EQUALITY AND HUMAN RIGHTS UPDATE
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Introduction

1. Whilst equality is the key overarching principle apparent in most international, regional and domestic human rights instruments, it has very often been treated as a subsidiary – if all else fails – ground. However, more recently it has become prominent in human rights cases. This can be explained at least in part because the Equality Act 2010 provides a more certain framework in some contexts for challenging public authority decision-making. The Public Sector Equality Duty, in particular, imposes positive obligations on the state to at least give conscious regard to the impact on equality that their decisions might have.

2. The exception to the growth in equality cases is in the employment sphere. The impact of a requirement to pay fees as a condition of instituting tribunal proceedings has been devastating and the impact is most clearly seen in equality claims. Women and other minorities, of course, in general bring these claims. A challenge to their introduction, including on equality grounds, has so far failed: *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935.

3. Given the prevailing political climate it will be no surprise to learn that many of the other key equality cases concern austerity measures. Many of the cuts to the funding of services and to local authorities have most profoundly affected the poor and within that group, women, disabled people and ethnic minorities.

4. Looking at the impact of tax, spending and benefit changes in the period 2010-15, research commissioned by the EHRC found that[1]: *"the impacts of tax and welfare reforms are more negative for families containing at least one disabled*

[1] Equality and Human Rights Commission Research report 94, Howard Reed and Jonathan Portes *'Cumulative Impact Assessment: A Research Report by Landman Economics and the National Institute of Economic and Social Research (NIESR) for the Equality and Human Rights Commission.'*

person, particularly a disabled child, and that these negative impacts are particularly strong for low income families. …..Women lose somewhat more from the direct tax and welfare changes compared to men. This is mainly because women receive a larger proportion of benefits and tax credits relating to children, and these comprise a large proportion of the social security reforms between 2010 and 2015. …In terms of public services (as opposed to tax and welfare), Black and Asian households lose out somewhat more than other groups. This is largely due to greater use of further and higher education, and, for Black households, social housing" (vii).

5. The Committee on the Elimination of Discrimination Against Women in its most recent observations on the UK has expressed concern about the austerity measures and in the serious cuts in funding for organisations providing social services to women, including those providing for women only, that have resulted and the negative impact on women with disabilities and older women, in particular. It has also expressed concern about the commissioning of women's services instead of direct funding, which might risk undermining the provision of these services and, relatedly, the cuts to the public sector which disproportionately affect women. [2] The Committee has urged the UK to mitigate the impact of austerity measures on women and services provided to women, particularly women with disabilities and older women, and to ensure that Spending Reviews continuously focus on measuring and balancing the impact of austerity measures on women's rights. We shall see……

6. Recent challenges in the public law sphere have, then, highlighted the effects of many of the highly publicised austerity measures, including the benefit cap, bedroom tax and the council tax support cases.

7. In addition, there have been some interesting and important cases on the concepts of equality under the Equality Act 2010 and related issues in the past

[2] Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (2013) CEDAW/C/GBR/CO/7.

year or so which will affect claims against state bodies. These are also addressed below.

Austerity Rules

8. In *R (SG & Others) v Secretary of State for Work and Pensions (Child Poverty Action Group & Another intervening)* [2015] 1 WLR 1449, the Supreme Court considered the lawfulness of the benefit cap. The claim was brought on the basis that the cap indirectly and unjustifiably discriminated against women, contrary to Article 14. It was conceded by the Secretary of State that the benefit cap resulted, indirectly, in differential treatment of men and women in relation to welfare benefits, because most non-working households receiving the highest level of benefit were lone parent households and most lone parents were women. It was also conceded that the benefits could amount to *"possessions"* within Article 1, Protocol 1. However the Secretary of State argued that the imposition of the cap was justified. The majority of the Supreme Court concluded that the imposition of the cap was indeed justified. In so doing, it held that the legislature's policy choice in relation to general measures of economic or social strategy, including welfare benefits, would be respected unless it was manifestly without reasonable foundation. The court held that the view of the government, endorsed by Parliament, was that achieving the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits which a household could receive were sufficiently important to justify making the regulations despite their differential impact on men and women. Accordingly, there had been no violation of Article 14 of the Convention read with Article 1, Protocol 1.

