REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2012

UNITED KINGDOM

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0 INTRODUCTION

0.1 The national legal system

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI). Great Britain (GB) includes England, Wales and Scotland.[1] The UK is a parliamentary democracy. It has neither a written constitution prescribing separation of legislative, executive and judicial powers, nor an entrenched constitutional bill of rights.

All UK-wide law-making powers are vested in the Westminster Parliament, which legislates through both primary legislation (Acts of Parliament) and secondary laws (Statutory Instruments). These laws are subsequently "interpreted" by the courts to create a body of case-law which is based on the binding rules of legal precedent. When passing a law, the Westminster Parliament must at the time determine in which of the four parts of the United Kingdom (England, Wales, Scotland and Northern Ireland) it will apply.

Both the Scottish Parliament and the Welsh Assembly have law-making powers, but these are limited both in scope and in the geographical area that they cover; anti-discrimination legislation is a matter reserved to the Westminster Parliament for all of Great Britain. After long negotiations, the 1998 Good Friday Agreement set out terms for devolved government for NI, and the Northern Ireland Act 1998 that followed established a Northern Ireland Assembly with powers to legislate on most matters affecting NI, including discrimination matters. After a period of political uncertainty, during which this Assembly was at times suspended while its devolved powers reverted to the Westminster Parliament, the Assembly has been again re-established following the St Andrew's Agreement in 2006 and currently exercises its wide-ranging devolved powers.

By signing the Treaty of Rome in 1972 the UK impliedly accepted some limitation on the sovereignty of the UK and the Westminster Parliament. For so long as the UK is a member of the EU, then it is bound by the directives and rules of the EU and the decisions of the Court of Justice of the European Union (CJEU). Section 2(2) of the European Communities Act 1972 permits the transposition of EU legislation into UK legislation by regulations without the need for primary legislation.

While this offers an efficient way to incorporate EU directives without excessive demand on the parliamentary timetable such regulations can go no further than is reasonably required to transpose the relevant EU provisions and this method

[1] For purposes of transposition of EU legislation, the UK also has responsibility for Gibraltar. To comply with the Directives 2000/43/EC and 2000/78/EC the Gibraltar legislature enacted the Equal Opportunities Ordinance 2004 (or Act), which came into force on 11 March 2004. This legislation has been replaced by the Equal Opportunities Act 2006, transposing the equal opportunities directives. The Gibraltar legislation is not discussed in this report.

accordingly resulted in piecemeal changes and an increasing lack of consistency over time across UK anti-discrimination legislation according to its degree of connection with EU law. This problem has however been eradicated in Great Britain by the Equality Act 2010, most of whose provisions became law on 1 October 2010 or 1 April 2011.[2] The Act replaces the old patchwork of Acts of Parliament and Regulations as they applied in Great Britain, though it does not extend to Northern Ireland. Discussions on a single Equality Bill started in Northern Ireland in 2001 but have yet to bear fruit.

The enactment of the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights (ECHR) into UK law, has also had a significant impact on the content of UK legislation (see below 1.0 General Legal Framework).

Anti-discrimination legislation in the UK is enforced mainly through the civil courts, with the exception of some minor provisions that provide for criminal sanctions. The relevant judicial systems in the three jurisdictions within the UK (England and Wales, Scotland and Northern Ireland) are similar but not identical. In each there are first instance tribunals in which all employment-related cases are heard, and separate civil courts (county courts in NI and England and Wales, sheriff courts in Scotland) for other civil claims. The final civil appeal court for all three jurisdictions is the Supreme Court which came into being in October 2009, replacing the Judicial Committee of the House of Lords.

Proceedings alleging breach by public authorities of HRA protection against discrimination (Article 14 ECHR) or failure by public authorities to comply with positive equality duties (imposed in the UK until 1 April 2011 by the Race Relations Act 1976 s.71 and Disability Discrimination Act 1995 s.49A, thereafter by the Equality Act 2010 (EqA), s.149, and in Northern Ireland by the Disability Discrimination Act 1995 s.49A and Northern Ireland Act 1998, s.75 and Schedule 9) would normally be by application for judicial review in the High Court. Failure by public authorities to comply with specific duties set out in regulations made under the legislation imposing these positive duties can be enforced by the Equality and Human Rights Commission (EHRC) in the lower county/sheriff courts.

The criminal courts in each jurisdiction have a similar tiered structure. Criminal courts in the UK would not hear complaints of discrimination; they may, however, hear cases where one of the protected grounds is relevant to the alleged offence, for example where an accused is charged with the offence of inciting racial or religious hatred, or offences including harassment, assault and criminal damage which are aggravated by hostility on grounds of race, religion or belief, sexual orientation or disability.

[2] A number of provisions, notably section 1, will not now be implemented given the change of government resulting from the general election of May 2010.

0.2 Overview/State of implementation

Domestic legislation giving effect to the Directives came into force in July and December 2003, October 2004 and, for the age provisions, 1 October 2006 and 1 December 2006. Extensive legislation covering race and sex discrimination in the areas of employment, occupation and access to goods and services had been in place since the mid 1970s, with disability discrimination legislation having been introduced in 1995. This legislation generated a complex and extensive case-law, partially as a result of activist NGOs and the presence in the UK of equality commissions (now the Equality and Human Rights Commission (EHRC)) since the late 1970s. As a result, there is extensive knowledge of discrimination law on the part of lawyers, trade unions, courts and tribunals. Therefore, for example, claims of indirect discrimination are commonplace in the UK.

The extent and variety of this case-law, however, generated a complex framework of legal norms and precedents, and the technical, detailed and precise nature of UK legislative drafting further contributed to this complexity.

In addition, the decisions by the UK government to transpose the Directives by way of secondary legislation, pursuant to s.2 of the European Communities Act 1972, meant that implementing legislation was restricted to the contents and scope of the Directives. Because the material scope of domestic law was broader than that of the Directives this resulted in ever-increasing complexities, and absence of coherence or consistency in places, and a framework which became increasingly difficult for employers and employees, service providers and service users and the public generally to understand.

These problems have now largely been eradicated as a result of the implementation[3] of the Equality Act 2010, although they remain in Northern Ireland pending the adoption there of equivalent legislation. So, for example, the Race Relations (Northern Ireland) Order 1997 (RRO) and Fair Employment and Treatment Order (FETO) now have two-track structures in which different definitions of indirect discrimination and harassment, different genuine occupational requirements and different rules on the burden of proof apply according to whether the discrimination at issue is regarded as being covered by EU law or not. To know which provisions apply in particular circumstances is not necessarily straightforward as it may depend on, for example, upon whether the discrimination alleged is said to be on grounds of the claimant being Black, being African, or being Nigerian,[4] for example, or on whether the alleged discrimination occurred when the police were assisting the claimant, or arresting or searching him/her.

[3] For the most part in October 2010 and April 2011.
[4] Though see the decision in *Abbey National plc* v *Chagger* [2010] ICR 397, Annex 3 below.

There remain a limited number of respects in which, despite the implementation of the EqA, domestic legislation may fail to comply fully with the Directives, or where judicial interpretation may be required to ensure that the UK legislation conforms to the requirements of the Directives. The areas of possible concern are as follows:

- Self-employment and occupation may not be fully covered by the anti-discrimination provisions.[5]
- The provisions of the Equality Act 2010 do not extend to post-employment acts of victimisation.[6]
- The EqA permits discrimination where the protected characteristic is "an occupational requirement" and the application of the requirement is "a proportionate means of achieving a legitimate aim", there being no express requirement (by contrast with the Directives) that the occupational requirement be either "genuine" or "determining". Domestic courts could correct this flaw by applying the legislation in line with the requirements of the Directives.
- Indirect discrimination on the grounds of disability is not currently prohibited in Northern Ireland, though the requirement to make reasonable accommodation *may* close this gap to a sufficient extent, as Art. 2(2)(b) of the Framework Equality Directive appears to contemplate.
- There is at present no general statutory right for individuals in Northern Ireland to seek legal redress for instructions to discriminate or discriminatory advertisements: in most cases, only the Equality Commission for Northern Ireland can bring such a case.[7] Further, Northern Ireland law does not expressly prohibit instructions to discriminate on grounds of sexual orientation, though being subjected to such instructions will amount to discrimination "on grounds of sexual orientation" against the person to whom the instructions are issued.[8]
- The law prohibiting discrimination on grounds of religion or belief in GB may be deficient as it is subject to ss.58–60 of the School Standards and Framework Act 1998 which give a considerable degree of freedom to schools to discriminate on the grounds of religious belief in employing staff.
- There is no provision permitting organisations to engage in proceedings *on behalf of* a complainant. Section 24 of the Equality Act 2006 permits the EHRC to seek injunctive relief to prevent a person from committing an unlawful act and the EHRC can also bring judicial review proceedings against public authorities which discriminate. During the consultation on what became the Equality Act 2010 (EqA) there were efforts to include provisions on representative or class actions within the legislation: in April 2009 the House of Commons Work and Pensions Committee recommended that the Government introduce provisions in what was then the Equality Bill to allow for representative actions to be taken

[5] See *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145 and *Jivraj v Hashwani* [2011] UKSC 40, [2011] IRLR 827, discussed in Annex 3.
[6] See *Jessemey v Rowstock Ltd*, discussed at 0.3 below.
[7] *Cf*, in Great Britain, the Equality Act 2010, s.111.
[8] *Weathersfield v Sargent* [1999] ICR 425.

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by bodies such as trade unions or the EHRC.[9] The EqA does not contain any provision for such actions.

- Discrimination on the basis of perceived disability or age, or association with persons having a disability or being of a particular age, is not at present covered by legislation in Northern Ireland other than by way of judicial interpretation.[10]
- The NI (Sexual Orientation) Regulations may permit wider scope for discrimination by organised religions than is provided for in Art. 4(1) Employment Framework Directive (but see the relatively narrow interpretation given to the materially identical GB provisions in *R (on application of Amicus & others) v Secretary of State for Trade and Industry*, discussed under 0.3 Case Law below, which was adopted to ensure conformity with the requirements of EU law). The EqA has not substantially improved the position in GB in this regard (see discussion in Annex 3).
- Concerns have been expressed that the continued use of age distinctions in statutory redundancy pay schemes and in fixing minimum wages for younger workers may not be objectively justified.
- Some uncertainty also surrounds the exemption of many forms of age distinctions used in occupational pensions schemes from the scope of the Regulations: while many of these exemptions come within Article 6(2) of the Directive and may therefore be valid, some other exceptions may fall outside the scope of this provision.
- UK law does not appear to be consistent with the decision of the CJEU in Case C-54/07 *Firma Feryn* in that discriminatory job advertisements are currently only explicitly prohibited in Northern Ireland, and then only when they relate to the race, religion/ belief or disability. Further, only the Equality Commission for Northern Ireland (ECNI) has the power to bring enforcement action in respect of such advertisements. There are no legislative prohibitions on discriminatory statements. Individuals across the UK may only bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, (as, for example, where they apply for the posts in question and are rejected on the relevant ground). Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision and it did not take the opportunity provided by the EqA to extend legislation in this area, instead removing such prohibitions (enforceable by the EHRC) as had previously applied.

[9] The Equality Bill: how disability equality fits within a single Equality Act", Work and Pensions Committee 3rd Report of 2008-09, http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/158/158i.pdf, accessed 4 April 2013.

[10] This because, while discrimination "on grounds of" race, religion or belief or sexual orientation will cover discrimination by association and discrimination on grounds of perceived status (under Northern Ireland's provisions on race, sexual orientation and religion/ belief), as will discrimination "because of " a protected characteristic (under the EqA), discrimination on grounds of the age or disability of the person alleging discrimination (this being what is prohibited by Northern Ireland's provisions on age and disability discrimination) will not absent robust judicial interpretation (for which see the decision of the EAT in *Coleman*, discussed below at 2.2.1(a).

It is unclear at present when individuals from the affected groups have the legal standing to bring a discrimination claim in such a situation: in particular, it is unclear whether an individual who is deterred from applying for a post on the basis of a discriminatory advertisement or statement can bring a legal claim, as that individual might be held not have been subject to any tangible form of less favourable treatment. Courts and tribunals could interpret the direct discrimination provisions of the relevant legislation as covering such a situation in order to ensure conformity with *Feryn*.

0.3 Case-law

Age
Name of the court: Supreme Court
Date of decision: 25 April 2012
Name of the parties: *Homer v Chief Constable of West Yorkshire Police*
Reference number: [2012] UKSC 15, [2012] IRLR 601 [2012] EqLR 594
Address of the webpage: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0102_Judgment.pdf
Brief summary: A police officer aged 61 challenged a requirement that, in order to qualify for the highest pay grade within his position, workers had to have a law degree, which he did not have. His employers offered to pay for the complainant to complete a part-time law degree but, as he intended to retire at 65, the completion of the degree would come too late for him. He complained that the requirement to have a law degree for promotion to the top pay grade was a provision or criterion which put people aged 60 -65 at a disadvantage because they could not complete a degree before retirement at age 65.

An employment tribunal ruled in his favour but the EAT and Court of Appeal disagreed, however, the latter ruling (rather oddly) that staff aged between 60 and 65 did not suffer any disproportionate impact: “it was not the appellant’s age but the temporal proximity of his intended retirement that stood in his way and prevented him from obtaining a law degree”. The Supreme Court allowed the employee’s appeal in April 2012, ruling that the disadvantage to which he was put by the requirement was suffered by a particular age group for a reason related to their age, those leaving the workforce because of the (then) default retirement age generally not having any choice in the matter. The Court accepted that facilitating the recruitment and retention of sufficiently high-calibre staff was a legitimate aim, but a distinction had to be drawn between recruitment criteria and criteria for entry to higher pay grades, and whether it was appropriate to apply the requirement for a law degree to existing employees seeking promotion would depend on whether non-discriminatory alternatives were available. The question of justification was remitted to the employment tribunal to determine.

Name of the court: Supreme Court
Date of decision: 25 April 2012
Name of the parties: *Seldon v Clarkson Wright and Jakes*

Reference number: [2012] UKSC 16, [2012] IRLR 590 [2012] EqLR 579
Address of the webpage: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0201_Judgment.pdf
Brief summary: The claimant was a partner in a law firm who challenged a mandatory retirement age applied by the firm. The retirement age did not fall within the UK's then default retirement age, because he was not an employee. The Supreme Court ruled that mandatory retirement could be justified by the aims of (1) ensuring that associates could progress to partnership after a reasonable period; (2) facilitating long-term workplace planning and (3) "limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture". Direct age discrimination alone could be justified under Directive 2000/78 because "age is different… not 'binary' in nature (man or woman, black or white, gay or straight) but a continuum which changes over time… younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age". The Court further ruled that the tests for justification of direct and indirect age discrimination differed, the legitimate aims in the case of the former being limited to social policy objectives of a public interest nature. The jurisprudence of the CJEU, which the Court reviewed, suggested that the legitimate aims which could be pursued by direct age discrimination could be characterised as relating to two broad aims: "inter-generational fairness" and "dignity". The aims pursued by the Defendant in the instant case were legitimate but the question of proportionality – specifically, whether the ends pursued justified the selection of a retirement age at 65, as distinct from any other age, would be referred back to the Tribunal.

Name of the court: Court of Appeal
Date of decision: 22 March 2012
Name of the parties: *Woodcock v Cumbria Primary Care Trust*
Reference number: [2012] EWCA Civ 330 [2012] IRLR 491 [2012] EqLR 463
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2012/330.html
Brief summary: The Court of Appeal here accepted that the employers had justified age discrimination consisting in the decision prematurely to dismiss the claimant on grounds of redundancy in order to avoid his eligibility for early retirement, thereby saving between £500,000 and £1 million. The Court accepted that costs could be a factor in justifying even direct age discrimination, relying on the "costs plus" approach established by the EAT in *Cross v British Airways* and on EU law.

Name of the court: Employment Appeal Tribunal
Date of decision: 10 February 2012
Name of the parties: *HM Land Registry v Benson & Ors*
Reference number: UKEAT/0197/11/RN, [2012] IRLR 373 [2012] EqLR 300
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2012/0197_11_1002.html
Brief summary: The Employment Appeal Tribunal accepted that an employer could base its selection criteria for redundancy primarily on cost notwithstanding the fact

that this disadvantaged employees aged between 50 and 54 who might have wished to be made redundant. The respondent wished to make as many voluntary redundancies as possible within a fixed budget. Workers aged 50-54 would have been the most expensive to made redundant as they would have been entitled to "compulsory early retirement", which would have entitled them to extensive benefits under the Civil Service Compensation Scheme.

They argued that being turned down for redundancy amounted to indirect age discrimination. An employment tribunal ruled that the respondent had not been entitled to rely on its limited budget (of £12 million), and that the allocation of an additional £19.7 million from its reserves would have enabled the respondent to make all applicants voluntarily redundant without having to go through a selection process. The EAT disagreed, accepting the respondent's argument that the aim pursued by the redundancy exercise was to reduce headcount as much as possible within a fixed budget, that the respondent was entitled to pursue this aim, and that there was no alternative criterion for the employer to adopt except the "cheapness" of the selection. The tribunal had erred in demanding that the respondent show that the additional £19.7 million which it would have cost to make all those who volunteered redundant was "unaffordable", the respondent being able to argue that the provision, criterion or practice applied was "reasonably" necessary", rather than absolutely essential. The impact of the discriminatory criterion was not as severe as in many cases since the claimants did not lose their jobs, or anything except the chance to take advantage of a "windfall".

Disability

Name of the court: Supreme Court
Date of decision: 12 December 2012
Name of the parties: *X* v *Mid-Sussex Citizens Advice Bureau*
Reference number: [2012] UKSC 59, [2013] IRLR 146
Address of the webpage: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0112_Judgment.pdf
Brief summary: The case involved a volunteer worker who provided specialist legal advice for the Citizens' Advice Bureau on a weekly basis. She was expected to be available to work three days each week. She claimed that she had been discriminated against on grounds of her disability (the details of the claim are not yet public because the Supreme Court decision was on the preliminary question whether she was covered by the Equality Act 2010). The Disability Discrimination Act 1995 (DDA) did not apply to volunteers but she argued that voluntary work was within the concept of "occupation" for the purposes of Directive 2000/78, and that the DDA had to be interpreted to provide the same protection. In December 2012 the Supreme Court rejected her appeal against the decision of the Court of Appeal which had ruled that, although "a broad and generous interpretation of the Directive should be given consistent with a purposive approach which EU law dictates", the European Council had chosen not to include voluntary workers within it in the face of an amendment proposed by the European Commission and it was "inconceivable that the draftsman

of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them" as "[v]olunteers are extensively employed throughout Europe, and it is unrealistic to believe that they were intended to be covered by concepts of employment and occupation which would not naturally embrace them", the concept of worker having been "restricted to persons who are remunerated for what they do". The Supreme Court agreed that EU law did not assist and that the concept of "occupation" in EU law did not extend to volunteers

Race

Name of the court: Court of Appeal
Date of decision: 15 May 2012
Name of the parties: *Hounga v Allen*
Reference number: [2012] EWCA Civ 609, [2012] IRLR 685 [2012] EqLR 679
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2012/609.html
The claimant, who had entered the UK illegally from Nigeria, was employed as a domestic worker. When she was dismissed she made a number of claims including one for race discrimination. An employment tribunal found that she had suffered serious physical abuse and had been treated badly because she was an illegal immigrant. The Court of Appeal, having remarked that her claim was dependent upon the "special vulnerability" to which the claimant was subject by reason of her illegal employment contract, ruled that her claim was blocked on public policy grounds: "her discrimination claim arose out of, or was clearly connected or inextricably bound up with her own illegal conduct… If this court were to allow her to make that case, and so rely upon her own illegal actions, it would be condoning her illegality."

Name of the court: Employment Appeal Tribunal
Date of decision: 24 November 2011
Name of the parties: *Moxam v Visible Changes Ltd*
Reference number: UKEAT/0267/11/MAA, [2012] EqLR 202
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0267_11_2411.html
Brief summary The EAT accepted that the claimant had been subject to racial harassment when her employers had referred in her presence to "fucking immigrants" despite the fact that she was not herself an immigrant.

Religion/ belief

Name of the court: European Court of Human Rights
Date of decision: 6 November 2012
Name of the parties: *Redfearn v UK*
Reference number: *Application no. 47335/06*
Address of the webpage: http://www.bailii.org/eu/cases/ECHR/2012/1878.html
Brief summary: The ECtHR ruled that the UK breached Article 11 by denying the claimant, an active member of a racist right-wing political party, a remedy when he was dismissed in connection with his membership of the organisation. The Court

pointed out that he would have been entitled to bring a discrimination claim had he been dismissed because of his race or his religion, and that he was prevented from claiming unfair dismissal by the existence of a one year qualifying period of employment (since extended to two). (It is not clear why he did not bring his claim before the domestic courts under the provisions prohibiting discrimination on grounds of belief.) The Government has reacted to the decision by removing the qualifying period for unfair dismissal in cases where the reason for dismissal is alleged to relate to the employee's political opinions or affiliation.

Name of the court: Court of Appeal
Date of decision: 24 October 2012
Name of the parties: *Woods v Pasab Ltd t/a Jhoots Pharmacy*
Reference number: [2012] EWCA Civ 1578, [2013] IRLR 305
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2012/1578.html
Brief summary: The claimant, a Muslim, was dismissed after she complained that the company was "a little Sikh club that only look[ed] after Sikhs." The employer regarded the comment as racist. The Claimant alleged that she had been victimised in connection with a complaint of race discrimination (i.e., that Sikhs were favoured over other employees), and this complaint was upheld by an employment tribunal. The EAT disagreed and the Court of Appeal rejected the Claimant's appeal. The tribunal having accepted the employer's explanation that the Claimant had been dismissed because she was believed to have made a racist comment, this was incompatible with any finding of victimisation.

Name of the court: Employment Appeal Tribunal
Date of decision: 13 December 2012
Name of the parties: *Mba v Mayor & Burgess of the London Borough of Merton*
Reference number: UKEAT/0332/12/SM
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2012/0332_12_1312.html
Brief summary: The Employment Appeal Tribunal ruled that the employer did not discriminate by requiring an employee to work her contracted hours on a Sunday despite her claim that this prevented her from complying with the requirement, as a Christian, to observe Sunday as a day of rest. The claimant worked in a children's home which operated a rota system. The employer had accommodated her insistence on Sundays off for two years but came to the view that this was unsustainable. The claimant claimed that she had been constructively dismissed and discriminated against. A tribunal found that the employer had acted proportionately in pursuit of a legitimate aim. Relevant factors included the fact that using agency staff to cover her shifts would have been more expensive and rostering other employees to cover her reduced their opportunity to have a full week off at any particular time. The EAT rejected the claimant's appeal, ruling that the tribunal had been entitled to reach the conclusion it did in the circumstances.

Name of the court: Employment Tribunal
Date of decision: 24 October 2012
Name of the parties: *Beyene v JDA International Ltd*
Reference number: Case no 2703297/11
Address of the webpage: N/A
Brief summary: A tribunal ruled that the repeated use of the words "my nigga" by a white colleague to the claimant, a black man, amounted to harassment related to race regardless of the context and, in particular, that the claimant had been the first to use those words and that his colleague had not intended to be offensive. According to the Tribunal, "the phrase is such an insulting phrase to use towards a black person that [it] could not conceive of any circumstances where its use would not violate dignity and create a degrading, humiliating or offensive environment".

Name of the court: Employment Tribunal
Date of decision: 5 November 2012
Name of the parties: *Henry v Ashtead Plant Hire Co Ltd*
Reference number: Case no 3202933/11
Address of the webpage: N/A
Brief summary: A tribunal ruled that the use of the word "nigger" on a single occasion by a younger white colleague to the claimant, an older black man, amounted to racial harassment. By contrast with the tribunal in *Beyene* the tribunal in *Henry* did not take the view that the use of the word would always amount to harassment (it had been argued that the word had been 're-appropriated' by some black rap musicians). The tribunal did, however, accept that its use was indefensible in the instant context. The claimant was awarded EUR 5300 (£4500) for injury to feelings which had been compounded by the fact that the word was used to the claimant in front of another employee and that his employers had failed to deal adequately with his complaint.

Sexual orientation

Name of the court: Court of Appeal
Date of decision: 10 February 2012
Name of the parties: *Bull & Bull v Hall & Preddy*
Reference number: [2012] EWCA Civ 83
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2012/83.html
Brief summary: The Court of Appeal recently upheld the decision of a lower court that the refusal of the Respondents, who ran a seven bedroom private hotel, to provide the Claimants (a same-sex couple) with a double room for occupation, amounted to sexual orientation discrimination.

Although the material scope of the case falls outside EU law, the case is of interest because of the argument put by the Respondents that, as Christians, they only let double bedded rooms to married couples, because to do otherwise would be to promote sinful sexual behaviour. They also argued that to find them in breach of the relevant legislation would breach their rights to manifest their religious beliefs under

Article 9 of the Convention. The Court of Appeal accepted, however, that, because same-sex couples could not get married in the UK, the restriction of hotel rooms to married couples amounted to direct discrimination because of sexual orientation and was therefore unlawful under the Equality Act (Sexual Orientation) Regulations 2007 (since replaced by the materially similar Equality Act 2010).

Name of the court: High Court
Date of decision: 16 November 2012
Name of the parties: *Smith v Trafford Housing Trust*
Reference number: [2012] EWHC 3221 (Ch), [2013] IRLR 86
Address of the webpage: http://www.bailii.org/ew/cases/EWHC/Ch/2012/3221.html
Brief summary: The claimant, a housing manager, responded to an article on the BBC news website about gay marriage by posting a link on his Facebook wall with a comment "an equality too far". He subsequently added that "I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church; the bible is quite specific that marriage is for men and women; if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose its rules on places of faith and conscience." He was disciplined after a colleague complained about the postings and was demoted for gross misconduct (breach of the employer's code of conduct and equal opportunities policy). He successfully challenged the demotion as being in breach of contract because, as the High Court found, his actions could not properly be regarded as "misconduct": it was clear that the postings were not made on the employer's behalf and his "moderate expression of his particular views about gay marriage in church" on his personal Facebook wall could not lead any reasonable reader to think badly of the Trust. The postings were not, "viewed objectively, judgmental, disrespectful or liable to cause upset or offence" to his work colleagues. "The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech".

Name of the court: Employment Tribunal
Date of decision: 7 December 2011
Name of the parties: *Jessemey v Rowstock Ltd & Anor*
Reference number: ET/2700838/11 and ET/2701156/11
Address of the webpage:
http://83.231.223.99/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247560215192&ssbinary=true
Brief summary: The Claimant was dismissed on grounds of retirement and then was provided with an unfavourable reference by his former employers because he made a claim of age discrimination. Section 108 of the Equality Act 2010 prohibits discrimination suffered after the termination of an employment relationship, but

s108(7) then states that "conduct is not a contravention of this section in so far as it also amounts to victimisation…". His victimisation claim failed.[11]
Name of the court: Employment Tribunal
Date of decision: 15 March 2012
Name of the parties: *Jones v TGI Fridays & Zurybida L*
Reference number: Case no 1402154/11
Address of the webpage: N/A
Brief summary: In this case a tribunal accepted that false allegations of sexual harassment made against a gay employee themselves amounted to harassment related to his sexual orientation.

Name of the court: Employment Tribunal
Date of decision: 29 March 2012
Name of the parties: *Austin v Samuel Grant (North East) Ltd*
Reference number: Case no 25039956/11 [2012] EqLR 617
Address of the webpage: N/A
Brief summary: In this case a tribunal confirmed that a heterosexual employee could be harassed on the basis of his perceived (gay) sexual orientation, also, very interestingly, that workplace discussion of religious matters could amount to unlawful harassment on grounds of religion/ belief where it created an adverse environment for others.

Name of the court: Employment Tribunal
Date of decision: 8 May 2012
Name of the parties: *Otomewo v Carphone Warehouse*
Reference number: Case no 2330554/11 [2012] EqLR 714
Address of the webpage: N/A
Brief summary: A tribunal ruled that the posting of comments including "gay and proud" on the claimant's facebook page by his colleagues amounted to unlawful sexual orientation harassment. The postings were made during working hours and the employer was liable for them.

Name of the court: Employment Tribunal
Date of decision: 13 November 2012
Name of the parties: *Walker v Innospec Ltd*
Reference number: Case no 2411316/11 [2013] EqLR 72
Address of the webpage: http://www.brickcourt.co.uk/news/pdf/employment-tribunal-reads-down-equality-act-to-give-civil-partners-equal-pe
Brief summary A tribunal ruled that the exclusion of the claimant's civil partner from the survivors' benefits to which he would have been entitled had he been a spouse breached Council Directive 2000/78 and that the relevant provisions of the Equality

[11] The EAT upheld the Tribunal's decision on 5 March 2013: http://www.employmentappeals.gov.uk/Public/Upload/12_0112rjfhSBDM.doc

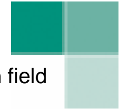
Act 2010 which allowed such claims only from 5 December 2005 would be disapplied.

Multiple discrimination

Name of the court: Supreme Court
Date of decision: 25 July 2012
Name of the parties: *Hewage v Grampian Health Board*
Reference number: [2012] UKSC 37, [2012] IRLR 870, [2012] EqLR 884
Address of the webpage: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0050_Judgment.pdf
Brief summary: The claimant was, a consultant orthodontist from Sri Lanka, complained about discrimination in the way that she had been treated by other colleagues and resigned when the health board took no action. She compared her treatment with that of two white, male consultants. The questions for the Supreme Court were whether the tribunal had applied the burden of proof test correctly, and on the proper role of comparators in determining whether there had been sufficient evidence to draw an inference of sex and race discrimination and whether the respondent had failed to rebut that inference. The respondent argued that the comparators were in different situations and that no valid comparison had been made. The Court ruled that "The question whether the situations were comparable is … a question of fact and degree" and that the Tribunal had been entitled to find sex and race discrimination. It is noteworthy that the Supreme Court did not take issue with the fact that the claimant argued both race and sex discrimination, and that the tribunal did not identify separate facts to support findings of race discrimination and sex discrimination.

Also of interest is the decision below which, although arising in connection with sex, is applicable across all of the other protected characteristics.

Name of the court: Court of Appeal
Date of decision: 26 September 2012
Name of the parties: *Clyde & Co LLP v Bates Van Winkelhof*
Reference number: [2012] EWCA Civ 1207, [2012] IRLR 992.
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2012/1207.html
Brief summary: The Claimant was a partner in a limited liability partnership (a firm of solicitors) who brought claims in respect of whistleblowing and pregnancy discrimination against the firm. The Court of Appeal confirmed that the former claim must fail because, as a partner, she was not a "worker" for the purposes of domestic law (applying the reasoning of the Supreme Court in *Jivraj v Hashwani*). She could, however, claim discrimination contrary to the Equality Act 2010 which expressly covers partners of limited liability partnerships. This remained the case notwithstanding the fact that she spent most (but not all) of her working time in Tanzania.



Trends concerning Roma and Travellers

There is little caselaw in the UK on discrimination against Roma, and no recent cases to report regarding travellers (older cases are discussed at 3.2.10 and annex 3 below). "Equality", a charity concerned with Roma in the UK, estimate that there are about 300 000 Roma from former Eastern block countries in the UK though many identify themselves by nationality rather than ethnicity with the result that the statistics are uncertain.[12] Roma people tend to be very disadvantaged ion terms of work and accommodation and are vulnerable to exploitation including by illegal "gangmasters".

[12] http://www.equality.uk.com/.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

The characteristics of the constitution of the United Kingdom are as follows:

- There is no single constitutional document, although there are a number of constitutional "conventions" and Acts of Parliament of constitutional significance such as the Human Rights Act 1998, European Communities Act 1972, Northern Ireland Act 1998, Government of Wales Acts 1998 and 2006 and Scotland Act 1998;
- Parliament is sovereign, though it has constrained itself (for the time being) by joining the European Union and incorporating the European Convention on Human Rights;
- There is no strong principle of the separation of powers;
- The United Kingdom is a unitary state, although devolved government has been established in NI under the Northern Ireland Act 1998, and limited legislative powers have also been devolved to Scotland and to Wales (the Government of Wales Acts 1998 and 2006 and Scotland Act 1998).

