PUBLIC LAW DISCRIMINATION CLAIMS: DEVELOPMENTS IN 2015

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This paper surveys the significant decisions and developments in discrimination cases this year that are likely to be of most relevance for public law claims[1].

Direct discrimination

Comparability and justification under ECHR and EU law:

In two recent appellate cases Justices of the Supreme Court have stressed that "sameness" and justification are not rigidly discrete issues.

In ***Webster v Attorney General of Trinidad and Tobago*** [2015] UKPC 10; [2015] ICR 1048; 9 March 2015, when summarising the European Court of Human Rights' ('ECtHR') approach under Article 14, Baroness Hale stressed that: "It is almost always possible to find *some* difference between people who have been treated differently…..discrimination entails an *unjustified* difference in treatment (paragraph 18)[2]. Citing from Lord Nicholls' speech in *R (Carson) v Secretary of State for Work and Pensions* [2006] AC 173, Baroness Hale made the point that the issues of "sameness" and justification can merge into one another. Whilst there may be occasions where there is an obvious *relevant* difference between the claimant and those who he seeks to compare himself with such that their situations cannot be regarded as analogous; where the position is not so clear, the Court's scrutiny may be best directed to considering whether the difference has a legitimate aim and whether the means chosen to achieve that aim are appropriate and not disproportionate (paragraph 19).

[1] For ease of reference there is an appendix setting out the main discrimination provisions that are referred to in this paper.

[2] This observation was made in the context of a claim brought under section 14 of the Constitution of Trinidad and Tobago for alleged infringement of the right to equality of treatment by reservist police officers complaining that they were not provided with the benefits conferred upon regular officers, such as free medical treatment and housing allowances. The judge below and the Court of Appeal of Trinidad and Tobago had dismissed the claim on the basis that the regular officers were not valid comparators for the reservists. Although finding there was no sufficient reason to depart from the findings of fact made

Baroness Hale also noted that the position was much the same under EU law, where the Court of Justice has made clear that it is not required for situations to be identical, merely that they be comparable; and if broad comparability is established, the second question is whether the reason for the difference in treatment is sufficient to justify it: see for example *Maruko v Versorgungsanstalt der deutschen Bühnene* (Case C-267/06) [2008] All ER (EC) 977 (paragraph 20).

In ***R (JS) v Secretary of State for Work and Pensions***[3] [2015] UKSC 16; [2015] 1 WLR 1449; 18 March 2018, the same point was made by Lord Reed (see paragraphs 8 – 9). A violation of article 14 would arise where there was: (1) a difference in treatment, (2) of persons in *relevantly similar* positions[4], (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, he observed that in practice the ECtHR usually elided the comparability of the situation, focusing on the question of whether the different treatment was justified; "This reflects the fact that an assessment of whether situations are 'relevantly' similar is generally linked to the aims of the measure in question: see for example, *Ramussen v Denmark* (1984) 7 EHRR 371".

Comparability under the Equality Act 2010

The challenge in ***R (Coll) v Secretary of State for Justice*** [2015] EWCA Civ 328; [2015] 1 WLR 3781; 31 March 2015 concerned the relative lack of approved premises ('APs') for female prisoners to live in when they were released on licence from prison. APs are single sex institutions with a relative strict regime and extensive security measures, where offenders stay for about 80 days between prison and return to the community. Generally placements in APs are as close to the individual's home as

below and thus dismissing the appeal, the Privy Council preferred to analyse the position by way of considering whether the differential in treatment was justified.

[3] Also known as *R (SG) v Secretary of State for Work and Pensions*. This case is considered in detail below in relation to indirect discrimination.

[4] Emphasis added.

possible, but this is more difficult to achieve for female offenders as there are 94 APs for men in England and Wales, but only 6 for women[5].

Cranston J. had rejected the claim that these arrangements directly discriminated against female prisoners on their release to APs, on the basis that the position of male and female APs was not comparable because of the lower risk requirements and various other respects in which female and male prisoners are treated differently, so that their situations were not comparable as required by section 23 Equality Act 2010 ('EQA 2010')[6].

The Court of Appeal dismissed the appeal in respect of the direct discrimination claim on different grounds. Elias LJ, giving the leading judgment, said that although he saw some force in that submission, he was ultimately persuaded that the differences that had been identified were not *material* for the purposes of the particular alleged discrimination. For example the different risk categories did not bear on the question of whether male and female prisoners should, where possible, be accommodated close to home. Thus the differences were not material and would not explain the difference in treatment (paragraphs 43 – 44).

The direct discrimination claim failed instead because the Court of Appeal considered that the policy under challenged did not itself differentiate between men and women, the same rule was applied to both, but its respective effect depended upon the configuration of available APs at the time. In so far as the complaint was about discrimination that might arise in a particular set of circumstances, it was not a complaint about the scheme as a whole and judicial review was not the appropriate remedy (paragraphs 39 – 41)[7].

[5] The case is also considered in relation to indirect discrimination below at page xxx.
[6] Set out on the appendix to this paper.
[7] The Court went on to conclude that had direct discrimination been established, the defence of justification in paragraph 26(1)(3) of Schedule 3, EQA 2010 would have been available to justify the separate accommodation of the sexes and the allocation of approved premises (paragraphs 48 – 49).

As regards undertaking a comparative exercise, Elias LJ also stressed (as highlighted by the appellate courts in various employment discrimination cases from Lord Nicholls speech in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 onwards), that in direct discrimination cases it is usually unhelpful to try and identify the hypothetical comparator in the abstract, since the material characteristics of the comparator cannot be identified without determining *why* the claimant was treated as she was, so that the two questions are inextricably interlinked (paragraphs 23 – 24).

