

Public Law webinar mini-series

An update on discrimination law – where are we now?

28th April 2021

Chair: Tim Ward QC
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Article 14 and the test for justification.

Where are we now?

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Recap on test for breach under A14

- (1) Does the alleged discrimination fall within the ambit of a Convention right?
- (2) Is the alleged ground of discrimination a “status” listed/falling within A14?
- (3) Has the claimant been treated less favourably than a class of persons whose situation is relevantly similar?
- (4) Is there an objective and reasonable justification for the difference in treatment?

Test for Justification

- (1) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
- (2) Is the measure rationally connected to that aim?
- (3) Could a less intrusive measure have been used?
- (4) Has a fair balance been struck between the rights of the individual and the interests of the community?**

Standard of review: duality of approach

- *R (DA) v SSWP* [2019] UKSC 21 – Second Benefit Cap Case.
- Lord Wilson – “*This court has been proceeding down two different paths*” [55]
- On the one hand, case such as *Humphreys v Revenue and Customs* [2012] UKSC 18 and *R (MA) v SSWP* [2016] UKSC 68
- On the other hand, *Bank Mellat No.2* [2013] UKSC 39 and *R (Quila) v SSHD* [2011] UKSC 45

Duality of Approach (2)

- See earlier decisions of ECtHR:
 - *James v UK* (1986) 8 EHRR 123
 - *Stec v UK* (43 EHRR 1017)
- Then See decision of SC in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.

Which is the correct approach?

- Lord Kerr and Lady Hale in *DA v SSWP* [2019] UKSC 21 :
 - MWRF test is the product of ECtHR used in a different context.
 - It had been wrongly imported by the domestic courts.
 - Lord Mance JSC was right in the *Asbestos* case.
- **BUT All the other Judges** of the SC in *DA v SSWP* disagreed with Lord Kerr and Lady Hale.

Is that the end of the matter?

- In *DA v SSWP*, Lord Wilson JSC at [65] on the correctness of the MWRF test - “*Let there be no future doubt about it*”
- See, however, *JD and A v United Kingdom*, 24/02/20
- *R (SC and CB) v SSWP* [2019] EWCA Civ 615, decision pending in the SC
- *DA v SSWP* now in ECtHR

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Discrimination in algorithmic decision-making

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JCWI v Home Office

- ‘Streaming Tool’ used to categorise visa applicants by reference to nationality - RAG
- ‘Suspect’ nationalities given higher risk scores – so more scrutiny, a longer wait, and higher refusal rate
- Direct race discrimination (cf. *R (European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55 at §38, §72 and §97)

Ofqual Exam Algorithm

- Students' grades set by reference to the historical attainment of their school
- Exemption applied for smaller cohorts – where pupils were entitled to receive teacher-assessed grades
- Indirect discrimination? On what grounds?
- Appeals process also potentially discriminatory

(1) Disclosure

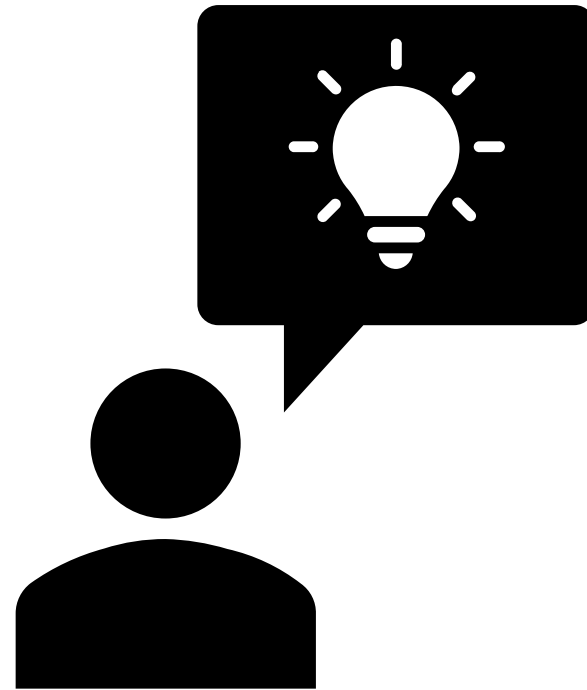
- *R (On the application of Eisai Limited) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 (at §36, §49-50, §66).
- Lord Sales, *Algorithms, Artificial Intelligence and the Law*, 12 November 2019 (p12):
 - *“There should also be scope for legal challenges to be brought regarding the adoption of algorithmic programs, including at the ex ante stage... The claimant will need to secure disclosure of the coding in issue.”*

(2) Procedure

- Section 149 of the Equality Act 2010:
 - Public authorities must have “*due regard*” to the need to eliminate discrimination, foster good relations and advance equality of opportunity.
 - EIA usually required (Lord Sales lecture, p.11).
- Articles 35/36 GDPR
 - DPIA required where processing, “*in particular using new technologies*”, is “*likely to result in a high risk to the rights and freedoms of natural persons*”.

(3) Expert Input

- Essential?
- Useful?