Unlike the other Member States, the UK has no constitution which is codified, fully written, and entrenched (supreme over ordinary laws), and which regulates the relationship between the citizens and the state. Over centuries, certain rights of natural and legal persons have been protected by decisions of the courts and parliamentary legislation. Discussions are on-going in both GB and NI as to the desirability of having a Bill of Rights to clarify and reinforce individual rights protection, but at present no such constitutional rights instrument forms part of either GB or NI law.

The UK is a signatory of all of the main international instruments and treaties relating to human rights and non-discrimination but, other than in the case of the European Convention on Human Rights (ECHR), it has declined to provide for rights of individual application to international human rights, or direct application in domestic courts. (The UK has acceded to the inquiry procedure in Articles 8 and 9 of the Optional Protocol to CEDAW.) The 1998 Human Rights Act (HRA),[13] which came into force on 2 October 2000, gives the UK courts jurisdiction to enforce the rights guaranteed under the ECHR, including Article 14. Most other laws approved by

[13] See http://www.hmso.gov.uk/acts/acts1998.htm.

Parliament proscribe or regulate the conduct of individuals or organisations, rather than declaring rights.

No general principle of equality or non-discrimination is applicable to Acts of the UK Parliament, although a common law principle of equality and non-discrimination can be applied in administrative law to prevent public authorities unreasonably discriminating against particular groups on "suspect grounds" such as race or ethnic origin, without the authorisation of an Act of Parliament. For example, in the case of *Gurung v Ministry of Defence*, McCombe J. decided that the exclusion of Gurkha soldiers from a scheme of compensation payments awarded to former prisoners of war held in Japanese prison camps in the Second World War was based on *de facto* racial distinctions, which were contrary to this common law principle of non-discrimination.[14] The exclusion of these Gurkha soldiers from this compensation scheme was therefore held to be an irrational decision.[15] There is a requirement under the Human Rights Act 1998 for a minister to certify whether or not a bill is compatible with the ECHR but, in the view of the author, it is perhaps unlikely that such process would highlight a potential conflict with Article 14 of the ECHR.[16] There is some degree of judicial discretion to avoid interpretations of Acts of Parliament which would result in discrimination. This, however, does not apply where the legislation is explicit, in which case declarations of incompatibility, though in theory not binding on the executive, result in practice in amendments to the offending legislative provisions.

Public authorities are prohibited from discriminating on the grounds of race, disability, religion or belief or sexual orientation in the performance of their public functions (s.29 Equality Act 2010; Article 20A of the Race Relations (Northern Ireland) Order 1997 (RRO); s.21B Disability Discrimination Act 1996 (N Ireland); Northern Ireland Act s.76; Reg. 12 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. This serves as a legal control on their activities but these legislative provisions cannot override other legislative provisions which may require discriminatory treatment.

Since April 2011, all public authorities in Britain have been under positive obligations (by virtue of s.149 EqA) to "have due regard to the need to "eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the EqA]; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] foster good relations between persons who share a relevant protected characteristic and persons who do

[14] [2002] EWHC 2463 Admin and see Annex 3.
[15] There is no specific definition of what exactly constitutes discrimination for the purposes of this common law principle.
[16] New developments 2013: the UK Government has made a commitment to provide more detailed information on the human rights aspects of government bills in its explanatory notes. See - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf.

not share it". The "relevant protected grounds" are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Section 149 further provides that:

- "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 disadvantages 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 [and] (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";
- "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"; that "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"; and
- "Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act".

There have been many decisions on the "public sector equality duty" (PSED) which confirm that equality considerations are now a mandatory consideration to be taken into account in public sector decision-making. The expanded PSED imposed by the Equality Act 2010 came into force on 5 April 2010. In May 2012 the Coalition Government announced that a review of the PSED duty which had been scheduled for 2015 would begin imminently and was expected to be completed by April 2013. The "independent steering group" consists of Local Authority Councillors, employees of HM Treasury, the Government Equalities Office, the NHS and the East Norfolk Academies Trust, HM Inspectorate of Constabulary, the London Deputy Mayor and EHRC chair Baroness O'Neill. As pointed out by Michael Rubenstein in the January 2013 *Equal Opportunities Review*, under the heading "Will turkeys vote for Christmas?", "the steering group is almost entirely composed of the very people held to account by the equality duty."

The "devolved" representative bodies that have been established in London, Wales and Northern Ireland are also subject to duties to promote equality. In Northern Ireland, section 6(2) of the NI Act provides that a provision is outside of the competence of the devolved Northern Ireland Assembly if it "is incompatible with Community law"; or "discriminates against any person or class of person on the ground of religious belief or political opinion". Section 75 of the 1998 Act imposes a general duty upon certain designated public authorities to promote equality in

carrying out its functions relating to Northern Ireland across all the anti-discrimination grounds covered by the EC Directives: this applies both to NI public authorities and some UK authorities that carry out functions in respect of NI. Public authorities are expected to report upon their compliance with these statutory requirements, and the equality commissions have a role in enforcing these very important duties.

Section 120 of the Government of Wales Act 1998 imposes a duty on the Welsh Assembly to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people. Section 81 of the same Act prevents the Government from acting (legislatively or otherwise) incompatibly with Convention Rights. Section 33 of the Greater London Assembly Act imposes a similar set of duties upon the Greater London Assembly. This general duty is supplemented by a more specific equality duty to also promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion, to eliminate unlawful discrimination and to promote good relations between persons of different racial groups, religious beliefs and sexual orientation. Under the Scotland Act 1998 the Scottish Parliament cannot legislate on designated “reserved matters” which include the subject matter of the EqA, subject to an exception which allows the Scottish Parliament to legislate for “the encouragement (other than by prohibition or regulation) of equal opportunities” and to impose duties on any office-holder in the Scottish Administration or any Scottish public authority subject to the control of the Scottish Parliament to make arrangements to ensure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.[17] Section 30 of the same Act provides that an Act of the Scottish Parliament is not law in so far as outside the legislative competence of the Parliament, which includes (as well as relating to reserved matters) that a measure is incompatible with Convention rights or with EU law and section 54 provides an additional important safeguard by making it outside devolved competence to act incompatibly with Convention Rights or EU law.

b) Are constitutional anti-discrimination provisions directly applicable?

See above – the UK has no written constitution, but the common law principle of equality and non-discrimination can be applied in administrative law to prevent public authorities unreasonably discriminating against particular groups on “suspect grounds” such as race or ethnic origin, without the authorisation of an Act of Parliament. The ECHR can also be applied to the acts of public authorities via the Human Rights Act 1998 (HRA), and such authorities are also subject to positive equality duties.

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

[17] Scotland Act 1998, Schedule 5, Part II, L2.

There is no general principle of equality or non-discrimination applicable to the private sector; the general principle governing the private sector is that of “freedom of contract”, save where specific restrictions have been imposed by Parliament, as in the case of anti-discrimination/ equality legislation. Having said this, the Human Rights Act has been interpreted as providing for a degree of “horizontal effect”: the UK courts will attempt to apply private law in a manner that ensures that the UK does not violate its obligations under the ECHR. In the *Copsey* case, for example (see Annex 3),[18] the Court of Appeal would have interpreted UK employment law to find that the claimant had been unfairly dismissed, if it had decided that his rights to religious freedom under Article 9 ECHR had been violated.

[18] *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] IRLR 811.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Discrimination is explicitly prohibited under British legislation in relation to what are now categorised as “protected characteristics” by the Equality Act 2010.[19] age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity and “race” (including colour, nationality and ethnic or national origins), religion or belief, sex and sexual orientation. In NI discrimination is prohibited on these grounds and also on grounds of political opinion and belonging to the Irish Traveller community (which can also be classified as discrimination on the grounds of ethnic origin). In GB discrimination in relation to all of the protected characteristics is regulated across a broad material scope (roughly corresponding to the material scope of Directive 2000/43).[20] In Northern Ireland this is true except in the case of age discrimination, the regulation of which is confined (broadly) to the material scope of Directive 2000/78.

The HRA enables ECHR rights to be enforced by UK courts and the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006 all allow Convention rights to be relied on in the relevant domestic courts. Article 14 of the ECHR prohibits discrimination on an open-ended list of grounds in exercise of other ECHR rights subject to the possibility of justification. Because there remains some uncertainty as to the standard of proof required, the protection from discrimination provided by Article 14 is less certain than that provided under the anti-discrimination laws where such laws can be applied; in other areas, for example, discrimination in access to a fair trial the HRA (relying on Arts. 6 and 14 ECHR) offers the only route to legal redress.

Pursuant to decisions of the CJEU, to the extent that any part of the present Directives has not been fully implemented by the UK after the designated date, those measures have direct vertical effect on the state or any emanation of the state. In practice this means that individuals can bring proceedings against the UK government or any public authority or anybody subject to the authority and control of the state under any provision of a relevant Directive that has not been fully transposed into UK law. Further, the courts have taken a broad approach to the interpretive obligations imposed by the CJEU in the *Marleasing* case with the effect that there is not a great deal of difference as regards the application of EU law to those employed by the state and by private bodies.

[19] Equality Act 2010 s.4.
[20] Though age discrimination is not regulated in the context of housing/ premises (Part 4 of the EqA).

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) *How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)*

i) *racial or ethnic origin,*

The term "racial origin" is not used in UK legislation. The Race Relations (Northern Ireland) Order 1997 (RRO) (art. 5(1)) provides that:

> "'racial grounds' means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins".

The EqA provides that "race" includes colour, nationality and ethnic or national origin and that "A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls". There is no definition in statute or case law of "racial origin"; since the first Race Relations Act in 1965 it has been clear that, as in Recital (6) of the Race Directive, the term has never been used to imply an acceptance of any theories regarding separate human races.

The meaning of "ethnic origins" or "ethnic group" has been the subject of litigation. The judgment of Lord Fraser of Tullybelton in *Mandla v Lee*[21] remains the benchmark, and has been applied to establish that Jews, Gypsies and Irish Travellers are ethnic groups, but that Muslims and Rastafarians are not:

> "For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: – (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community

[21] [1983] IRLR 209.

> surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.
>
> A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes, of the Act, a member…

Section 9 of the Equality Act 2010 provides, for the first time, a power to amend the definition of "race" to include "caste". The Explanatory Notes provide as follows:

> 49… When exercising this power, the Minister may amend the Act, for example by including exceptions for caste, or making particular provisions of the Act apply in relation to caste in some but not other circumstances. The term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed "untouchable") are known as Dalit.

Research conducted for the government by the National Institute of Economic and Social Research concluded in December 2010 that caste discrimination did occur, in particular in the context of employment and service provision, although it was not possible on the basis of the research conducted to estimate the scale of the problem.[22] The researchers estimated that up to three million of South Asian descent, of whom up to 200 000 would be defined as "low caste", might be affected by caste discrimination. The first claim of caste discrimination was brought to an employment tribunal in August 2011 as a race discrimination claim.[23] In November 2012 another employment tribunal ruled that the Equality Act 2010 did not regulate caste discrimination.[24]

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[22] Metcalfe and Rolfe, *Caste discrimination and harassment in Great Britain*, December 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85523/caste-discrimination.pdf, accessed 5 April 2013.

[23] *Begraj v Heer Manak Solicitors*. The case collapsed in February 2013: see: http://www.theguardian.com/money/2013/feb/14/caste-discrimination-employment-tribunal-collapses, accessed 8 January 2014. It has recently been announced that caste discrimination will be regulated.

[24] *Naveed v Aslam* case no 1603968/11 26 November 2012.

ii) religion or belief,

NI

The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), which outlaws discrimination on grounds of religious belief or political opinion, in Article 2(3) provides that:

> "references to a person's religious belief or political opinion include references to
>
> (1) His supposed religious belief or political opinion; and
> (2) The absence or supposed absence of any, or any particular, religious belief or political opinion."

The FETO did not originally define further either "religious" or "belief" but the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 add a further definition under article 2(2):

> "'religious belief' in relation to discrimination or harassment … includes any religion or similar philosophical belief"

GB

The Employment Equality (Religion or Belief) Regulations 2003 defined "religion or belief" as "any religion, religious belief or similar philosophical belief". Some commentators queried whether this definition includes people with no religion or religious or philosophical belief within the protection of these Regulations. Sections 44 and 77 of the Equality Act 2006 accordingly amended the definition in terms similar to those now set out in the EqA, s.10:

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
(3) In relation to the protected characteristic of religion or belief—

    (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
    (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

"Religion" itself is not defined. The Government made clear in Parliament, in introducing the 2006 Act, that it expected religion or belief to be defined in accordance with case law developed under Article 9 of the European Convention. The Explanatory Notes to the EqA now provide (paras 51-52) that:

> the protected characteristic of religion or religious or philosophical belief … [has] a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights. The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity... The Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision...
>
> The criteria for determining what is a "philosophical belief" are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria".[25]

Courts and tribunals have been ready to adopt a very broad approach to what can constitute a "belief": see for example *Grainger v Nicholson*, discussed in Annex 3, and the subsequent tribunal decisions there reported. It is not clear that the Explanatory Notes are correct as to the limitations imposed on "belief" by virtue of Article 9 ECHR which imposes absolute protection on freedom of belief regardless of content, coupled with a qualified protection on its manifestation. The Explanatory Notes are silent as to the status of political beliefs.

iii) disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

The status protected by the EqA and, in Northern Ireland, the DDA is that of being "a disabled person", that is, "a person who has a physical or mental impairment which has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities".[26] "Long-term" means lasting or likely to last at least 12 months, or for the rest of the person's life.[27] Under DDA an impairment is only taken to affect a person's ability to carry out normal day-to-day activities if it affects their mobility,

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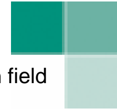
[25] http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf, accessed 5 April 2013.
[26] DDA section 1 (1). Note, however, the decision in *Coleman v Attridge Law*, 0.Annex 3.
[27] DDA Schedule 1, §2.



manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or their perception of the risk of physical danger.[28] This list of capabilities has been removed in GB by the EqA, though the requirement for long term substantial impairment of the ability to carry out normal day to day activities remains.

In addition to the above situations the EqA and DDA cover a number of special conditions, including progressive or asymptomatic conditions, controlled or corrected conditions, and severe disfigurement. A person who has cancer, HIV infection or multiple sclerosis is deemed to meet the definition of disability, effectively from the point of diagnosis.

The legislative definition of disability adopted in the UK is broadly similar to that adopted by the CJEU in case C-13/05, *Chacón Navas*, according to which “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” [43]. The UK definitions differ somewhat, in that they refer to hindrance in “day to day activities” as distinct from “professional activities”. The CJEU did not explicitly require in *Chacón Navas* that a disability had to be a condition which was long-lasting, although at [45] it noted that it was probable that a condition would be long-lasting before it would qualify as a disability. The UK definition requires that an impairment has to have lasted for at least 12 months, or the period for which it is likely to last is at least 12 months or it is likely to last the rest of the person’s life. This requirement that a disability is of a particular duration may constitute a potential issue of incompatibility, as the CJEU appeared to leave open the possibility that a condition need not in some circumstances be long-lasting: however, this aspect of *Chacón Navas* remains unclear.

In *Paterson v Commissioner of Police for the Metropolis*,[29] the Employment Appeal Tribunal (EAT) interpreted the definition of disability contained in the DDA in line with the approach adopted by the CJEU in the *Chacón Navas* case to rule that the concept of “day-to-day activities” must be given a meaning “which encompasses the activities which are relevant to participation in professional life’. This meant that, if the effect of a disability would adversely affect promotion prospects, it could be said to affect day to day activities, as it would hinder participation in the claimant’s professional life. On this basis, the EAT held that the complainant’s dyslexia was sufficient to constitute a disability which sufficiently interfered with his job as a police officer to qualify as a disability under the DDA, in that it hindered his chances of promotion. This approach would continue to apply under the EqA, but it only goes so far; in *Chief Constable of Lothian and Borders Police v Cumming* the EAT ruled that

[28] DDA Schedule 1, ara §4(1).
[29] [2007] IRLR 763.

visual impairment which did not require correction by glasses or contact lenses, but which excluded the claimant from employment as a police officer, did not amount to a disability for the purposes of the DDA.[30] According to the Court: “the status of disability … cannot be dependent on the decision of the employer as to how to react to the employee’s impairment”.

There has been criticism that the DDA/ EqA definition involves too much focus on what the applicant *cannot*, rather than on what he or she *can*, do,[31] thereby placing the onus on applicants to show that they are disabled within the definition used in the Act, and potentially exposing them to demeaning cross-examination to establish the veracity of their claim, and to significant costs in obtaining medical evidence of their incapacity. Increasingly it is the practice for tribunals to hear medical evidence as to the nature and degree of any impairment, though whether any impairment is “substantial” is a question of fact for the tribunal to determine.[32]

In order to have protection from disability-related discrimination the definition of “disabled” in the DDA/ EqA must be satisfied regardless of whether a person is “registered” as “disabled” for the purposes of other legislation, including social security legislation, or satisfies the eligibility conditions for certain disability-related benefits or concessions. The limited exception to this concerns people who are registered as blind or partially sighted in a register maintained by, or on behalf of, a local authority, who are deemed to be disabled for the purposes of the DDA/ EqA.

In the employment case of *Coleman v Attridge Law*, (see Annex 3) a woman claimed that she was discriminated against because of her *association* with her disabled son, who needed considerable care from her. An Employment Tribunal decided that as Ms Coleman was not “disabled” within the DDA definition, she could not bring a claim for disability discrimination. However, the tribunal, and subsequently the EAT, considered that a case existed that the UK legislation was not compatible with the Framework Equality Directive in this respect, and referred the question directly to the CJEU. The CJEU confirmed that the prohibition contained in Articles 1 and 2 of the Framework Equality Directive on discrimination based “on the grounds of” disability includes direct discrimination and harassment based on association (see below), and the ET and EAT have confirmed that the DDA can be interpreted to this effect.[33] The EqA gives effect to *Coleman* in domestic law across all the protected grounds by regulating discrimination “because of” and harassment “related to” a protected characteristic.

iv) age,

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[30] [2010] IRLR 109.
[31] *Abedeh v British Telecommunications plc,* [2001] ICR 156.
[32] *Ibid*.
[33] See 0.Annex 3 and the decision of the EAT at [2010] IRLR 10.

Neither the EqA nor the Employment Equality (Age) Regulations (Northern Ireland) 2006 define the term “age”, leaving it open to the courts and tribunals to define if necessary.

Both sets of regulations do define the term “age group” as a “group of persons defined by reference to age, whether by reference to a particular age or a range of ages”: this may be important in indirect age discrimination claims.

v) sexual orientation?

The English language version of the Employment Framework Directive uses the words “sexual orientation”. The Equality Act and NI Sexual Orientation Regulations do the same, defining “sexual orientation” as “a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex” (s.12(1) and Reg 2(2) of the NI Regulations). The Explanatory Memorandum to the Equality Act clarifies the definition by using the (apparently non-legal) words “lesbian”, “gay”, “bisexual” and “straight”.

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

i) racial or ethnic origin

There are a number of offences which are aggravated by racist intent or overtones as well as offences of using words etc with the intention to incite racial hatred, “race”/ “ethnic origins” are not defined. So, for example, s17 of the Public Order Act 1986 provides simply that “In this Part ‘racial hatred’ means hatred against a group of persons . . . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”.

ii) religion or belief (e.g. the interpretation of what is a ‘religion’ for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)?

An amendment to the Crime and Disorder Act 1998 contained in the Anti-Terrorism, Crime and Security Act 2001 created “religiously-aggravated” offences, and defines “religious group” as “a group of persons defined by reference to religious belief or lack of religious belief” but does not define “belief”. There is no statutory definition of religion under any other laws.

One useful reference for a common law definition of "religion" (but not "belief") is a decision of the Charity Commissioners for England and Wales [34] rejecting the application by the Church of Scientology (England and Wales) to be a registered charity. In reaching their decision the Charity Commissioners considered English case law, the European Convention on Human Rights and decisions by the European Court of Human Rights as well as the law in other jurisdictions. The Commissioners' conclusions include the following:-

- The definition of a religion in English charity law was characterised by a belief in a supreme being and an expression of that belief through worship;

"Belief in a supreme being" is a necessary characteristic of religion for the purposes of English charity law, although it would not be proper to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion (the Commissioners did not accept that the requirement of a supreme being is no longer necessary to the concept of religion in English charity law and, contrary to Indian case law, they did not find themselves compelled to reject "theism" altogether);

- The criterion of "worship" would be met where belief in a supreme being found its expression in conduct indicative of reverence for or veneration of a supreme being.

iii) Disability

The threshold requirements for various disability-related benefits available in the UK is not related to the definition of "disability" for the purposes of protection under the EqA/ DDA.

iv) age

"Age" has not as yet been given a fixed meaning elsewhere in national law.

v) sexual orientation

Sexual orientation" is not elsewhere defined.

There is no direct equivalent of recital 17 of Directive 2000/78/EC in UK legislation against discrimination, which instead makes use of the genuine occupational requirement defence, the comparator requirement for direct discrimination and the ability to demonstrate objective justification in indirect discrimination cases in its place. Note also that the duties imposed on service providers to make reasonable

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[34] 17 November 1999, http://www.charitycommission.gov.uk/media/100909/cosfulldoc.pdf, accessed 8 January 2014.

accommodation are limited to some extent by Sch 2 para 2(7) EqA and s. 21(6) DDA, which state that nothing requires a service provider to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business.[35]

c) *Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

Neither the Employment Equality (Age) Regulations (Northern Ireland) 2006 nor Equality Act 2010, insofar as it applies to employment and occupation etc, contain any restrictions related to the scope of "age" or any minimum or maximum age limits. The provisions of the Equality Act 2010 which prohibit age discrimination in the provision of goods and services and the performance of public functions apply only to discrimination suffered by adults over the age of 18.

2.1.2 Multiple discrimination

a) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*

The EqA provides (s.14) for the recognition of "dual discrimination" in cases (involving direct discrimination alone) where "because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics". The characteristics which could be recognised in this context were limited to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, not including pregnancy or married or civilly partnered status. The provision did not cover indirect multiple discrimination (though see the discussion immediately below). In any event, the Coalition Government announced in March 2011 that it would not implement s.14 which was seen as imposing unnecessary burdens on business. Meanwhile, as seen in Annex 3 (*Ministry of Defence v DeBique*),[36] caselaw has begun to recognise multiple discrimination.

Research has shown that the problem of multiple discrimination, or "intersectional discrimination", may be relatively widespread.[37] For example, the former Equal

[35] Para 4.28 of the *Code of Practice (Revised): Rights of Access to Goods, Facilities and Premises* produced by the former Disability Rights Commission gives some examples of when this exception would apply: for example, nightclubs would not have to adjust their interior lighting to accommodate customers who are partially sighted if this would fundamentally change the atmosphere or ambience of the club.
[36] [2010] IRLR 471.
[37] See Sandra Fredman, 'Double trouble: multiple discrimination and EU law', *European Anti-Discrimination Law Review*, issue no 2, 2005, pp13-18, at p.14.

Opportunities Commission investigated the problems experienced by Bangladeshi, Pakistani and Black Caribbean women at work, and concluded that these groups are more likely to be unemployed than comparable white English women, a result that may be partially due to the impact of multiple discrimination.[38] The need to find solutions to the problem of multiple discrimination was one of the main reasons for the establishment of the single Equality and Human Rights Commission (EHRC), which has attempted to develop internal strategies for addressing multiple discrimination in its case-work and promotional activities, while also emphasising the importance of human rights law as a tool for addressing problems of intersectional and cross-ground exclusion.

Despite recent developments, the requirement in UK law to show that a comparator would have been more favourably treated can create particular difficulties in this area. In *Bahl v the Law Society*[39] an Asian woman claimed that she had been subjected to discriminatory treatment as a Black woman. At the first stage of the case an employment tribunal ruled that she could compare herself to a *white man*, so that the combined effect of her race and her sex could be considered together. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was not possible under the existing law. The Court of Appeal made it clear that each alleged act of discrimination had to be proved as having been connected with the claimant's race, and/or her sex, separately, even if she had experienced the different forms of prejudice as completely linked together. The claimant had to show that a white "person" would not have been treated as she was, and/or to separately show that a man would not have been so treated, which made her chance of success much less.

The authoritative value of *Bahl* is perhaps in doubt as a result of the recent decision of the Supreme Court in *Hewage* (see 0.3). There the Court took a relatively liberal approach to comparators and did not question that finding of the tribunal that the claimant had been subject to race and sex discrimination (this without the tribunal having identified which incidents amounted to sex discrimination and which to race discrimination).[40] Having said this, the Supreme Court did not refer to the decision in *Bahl* which cannot therefore be regarded as having been overruled.

> *Would, in your view, national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Express legislation at European level would be of assistance in dealing with multiple discrimination, particularly if such legislation established that comparators, whether

[38] http://dera.ioe.ac.uk/14145/1/docbme_gfi_women_employment_survey070410145059.pdf, accessed 4 April 2013.
[39] [2004] IRLR 799.
[40] See also *Central Manchester University Hospitals NHS Foundation Trust v Browne* [2012] EqLR 318 in which the EAT ruled that it was not always necessary to look too closely at the characteristics of a hypothetical comparator when the reason for the discrimination was identifiable. See, similarly, *Birmingham CC v Millwood* [2012] EqLR 910.

real or hypothetical, should not operate so as to render such claims unnecessarily difficult in practice.

b) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

Prior to the decision in *Ministry of Defence v DeBique*,[41] UK law appeared to require cases to be brought and argued under the separate grounds, even if the applicant has suffered discrimination on a combination of grounds. In *DeBique* the Employment Appeal Tribunal there recognised discrimination against the Claimant, as a Black woman, prior to the implementation of section 14. The burden of proof was not at issue as this was a claim for indirect discrimination and the facts were not substantially in dispute. Nor is there any record of the combined nature of the discrimination having any impact on the level of the EUR 18 333 (£15 000) damages awarded in respect of injury to feelings.

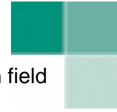
2.1.3 Assumed and associated discrimination

a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

NI law on disability discrimination does not prohibit discrimination based on assumed or perceived characteristics: the text of the DDA protects only persons who can establish that they are “disabled” or have previously been “disabled” within the statutory definition set out in the legislation (other than in relation to protection against victimisation). The Employment Equality (Age) (Northern Ireland) Regulations 2006 explicitly prohibit discrimination on the grounds of a person’s “apparent age” while the NI provisions on race, sexual orientation and religion or belief regulate discrimination “on grounds of” the protected characteristic, a formulation which is well understood as including perceived or assumed characteristics. Thus, in *Mandla v Lee*[42] Lord Fraser commented that:

> “A person may treat another relatively unfavourably ‘on racial grounds’ because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous.”

[41] [2010] IRLR 471.
[42] [1983] IRLR 209.



The EqA refers to discrimination "because of" a protected characteristic (s.13), the Explanatory Notes providing as follows:

> 59… This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).
> 60. However, a different approach applies where the reason for the treatment is marriage or civil partnership, in which case only less favourable treatment because of the victim's status amounts to discrimination. It must be the victim, rather than anybody else, who is married or a civil partner.
> 61. This section uses the words "because of" where the previous legislation contains various definitions using the words "on grounds of". This change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act.

It follows that it is not necessary for a person to disclose his or her sexual orientation / religion or belief to being a claim of direct discrimination; it will be sufficient that he or she has suffered a disadvantage because of the assumptions made about his or her sexual orientation / religion or belief. In the interesting case of *English v Thomas Sanderson Blinds Ltd*[43] the Employment Appeals Tribunal (EAT) dismissed a claim for harassment brought by a man who was not gay and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The EAT took the view that the claimant was not subject to harassment "on the grounds of" his actual sexual orientation, as required by the Regulations, as the harassers knew he was not gay. However, the Court of Appeal subsequently overturned the decision of the EAT and took the view that as the harassment occurred "on the grounds of" the claimant's sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, that was sufficient to bring the complaint within the scope of the 2003 Regulations (as it would be under the EqA).[44]

The provisions of Recital 17 of the Directive are reflected in the EqA and DDA through the ability of employers to justify discrimination related to a person's disability and the requirement that accommodation be "reasonable": see below. Note also that the duties imposed on service providers to make reasonable accommodation are limited to some extent by Sch 2 para 2(7) EqA and s. 21(6) DDA, which state that nothing requires a service provider to take any steps which would fundamentally alter

[43] [2009] ICR 543, [2009] IRLR 206.
[44] [2008] EWCA Civ 1421. See also *Austin v Samuel Grant (North East) Ltd* 0.3 above.

the nature of the service in question or the nature of his trade, profession or business.

In *Burnett v London & South Eastern Railway Ltd* the EAT ruled that the Religion or Belief Regulations 2003 did not protect against discrimination on grounds of *perceived* belief.[45] At the material time the Regulations prohibited discrimination "on the grounds of the religion or belief of B or of any other person except [the discriminator]". This decision would now be different as a result of the prohibition by the EqA of discrimination "because of" religion or belief.

b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

The prohibition on less favourable treatment "on grounds" of sexual orientation, race, and religion or belief in Northern Ireland, covers discrimination against a person by reason of the sexual orientation / race/ religion or belief of someone with whom the person associates.

This has been recognised by the House of Lords in relation to the RRA definition: see paragraph 80 of Lord Hope's speech in *MacDonald v Advocate General for Scotland*.[46] In Great Britain the formulation of direct discrimination in relation to all of the protected grounds: less favourable treatment "because of" a protected characteristic is intended to cover, and was stated by the Explanatory Notes to the Bill, to have the effect of covering, discrimination by association. Para 71 of the Notes to the Bill stated that the new definition was intended to be "broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic". In her evidence to the JCHR, then Solicitor General Vera Baird MP stated that:

> It is well established and well understood that the definitions of direct discrimination in current legislation using the words "on grounds of" the relevant protected characteristic (i.e. race, religion or belief and sexual orientation) are broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic … As the words "because of" a protected characteristic used in clause 13 do not change the legal meaning of the definition, there is therefore no need to explicitly prohibit discrimination on the basis of

[45] 25 October 2011, Case No. 2205331/10 [2011] EqLR 1290.
[46] [2003] UKHL 34, [2003] IRLR 512. The House of Lords drew from case law under the RRA and the Fair Employment and Treatment Order the fact that the words "on grounds of" enable, in relevant circumstances, the characteristics of third parties to be taken into consideration. (per Lord Hope §§80–82).

> association and perception on the face of the Bill. To do that would also run the risk of excluding other cases which the courts have held are covered by the words "on grounds of" (see, for example, *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65 and *English v Thomas Sanderson Ltd*)[47] and future cases which the Government would want the equally broad and flexible formulation 'because of' to extend to.[48]

Northern Ireland's legislation regulating disability and age refers to less favourable treatment on the grounds of the victim's disability or age. The-then absence of protection against "association" with a disabled person was the subject of a reference to the CJEU in the case of *Coleman v Attridge Law* where, as discussed above, a woman claimed that she was discriminated against because of her association with her disabled son, who needed considerable care from her. An Employment Tribunal decided that, as Ms Coleman was not "disabled" within the DDA definition, she could not bring a claim for disability discrimination. Nevertheless, the tribunal, and subsequently the EAT, considered that a case existed that the UK legislation was not compatible with the Framework Equality Directive in this respect, and referred the question directly to the CJEU. The CJEU held that national legislation must prohibit discrimination on the grounds of association with a disabled person.

Subsequently the EAT confirmed in *EBR Attridge LLP & Anor v Coleman*[49] that the DDA was capable, as a result of the decision of the CJEU in that case, of being interpreted to cover the facts alleged in that case. It is likely that this approach would be applied in Northern Ireland to the Age Regulations as well as to the DDA as it there applies.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

In general

In Great Britain, there is now a single (if complex) definition of "direct discrimination" which is applicable to all the protected grounds. Section 13 provides as follows:

> **13 Direct discrimination**
>
> (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.