Indirect discrimination

The connection between the claimant, the protected characteristic and the group disadvantage

This topic has arisen recently in two different contexts, firstly in relation to whether a claimant must identify and share the *reason* for the group disadvantage relied upon under the statutory definition of indirect discrimination contained in section 19 EQA 2010 (see the appendix); and secondly as to whether a shared protected characteristic between the group and the claimant is required under EU law.

Shared reason for the group disadvantage

The section 19 EQA 2010 question arose in the context of an employment case, but the same definition of indirect discrimination applies in respect of the other areas of conduct covered by the legislation, including the exercise of public functions and the provision of services, so the point is of wider application.

In ***Home Office (UK Border Agency) v Essop*** [2015] EWCA Civ 609; [2015] IRLR 724; 22 June 2015 the Court of Appeal considered whether a claimant had to show that the disadvantage suffered by him (under section 19(2)(1)(c)) and by the group with the same protected characteristic (section 19(2)(1)(b)) was a shared one, connected to that characteristic. In the EAT Langstaff J had held that it was unnecessary in an indirect discrimination case for the claimant to show *why* the provision, criterion or practice (‘PCP’) had disadvantaged the group and the individual claimant. The Court of Appeal

disagreed with that approach. Sir Colin Rimer, who gave the leading judgment, considered that it was conceptually impossible to prove a group disadvantage for the purposes of section 19(2)(b) without also showing *why* the claimed disadvantage was said to arise: "group disadvantage cannot be proved in the abstract. Its proof necessarily requires a demonstration of why the comparative exercise inherent in the section 19(2)(b) inquiry results in the claimed disadvantage" (paragraph 59).

Mr Essop was the lead claimant of a group of Home Office employees, who alleged that the operation of the internal Core Skills Assessment ('CSA') test was indirectly discriminatory in terms of race and/or age. All Home Office staff had to pass the generic CSA in order to be eligible for promotion; if they passed this test they were then able to sit and pass a Specific Skills Assessment test relating to a particular post. The claimants had all failed the CSA and thus were ineligible for promotion. They relied on the protected characteristics of BME and/or age (the latter in respect of claimants who were over 35). Agreed statistical evidence showed that proportionately BME and older candidates had a significantly lower CSA pass rate that white and younger candidates[8]. A preliminary hearing in the Employment Tribunal rejected the proposition that this statistical disparity of itself established prima facie indirect discrimination arising from the admitted PCP (the requirement to pass the CSA), deciding that it was necessary for the nature of the particular disadvantage shared by the group in question and by the claimants to be identified (paragraph 22). The Court of Appeal agreed that it was necessary to show the nature of the group disadvantage and that each claimant suffered the same disadvantage: see paragraphs 60 – 61.

<u>The impact of the reverse burden of proof provision</u>

However, the Court of Appeal did reject the Home Office's submission that proof of the particular disadvantage within section 19(1)(c) had to be shown by the claimant *before* the reverse burden of proof provisions in section 136[9] could apply (paragraph 66). The

[8] The BME selection rate was 40.3% of the white selection rate and there was a 0.1% chance that this could happen by chance. For older candidates the rate was 37.4% with again a 0.1% risk that this could happen by chance.
[9] Included in the appendix to this paper.

Court held that it was in principle open to the claimants to rely on the statistical evidence in support of the proposition that each of them was disadvantaged by the PCP in the same way as the group as a whole, so as to meet the requirements of section 19(1)(c) and, relying on section 136, to submit that *in the absence of any other explanation* the ET could decide that, subject to justification, the claim was made out (paragraphs 64 – 65).

Lack of shared protected characteristic

After the Court of Appeal's decision in ***Essop***, the Grand Chamber of the Court of Justice of the EU gave judgment in ***CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*** EU:C: 2015: 480; [2015] IRLR 746; 27 July 2015, a case which considered whether an alleged victim of indirect discrimination need share the protected characteristic of the group in question.

The indirect race discrimination claim arose in the context of the provision of electricity services to consumers. Article 2.1(b) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, provides that indirect discrimination occurs "*where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic original at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*". Article 3.1(h) of Council Directive 2000/43 covers discrimination in relation to access to and supply of goods and services to the public. Reliance was also placed on Article 21 of the Charter of Fundamental Rights of the European Union.

The question for the Court arose from a domestic Bulgarian claim brought by Ms Nikolova who ran a grocer's shop in Dupnitsa, a district inhabited mainly by persons of Roma origin. The CHEZ RB had installed the electricity meters for all consumers in that district on the concrete pylons forming part of the overhead electricity supply network at a height of between 6 – 7 metres. In other local districts CHEZ RB had placed meters

at a much lower height of about 1.70 metres and usually in the consumer's property. In consequence of its placement, it was very difficult for Ms Nikolova to read her meter, which she wanted to check regularly. She was not herself a Roma. It was accepted evidence that CHEZ RB placed metres in the inaccessible way complained of only in 'Roma districts' and apparent to the Court that this was because it considered it was above all people of Roma origins who would otherwise make unlawful connections to the supply (paragraph 31).

The Court ruled that the concept of indirect discrimination in Directive 2000/43 and in the Charter must be interpreted to include the instant situation, even though Ms Nikolova did not share the protected characteristic (Roma), which was the factor which had led to the collective measure in question, she had suffered the same particular disadvantage resulting from the measure (namely placement of metres at an inaccessible height in her district): see paragraphs 50 & 59 – 60.

Implications

As worded, section 19 EQA 2010 would preclude an indirect discrimination claim in this kind of situation as section 19(1) and (2)(b) requires that the PCP is discriminatory in relation to a protected characteristic of 'B's' (the claimant) and that he "shares the characteristic" with the group who is put at a disadvantage. There may be arguments for the future, underscored by the *CHEZ RB* case that this definition is too restrictive to be compatible with EU law. (It may also be significant that on the particular facts it was clearly apparent that the alleged victim of the discrimination and the group with the protected characteristic suffered the same disadvantage – being unable to reach their electricity meters).

