Bringing public law discrimination claims – some key considerations

Judicial Review Trends and Forecasts 2016

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Why public law claimants should consider running discrimination arguments

a) Discrimination is constitutional responsibility of courts

Lord Hoffmann in *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38 at [48]:

> 'Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests.'

b) Discrimination challenges offer a structure which may be lacking in reasonableness review.

But beware of getting too technical...Maurice Kay LJ in *Burnip v Birmingham CC* [2012] EWCA Civ 629 at [13]:

> 'one of the attractions of article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law.'

c) Discrimination challenges call for a focus on differential treatment or impact, not on the substantive merits of a policy or decision.

Baroness Hale in *R (SG) v SSWP* [2015] UKSC 16 at [188]:

> '...it is not the [benefit cap] scheme as a whole which has to be justified but its discriminatory effect: see A v Secretary of State for the Home Department [2005] 2 AC 68, para 68, per Lord Bingham of Cornhill; AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434, para 38, per Baroness Hale of Richmond. It is not enough for the Government to explain why they brought in a benefit cap scheme. That can readily be understood. They have to explain why they brought in the scheme in a way which has disproportionately adverse effects on women.'

Judicial review always available

Equality Act 2010 section 113:

> 113 Proceedings
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> (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
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> ...

(3) Subsection (1) does not prevent—

(a) a claim for judicial review...[1]

Service providers and public functions – EA 2010 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 the service.

...

(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.

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

Indirect discrimination

The concept of indirect discrimination allows for the examination by the court of whether the policies and decisions of public bodies have unintended negative consequences for particular protected groups.

Highly structured approach – Equality Act 2010 section 19:

19 Indirect discrimination

(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—

(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,

[1] An argument that sections 113(4) and 114 remove the jurisdiction of the Administrative Court on an application for judicial review under EA 2010 s 29 was raised by the Defendant at the permission stage in *R (Dowsett) v SSJ* [2011] EWHC 2877 (Admin) but does not appear to have been pursued or determined at the final hearing in *Dowsett* or any subsequent case. There are numerous decisions where the High Court and Court of Appeal have considered claims of substantive discrimination contrary to the EA 2010, see for example *MM and another v SSWP* [2013] EWCA Civ 1565 and *R (Hottak) v Foreign Secretary* [2016] EWCA Civ 438. Claimants may well however have to demonstrate why a County Court claim is not an effective alternative remedy to judicial review, see the discussion in *Hamnett v Essex CC* [2014] EWHC 246 (Admin). This may be because the case is a challenge to a policy rather than a decision in an individual case, and / or because there the EA 2010 substantive discrimination challenge is one of a number of grounds which the Claimant seeks to advance.

(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.

Recent application – *R (H) v Ealing LBC* [2016] EWHC 841 (Admin) – challenge to a policy whereby a percentage of a local authority's social housing allocations were ringfenced for 'working households'.

Applying section 19(2):

a) The policy applied to everyone.
b) The policy put women, disabled people and elderly people at a particular disadvantage given the barriers to work they face.
c) The claimants (cumulatively) experienced this disadvantage.
d) The defendant could not show that the measure was justified.

[NB – the defendant is seeking permission to appeal].

Justification – application of the proportionality principles from *Bank Mellat v HM Treasury* [2013] UKSC 39 per Lord Reed at [74].

(1) is there a sufficiently important objective (i.e. legitimate aim),
(2) is the measure rationally connected to that objective
(3) is it the least intrusive measure which could be used without unacceptably compromising the objective and
(4) in adopting the measure has the defendant struck a fair balance between the importance of securing the objective and its particular effects on the claimant's rights.

Article 14 ECHR

Made more claimant-friendly by the Supreme Court's decision in *Mathieson v SSWP* [2015] UKSC 47.

Four stage approach:

(1) Is there differential treatment between different groups?
(2) Does the relevant group has the necessary 'status'?
(3) Is the issue within the 'ambit' of one or more of the substantive Convention rights?
(4) Can the difference in treatment be justified?

On differential treatment, note *Thlimmenos v Greece* (2000) 31 EHRR 411, para 44:

> 'The court has so far considered that the right under article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when states treat differently persons in analogous situations without providing an objective and reasonable justification. However, the court considers that this is not the only facet of the prohibition of discrimination in article 14. The right not to be discriminated against in the

enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

Per Maurice Kay LJ in *Burnip* at [18]:

> 'Whilst it is true that there has been a conspicuous lack of cases post Thlimmenos in which a positive obligation to allocate resources has been established, I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established. I can see no warrant for imposing a prior limitation on the Thlimmenos principle. To do so would be to depart from the emphasis in article 14 cases which, as Lady Hale demonstrated in AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434 , para 25 is "to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification". I would apply the same approach to a Thlimmenos failure to treat differently persons whose situations are significantly different.'

On status, note that in *Mathieson* the accepted status was 'a severely disabled child in need of lengthy in-patient hospital treatment' (per Lord Wilson at [23]) or 'a child hospitalised free of charge (essentially in a NHS, rather than private, hospital) for a period longer than 84 days' (per Lord Mance at [60]). This emphasises the modern liberal approach.