[47] [2009] ICR 543, [2009] IRLR 206.
[48] http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/158/158ii.pdf, ev 67 at Q 15, accessed 4 April 2013.
[49] [2010] ICR 242.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others…

Also relevant is section 23 which provides that:

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 [dual discrimination], or 19 [indirect discrimination] there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability…
(3) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.

It is clear from the above that (a) direct discrimination is subject to a justification defence only in the case of age; (b) leaving aside discrimination by association, disability discrimination protects only those with disabilities; (c) those who are married or civilly partnered are protected from discrimination because of that status, but the prohibition does not apply to single persons. In other words, whereas UK law is generally symmetrical in its approach to discrimination, there are exceptions to this rule. Further, section 7(1) provides that "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex". Only those who have the characteristic are protected from discrimination connected with it, so the protection against discrimination "because of" gender reassignment is also asymmetrical.

In Northern Ireland there are a number of different approaches to direct discrimination. The Race Relations (Northern Ireland) Order (RRO), art. 3(1)(a); Fair Employment and Treatment Order art. 3(2)(a); and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg.3 provide that "A person discriminates against another person on racial grounds/on grounds of sexual orientation/ on

grounds of religion or belief if he treats that other less favourably than he treats or would treat other persons", also (RRO art. 3(2)) defining racial segregation as a form of direct discrimination. Reg.3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006) adopts a similar approach to the legislation governing religion or belief, sexual orientation and race (reg.3), except that it allows the justification of direct age discrimination if it is a proportionate means of achieving a legitimate aim.

Each of the discrimination provisions in NI requires a relevant (real or hypothetical) comparator in materially identical terms to that set out in section 23 of the Equality Act 2010 (RRO 3(1c); Fair Employment and Treatment Order art. 3(3); and reg.3(2) of each of the Northern Ireland Sexual Orientation Regulations, the Equality Act (Sexual Orientation) Regulations (Northern Ireland) Regulations 2006 and the Employment Equality (Age) Regulations 2006.

Cases of direct discrimination under both the RRA and SDA have established the following principles which are unaffected by the implementation of the EqA:

- The intention or motive of the discriminator is not relevant to liability; the test is whether, *but for* the person's race or sex, he or she would have been subjected to the treatment complained of.[50] This was reinforced in the *Roma Rights* case,[51] where the House of Lords, acknowledging that, on the facts, immigration officers may have had good reason to treat Roma more sceptically than non-Roma, stated that to do so would involve acting on racial grounds and, for purposes of direct racial discrimination the reason is irrelevant.
- Stereotyping on racial grounds is wrong, not only if it is untrue, otherwise this would imply that direct discrimination can be justified. The Supreme Court recently confirmed this approach in *R (E) v Governing Body of JFS*.[52]
- As the definition of direct discrimination refers to how the alleged discriminator "treats or would treat" another, a hypothetical comparator is acceptable.[53] In the absence of an actual comparator, the court must construct a hypothetical comparator to show how a person of the other racial group or sex would have been treated.[54] This has recently been confirmed by the House of Lords in *Ahsan v Watt*.[55]

Disability Discrimination

As noted above, section 23 EqA provides, where direct disability discrimination is alleged, that the "relevant circumstances" which must be materially similar as

[50] *James v Eastleigh Borough Council* [1990] 2 AC 751.
[51] *R (European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.
[52] [2009] UKSC 1, [2010] 1 All ER 1.
[53] *Chief Constable of West Yorkshire v Vento* [2001] IRLR 124.
[54] *Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting* [2002] IRLR 288.
[55] [2008] IRLR 243.

between the claimant and his or her real or hypothetical comparator "include a person's abilities". In other words, if a person who is unable, by virtue of disability, to walk, claims that she has been discriminated against in relation to her application for a job as a fire fighter, a finding of direct discrimination would require that be found to have been has been treated less favourably than someone who, for a reason other than disability, is unable to walk. It goes without saying that this is a very narrow test, although it will capture (for example) a refusal to employ a wheelchair user on the basis that she would "provide the wrong impression", or a person with a history of mental health problems on the assumption that she will be "unreliable" or "dangerous". Refusing to employ a blind person because he cannot see amounts to direct discrimination only if the ability to see is not an "ability", presumably this would be the case if sight were immaterial to the ability to do the job.

In addition to prohibitions on direct and indirect discrimination, the EqA also includes prohibitions on discrimination arising from disability (section 15) and obligations to make reasonable adjustments (sections 20, 21) as follows. Section 15 broadly replaces the category of discrimination "for a reason related to [his or her] disability", which provision of the DDA was effectively gutted by the House of Lords in *Lewisham v Malcolm* (Annex 3):

> **15 Discrimination arising from disability**
>
> (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.

Section 15 requires no comparison to be drawn between the treatment of the claimant and that of anyone else, and is intended to cover unfavourable treatment arising (for example) in connection with a visually impaired person's use of a guide dog; or the risk of transmission posed in some situations by a person with HIV; or the absence record of a person being treated for cancer. Such unfavourable treatment will be "because of something arising in consequence of B's disability, and", but is subject to requirement of actual or constructive knowledge on the part of the discriminator and a justification defence. So, for example, a restaurant owner who suffers from a severe allergic reaction to dogs or who, on religious grounds, regards dogs as unclean, may be able to justify a refusal to allow dogs entry to his restaurant notwithstanding the fact that this will amount to unfavourable treatment in the case of a visually impaired guide dog user. The same will be true of a refusal to allow a person who is HIV positive to work as a surgeon, or in another job with a significant risk of transmission.

Section 20 defines the duty to make adjustments as arising “where a provision, criterion or practice of A'”, or “a physical feature”, “puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled”. In such case a duty is imposed on the employer, service provider, etc “to take such steps as it is reasonable to have to take to avoid the disadvantage”. In addition, “where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled”, the obligation is “to take such steps as it is reasonable to have to take to provide the auxiliary aid”. The cost of making reasonable adjustments may not (unless specific provision to the contrary is made), be passed onto the disabled person. Where the disadvantage to the disabled person is created by a “physical feature”, the “steps [that are] reasonable to have to take to avoid the disadvantage” may include “removing the physical feature in question, altering it, or providing a reasonable means of avoiding it.” Section 21 then provides that a failure to comply with a duty to make reasonable adjustments amounts to discrimination for the purposes of the EqA.

The position in Northern Ireland is somewhat different, the EqA not extending beyond Great Britain. The DDA as it applies to Northern Ireland prohibits direct disability discrimination in the context of employment and occupation (as defined by Directive 2000/78) alone (s.3A(5)). It also defined as a form of discrimination a failure to make reasonable adjustments (this subject to a justification defence outside the employment/ occupation context). In place of a prohibition on discrimination arising from disability it prohibits “less favourable treatment” “for a reason which relates to the disabled person's disability” (s.3A(1)), this the form of discrimination which formed the subject matter of the decision of the House of Lords in *London Borough of Lewisham v Malcolm*,[56] and is discussed in Annex 3. That decision has had the effect that “less favourable treatment” “for a reason which relates to the disabled person's disability” is no broader than direct disability discrimination.

The duty to make reasonable adjustments continues to apply in Northern Ireland in materially identical terms to those in which it applies in Great Britain so even pending amendment of the DDA in Northern Ireland it may be the case that the gap left by *Lewisham v Malcolm* is not as significant as would otherwise be the case.

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).

Individuals may bring legal claims in respect of discriminatory advertisements or statements if they are actually made subject to less favourable treatment on any prohibited ground as a consequence, i.e. if an individual applies for the advertised posts in question and is rejected on account of a protected characteristic. Perhaps on

[56] [2008] UKHL 43, [2008] 2 WLR 369.

this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision, and did not take the opportunity presented by the EqA to make express provision in this matter.

The EqA actually does away with the provisions in the predecessor legislation which imposed express prohibitions, enforceable by the EHRC, on discriminatory advertising. The Explanatory Notes to the EqA state (para 63) that "If an employer advertising a vacancy makes it clear in the advert that Roma need not apply, this would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement." There is, however, no express prohibition in the Act against discriminatory advertising, and the problem with the reliance on the normal prohibitions on discrimination is that the person who complains about the advertisement will succeed in so doing only if he or she can fit the complaint within section 39 EqA "An employer (A) must not discriminate against a person (B) … in the arrangements A makes for deciding to whom to offer employment".

In *Cardiff Women's Aid v Hartup* the EAT held that placing a discriminatory advertisement merely indicated an "intention" to discriminate but was not an act of discrimination in itself.[57] A similar approach was adopted by an employment tribunal in *GPS (Great Britain) Ltd v Clarke* (2007), which decided that only a claimant who had actually been subject to less favourable treatment could bring a legal claim for discrimination in response to an advert that discriminated on the basis of age. Courts and tribunals could interpret the direct discrimination provisions of the EqA and the Northern Irish provisions to cover situations where individuals are deterred from applying for a post in order to ensure conformity with *Feryn*, but in view of the decisions in *Hartup* and *GPS* it is not clear that the Act actually delivers on the assertion made by the Explanatory Notes and it would be preferable to have greater clarity in the legislation in the form of explicit provisions that ensure conformity with the *Feryn* decision.

Discriminatory job advertisements, whether published by the potential employer or circulated by a third party publisher, are explicitly prohibited under Northern Ireland's legislation on race, disability and religion/ belief: reg. 29 RRO 1997; s.16B DDA, reg. 34 FETO. S16A of the DDA, for example, makes it unlawful to publish or cause to be published an advertisement inviting applications for (amongst other things) "employment, promotion or transfer of employment" if it indicates "or might reasonably be understood to indicate" that an application will or may be determined to any extent by reference to the applicant not being disabled or not having any particular disability. An "advertisement" for this purpose includes every form of advertisement or notice, whether to the public or not (s.16B(6)). The advertisement will also be unlawful if it suggests reluctance to make reasonable adjustments to accommodate an applicant's disability. The power to take legal action against

[57] [1994] IRLR 390.

discriminatory advertisements is vested in the Equality Commission for Northern Ireland (ECNI).

The RRO, DDA and FETO provide a defence for third party publishers which they can prove that, in publishing an advertisement, they placed reasonable reliance on a statement about the lawfulness of the advertisement made by the person who placed it. They also make it an offence for a person knowingly or recklessly to make a false or misleading statement about the lawfulness of an advertisement, carrying on summary conviction a fine not exceeding level 5 on the standard scale (currently £5 000 – approx. EUR 6 000).

Discriminatory statements have not been explicitly prohibited under UK discrimination law unless they amount to incitement to racial or religious hatred, harassment or direct discrimination (i.e. where an individual has been subject to “less favourable treatment” as a result of his or her possession of a protected characteristic).

c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

UK anti-discrimination legislation does not permit justification of direct discrimination except in relation to age: EqA, s.13(2); reg. 3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006.

Outside the scope of the anti-discrimination legislation, as noted above, direct discrimination under Article 14 ECHR can be justified. The approach, as with other Convention provisions, turns on proportionality, the test being whether the discriminator can show that a legitimate aim exists, and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

d) *In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

Neither the EqA nor the Employment Equality (Age) Regulations (NI) 2006 specify how the comparison is to be made. It is expected that the “but for” approach applied above will also be applied in the age context.

2.2.1 Situation Testing

a) *Does national law clearly permit or prohibit the use of ‘situation testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

UK law provides that, if a person has been subject to direct discrimination, then a claim can be brought under anti-discrimination legislation. There is no legal bar to "situational testing" being used as evidence across all the equality grounds to establish that direct discrimination is occurring, as long as a person has been subject to less favourable treatment. There is no legal definition of this term, nor are there are particular procedural conditions for its admissibility, or barriers to its use once its relevance has been established. One issue which would have arisen under the RRA and SDA, but which no longer applies as a result of the general genuine occupational requirement defence in Schedule 9 to the EqA, might have concerned the recruitment of people to carry out situation testing. Under the "list" approach to genuine occupational defences which characterised the earlier statutes it was not entirely clear that the recruitment of (say) a man and a woman, or an Asian and a White person, would have been lawful. That problem could still arise in Northern Ireland.

b) Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc.).

Possibly because of the uncertainty surrounding its legality, situation testing does not appear to be frequently used in the UK. There have been reports from time to time of such testing carried out for the purposes of television broadcasts but these are not commonplace.

The types of direct forms of discrimination that situation testing would be effective at identifying are less common now, and it can often be difficult to establish a clear case of direct discrimination using this method: it would be very unusual for example for a night-club or bar to maintain a full "colour-ban" or to exclude all of a particular group. Community groups do periodically use this method to put pressure on bars and night clubs that they feel are restricting entry to ethnic minority groups: often, its use may generate changes in practice that do not require litigation.

Disability rights groups use situational testing to some extent to assess compliance with the DDA (now EqA), and the CRE produced some internal guidance for its staff on the use of situational testing, including examples of where and when it could be used. The EHRC and the legacy commissions have, however, for the most part refrained from making use of situation testing, tending to take the view that it would be of limited practical use in the UK context and perhaps also be of limited evidential value.

c) Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Anti-discrimination lawyers do have concerns that introducing certain forms of situational testing evidence in certain situations may be problematic, as this evidence may be excluded on the grounds of irrelevance or unfairness in some cases, as has

apparently happened at the pre-trial stage in one unreported Scottish case.[58] This means that some caution exists about its use, but there are no actual procedural or legal barriers to the admissibility of relevant and probative situational testing evidence. The greater focus on situational testing in other European counties has resulted in the (now defunct) Commission for Racial Equality and anti-discrimination lawyers considering whether its use could become more common in the UK context, but some doubts remain about its usefulness and utility in current conditions in the UK (see below). Case-law from other countries has had little or no influence in this area.

d) Outline important case law within the national legal system on this issue.

There is little case-law on the use of "situational testing", and none that establishes any significant precedent. In *R (European Roma Rights Centre) v Chief Immigration Officer, Prague Airport*,[59] however, the House of Lords was willing to accept evidence obtained through situational testing, together with other forms of evidence, as relevant and admissible testimony.

2.3 Indirect discrimination (Article 2(2)(b))

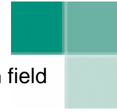
a) How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

The EqA provides (s.19) that:

> (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,
> (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…

Materially identical definitions apply in Northern Ireland to age and sexual orientation and, insofar as it overlaps with EU law, race and religion/ belief discrimination. Discrimination other than that falling within EU law (nationality or colour-related

[58] Information obtained by the author from the Commission for Racial Equality, July 2006.
[59] [2004] UKHL 55, [2005] 2 AC 1.



discrimination, for example, or race discrimination in the coercive function of the state, or religion/ belief discrimination other than in the context of employment/ occupation) falls to be considered according to an older definition which provides (RRO, art.3(1)(b)):

> A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but – (a) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (b) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (c) which is to the detriment of that other because he cannot comply with it.

Disability

The EqA prohibits indirect disability discrimination but the DDA, as it applies in Northern Ireland still, does not. Some failures to make reasonable adjustment may be comparable in effect to indirect discrimination but the scope of indirect discrimination, which under the Directive can be anticipatory, is wider than the provisions of the DDA.

The new, wider, definition of indirect discrimination contained in EqA and applicable in Northern Ireland to discrimination falling within the scope of EU law was introduced into UK legislation for purposes of compliance with the Directives. Nevertheless, this definition of indirect discrimination could be seen as narrower than that in the Directives since, unlike the Directives, it would not apply to disadvantage which could be anticipated before the provision, criterion or practice was actually applied. Courts and tribunals may be called upon to disregard the apparently narrow scope of UK law in this area to give effect to the provisions of the Directives.

Some commentators suggest that the UK definition of indirect discrimination is also more restrictive than that in the Directives because it requires evidence that there is a group defined by the particular characteristic (of which the affected person is a member) which is disadvantaged, while under the Directive indirect discrimination could occur when only one person defined by the particular characteristic was put at a disadvantage. For the application of this in practice see the decision in *Eweida v BA*, discussed in Annex 3.[60]

[60] [2010] ICR 890, [2010] IRLR 322.

The earlier and more restrictive definition that is still part of the RRO and FETO, and which still applies to those areas which are outside the scope of the Directives, appears not to be in line with the Directives.

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

The test for justification under the EqA requires that the provision, criterion or practice be shown to be "a proportionate means of achieving a legitimate aim". This has been criticized on the basis that it makes no reference to necessity but the courts will interpret the test in light of the Directives.

The CJEU interpretation of "justifiable" indirect discrimination in *Bilka-Kaufhaus GmbH v Weber von Hartz*[61] was adopted by the UK courts in the early 1990s in the application of earlier definitions of indirect discrimination: *Hampson v DES*.[62] Decisions such as *Azmi v Kirklees Metropolitan Council* (see Annex 3) saw the courts adopt a similar approach to the "appropriate and necessary" test contained in the 2000 Directives as was applied in *Bilka* and indirect discrimination cases under the "old" definitions.

A wide range of legitimate aims have been recognised in UK case-law over the years. Ensuring good education for children (*Azmi v Kirklees Metropolitan Council*),[63] respect for a school uniform policy (*X v Y)*,[64] control of costs and limiting financial exposure (*Secretary of State for Defence v Elias*)[65] are all examples.

Under the earlier definition that applies under the RRO on grounds of colour or nationality, or for activities falling outside EU law, and under Fair Employment and Treatment Order (FETO) for activities outside art.3(2B), the alleged discriminator must show that the requirement or condition in question is justifiable irrespective of the racial group/religious belief or political opinion of the person to whom it is applied. This express provision has been removed in more recent definitions but it is likely to be implicit within the concept of "legitimate aim": to take an example, practices amounting to indirect discrimination against white people might be justifiable on the basis that they served to reduce racial inequality.

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[61] Case 170/[1986] ECR 160.
[62] [1990] IRLR 302.
[63] [2007] ICR 1154, [2007] IRLR 484.
[64] [2007] EWHC 298 (Admin) (21 February 2007).
[65] [2006] EWCA Civ 1293, [2006] IRLR 934.

Insofar as the practice was applied taking into account the racial group of those to which it was applied it would in fact amount to direct race discrimination (since the essence of indirect discrimination is that it is the by-product of a rule of general application).

It is very unusual for the courts to categorise an aim as illegitimate: see however the decision of the House of Lords in *Ahsan v Watt (formerly Carter)*[66] in which the aim of the Labour Party to select a candidate who was not closely linked to the Pakistani community was treated as illegitimate.

Controversy has surfaced from time to time about whether the weight accorded to legitimate aims is greater than that sometimes accorded to the equality principle. This was certainly seen as a major concern in the 1970s and 1980s, where court decisions were often criticised as downplaying the importance of equality. However, higher court decisions in recent years have seen considerable emphasis placed on the importance of equality as a general principle of law and as a core human right: see e.g. the decisions in *Amicus* and *Secretary of State for Defence v Elias* (both in Annex 3).[67] There has been a notable shift in the jurisprudence of the UK courts on this point over the last decade, which is also reflected in human rights cases under the ECHR.

c) Is this compatible with the Directives?

See response to (a) above. In addition, in relation specifically to justification, the UK definition of justification, refers to "a proportionate means" of achieving a legitimate aim which may be interpreted as imposing a less rigorous test than the Directive's requirement to show that the provision, criterion or practice, as a means of achieving a legitimate aim, is both "appropriate and necessary". Having said this, the UK courts will probably be able to give effect to the Directive's requirements by interpreting the test provided for by the Regulations in line with that specified in the Directive. Thus far, no clear examples of divergent case-law on this point can be identified.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

Section 19 EqA simply refers to age as one of the protected characteristics in respect of which the prohibition on age discrimination applies. Section 5 of that Act provides that "In relation to the protected characteristic of age (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group. A reference to an age group is a reference to a group of persons defined by reference to (2) age, whether by reference to a particular

[66] [2008] IRLR 243, [2008] 1 AC 696.
[67] [2007] ICR 1176, [2004] IRLR 430 and [2006] EWCA Civ 1293, [2006] IRLR 934 respectively.

age or to a range of ages. It follows that complaint can be made of a provision criterion or practice which disadvantages (or would disadvantage) the “over 60s”, “those aged between 50 and 65” or the “under 25s”.

The NI Age Regulations 2006 define indirect age discrimination as occurring (reg 3) where an apparently neutral provision, criterion or practice puts or would put persons of a certain age group at a particular disadvantage compared with other persons; a person of that certain age group suffers that disadvantage; and there is no objective justification for the provision, criterion or practice.[68] Reg 3(3), like s.5 EqA, defines “age group” as a “group of persons defined by reference to age, whether by reference to a particular age or a range of ages”. Aside from this, the Regulations do not specify how a comparison is to be made.

e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

Differences in treatment based on language can constitute indirect discrimination on the grounds of racial or ethnic origin, if the difference in treatment cannot be shown to be objectively justified. Several cases have established this. *Toor v Air Canada*, for example, concerned a woman of South Asian ethnic origin for whom English was not a first language, who was employed by Air Canada in its catering section at Heathrow.[69] When the catering section was sold to an external company, Air Canada identified a number of posts which would continue to be filled by Air Canada employees. The selection process for these posts involved a 15 minute written test with 20 questions in English. Mrs Toor, who had four years’ experience with the company, failed the test and claimed that she had been subject to indirect race discrimination. She won her case and was awarded damages. The Employment Tribunal held that, even though the discrimination in question was completely unintentional, a written test in English was one which considerably fewer people of her racial group could successfully pass than was the case with the ethnic groups to which the other employees belonged. She, with other members of her ethnic group, had been placed at a substantial disadvantage, and the application of the English language criterion could not be objectively justified given the nature of the job which did not require excellent English.

2.3.1 Statistical Evidence

a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Statistical evidence may be used as evidence from which the existence of indirect discrimination can be inferred, as long as it is relevant and of real evidential value in

[68] See *Coming of Age*, (London: DTI, 2005), p. 23.
[69] *Sunner & Ors v (1) Air Canada and (2) Alpha Catering Services* [1998] IT/2303121/97.

the circumstances. There exist no restrictions in UK law on the use of such statistics, which are subject only to standard data protection requirements.

b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

The use of statistical evidence is common, especially in race and gender cases where its utility may be greatest. There are no real obstacles to the use of statistical evidence in the courts, if the evidence is probative and relevant: the influence of European sex discrimination law is strong here, as is experience from the USA and Commonwealth countries. However, of course, there may be circumstances where lawyers or applicants face difficulty in finding relevant statistical evidence.

c) *Please illustrate the most important case law in this area.*

In *West Midlands Passenger Transport Executive v Singh*,[70] the Court of Appeal laid down extensive guidance as to the use of statistics in race discrimination cases. Statistical evidence is not conclusive and definite proof by itself but, in the absence of a satisfactory explanation of clear-cut statistical disadvantage, an inference of discrimination can be established depending upon the circumstances.

In the sex discrimination case of *London Underground v Edwards (No 2)*, the Court of Appeal ruled that the tribunal was entitled to take into account national statistical patterns that indicated that women had greater primary care responsibility for children than men in general, and that such account could be taken of relevant statistics across all the grounds covered by the Directives.[71] See also *CRE v Dutton*[72] and *Perera v Civil Service Commissioners*.[73]

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

There are no national rules that restrict data collection in respect of any of the five grounds, although organisations are subject to data protection requirements that prevent the collection and retention of data in a form that would identify specific

[70] [1988] IRLR 186, [1988] ICR 614.
[71] [1999] ICR 494, [1998] IRLR 364.
[72] [1989] QB 783, [1989] IRLR 8.
[73] [1983] ICR 428, [1983] IRLR 166.

individuals. Individuals also can refuse to reveal personal data.[74] Many employers collect data on the ethnic composition of their workforce, and this practice is becoming more common for disability and age. It is still rare for data on sexual orientation and religious belief to be collected, although certain organisations have introduced some data collection in these areas, with considerable caution and sensitivity. The position in Northern Ireland is different: see below.

UK anti-discrimination law can require that statistical data be produced in certain circumstances. Before proceedings have commenced a claimant can, under the UK's anti-discrimination legislation, ask an alleged discriminator for answers to specific questions set out in a questionnaire format. Replies to the questionnaire are admissible in evidence.[75] A failure to reply, or inadequate replies, may give rise to an inference of discrimination.[76] The production of evidence can also be ordered to be disclosed by a court or tribunal during the proceedings of a case.

Through all these different means, statistical data can be ordered to be disclosed for the benefit of a complainant. A tribunal or court may, however, refuse a request for disclosure of statistical evidence if compliance would require the employer to provide material that is not readily available, or to begin a process of data collection that would add unnecessarily to the length and cost of a hearing. An employer can also refuse to provide statistical evidence if it is covered by legal professional privilege in which case no inferences of discrimination would be drawn. Confidentiality is not a defence to disclosure for the purposes of legal proceedings and the Data Protection Act permits disclosure in this context but the degree of confidentiality/ sensitivity of particular information may be a factor which a tribunal will take into account in determining whether disclosure is proportionate to the case.

The collection and publication of statistics by public authorities is sometimes required by law. In Northern Ireland, the Fair Employment Act 1989 imposed a positive duty on employers with a workforce of ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce. This "employment equity" duty has been extended and modified by FETO. Employers with ten or more employees are required to monitor annually the "community composition" of their workforce, and every three years to review their recruitment, promotion and training practices. The ECNI monitors compliance with these duties: the Commission may report employers who fail to comply to the Secretary of State for Northern Ireland,

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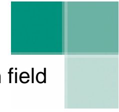
[74] There is little data on why individuals choose to do this, or what ethnic groups are more likely to refrain from revealing data. The extent to which individuals in a particular workplace refuse to reveal personal data varies considerably.

[75] See now s.138 Equality Act 2010. There are equivalent provisions in Northern Ireland for discrimination on the various grounds. The Coalition Government has recently confirmed (March 2013) that it intends to repeal the provisions establishing statutory questionnaires. Tribunals are and will remain able, however, to order that written answers be given to specific questions before proceedings commence, and can make this order either at the request of one of the parties to the action, or on its own authority.

[76] See Employment Tribunal Rules rule 4(3).



who may bar such employers from bidding for public sector contracts (a major source of business revenue in Northern Ireland).

In GB, there is a general statutory duty upon British public authorities to eliminate unlawful discrimination related to sex, gender reassignment, pregnancy and maternity, race, disability, age, religion or belief and sexual orientation and to promote equality of opportunity related to each of these "protected characteristics". As part of giving effect to this duty, public authorities are often required to monitor the composition of their workforce and the relevant pools of service users. How authorities collect statistics and data may vary from ground to ground, however.

Standard practice is to use the categories of a) White, with options for White British, White Irish, White Other; b) Mixed, with options to tick White and Black Caribbean, White and Black African, White and Asian or any other mixed background; c) Asian or Asian British, with options for Pakistani, Bangladeshi, Indian, Other Asian background; d) Black or Black British, with options for Black African, Black Caribbean, or Other Black background; e) Chinese or Other Ethnic, and f) mixed categories. It is beginning to be more common for membership of the travelling community or Roma ethnicity to be included in these categories.

Prior to its absorption into the Equality and Human Rights Commission, the Commission for Racial Equality published detailed guidance as to how public authorities should conduct monitoring of the ethnic composition of their workforce and service users, and what ethnic categories should be used. That guidance is no longer available from the EHRC which merely suggests that employers

> "can monitor information about:
>
> - How many people with a particular protected characteristic apply for each job, are shortlisted and are recruited.
> - How many people in the workforce have a particular protected characteristic and the levels within the organisation that they are employed at.
> - The satisfaction levels of staff with a particular protected characteristic".
>
> There may be other equality-related areas you might wish to monitor and record. For example, if there has been a particular equality-related issue in your organisation, it might be useful to monitor the levels of internal complaints and/or the number of staff using the grievance or harassment and bullying procedures. Some larger organisations choose to monitor this

type of information as a matter of course, to check if any equality-related issues are a cause for concern".[77]

It is perhaps surprising that, after decades during which monitoring was best practice, and 10 years during which it was required, in connection with race, of public authorities, the guidance issued by the Commission fails even to make it clear that monitoring is recommended for private sector employers, mandatory for public bodies.

In NI, section 75 of the Northern Ireland Act 1998 imposes a duty on specified public authorities to have "due regard to the need to promote equality of opportunity" across all the equality grounds. This can require the collection of data, including data on religious belief, age, disability and the other equality grounds. The ECNI has issued guidance on monitoring and may enforce compliance with this duty.

Statistics are regularly used in both the public and private sectors to design positive action schemes (within the limits of UK law). The positive duties outlined above require the collection of data and its use to formulate positive action planning. Private bodies also are increasingly using data to develop positive action on a voluntary basis.

The data collected is taken from equal opportunities monitoring, which is commonplace now in the UK: this involves the use of voluntary monitoring mechanisms, whereby job applicants and individuals applying for promotion, service users and others provide anonymous data on their ethnic background, gender, disabled status, age and other indicators. This information is scrutinised and conclusions drawn about where, when and how positive action needs to be taken.

Both the EHRC and ECNI use statistical evidence in their research, promotional and enforcement activity, in particular evidence obtained from public sector bodies under the positive equality duties (and from private sector bodies under the NI FETO duty).

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The EqA provides (section 26) that:

(1) A person (A) harasses another (B) if—

[77] Good equality practice for employers: equality policies, equality training and monitoring, http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employers_good_equality_practice.pdf, 13 (accessed 6 March 2012).

(a) A engages in unwanted conduct related to a relevant protected characteristic [age, disability, gender reassignment, race, religion or belief, sex or sexual orientation], and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

A similar definition of harassment applies in Northern Ireland under the RRO, DDA, FETO and age and sexual orientation Regulations, insofar as the conduct falls within the scope of EU law:

(1) A person ('A') subjects another person ('B') to harassment where, on racial grounds/on grounds of sexual orientation/religion, disability or belief/age, A engages in unwanted conduct which has the purpose or effect of –
(a) violating B's dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) Conduct shall be regarded as having the effect specified in paragraph (a) or effect (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

Until the legislation giving effect to Directives 2000/43 and 2000/78 came into force there was no definition of harassment in UK law. From the 1980s on, the courts gradually recognised the consequences of racial (and sexual) harassment and accepted that such harassment was a form of conduct that Parliament, in passing the anti-discrimination laws had intended to prohibit. In 1986 the Scottish Court of Sessions, as a Court of Appeal, established that sexual harassment could constitute

direct discrimination.[78] In the context of employment sexual harassment could constitute a *detriment* and so be actionable as a form of employment-related discrimination. In a number of cases that followed, the nature of the harassment was regarded as sufficiently race-specific, or sex-specific, so that the complainant did not need to point to a comparator of a different racial group, or different sex, to demonstrate that the treatment amounted to racial or sexual discrimination. In 2003, however, the House of Lords overturned these earlier decisions, ruling that harassment could only fall within the legislative prohibitions on direct discrimination if it involved less favourable treatment than a comparator.[79] This requirement is now of relevance only in Northern Ireland insofar as the harassment falls outside the scope of EU law (where, for example, it relates to nationality, or takes place outside the broad area of employment/ occupation and is related to disability).

Case law has defined other aspects of racial/sexual harassment. It has been established, for example, that a court can look at a number of incidents that form a course of conduct based on race/sex; on the other hand a one-off event of sufficient seriousness can amount to racial/sexual harassment and to a detriment.

The Regulations transposing the 2000 Directives provided (and still provide in NI) that unwanted conduct shall be regarded by any court or tribunal as having the effect in 1(a) or 1(b)" (i.e., as violating the complainant's dignity or resulting in a humiliating, intimidating etc environment for him or her) "only if… it should reasonably be considered as having that effect. This caused some concern as it was thought that tribunals might fail adequately to take into account the perception of the victim (a subordinate woman in a strongly male, sexualised, working environment might, for example, have a very different view of what is "reasonable" in this context than an employment judge). Given the fact that previous caselaw (in particular *Reed and Bull Information Systems Ltd v Stedman*)[80] placed great emphasis on the victim's perception there was some concern that the transposition of the Directives might have breached the principle of non-regression.
The caselaw did not indicate that such problems actually arose in practice but the EqA uses a different formulation, 26(4) stating that in determining whether unwanted conduct had the effect of violating dignity etc the tribunal must take into account the perception of the victim *and* "the other circumstances of the case" as well as "whether it is reasonable for the conduct to have that effect."