Establishing group disadvantage

To what extent it is still necessary to conduct the kind of detailed statistical analysis that was commonplace under the legacy discrimination statutes, to show prima facie indirect discrimination within section 19(1) EQA 2010?

In ***R (Diocese of Menevia) v City and County of Swansea Council*** [2015] EWHC 1436 (Admin) Wyn Williams J observed that whilst in *Homer v Chief Constable of West Yorkshire Police* [2012] 3 All ER 1287 Baroness Hale had made it clear that one of the objects of the wording chosen for section 19 in the EQA 2010 was to remove the need for statistical comparisons in cases involving alleged indirect discrimination, he did not read this as removing the need for such an analysis where all the necessary statistical information existed upon which such analysis could be undertaken (paragraphs 43-44 & 74).

It may be significant that both parties in that case sought to rely on the available statistics as helpful to their position, albeit the claimant initially presented the case without reference to the detailed statistical analysis[10] that was subsequently advanced to rebut the defendant's contentions. In the judgment there is much debate about the correct pool and correct statistical interpretation. However, having examined the competing contentions in detail, the Court found that the requisite group disadvantage was shown.

The claim concerned a changed policy in respect of the provision of free transport for pupils attending one of the six faith schools in the local education authority's area, restricting its provision to circumstances where no suitable alternative school was located within a specified distance of the pupil's home. The provision of free transport to schools in the area where teaching was undertaken in Welsh remained unchanged. The claim was brought on the basis that the changed policy was indirect race discrimination, (Schedule 3, Part 2 paragraph 11(e) of the EQA 2010 precluding a claim on the ground of religion or belief).

[10] Relying on the fact that under the previous policy 1642 white British children and 270 BME children received free transport, whereas under the amended policy the figures would be 1211 and 33 respectively, so that a very significant number of white British children would still qualify, but nearly all BME children currently provided with free transport would be excluded (paragraph 73).

The Court upheld the claimant's submission that the pool should be confined to those pupils who would qualify for the free school transport but for the amended policy[11].

In terms of the particular disadvantage (loss of free school transport), the Court held that within the pool it had identified, the percentage of white British children who were disadvantaged by the amended policy was 29.17%, whereas the percentage of BME children disadvantaged was 86.23%, so that the statutory test was plainly met (paragraph 71)[12].

Failing to confer an advantage as opposed to putting at a disadvantage

The indirect discrimination challenge pursuant to section 19 EQA 2010 in ***R (Coll) v Secretary of State for Justice*** (see pages 2 - 3 above for the underlying facts and the analysis of the direct discrimination claim) was rejected by the Court of Appeal on the basis that the real complaint was not about disparate impact arising from the application of the current policy of requiring residence in an AP if a condition to do so was attached to the prisoner's release licence, but about the failure to adopt a further and distinct policy of *positive discrimination* to deal with the particular problem faced by women prisoners alone resulting from the small number of APs available to them and thus the potentially long distances from their homes (paragraphs 54 – 59).

Elias LJ (with whom the other members of the Court of the Appeal agreed) considered that section 19 EQA 2010 did not bite on such a complaint (paragraph 60). He went on to observe that in so far as there could be any positive discrimination argument, it would have to be advanced under the ECHR along the lines that the Article 8 rights of the female prisoners were engaged and there was discrimination contrary to Article 14 in that they were in a different position, but subject to the same policy. As is now well

[11] Applying Baroness Hale's approach in *Homer*, that a pool for comparison would not include people who had no interest in the advantage or disadvantage identified as a consequence of the provision under scrutiny. Accordingly the pool was confined to the children who had a genuine interest in the amended policy: see paragraphs 36 & 68 – 70.

[12] The Defendant failed to establish justification, in that it had not shown that the amended policy was a proportionate means of achieving a legitimate aim, given there had been a failure to appraise the alternatives: paragraphs 77 – 80.

established, Article 14 requires that significantly different cases be treated differently: (*Thlimmenos v Greece* (2000) 31 EHRR 411). However, the contention had not been pursued in the instant claim and Elias LJ observed that even if it was advanced, the test of proportionality in such a case would be very broad, conferring a wide margin of appreciation to the State[13] and he had no doubt that it would be satisfied in this instance (paragraph 60). He also indicated that he would expect the approach of the courts in such circumstances to broadly reflect the Strasbourg caselaw, which would allow greater weight to be given to economic pressures and the needs of other public objectives, than is the position in relation to justification under section 19(2)(c) EQA 2010[14].

Consistent with a theme discussed above in relation to direct discrimination (see pages 1 – 3), Elias LJ indicated that he not adopt the reasoning of Cranston J below, who had rejected the indirect discrimination claim on the basis that the circumstances of the male and female prisoners were different (paragraph 61).

<u>Justification</u>

Cranston J had found that the Secretary of State was in breach of the public sector equality duty ('PSED') under section 149 EQA 2010 in that he had failed to address possible impacts by assessing that there was a disadvantage to women, how significant it was and what steps might be taken to mitigate it. There was no appeal against this conclusion. Nonetheless, Cranston J had also held that if there was prima facie indirect discrimination, it was a proportionate means of achieving a legitimate aim. Side-stepping addressing the justification question in any detail (perhaps because of the potential problem presented by the PSED finding), Elias LJ said that he considered the justification finding to be sustainable, but the exercise was artificial, because the complaint was essentially about positive discrimination (paragraph 64).

[13] He referred in this context to Sales J's judgment in what he described as a factually analogous case, *R (S) v Secretary of State for Justice* [2013] 1 WLR 3079.

[14] In relation to justification under section 19 EQA 2010 it is established that it cannot be based on costs saving alone: *Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126 (albeit in *Ministry of Justice* v *O'Brien* [2013] I WLR 522 Baroness Hale left open the question of whether this was a correct analysis).

