DISCRIMINATION LAW DAMAGES FOR PUBLIC LAWYERS

NOTES TO ACCOMPANY TALK FOR PUBLIC LAW PROJECT,

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How Discrimination Law Arguments Arise in Claims for Judicial Review

1. Barring clever common-law arguments, substantive discrimination law claims in applications for judicial review can arise in one of three ways:

a) A claim that a policy or decision is unlawful because it contravenes the statutory prohibitions on discrimination in domestic law (now contained in the Equality Act 2010). Example of successful claims of this kind are

- *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1;
- *R(European Roma Rights Centre) v Immigration Officer Prague Airport* [2004] UKHL 55, [2005] 2 AC 1*;*
- *R(Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213.
- *R(Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC (Admin) 1865;
- *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.

b) A claim that a policy or decision is unlawful because it contravenes Article 14 of the European Convention on Human Rights (ECHR) and so is contrary to section 6 Human Rights Act 1998. An example of a successful claim of this kind is

- *Burnip v Secretary of State for Work & Pensions* [2012] EWCA Civ 629, [2013] PTSR 117 (though this came through the FTT/Upper Tribunal route to the Court

of Appeal, the argument that the size criteria for Local Housing Allowance discriminated contrary to Article 14 read with Article 1 Protocol 1 ECHR were 'pure public law' arguments).

An example of an unsuccessful claim of this kind is

- *MA v Secretary of State for Work & Pensions* [2014] EWCA Civ 13 (a similar challenge to the size criteria for housing benefit paid to tenants in the social sector).

c) A claim that a policy or decision is unlawful because it contravenes a free-standing anti-discrimination provision in EU law. An example of a successful claim of that kind is

- *O'Flynn v Adjudication Officer* [1996] ECR I-2617 (overturning provisions on payment of funeral grants for funerals taking place abroad which placed migrant EU workers at a 'particular disadvantage'.

An example of an unsuccessful claim of that kind is

- *HC v Secretary of State for Work & Pensions* [2013] EWHC 3874 (Admin); [2014] PLLR 003.

2. Of course some cases (eg *Watkins-Singh)* arise under all three categories. It may be attractive to decide which is strongest and focus argument around that, using other arguments for purposes of analogy or as 'back-up'. Note that some claims may succeed under one head, such as domestic and EU equality law, where they have failed under Article 14, which is perceived to have a broader margin of appreciation, at least in some contexts: contrast *Elias (*cit sup) with *R(Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* p2003] EWCA Civ 473; [2003] QB 1397.

3. Note also the useful persuasive effective of arguments based on more specialist anti-discrimination instruments such as the UN Convention Rights of Persons with Disabilities (*Burnip* per Maurice Kay LJ at [19]-[22]).

How discrimination claims are argued

4. This is necessarily a very broad overview to identify the types of issues which arise. A detailed analysis of the substantive content of equality law is outside the scope of this paper.

5. If a decision unlawfully discriminates in a field within the ambit of one or more of the EU, ECHR or EqA equality guarantees, it can be quashed or give rise to other public law remedies (including – depending on the context – mandatory or prohibitive injunctions, or a declaration of incompatibility).

6. The substantive discrimination law claim will depend on the claimant establishing to the court's satisfaction facts from which discrimination is proved or can be inferred. Discrimination can arise where public bodies treat differently analogously situated people without providing an objective and reasonable justification for doing so. However, the right not to be discriminated against is also violated when public bodies, without objective and reasonable justification, fail to treat differently people whose situations are significantly different.

7. The way in which discrimination is characterised (whether as 'direct', 'indirect' or '*Thlimennos*' discrimination, or a failure to make reasonable adjustments), and the implications of the relevant characterisation of the 'kind of discrimination' for the outcome of an argument, are currently controversial hot topics. See:
    - *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.
    - *MA v Secretary of State for Work & Pensions* [2014] EWCA Civ 13.
    - *Bull v Hall & Preddy* [2013] UKSC 73.