The EqA refers to unwanted conduct "related to a relevant protected characteristic", in line with the Directives' approach. NI legislation, as set out above, refers by contrast to unwanted conduct "on grounds of" the protected characteristic. Concerns over the conformity of NI law with the Directives were allayed with the decision of the Court of Appeal in *English v Thomas Sanderson Blinds Ltd* (Annex 3) in which,

[78] *Strathclyde Regional Council v Porcelli* [1986] IRLR 134.
[79] *Macdonald v Advocate General for Scotland and Pearce v Governing Body of Mayfield Secondary School* [2003] UKHL 34, [2003] IRLR 512.
[80] *Reed and Bull Information Systems Ltd v Stedman* [1999] IRLR 299.

dealing with the pre-Equality Act definition (still applicable in NI) the Court accepted that the subjection of a man who was not gay, and who was known by his harassers not to be gay, to homophobic abuse, amounted to harassment “on the grounds of” the applicant’s sexual orientation, the link between the behaviour and his real or imagined sexual orientation being sufficient to bring the complaint within the scope of the 2003 Sexual Orientation Regulations (now EqA).[81]

Harassment in the form of words or physical acts that demonstrate hostility against LGB persons will be caught by s.26 EqA and the equivalent provision of NI law as unwanted conduct “related to” or “on grounds of” sexual orientation, whether or not it involves unwelcome sexual advances. Such advances, whether or not “related to” or “on grounds of” the victim’s sex or sexual orientation, will amount to harassment of a sexual nature (see EqA, s.26(2): NI’s Sex Discrimination Order contains an equivalent provision).

As above, the express statutory prohibition on harassment does not apply in NI to conduct falling outside the scope of EU law though in such cases harassment may still amount to comparator-based direct discrimination.

The EqA does not apply the prohibitions on harassment related to sexual orientation or religion/ belief in the provision of services and the exercise of public functions, this as a result of uncertainty as to what will constitute harassment in this context and, in particular, when religious evangelisation during the provision of goods and services would amount to “harassment”. Nor, in NI, does legislation regulate harassment on grounds of religion or belief in the provision of services or the exercise of public functions. Reg. 3(3) of the Equality Act (Sexual Orientations) Regulations (Northern Ireland) 2006, in its original form, regulated harassment on the ground of sexual orientation in the provision of goods and services. In *Re The Christian Institute & Ors*, Weatherup J, in the Northern Ireland High Court, took the view that that provision was compatible with Convention rights including those protected by Article 9 (freedom of religion) and Article 10 (freedom of expression).[82] Because, however, the government had failed to adhere to procedural requirements in the consultation stage prior to the introduction of the Regulations, the harassment provisions were set aside and now have no legal effect.

The current situation, therefore, is that there is no express prohibition of harassment on the grounds of sexual orientation or religion/ belief in the UK in the context of the provision of goods or services or the exercise of public functions but much harassment will nevertheless qualify as discriminatory treatment under this legislation.

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[81] [2009] ICR 543, [2009] IRLR 206.
[82] [2007 NIQB 66 (11th September 2007).

Criminal offences of harassment and their relationship to discrimination falling within the scope of the Directives.

Harassment can, of course, take various forms, from physical assault to offensive banter. Many of the different forms of conduct that could constitute harassment are prohibited under criminal law in the UK. GB's 1986 Public Order Act, for example, creates offences of inciting racial and religious hatred and offences concerned with causing harassment, alarm or distress or creating fear or provoking violence (Part I). And the Public Order (Northern Ireland) Order 1987 includes offences of inciting hatred or arousing fear on grounds of race or religious belief, sexual orientation and disability.[83]

The Protection from Harassment Act 1997 and the Protection from Harassment (Northern Ireland) Order 1997 also prohibit harassment both as a tort and a criminal offence. Harassment is not specifically defined but requires conduct (including speech) on at least two occasions, and covers conduct which alarms the victim or causes them distress.

The criminal offence is punishable by 6 months imprisonment and/or a fine. In *Majrowski v Guy's and St Thomas's NHS Trust* (Annex 3) the House of Lords ruled that the Protection from Harassment Act 1997 could apply to workplace bullying and harassment, and that an employer could be held to be vicariously liable and be ordered to pay damages for harassment of one worker by another, as long as the bullying was closely linked to performance of the duties of the job.[84] Such cases would be brought in the County Court, High Court or (in the case of a prosecution of a criminal matter) the Crown Court. More recently, in *Veakins v Kier Islington Ltd*, the Court of Appeal suggested that it was more appropriate for an employee to challenge "high-handed or discriminatory misconduct by or on behalf of an employer … in the employment tribunal rather than by recourse to a civil claim for harassment and damages", though the Court allowed an appeal against the dismissal of a claim brought under the 1997 Act.[85] The Court pointed out that the Act had been directed against stalking but accepted that it did not by its language exclude workplace harassment, though "It should not be thought from the present unusually one-sided case that stress at work would often give rise to liability for harassment" and "It was far more likely that in the great majority of cases, the remedy for highhanded or discriminatory misconduct by or on behalf of an employer would be more fittingly in the employment tribunal. In *Marinello v City of Edinburgh Council*,[86] a claim was brought under the 1997 Act in relation to alleged verbal abuse and bullying over an extended period, after which the claimant was absent from work for almost two years when a further incident of bullying involving a raised fist was alleged against one of the perpetrators outside the work context. The Scottish court accepted that a gesture

[83] Amended by the Criminal Justice No.2 (NI) Order 2004.
[84] [2006] ICR 1199, [2006] IRLR 695.
[85] [2010] IRLR 132.
[86] [2010] IRLR 778.

with a clenched fist was sufficiently threatening to fall within the Act but did not accept, given the lapse of time between the alleged incidents, that there was a "course of conduct" as required by the Act (the earlier incidents being out-of-time). In *Rayment v Ministry of Defence* the High Court allowed a claim under the 1997 Act from a woman driver who used a military transport restroom which was decorated with pornographic material which was replaced after she removed it, and remained in place despite her complaint.[87] The Court accepted that the material was "offensive" and that the defendant was responsible for ensuring that it was not present in the room. The defendant's failure amounted to "oppressive and unacceptable" behavior which, on the facts, it ought to have known amounted to harassment of the claimant as required by the act.

The Crime and Disorder Act 1998, as amended by the Anti-Terrorism, Crime and Security Act 2001, creates racially and religiously aggravated offences (including offences of assault, harassment and criminal damage) which carry higher sentences than the same offences without aggravation. It also provides that in sentencing for any other offences which are racially or religiously aggravated, the court shall may impose a more severe sentence than would otherwise apply.

The Criminal Justice Act 2003 further provides that, in sentencing for offences aggravated on grounds of disability or sexual orientation, the Court must treat the aggravation as a factor increasing the sentence. And the Criminal Justice (No.2) (Northern Ireland) Order 2004 requires a court, in considering the sentence for any offence, to treat as serious any offences which are aggravated by hostility based on the victim's membership (or presumed membership) of a group defined by race, religion or sexual orientation or based on a disability or presumed disability of the victim (note that age is not covered). This would apply to sentencing under the Protection Against Harassment (Northern Ireland) Order 1997 (see above), when the offence of harassment was connected with one of the specified grounds.

b) Is harassment prohibited as a form of discrimination?

An important feature of the Directives and the implementing legislation is that harassment is prohibited, not as a form of direct discrimination, but as a separate form of unlawful conduct. The EqA and the NI provisions which explicitly regulate harassment adopt this approach. In practical terms this means that, by contrast with the position which developed in the earlier case law, the statutory definition of harassment does not require a comparator.

As noted above, the current situation is that there is no express prohibition of harassment on the grounds of sexual orientation or religion/ belief in UK legislation in the context of the provision of goods and services or the exercise of public functions. In such cases, as (in NI) where the harassment falls outside the context of EU law, it

[87] [2010] IRLR 768.

will be actionable under the anti-discrimination legislation only if it amounts to "discrimination" on a comparator-based approach.

c) *Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

The EHRC has issued Codes of Practice which discuss the application of the EqA in the context of employment, goods and services etc. Chapter 7 of the Employment Code of Practice deals with harassment, discussing the meaning of the concept and giving examples of where conduct might be "unwanted", where it would be "related to" a protected ground, etc. Thus:[88]

> "**Example:** In front of her male colleagues, a female electrician is told by her supervisor that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the electrician would not have to object to it before it was deemed to be unlawful harassment…
>
> **Example:** During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her…
>
> **Example:** A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability…
>
> **Example:** A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamaphobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion….
>
> **Example:** A manager racially abuses a black worker. As a result of the racial abuse, the black worker's white colleague is offended and could bring a claim of racial harassment…
>
> **Example:** A shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for a promotion which she

[88] http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/, accessed 5 April 2013.

believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim for harassment…

Example: A female worker is asked out by her team leader and she refuses. The team leader feels resentful and informs the Head of Division about the rejection. The Head of Division subsequently fails to give the female worker the promotion she applies for, even though she is the best candidate. She knows that the team leader and the Head of Division are good friends and believes that her refusal to go out with the team leader influenced the Head of Division's decision. She could have a claim of harassment over the Head of Division's actions…"

d) *What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin, but please also look at the other grounds of discrimination) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

Under all of the UK anti-discrimination laws, except in cases where criminal liability is at issue, an employer may be vicariously liable for the harassing or discriminatory acts of an employee, if these acts are committed during the course of their employment.[89] This applies regardless of whether the act of harassment or discrimination is in the context of employment or provision of goods and services, education, housing etc. The legislation offers a limited defence if the employer can prove that s/he took reasonably practicable steps to prevent that employee from committing the unlawful discriminatory acts.[90]

In *Jones v Tower Boot* [1997] IRLR 168 the Court of Appeal ruled that s.32 RRA (now s.109 EqA) should be given a purposive interpretation, extending vicarious liability for discrimination beyond the-then scope of employers' common law liability in tort.

The EqA also provides (s.40(2) & (3)) that employers are liable for harassment by third parties where they "know[] that [the worker] has been harassed in the course of [his or her] employment on at least two other occasions by a third party … whether the third party is the same or a different person on each occasion", and "failed to take such steps as would have been reasonably practicable to prevent the third party from doing so". This applies only in relation to liability for employment-related harassment. The Coalition Government has recently confirmed its intention to repeal this provision from the Act. As we see in Annex 3, however, in *Sheffield City Council v Norouzi* the

[89] Equality Act s.109; DDA s 58, RRO art. 32, Fair Employment and Treatment Order art.36, NI Sexual Orientation Regulations reg. 24; NI Age Regs, reg. 26.
[90] See eg Equality Act 2010 s.109(4).

EAT ruled that a claimant could rely on the Race Directive to hold his employer liable for harassment by a third party where the employer had failed to take adequate steps to protect an Iranian social worker from the abusive conduct of a child in care.[91]

2.5 Instructions to discriminate (Article 2(4))

a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

Section 111 EqA provides that:

> **111 Instructing, causing or inducing contraventions**
>
> (1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).
> (2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.
> (3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.
> (4) For the purposes of subsection (3), inducement may be direct or indirect…
> (7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

Both instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited in NI in the case of religious belief or political opinion. Proceedings may be brought whether or not the instruction or inducement results in an act of discrimination by B and proceedings may be brought by B and/or C, subject to a requirement of detriment, and/or by the Commission. Instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited on all the other protected grounds in NI, but only in the case of religion/ political belief and age can an individual bring enforcement action. In other cases the Equality Commission alone can act. Having said this, there is authority that a person who is instructed to discriminate against another can bring enforcement proceedings against the instructor where (as in *Weathersfield Ltd v Sargent*, where the instruction was issued by an employer)[92] the instruction amounts to the imposition of a detriment on the person to whom it is issued. There may also be some circumstances where an action may be brought by a private individual against an employer for instructing an employee to discriminate, via the provisions of UK law that make employers liable for the misdeeds of their employees, and/or those that prohibit aiding unlawful acts.

[91] [2011] EqLR 1039, [2011] IRLR 897.
[92] [1999] IRLR 94.

Although there are very few reported cases of enforcement action by the equality commissions, their power to bring proceedings for instructions to discriminate has operated as a useful deterrent. For some years there was a good working relationship between the Commission for Racial Equality (CRE) and JobCentrePlus (part of the Department for Work and Pensions); if an employer instructed a job centre to discriminate on racial grounds in selecting potential employees, the job centre would not only refuse to comply but would refer the employer to the CRE who would consider enforcement action. In some instances the threat of proceedings by the CRE was sufficient to secure withdrawal of discriminatory instructions.

b) *Does national law go beyond the Directives' requirement? (e.g. including incitement)*

As above. The prohibition in the Equality Act 2010 extends to causing and inducing as well as instructing.

c) *What is the scope of liability for discrimination)? Specifically, can employers or (in the case of racial or ethnic origin) service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

See 2.4(d) above. Vicarious liability applies in respect of instructions to discriminate as it applies to discrimination and harassment more generally.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

In Northern Ireland duties of reasonable adjustment are found in the DDA (s.4A), as amended by the Disability Discrimination Act 2005. The provision imposes a parallel set of [subtly different] duties on public and private sector employers[93] to make reasonable adjustments in relation to their disabled employees and job applicants.

[93]The DDA duty to make reasonable adjustments also applies to contract workers, office holders, partnerships, barristers and advocates, trade unions and professional bodies, qualifications bodies, practical work experience and occupational pension schemes.

Similar, but anticipatory, duties exist in the context of the provision of goods and services, as well as in education. The duty arises whenever any physical feature of premises, or any provision, criterion or practice applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with people who are not disabled. In these circumstances, the employer (or potential employer in respect of a job applicant) must take such steps as can be considered reasonable in all the circumstances of the case in order to prevent that disadvantage. When an employee is placed at substantial disadvantage by arrangements or physical aspect of premises, the onus is on the employer to consider whether a reasonable adjustment can be made to overcome this disadvantage.

The House of Lords took the view, in *Archibald v Fife County Council*,[94] that the effect of the arrangements in question upon the disabled person could be compared with their effect upon the non-disabled persons subject to the same arrangements, but who, had not been subject to any disadvantage. This would clarify if a "substantial disadvantage" had occurred.[95] This approach was adopted by the Court of Appeal in *Smith v Churchills Stairlifts plc*,[96] in which a disabled applicant for a sales job was dismissed from a training course as he was unable to carry a radiator cabinet that the firm wished their sales staff to display as a sample to potential customers. At first instance an employment tribunal held that the claimant had not been placed at a "substantial disadvantage", as his inability to carry the cabinet would have been shared by the majority of the general population. The Court of Appeal, however ruled that the claimant had been placed at a disadvantage by this arrangement.

The Court took the view that the appropriate comparison was not between the impact of the requirement on the claimant and the general population at large, but rather between its impact on the claimant and that on the nine other applicants who, unlike the claimant, had been accepted for the training course.

Employers do not have a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that a person is disabled.

The DDA (s. 18B(2)) includes some examples of steps an employer may need to take in order to comply with a duty to make reasonable adjustments; these include making physical adjustments to premises; allocating some duties to another employee; transferring the person to fill an existing vacancy, being flexible with regard to working hours or place of work; allowing absence from work for rehabilitation, treatment and assessment; giving or arranging special training; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or interpreter;

[94] [2004] UKHL 32.
[95] 'Substantial' is described by the Employment Code of Practice as meaning something 'not minor or trivial': see §5.11.
[96] [2005] EWCA Civ 1220, [2006] ICR 524, [2006] IRLR 41.

and providing supervision or other support. The EqA contains no such list. As discussed above at 0.3, in *Archibald v Fife County Council*[97] the House of Lords decided that the obligation to make reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

In NI the DDA sets out a list of factors which should be considered in determining whether in the particular circumstances it is reasonable for the employer[98] to have to make a particular adjustment.[99] The factors it lists can be summarised in general as follows:

- Effectiveness in preventing the particular disadvantage;
- Practicability;
- Financial and other costs which would be incurred and extent of any disruption caused;
- The employer's financial or other resources;
- The availability to the employer of financial or other assistance (for example government grants under *Access to Work* scheme);
- The nature of the employer's activities and size of its undertaking.

Increased risk to the health and safety of any person is also a relevant factor.[100] A "reasonable accommodation" has been defined as one which does not amount to a "disproportionate burden" for an employer. In *Morse v Wiltshire CC*[101] the EAT held that a tribunal must apply an objective test in deciding whether a particular accommodation was "reasonable" in the circumstances. Deciding what constituted a "disproportionate" burden is a task for the tribunal, which should pay considerable attention to what factors the employer has considered or failed to consider, scrutinise any explanation for not accommodating the disabled person in question, and reach its own decision on what, if any, steps were reasonable.

In *Smith v Churchill Stairlifts*[102] the Court of Appeal concluded that an employer's reason for refusing to make an adjustment, if genuinely held and material and substantial, could be sufficient justification for less favourable treatment of a disabled person, but would not constitute sufficient justification for a failure to make reasonable accommodation if the employer had failed to give real consideration to the possibility of altering the problematic arrangements. And in *O'Hanlon v Commissioners for HM Revenue and Customs*[103] the Court of Appeal held that it would be rare that an employer would be obliged under the requirement to make

[97] [2004] UKHL 32, [2004] ICR 954; [2004] IRLR 651.
[98] Or the person responsible in the employment related situations mentioned in the above footnote.
[99] DDA s.18B(1).
[100] Management of Health and Safety at Work Regulations 1999.
[101] [1998] ICR 1023, [1998] IRLR 352.
[102] [2005] EWCA Civ 1220, [2006] ICR 524, [2006] IRLR 41.
[103] [2007] ICR 1359, [2007] IRLR 404.

reasonable adjustment to continue to pay full sick leave allowance to a person who was sick for a long time period as a result of their disability.

In GB the duty to provide reasonable accommodation is now imposed by s.20(2) EqA which provides that "[t]he duty comprises the following three requirements", s.20 going on to provide as follows:

> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty…
> (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
> (a) removing the physical feature in question,
> (b) altering it, or
> (c) providing a reasonable means of avoiding it.
> (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
> (a) a feature arising from the design or construction of a building,
> (b) a feature of an approach to, exit from or access to a building,
> (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
> (d) any other physical element or quality.
> (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service…

The EqA does not further specify what is to be taken into account in determining the question of reasonableness (by contrast with the DDA, discussed above). We saw in *Cordell v Foreign and Commonwealth Office*, discussed in Annex 3, an example of a case in which the cost of the adjustment provided was a significant factor in the determination that such adjustment was not reasonable. The caselaw developed under the DDA, also discussed above, is likely to remain relevant and the EHRC has issued guidance which provides as follows:

> Various factors influence whether a particular adjustment is considered reasonable and the responsibility for making the decision about reasonableness rests with you as the employer.
> When deciding whether an adjustment is reasonable you can consider:
>
> - how effective the change will be in avoiding the disadvantage the disabled person would otherwise experience
> - its practicality
> - the cost
> - your organisation's resources and size
> - the availability of financial support.
> Your overall aim should be, as far as possible, to remove or reduce any disadvantage faced by a disabled worker or job applicant.
>
> Issues to consider:
>
> - You can treat disabled people better or 'more favourably' than non-disabled people and sometimes this may be part of the solution.
> - The adjustment must be effective in helping to remove or reduce any disadvantage the disabled person is facing.
> If it doesn't have any impact then there is no point.
> - In reality it may take several different adjustments to deal with that disadvantage but each change must contribute towards this.
> - You can consider whether an adjustment is practical. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn't mean it can't also be reasonable. You need to balance this against other factors.
> - If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.
> - Your size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for you to make it if you have substantial financial resources. Your resources must be looked at across your whole organisation, not just for the branch or section where the disabled person is or would be working. This is an issue which you have to balance against the other factors.
> - In changing policies, criteria or practices, you do not have to change

the basic nature of the job, where this would go beyond what is reasonable.

- What is reasonable in one situation may be different from what is reasonable in another situation, such as where someone is already working for you and faces losing their job without an adjustment, or where someone is a job applicant. Where someone is already working for you, or about to start a long-term job with you, you would probably be expected to make more permanent changes (and, if necessary, spend more money) than you would to make adjustments for someone who is attending a job interview for an hour.
- If you are a larger rather than a smaller employer you are also more likely to have to make certain adjustments such as redeployment or flexible working patterns which may be easier for an organisation with more staff.
- If advice or support is available, for example, from Access to Work or from another organisation (sometimes charities will help with costs of adjustments), then this is more likely to make the adjustment reasonable.
- If making a particular adjustment would increase the risks to the health and safety of anybody, including the disabled person concerned, then you can consider this when making a decision about whether that particular adjustment or solution is reasonable. But your decision must be based on a proper assessment of the potential health and safety risks.

The Commission's Code of Practice on Employment sets out further detailed guidance. It is clear that the availability of funding, whether from the government or elsewhere, would be relevant to the reasonableness of possible steps to accommodate.

b) Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The definition of disability does not change according to whether an alleged failure to make reasonable adjustments, or any other form of disability discrimination, is at issue.

c) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

Yes, see section (a) above. Under the EqA a similar duty applies across the material scope of the Act though the details of application differ according to the context (work, provision of services, education, premises etc), those details being set out in different schedules to the Act. One significant variation concerns whether the duty is anticipatory. In employment it applies only in relation to employees and actual and prospective applicants etc (ss20, 39 and Schedule 8 Part 2 EqA), whereas in relation to access to services and the operation of public functions it is anticipatory: it is owed to disabled persons generally (service providers are obliged to make reasonable adjustments where their provisions, criteria or practices, premises or failure to provide auxiliary aids would put disabled persons generally at a substantial disadvantage by comparison with others, to take reasonable steps to avoid that disadvantage: ss20, 20 and Schedule 2 §2) EqA).

Under the DDA, which applied previously in GB and still applies in Northern Ireland, the duty to make reasonable adjustment differed more according to context, adjustments only being required in relation to access, by disabled people, to goods, facilities and services, where, otherwise, access to the service would be "impossible or unreasonably difficult" (Part 3 DDA, s.21). A similar duty was/is imposed by Part 4 of the DDA upon education providers.

d) Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

The EqA provides (s.21) that a failure to comply with the duty of reasonable adjustment amounts to discrimination. The DDA (s.3A(2)) makes similar provision in Northern Ireland. No justification defence is available in GB or, in Northern Ireland in the context of employment. Failure to make reasonable adjustment is, therefore, more similar to direct than to indirect discrimination (though the question of proportionality will of course be relevant to whether any particular adjustment is "reasonable"). The EqA does, but the DDA does not, utilise the concept of indirect disability discrimination.

e) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)

i) race or ethnic origin

No although, as discussed also in Annex 3, in the case of *First Secretary of State v Chichester District Council* the Court of Appeal decided that the right of members of the travelling community to respect for their home life under Article 8 of the ECHR had to be given due weight in planning decisions.[104] This followed the decision of the

[104] [2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800.

European Court of Human Rights in *Connors v UK* that the legal framework governing when eviction from property was possible failed to take account the special needs and position of the travelling community, and therefore constituted a violation of the positive obligations imposed under Article 8 of the ECHR.[105] In *Kay v Lambeth; Price v Leeds*[106] the House of Lords held that, while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where a local government policy or regulation could be challenged under the ECHR before the administrative courts for failing to accommodate the special needs of particular groups.

There has been little, if any, discussion of whether the *DH v Czech Republic* decision of the ECtHR[107] requires special accommodation to be made for the children of Traveller families or other disadvantaged groups. While educational segregation is an issue in respect of particular ethnic minority and religious groups, it stems from a complex set of social factors which are dissimilar to the issues generated by the educational testing techniques in *DH*. Also, the largely nomadic nature of the UK Traveller population presents different problems than the segregation at issue in *DH*, and some special provision already exists in UK law to accommodate the special educational needs of the nomadic Traveller communities. (This special provision is usually classified as a form of needs-based assistance rather than as a form of positive action or reasonable accommodation: it could however be understood as a particular and specialised form of positive action.) It is unclear at present, therefore, whether the DH decision will ultimately require any changes to UK law.

ii) religion or belief

No, but a failure to make reasonable accommodation for religious beliefs could violate the ECHR as incorporated into UK law by the Human Rights Act: see the cases of *Copsey* and *Begum*, *Eweida, Chaplin, McFarlane* and *Ladele*, discussed in Annex 3 below. (It is clear from these decisions that such cases are difficult to win.) Similarly, a failure to make reasonable accommodation for Roma and traveller families could give rise to a breach of Article 8.

iii) age

No.

iv) sexual orientation

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[105] (2004) 40 EHRR 189. For an analysis of the scope of positive obligations under the ECHR in general, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).
[106] [2006] UKHL 10, [2006] 2 AC 465.
[107] (2008) 47 EHRR 3.

No.

f) Please specify whether this is within the employment field or in areas outside employment

i) race or ethnic origin
ii) religion or belief
iii) age
iv) sexual orientation

See the answer immediately above.

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

It is difficult to answer this. It can be said that the avoidance of indirect discrimination (by, for example, accommodating dress codes related to ethnicity or religion), or accommodating time-off requests linked to religious observance, amounts to the provision of reasonable accommodation. This certainly happens, not least because rigid refusals of accommodation will likely amount to unlawful indirect discrimination.[108] For the most part, the accommodation of religious/ cultural dress is relatively unproblematic, at least in areas where populations are heterogeneous. Most school uniforms would accommodate, for example, Sikh turbans, Muslim headscarves and Jewish kirpans, and public servants including immigration officers, judges and police and prison officers may wear these insignia.

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

In establishing whether an employer failed to make reasonable accommodation, a similar approach is taken to matters of proof as in determining whether a person has suffered direct or indirect discrimination across the equality grounds (or less favourable treatment related to a person's disability).

In other words, the burden of proof will shift as required by s.136 EqA where the claimant establishes the existence of a *prima facie* case of a failure to make reasonable accommodation.[109] The same is true in Northern Ireland in employment and occupation cases by virtue of s.17(1C) DDA.

Outside the employment and occupation context, however, the burden to establish the claim on the balance of probabilities remains in NI (but not in GB) on the

[108] Refusal to accommodate time-off requirements is perhaps less likely to result in a finding of unjustified indirect discrimination: see, for example, *Patrick v Sterile Services Ltd* Annex 3.
[109] *Tarbuck v Sainsbury Supermarkets* [2006] IRLR 664.

claimant, but inferences can arise in certain circumstances which an employer will have to rebut.

i) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Under the duties in the EqA and, in NI, the DDA, those involved in supplying goods and services or delivering public functions are required to make reasonable adjustments to those services/ functions, to accommodate the needs of disabled users. Such adjustments do not have to be made where they would change the nature of the service (s.21(6) DDA; Sch. 2, para 2(7) EqA): this might be the case, for example, where the muted lighting in a nightclub disadvantaged people with particular forms of visual disorders). In addition, employers, service providers and public authorities may be required under the legislation to make changes to the premises in which they operate, where this is necessary to avoid substantial disadvantage (in NI, other than in the context of employment, where access will otherwise be “impossible or unreasonably difficult”). Finally, buildings regulations provide specifications to which buildings must be designed, built and (where relevant) renovated, which specifications are designed to provide a degree of accessibility to disabled people.

Buildings Regulations apply to those building or renovating premises but do not impose on-going obligations to maintain any degree of accessibility to existing buildings. A failure to make reasonable adjustments to premises could, however, found a claim under the employment-related provisions of the DDA or the EqA, though I am unaware of actual examples of this to date (in *Ridout v TC Group* it was accepted that adjustments might have to be made to the use of strip lighting, though it was not accepted in that case that the employers had sufficient knowledge of the applicant’s disability to come under the duty to make reasonable adjustments).[110] A failure to make a bank branch accessible to a wheelchair user was found to have breached the DDA in *Allen v Royal Bank of Scotland Group plc*, in which the Court of Appeal required the bank to carry out work in order to make its building accessible to a wheelchair user.[111] The building was a 19th century building protected from alteration by the fact that it was “listed”. Access to all of its entrances was up flights of stone steps and, although there were cash machines at the front of the building, they were set too high to be useable by the Claimant, who was a wheelchair user. In order to deal with the Claimant the bank’s staff had had to come and speak with him in the street. The bank took the view that reasonable adjustments to their services in the case of the Claimant consisted in a combination of internet and telephone banking and the use of branches elsewhere in the town.

[110] [1998] IRLR 628.
[111] [2009] EWCA Civ 1213, 112 BMLR 30.

A county court awarded the Claimant EUR 8000 (£6 500) for injury to feelings and ordered the bank to install a platform lift, which meant the loss of one of the bank's eight interview rooms and expenditure in the region of EUR 244 440 (£200 000). The Court of Appeal rejected the bank's appeal, ruling that there were reasonable steps that the bank could take to make disabled access possible and that the fact that these would mean the loss of an interview room was not a reason not to make them in a case in which the bank had not pleaded that the cost of carrying out the work was disproportionate.

The *Allen* case illustrates that employers and those who provide services may be unable to rely on the fact that the buildings in which they operate are inaccessible to or otherwise inappropriate for workers or service users with disabilities, if they are faced with a complaint about a failure to accommodate an actual or prospective worker's or service user's disability-related needs. Thus, for example, a GB employer is required to take reasonable steps to prevent a disabled worker being placed at a "substantial disadvantage" by a physical feature of premises. Sometimes this may be done by (for example) moving the work station of a worker who has become a wheelchair user from an office accessible only up a flight of stairs to one which is on the ground floor or has easy access by a lift. In other cases (such as where the front door of the premises is too narrow for wheelchair access, or has a step) it may require changes to the premises themselves.

Premises and transport are covered by the EqA and the DDA in limited fashion, the emphasis being on the replacement of public service vehicles, and the replacement and/or refurbishment of the housing stock over time, to specifications which are themselves designed to increase accessibility.

j) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

Specific legislative provisions and statutory provisions have been introduced as outlined above to regulate the provision of accessibility in different contexts. Further, the duty to make reasonable adjustments in connection with access to goods, services and facilities, the functions of public authorities, and access to education applies where the provisions, criteria or practices, premises or failure to provide an auxiliary aid would place disabled persons generally at a substantial disadvantage by comparison with those who are not disabled. In such cases, the service provider, public authority or provider of education will have to make such reasonable adjustments as are necessary to remove the disadvantage. This may require action in advance of any complaint/ request.

In addition, the introduction by the Equality Act 2010 of a prohibition on indirect disability discrimination will have the effect that a failure to anticipate may result in an

employer or a service provider, public authority, educator etc being in a position such that its provisions, criteria or practices, method of service or public function delivery, premises, etc will place disabled people at a disadvantage compared with non-disabled people. If this was foreseeable, it is likely that the employer/ service provider will not be able to justify the indirect discrimination by way of an argument that they cannot change the practice etc in time to accommodate the needs of the particular disabled person who is complaining of discrimination. In addition, the public sector equality duty requires that public authorities pay due regard to the needs to eliminate discrimination relating to disability and promote equality for disabled people in everything that they do. This may well impose some anticipatory duties on such authorities, and on others who perform public functions.

In relation to transport and housing the EqA (and, in NI, the DDA) operate for the most part by means of requiring that vehicles and premises are made accessible over time, when they are being built or, in the latter case, renovated.

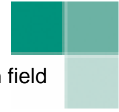
k) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

Public authorities (including health authorities) are required under s.20 and Sch.2 EqA (in NI, s.21E DDA) to take all reasonable steps to change practices, policies or procedures which substantially disadvantage disabled people (or, in NI, make it "impossible or unreasonably difficult" for them to receive a benefit). In addition, the positive duty to promote equality of opportunity for persons with disabilities that is imposed on public authorities may require reasonable accommodation to be made as part of fulfilling this duty. Various specific forms of state aid, social assistance and health care are also provided through social welfare legislation for certain categories of persons with disabilities.