When considering the justification arguments in this case, Elias LJ indicated (at paragraph 62) that the Secretary of State accepted the claimant's submission that the test of proportionality under the ECHR, including in respect of Article 14, is not as rigourous as the justification defence under the EQA 2010: see ***Aster Communities Ltd v Akerman-Livingstone*** [2015] 2 WLR 721 (discussed in the next section of this paper).

Justification

Justification under the EQA 2010 and ECHR proportionality

In ***Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone*** [2015] UKSC 15; [2015] 2 WLR 721; 11 March 2015 the Supreme Court highlighted the distinctions between a defendant establishing justification in relation to discrimination arising from disability under section 15 EQA 2010[15] and establishing a lawful justification for an infringement of Article 8 ECHR rights in relation to the recovery of possession of residential accommodation.

The context

The issue arose in the context of the Court identifying the circumstances in which an order for possession could be granted summarily when the occupier contended that the bringing of possession proceedings constituted discrimination against him by reason of his disability pursuant to section 15(1) EQA 2010 (read with section 35 of the Act which covers discrimination against occupier by those managing premises). The Supreme Court had previously held that if an Article 8 defence was raised, the court had to determine whether it would be proportionate to make a possession order, but that in virtually every social housing case in which there were no domestic law rights of occupation, there would be a strong basis for saying that the possession order would be a proportionate means of achieving the twin aims of vindicating the local authority's property rights and enabling it to comply with its statutory duties in respect of the

[15] In relation to which the justification test is the same as in respect of indirect discrimination: see sections 15(1)(b) and 19(2)(c) in the appendix provided.

allocation of housing stock, so as to enable summary determination of the issue: *Manchester City Council v Pinnock* [2011] 2 AC 104.

The Supreme Court's decision

However, the Supreme Court held that the substantive right to equal treatment protected under the EQA 2010 was different from and stronger than the substantive right protected by Article 8 ECHR. Once the possibility of discrimination was made out, the burden of proof was on the landlord to show either that there was no unfavourable treatment because of something arising in consequence of the tenant's disability contrary to section 15(1)(a) or that the order for possession was a proportionate means of achieving a legitimate aim under section 15(1)(b). It could not be taken for granted that the aim of vindicating the landlord's property rights would invariably prevail over the tenant's right to have due allowances made for the consequences of his disability. Accordingly, dealing with the claim summarily would not normally be appropriate if the claim was genuinely disputed on grounds which appeared to be substantial[16].

The Justices' reasoning

Baroness Hale acknowledged that the concept of proportionality in section 15(1)(b) EQA 2010 was drawn from EU and ECHR case law and as explained by Lord Reed in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 it required consideration of the following four overlapping questions: (i) is the objective sufficiently important to justify limiting a fundamental right; (ii) is the measure rationally connected to that objective; (iii) are the means chosen no more than is necessary to accomplish the objective or could a less intrusive measure have been used; and (iv) whether having regard to these matters and to the severity of the consequences, a fair balance has been struck between the right of the individual and the interests of the community[17] (paragraph28).

[16] The Court went on to hold that although the judge in the County Court had misdirected himself in his approach to the claim in deciding to grant an order for possession summarily, on the particular facts the tenant's eviction would be a proportionate means of achieving a legitimate aim so the case would not be remitted for a full hearing.

[17] A number of recent judgments still refer to the previous threefold formulation first identified in domestic case law in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

Despite the similar test and the fact that the legitimate aims relied upon would be in the same in a section 35 EQA 2010 discrimination claim as in an Article 8 ECHR case, it did not follow, she said, that vindicating a landlord's rights would trump the occupier's equality rights. In particular, direct discrimination under the EQA 2010 could not be justified; section 15 EQA 2010 obliged a landlord to be *more* considerate towards a disabled tenant than all his tenants with their Article 8 rights; and the justification test required a balance to be struck between the landlord's aims and the seriousness of the impact on the tenant (paragraphs 30 – 32). Furthermore, the structured approach to proportionality identified in *Mellat* was not to be applied in the *Pinnock* type of situation (paragraph 29). A further difference between Article 8 and the EQA 2010 situation was the shifting burden of proof applicable in the latter instance (paragraphs 33 – 34).

Lord Neuberger arrived at the same conclusion as Baroness Hale for similar reasons[18]. He stressed that the protection afforded by section 15 read with section 35 EQA 2010 provided a particular degree of protection to a limited class of occupiers, considered by Parliament to be deserving of special protection (paragraph 55). Furthermore, in contrast with an Article 8 case, the proportionality exercise involved focusing on a very specific issue, namely the justification for the discrimination (paragraphs 55 - 56).

Wider applicability?

Given the identical wording of the justification defence, the Supreme Court's analysis of section 15(1)(b) should be equally applicable to a justification defence raised in respect of indirect discrimination under section 19 EQA 2010.

Less clear, is whether the distinctions drawn by the Court between an evaluation of a justification defence under the EQA 2010 and a consideration of proportionality under Article 8 ECHR in the context of a possession claim, applies more widely to indicate a difference of principle in the approach to justification in a discrimination claim brought

[18] Lords Wilson, Clarke and Hughes agreed with the principles stated by both Baroness Hale and Lord Neuberger,

under Article 14 as opposed to under the domestic statute. As indicated earlier in this paper, brief observations in *R (Coll) v Secretary of State for Justice* seem to support this proposition (see page 11 above). However, as this summary of the Supreme Court's reasoning shows, much of it was specific to the particular possession-related Article 8 context.

Justification: relevance of non-compliance with international convention obligations:

The relevance of actual / assumed non-compliance with obligations arising under the United Nations Convention on the Rights of the Child ('UNCRC'), an unincorporated international treaty to which the UK was a signatory, was considered by the Supreme Court in ***R (JS) v Secretary of State for Work and Pensions*** [2015] UKSC 16; [2015] 1 WLR 1449; 18 March 2015[19], in determining whether the disparate adverse impact of the benefit cap upon women had been justified by the Minister under Article 14 ECHR.