9. In *Burnip and O'rs v. Birmingham CC and O'rs* [2012] EWCA Civ 629; [2013] PTSR 117, the Court of Appeal considered the impact of what has come to be known as the *"bedroom tax"* in the private rented sector. The claimants argued that the measures were unlawfully discriminatory and relied upon Article 14 read with Article 1, First Protocol (housing benefit being a possession for these purposes). It concluded that the measures discriminated against certain groups of disabled people (who could not share a room or who needed overnight carers) (applying *Thlimmenos v Greece)*. The Court also concluded that the

measures were not justified having regard to their impact on those with severe disabilities.

10. In *MA v. Secretary of State for Work and Pensions* [2014] EWCA Civ 13; [2014] PTSR 584, the Court of Appeal considered the impact of the bedroom tax in the social rented sector upon severely disabled claimants — the schemes applicable in the private and social sector were identical in every material respect. The claimants again argued that the measures were unlawfully discriminatory and relied upon Article 14 read with Article 1, First Protocol. In *MA* it was also argued that the new measures involved a breach by the Secretary of State of the Public Sector Equality Duty ("PSED") in section 149 of the Equality Act 2010. In relation to the unlawful discrimination issue, the claimants submitted that the statutory criteria had a disparate adverse impact on disabled people or failed to take account of the differences between the disabled and the non-disabled. In *MA*, the Court of Appeal (differently constituted to that in *Burnip*) held that (1) that, when read in isolation and without regard to the scheme for discretionary housing payments, the Housing Benefit Regulations 2006 (as amended to introduce the bedroom tax) discriminated against disabled people on the ground of disability. This was because the bedroom criteria defined under-occupation by reference to the objective needs of non-disabled households and not by reference to the objective needs of at least some disabled households. However, the Court concluded that the Secretary of State had recognised that some persons ought not to be subjected to the percentage reductions in benefit by including in the regulation certain exempted groups, for example children who could not share a bedroom or persons who required overnight care, and also by relying on the discretionary housing payment ("DHP") scheme for payment to those to whom it might not be reasonable to apply the bedroom criteria. The question was whether the discrimination was justified, namely whether the justification advanced was manifestly without reasonable foundation. The court considered that *"caution"* had to be demonstrated in reviewing the scheme since the amendments had been approved and reviewed by the legislature and their effect in relation to disabled persons and alleged shortcomings had been canvassed and debated in Parliament. Having regard to the availability of DHPs, the Court concluded that

the measures were justified. As to the PSED, The Court recognised that *"it is insufficient for the decision-maker to have a vague awareness of his legal duties"*; *"[he] must have a focused awareness of* <u>*each*</u> *of the section 149 duties and (in a disability case) their potential impact on the relevant group of disabled persons"* (emphasis added). However, the Court went on that in some cases *"there will be no practical difference between what is required to discharge the various duties even though the duties are expressed in conceptually distinct terms"* and accordingly the focus on, and discharge of, one limb of section 149, may be adequate to discharge all of them. The court concluded that in consulting and considering the impact on disabled people of the bedroom tax, that was adequate to discharge all limbs even without specific focus on the duty to have due regard to the need to advance equality for (among others) disabled people. Consideration had also been given to whether sufficient money would be available for DHPs. For these reasons, the decision-making process had been conducted with due regard to the matters set out under the PSED.

11. There is obvious friction between *Burnip* and *MA*. Permission to appeal in *MA* has been granted by the Supreme Court on the Article 14 issue. The appeal is due to be heard next Spring. In the meantime, two further cases are following: *A v SSWP* and *Rutherford v SSWP*. In the first case, the Court of Appeal is considering the impact of the bedroom tax on women victims of domestic violence, and in particular certain victims of severe domestic violence, namely those like the Appellant who live in adapted "sanctuary scheme" homes. These are specially adapted homes, designed to protect high risk victims of domestic violence, through use of security measures such as panic rooms, bullet proof glass, fire-proof letterboxes and "markers of interest" for quicker responses to 999 calls. The vast majority of those who live in such adapted homes are women, as indeed are the vast majority of victims of domestic violence. In the second case the Court of Appeal will consider the impact of the bedroom tax on children who require overnight carers. The Appellants lost at first instance and their appeals have been expedited (with a view to hearing them in time for them to be joined to *MA* in the Supreme Court if the Supreme Court choose to give permission).

12. There are a number of issues before the Supreme Court in *MA*. These include: Was the Court of Appeal wrong to hold that the standard of review in that case was whether the justification for the discrimination was "*manifestly without reasonable foundation*" or alternatively did it correctly apply that test in the circumstances of that case? Must the Respondent have weighty reasons to justify the discrimination, either because the claims involve direct discrimination, or at least discrimination so closely connected to their status as disabled persons to make it appropriate to require similarly powerful justification? The appeal is expected to be heard in March 2016.

