared to accept differential treatment of Roma based on their being more likely than non-Roma to apply for asylum. The HL, overturning the CA decision, held that the operation by UK immigration officers, in which individual Roma passengers, simply because they were Roma, were routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma was *'inherently and systemically discriminatory and unlawful.'* To treat people less favourably based on a stereotype, even if that stereotype is true, is discrimination. The immigration officers' treatment of Roma passengers was also a breach of the UK's non-discrimination obligations under international human rights instruments including Article 26 ICCPR and Article 2 of the International Convention on all forms of Racial Discrimination. (The UK has not signed the Optional Protocol that would enable individual petitions under ICERD)

Many discrimination lawyers fear that a differently constituted panel of judges in the new Supreme Court might take a different view in a future case involving racial profiling on different facts.

Equality Bill

The Equality Bill will return to the House of Commons after the Queen's Speech on November 18, 2009. It will then have its report stage on the floor of the House of Commons before being sent to the House of Lords. It is hoped that it will have its second reading in the House of Lords before Christmas, as it is important for the Bill to have been approved by both Houses by the end of March.

It is likely that the government will introduce a very limited number of amendments to the Bill at the report stage. These may include provisions on pre-employment questionnaires and clarification of the asymmetric nature of disability discrimination. There had been some discussion about introducing provisions to permit representative actions but this is unlikely to be included.

Details of its progress through parliament as well as the latest version of the Bill can be found at http://services.parliament.uk/bills/2008-09/equality.html

The Equality Commission and the BNP

The Equality and Human Rights Commission has successfully sued the British National Party alleging that their membership criterion discriminates against people on the grounds of their ethnic minority status or their colour. The case has now been adjourned following the BNP's confirmation that it will accept the EHRC's requirement that it change its constitution and membership criteria. The BNP has also agreed to not accept any new members until its new constitution comes into force.

Following an order by the Central London County Court, the BNP has agreed to use all reasonable endeavours to revise its constitution so that it does not discriminate, either directly or indirectly on any 'protected characteristic' – for example, on the grounds of race, ethnic or religious status – as defined in clause 4 of the Equality Bill. These changes must be carried out as soon as reasonably practicable, and within no more than three months from the date of the order.

The order also states that from October 15, 2009, until the new constitution comes into effect, BNP chairman Nick Griffin will close the membership of the party to all new membership applications and prevent the party from accepting into membership any new member.

Discrimination Law Association

DLA AGM

The DLA will hold its AGM and annual social event at 6pm on Wednesday 2, December 2009 at Irwin Mitchell Solicitors, 40 Holborn Viaduct, London, EC1N 2PZ
The guest speaker will be Maleiha Malik who will talk about 'Equality conflicts – managing conflicts within and between equality strands.' Wine, soft drinks and nibbles will be provided. Please contact Sharon Morris at the DLA office if you will be attending or if you require any reasonable adjustments. 2 CPD points available.

Ministers call for evidence on default retirement age

Ministers are calling for businesses and individuals to submit evidence on the default retirement age to feed into the review taking place next year.

The government is asking for evidence, including on the:

- operation of the Default Retirement Age in practice
- reasons that businesses use mandatory retirement ages
- impacts on businesses, individuals and the economy of raising or removing the Default Retirement Age
- experience of businesses operating without a Default Retirement Age
- how could any costs of raising or removing the DRA be mitigated and benefits realised

Submissions are requested by February 1, 2010 and should be emailed to draevidence@bis.gov.uk and/or posted to DRA Evidence, Department for Business, Innovation and Skills, V497, 1 Victoria Street, London, SW1H 0ET.

Further details are available from: http://www.dwp.gov.uk/newsroom/press-releases/2009/october-2009/dwp054-09-281009.shtml

DLA's probono heros!

Two members of the DLA's executive committee, Elaine Banton and Sophie Garner, are among 50 representatives of the legal profession and the voluntary sector who were honoured for their exceptional contributions to pro bono work across the country. On November 3, a reception to celebrate the work of the pro bono heros was hosted at the House of Lords by the Attorney General Baroness Scotland QC who praised their work and the impact it has *'on those who need legal advice and assistance but would otherwise be denied it'*. Congratulations to Elaine and Sophie!

Discrimination in recruitment practice

Research published recently by the Department of Work and Pensions has found that there is significant discrimination in recruitment based on whether a person has a name indicating they are of 'white British' origin or a name indicating they are from an ethnic minority.

Researchers submitted three similar applications to 987 advertised job vacancies. One of the three had a 'white British' name; the other two had names from different ethnic minority groups. When the sets of applications with positive responses were analysed, 68% were from 'white British' applicants compared with 39% from ethnic minority applicants, a difference of 29% in favour of 'white British' applicants. The research showed that for every nine applications sent by a white applicant, an equally good applicant with an ethnic minority name had to send sixteen to obtain a positive response.

The need for this research was based on the persistent and unexplained gap in the employment rate between the ethnic minority population and the population of Great Britain, where there is still a 13.8 percentage point difference. Jim Knight, Minister for Employment and Welfare Reform said: *'We are determined to stop this scourge on society – the Equality Bill will strengthen our hand and we are already preparing to publish specific plans for dealing with discrimination in the workplace.'*

Vacancies in the public sector, which usually require standard application forms, were included in the study and showed no discrimination at this initial stage of recruitment. This suggests that discrimination might be reduced by the use of standard application forms.

Briefings

Abbreviations

BMA	British Medical Association
BNP	British National Party
DDA	Disability Discrimination Act 1995
DH	Department of Health
DRA	Default retirement age
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EC	European Community
EC Treaty	The Treaty Establishing the European Economic Community 1957
ECJ	European Court of Justice
ED	Council Directive 2000/78/EC
EHRC	Equality and Human Rights Commission
EOC	Equal Opportunities Commission
EqPA	Equal Pay Act 1970
ERT	Equal Rights Trust
EU	European Union
GMC	General Medical Council
HC	High Court
HL	House of Lords
ICCPR	United Nations International Covenant on Civil and Political Rights 1966
ICERD	United Nations International Convention on the Elimination of All Forms of Racial Discrimination 1966
IVF	In vitro fertilisation
IT	Industrial Tribunal
LGBT	Lesbian, gay, bisexual and transgendered
LJ	Lord Justice
NCVO	National Council for Voluntary Organisation
NSS	National Secular Society
PHR	Pre-hearing Review
RB Regulations	Employment Equality (Religion and Belief) Regulations 2003
RRA	Race Relations Act 1976
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 1981