8. The detail of that controversy is outside the scope of this paper, but the practical reason for its importance is that as a matter of domestic equality law, direct discrimination on grounds of a protected characteristic is incapable of justification, whereas indirect discrimination can be justified: see *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728. However, under the ECHR, even direct discrimination is capable of justification.

9. There are nonetheless two principal attractions of bringing a claim under Article 14 ECHR:

   - The technicalities of 'proving' discrimination and establishing whether it is direct or indirect are much diminished. Strasbourg's 'less complicated approach' was described by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 at paragraphs [20]-[24], and see also *MA v Secretary of State for Work & Pensions* [2014] EWCA Civ 13 per Dyson MR at [44]-[47];

   - Discrimination is not prohibited only one on of a number of listed 'protected characteristics' (cf section 4 Equality Act 2010). Instead, signatories to the ECHR have a duty to 'secure' 'equal enjoyment' of other Convention rights without discrimination on grounds of a list of protected statuses 'or any other status'. The concept of 'status' is very wide: it can include, for example, immigration status (*Hode v UK* no. 22341/09, ECHR 2012 at [46] and *Bah v United Kingdom*, Application no. 56328/07, ECHR 2011). However, the further the 'status' from a 'core' status such as race or sex, in general, the broader the margin of appreciation afforded to the executive's assessment of justification: see *R(RJM) v Secretary of State for Work & Pensions* [2009] AC 311 per Lord Walker.

10. Another controversial topic is the standard of justification which is required for discrimination – even direct discrimination – in the field of social welfare. Current debate focuses around the extent of application, and the proper application, of the observations of Baroness Hale in *Humphreys v Revenue & Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545.

<u>Which forum?</u>

Forum Shopping

11. Discrimination law claims can be brought in the High Court, and if the object is to quash a policy or decision, this may be most appropriate forum (see eg *Watkins-Singh*). However, judicial review is a remedy of last resort, and a claim may be dismissed if a suitable alternative remedy exists in another forum. (See the fate of

Mrs Day in *R v Secretary of State for Employment ex parte Equal Opportunities Commission & Day* [1995] 1 AC 1, whom – it was held – ought to have proceeded in the employment tribunal to seek to disapply statutory qualification periods for bringing a claim for unfair dismissal. In the House of Lords, the EoC successfully argued that these qualification periods amounted to unlawful indirect sex discrimination contrary to EU law.

12. The county court is envisaged as the 'primary' forum for equality claims other than in relation to employment or special educational needs/disability discrimination in education: s113 Equality Act 2010.

13. Lawyers seeking to challenge decisions of public authorities on discrimination law grounds should be aware for example, that claims under the Equality Act 2010 concerning discrimination in relation to services, premises and education can and in most cases should be brought in the county court (s114).

14. So too can a claim of discrimination in relation to performance of functions of a public nature, except insofar as there is a statutory prohibition. (As to which, see discussion of specialist tribunals at paragraphs 17ff below).

15. A recent example is *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191 in which a profoundly deaf claimant, F brought a claim in the county court against the Chief Constable whose officers had executed a search warrant in F's home. Although officers were aware of F's disability, they were not accompanied by a British Sign Language interpreter, which was held (o appeal) to be a failure to make a reasonable adjustment in performance of a public function under section 20 and 29 Equality Act 2010.

16. However, in the wrong case, it might be suggested that an attempt to bring such a claim in the county court was an attempt to evade the permission requirements. In a case with a high 'policy' content, it may still be best to proceed in the Administrative Court, with a linked claim for damages to be initiated (but stayed) in the county court (see further below)

Specialist Tribunals

17. Some claims, though they have a public law content and are brought against public bodies, ought to be brought in specialist tribunals. For example, by virtue of s115 Equality Act 2010, claims of discrimination by immigration officials must be brought in the First Tier Tribunal (Immigration & Asylum Chamber or the Special Immigration Appeals Commission as the case may be).