13. Further, judgment at first instance is awaited in a challenge to a local council tax support scheme – in this case imposing an obligation on all householders to pay 15% of the full council tax liability. The case is bought on behalf of a disabled person because of the particular impact on him given that all his extremely limited funds are applied to disability related expenses or bare minimum living expenses (*R (Logan) v Havering LBC* CO/1822/2015). Reliance is placed on Article 1, Protocol 1 and Article 14 and the Equality Act 2010 (sections 19, 29 and 149).

<u>Other economic and social rights</u>

14. In *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law Intervening)* [2015] UKSC 57; [2015] 1 WLR 3820, the Supreme Court considered a rule which restricted entitlement to a student loan to those *"settled"* in the United Kingdom. *"Settled"*, for these purposes means, effectively, having an entitlement to *"indefinite leave to remain"*. The claimant argued that this rendered her ineligible to receive a loan because of her immigration status and that was incompatible with her rights under Article 14 and Article 2 of the First Protocol (right to education). The court reiterated that Article 2 of the First Protocol did not impose on the State an obligation to provide, or fund, tertiary education, but such State support as was available had to be offered on a Convention-compliant basis. According to the Court, Article 14 and its reference to *"other status"* covers *"immigration status"* and accordingly the claimant was entitled to make complaint under Article 14,

because what disentitled her to a student loan for the purposes of funding a place at University was her *"immigration status"*, namely that she did not have indefinite leave to remain. The claimant had been in the United Kingdom for most of her life and had undertaken her primary and secondary education in the United Kingdom. She had not meaningfully lived anywhere else and it was quite plain that her future lay in the United Kingdom. The court considered that it was legitimate to target resources on those students who were properly part of the community and were likely to remain in England indefinitely and to contribute to the economy but there was no evidence that the Secretary of State had addressed his mind to the situation that those like the claimant found themselves in. The claimant was plainly not going anywhere but was unable to commence a university course because the rules disentitled her from a student loan until such time as she had acquired indefinite leave to remain which she invariably would in due course. The claimant could not be removed from the United Kingdom, absent some exceptional circumstance (like the commission of a serious offence) because her Article 8 rights would prohibit such a removal. Since this was the position the impugned rule was not rationally connected to its objectives. Even if a bright line rule were justified, the particular rule chosen had itself to be rationally connected to its aims and proportionate in its achievement of those aims. This was not so here. Accordingly the claimant had been subject to unlawful discrimination contrary to Article 14.

15. In *Hotak & Others v Southwark London Borough Council & Others* [2015] UKSC 30; [2015] 2 WLR 1341, the Supreme Court considered the meaning of *"vulnerable"* in the Housing Act 1996 which requires that for a homeless person to be deemed in priority need they have to meet certain criteria. Unless they fall into another class that is deemed in priority need, a homeless person must show that they were *"vulnerable as a result of … mental … handicap … or other special reason"*. The court held that the correct comparator for determining *"vulnerability"* was the ordinary person if made homeless – not an ordinary actual homeless person – and that vulnerability had to be assessed by reference to the applicant's situation if and when homeless. Further, and importantly, the court held that in assessing whether a person was vulnerable for these purposes, the PSED under section 149, Equality Act 2010 could fairly be

described as *"complementary"* to its duties under the Housing Act and each stage of the decision-making exercise had to be made with the equality duty well in mind, and exercised in substance, with rigour and with an open mind. The court held that while a review made in ignorance of the equality duty might very often incidentally comply with the duty, there would undoubtedly be cases where an otherwise lawful review would be held unlawful because it did not comply with the PSED.

Back to basics

16. There has been some recent case law challenging some of the prevailing orthodoxy around the concepts of equality under the Equality Act 2010 and related matters.

17. Firstly, as to the meaning of indirect discrimination under the Equality Act 2010. Section 19 defines indirect discrimination as occurring when a provision, criterion or practice ("PCP") is applied to all in the relevant pool, irrespective of their protected characteristics, but which puts or would put persons with whom the claimant shares the protected characteristic in issue at a particular disadvantage when compared to those who do not share it, and which puts or would put the claimant at that disadvantage and which is not justified (it is not especially elegantly worded!). The EU Equality Directives[3] provide the backdrop for that definition and define indirect discrimination as occurring where an apparent neutral PCP would put persons with the relevant protected characteristic at a particular disadvantage compared with those without it, save where it is justified.