State funding supports the provision of technical aids and other forms of technological support, including information technology systems. Special state support also exists for leisure activities for persons with disabilities in the sporting and cultural fields.

The Special Educational Needs and Disability Act ("SENDA") 2001 and the Special Educational Needs and Disability (Northern Ireland) Order 2005 (known as "SENDO") require schools, universities and other educational institutions to take reasonable steps to make sure that disabled pupils are not placed at a "substantial disadvantage" when compared to non-disabled pupils. SENDA also establishes a general Special Educational Needs (SEN) framework for students with disabilities, which regulates the provision of technical aid and special support.

Under the EqA and DDA, positive action in favour of persons with disabilities is not subject to legal restraint: however, the UK has largely abandoned the use of quota



schemes to benefit persons with disabilities in favour of an anti-discrimination approach.

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

UK government policy at present is designed to encourage disabled persons to move from “sheltered” accommodation and employment to “conventional” accommodation and employment. However, as it does not constitute discrimination under the DDA or EqA to give preferential treatment to disabled persons or to make special provision for their needs, there is no legal obstacle in UK law to public authorities or charities maintaining “sheltered” environments.

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Forms of “sheltered” activities could constitute employment under the EqA/ DDA, depending upon the nature of the employment relationship in question.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are no residence or citizenship/nationality requirements for protection under any of the anti-discrimination measures in the UK.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

a) *Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

There has never been any doubt that the discriminator, as employer, provider of goods and services, provider of education or training, etc. may be a natural or a legal person. As is discussed, below, the legislation specifically provides that the employer (as a natural or, often, legal person) is liable for the acts of discrimination of his employees, while the individual employee may be liable for aiding the discrimination by the employer.

Generally protection against discrimination is regarded as a right given to natural persons. In the case of disability discrimination, protection under the EqA and (in NI) the DDA is provided to "a disabled person", which, on the basis of the statutory definition, will always be a natural person.

Protection against discrimination in the field of employment applies only to persons who come within the definitions of employee, partner, officeholder, barrister, member of a trade union or professional association etc., which are limited to natural persons. The concept of "employee" is explored in the *Jivraj v Hashwani* case, see Annex 3.[112]

In principle, there could be discrimination against a legal person in relation to the provision of goods facilities and services, or the exercise of public functions, under s.20 EqA (where, for example, a corporate body was perceived as having, or being associated with, a particular ethnicity, sexual orientation or religion). The same is true in NI but the author is not aware of reported cases where this has occurred.

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[112] See also C McCrudden, "Two Views of Subordination: the Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani* (2012) 41 *Industrial Law Journal* 30 and M Freedland and N Kountouris, "Employment Equality and Personal Work Relations: a Critique of *Jivraj v Hashwani* (2012) 41 *Industrial Law Journal* 56.

b) *Is national law applicable to both private and public sector including public bodies?*

Yes.

3.1.3 Scope of liability

Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

As mentioned above (2.4(d)) an employer may be vicariously liable under all UK discrimination laws for the discriminatory acts of an employee, if these acts are committed during the course of their employment,[113] whether the act of discrimination is in the context of employment or provision of goods and services, education, housing etc. The defence provided to employers is set out there as is the scope of liability for the actions of agents and third parties.

In addition, police constables are not formally employees but the anti-discrimination measures include provisions creating, for the purpose of such legislation, a notional relationship of employer-employee between the chief officer of police and constables, and thereby making chief officers of police vicariously liable for the unlawful acts of discrimination or harassment committed by police constables under their direction and control. For example, see EqA, s.42; DDA s.64A; RRO art. 17.

Where vicarious liability is imposed on employers, liability may be shared with another person who knowingly aids in the commission of an unlawful act of discrimination; for example the employee who commits the act of discrimination or harassment (eg s.112 EqA). Further, in GB an employee may be personally liable for discrimination, harassment or victimisation even if a claim is not brought against the relevant employer: in *Barlow v Stone* [2012] IRLR 898 the EAT ruled that s110 of the Equality Act 2010 allowed a freestanding claim of victimisation to be brought directly by one employee against another employee in such circumstances.

The legislation provides a separate defence if the “aider” acts in reliance on a statement made to them by the discriminator that the discrimination would not be unlawful, for example a personnel officer acting on a statement by her manager regarding discriminatory policies of the employer (eg s.112(2) EqA). These vicarious liability principles also apply, at least in part to the relationship of principal and agent. Anything done by a person as agent for a principal, and with the principal’s express or implied authority, is treated for the purposes of the Act as also done by the principal: eg s.109(1)&(2) EqA.

[113] Equality Act s.109; DDA s 58, RRO art. 32, Fair Employment and Treatment Order art.36, NI Sexual Orientation Regulations reg. 24; NI Age Regs, reg. 26.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The UK anti-discrimination legislation applies to all sectors of employment. The legislation defines employment as "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour". The legislation covers some, but not all, forms of self-employment. In particular, the decision of the Supreme Court in *Jivraj v Hashwani* (see 0.3 above) would appear to deny the protection of anti-discrimination law to anyone who would not be regarded as a (subordinated) "worker" for the purposes of EU law, unless (see the paragraph immediately following) such persons are expressly covered by the legislation.

UK legislation also applies to contract workers, police officers, partners in firms, barristers and advocates, people undertaking practical work experience for a limited period for the purposes of vocational training, barristers and appointed, but not elected, officeholders, and the EqA and (in Northern Ireland) the DDA prohibits discrimination by a local authority against a elected members of the authority. Employment includes employment in the armed forces in GB but (Sch.9, para 4(3) EqA, and equivalent provisions in the DDA and Age Regulations in NI) the prohibitions on age and disability discrimination in employment and occupation "do not apply to service in the armed forces." Certain other forms of occupation, such as occupation in a voluntary capacity, fall outside the anti-discrimination legislation with the effect that the material scope of UK law may not fully reflect that of the Directives in every respect (though in *X v Mid-Sussex Citizens Advice Bureau*, 0.3 above, the Supreme Court refused a reference to the CJEU on the basis that it was *acte clair* that Directive 2000/78 did not protect volunteers). In *Jivraj v Hashwani* the Supreme Court ruled that arbitrators were not "employed" for the purposes of the anti-discrimination provisions[114] and, more significantly, that the prohibition of employment "under a contract personally to do work" did not cover independent providers of services who were not in a relationship of subordination with the person who received the services (see Annex 3). The extent to which domestic law protects self-employed persons against discrimination is uncertain following *Jivraj*.

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

[114] [2011] UKSC 40, [2012] 1 All ER 629, [2011] IRLR 827.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

Except to the extent that the UK legislation fails to cover self-employment and occupation (see above 3.2.1), the UK anti-discrimination legislation covers this area for all of the grounds in several ways.

1) The prohibition of discrimination or harassment in employment (defined as above) includes the arrangements made for the purpose of determining who should be offered employment, the terms on which employment is offered and refusing or deliberately omitting to offer employment or access to opportunities for promotion or transfer.
2) Discrimination is prohibited in offering pupillage or tenancy to a barrister (in Scotland, an advocate).
3) It is also unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate in the terms on which it is prepared to confer the authorisation or qualification or by refusing or deliberately omitting to grant the application

The public sector is generally treated in the same way as the private sector, subject to the elected representatives exception (see 3.2.1 above). However, public authorities in Britain are also subject to duties to promote equality of opportunity on the grounds of disability, race and sex. These duties require public authorities to take active steps to assess whether their employment policies comply with anti-discrimination law, and whether these policies should be altered to ensure a greater degree of equality of opportunity. The duty imposed by s.75 of the Northern Ireland Act 1998 on public authorities in NI has a similar effect across all of the equality grounds and the EqA makes all GB public authorities subject to a single equality duty which extends across all the equality grounds.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

UK anti-discrimination legislation fully covers this area for all the grounds. It applies to terms of employment (which include pay and other contractual matters), to the way the employer affords access to any benefits, facilities or services and to dismissal and subjecting the employee to any other detriment. The EqA and Equal Pay Act (Northern Ireland) 1970 specifically deal with matters relating to pay inequality between women and men.

With regard to occupational pensions, UK anti-discrimination legislation for all the grounds applies to the provision of occupational pensions by employers which, under the influence of the sex discrimination case-law of the CJEU, are now treated, as a result of judicial interpretation, as "benefits" conferred by an employer and therefore come within the various legislative prohibition on the different types of discrimination. The Equality Act 2010 (ss.61-63) and, in Northern Ireland, the DDA (Part II) and Employment Equality (Sexual Orientation) Regulations (NI) 2003, Sch.1, contain specific prohibitions on discrimination and harassment and (in the case of the DDA) requirements for reasonable adjustments in occupational pension schemes.

The major area of partial exception in this context is age. The EqA provides that regulations may be made containing exceptions to the prohibition on age discrimination in this context (these in addition to the general justification defence for age discrimination). The EqA (Age Exceptions for Pension Schemes) Order 2010 provides wide exceptions including in relation to the application of length-of-service provisions; minimum and maximum age limits and minimum pay limits on admissions to pension schemes; the use of age criteria in actuarial calculations and contributions; minimum ages for age-related benefits; the specification of normal retirement dates and payment of early and late retirement pensions; the payment of ill-health early retirement pensions without reduction and/or with enhancement, etc. Similar exceptions are provided in Northern Ireland to reg. 12 and Sch. 1 of the NI Age Regulations:

Some of these exceptions may be potentially wider in scope that the exception set out in Article 6(2) of the Directive, and any exceptions still in the Regulations that lie outside the scope of Article 6(2) will have to be shown to be objectively justified under Article 6.1. It should also be noted that the use of age distinctions in occupational schemes can still be challenged on the basis of (indirect) sex discrimination.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational

training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

UK anti-discrimination law covers access provided by employers to training for all the grounds. It also prohibits discrimination or harassment by a person who provides, or makes arrangements for the provision of, facilities for training to fit a person for any employment, including terms for access to any training courses or facilities, and discrimination or harassment in a refusal or omission to afford such access. Where practical work experience is a form of employment, it is covered by the provisions that prohibit discrimination by employers. The EqA and, in NI, the DDA specifically prohibits discrimination and harassment and requires reasonable adjustments (in the former case in relation to disability) in practical work experience (ss.55 & 56(6)(b) EqA, ss.14C–14D DDA).

The RRO has always applied to *all* stages of education, including further education, university education and adult life-long learning, as does FETO. Recognising that vocational training is often the, or one of the, main objects of further and higher education, the UK government included such education in transposing the Employment Framework Directive. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 make it unlawful to discriminate on grounds of sexual orientation in the provision of goods, facilities and services, education and public functions. Note however that age discrimination in education outside of the scope of Directive 2000/78/EC is not prohibited in Northern Ireland as yet.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

The UK anti-discrimination legislation for all the grounds applies to all aspects of membership of a “trade organisation”, that is, an organisation of workers or employers, or any other organisation whose members carry on a particular profession (including any vocation or occupation) or trade for the purposes of which the organisation exists. Discrimination is prohibited in relation to admission or refusal to admit to membership, and in relation to members’ access to benefits, deprivation or variation of the terms of membership or subjection to any detriment.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

Social protection is not defined in UK law. The EqA prohibits discrimination on all the grounds by public or private sector organisations in the provision of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include any publicly provided social protection as well as social security and publicly provided healthcare. There are extensive exceptions in the case of the prohibition on age discrimination which does not in this context protect those under 18.[115]

In Northern Ireland the RRO[116] prohibits discrimination in the functions of public authorities that consist of the provision of any form of social security, healthcare and any other form of social protection. The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include health care, and prohibits discrimination on the grounds of disability in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including healthcare, as well as social security. FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. Healthcare would be included, but it is unlikely that all forms of social protection and social security including inequality in levels of state benefits would be wholly within FETO. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 prohibit discrimination on the ground of sexual orientation in the performance of public functions, again including social protection, including healthcare and social security. Age discrimination is not regulated in NI outside the scope of Directive 2000/78.

The various positive duties imposed upon British and NI public authorities discussed above at 1.0 require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social protection.

The exception in Article 3(3), Directive 2000/78?

Since, under UK law, payments made as part of the state social security scheme which do not arise from an employment relationship are not defined as "pay", such payments did not come within the scope of the 2003 regulations on religion or belief or sexual orientation, which covered only employment and employment-related activities and vocational training. Therefore, there was no need for a specific exception to reflect Art. 3(3) in those Regulations. The DDA did prohibit discrimination by state actors at least from 2006, subject to a justification defence. All discrimination by public authorities is now prohibited on all grounds covered by the Directive with the exception of age, as a result of s.29 EqA, but subject to an

[115] Equality Act (Commencement No.9) Order 2012 and Equality Act 2010 (Age Exceptions) Order 2012.
[116] Article 20A RRO.

exception which covers all discrimination authorised by statute where the discrimination is not also prohibited by EU law. Thus, subject to the requirements of the European Convention on Human Rights, discrimination in state social security schemes could be authorised despite the Equality Act. To the best of my knowledge no such statutory authority has been enacted. A similar position prevails in Northern Ireland by virtue of the DDA, and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

The Equality Act 2010 prohibits discrimination in the provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include any publicly provided social protection as well as social security and publicly provided healthcare. This is likely to cover much of what might be regarded as "social advantages".

In Northern Ireland the RRO[117] prohibits discrimination by public authorities in providing any form of social advantage (article 20A). The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include health care, and prohibits discrimination on the grounds of disability in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including healthcare, as well as social security.

FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 prohibit discrimination on the ground of sexual orientation in the performance of public functions, which should again catch at least some areas of "social advantages".

The EqA's provisions prohibiting age discrimination across (broadly) the scope of Directive 2000/78 were brought into affect in October 2012 along with provisions

[117] Article 20A RRO.

creating a number of exceptions to the (now general) prohibition on age discrimination.[118] There is at present no equivalent legislation in Northern Ireland

The various positive duties imposed upon GB and NI public authorities discussed above at 1.0 require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social advantages. UK law does not, however, contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the CJEU.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

The RRA and RRO have always included within their scope all forms and all levels of education, including all educational institutions, publicly and privately maintained. (Note: in GB a significant number of publicly maintained schools are denominational schools, but all were subject to the provisions of the RRA, and are now subject to the race discrimination provisions). Both the EqA and the RRO also prohibit segregation across their scope of application, so segregation in schools between persons of different racial or ethnic groups would be unlawful, including segregation of traveller or Roma children.

Concerns persist as to the concentration of ethnic minority students in particular schools, which reflect wider issues of divided communities and social segregation.[119] State schools in particular parts of England, in particular the East End of London and in some of the northern cities such as Bradford, often contain high numbers of black and Asian pupils, with some schools also being overwhelmingly Muslim in student composition. For example, around a quarter of England's minority ethnic pupils are in schools in Outer London and just under a fifth are in schools in Inner London: see Department of Education: *Ethnicity and Education* (2006), p. 27, which results in certain schools having a very large BME (black and minority ethnic) population.

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[118] Equality Act (Commencement No.9) Order 2012 and Equality Act 2010 (Age Exceptions) Order 2012.
[119] See S. Burgress and D. Wilson, *Ethnic Segregation in England's Schools*, CASE paper 79, Centre for Analysis of Social Exclusion, London School of Economics, 2004, available at: http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper79.pdf.

This is partially due to population settlement patterns, partially due to ethnic groups tending to “cluster” in particular areas, and partially due to other complex factors, including a times a tendency for white families to avoid schools which are seen to contain few white pupils. Further, state funding is provided for schools which select their pupils by religious adherence, which has implications for racial diversity in intake. While various initiatives exist at local level which attempt to deal with this problem, this produces at times a pattern of segregation: however, studies have shown that the national situation is complex and it is difficult to make generalisations in this area (Department of Education: *Ethnicity and Education* (2006), p. 28-9, Runnymeade Trust, *School Choice and Ethnic Segregation* (2007)).[120] There is also a degree of segregation in third level education, with some institutions of higher education having more than 40% BME (black and minority ethnic) intake, others have less than 5% (Higher Education Statistics Agency, 2003-04).[121] Again, some initiatives are in place to attempt to address this “clustering” of BME students, but there is not a clear or systemic nation-wide anti-segregation strategy.

Concerns also exist as to the lack of facilities for Traveller children.[122] Useful positive action practices exist in the field of education. For example, all Local Authorities have a statutory duty to ensure that education is available for all children of compulsory school age (five to 16 year-olds) in their area. These duties apply to all children residing in the area, whether permanently or temporarily and, therefore, Traveller and Roma children residing with their families on temporary or unauthorised sites are included within this general duty. Most Local Authorities also provide specialist Traveller Education Support Services which help Traveller pupils and parents to access education and provide practical advice and support to schools taking in Traveller pupils. Special provision is made in legislation to protect Traveller parents against criminal convictions for the non-attendance of their children at school. However, despite these useful positive action policies which have been developed over time, many Traveller children still face disruption to their education, often caused by the absence of adequate housing facilities and the risk of eviction (see below). Therefore, the lack of temporary accommodation for Traveller families can have a very negative impact on the education of their children.

Concern also exists about the “clustering” of Traveller children in certain poorly-performing schools, especially in NI.

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[120] http://www.runnymedetrust.org/uploads/publications/pdfs/School%20ChoiceFINAL.pdf and see generally http://www.measuringdiversity.org.uk/, both accessed 3 April 2013.
[121] And see Runnymede Trust, *Not Enough Understanding? Student Experiences of Diversity in UK Universities* (2007), http://www.runnymedetrust.org/uploads/file/Not%20Enough%20Understanding%20-%20final.pdf accessed 8 January 2014.
[122] See the Commission for Racial Equality, *Gypsies and Travellers: A Strategy for the CRE 2004-7*, available at http://www.cre.gov.uk/policy/gypsies_and_travellers.html.

The Equality Act 2010 and, in Northern Ireland, the Sexual Orientation Regulations and the FETO regulate discrimination in further and higher education. All employees working in the education sector, including teachers and other educational staff, are covered.

The EqA prohibits discrimination on the grounds of religion or belief in access to and provision of education in GB, subject to an extensive series of exceptions to protect the status of public state-funded denominational schools and private schools with a particular religious ethos. None have as yet given rise to legal issues involving segregation.

Segregation of Catholic and Protestant pupils in Northern Ireland has been a constant problem there for many decades, with large proportions of the different groups going to faith schools.

The EqA and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 prohibit discrimination in access to and the provision of education on the grounds of sexual orientation in GB and NI respectively, subject to certain narrow exceptions.

The relevant provisions of the EqA prohibit age discrimination in GB in the provision of goods and services and in the performance of public functions but do not protect those under 18 from age discrimination and the prohibition on age discrimination does not apply to schools in the performance of their education function.

The provision of education services was originally excluded from the scope of the DDA, even if employment by schools and colleges was covered: Part 4 of the Act only required schools and institutes of further and higher education to publish their policies on educating disabled persons.[123] These provisions were replaced by the extensive obligations and provisions protecting individual educational rights introduced by the Special Educational Needs and Disability Act (SENDA) 2001 (and in Northern Ireland by the Special Educational Needs and Disability (NI) Order 2005), which prohibits disability discrimination in GB (NI) schools. The reasonable accommodation duties imposed on schools under Part 4 of the DDA (now, in GB, Part 6 of the Equality Act 2010), as well as a variety of policy initiatives and legislative provisions, are intended to encourage integrated education within the educational mainstream for persons with disabilities, which has been since the Education Act 1981 a policy priority within the UK state educational structure.

The various positive duties imposed upon public authorities in GB and NI discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of education.

[123]See original Part IV DDA 1995, ss. 29 and 30.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The EqA prohibits discrimination related to race, disability, religion, belief, age[124] and sexual orientation, by public or private sector bodies in the provision of goods, facilities or services to the public or a section of the public. In Northern Ireland the RRO (art. 21), DDA (Part 3), Fair Employment and Treatment Order (art.28) and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (reg.5) prohibit discrimination in access to goods, facilities and services provided to the public or a section of the public on grounds of race, disability, religion/ belief and sexual orientation respectively.

There are separate provisions prohibiting discrimination by associations with 25 or more members because of race, disability, religion or belief, age[125] or sexual orientation against any member or associate in access to any benefits, facilities or services in GB (Equality Act 2010, Part 7) and, in NI, on grounds of race, sexual orientation and disability (RRO art. 25; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg 17, DDA s.21F). Insofar as they apply to disability these provisions require the making of reasonable adjustments.

The various positive duties imposed upon GB and NI public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of state services.

b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

The EqA regulates age discrimination in the provision of financial services. An exception is provided in relation to age discrimination based on risk assessment “by reference to information which is relevant to the assessment of risk and from a source on which it is reasonable to rely”.[126]

In addition, as discussed below in detail at 4.7, the EqA and the equivalent provisions of NI law exempt the use of certain types of age distinctions in the provision of

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[124] The prohibition on age discrimination in this context does not protect those under 18.
[125] The prohibition on age discrimination in this context does not protect those under 18.
[126] Sch 3 Part 5 §20A.

occupational services from the scope of the prohibition of age discrimination in employment (taking advantage of Article 6(2) of Directive 2000/78/EC): however, other forms of age distinction in this context are covered by the EqA and the NI Age Regulations. These very technical and precise provisions govern the use of age distinctions in the provision of occupational pensions: as many UK occupational pension schemes are administered by financial service providers, these provisions therefore regulate the use of age distinctions in this particular area of financial services.

As the EqA and the DDA in NI prohibit less favourable treatment related to an individual's disability in the provision of goods and services, and require service providers to make reasonable accommodation in certain circumstances (see above), disability discrimination in the provision of financial services is potential covered by the Acts. However, the ability to justify less favourable treatment may in practice limit the impact of the EqA and the DDA in the field of financial services, in particular where such services are denied on the basis of actuarial or statistical data particular to an individual's specific disability.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

The EqA and the RRO regulate discrimination in all aspects of housing: sale and letting of privately owned properties, allocation of tenancies in public or private sector, management of rented accommodation in public or private sector, residential care institutions etc. The EqA applies in this context to discrimination because of race, disability, religion or belief and sexual orientation, but not age, while the RRO (as its name suggests) applies to race discrimination.

The EqA and the equivalent provisions in NI specifically prohibit discrimination and harassment in the sale or letting of premises, including residential premises. Other than in the case of race, however, the EqA and NI equivalents include an exception where premises are sold privately and without the use of an estate agent or advertising. The legislation also prohibits discrimination and harassment in the management of premises, including residential premises, in access to benefits or facilities, in eviction or any other detriment, and make it unlawful for a landlord to discriminate in the granting of licence or consent for the disposal of a tenancy. The EqA's prohibitions on harassment do not, however, apply to religion or belief or to sexual orientation in this context, nor are those whose permission is required for the disposal of premises prohibited from discriminating on grounds of religion, belief or sexual orientation (s.34(1) and Sch.5, para 1 EqA). Further, s.36(1)(a) EqA, which imposes a duty of reasonable adjustments on leaseholders, does not apply (Sch.5,

para 2 EqA) to private householders who lease premises which were their main home. And the prohibitions on discrimination other than on grounds of race do not apply in relation to "the disposal, occupation or management of part of small premises if (EqA Sch.5, para 3):

> (a) the person or a relative of that person resides, and intends to continue to reside, in another part of the premises, and
> (b) the premises include parts (other than storage areas and means of access) shared with residents of the premises who are not members of the same household as the resident mentioned in paragraph (a).

The Fair Employment and Treatment Order prohibits discrimination in NI in housing on the grounds of religious belief or political opinion, with exceptions for small dwellings. The Equality Act (Sexual Orientation) Regulations (NI) 2006 similarly prohibits discrimination on the ground of sexual orientation in housing. The DDA also prohibits discrimination in relation to housing in NI but the duties to make reasonable accommodation are not as extensive as they are under the EqA and, in particular, do not extend to the common parts of rented residential property.

The various positive duties imposed upon British and Northern Irish public authorities discussed above at 1.0 require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of housing. These duties may influence how other statutory duties are performed by public authorities, such as their duties to provide housing for local populations: this may have an impact on the provision of accommodation for Traveller groups, which continues to be a source of controversy.

In *Connors v UK* the ECtHR ruled that the UK had been in breach of Article 8 of the Convention when a local authority failed to take account of the special needs of a Traveller community when carrying out a summary eviction of that family from local authority property.[127] For "normal" eviction procedures the House of Lords held in *Kay v Lambeth; Price v Leeds*[128] that, while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where the compatibility of a local government policy or regulation with Article 8 could be challenged. It remains to be seen how this will impact on the treatment of Travellers by local authorities, which remains a serious area of concern in the UK.

Before the enactment of the Criminal Justice and Public Order Act 1994 (CJPOA), local authorities had been a statutory duty to provide caravan sites for Gypsies and Travellers under the Caravan Sites Act 1968. The CJPOA removed that duty and gave local authorities and the police broad powers to evict Gypsies and Travellers

[127] (2002) 35 EHRR 691.
[128] [2006] UKHL 10, [2006] 2 AC 465.

from unauthorised sites. For a considerable period of time Circular 1/94, Gypsy Sites and Planning, issued by central Government, guided local authorities in providing accommodation for Travellers. This Circular provided that local authorities should take special action to encourage Travellers to purchase land for halting sites themselves and to apply to legitimise their own sites through the planning system. Travellers, however, face considerable difficulties in obtaining planning permission for private halting sites. Circular 1/94 also required local planning authorities to assess the need for caravan sites for Travellers in their administrative areas and identify locations where the land use requirements of Travellers can be met. This positive duty has often meet with a degree of resistance and inertia on the part of local authorities, many of whom have not identified suitable locations for such sites, or rely on unrealistic criteria. This has caused considerable difficulties for many Travellers, who are therefore often forced to camp illegally.

The House of Commons' Select Committee on the Housing Bill 2004 recommended to the Government that the re-introduction of the statutory duty on local authorities to provide authorised camping sites was required to remedy the situation. Also, the House of Lords in the cases of *South Buckhamshire v Porter*, *Wrexham CBC v Berry*, and *Chichester DC v Keet and Searle*[129] held that the vulnerable position of Travellers as a minority group deserved more sympathetic attention and special consideration of their needs than had previously been the case in the planning and site allocation process. However, this decision has not resulted in major changes to the existing situation.

Under the Housing Act 1996, local authorities had a duty to provide accommodation to people who are judged to be "homeless" and have a "priority need" for accommodation. This can entitle Travellers to accommodation, which may include positive provision in the form of temporary accommodation on caravan sites, as many Traveller groups desire to maintain their nomadic lifestyle. However, this is dependent on the availability of this type of accommodation. The Housing Act 2004, in conjunction with Circular ODPM 1/06, requires councils to assess the needs of Gypsies and Travellers via an Accommodation Needs Assessment process, and to have a strategy in place which sets out how any identified needs will be met as part of their wider housing strategies. This positive duty came into force on 2 January 2007, and it is yet too early to determine what overall effect this is having. However, by imposing a clearer duty upon local authorities to accommodate the needs of Travellers, this new legislation has some potential to improve the situation. Practical guidance on how to carry out assessments of the accommodation needs of Gypsies and Travellers has also been produced. In addition, a Task Group on Site Provision and Enforcement has been established to provide further guidance on issues of eviction, site quality and design.

[129] [2003] UKHL 26, [2003] 2 AC 558.

In Northern Ireland, the Housing Executive (NIHE) has carried out a comprehensive assessment of the accommodation needs of all Travellers in Northern Ireland and has drawn up a programme of positive action schemes to cater for their special needs.

In *Basildon District Council v McCarthy & Ors*,[130] the appellant local authority appealed against a High Court judgment which had overturned the authority's decision under planning control legislation to enforce compliance with enforcement notices requiring Irish Traveller and Gypsy families resident on unauthorised sites in the Council's district to leave these sites. The Court of Appeal held that the Council had not erred in failing to give adequate consideration to the lack of camping sites or other forms of suitable accommodation for the Gypsy and Traveller population. The Court took the view that the local authority had discharged its statutory obligations by considering the impact of eviction on each individual family and their duties under the UK's homelessness legislation: no wider consideration of housing matters was required. There was then an extended stand-off between the council and Travellers who had unlawfully established residence on Dale Farm, the stand-off resulting eventually in the eviction of the unlawfully settled Travellers after a number of efforts on their part to mount legal challenges to eviction orders failed.

Another problem relates to the absence of security of tenure. Travellers living on local authority halting sites have no security of tenure. The Caravan Sites Act 1968 simply provides that, possession can be obtained by a local authority if it gives a resident four weeks notice to quit and then obtains a possession order from a court. However, the ECHR decision in *Connors v UK* and subsequent UK court decisions has established that the Article 8 right to home life needs to be taken into account in eviction processes: alternative accommodation may have to be provided. Again, recent legislation has slightly improved the legal position. In 2004 the Office of the Deputy Prime Minister (DCLG) and the Home Office jointly launched the "Guidance on Managing Unauthorised Encampments". It provides guidance to local authorities, the police and others on managing unauthorised encampments. A lack of accommodation remains a persistent problem for Travellers, however, and the planning system as a whole could be said to place Travellers in a highly disadvantageous position.

In previous decades, BME (black and minority ethnic) groups suffered discrimination in housing, both as a result of discrimination by private landlords and segregation and discrimination in the allocation of public housing. Certain towns and cities in the north of England still remain very segregated, even if discrimination in the sphere of housing appears to be less common than was the case in the past. Segregation is also a problem in NI, where Catholic and Protestant communities often live in segregated communities as a result of the communal violence of the last thirty years.

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[130] [2009] EWCA Civ 13, [2009] LGR 1013.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

GB and NI – Disability

The DDA (in Northern Ireland) does not provide an exception for genuine and determining occupational requirements, presumably because of the justification defence originally available under that Act, and the combination of the asymmetric approach taken by the Act and very narrow definition of direct disability discrimination which (post 2005) is not subject to a justification defence.[131] These factors leave little requirement for any GOR. Nevertheless, and in the interests of clarity and harmonisation, the EqA does apply the same GOR defence to disability as it does to the other protected grounds, Schedule 9 Part 1 para 1 providing that:

> (1) A person (A) does not contravene a [relevant] provision … by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—
> (a) it is an occupational requirement,
> (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
> (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

As we shall see below, additional GORs are provided in relation (so far as is relevant here) to sexual orientation and religion or belief.

GB and NI – Race

[131] S3A(5) DDA defines direct disability discrimination as less favourable treatment of the disabled person than that of a real or hypothetical comparator "whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person".

The RRA (s.5(2)) and RRO (art. 8(2)) had listed four types of jobs where being of a particular racial group could be a genuine occupational qualification and, therefore, discrimination in recruitment, selection, opportunities for promotion, transfer and training would be permitted.[132] Those exceptions have been replaced in the EqA by the general provision extracted above. Under the RRO in Northern Ireland they remain unchanged in the case of nationality and colour discrimination,[133] but in the case of race and ethnic and national origins, they have been replaced by a new generic GOR defence which applies under the NI Sexual Orientation Regulations. There are other exceptions in the RRO, including employment for purposes of a private household, that continue to apply in relation to discrimination on grounds of nationality and colour.[134]

GB – Religion or Belief
The EqA provides, in relation to religion or belief, an additional GOR defence which is intended to reflect Article 4(2) of Directive 2000/78/EC by permitting discrimination not only where (as in relation to race, above) having regard to the nature or context of a job, being of a particular religion or belief is a genuine and determining occupational requirement, but also more broadly where (Schedule 9, Part 1, para 3) an employer has an ethos based on religion or belief. This is considered in the following section.

GB and NI – Sexual Orientation
Art. 4(1) Directive is transposed by the EqA and the NI Sexual Orientation Regulations (reg 8(2)), which are in materially similar terms to Schedule 1, Part 1, para 1 EqA, above. In addition, Schedule 1, Part 1, para 2 EqA provides a broader exception where a person is (or would be) employed “for the purposes of an organised religion”. This is discussed in the following section.