18. Claims of disability discrimination against schools are within the expertise of the First Tier Tribunal (Special Educational needs and Disability) (SEND). That is the correct forum for a claim that a local authority (or indeed a private educational institution) has discriminated against a child if a remedy of reinstatement, reasonable adjustments, or a declaration is sought. (The SEND does not have jurisdiction over discrimination claims in relation to any other protected characteristic).

19. The remedies which the SEND has power to award are wide-ranging (the include apologies, reinstatement of a child and training); but they are limited, and do not include financial compensation. If financial compensation is sought, a 'companion' claim will need to be lodged in the county court (see below).

20. Another example of a specialist tribunal being regarded as the preferable body for bringing a discrimination law claim is *Secretary of State for Work & Pensions v R(MM & DM) (Mind & Others intervening)* [2013] EWCA Civ 1565, [2014] EqLR 34. This was a challenge to the process for assessing entitlement to Employment Support Allowance, introduced by regulations made under the Welfare Reform Act 2007. The claimants challenged the process on the basis that it put some claimants with mental health differences at a disadvantage whilst trying to prove eligibility.

21. The Administrative Court referred the matter to the Upper Tribunal on the basis of its direct expertise and to establish whether there was a duty to make reasonable adjustments under s20 Equality Act 2010. The UT decided that the process did in fact place claimants with mental health differences at a disadvantage and adjourned the

matter of reasonableness for the Secretary of State to lodge further evidence. However, the Secretary of State did not like the UT's approach and appealed.

22. The Court of Appeal upheld the UT's decision: (i) that the individual claimants had standing to proceed before it (and did not therefore decide whether the interveners alone would also have had standing); (ii) that the UT had not erred in finding that the procedures gave rise to substantial disadvantage; (iii) and that although the UT ought not to have acted in an inquisitorial way it had not in fact erred in adjourning to allow the Secretary of State to adduce further evidence and argument as to justification.

Where's the money? Jurisdictional issues

EU/ECHR claims

23. For a claim brought directly under EU Law or the ECHR, either the high court or the county court has jurisdiction to make an award of damages.

24. I am unaware of a claim under Article 14 ECHR in the high court in which a claim for damages has been successfully prosecuted. However, there is no reason in principle why such a claim should *not* be brought. In *Gas & Electricity Markets Authority v Infinis & Another* [2013] EWCA Civ 70, the regulator erred in refusing Infinis a 'Renewable Obligations Certificate' (ROC). It was held that the claimants had been unlawfully deprived of the benefit of an ROC, and had thereby suffered a clear and calculable financial loss. The claimants were granted significant damages under section 8 HRA 1998 (to be assessed if not agreed), based on restitutio in integrum principles. These were awarded on the basis that such damages were necessary to achieve just satisfaction for breach of Article 1 Protocol 1 and were in the millions of pounds.

25. There seems no reason in principle why – assuming a breach could be established and a clear and calculable financial loss flowed - an equivalent claim could not be brought under Article 14 read with Article 1 Protocol 1. (For example, a group claim in a social security context.)

Equality Act claims

26. For claims under the Equality Act it is important to note that the county court has sole jurisdiction over damages claims. Section 113 provides that " Proceedings relating to a contravention of this Act must be brought in accordance with this Part" (except that 113(1) does not prevent "a claim for judicial review" (s113(3)).

27. S114(1) provides that that *county courts* have jurisdiction to determine claims relating to a contravention of equality law in relation to provision of services, premises, education andperformance of public functions (except immigration, s115). If the county court finds that the relevant provision of the Act has been breached it has power (s119) "to grant any remedy which could be granted by the High Court (a) in proceedings in tort; (b) on a claim for judicial review".