18. In *Home Office v Essop* [2015] EWCA Civ 609, the Court of Appeal considered what was required to establish the necessary relative disadvantage and the disadvantage to the claimant by any PCP for the purposes of any indirect discrimination. The facts were straightforward and not exceptional. The Home Office imposed a requirement that as a condition for eligibility for promotion, staff had to pass a *"course skills assessment"* as it was known. This was a

[3] 2000/43/EC ("The Race Directive"); 2000/78/EC ("The Framework Directive") and 2006/54/EC ("The Recast Directive").

generic test and if passed a member of staff went on to take a further test specific to the post to which they sought promotion. Statistics demonstrated that the pass rate for Black and ethnic minority members of staff was 40.3% of the pass rate for White candidates and according to evidence from statisticians, there was a 0.1% risk that this could occur randomly - i.e. by chance - meaning that there was something in the test itself which was causing that disparity. The problem, to the extent that there was one, was that what caused the disparity was unknown. A similar picture emerged in relation to age with those over 35 years old experiencing very much higher failure rates – and these again could not be explained by chance. The fact that there was a reason – a non-random explanation or reason – for the disproportionate failure rates was known but what it was, was unknown. This would not seem to be a difficulty. This was a paradigm case of indirect discrimination and there has, until this case, never been any requirement to know the reason for any disparity in results. Indirect discrimination, unlike direct discrimination, is concerned with outcomes/effects. However, the Court of Appeal in *Essop* held otherwise. It concluded that it was necessary to find the reason why a person and a group had failed and that that reason operated in both the case of the group and the particular claimant - in other words the reasons were the same in both case. Since the claimants in *Essop* do not and cannot know the reason for the disproportionate failure rates and the failure in their own cases, then subject to persuading the court that the burden of proof has shifted, they will inevitably fail. The approach of the Court of Appeal is reminiscent of direct and not indirect discrimination – in requiring that there be a known reason for the disparity – and is highly problematic because the fact is that one often cannot know why a group is disadvantaged. Sometimes it will be obvious or can be intelligently guessed at, but that is not always the case. Permission to appeal to the Supreme Court has been applied for and the outcome of that application is awaited.

19. As mentioned above, *"immigration"* status is a protected status under Article 14 (*R (Tigere) v Secretary of State for Business, Innovations and Skills* [2015] UKSC 57). The same is not so, currently, under the Equality Act 2010. In *Onu v Akwiwu & Taiwo v Olaigbe*, the Court of Appeal was required to consider whether the abuse of migrant domestic workers *because* they were migrant

domestic workers, amounted to discrimination on the grounds of nationality. The claimants in those cases argued that the discrimination was closely connected to nationality since only non-EU nationals could hold migrant domestic worker visas and accordingly treatment on that ground was direct discrimination on the grounds of nationality (justification, of course, for direct discrimination under the Equality Act 2010 being unavailable[4]). The Court of Appeal held that discrimination on the grounds of migrant worker status was not discrimination on the grounds of nationality. For direct discrimination there needed to be an exact correspondence between the reason for the treatment and the protected characteristic and here since not all non-EU workers in the United Kingdom were domestic workers, there was no complete correspondence between nationality and the ground for the treatment and accordingly it was not direct discrimination. The case is problematic since the jurisprudence relied upon for the making of that decision, which derives from EU law, is itself difficult (see the discussion in *Patmalnice v Secretary of State for Work and Pensions* [2011] 1 WLR 783). However the Supreme Court has given permission to appeal in this case and so matters may develop further.

20. Identifying the pool for indirect discrimination can be difficult but there has been a good deal of caselaw about it. Unfortunately a new case has approached the matter in the way that introduces confusion and frustrates the purposes of the prohibition on indirect discrimination. It is only a decision of the Employment Appeal Tribunal and it is hoped that it will be overturned in due course (it is not clear whether or not the claimant in that case proposes to appeal). The case is *Naeem v Secretary of State for Justice* [2014] IRLR 520. It concerned the approach to be adopted having regard to the terms of section 23, Equality Act 2010. Section 23 provides that *"on a comparison of cases … there must be no material difference between the circumstances relating to each"*. It is important in undertaking the comparison exercise to ensure that a meaningful exercise takes place that is capable of identifying whether there truly is discrimination and for these purposes, the discriminatory circumstances must not be fed into the comparison exercise (for example, it is no answer to a