NI – Religious Belief
FETO removed the blanket exception for the employment of teachers that had previously been included with the FETO and, in line with the special provision in Article 15(2) of the Directive, the FETO now permits discrimination on grounds of religious belief only in the recruitment of teachers.

The targeted recruitment on grounds of religious belief under the Police (Northern Ireland) Act 2000 is discussed below (see section 5).

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[132] a) participation in a dramatic performance, b) participation as an artist’s or photographer’s model, c) working where food or drink is provided to the public in a particular setting where a person of a particular racial group is required for reasons of authenticity, and d) providing persons of a particular racial group with personal services promoting their welfare which can most effectively be provided by a person of that racial group. The only caselaw in this area makes it clear that these provisions are to be narrowly interpreted: in particular, *Lambeth London Borough Council v Commission for Racial Equality* [1990] ICR 768, [1990] IRLR 231.
[133] Though see *Abbey National v Chagger* Annex 3.
[134] Though see *Abbey National v Chagger* Annex 3.

FETO also makes specific provision for clergy, which is discussed in the next section.

GB and NI – Age
The EqA and the NI Age Regulations state that an employer will be entitled to use an age requirement where, having regard to the nature of the employment or the context in which it is carried out, i) this is a genuine and determining occupational requirement, ii) it is proportionate for the employer to apply the requirement in the particular case, and iii) the employer did consider, and it was reasonable for the employer to so consider, that the person to whom this age requirement is applied does not meet this requirement.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?

GB – Religion or Belief
The EqA provides, in relation to religion or belief, an additional GOR defence where (Schedule 9, Part 1, para 3) an employer has an ethos based on religion or belief and, having regard to that ethos and the nature and context of the job, being of a particular religion or belief is a genuine (but not necessarily determining) occupational requirement, "the application of the requirement is a proportionate means of achieving a legitimate aim, and the person to whom … the requirement [is applied] does not meet it (or [the person applying it] has reasonable grounds for not being satisfied that the person meets it)".

The EqA's prohibitions on discrimination related to religion or belief are made subject to ss.58–60 of the School Standards and Framework Act 1998 (reg. 39), which permit voluntary aided schools (publicly maintained schools with a degree of independent management) with a religious character to discriminate in the recruitment of teachers and their dismissal. Specifically, s.60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character to have regard "in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination". This exception applies only to teachers, according to s. 60(6). A similar provision exists for Scottish Catholic schools in s.21(2A) of the Education Act (Scotland) 1980.

These provisions permit wide scope for discrimination in selection and dismissal, as schools are not required to demonstrate that the person's religion or belief constitutes a genuine, legitimate and justified occupational requirement for the job in question (for example teaching mathematics). By taking this Act into account, the EqA may fail to comply with Article 4(2) and judicial interpretation of the Regulations to ensure that direct effect is given to Article 4(2) may be required. This appears to have been done

in *Glasgow City Council v McNab*,[135] in which the EAT gave a narrow interpretation to the permitted "ethos" exceptions to the prohibition on discrimination based on religion or belief in the GB Religion or Belief Regulations, which were replaced by the EqA.

In the *McNab* case an atheist who applied for a temporary position as acting head of a Catholic state school was rejected because he was not Catholic. The EAT held that this constituted a violation of the Religion and Belief Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school.

NI – Religious Belief
The fair employment legislation has always had exceptions for employment as a clergyman or minister of a religious denomination; that exception is maintained. The Fair Employment and Treatment Order also permits discrimination "where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief" (which, under the FETO Regulations, would include any religion or similar philosophical belief). FETO does not amend this provision, leaving an exception considerably wider than Article 4(l) or 4(2) of the Directive; most significantly there is no obligation to justify the requirement on the basis of a legitimate aim or that it is a proportionate means of meeting that aim. Judicial interpretation of the Regulations to ensure that direct effect is given to the Directive may be required.

b) Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).

Schedule 1, Part 1, para 2 EqA provides that a person does not contravene any of the Act's prohibitions on discrimination in relation to employment because of sexual orientation (sex, marriage or civil partnership) if the discriminator "shows that:

> (a) the employment is for the purposes of an organised religion,
> (b) the application of the requirement engages the compliance or non-conflict principle, and
> (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

Para 3 goes on to provide that:

> (5) The application of a requirement engages the compliance principle if

[135] [2007] IRR 476.

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> the requirement is applied so as to comply with the doctrines of the religion.
> (6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

The relevant provisions of the NI Sexual Orientation Regulations are materially similar. The Equality Bill in its original form had attempted to tighten the previous provisions of the GB Sexual Orientation Regulations which were materially identical to the NI Regs, the Equality Bill requiring that the GOR was a proportionate way of complying with the doctrines of the religion or of avoiding conflict with beliefs. In addition, the clause had provided that employment would only be classified as being for the purposes of an organised religion if it "wholly or mainly involves (a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or (b) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others)". Solicitor-General Vera Baird expressed the view that these inclusions did no more than to codify the decision in *Amicus v Secretary of State for Trade and Industry* and did not narrow the scope of the defence. Baroness Royall of Blaisdon suggested, for the Government, (25 Jan 2010: cols 1215-16) that:

> The small number of posts outside the clergy to which [the paragraph] applies are those that exist to promote or represent an organised religion or to explain the doctrines of the religion. We therefore intend senior employees with representational roles, such as the secretary-general of the General Synod and the Archbishops' Council of the Church of England, to be within the definition. A further example is that of a senior lay post at the Catholic Bishops' Conference charged with acting on behalf of bishops when contributing to public policy developments. These are both roles where the emphasis is more representational than promotional. There will be similar such roles in other organised religions. An example of a post that exists more to promote the religion is that of a missionary working for a church in this country. A church youth worker who primarily organises sporting activities would be unlikely to be covered by the exception.
> However, a youth worker whose key function is to teach Bible classes probably would be covered, because explaining the doctrines of the religion would be intrinsic to the role.
> Because the exception applies only to a very narrow range of posts, all roles will need to be closely examined to determine whether or not they fall within the scope of the exception. An organised religion that applies in relation to a role a requirement related to sexual orientation, for example, must be prepared to justify this on a case-by-case basis. Whether or not a particular role exists to promote or represent the religion or explain its doctrines will depend on the purposes of the role and the nature of the work that it involves.

> It is certainly not our intention that the exception should apply to employees such as administrative staff, accountants, caretakers or cleaners. Whether or not an applicant for the job of church bookkeeper is, for instance, married to a divorcee should not be a reason not to employ the person. In addition, the exception would not apply to most staff working in press or communications offices, although senior and high-profile roles within such offices that exist to represent or promote the religion would probably be within its scope. The revised definition that we propose also covers a case where a post to which the exception applies has just been created and the first person to hold it has yet to be appointed…

The provision was amended to remove the requirement for proportionality and the definition of employment for the purposes of an organized religion. The wording of para 2(5) and (6) are the result a late amendment by Lady O'Cathain who argued that the Bill in its original form would change the existing legal framework and make it more difficult for religious organisations to discriminate, and Baroness Butler-Sloss (col.1220) who suggested that the Bill's requirement for proportionality might threaten the Catholic Church's requirement that priests be celibate. The Joint Committee on Human Rights, which expressed doubts about the consistency of the eventual provision with EU law, pointed out that the Lords' amendments would not alter the required legal interpretation of the provisions in line with EU law but lamented the loss of clarity arising from the removal of the express proportionality requirement and definition of employment for the purposes of an organised religion:

> 1.9 In its reasoned opinion infringement No. 2006/2450, paragraphs 15-20, which is usually confidential but which has found its way into the public domain, the European Commission takes the view that Article 4(1) of the 2000/78/EC Directive:
>
>> Contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate.
>> No elements of this test appear in Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 ... [The] Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive.
>
> 1.10 The Commission further stated that:
>
>> The wording of the 2003 Regulations contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of

> treatment based on religion "should not justify discrimination on another ground".

This is not reflected in Schedule 9(2)(8) of the Equality Bill.

1.11 In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) we share the view of the European Commission that UK law does not comply with the Framework Equality Directive.

Schedule 9, Part 1 para 2 EqA and the equivalent provisions of the NI Sexual Orientation Regulations appear to go beyond the exceptions permitted under the Employment Framework Directive in that they do not provide that the "requirement related to sexual orientation" (e.g. not engaging in any sexual activity at all, or not doing so outside of a different-sex marriage, and accepting the religious organisation's doctrines on same-sex sexual activity) must be "proportionate" to any legitimate aim, especially considering the nature of the job to which the requirement is applied (priest vs. cleaner in a convent). Nor do they comply with art. 4(2) (second para.) Directive, which requires an assessment of each LGB individual's conduct. Instead, they create (as drafted) a blanket exception, without regard to the conduct of the individual employee or prospective employee, for any employment "for the purposes of organised religion". Judicial interpretation of the Regulations to ensure that direct effect is given to Article 4 of the Directive will be required.

The compatibility of reg.7(3) of the GB Sexual Orientation Regulations (which was in materially similar terms to Schedule 9, Part 1 para 2 EqA, and materially identical terms to reg 8(3) of the NI Sexual Orientation Regulations) with the Directive and with the ECHR was challenged by 7 trade unions who applied, unsuccessfully, to the High Court in the *Amicus* case to have the regulation annulled. (see Annex 3).[136] The Court accepted the government's argument that reg. 7(3) was intended to have a narrow scope and was therefore not outside Art. 4(1) of the Directive.

Mentioned above was the EAT's decision in *Glasgow City Council v McNab*.[137] The EAT there ruled that the refusal to employ him was a violation of the Religion and Belief Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school. This shows that the employment tribunals may give a narrow interpretation to the permitted "ethos" exceptions to the prohibition of discrimination based on religion or belief.

There is genuine concern, however, that the exceptions to the prohibitions on sexual orientation discrimination will have a deterrent effect on prospective LGB employees

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[136] *R (Amicus & Ors)* v *Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] IRLR 430.
[137] [2007] IRLR 476.

thinking of applying for jobs with religious organisations (including schools and hospitals run by religious organisations), and on LGB employees of such organisations in relation to how open they could be regarding their sexual orientation. Despite the "narrow scope" these exceptions have on paper, there must be a real risk that, in practice, they may be relied upon (unlawfully) by some religious organisations, and not merely organised religions, to operate employment policies that discriminate against LGB people. There remain strong arguments that the exceptions should be repealed.

To date the controversial cases in the UK have arisen where individuals have alleged that they have been subject to religious discrimination when they are required to refrain from wearing particular symbols linked to their religious beliefs (see the *Azmi* and *Eweida* cases at Annex 3 below)[138] or have been disciplined for refusing to perform functions relating to same-sex partnership and family rights (see *Ladele* and *McFarlane*, Annex 3 below).

c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

As discussed above, the EqA's prohibitions on discrimination related to religion/ belief are made subject to ss.58–60 of the School Standards and Framework Act 1998, which permit voluntary aided schools (publicly funded state schools with a degree of independent management) with a religious character to discriminate in the recruitment of teachers and their dismissal. Specifically, s.60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character to have regard "in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination". This exception applies only to teachers, according to s.60(6). A similar provision exists for Scottish Catholic schools in s. 21(2A) of the Education Act (Scotland) 1980. (Only national legislation is involved.)

This permits a wide scope for discrimination in selection and dismissal, as the school is not required to demonstrate that for the job in question (for example teaching mathematics) the person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. By taking this Act into account, the EqA may fail to comply with Article 4(2) and judicial interpretation of the Act may be requiired to ensure that direct effect is given to Article 4(2).

[138] Respectively 2007] ICR 1154, [2007] IRLR 484 and [2010] ICR 890, [2010] IRLR 322.

This appears to have been done in *Glasgow City Council v McNab*,[139] discussed above at 4.2(a). Despite this decision, there is some concern that the discrimination permitted under the School Standards and Framework Act 1998 and the Scotland (Education) Act 1980 may still be used to exclude or dismiss LGB teachers or others whose conduct is deemed not to reflect the school's religious ethos.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

The EqA disapplies the prohibition on employment-related age and disability discrimination in relation to service in the armed forces (Schedule 9, Part 1, para 4). In NI, the Age Regulations do not extend to the armed forces and the DDA includes an exception in relation to service in the armed forces.

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

There are no exceptions in GB or NI legislation intended to reflect Recital 18, Employment Framework Directive. Neither the EqA, the DDA nor any of the other anti-discrimination laws is likely to be interpreted as requiring these bodies or any other to employ a person who is not capable of carrying out whatever tasks are included in their job.

Under the EqA and (in NI) the DDA, the duty to make reasonable adjustments requires employers within the police, prison and emergency services to make appropriate reasonable adjustments to enable a disabled person to be employed, but in doing so they are not required to compromise the operational capacity of the service.

4.4 Nationality discrimination (Art. 3(2)

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

a) How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?

[139] [2007] IRLR 476.

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Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

The Equality Act defines “race” (s.9) to include “colour”, “nationality” and “ethnic or national origins”, the RRO (art.5) similarly defining the “racial grounds” on which discrimination is regulated to include “race”, “colour”, “nationality” and “ethnic or national origins”. Thus, under UK legislation, discrimination on grounds of nationality, across the full scope of the EqA and the RRO, is prohibited in the same manner as other forms of race discrimination, though in NI the provisions of the RRO which apply to nationality, as distinct from the “race” and “ethnic or national origins” have not been amended to reflect the changes required to be made to the RRO to reflect the race directive (these changes included the definition of indirect discrimination, for example, and the burden of proof). Other than the amendments to art.40 mentioned below, the amendments to the RRO by the 2003 Regulations generally left untouched the protection against discrimination on grounds of nationality that were in place before the Race Directive came into force. In GB, no distinction is drawn by the EqA between “nationality” and other forms of race discrimination except that greater scope is permitted for other statutory provisions to authorise such discrimination (Sch., para 1).

Nationality discrimination can constitute indirect discrimination related to ethnicity, national origin or colour, but for the most part, discrimination on the basis of nationality is directly litigated as such. However, because in NI the legislative prohibition on nationality discrimination lacks the enhanced protection against race discrimination provided by the 2000 Racial Equality Directive and the 2003 RRO, protection against national discrimination is less developed than protection against discrimination on the basis of race, ethnicity or national origin.

The Race Relations (Amendment) Act (RR(A)A) brought within the scope of the RRA all functions of public authorities (s.19B RRA) including immigration control. The relevant provisions are now found in Part 11 of the Equality Act 2010 There is one major exception that is particularly relevant to nationality discrimination, that is, Sch. 18, para 2 EqA (formerly s.19D RRA), under which a minister can authorise discrimination on grounds of nationality and ethnic or national origins in the carrying out of specified immigration control functions.

Under the Race Relations (Immigration and Asylum) Authorisation 2004 there is a list (not in the public domain) of nationalities, and a person of a nationality on the list seeking to enter the UK can be subjected to more rigorous examination than other persons, detention pending examination, refusal of leave to enter and imposition of conditions on temporary admission and a person of a nationality on the list wishing to travel to the UK can be refused leave to enter or can be required to provide information and documents.

b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

The EqA contains specific exceptions to the protection against discrimination on grounds of nationality:

- In order to comply with Art. 14 of the Race Directive the UK removed, in relation to discrimination on grounds of race or ethnic or national origins, the exception (RRO, art. 40(1)) which permitted discrimination where this was done under statutory authority (to comply with primary or secondary legislation or requirement imposed by a Minister by virtue of an enactment). This exception continues to apply, however, in the case of nationality discrimination. At the same time, the UK strengthened the exceptions in RRO art. 40(2) that permit discrimination not only on grounds of nationality but also on place of ordinary residence or length of time a person has been present in the UK, if this is done under statutory authority or in pursuance of any arrangements made or approved by a Minister of the Crown or in order to comply with any condition imposed by a Minister of the Crown. This exception applies in relation to legislation passed at any time. Materially similar provisions are now found in Sch. 23, para 1 EqA.
- Schedule 22, para 5 EqA and RRO (art.71) permit rules which restrict employment in the civil service or by prescribed public bodies to persons of particular birth, nationality, descent or residence.
- The EqA (s.195) and RRO (art.38) permit discrimination on grounds of nationality in selecting persons to represent a country in any sport or game.

The EqA removes exceptions in the RRA that permit nationality discrimination in small partnerships and private households. The RRO continues to provide these exceptions.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

Relying on Recital 22 in the Employment Framework Directive, the UK originally included in the Sexual Orientation Regulations and the NI Sexual Orientation Regulations a specific exception for benefits related to “martial status”:

Nothing in Part II or III shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status. This provision, that continued the exclusion of same-sex partners from certain types of benefits, was widely criticised as incompatible with the Directive and the ECHR. A group of seven major trade unions were unsuccessful in their High Court challenge to the Sexual Orientation Regulations on this point (see the Amicus case, above at 0.3 Case Law).[140] After the hearing, but before judgment was given in the *Amicus* case, the government published the Civil Partnership Bill, which established a civil partnership scheme whereby same-sex couples can register their partnership which is then legally recognised as equivalent to marriage. Before that Act received Royal Assent, the government announced that same-sex couples who made a formal commitment to each other by registering under this statutory civil partnership registration scheme would be able to benefit from private occupational pension schemes and public sector schemes in the same way that married people do.

Pension schemes are now required to provide survivor's pensions for registered civil partners accrued from 1988 as they do for surviving widowers. Employment benefits, including occupational pension schemes, must comply with the non-discrimination requirements of the EqA and, in NI, the NI Sexual Orientation Regulations. Employers across the UK must extend any benefits offered to the spouses of employees who are married to partners of employees who are in a civil partnership.[141]

b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

There are no legal requirements to offer such benefits to couples of either the same or opposite sex who have not entered into a marriage or civil partnership.[142] However, where benefits are made available to unmarried couples of opposite sex they must be extended equally to same sex couples who have not registered a civil partnership, by virtue of the EqA and the NI Sexual Orientation Regulations. This has been the case since 1 December 2003, when the original Regulations came into force.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

a) *Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

[140] *R (Amicus & Ors)* v *Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] IRLR 430.
[141] Schedule 17, s.7. This does not affect benefits limited to married couples where the right to the benefit accrued or the benefit is payable in respect of periods of service prior to December 5, 2005.
[142] Schedule 17, s.7(3).

Employers have a duty[143] to carry out an assessment of the risks to health and safety to which their employees are exposed while at work to identify what they must do to comply with health and safety legislation. Employers are expected to put in place measures that reduce risks to as low a level as is reasonably practicable, but there is no duty to remove all conceivable risks.

It could constitute direct discrimination to treat a disabled person less favourably than others on the basis of a generalised assumption about risks to health and safety. A health and safety risk assessment for a disabled person should consider the degree of risk in carrying out relevant work-related activities and the impact of any reasonable adjustment. If, after such assessment, the employer decides that the degree of risk to the health and safety of the disabled person or other people arising from employing the disabled person to do the job in question is too great, this may be relied upon as a justification for less favourable treatment of the disabled person under the Equality Act 2010 or the DDA. Whether this defence will succeed in any particular case depends on whether the justification meets the statutory test of "material and substantial" (under the DDA) or whether, under the Equality Act 2010, it was "a proportionate means of achieving a legitimate aim".

Disability-related discrimination in the provision of goods and services can be justified in NI under the DDA (s.20(4)) on the grounds of health and safety, where the treatment is necessary in order not to endanger the health and safety of any person (including the disabled person). The EqA has replaced the various provisions on justification contained in the DDA with a single overarching provision requires that the disputed treatment (not amounting to direct discrimination, which is narrowly defined (see above)), is "a proportionate means of achieving a legitimate aim".

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.)?

Other than in relation to pregnant women, the EqA does not contain any exceptions relating to health and safety. Where the discrimination is for a reason arising from a person's disability, rather than the mere fact of disability, s15 EqA provides that it may be justified if it is a proportionate means of achieving a legitimate aim. NI legislation outlawing discrimination on grounds other than disability does not include specific exceptions relating to health and safety law.

A number of cases alleging indirect discrimination on racial grounds have been brought where employers or educational institutions have imposed dress codes on health and safety grounds that disadvantaged members of particular racial groups who were not able to comply with the dress requirements. Examples of such codes include a "no beards" requirement applicable, for reasons of hygiene, to those

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[143] Management of Health and Safety at Work Regulations 1999.

involved in food preparation or packaging,[144] a requirement that all railway repair workers wear protective headgear,[145] and a prohibition on the wearing of a religious bangle by a Sikh schoolgirl.[146] And *Chaplin v Royal Devon and Exeter NHS Foundation Trust*, mentioned at Annex 3 below, involves an Article 9 challenge to the imposition of a health & safety prohibition by a hospital of the wearing of necklaces (in the claimant's case, a crucifix).[147] The claimant's challenge to the ECtHR failed.

The outcome of such cases, in common with any other complaint of indirect discrimination, depends on whether the employer can show that their need for the rule outweighs its discriminatory impact: often such cases have resulted in the employer recognising that there were other, non-discriminatory, ways in which they could have dealt with the health and safety risk.

It should be noted that Sikh men are exempted from otherwise generally applicable statutory requirements to wear motorcycle helmets when riding motorcycles and to wear hard hats when working on construction sites.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

a) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

The Equality Act 2010 and the Employment Equality (Age) Regulations (Northern Ireland) 2006 prohibit direct or indirect age discrimination in employment and occupation subject to a general objective justification defence where the employer can show that the discriminatory treatment on the grounds of age is a proportionate means of achieving a legitimate aim.

Specific exceptions are also made for the use of age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers (see Equality Act 2010, Schedule 9, Part 2, paras 11 and 12). This is controversial, and may be difficult to justify given the CJEU decision in *Mangold*.

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[144] *Panesar v Nestle Co. Ltd.* [1980] IRLR 64; *Blakerd v-Elizabeth Shaw Ltd* [1980] IRLR 64.
[145] *Singh v British Rail Engineering Ltd* [1986] ICR 22.
[146] *R (Watkins-Singh)* v *Governing Body of Aberdare Girls School* [2008] EWHC 1865 (Admin), [2008] ELR 561, see Annex 3.
[147] [2011] EqLR 548.

Less controversial specific exemptions exist for the payment of insurance benefits to older workers (see Schedule 9, Part 2, para 14 EqA: in NI the equivalent exemption covers the payment of life assurance benefits to retired workers (reg 36)) while special and complex exceptions are also made for the use of some age-based criteria in invalidity and occupational pension schemes, as permitted by Article 6(2) of the Directive: see below. Provision is also made for positive action in training and encouraging workers from particular age groups: this is much narrower in NI (Reg 31) than in GB following the implementation of the positive action provisions of the Equality Act 2010. Another specific exemption allows older workers to receive higher levels of redundancy payment (Sch. 9, Part 2, para 13 EqA/ reg 35): this remains controversial despite the view of the UK government that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers.

Prior to April 2011, the legislation permitted the dismissal of employees when they reached 65 years of age, allowing employers to use mandatory retirement ages if they wished. In *R (Heyday) v Secretary of State for Trade and Industry,* an age equality campaigning group challenged the provision allowing employers to maintain a mandatory retirement age for employees after they reach 65, on the basis that this was contrary to the requirements of Article 6 of the Framework Equality Directive. The matter was referred by the English High Court to the CJEU for resolution and the CJEU set out the required approach to assessing whether such retirement age provisions can be objectively justified.[148] The High Court concluded, on the case's return to the UK, that the default retirement age was justified but it was abolished in any event with effect from April 2011 though individual employers may be able to justify the retention of a retirement age.

Benefits that are linked to the length of an employee's length of service with a particular employer are also exempted from the legislation in certain circumstances. The use of length of service by an employer to award or increase benefits to employees during the first five years of their service is deemed by the EqA (Sch. 9, Part 2, para 10: in NI by the Age Regulations, reg 34) to be clearly justified, and a complete and automatic exemption will apply: the UK government considers that this is objectively justified as it allows employers to encourage recently recruited employees to remain with their new employers for at least some time.

In contrast, discriminating between employees on the basis of length of service requirements which are longer than five years may still be justified, but will not be automatically so. Reg 34(2) provides that "Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers)".

[148] Case C-388/07 [2009] ECR I-1569.

By contrast, Sch. 9, Part 2, para 10(2) EqA provides only that “If B's period of service exceeds 5 years, A may rely on sub-paragraph (1) [which permits the reward of service] only if A reasonably believes that doing so fulfils a business need.”

In *Rolls Royce Plc v Unite*[149] the Court of Appeal upheld the decision of the High Court that an employer’s use of length of service as part of a scheme used to select employees for redundancy was lawful under Reg. 32 (the predecessor to the EqA, Sch.9, Part 2, para 10, which was materially identical to reg.34 of the NI Age Regulations). It should be noted that the High Court stated in this case that the use of redundancy selection schemes that were based solely on the principle of “last in first out” (“LIFO”) would be less likely to satisfy the objective justification test. (See Annex 3.)

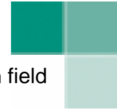
b) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?

As discussed above, the EqA and the NI Regulations make it unlawful for trustees or managers of an occupational pension scheme, when carrying out their functions, to discriminate on grounds of age. However, certain age-related rules or practices in occupational pension schemes are exempted, and these are defined in a complex set of provisions in Schedule 1 of the NI Regs and in the Equality Act (Age Exceptions for Pension Schemes) Order 2010, SI 2010/2133, made under section 61 of the EqA. These exceptions permit occupational pension schemes, *inter alia*, to:

- Have minimum and maximum ages for joining;
- Specify a normal retirement date;
- Pay early and late retirement pensions;
- Pay ill-health early retirement pensions without reduction and/or with enhancement;
- Pay early retirement pensions on redundancy without reduction and/or with enhancement;
- For defined benefit schemes, link benefits to service;
- Close a scheme to new entrants;
- Pay differential increases to pensioners of different ages.

It should also be noted that the use of age distinctions in occupational schemes can still be challenged as discriminatory on grounds of sex.

[149] [2008] EWHC 2420 (QB), [2009] EWCA Civ 387, [2009] IRLR 576 (CA).



4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

The national minimum wage (NMW) is paid at three different rates based on the age of the worker: the rates on 1 January 2011 are – under 18 EUR 4.34 (£3.68) per hour; 18-20 EUR 5.87 (£4.98) per hour and workers 21 and over EUR 7.30 (£6.19) per hour. Apprentices under 19, or 19 and over but in their first year of apprenticeship, are entitled only to EURO 3.12 (£2.65) per hour.

The EqA and NI Age Regulations, as discussed above, contain exemptions allowing for the payment of age-diffentiated NMW, but not otherwise permitting different rates according to age. The UK government argues that the exception is objectively justified as necessary to promote the integration of younger workers into the workforce.

Employers of children and young people have additional health and safety obligations.

The Employment Rights Act 1996, as amended, enables people with caring responsibilities for children under age 17 (or under 18 if disabled), or for adults to request a change in their terms and conditions of employment regarding hours, time of work or working partly or wholly from home.

The employer must consider every such request and if they refuse must give reasons for refusal; the employee has a right of appeal but no automatic right to flexible working. Comparable provisions exist in NI under the Employment Rights (NI) Order 1996.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

As discussed above, the EqA and the NI Age Regulations provide for positive action exceptions to the general prohibition on age discrimination. In GB the positive action provisions found in the EqA are broad. They are discussed below.

In NI the Age Regulations do not allow discrimination at the point of recruitment or promotion (except where this meets the general justification defence for direct or indirect age discrimination) but do allow persons of a particular age to be given special access to training facilities to help them take on particular work, or to be allowed to take advantage of opportunities for doing particular work, where it seems

reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age.

There are national laws and local by-laws (along with specific NI legislation) regulating the employment of children (up to minimum school leaving age (age 16)) consistent with EC Directive 94/33/EC. Currently, a wide variety of trades and professions set minimum ages for entry as trainees: the use of such entry ages will have to be objectively justified under the age regulations. Health and safety considerations may influence minimum ages for certain types of jobs. In some cases there are also maximum ages for entry while some jobs, notably judicial office, are subject to maximum age limits (broadly 75). In fixing age limits which are not prescribed by law employers will have to take care to avoid unjustifiable age discrimination and unlawful discrimination on other grounds. A maximum age for entry to the Civil Service, for example was held to be unlawful indirect discrimination on grounds of sex prior to the implementation of the legislative prohibition of age discrimination as such.[150]

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

State pensions are payable at 60 for women and 65 for men, although these ages will be equalised at 65 by November 2018 (and eventually increased to 68 by 2046). The changes will not affect women born on or between 6 April 1953 and 5 April 1960, or men born on or between 6 December 1953 and 5 April 1960.

b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

[150] *Price v Civil Service Commission* [1977] 1 WLR 1417, [1977] IRLR 291.

While arrangements vary, individuals are often now able to defer collecting their occupational pensions in return for higher payments if they wish to work longer. Tax rules preventing people from collecting their occupational pension while continuing to work were abolished in April 2006. Occupational pensions will be paid when the scheme rules determine, though those rules must be compliant with the Equality Act (Age Exceptions for Pension Schemes) Order 2010 and the NI Regulations: see above. The law does not permit distinctions to be drawn on grounds of sex in this matter.

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?

For most workers, there is no legal requirement to retire at a certain age. However, for certain public sector employment that is regulated by statute, there are national laws specifying a retirement age. Examples include the judiciary, the police and some civil servants. For other public sector employment, “retirement age” is regarded as the age when a worker can receive a full pension, at which point their contracts of employment are often terminated. In the private sector, employers have often set a fixed retirement age: see below. As discussed above, however, mandatory retirement ages have been unenforceable since April 2011 unless justifiable by the employer. Discrimination on grounds of sex in retirement ages is unlawful.

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

Retirement ages can be set but they can only be enforced if and to the extent that the resulting age discrimination is justifiable. Sex discrimination in retirement ages is unlawful.

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?

Yes. An employee who is dismissed because s/he has reached the employer’s retirement age can claim unfair dismissal, subject to any exceptions provided by statute (as in the case, for example, of the judiciary).

f) Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise

and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.

The answer to this is not entirely clear. The possible justification of mandatory retirement ages would appear to be in line with EU caselaw, this being the starting point adopted by the Supreme Court in *Seldon* (see 0.3 above). The position with regard to length of service (see 4.7.1 above) is less clear. Domestic law in this respect, particularly in the case of the EqA, appears to be easier to satisfy than the full objective justification test and the exceptions may be wider than permitted under the Directive, even though the UK government believes them to be objectively justified. Concern has also been expressed that the five year exemption of any length of service requirement may provide employers with too much leeway: five years is a considerable period of time in the contemporary workplace, and this time limit seems to be potentially disproportionate. It should also be noted that length of service requirements may fall foul of the prohibition on indirect sex and race discrimination in certain circumstances.[151]

4.7.5 Redundancy

a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

National law does not regulate criteria for selection for redundancy; where unions are recognised this is normally a matter negotiated and agreed between the unions and the employer. There is no prohibition on taking age or seniority into account, provided that it can be objectively justified under the EqA or, in NI, the Age Regulations. (See the discussion of *Rolls Royce Plc v Unite*[152] above.)

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

Older workers may receive higher levels of redundancy payment: the UK government considers that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

[151] See e.g. Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-297.
[152] [2009] EWCA Civ 387, [2009] IRLR 576 (CA).

The RRO (art. 41), Fair Employment and Treatment Order (art. 79), the NI Sexual Orientation Regulations (reg. 26), Equality Act (Sexual Orientation) Regulations (NI) 2006 and the NI Age Regs (Reg. 29) provide an exception for an act done for the purpose of protecting public safety or public order: “Nothing in Parts II to IV shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order.” The FETO, NI Age Regulations, Equality Act (Sexual Orientation) Regulations (NI) 2006 and NISO, however, provide that this exception applies only where the doing of the act is justified by that purpose.

The EqA provides (s.192) that “A person does not contravene this Act only by doing, for the purpose of safeguarding national security anything it is proportionate to do for that purpose”. The Act makes no reference to protecting public safety or public order.