On ambit, see Lord Wilson in *Mathieson* at [17] (emphasis added):

> 'In his invocation of article 14 , Mr Mathieson therefore needs first to establish a link with one or more of the Convention's other articles. He alleges a link with either or both of Cameron's rights to "the peaceful enjoyment of his possessions" under article 1 of Protocol 1 (" A1P1 ") and to "respect for his … family life" under article 8 . For the purposes of article 14 , Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those articles: otherwise article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them. How can a public authority's action be within the scope of an article without amounting to an interference with rights under it? Carson v United Kingdom (2010) 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights explained at paras 63-65 that A1P1 did not require a contracting state to establish a retirement pension scheme but that, if it did so, the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in article 14 . Hode and Abdi v United Kingdom (2012) 56 EHRR 960 provides another example. There the Court of Human Rights explained at para 43 that article 8 did not require the state to grant admission to a refugee's non-national spouse but that, if it introduced a scheme for doing so, it fell within the scope of article 8 and so had to be administered without discrimination on any of the identified grounds.'

On justification – in welfare benefits cases (pending the Supreme Court's judgment in the bedroom tax cases) the question is whether the differential treatment is 'manifestly without reasonable foundation', per *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545. However per Baroness Hale at [22], 'the fact that the test is less stringent than the "weighty reasons" normally required to justify sex discrimination does not mean that the justifications put forward for the rule should escape careful scrutiny. On analysis, it may indeed lack a reasonable basis.'

Moreover in public law challenges in other areas a more rigorous standard of justification may apply. See Baroness Hale and Lord Kerr in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at [27]-[33]:

> '27... On the one hand, in Strasbourg, "a wide margin of appreciation is usually allowed to the state under the Convention when it comes to general measures of political, economic or social strategy, and the court generally respects the legislature's policy choice unless it is 'manifestly without reasonable foundation'"... That test has also been employed in Strasbourg and domestically when considering the justification for discrimination in access to cash welfare benefits...
>
> 28 On the other hand, education is rather different...
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> 32... As the appellant points out, education (unlike other social welfare benefits) is given special protection by A2P1 and is a right constitutive of a democratic society. Nevertheless, we are concerned with the distribution of finite resources at some cost to the taxpayer, and the court must treat the judgments of the Secretary of State, as primary decision-maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us (see, for example, Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420), or that the issue has received active consideration in Parliament: see R (SG) v Secretary of State for Work and Pensions...'

Public Sector Equality Duty

Of limited value to claimants...?

Laing J in *R (BNM and DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin):

> '34. Section 149, and the specific equality duties imposed by earlier legislation, have been the subject of many decisions. The duty is repeatedly referred to as a duty to have regard to, or to consider, a duty. It is not. It is a duty to have 'due' regard to the listed equality needs...
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> ...
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> 41. The practical question, or questions, posed by section 149 in relation to a particular decision will depend on the nature of the decision and on the circumstances in which it is made. It is clear from the authorities that the fundamental requirement imposed by section 149 is that a decision maker, having taking reasonable steps to inquire into the issues, must understand the impact, or likely impact, of the decision on those of the listed equality needs which are potentially affected by the decision...

Approach of Wilson LJ (as he then was) in *Pieretti v Enfield LBC* [2010] EWCA Civ 1104 has not been significantly developed in more recent cases:

> '34 For practical purposes, however, I see little difference between a duty to "take due steps to take account" and the duty under section 49A(1)(d) to "have due regard to … the need to take steps to take account". If steps are not taken in circumstances in which it would have been appropriate for them to be taken, ie in which they would have been due, I cannot see how the decision-maker can successfully claim to have had due regard to the need to take them.'[2]

Note potential to focus on need to 'advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it'. Requirement to <u>consider</u> taking positive steps?

<u>What do public law claimants need to do to win discrimination cases?</u>

(1) Get through the initial hurdles as quickly as possible:
    a. Indirect discrimination – policy of general application, group and individual disadvantage
    b. Article 14 – differential treatment (or failure to treat differently), status, ambit
(2) Persuade court that standard for justification is proportionality
    a. Straightforward under the Equality Act 2010
    b. More difficult under Article 14 – though use *Tigere*
(3) Highlight less intrusive and fairer alternative measures which could have been chosen[3]

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[2] See though *R (BAPIO Action) v Royal College of GPs* [2014] EWHC 1416 (Admin) per Mitting J at [31]; '...Section 149 does not permit a person exercising public functions to identify the need to eliminate discrimination in one of the public functions it exercises and then do nothing about it. If it acted thus it would not be "having regard" to the need to eliminate discrimination in the exercise of its public function, it would be disregarding a specific need which it had itself identified...'.

[3] Although note Lord Reed in *Bank Mellat* at [75]: 'In relation to the third of these criteria, Dickson CJ made clear in R v Edwards Books and Art Ltd [1986] 2 SCR 713 , 781–782 that the limitation of the protected right must be one that "it was reasonable for the legislature to impose", and that the courts were "not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173 , 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost.'