As is explained in more detail below, a minority of the Supreme Court (Baroness Hale and Lord Kerr) held that non-compliance with Article 3.1 of the UNCRC was relevant, indeed crucial, to the assessment of whether justification had been established. However, a majority of the Court (Lords Reed, Carnwarth and Hughes JJSC) dismissed the appeal on the narrow ground that the particular international treaty obligations relied on here were only relevant at best to questions concerning the ECHR rights of children and not to a claim of discrimination between men and women. Nonetheless in his general analysis of the significance of a breach of an international convention obligation and the conclusion that Article 3.1 UNCRC was not adhered to in this instance, Lord Carnwarth agreed with Baroness Hale and Lord Kerr.

<u>The claim and the issues before the Court</u>

The Benefit Cap (Housing Benefit) Regulations 2012 which imposed a cap on the amount of welfare benefits received by non-working households, equivalent to the net median earnings of working households were challenged as contrary to Article 14

ECHR read with Article 1 of the First Protocol to the Convention ('A1P1'). The claimants were from lone parent families whose welfare benefits were substantially reduced as a result of the cap. They argued that child-related benefits should have been excluded from the benefits covered by the legislation or that exceptions should have been made for lone parents with several children at home. It was accepted that the Regulations resulted in a disparate impact on women as compared to men, because most non-working households receiving the highest level of benefits were lone parent households and in turn most lone parents were women. It was also accepted that the benefits could amount to "possessions" for the purposes of A1P1. The claim thus turned on whether the differential impact was justified, the Secretary of State arguing that it was on the grounds of economic and social policy.

<u>The correct justification test</u>

In *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545 the Supreme Court had accepted that the normally strict test for justification of sex discrimination in the enjoyment of Convention rights gave way to the "*manifestly without reasonable foundation*" test in the context of welfare benefits, applying the ECtHR's decision in *Stec v United Kingdom* (2006) 43 EHRR 1017.

<u>The Article 3.1 UNCRC submission</u>

In relation to proportionality, the claimants relied upon Article 3.1 of the UN Convention on the Rights of the Child (1989) which provides: "*In all actions concerning children…the best interests of the child shall be a primary consideration*". Although an unincorporated treaty in terms of domestic law, the claimants contended that in enacting the Regulations the Minister had failed to have regard to the best interests of children affected and that the failure to comply with the Article 3.1 obligation was decisive in their favour in terms of the proportionality argument[20].

[19] The case is also known as *R (SG) v Secretary for Work and Pensions*.

[20] For a discussion of the content of the Article 3.1 UNCRC obligation, see Lord Carnwarth at paragraphs 105-108.

Situations where the relevance of an unincorporated international treaty is accepted

In considering the submission, the Justices reviewed the circumstances in which it was already accepted that an unincorporated international treaty such as the UNCRC had an impact. It could be taken into account as an aid to interpretation of a domestic statute in cases of ambiguity, on the basis that this country meant to honour its international obligations (paragraphs 115 & 137). Equally it could guide the development of the common law (paragraph 137). Furthermore, it could be taken into account by the ECtHR in the interpretation of the ECHR in accordance with Article 31 of the Vienna Convention on the Law of Treaties (paragraphs 83, 116 & 137); and it followed that ECHR rights protected in domestic law under the HRA could be interpreted in light of such treaties (paragraphs 83 – 84).

Failure to comply with Article 3.1 UNCRC in this instance

A majority of the Justices (Carnwarth, Hale and Kerr JJSC) agreed that the Secretary of State had failed to show how the Regulations were compatible with the obligation to treat the best interests of the child as a primary consideration: paragraphs 122-128 (Lord Carnwarth); paragraphs 225 - 227 (Baroness Hale) and paragraph 257 & 269 (Lord Kerr). The crucial question was thus how this finding affected the justification issue.

Significance of non-compliance

Baroness Hale considered that international obligations under the UNCRC had the potential to illuminate the court's approach to justification and that the ECtHR would look with particular care at justification put forward for any measure which placed the UK in breach of its international obligations under a human rights treaty to which it was a party (paragraphs 217 – 218). Further, that in considering whether the discriminatory effects of the benefit cap in terms of lone parents could be justified, she had no doubt that it was right to take account of the best interests of the children affected by it (paragraphs 223 - 224).

Lord Kerr was prepared to go even further, finding that Article 3.1 UNCRC was directly enforceable in UK domestic law (paragraph 257). However, in the alternative, he was in agreement with Baroness Hale's approach (paragraphs 233). Article 3.1 UNCRC was directly relevant to justification in terms of whether a primacy of importance was given to the interests of the children in formulating the Regulations (paragraphs 259 – 262). Further, the discriminatory impact on women was by reason of their position as lone parents, so that justification of that impact must directly address the impact it would have upon their children; the lone mother's interests when it came to receiving State benefits was indissociable from those of her children (paragraphs 263 – 268).

For these reasons, both Baroness Hale and Lord Kerr considered that justification for the admitted discriminatory effect had not been shown.

However, a majority of the Justices (Reed, Hughes & Carnwarth JJSC) held that even if the benefit cap regulations were not compatible with Article 3.1 UNCRC[21], such a failure did not have any bearing on whether the legislation unjustifiably discriminated between *men and women* in their enjoyment of their A1P1 property rights, as the rights of the adults were not inseparable from the best interests of the children and there was no factual or legal relationship between the fact the cap affected more women than men and the failure of the legislation to give primary to the best interests of the child: Lord Reed at paragraphs 86 – 90; Lord Carnwarth at paragraphs 129 & 131; and Lord Hughes at paragraphs 142 – 147. Accordingly, applying the manifestly without reasonable foundation test (which the Article 3.1 UNCRC submission was seen as an attempt to circumvent), the Secretary of State had established an objective and reasonable justification based on the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits a household could receive.