Since the coming into force of the Human Rights Act 1998 which incorporates the ECHR into UK law, the courts are expected at all times to consider ECHR implications of matters before them, which may involve balancing the rights and freedoms of different parties where prohibiting discrimination may limit exercise of one of the qualified ECHR rights.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

The DDA, which applies in NI, contains an exception (s.59) for acts done in pursuance of primary legislation, including any passed after the date of the DDA or to comply with secondary legislation made after the date of the DDA or any condition or requirement imposed by a Minister of the Crown. Such an exception, which (unlike the statutory authority exceptions in the EqA) applies to discrimination falling within the scope of EU law, may be in breach of the Employment Framework Directive (art. 16). Outside of the scope of the Directives, the RRO, the NI Age Regulations and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 retain exceptions for all acts done under statutory authority.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

The law in this area has changed very significantly in GB with the implementation in April 2011 of ss.158 and 159 of the EqA which provide as follows:

158 Positive action: general

(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…
(4) This section does not apply to—
(a) action within section 159(3)…

159 Positive action: recruitment and promotion

(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, or
(b) participation in an activity by persons who share a protected characteristic is disproportionately low.
(2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
(a) overcome or minimise that disadvantage, or
(b) participate in that activity.
(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.
(4) But subsection (2) applies only if—
(a) A is as qualified as B to be recruited or promoted,

(b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
(c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2)…

These sections provide wide scope for positive action, particularly other than in relation to differential treatment at the point of recruitment/ promotion. The EqA also makes provision (s.104) for positive action across all the protected grounds in the selection of candidates for election, something which previously was available only in relation to gender. Those provisions are intended to enable parties in GB to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration, including the following:

- Carrying out an audit of political party membership to identify the proportion of members from under-represented groups and identify where gaps are present;
- Setting targets for recruitment drives;
- Carrying out general and specific or targeted recruitment drives;
- Running mentoring and leadership programmes;
- Setting targets for increasing the proportion of politicians and staff from under-represented groups;
- Establishing and supporting in-house forums for under-represented groups;
- Reaching out to community and faith organisations;
- Supporting local young Mayors and youth parliament;
- Supporting non-partisan voter registration initiatives and democracy week.[153]

Political parties will not, however, be permitted to adopt wide-ranging positive action measures to ensure the selection of ethnic minority candidates for parliamentary seats such as by introducing all-minority shortlists for candidate selection in certain constituencies. Women-only shortlists, by contrast, are and will remain lawful.

In NI the law relating to positive action is as follows

Age

Reg. 32 of the NI Age Regulations provides a specific exception is made for positive action that gives persons of a particular age access to training facilities to help them take on particular work, or that allows them to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age.

[153] *Ibid.*, para. 5.36.

Disability

The DDA permits discrimination in favour of a disabled person on grounds of their disability in employment, in further and higher education and in access to goods, facilities and services. Therefore there was no need to include in the DDA (still applicable in NI) specific positive action provisions like those in other anti-discrimination legislation that operate as exceptions to the prohibition of discrimination.

The positive duty to promote equality of opportunity imposed upon public authorities by the DDA 2005 (and, in GB, the EqA) may require public authorities to take certain forms of positive action where necessary to alter policies and practices that may have negative consequences for disabled persons.

Religion or Belief

Prior to the implementation of the positive action provisions of the EqA, the most comprehensive positive action provisions relating to employment in the UK were found in FETO, whose provisions resulted from US pressure on successive UK Governments to take steps to deal with the entrenched economic inequality experienced by Northern Irish Catholics. The Order, until its amendment for the purposes of implementing the prohibition on discrimination on grounds of religion or belief in Directive 2000/78/EC, did not protect against discrimination on grounds other than identification as Catholic or Protestant, and its positive measures only applied in respect of these groups.

Article 4 FETO defines “affirmative action” as:

> “…action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including –
>
> 1) The adoption of practices encouraging such participation; and
> 2) The modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

Article 5 defines equality of opportunity and provides in 5(5) that promotion of equality of opportunity includes promotion of affirmative action.

FETO requires registration of all employers with 10 or more employees, and requires all registered employers to monitor the composition of their workforce by persons belonging to either the Catholic or Protestant communities and by sex. The Equality Commission for Northern Ireland (ECNI) has powers of enquiry, investigation, etc., accompanied by powers to recommend or require employers to take certain “affirmative action” in a specified period.

Article 73 states that to pursue “affirmative action” in selection for redundancy will not be unlawful discrimination, and Article 74 that acts done by employers, employment agencies or vocational organisations in pursuance of affirmative action will not be unlawful discrimination. Article 76 provides that, as long as the ECNI has given its approval, it will not be unlawful discrimination for an employer or a training agency, on the employer’s behalf, to provide training to persons of a particular religious belief (not specifically Catholic or Protestant) in relation to employment at a particular establishment in NI where there are no persons of that religious belief doing that work at that establishment or where persons of that religious belief are under-represented amongst persons doing that work at that establishment. This preferential access to training cannot be given to current employees of the employer providing the training (or on whose behalf the training is provided).

As the scope of “affirmative action” in FETO applies only in relation to Protestants and Catholics, and as training under article 76 applies only in relation to a particular establishment, this otherwise very commendable package of measures probably does not go as far as is permitted under Article 7 of the Employment Framework Directive.

The Employment Framework Directive (Art.15(1)) provides a specific exception permitting positive action in recruitment into the police service of NI. The Police (Northern Ireland) Act 2000, requires that 50% of persons recruited to the NI Police Service as police trainees or support staff are to be Catholics and 50% are to be persons who are not Catholics; these measures were incorporated as part of the government’s response to the report of the Independent Commission on Policing for NI and are intended to overcome the historic under-representation of Catholics in an important, highly visible and historically controversial public service.

These 2000 Act’s measures were to expire on the third anniversary of their coming into force unless specifically renewed by an order made by the Secretary of State, who was expected to take account of progress that has been made in securing a more representative police force. So far, the measures have been maintained in effect by the Secretary of State. The cross-community reaction to the shooting dead of a Catholic member of the Police Service of Northern Ireland in March 2011 is testament to the extraordinary change in the approach of the Catholic minority towards the police service, a change which is likely to be attributable in part to the significant change in constitution of that service as a result of the positive action measures taken under the 2000 Act.

Race

The RROs permit positive action in the following contexts:

1) Allowing persons of a particular racial group access to facilities to meet their special needs in relation to their education, training and welfare (RRO art.35)

2) Permitting the provision of training or encouragement for persons of a particular racial group in respect of particular work where members of that racial group are underrepresented amongst persons doing that work (RRO art.37); and
3) Permitting trade unions, employers' or professional organisations to encourage membership among under-represented racial groups (RRO art.37).

Sexual Orientation

Exceptions for positive action are in the NI Sexual Orientation Regulations (reg. 29), and take the following general form:

> Nothing… shall render unlawful any act done in or in connection with –
>
> *1)* affording persons of a particular sexual orientation access to facilities for training which would help fit them for particular work; or
> *2)* encouraging persons of a particular sexual orientation to take advantage of opportunities for doing particular work, where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing that work or likely to take up that work.

The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 contain no specific exceptions for positive action in the provision of goods and services.

There has been some discussion recently about the relative absence of women from the upper echelons of the British judiciary. Many male judges take the view that any use of positive action in this area would be inconsistent with the "merit" principle, the obvious implication being that those currently in the higher judiciary have not been advantaged by their (male) sex in achieving such office.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

Broad Social Policy

The most important measures to secure positive action towards equality in the UK are embodied in the recent legislation imposing duties to promote equality on public authorities.

At least prior to the implementation of the EqA's single equality duty in April 2011, the most comprehensive public sector equality duties (PSEDs) were the provisions in the Northern Ireland Act 1998 (NIA) which (s.75 and schedule 9) require public authorities of particular descriptions in carrying out their functions to have due regard to the need to promote equality of opportunity on nine separate grounds.[154] In GB, the Race Relations (Amendment) Act 2000 amended the RRA to include (s.71(1)) a statutory duty on all public authorities named or described in RRA Schedule 1A in carrying out their functions to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. In 2006 the DDA 2005 imposed, a comparable duty on public authorities in GB to promote disability equality, and in 2007 the Equality Act imposed a similar gender duty. The Disability Discrimination (Northern Ireland) Order 2006 requires public authorities in NI to have due regard to the need to promote positive attitudes towards disabled persons and encourage participation by disabled persons in public life. In any case, public authorities in NI are also subject to the s. 75 duty discussed above, which covers disability. As previously noted, since April 2011 the EqA has imposed a single PSED across all the equality grounds on public authorities in GB.

Various special measures have been adopted over the years to assist the UK's various ethnic minority groups, including the provision of information on how to access social services in a variety of languages (including Urdu, Chinese, Hindi and Swahili), arrangements for special educational and health care support, and special "outreach" schemes designed to encourage people from ethnic minorities to enter professions, universities and other parts of society which remain predominantly white.

Special Measures

The Employment Act 1989 introduced a statutory exception to the requirement to wear a safety helmet on a construction site for Sikhs who wear turbans when on such sites. The Equality Act 2010 (Schedule 26, Part 1, para 15) refers to this provision and provides that it would be unlawful indirect discrimination to apply a requirement, criterion or practice to a Sikh relating to the wearing of a safety helmet on a construction site if the person has no grounds to believe that the Sikh would not be wearing a turban when on the site. A special exemption also permits Sikhs to refrain from wearing motorcycle helmets. In general, the wearing of the *hijab,* turban and other forms of religious symbols is not prohibited in schools, courts and other public places: it is not exceptional, for example, for lawyers or civil servants to wear the *hijab* if they are Muslim women, or the turban if they are Sikh men.

[154] Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, between men and women, between persons with a disability and persons without; and between persons with dependants and persons without.

Various special measures also exist to assist older and younger persons, such as employment and welfare support measures. In addition, the Department for Work and Pensions, through its Jobcentre Plus (combined job centre and social security office) supports a number of positive measures to assist disabled people enter employment, which are intended to prevent or compensate for disadvantages related to disability. The following are some key examples:

- *Job Introduction Scheme:* pays a sum of money to the employer for the first 6 weeks of employment provided that employment continues for 6 months; in exceptional cases it may be paid for 13 weeks.
- *Access to Work*: provides practical advice to help overcome work-related obstacles resulting from disability and makes grants towards extra employment costs, including: special aids or equipment, adaptations to premises/ equipment, help with travel to work, a support worker. In December 2010 it was reported that the programme had "drastically cut the range of products it will fund" in a bid to cut costs.[155]
- *Work Preparation:* an individually-tailored programme to help a disabled person to return to work after a long period of sickness or unemployment.
- *Disability Living Allowance:* a non-contributory benefit for disabled people who need help to care for themselves, or have mobility problems, or both. It is tax free, not means tested, and payable on top of any employment earnings. This is to be removed from April 2013.
- *WORKSTEP*: provides job support for disabled people who face complex barriers to getting and keeping a job but who can work effectively with the right support; it provides opportunities for disabled people to work for 16 hours or more in a supportive environment.

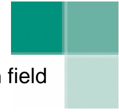
No affirmative action measures exist for Roma, but special educational facilities are available for Roma and Traveller children (as discussed above in some detail at 3.2.8), and some positive provision is made for Traveller families in housing (see also above at 3.2.10).

Quotas

See above for information on the temporary quota provision in the Police (Northern Ireland) Act 2000 to increase representation of Catholics in the police service, which is permitted as a special exception in the Employment Framework Directive (art.15(1)). This requires that 50% of persons recruited to the NI Police Service as police trainees or support staff are to be Catholics and 50% persons are to be persons who are not Catholics.

Quotas for employing persons with disabilities are sometimes used in the voluntary sector and in some public organisations. However, in general, there are no disability

[155] http://www.abilitymagazine.org.uk/Articles/Article-108-3.aspx, accessed 21 April 2011.



quotas in operation in the UK, the previous quota scheme having been deemed a failure and abolished by the DDA.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

a) *What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?*

The UK anti-discrimination legislation (EqA, Part 9; RRO arts. 51-54; DDA ss.17A and 25; Fair Employment and Treatment Order arts. 38-40; NI Sexual Orientation Regulations regs 34-38; Part 6 of the NI Age Regs.) includes provisions enabling individuals who consider they have been discriminated against contrary to the Act/Order/Regulations to bring legal proceedings; complaints concerning employment-related discrimination (public sector and private sector) can be made to the employment tribunal (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) can be made to the civil court (county court in England, Wales and NI and sheriff court in Scotland). The court/tribunal procedures are available to any person who considers s/he has suffered unlawful discrimination.

Employment/industrial tribunals were established to consider the full range of employment disputes. Each tribunal has a legally qualified chairman and two lay members, one broadly representing employers and the other employees. In the county/sheriff court, cases are decided by a single judge; for cases under the Equality Act 2010, however, the judge must generally be assisted by two lay assessors: people selected from a list maintained by the Secretary of State, unless the parties agree that the judge should sit without assessors (s.114).

The EHRC now funds the “Equalities Mediation Service”, formerly the “Disability Conciliation Service”, an independent scheme for resolving disputes about discrimination in the provision of goods and services and in education and employment on grounds of race, gender, age, religion and belief and sexual orientation as well as disability. The Commission also provides a specialised advisory service on discrimination claims to representatives and advisers working in the not-for-profit sector.

All claims to the employment tribunal for unfair dismissal or unlawful discrimination are referred to the Advisory Conciliation and Arbitration Service (ACAS), or in NI the Labour Relations Agency, which have statutory duties to promote settlements. The ACAS or Labour Relations Agency officer attached to a claim will contact the parties who may or may not choose to enter into a discussion. Settlements agreed through ACAS or the Labour Relations Agency are binding on the parties.

A complainant is at present able to use a statutory pre-action questionnaire to obtain information from the respondent. The questionnaire often helps the complainant or their adviser to assess the merits of a complaint before beginning legal proceedings; if a respondent fails to reply to the questionnaire, or if the reply is evasive or equivocal, a court or tribunal may draw any inference from this fact including an inference of unlawful discrimination (EqA, s.138; RRO art. 63; DDA s. 56; NI Sexual Orientation Regulations reg. 39; Fair Employment and Treatment Order art. 44; NI Age Regulations, reg 46). The Coalition Government will abolish the statutory discrimination questionnaires in 2013.

The EqA expanded the power of employment tribunals in GB to make more wide-ranging recommendations in discrimination cases by allowing tribunals to indicate steps that employers should take to prevent discriminating against employees and the steps that they should take to prevent other discrimination cases arising. In 2012 tribunals made 24 recommendations in discrimination claims (the highest number in any previous year was 15 in 2008). Of these, 15 indicated actions extending beyond the claimant him or herself.[156] The most common recommendation concerned training (made in 11 of the 24 cases) while 7 recommendations were made for review of policies, and one for the appointment of a contact person for employees with disabilities. The Coalition Government has also indicated its intention to remove this power.

There is no difference between the public and private spheres in the context of remedies and enforcement under employment-related discrimination law.

Research consistently reveals that the majority of people who consider they have been victims of unlawful discrimination or harassment are very slow to seek legal redress. The main reasons are generally lack of confidence that they will be believed or fear that they will face some form of retaliation or victimisation.[157] Individuals who are confident and determined enough to consider bringing legal proceedings face a number of barriers. There are statutory time limits for the initiating of complaints of discrimination (3 months for employment-related cases and 6 months in the county/sheriff court, though the court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so).

Employment tribunals do not normally order the unsuccessful party to pay the costs of the winner, though a tribunal may order costs against a party who has acted “vexatiously, abusively, disruptively or otherwise unreasonably”, or whose bringing or conduct of the proceedings is “misconceived”, i.e. has no reasonable prospect of success. The maximum amount of such costs was raised from EUR 11800 (£10 000)

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[156] *Equal Opportunities Review* 14 December 2012 “Recommendations”.

[157] Aston J, Hill D, Tackey N., *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (2006) Department of Trade and Industry, Employment Relations Research Series, ERRS55.

to EUR 23600 (£20 000) in 2012. It may be difficult for unrepresented claimants to know if their case is “misconceived”. In the county/sheriff court there are fees from the outset, and, with few exceptions, an unsuccessful applicant will be ordered to meet the costs of the respondent. It is difficult to over-state how much of a barrier this places in practice to litigation. It is a matter of real concern, therefore, that fees are to be introduced in employment tribunals. In cases of discrimination a payment of £250 will be required to issue the claim followed by an additional £950 prior to the hearing. Fees can be remitted for the very low-earning (an estimated 24% of claimants), but the introduction of fees will inevitably prevent many meritorious claims from being brought.

In 2009-2010, costs were awarded against 88 employers and 324 claimants in employment tribunal cases. The maximum award of costs was EUR 17 085 (£13 924), the median EUR 1 222 (£1 000) and the average EUR 2807 (£2 288).[158] In 2011-2012 costs were awarded against 132 employers and 355 claimants, the maximum, median and average awards being EUR 102 000 (£83 000), EUR 1 562 (£1 273) and EUR 3 472 (£2 830) respectively.[159]

Disabled people may have additional barriers to seeking legal redress; while the courts have a duty as service providers to make reasonable adjustments in anticipation of the needs of disabled people (s.21 DDA), there continue to be occasions when disabled people are significantly disadvantaged. Some courts and tribunals are not physically accessible and there are examples where no interpreters or unsuitable interpreters were provided or documents not provided in alternative formats, e.g. Braille, large font size.

A final barrier for discrimination claimants is the lack of skilled, experience advice and assistance. Discrimination law is increasingly complex. Not only is most of the evidence in the hands of the respondent, but, in most cases, the respondent will have access to legal or other professional advice and representation; without comparable access to skilled case preparation and representation complainants are far less likely to succeed.

Success rates for discrimination complaints are not high, even with representation; complaints of race discrimination are least likely to succeed, but on any of the grounds the rate of success for cases that are given a full hearing in the employment tribunal is likely to be between 20 – 30%.[160] The equality commissions, later the

[158] Employment Tribunal and EAT statistics 2010-11 (GB), available at http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb, accessed 1 November 2012.

[159] Employment Tribunal and EAT statistics 2009-110 (GB), available at http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb, accessed 5 April 2013. The 2011-12 figures are skewed by an award of £5 costs against each of 800 claimants in a multiple case and so are not included here.

[160] Figures taken from research for the year 2001 published in Labour Research, April 2002.

EHRC, have over the last few years assisted relatively few applicants; public funding generally involves strict means testing and is not available for legal representation in employment tribunals. The lack of available skilled advice, assistance and representation in discrimination cases is a matter of growing concern.

The following are the statistics showing the discrimination claims which were accepted by the employment tribunals from 1st April 2006 to 31st March 2010:[161] there is no equivalent data on the amount of goods and services cases brought before the county courts.[162]

Employment Tribunal Claims, 2004-10[163]

Year	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010
Disability discrimination	4 900	4 600	5 500	5 800	6 600	7 500
Race discrimination	3 300	4 100	3 880	4 100	5 000	5 700
Age discrimination	n/a	n/a	972[164]	2 900	3 800	5 200
Religion/ belief discrimination	300	490	650	710	830	1 000
Sexual orientation discrimination	350	400	470	580	600	710

The following tables indicate the outcome of cases **disposed of** by the employment tribunals in 2011-12. The very low rate of success is noteworthy.

Outcome of Employment Tribunal cases, 2011-12[165]

Nature of Claim	No of claims	Withdrawn	Formally settled	Dismissed without full trial	Full hearing	
					Success-ful	Unsuccess-ful
Disability discrimination	7300	31%	45%	10%	3%	11%
Race discrimination	4700	30%	36%	11%	3%	17%
Age discrimination	3800	43%	31%	17%	1%	8%
Religion/ belief discrimination	850	31%	34%	15%	3%	16%
Sexual orientation discrimination	590	29%	42%	14%	3%	10%

[161] See Appendix A, *The Employment Tribunal Service: Annual Report 2006-07* (London: 2007).
[162] Numbers are rounded to the nearest 10 (where under 1000) or the nearest 100 (where over 1 000).
[163] Source Ministry of Justice annual statistics.
[164] Most of the age cases relate to mandatory retirement, and were suspended pending the decision of the CJEU in the *Heyday* reference.
[165] http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf, accessed 5 April 2013.

b) Are these binding or non-binding?

Orders by the tribunal or court are binding on the parties. There is a right of appeal on a point of law. In GB, appeals in employment cases proceed to the Employment Appeal Tribunal (one judge and two non-lawyer members), then to the Court of Appeal (England and Wales) or the Inner House of the Court of Session (Scotland) (three judges), then to the Supreme Court (the highest court in the UK) (usually five judges).

In NI appeals go directly to the Northern Ireland Court of Appeal (three judges), then to the House of Lords. Appeals from the county court go to the Court of Appeal and from the sheriff court to the Court of Sessions.

Employment/industrial/fair employment tribunals may also make recommendations (see 6.5 below). Failure to abide by these recommendations does not amount to a punishable contempt of court but may result in an order for increased compensation.

c) What is the time limit within which a procedure must be initiated?

Generally legal proceedings must be brought within three months of the act complained of, though time limits can be extended where “just and equitable” to do so and time does not begin to run until the end of any continuing act of discrimination.

d) Can a person bring a case after the employment relationship has ended?

Yes, subject to the time limits. Further, in *Relaxion Group v Rhys-Harper plc*[166] the House of Lords held that a complainant can bring an action in respect of discrimination that occurred after the employment relationship had terminated under the SDA, RRA and DDA, as long as some link existed between the discriminatory act and the period of employment itself.

Provisions in the regulations introduced to implement the 2000 Directives subsequently made explicit provision for this: now see s.108 of the Equality Act 2010 which provides that “A person (A) must not discriminate against another (B) [or harass B] if— (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act”. S.108(4) provides further that “A duty to make reasonable adjustments applies to A [if B is] placed at a substantial disadvantage as mentioned in section 20”. Similar provision is made in NI. As mentioned above, however, the post-employment provision in the EqA does not apply to discrimination by way of victimisation.

[166] [2003] UKHL 33, [2003] ICR 867, [2003] IRLR 484.

e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Litigants are unlikely to succeed in discrimination claims without expert representation which is very expensive. It is possible that an unsuccessful party may be required to pay the legal costs of the other side, though this is relatively unusual in tribunals. (this has the effect, of course, that successful litigants are unlikely to recover their costs, which may well amount to a significant part of any compensation awarded). In addition, as set out above, fees are to be introduced in employment tribunals which are likely to have a significant downward impact on claims.

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

Employment Tribunal cases, 2011-12[167]

Nature of Claim	No of claims
Disability discrimination	7300
Race discrimination	4700
Age discrimination	3800
Religion/ belief discrimination	850
Sexual orientation discrimination	590

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).

The various rules of civil procedure and common law precedent which regulate proceedings in UK courts and employment tribunals limit the circumstances in which associations may intervene in an ongoing case as independent parties in support of a claimant. In general, only claimants who allege that they have been the victims of discrimination may bring a case before a court or tribunal. Any organisation may however act in support of victims and an application for judicial review of the

[167] http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf, accessed 5 April 2013.

lawfulness of public authority actions can be brought by any person or body with “sufficient interest” (Superior Court Act 1981 s.31(3)).

b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove “legitimate interest”, what types of proof are needed? Are there legal presumptions of “legitimate interest”?*

Only associations with sufficient interest (*locus standi*) in a matter may bring judicial review actions under administrative law against public authorities, even if they have not themselves been the victims of a wrongful act. This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts and trade unions, NGOs and the equality commissions have brought bring important actions against public authorities through judicial review proceedings, such as the *R (Amicus) v Secretary of State for Trade and Industry* and case discussed in Annex 3.

In addition, courts and tribunals may at their discretion permit associations with relevant expertise to make a “third-party intervention” in any case, whereby associations may present legal arguments on a point of law that is at issue in the proceedings (as distinct from presenting arguments directly in favour of the claimant). Such “third party interventions” are often permitted in complex discrimination law cases.

There are no restrictions under the normal rules of civil procedure on any organisation offering support to complainants in discrimination cases, in the sense of providing complainants with advice, legal assistance in case preparation or financial assistance to secure external lawyers’ services. Some trade unions, the equality commissions and some specialised NGOs directly employ qualified lawyers and therefore can offer full support to complainants. In many discrimination cases, the legal arguments put forward by the complainant have been prepared by the legal teams of the Equality and Human Rights Commission, trade unions or NGOs which may also argue the case before the court or tribunal as the complainant’s chosen legal representatives.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

As above, there are no provisions allowing entities to act on behalf of victims. No authorisation is required in interventions, which are regarded as being made in the interest of the intervener rather than complainant or respondent, but the agreement (or objection) of either party may be taken into account by the court in deciding whether or not to permit an intervention.

As to authorisation for other forms of support: a victim who does not wish to accept such support is free to reject it. Minors are deemed to lack legal capacity and must litigate through Litigation Friends who have to be approved by the court: they are generally the minors' parents). Adults lacking legal capacity by reason of mental impairment may also litigate through litigation friends.

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

All such action would be discretionary.

e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

As above, in practice associations can only act in their own interest by way of judicial review or by intervention in any type of proceedings with the permission of the court.

f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

The remedies available in judicial review are declarations of the law and orders to stop doing something which is unlawful or to do something which the law requires. An order may also be made quashing an unlawful decision. Save where an organisation claims breach of its own rights under the ECHR, no financial remedy is available in judicial review. Nor are remedies available to interveners.

g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

No.

h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

No, save for the EHRC's powers to seek injunctive relief in respect of unlawful discrimination (see (i) below). Associations can only act if they have sufficient interest in the outcome of a case to have "standing".

i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

UK anti-discrimination legislation does not permit associations, organisations or other legal entities, including the equality bodies, to engage in proceedings on behalf of one or more complainants. Organisations cannot bring representative or "class" actions in the name of victims. In this respect UK legislation may not be fully compliant with the Directives (arts. 7(2)/9(2)). However, section 24 of the Equality Act 2006 permits the EHRC to seek injunctive relief to prevent a person from committing an unlawful act.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

All UK anti-discrimination legislation provides for shift of the burden of proof in relation to each of the grounds of discrimination, either (in GB) across the material scope of the Equality Act 2010 or (in NI) in relation to all of the activities considered to be within the scope of the Directives.[168] So, for example, s.136 of the Equality Act 2010 provides that:

> (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…
> (5) This section does not apply to proceedings for an offence under this Act.

[168] The shift of the burden of proof does not apply in cases under the RRO where the alleged discrimination is on grounds of colour or nationality, in cases under the Fair Employment and Treatment Order for activities outside art. 3(2B) and in cases under the DDA other than under Part II or employment services (s.21A).

DDA s.17A(1C); FETO, arts 38A and 40A, RRO, arts. 52A and 54B; NI Sexual Orientation Regulations, regs. 35 and 38, Regs. 42 and NI Age Regulations, regs 42 and 45 are in materially similar terms.

Recent cases concerning shift of the burden of proof and guidelines laid down by the EAT are discussed above under Case Law (0.3). It would appear that, in this respect, the UK legislation complies with the Directives.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Victimisation under all of the UK anti-discrimination measures is prohibited as a form of unlawful discrimination. The EqA, which applies in GB across all the protected grounds, provides as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…

In NI the provision made by the various Orders and Regulations and by the DDA is broadly similar, except that victimisation is defined as occurring where a person (A) “treats [another] less favourably than he treats or would treat other persons in those circumstances” because B has done, or A believes him to have done, a “protected act”. The NI provisions offer broad protection insofar as they apply to a wide range of people: the victim of the original act of discrimination or harassment, a witness, a third party who raised or supported a complaint on behalf of the victim; and there is no requirement that the perpetrator of the victimisation should have been involved in the original complaint, for example an employer who refused to employ a person who, in a previous job, had complained of discrimination or assisted a victim of discrimination.

The approach taken in the Equality Act 2010 is an improvement from the NI approach, which applied in GB prior to the implementation of the EqA, because it does away with the need to show "less favourable" treatment, which required the complainant to identify a real or hypothetical comparator.

Case law has demonstrated how difficult it is for an individual to establish that because she/he had done one of the protected acts, she or he was treated "less favourably", that is to find an appropriate comparator.[169] The Directives (arts. 9/11) differentiate between victimisation and discrimination, providing that a person should not receive "adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment". There is no indication that a comparator is required.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The anti-discrimination legislation specifies the remedies available where complaints of discrimination or harassment are upheld by a court or tribunal. The same remedies are available against public sector and private sector respondents. The main remedy is damages, which are calculated as in civil proceedings for tort, and may include "compensation for injury to feelings" whether or not damages are awarded for any other reason. Damages may be awarded for direct discrimination and harassment whether it was intentional or unintentional. In the case of indirect discrimination, if the employer or other respondent proves that the discrimination was unintentional, damages may only be awarded if the tribunal or court considers it "just and equitable" to do so.

b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

There is no upper limit to the amount of compensation that can be awarded. In recent years the average total award in the employment tribunal has been approximately EUR 9 600–12 000 (£8-£10 000), with some awards of only a few hundred pounds and exceptional awards well in excess of EUR 120 000 (£100 000).

In 2002, the Court of Appeal[170] fixed a wide range for injury to feelings compensation – from EUR 600-30 000 (£500 to £25,000) -- divided into three bands depending on the seriousness of the case. An award can include aggravated damages to take

[169] See, for example, *Aziz v Trinity Taxis* [1989] QB 463 and *Chief Constable of the West Yorkshire Police v Khan* [2001] IRLR 830.
[170] *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102.

account of the way the respondent treated the complainant or conducted their case. More recent caselaw suggests that the appropriate brackets now range from about EUR 720-36 000 (£600 to £30 000).[171]

c) Is there any information available concerning:
i) the average amount of compensation available to victims?

Compensation awards vary across the grounds, and from context to context. In April 2009 to March 2010, April 2010 to March 2011 and April 2011 to March 2012 respectively the median, average and maximum awards made by tribunals across the range of protected grounds were as follows (all three years are included to show the degree of variation over time):

Employment tribunal awards 2009-2010[172]

Protected ground	Average award	Median award	Maximum award
Disability	£52 087	£8 553	£729 347
Race	£18 584	£5 392	£374 922
Sexual orientation	£20 384	£5 000	£163 725
Age	£10 931	£5 868	£48 710
Religion/ belief	£4 886	£5 000	£9 500

Employment tribunal awards 2010-2011[173]

Protected ground	Average award	Median award	Maximum award
Disability	£14 137	£6 142	£181 083
Age	£30 289	£12 697	£144 100
Race	£12 108	£6 277	£65 530
Sexual orientation	£11 671	£5 500	£47 633
Religion/ belief	£8 515	£6 892	£20 221

[171] *Da'Bell v NSPCC* [2010] IRLR 19.
[172] Employment Tribunal and EAT statistics 2009-10 (GB), available at http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb, accessed 5 April 2013.
[173] Employment Tribunal and EAT statistics 2010-11 (GB), available at http://www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb, accessed 5 April 2013.

Employment tribunal awards 2011-2012[174]

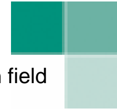
Protected ground	Average award	Median award	Maximum award
Disability	£22 183	£8 928	£390 871
Age	£19 327	£6 065	£144 100
Race	£102 259	£5 256	£4 445 023
Sexual orientation	£14 623	£13 505	£27 473
Religion/ belief	£16 725	£4 267	£59 522

County/sheriff courts, in addition to the power to award damages (including damages for injury to feelings and aggravated damages), have all of the powers they would have in any other action in tort or (in Scotland) in reparation for breach of statutory duty. Levels of compensation in county/sheriff court claims are generally lower than in the employment tribunals (primarily because in most cases the victim's actual loss is likely to be less) and there is little evidence that the courts often use their powers to issue injunctions or other orders regulating the relationship of the parties. There are no reported cases of which the author is aware in which the court has ordered the defendant to take any measures to prevent future discrimination.