28. The high court does not, however, appear to have jurisdiction to hear a claim for damages under the Equality Act 2010. There is no authority specifically on this point but in *R v South Bank University ex p Coggeran* [2000] ICR 1342 (decided under predecessor legislation) the Court of Appeal ruled that the claimant, who wished to challenge alleged sex discrimination in relation to a degree course in radiography by way of judicial review, was required to bring her claim in the county court. The Court of Appeal relied on s66 Sex Discrimination Act 1975 which provided that the relevant claim "shall be brought in England and Wales only in a county court". This was bolstered by s62(1) which provided that "Except as provided by this Act no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Act," though (s62(2) "Subsection (1) does not preclude the making of an order of certiorari, mandamus or prohibition."

29. The jurisdiction of county courts under the Equality Act 2010 has recently been considered by the Central London County Court in *Garrard v Governing Body of the University of London* [2013] EqLR 746. The claimant, who sought access to a medical course for postgraduate doctors, brought a claim to the county court complaining that the respondent had failed to make reasonable adjustments to meet his

disability-related needs. The court ruled that, the claim being concerned with vocational training, fell within Part 5 of the Act (work) rather than part 6 (education) and so the exclusive jurisdiction to consider it was in the employment tribunal. The provision which gives the employment tribunal jurisdiction in relation to Part 5 claims (s120) is in materially identical terms to s114 EqA 2010.

30. It follows from the above that the high court does not have jurisdiction to hear a tort claim for discrimination under section 29 Equality Act 2010; but it can hear and award remedies on an application for judicial review.

Practical consequences for money claims under the Equality Act 2010.

31. In claims with a 'high policy' content sufficient to justify an application for judicial review, but also a potential tort claim for damages if the judicial review challenge is upheld, the sensible course is to lodge judicial review proceedings in the high court, and an ancillary claim for damages in the county court (which is then stayed pending the outcome of the high court proceedings). The usual time limit for proceedings in the county court is six months (s118 Equality Act 2010)

What's the money? Quantum

32. For special damages/ascertainable money claims, the principle of *restitutio in integrum* will apply (*Infinis,* and – under the Equality Act 2010 – general tort principles).

33. Damages for injury to feeling are difficult to determine, and a conventional 'scale' has been established in the case of *Chief Constable of West Yorkshire Police v Vento (No 2)* [2002] EWCA Civ 1071, [2003] ICR 318 at [65]-[66]. The lowest end of the scale was £500-£5000 (for less serious or one-off incidents); the most serious end of the scale , for injury persisting over a time or of exceptional seriousness was £15 - £25,000. The middle scale, of £5000-£15,000 was for cases somewhere in between. The Court of Appeal in *Vento* held that awards of less than £500 should not generally be made as they fail to give sufficient seriousness to discrimination claims.

34. That scale has since been uprated in line with inflation, in the case of *Da'Bell v NSPCC* [2010] IRLR 19. The top of the bottom band is now £6000; the middle band goes from £6000-£18000, and the top scale goes from £18000-£30,000.

35. In an appropriate case, aggravated damages may be awarded as compensation where a defendant has behaved in a "highhanded, malicious, insulting or oppressive" manner. Exemplary damages, which are punitive in nature may be awarded in an appropriate case on the ground of "oppressive, arbitrary or unconstitutional action" by servants of the government in order to punish "an outrageous use of executive power". These are distinct from one another and should not be treated as part of the damages for injury to feeling.

36. In practice, it is difficult to envisage a public case in which either of these will be awarded, in the face of the overview and application of the law by Mummery LJ in *Elias* at [245-259].

A practical point – assessors

37. In a claim under section 114 Equality Act 2010 in the county court, the court should normally exercise its power under section 63(1) County Court Act 1984 to appoint expert lay assessors, unless the judge is satisfied that there are good reasons not to do so (s114(7) Equality Act 2010).

38. Assessors, who are usually equality experts are not part of the decision-making tribunal, but they can be useful in advising the judge and providing him (or her) with a reality-check.

39. One good reason for not appointing assesors might be that the matter has not been addressed until very late in the day, and it would cause disproportionate delay and expense to adjourn. So it is worth raising this point with the court early.

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