Lord Carnwarth's analysis appeared to accept the proposition that where there was a direct link between the international treaty relied upon and the particular discrimination

[21] A proposition wwhich Lord Carnwarth found established and Lords Reed and Hughes assumed for the purposes of the argument without so finding.

alleged, non-compliance with the treaty obligations *could impact on the proportionality assessment*, on the basis that, broadly speaking, this was an exercise in interpreting the terms and notions of the ECHR, an approach, in turn, which had been accepted by the ECtHR: see paragraphs 113 – 119 & 130. Lord Hughes also seemed to allow for this possibility (paragraphs 142 – 144). Accordingly, it can be said with some confidence that there was majority support from the Supreme Court for the proposition that non-compliance with an international treaty could inform the assessment of whether justification had been shown in respect of a difference in treatment arising under Article 14 ECHR.

An additional observation on the *Stec* test

Baroness Hale raised the idea that for the purposes of the application of the *Stec* "*manifestly without foundation test*", a distinction might be drawn between the aims of the interference and the proportionality of the means employed, with this test only relating to the former: paragraph 210. However, this was not a point argued in the current case or addressed in detail.

The extent to which non-compliance with Article 3.1 UNCRC and (in this case) Article 7.2 of the United Nations Convention on the Rights of Persons with Disabilities affected justification under Article 14 ECHR was also raised by the claimant's appeal to the Supreme Court in the subsequent case of ***Mathieson v Secretary of State for Work and Pensions*** [2015] UKSC 47; [2015] 1 WLR 3250; 8 July 2015, a case in which the Secretary of State failed to make out a justification defence even on the "*manifestly without reasonable foundation test".*

The claim and the issues before the Court

The claimant was diagnosed with a number of severe medical conditions after he was born in June 2007. He lived at home and his complex bodily needs were met by his parents who received disability living allowance ('DLA'). In 2010 he was admitted to hospital where he remained for 13 months. During this time one or other of his parents was at the hospital at all times and they remained his primary care-givers. Extra

expenses were caused to the parents as a result of their son's hospitalisation. The Secretary of State suspended the claimant's DLA in accordance with regulations 8, 10, 12A & 12B of the Social Security (Disability Living Allowance) Regulations 1991 on the ground that he had been an in-patient in an NHS hospital for more than 84 days.

The claimant, by his father, challenged this on the basis that it breached his right not to be discriminated against under Article 14 ECHR, read with the right to peaceful enjoyment of his possessions in A1P1. Following the claimant's death, his father continued with the claim.

The claim was unsuccessful before the First-tier Tribunal, the Upper Tribunal and the Court of Appeal, but succeed unanimously in the Supreme Court.

It was accepted that the provision of DLA fell within the scope of A1P1, but the defendant argued that the claimant did not have a status falling within the grounds of discrimination protected by Article 14 and, alternatively, that the difference in treatment was justified.

"Other status" under Article 14 ECHR

The Court needed little persuading that the claimant had a status protected by Article 14, whether it was analysed as that of a severely disabled child in need of lengthy in-patient treatment (Baroness Hale, Lord Clare, Lord Wilson and Lord Reed) or as a child hospitalised free of charge in an NHS hospital (Lord Mance, Lord Clare and Lord Reed). Lord Wilson reviewed the Strasbourg authorities on what amounted to an "other status" within Article 14, observing that where the alleged discrimination fell within the scope of a Convention right, the ECtHR was reluctant to conclude that the applicant had no relevant status, with the result that the inquiry into the discrimination could not proceed (paragraph 22).

A lack of justification and the Court's decision on the appeal

As there was a difference of treatment between children in this position (on the one hand) and disabled children who did not require such hospital admission and thus remained entitled to DLA without the application of an 84 day cut-off period (on the other), the question was whether there was objective and reasonable justification.

As the challenge concerned the provision of a welfare benefit, the "*manifestly without reasonable foundation*" test applied (see page 15 above). The Court also followed earlier authority in observing that a bright-line rule would not be invalidated simply because hard cases fell on the wrong side of it, provided the rule was beneficial overall: Lord Wilson (paragraph 27) and emphasising this point more strongly, Lord Mance, with whom Lords Clarke and Reed agreed (paragraph 51).

Nonetheless, the evidence before the Court (which the Secretary of State had not countered), showed that the personal and financial demands made on the substantial majority of parents who helped to care for their disabled children who were long-term hospital in-patients was *no less* than when they cared for them at home, so that the Secretary of State had failed to establish any reasonable foundation for the suspension of DLA after 84 days of a child being in hospital and thus for the difference in treatment.

Accordingly, the Secretary of State's decision to suspend payment of DLA to the claimant violated his rights under Article 14 ECHR read with A1P1 and he was entitled to declaratory relief to that effect. However, it did not follow from this that the suspension of payment pursuant to the 84 day rule would always entail a violation; decisions founded on human rights were essentially individual and the Secretary of State should be given the opportunity to consider whether there were adjustments he could make other than abrogation of the cut-off provision to avoid violating Article 14 rights in other cases (paragraphs 48 – 49).

Significance of the breaches of international Conventions

Lord Wilson reviewed the content of Article 3.1 UNCRC and Article 7.2 UNRPD, indicating that on the evidence before the court, the Secretary of State had never conducted an evaluation of the possible impact of the decision to bring in the 84 day cut-off rule on the children concerned, so that in turn, he was in breach of both the substantive duty to have the best interests of the child as a primary consideration and the procedural duty to evaluate the possible impact arising under Article 3.1 UNCRC[22]. Lord Wilson thus turned to consider how that conclusion would affect the Article 14 justification argument.