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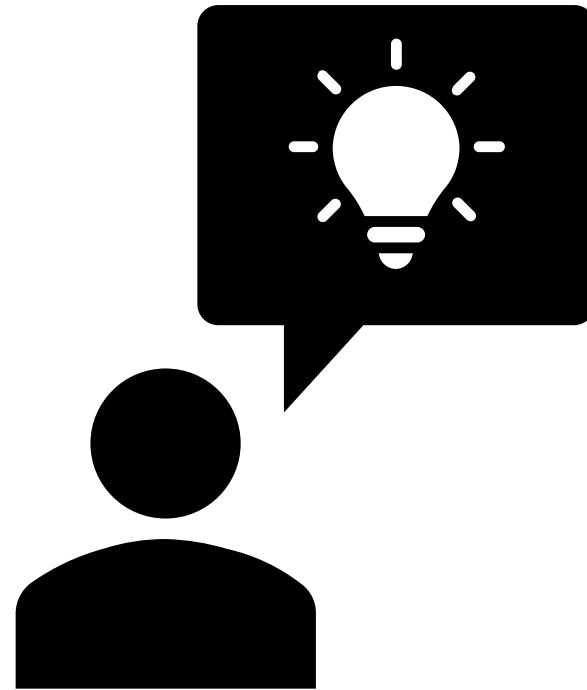
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Positive action in the Supreme Court

The decision in *R (Z) v LB Hackney & ALHA*

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- “no one wants to feel they have got the job in any way other than on their own merits”

Baroness Hale, *Guardian*, 1 January 2019

Section 158, Equality Act 2010

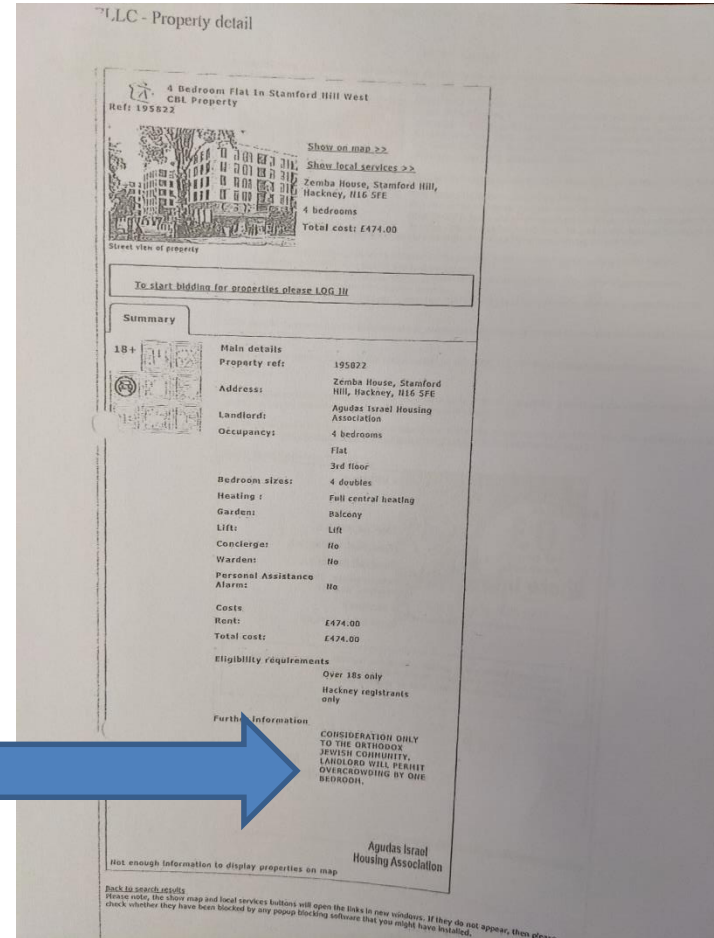
- (1) This section applies if a person (P) reasonably thinks that—
 - (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
 - (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
 - (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
- (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
 - (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
 - (b) meeting those needs, or
 - (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

Section 158 and positive discrimination

“...we would stress that section 158 does not concern what is sometimes called "positive discrimination"; it is more limited and concerns only what the legislation calls "positive action". **In general "positive discrimination" is unlawful under the Equality Act ...**”

R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London
[2018] EWHC 969 Admin; [2019] QB 251
Divisional Court (Singh LJ and Whipple J)

AIHA's policy



“CONSIDERATION ONLY TO THE ORTHODOX JEWISH COMMUNITY”

Case C-319/03 *Briheche*

“A measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not **automatically and unconditionally give priority** to women when women and men are equally qualified, and the candidatures are the subject of an **objective assessment which takes account of the specific personal situations of all candidates**”

(para 23)

Proportionality on appeal (1)

“...Since the Divisional Court gave itself a correct self-direction as to the test to be applied, its conclusion that AIHA’s allocation policy is a proportionate means of pursuing the legitimate aims identified can only be set aside if the appeal court comes to the view that its conclusion was wrong in the relevant sense. **It is not sufficient that an appellate court might think it would have arrived at a different conclusion** had it been considering the matter for the first time...”

(Lord Sales JSC at [74])

Proportionality on appeal (2)

“...if the appellate court only conceives of its role as checking that the first instance court has directed itself in an appropriate way and then reached a result which cannot be said to be unreasonable...[s]ociety does not benefit from application of the wisdom of senior judges on some of the most difficult and sensitive cases which come before the courts.”

“Proportionality review in appellate courts: a wrong turning?”

Lord Sales

Annual ALBA Lecture, November 2020

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