[4] Save in relation to age.

complaint of discrimination by a pregnant woman to say that the proper comparator is a pregnant man – that would obscure the gender discrimination in issue). In *Naeem*, a Muslim Chaplain employed by the prison service complained of discrimination in relation to the pay system operated. The Ministry of Justice operated a service-related pay scheme – entirely common in many areas in the labour market. This meant that one achieved an incremental pay award dependent on service. Until 2002 only Christian Chaplains were employed by the prison service. After that date Muslim Chaplains (and presumably those from other faiths) were employed. The claimant Muslim Chaplain complained of indirect discrimination in that the length of service criterion used to determine pay discriminated against Muslim Chaplains since they were more likely to have less service – self-evidently. The Employment Appeal Tribunal held that the relevant pool for determining whether there had been indirect discrimination comprised all chaplains employed since 2002 since before then Muslims were not employed. That was the very point of the claim and the approach adopted by the Employment Appeal Tribunal was plainly wrong since by taking the disparity in length of service out of the comparison exercise it removed the basis of the claim entirely. Unsurprisingly the claimant lost.

21. In a really interesting case from the Court of Justice of the European Union (CJEU) a very wide meaning has been given to indirect discrimination and who it protects. In *Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia* (2015) Case C-83/14 [2015] IRLR 746, an owner of a grocer shop in Bulgaria brought a claim of discrimination against an electricity supplier which placed its electricity meters high up in an area populated largely by people of Roma origin. This was purportedly because they believed that those of Roma origin were more likely to tamper or vandalise the meters. The claimant was a non-Roma woman but she lived in an area largely populated by people of Roma origin and she said she suffered a detriment by reason of the height of the meters because she could not check on electricity use and so on. The practice of putting meters high up in areas largely populated by Roma people would seem to be indirect discrimination against Roma people (and arguably direct discrimination – something the CJEU left to the national court)

but the claimant apparently did not have the protected characteristics of the disadvantaged group – she was not Roma. However, the CJEU gave a wide meaning to the concept of discrimination under the Race Directive 2000/43/EC holding that it was intended to benefit not just those possessing the characteristic in issue but all those treated disadvantageously on the basis of it. Here, the practice of not putting electricity meters in a position which was readily accessible in areas populated by Roma people disadvantaged those of Roma origin and others residing there put both groups at a particular disadvantage. This means that one might bring a claim of indirect discrimination by reference to an association with another disadvantaged protected class. This is extremely interesting[5]. It may be that there will be caused some difficulties. How is it that the disadvantaged group for indirect discrimination will be made out; will those associated with the disadvantaged group be included in the relevant pool of those disadvantaged; if so, will that obscure the disadvantaged to the protected group; however, it does raise interesting questions.

22. In *EAD Solicitors LLP and seven others v Abrams* (2015) UK EAT/0054/15, it has been held that a limited company forming part of a limited liability partnership could bring proceedings under the Equality Act 2010. Discrimination by an LLP against a member is prohibited under the Act (section 45). This is, in my view, an extremely important decision. Until this case, it had always been presumed that the statutory torts under the Equality Act would only be actionable by individuals. The Interpretation Act 1978, of course, provides that *"person"* includes a corporate body but such applies "*unless the contrary intention appears*" (section 5, Interpretation Act 1978). The way in which the statutory torts under the Equality Act are drafted, appears to me to be directed at individuals (indeed some of the provisions explicitly refer to individuals: section 27, Equality Act 2010) and the remedy for *"injury to feelings"* (section 119) would point to the Act being limited to individuals so far as the unlawful acts are concerned. The impact of this decision may be widely

[5] There has for some time been the opportunity of bringing a claim of direct discrimination by association: *Coleman v Attridge* and the Supreme Court are about to hear a claim in relation to reasonable adjustments by association; *Hainsworth v MOD*.

felt. Section 29 of the Equality Act 2010 prohibits discrimination by those providing goods, facilities or services and section 29(6) prohibits discrimination by public authorities. If corporate bodies were entitled to bring proceedings under the Act then, for example, they might challenge diversity targets as a contractual condition when a company or public authority are purchasing services (public procurement rules make provision for this separately but they do not apply to all contracts particularly those below a specified threshold). If a company were to require that anybody from whom it is buying services employ a certain number of women, for example, one could see arguments from companies who do not meet that requirement that the condition discriminates against them *"because of sex"* (section 13, Equality Act 2010). It is not known whether the LLP intends to appeal.

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