He noted that in *R (JS) v Secretary of State for Work and Pensions*, the Secretary of State's submission that an international convention had no role to play in any inquiry under Article 14 into the justification for any difference in treatment in the enjoyment of the substantive rights had been rejected by a majority of the Supreme Court (see pages 16 - 18 above). However, he went no further than observing that his conclusion already reached without reference to the international conventions that the Secretary of State had failed to establish justification, would "*harmonise"* with a conclusion that his different treatment of them violated their rights under the two Conventions relied upon by the claimant (paragraphs 43 – 44).

Thus in this indirect way the Court took into account the breaches of the international conventions as supporting / reinforcing the conclusion already reached without reference to them that justification had not been established. As the Secretary of State was unable to show justification even on a conventional application of the *Stec* case, the Court did not have to decide what difference the breach of the international conventions might have made had this not been the case.

[22] Like Lord Carnwarth in *R (JS) v Secretary of State for Work and Pensions*, Lord Wilson proceeded on the basis that Article 3.1 UNCRC imposed three-fold obligations: a substantive right, an interpretative principle and a procedural duty, as identified by the UN Committee on the Rights of the Child in its General Comment No 14 (2013): (paragraph 39).

Justification in circumstances involving the application of bright line rules

A third Supreme Court appeal this year also raised fundamental issues over the correct approach to justification under Article 14 ECHR, in this instance in relation to the provision of student loans in ***R (Tigere) v Secretary of State for Business, Innovation and Skills*** [2015] UKSC 57; [2015] 1 WLR 3820; 29 July 2015. The majority in a sharply divided Supreme Court held that the "*manifestly without reasonable foundation*" approach did not apply in relation to measure relating to the provision of funding for education and that justification was not established as even if *a* bright-line rule would have been justified in the circumstances, limiting eligibility for student loans, the rule chosen had to be rationally connected to its aim and proportionate in its achievement, which was not the case here.

<u>The claim and the issues before the Court</u>

The claimant had come to the UK in 2001 with her parents from Zambia. She and her mother were granted discretionary leave to remain as overstayers after her father returned to Zambia in 2003. After successfully completing her school studies in the UK, she obtained a place at a university in England, but was refused the student loan she needed to enable her to study because she could not meet the criteria contained in regulation 4(2) and paragraph 2, Schedule 1 of the Education (Student Support) Regulations 2011. Specifically, she could not show that she had been lawfully ordinarily resident in the UK for 3 years before the first day of the academic course or that she had been "settled" in the UK on the day, as she would not be eligible under immigration legislation to attain indefinite leave to remain in the UK until 2018.

The claimant argued that she had been unlawfully discriminated against under Article 14 ECHR in respect of her rights under Article 2 of the First Protocol ('A2P1'). The Court accepted that there was a difference of treatment by reference to her immigration status, which was an "other status" for the purposes of Article 14 and that the provisions relied upon required that state support for tertiary education be funded on a non-discriminatory basis. Thus the crux of the argument was whether the difference in treatment was justified.

The Supreme Court agreed that the three years ordinary residence rule was justified and thus compatible with the claimant's ECHR rights. However, the Court was divided 3 – 2 over whether the settlement rule was justified.

The approach of the majority to the justification issue

For the majority, Baroness Hale held that education, unlike other social welfare benefits, was given special protection by A2P1 and that nowhere in the Strasbourg discrimination cases concerning education was the "manifestly without reasonable foundation" phrase used, accordingly the usual, established four-fold justification test identified in *Bank Mellat v HM Treasury (No 2)*[23] applied: see paragraph 32.

Baroness Hale (with whom Lord Kerr agreed) went on to hold that even if *a* bright-line rule is justified in a particular context, *the particular* bright line rule chosen had itself to be rationally connected to the legitimate aim identified and a proportionate way of achieving it (paragraph 37). Further, it was one thing to have an inclusionary bright line rule defining those who definitively should be included and another thing to have an *exclusionary* bright line which, as here, allowed for no discretion to consider unusual cases falling on the wrong side of the line (paragraph 37). In this instance a bright line rule could have been chosen which more closely fitted the aims of the measure (paragraph 38). Furthermore, a fair balance had not been struck between the interests of the community in maintaining the bright line rule and the very severe effects on persons in the claimant's position (paragraph 39). For these reasons the application of the settlement rule to the applicant could not be justified and was incompatible with her Convention rights (paragraph 42) and the claimant was entitled to a declaration to that effect (paragraph 49). However, the Court declined to quash the settlement criterion in its entirety, as there would be cases where it was not incompatible with the individual's Convention rights (paragraph 49).

[23] See page 12 above.

Although agreeing with Baroness Hale's conclusion (paragraphs 50 & 68), Lord Hughes emphasised that a simple bright line rule, even if it gave rise to hard cases that fell on the wrong side of it, generally had great merit (paragraphs 59 – 60). However, in this instance he accepted that there would be no difficulty in formulating a rule as clear and simple to operate as the current one, but which recognised the position of students in the claimant's position, who's long residence in the UK was such that she was in ordinary parlance settled here and was in reality a "home grown" student (paragraphs 64 & 67).

The approach of the dissenting minority to the justification issue

Lords Sumption & Reed, dissenting, considered that the current Regulations represented a lawful policy choice for the Secretary of State. Whilst other criteria could have been chosen, within the broad lines that had not been exceeded in this case, these were matters for his political judgment (paragraphs 69, 95 & 100).

The minority considered that there was no basis for not applying the *Stec* "manifestly without reasonable foundation" approach to justification, as there was no principled reason why State benefits in the domain of education should be subject to any different test from other equally important State benefits (paragraphs 76 – 77). However, they did acknowledge that the more fundamental the right which is affected by the discrimination in the provision of financial support, the readier a court may be to find that the reasons for the discrimination are manifestly without reasonable foundation.

As regards the bright line settlement rule, the minority considered that as it was legitimate to discriminate between those who do and those who do not have a sufficient connection with the UK for the purpose of the provision of student loans, it was not only justifiable but necessary to make the distinction by reference to a rule of general application in the interests of legal certainty and consistency (paragraphs 88 – 93). Further, once it was accepted that a line had to be drawn at some point on a continuous spectrum, proportionality could not be tested by reference to outlying cases (paragraph 98).

<u>Public Sector Equality Duty</u>

The public sector equality duty imposed by section 149 EQA 2010 (see appendix) has now been considered by the Supreme Court for the first time in ***Hotak v Southwark London Borough Council*** [2015] UKSC 30; [2015] 2 WLR 1341; 13 May 2015.

The identification of what the PSED requires in a series of earlier Court of Appeal decisions, in particular in the judgment of Wilson LJ at paragraphs 28 & 32 in *Pieretti v Enfield London Borough Council* [2011] PTSR 565; McCombe LJ at paragraph 26 in *Bracking v Secretary of State for Work and Pensions* [2014] Eq LR 60; and Elias LJ at paragraphs 77 – 78 & 89 in *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] HRLR 374, was not challenged in this appeal. Nonetheless, it is noteworthy that Lord Neuberger, giving the judgment on behalf of the majority, not only cited from these judgments, but appeared to endorse them, noting that they had "rightly" not been challenged in the instant appeals (see paragraph 72). Accordingly, this part of Lord Neuberger's judgment, particularly when cited in tandem with McCombe LJ's judgment in *Bracking* provides a helpful round-up of the applicable principles from the case law.

Beyond this, Lord Neuberger did make the point that it was difficult to be more prescriptive as to what "*due*" regard required; the weight and extent of the duty was highly fact-sensitive and dependent on individual judgement (paragraph 74).

In the cases before the Court, the PSED was raised in the context of whether the reviewing officer had complied with the equality duty in deciding that the applicant, who had mental and physical health problems, and his wife were "vulnerable" under section 189(1) of the Housing Act 1996.

Lord Neuberger said that at each stage of the decision making exercise in relation to an application with an actual or possible disability, the decisions must be made with the

equality duty well in mind and "must be exercised in substance, with rigour and with an open mind", rather than it simply becoming a formulaic or high-minded mantra (paragraph 78). He also acknowledged that there would be cases where a review which was otherwise lawful, will be unlawful because it does not comply with the equality duty (paragraph 79).

Examples of other interesting discrimination cases determined in 2015

Other successful, interesting public law discrimination cases this year have included:

> ***R (Moore) v Secretary of State for Communities and Local Government*** [2015] EWHC 44 (Admin); [2015] JPL 762; 21 January 2015, where Gilbart J found that the defendant's practice of recovering planning appeals for himself where they related to proposals for pitches occupied by one or more caravans on Green Belt land, constituted indirect discrimination under section 19 EQA 2010 and entailed a breach of the PSED; and

> ***R (Hardy) v Sandwell Metropolitan Borough Council*** [2015] EWHC 890 (Admin); 30 March 2015 where Phillips J held that the Defendant's practice of taking into account the care component of disability living allowance when assessing the amount of a discretionary house payment constituted indirect discrimination under Article 14 ECHR and a breach of the PSED.

Other unsuccessful, interesting public law discrimination cases this year have included:

> ***R (JK) v The Registrar General for England and Wales*** [2015] EWHC 990 (Admin); [2015] HRLR 10; 20 April 2015 where Hickinbottom J held that the requirement a transgender woman be recorded as the 'father' on the birth certificates of her two biological children was a lawful and proportionate interference with her Article 8 and her Article 14 ECHR rights; and

R (A) v Secretary of State for Work and Pensions [2015] EWHC 159 (Admin); 29 January 2015 in which it was held that in failing to provide an exception for victims of domestic violence living in accommodation adapted under the provisions of a Sanctuary Scheme in the 'bedroom tax' provisions contained in the Housing Benefit (Amendment) Regulations 2012, the Secretary of State had not discriminated unlawfully under Article 14. In finding that the discriminatory effect on women was justified and there was no breach of the PSED, the Court relied heavily on the Court of Appeal's decision in the earlier bedroom tax case, *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, due to be heard by the Supreme Court next year. Permission to appeal in this case has been granted by the Court of Appeal and the appeal will be heard along with the claimant's appeal in *R (Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) .

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30 September 2015

Appendix: Discrimination Provisions[24]

Article 14: European Convention on Human Rights

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Equality Act 2010

Direct discrimination: section 13:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Discrimination arising from disability: section 15:

"(1) A person (A) discriminates against a disabled person (B) if –
- (a) A treats B unfavourably because of something arising in consequence of B's disability; and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

Indirect discrimination: section 19:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1) a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

[24] This appendix sets out the text of the discrimination provisions most frequently referred to in the cases discussed above, for ease of reference. It should not be treated as a comprehensive round-up of such provisions.

(a) A applies or would apply it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put B at that disadvantage and, (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -
age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation."

Discrimination arising from disability: section 15:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably be expected to know that B had the disability."

Comparison by reference to circumstances: section 23:

"(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be mo material difference between the circumstances relating to each case."

Discrimination in provision of services and exercise of public functions:

Section 29:

"(1) A person ("a service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with that service.

(2) A service provider (A) must not, in providing the service, discrimination against a person (B) –

(a) as to the terms on which A provides a service to B;
(b) by terminating the provision of the service to B;
(c) by subjecting B to any other detriment

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation".

Section 31:

"(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function"

Burden of proof: section 136:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Public sector equality duty: section 149:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to –
    (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
    (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
    (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the mattes mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

    (a) remove or minimise disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
    (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
    (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
    (a) tackle prejudice; and
    (b) promote understanding."