In addition to a declaration of the rights of the parties and an order for compensation, the employment/industrial/fair employment tribunal may make recommendations to protect the position of the complainant. The EqA provides (s.124(3)) that: "An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which he proceedings relate— (a) on the complainant; [or] (b) on any other person"; s.124(7) providing that "If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation in so far as it relates to the complainant, the tribunal may— (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid; (b) if no such order was made, make one". As mentioned above, the power to make recommendations extending beyond the respondent's treatment of the claimant is to be repealed by the Coalition Government.

In NI, except under the FETO, tribunals may only make recommendations to *"*obviate or reduce the adverse effect on the complainant of any act of discrimination to which the complaint relates", although the Fair Employment Tribunal has the additional power, when upholding a complaint, to make a recommendation that the respondent take action to prevent or reduce the adverse effect on a person other than the complainant (the author's emphasis) of any unlawful discrimination or harassment to which the complaint relates.

[174] Employment Tribunal and EAT statistics 2011-12 (GB), available at http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf, accessed 5 April 2013.



None of the legislation, however, gives a tribunal the power to order a respondent to hire, promote or reinstate (after dismissal) the complainant or to take any steps to prevent discrimination in future.

Adverse media publicity following a successful complaint, in particular, of race discrimination, can often be a more effective and dissuasive sanction than any formal order by a court or tribunal. In practice, it is the fear of adverse publicity that often influences respondents to settle complaints in advance of a hearing; the equality bodies have used the negotiations to settle cases as a means of securing agreement by respondents to take action to prevent future acts of discrimination. The effectiveness of such agreements depends, of course, on how well they are monitored once the ink is dry.

There is nothing in the UK anti-discrimination legislation that directly penalises organisations found persistently to discriminate, for example by excluding them from the opportunity to be awarded government contracts. The equality commissions are able to use their powers of formal investigation to investigate organisations they believe are discriminating and, where they are satisfied that unlawful acts have been committed, can serve binding non-discrimination notices requiring organisations to stop discriminating and to take action by specified dates to prevent discrimination from recurring. These same bodies can apply to the county/sheriff court for an injunction to prevent discrimination occurring.

Under the Human Rights Act, courts can issue injunctions to prevent breaches of the ECHR (as well as awarding damages), and can also grant similar forms of relief in administrative law to prevent discriminatory actions. There has as yet been no use of these powers or of the powers under the anti-discrimination legislation to grant injunctive relief to impose large-scale desegregation requirements or similar measures.

It should be noted that the FETO does contain sanctions on employers, including exclusion from public authority contracts, not for persistent discrimination but for failure to meet statutory reporting and workforce monitoring requirements, or for failure to comply with ECNI directions related to affirmative action; most commentators regard these as having a greater, long-term dissuasive impact than the sanctions available following successful litigation.

ii) *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

There are concerns that the existing remedies do not meet the standard of “effective, proportionate and dissuasive” set by the Directives. Arguably this is intrinsic in a scheme in which remedies are based on the principle of restitution, which is concerned to put the victim in the position s/he would have been had the act of discrimination not been committed. Of course the payment of damages could have a

deterrent effect, but the fact that certain organisations are repeatedly subject to discrimination proceedings suggests that more “dissuasive” sanctions are required. One suggestion is that tribunals and courts could be given wider powers to order respondents to revise practices shown to be discriminatory. The Equality Act 2010 went some way towards this by expanding the power of employment tribunals in GB to make more wide-ranging recommendations in discrimination cases. As noted above, however, this useful power is to be repealed.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The Equality and Human Rights Commission
The Equality Act 2006 established a new single equalities and human rights body for GB, the Commission for Equality and Human Rights (CEHR), which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC). The EHRC has taken over the powers and functions of the three previous GB equality commissions – the Commission for Racal Equality, the Disability Rights Commission and the Equal Opportunities Commission and has new functions in relation to sexual orientation, religion, belief and age, as well as in relation to human rights in general. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is now the designated body for GB in relation to Article 13 of Directive 43/2000/EC (succeeding the CRE). There have recently been very significant cuts to the funding of the EHRC.

The Equality Commission for Northern Ireland (ECNI)
The Equality Commission for Northern Ireland (ECNI) was established under the Northern Ireland Act 1998 (s.73) to take over the functions of the separate equality bodies in NI, namely the CRE for NI, the Fair Employment Commission for NI, the Equal Opportunities Commission for Northern Ireland and the NI Disability Council. This meant that the ECNI has duties and powers comparable to the EHRC in relation to race, religious belief and political opinion, sex and disability and, now, since the NI Sexual Orientation Regulations (regs.30 – 32), and Part 5 of the NI Age Regs., many of the same powers and duties in relation to sexual orientation and age. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is the designated body for NI in relation to Article 13 of Directive 43/2000/EC.

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

EHRC
Like the bodies it has replaced, members of the EHRC are appointed by a Secretary of State to serve for a fixed term. The appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission.

Funding is determined by the designated Secretary of State out of his or her departmental budget, and the EHRC is therefore accountable to the Secretary of State, to whom it reports annually. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Members of Parliament can choose to stage a debate on the contents of the report, but this rarely if ever happens.) In addition, the Joint Committee on Human Rights of the UK Parliament has the ability to inquire into the work of the EHRC and its relationship to the Secretary of State. The first such inquiry resulted in a very critical report published in March 2010.[175]

It was reported in November 2010 that the Equality and Human Rights Commission "has had to agree to a cut in its annual budget of 55%" (to EUR 38 million or £32 million) as a result of existing and planned cuts to government expenditure in the wake of the May 2010 general election.[176] By January 2013 the budget had been reduced to EUR 20 million (£17.1 million) per annum with additional "transitional funding" of EUR 9.4 (£7.94 million) in 2013/14 and EOR 1.65 million (£1.4 million) in 2014/15.

ECNI
Members of the ECNI are appointed by the Secretary of State for Northern Ireland to serve for a fixed term. As with the EHRC, the appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission. However, the Secretary of State is often subject to pressure from civil society to select well-qualified candidates with a good record on equality issues, which ensures that appointments to some degree reflect the expectations of civil society and disadvantaged groups. In addition, substantial political pressures exist in NI for the two major communities to be well represented on the Commission.

Funding is determined by the designated Secretary of State out of their departmental budget, and the ECNI reports annually to him/her. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Again, as with the EHRC, this rarely generates active parliamentary debate.) In addition, committees of the UK Parliament have the ability to inquire into the work of the ECNI and its relationship with the Secretary of State, although so far this has not taken place to any significant degree.

[175] JCHR 13th Report of Session 2009-10, "Equality and Human Rights Commission", available at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/72/72.pdf, accessed 18 April 2010.
[176] *Equal Opportunities Review* November 2010, Issue 206, 3.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

EHRC
The EHRC's remit at present extends across all the anti-discrimination grounds, and also includes the promotion of equality of opportunity and "understanding of the importance of equality and diversity". It also includes (s.10 of the Equality Act 2006) the promotion of good relations and prevention of hostilities between different communities and "groups" in British society.[177] The Commission is placed under a general duty by s.3 of the 2006 Act to:

> (1) … exercise its functions under this Part with a view to encouraging and supporting the development of a society in which—
> (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
> (b) there is respect for and protection of each individual's human rights,
> (c) there is respect for the dignity and worth of each individual,
> (d) each individual has an equal opportunity to participate in society, and
> (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The EHRC is similarly given a wide-ranging remit to promote compliance with, and understanding of, human rights. This includes rights contained in international instruments which have not been formally incorporated into UK law, although the Commission is to pay "particular regard" to the ECHR rights.[178]

The EHRC can also monitor and advise on the effectiveness of equality and human rights instruments, and is obliged to monitor and produce periodic reports on progress towards the social goals set out in s. 3 of the 2006 Act. The EHRC is precluded from taking "human rights action" in relation to devolved matters in respect of which the Scottish Parliament has conferred competence on the Scottish Human Rights Commission. But the EHRC has full responsibility for equality and anti-discrimination issues in Scotland. Both Commissions will have to work closely to prevent unnecessary overlaps and confusion between "human rights" and "equality"

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[177] A consultation paper launched in March 2011 by the UK Government Equalities Office suggests that this function may be removed: *Building a fairer Britain: Reform of the Equality and Human Rights Commission*, www.equalities.gov.uk/pdf/ EHRC%20Reform%20Condoc%20Accessible.pdf, accessed 22 April 2011.
[178] Clause 8(4) of the original Bill provided that the Commission 'may not take action in relation to non-Convention rights unless satisfied that it has taken or is taking all appropriate action in relation to the Convention rights.' This would have substantially reduced the freedom of action of the Commission to promote compliance with other rights instruments, including involvement with UN and Council of Europe monitoring systems. Following criticism, this clause was amended during the Bill's passage through Parliament.

issues: the existence of a separate "Scottish Committee" within the EHRC structure will help with this.

A Consultation Paper published in March 2011[179] proposed a significant narrowing of the EHRC's remit "to focus the Commission on the following core equality functions:

- Promoting awareness of equality legislation so that individuals, employers and others understand their rights and obligations;
- Working in partnership with organisations to highlight good practice and build their capacity to eliminate unlawful discrimination, advance equality of opportunity and foster good relations;
- Monitoring compliance with equality legislation and, in partnership with civil society organisations, holding Government and public bodies to account for their performance on equality, for example on their compliance with the new public sector Equality duty;
- Intervening to address non-compliance including by bringing or supporting individuals to bring strategic test cases to clarify and enforce the law;
- Maintaining a robust evidence base to inform and drive improvements in equality practice and against which progress towards a more equal society can be monitored;
- Helping the Government to evaluate and monitor the effectiveness of the Equality Act 2010.

ECNI
The remit of the ECNI extends across all of the discrimination grounds, and also extends to discrimination on the grounds of political belief. It however does not have responsibility for wider human rights issues, which come within the remit of the Northern Irish Human Rights Commission.

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

EHRC
The general duty imposed (at present) on the EHRC by s.3 of the 2006 Act is set out above. The 2006 Act conferred the powers of the previous equality commissions on the EHRC, and extended them across the six equality grounds. The EHRC can choose to support individual alleging discrimination before courts and tribunals, or to provide alternative forms of legal support and advice: it is not required to do so, and the expectation is that the EHRC will aim to select strategic cases rather than support a wide number of individual cases. The former equality commissions had at one stage provided assistance to a wide range of complainants, which however was reduced over the last few years, due to a preference for supporting strategic cases

[179] *Ibid.*

rather than a large amount of costly individual cases. Given the lack of support for individual discrimination cases in the UK system, the current lack of support for most individual cases is concerning, and may raise an issue under Article 13(2) of the Race Directive.

In contrast to these extended enforcement powers in the context of anti-discrimination law, the EHRC's powers in respect of human rights are more circumscribed. It cannot support individual cases brought under the HRA or based upon any other cause of action apart from the anti-discrimination legislation.[180] The EHRC can, however, support cases that combine both anti-discrimination and human rights claims.

The EHRC can also issue codes of practice, undertake research, surveys or educational activities, provide general advice, campaign for reform, and provide financial assistance to organisations concerned with the promotion of equality of opportunity and good relations. These powers are applicable in both the discrimination and human rights spheres.

ECNI
The ECNI has similar powers and functions as the EHRC, including the power of supporting individual cases. As with the EHRC, the continuing debate within the ECNI concerns the relative priority to be given to strategic "promotional" work and to law enforcement, including assistance to individual complainants: the ECNI at present supports more individual cases then does the EHRC.

e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

Yes.

f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The EHRC has powers to conduct formal investigations for any purpose connected with its duties, and can use its findings to make recommendations: where an investigation is based on a suspicion of unlawful discrimination, the EHRC can use statutory powers to require production of documents and information and can issue notices requiring discriminators to change their behaviour, which can be enforced in the courts. The EHRC also has powers to bring proceedings in relation to

[180] The Scottish Human Rights Commission is similarly barred from supporting individual human rights actions.

discriminatory advertisements and instructions or inducement to discriminate. Also, the EHRC has the power to take enforcement action against public authorities who fail to comply with their duty to promote race equality.

The 2006 Act clarified and enhanced the scope of some of these powers. S.30 places the ability of the EHRC to apply for judicial review and to intervene in court proceedings that relate to discrimination issues on firmer ground, by making explicit statutory provision for these powers.[181] The Commission's general inquiry and formal investigation powers have also been clarified and extended. The Commission has also been given extended powers to assess the compliance of public authorities with the general positive equality duties, and to issue a "compliance notice" when it concludes following such an assessment that a public authority is not complying with the requirements of a general duty.[182]

The EHRC was also given a new power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies who undertake to avoid discriminatory acts: this power was held by the DRC, but not by the other two commissions. The Commission is also now able to seek an injunction to prevent someone committing an unlawful discriminatory act, another new power.[183]

As noted above, the EHRC's powers in respect of human rights are more circumscribed. The EHRC can carry out general inquiries into matters concerning compliance with human rights instruments. It also has the important power under s. 30(3) of the Act to bring judicial review proceedings under the HRA against public authorities, and it can intervene in court proceedings that relate to human rights issues. (The EHRC has made important interventions in a series of key recent cases, including *Malcolm*, *Basildon* and *Shah & Kaur*, discussed in Annex 3.) The Commission, however, cannot initiate "named investigations" into whether particular authorities are complying with the HRA.

The ECNI has similar powers and functions as the EHRC, except that it has no power to commence formal investigations into questions relating to wider human rights issues, or to bring judicial review proceedings against public authorities for violating human rights. However, it can bring judicial review proceedings to prevent public authorities breaching the provisions of anti-discrimination legislation, intervene in court proceedings, launch formal investigations and assess compliance with the public and private sector equality duties.

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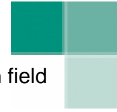
[181] The absence of such an explicit power to intervene in court proceedings in the legislation establishing the Northern Irish Human Rights Commission required a decision by the House of Lords to confirm that the Commission did have this power: see *In re the Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236.
[182] Ss. 31-32 Equality Act 2006.
[183] See s. 24 of the Equality Act 2006. The EOC had previously only the power to seek an injunction against bodies with a previous 'track-record' of illegal discrimination, and even then this power was limited.



g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).

Neither the EHRC or the ECNI are quasi-judicial institutions. Their role is to promote equality and enforce discrimination law, not to act as adjudicatory bodies. Both commissions can as noted above, however, carry out formal investigations as to whether persons and/or organisations are complying with discrimination law (including the positive equality duties). If, following such an investigation, the EHRC or the ECNI consider that a individual or an organisation is violating the law, it may issue an enforcement or compliance notice stating the necessary action required to ensure conformity with the discrimination legislation (the terminology varies according to the investigatory power being used).

Such notices are not legally binding: if the individual or organisation concerned refuses to comply with the notice, the EHRC or the ECNI needs to go to the courts to seek an order requiring compliance (or in the case of the ECNI when investigating compliance with the Fair Employment and Treatment Order duty, the Secretary of State, who can prohibit non-compliant companies from obtaining government contracts.) These powers are mainly used at present to ensure conformity with the positive equality duties: in that context, notices issued by the commissions are usually complied with without the need for a court order.

EHRC

In general, the EHRC is widely perceived as being largely independent of government interference, despite the lack of direct accountability to Parliament which many commentators have argued would be preferable to the current relationship with the relevant Secretary of State.

Paragraph 42(3) in Schedule 1 to the Equality Act 2006 (which was inserted into the Bill to provide reassurance about the Commission's independence) provides that:

> "The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining-
> (1) Its activities,
> (2) Its timetables, and
> (3) Its priorities."

During the consultations on its establishment, there were strong representations that the ECHR should report directly to Parliament or a committee of Parliament instead of to the executive. These suggestions were not adopted. By contrast, the Scottish Human Rights Commission (SCHR) is expressly not subject to the direction or control

of any Minister, MSP or Parliament (para 3 of Schedule 1 to the 2006 Act) and must report annually to the Scottish Parliament.

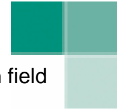
ECNI
The ECNI is widely seen as acting independently of government interference: historically, it has been perceived to be the most independent of the UK equality commissions, although it must move carefully in the complex world of NI politics.

h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

EHRC
The Equality and Human Rights Commission has made support for Travellers and Roma a central part of its legal strategy. It as also identified their concerns about housing and discrimination as a significant part of its policy agenda over the next years. The new Commission intends to support appropriate cases using both anti-discrimination law and the ECHR and to continue to campaign in the media and in the elected parliaments for Traveller and Roma rights. It has published several authoritative research publications on the treatment of Traveller families in the UK, which can be accessed via the Commission's website.[184]

ECNI
The ECNI has also identified Roma and Traveller issues as a priority issue and has in particular launched a consultation on strategy for promoting equality for Travellers in education in April 2006, as well as emphasising Traveller issues in much of its case-work and legal reform campaigning.

[184] See http://www.equalityhumanrights.com/key-projects/good-relations/gypsies-and-travellers-simple-solutions-for-living-together/gypsies-and-travellers-research-reports, http://www.equalityhumanrights.com/key-projects/good-relations/gypsies-and-travellers-simple-solutions-for-living-together/gypsies-and-travellers-research-reports/#2010, accessed 23 April 2011.



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The government committed itself to wide consultation on its proposals for implementation in GB of the Directives. As consultation requires a baseline of information, this has served as a way to disseminate information about the Directives. Well in excess of 10,000 copies of the first consultation document, were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs with a particular interest in any of the areas of discrimination within the Directives, lawyers' organisations, academics and others. In 2002-3 the government consulted in more detail on proposals for transposition, "Equality and Diversity – the Way Ahead". A separate consultation regarding legislation on age discrimination, "Age Matters", was carried out later in 2003; the government invited views on some of the difficult issues associated with age and employment. A similar consultation in NI was carried out between October 2003 and January 2004, "Prohibiting age discrimination in employment and training – Legislation for NI". Following the publication of the draft age regulations in 2005, an extensive consultation resulted in some significant alterations in the final text of the 2006 GB and NI age regulations. The Discrimination Law Review also involved a very extensive consultation process as did the development of the Equality Act 2010.

The government used its websites to make its consultation documents available to anyone interested, with links to versions of the consultation documents in Arabic, Hindi, Chinese and Gujarati, and a version prepared for persons with learning difficulties. The consultation documents are also available in Braille, large print and on tape. Similar steps have been taken for the draft age regulations, which have attracted a wide-ranging set of responses.

There was some press coverage when the Religion and Belief Regulations and Sexual Orientation Regulations were approved and, later, when they came into force. Similarly some publicity was given to the DD Regulations when they came into force while the Age Regulations have received extensive publicity.

The Government made available £625,000 (736,865 euros) in 2003-4 and £1.45 million (1,709,973 euros) in 2004-5 to fund NGO awareness raising projects in relation to the Sexual Orientation and Religion and Belief Regulations, including information materials, good practice guides, conferences and training. A further £2.5m (2,948,245 euros) was provided for the period 2005-07. ACAS produced

useful guidance on the Sexual Orientation Regulations and Religion and Belief Regulations, in consultation with outside organisations.

Similar steps were undertaken for the 2006 Age Regulations and the 2006 and 2007 Equality Act (Sexual Orientation) Regulations in both GB and NI.

To a considerable extent the Governments in GB and NI rely on the equality commissions to increase public awareness of existing anti-discrimination laws and the Directives. The previous GB commissions and the ECNI have published a great deal of information about current protection against discrimination; all generated an extensive range of publications, information and guidance, much of which is available in hard copy from the EHRC and the ECNI, and which is also on the EHRC and ECNI websites. Some criticism was directed at the EHRC for initially failing to duplicate much of the material made available by its predecessor commissions on its website, the transition to the new commission structure having resulted in material becoming less accessible.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

There exist in the UK a very large number of NGOs that represent or support particular groups or communities or special interests and are concerned to combat discrimination. Some receive some financial support from central or local government while most are dependent on non-government funding. There has been nothing to indicate that arrangements for consultation or “dialogue” have been initiated in GB or NI specifically to meet the requirements of Article 12; it is more likely that the greater attention paid to NGOs has been to inform Government and to seek to secure wider acceptance of its policies.

As indicated above, the Government sought wide distribution of its consultation documents on transposition of the Directives, and encouraged responses from NGOs. This was particularly true in respect of the draft Age Regulations and the Disability Discrimination Act 2005, on which the Government worked very closely with NGOs on a range of matters.

There are no formal structures for central Government dialogue with NGOs, but there are no barriers to such dialogue. Government departments often establish ad-hoc groups by means of which Ministers or senior officials can consult with NGOs on difficult or controversial issues. For example, after disturbances involving Asian and white youths in several towns in the North of England in 2001, a number of groups were called together to discuss community cohesion, including representatives from NGOs as well as representatives from relevant public authorities. The positive race and disability duties require public authorities to consult on the equality impact of their policies and practices, which has encouraged greater engagement with civil society and local communities.

Implementation of the s.75 positive duty in NI has seen widespread consultation with community groups. In NI, NGOs have established themselves as significant stakeholders in any discussions on equality issues. They were involved in the initial consultation on a Single Equality Bill and in later consultations in which proposals reflected some of the earlier response. They have also played an active role in consultation on measures to transpose the Directives. NGOs act as effective watchdogs of the performance by public authorities of their equality duties under s. 75 of the Northern Ireland Act 1998, which requires public authorities to consult on the equality impact of their policies and practices, and many NGOs with specialised interest, for example in disability issues, are more likely to be listened to within the equality impact assessment carried out by NI public authorities.

An extensive consultation with NGOs and stakeholders was carried out after the publication of the Discrimination Law Review in 2007, which informed the UK government's preparation of the Equality Act 2010 in GB.

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The British Trades Union Congress (TUC), in its response to the December 2001 consultation document,[185] welcomed the inclusion of Articles 11/13 in the Directives and the recognition of the potential role of collective bargaining to achieve good employment practice. The TUC stated that the provisions of Article 11 "… reflect, accurately in our view, that equal treatment is often better achieved and sustained not through litigation but by the parties involved dealing with each other honestly and openly". The TUC response asked for further information as to what measures will be proposed for compliance with Articles 11/13.

In the various consultation documents concerning transposition of the Directives and establishment of a single equality body in GB, it appear that one aim of the Government has been to reassure business and employers generally that neither the existing nor the proposed legislation should be unduly burdensome, that guidance and support will be available and, more positively, that equality is good for business. This message has not included a role for trade unions in combating discrimination or promoting equality in the workplace, through collective agreements, joint working or any other methods. Again, however, the positive equality duties may have an impact in this respect.

d) to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?

[185] TUC, Implementing the Employment and Race Directives, March 2002 (paras 3.1–3.5).

Formal consultation with Traveller groups is increasingly common, both at central government level and also within the devolved administrations. The Gypsy and Traveller Unit within the Department for Communities and Local Government acts as a point of contact with Traveller communities within central government.

The Housing Act 2004 requires local authorities to include Travellers in the Accommodation Needs Assessment process established by that legislation. Once again, however, considerable variations exist as regards consultation at local level, where considerable hostility towards Traveller groups exists, and consultation mechanisms with respect to the UK's small but growing Roma population are not well developed.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

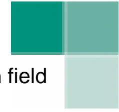
There are specific provisions for this purpose in the anti-discrimination legislation for each of the relevant grounds: EqA, ss.142-143, 145-146; DDA s.17C and Schedule 3A; FETO, articles 100, 100A and 100B; RRO, arts. 68, 68A and 68B; NI Sexual Orientation Regulations, art. 42 and Schedule 4; NI Age Regulations, Sch.4.

b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?

It is not unreasonable to assume that there are laws, regulation or rules contrary to the principle of equality that are still in force; nothing in the UK anti-discrimination legislation has the effect of striking out or disapplying primary or secondary legislation**.**

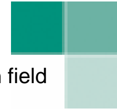
However, as part of the transposition process, government departments were required to review the legislation for which they are responsible to ensure that any which was contrary to the Directive's principles of equal treatment in relation to disability, religion or belief and sexual orientation was repealed or amended. That procedure was repeated in respect of age. Legislative provisions found contrary to the principle of equal treatment on grounds of age have been repealed or, retained, where they can be objectively justified under the provisions of the Directive.

Prior to the 2003 regulations, the RRA, the RRO and FETO stated that the prohibition of discrimination did not apply to acts done in compliance with other legislation passed before or after these measures. The 2003 regulations deleted that exception



in the RRA (now EqA), RRO and FETO as they regulate discrimination within the scope of the Directives, but have not repealed any existing conflicting legislation. An exception for acts done under statutory authority also remains part of the DDA and NI Age Regulations.

The EqA also states (Sch.11, Part 2, para 5) that the Act's prohibitions on discrimination related to religion/ belief are without prejudice to ss.58–60 of the School Standards and Framework Act 1998 (which permit religious discrimination in appointment and dismissal of teachers in schools with a religious character, without the need to show legitimate aim or proportionality – see above 4.2(a)) and s.21 of the Education (Scotland) Act 1980 (management of denominational schools).



9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

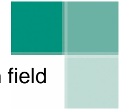
At governmental level in GB there has traditionally been less than complete clarity as to which government department was responsible for anti-discrimination measures, and there has been a history of constantly shifting responsibility between different departments to reflect the differing interests of different ministers. Consultation on proposals for transposition of the Directives was initially led by the Department of Trade and Industry, which was then disbanded with many of its functions being taken over by a new Department for Business, Enterprise and Regulatory Reform. The Home Office retained responsibility for issues relating to race and religion, and the Department for Work and Pensions has lead responsibility for disability and age issues (though certain age issues were shared with the Department for Business, Enterprise and Regulatory Reform.) Equality considerations were supposed to be mainstreamed into the work of all government departments, which are also subject to the positive equality duties.

The Government Equalities Office, formed in October 2007 and now a "cross cutting Home Office unit", has responsibility within Government for equality strategy and legislation in the UK. The Office is responsible for the Government's overall strategy and priorities on equality issues and leads on gender, sexual orientation and transgender issues but lead responsibility on age and disability rests with the Department for Business, Enterprise and Regulatory Reform while that for race and religion rests with the Home Office. The Government Equalities Office is now part of the Department for Culture, Media and Sport.

In NI, proposals to transpose the Race Directive and Framework Directive were published by the Office of the First Minister and Deputy First Minister (OFMDFM). Since the restoration of devolved government in Northern Ireland, responsibility for equality lies with the Minister with responsibility for equality issues in the Office of the First Minister Deputy First Minister.

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

Not that I am aware of.



ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the main transposition and Anti-discrimination legislation at both Federal and federated/provincial level

Name of Country: United Kingdom **Date: 1 January 2013**

Title of Legislation (including amending legislation)	Date of adoption: Day/month/year	Date of entry in force from: Day/month/year	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Title of the law: Abbreviation: Date of adoption: Latest amendments; Entry into force: Where the legislation is available electronically, provide the webpage address.			**Please specify**	**Please specify**	e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
http://www.legislation.gov.uk/ukpga/1995/50/contents (this is not the current version which is not freely available online)	8.11.95	Various dates from Nov. 1995	Disability past or present	Civil law	All sectors of employment and employment related activities, access to goods, facilities and services, further and higher education,	Prohibits discrimination unless can justify, requires reasonable adjustments unless can justify failure to

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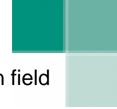
					some aspects of transport. Now applies only to NI.	do so, victimisation, instructions to discrimination, right to seek legal redress
Race Relations (NI) Order 1997 RR(NI)O 19.3.97 Race Relations Order 1997 (Amendment) Order (Northern Ireland) 2012 Various dates from March 1997 www.legislation.gov.uk/nisi/1997/869/contents/made (this is not the current version which is not freely available online)	19.3.97	Various from March 1997	Racial grounds, including grounds of colour, nationality (including citizenship), ethnic origins, national origins and belonging to Irish Traveller community	Civil law	All sectors of employment and employment related activities, education, access to goods facilities and services, disposal and management of premises. Applies only to NI.	• Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, • Rights of individual to seek legal redress.
Fair Employment and Treatment Order 1998 FETO 16.12.98 Fair Employment (Specification of	16.12.98	1.3.99	Religion, political belief and (from 2003) belief	Civil	All sectors of employment and employment related activities, education, access to goods facilities and services,	• Prohibits direct, indirect discrimination and victimisation, harassment and

Public Authorities) (Amendment) Order (Northern Ireland) 2013 1.3.99 www.legislation.gov.uk/nisi/1998 (this is not the current version which is not freely available online)					disposal and management of premises. Applies only to NI.	instructions to discriminate, • Rights of individual to seek legal redress, Affirmative action and reporting provisions
Northern Ireland Act 1998 NIA 19.11.98 Justice and Security Act 2013, Antarctic act 2013 Various from 15.2.99 http://www.opsi.gov.uk/acts/acts1998/19980047.htm this is not the current version which is not freely available online)	19.11.98	Various from 15.2.99	religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability and dependant status	Civil law	Activities of public authorities and the performance of public functions	Prohibits discrimination on the grounds of religion or belief in the performance of public functions (s. 76), and imposes a duty upon NI public authorities to promote equality of opportunity (s. 75)
Employment Equality (Sexual Orientation) Regulations (NI) 2003 EE(SO)(NI) Regs	1.12.03	2.12.03	Sexual orientation	Civil law	All sectors of employment, employment related activities, further &	Prohibit direct, indirect discrimination and victimisation,

1.12.03 Civil Partnership Act 2004 2.12.03 http://www.legislation.gov.uk/nisr/2003/497/contents/made (this is not the current version which is not freely available online)					higher education. Apply only to NI.	harassment and instructions to discriminate, Rights of individual to seek legal redress.
Equality Act 2006 EqA 2006 16.2.06 Equality Act 2010 Various from 6.4.07 http://www.legislation.gov.uk/ukpga/2006/3/contents (this is not the current version which is not freely available online)	16.2.06	Various from 6.4.07	Sexual orientation, all grounds	Civil	Enforcement and promotion; goods and services, housing; education; functions of public authorities. Applies to GB only insofar as it establishes the EHRC. It also provides the basis for the enactment in NI of regulations prohibiting sexual orientation discrimination outside employment.	Extends protection against discrimination on grounds of sexual orientation to provision goods and services, housing, education, public functions. Also establishes new Commission for Equality and Human Rights.
Employment Equality (Age) Regulations (NI) 2006	16.6.06	1.10.06	Age	Civil law	All sectors of employment, employment related	Prohibit direct, indirect discrimination and



EE(A)(NI) Regs 16.6.06 Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011 1.10.06 www.legislation.gov.uk/nisr/2006/261/contents/made (this is not the current version which is not freely available online)					activities, further & higher education. Apply only to NI.	victimisation, harassment and instructions to discriminate, Rights of individual to seek legal redress.
Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 EA(SO)Regs 2006 8.11.06 N/A 1.1.07 www.legislation.gov.uk/nisr/2006/439/introduction/made (this is not the current version which is not freely available online)	8.11.06	1.1.07	Sexual orientation	Civil	Access to goods and services; education; housing; performance of public functions.	Protect against discrimination on the ground of sexual orientation in the provision goods and services, housing, education, public functions in NI.

Equality Act 2010 EqA 2010 8.4.10 The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 1.10.10/ 6.4.11 www.legislation.gov.uk/ukpga/2010/15/contents (this is not the current version which is not freely available online)	8.4.10	1.10.10/ 6.4.11	Racial grounds, including grounds of colour, nationality (including citizenship, ethnic origins, national origins; Gender, including gender reassignment, pregnancy and maternity; Married/ civilly partnered status Disability Religion/ belief Sexual orientation Age	Civil law	All sectors of employment and employment related activities, access to goods facilities and services (thereby covering most areas of social advantages and social protection), disposal and management of premises, education. Applies only to GB.	Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, Positive obligations on public authorities Rights of individual to seek legal redress

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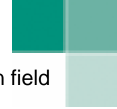

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: United Kingdom **Date: 1 January 2013**

Instrument	**Date of signature (if not signed please indicate) Day/month/year**	**Date of ratification (if not ratified please indicate) Day/month/year**	**Derogations/ reservations relevant to equality and non-discrimination**	**Right of individual petition accepted?**	**Can this instrument be directly relied upon in domestic courts by individuals?**
European Convention on Human Rights (ECHR)	4.11.50	8.3.51	A derogation from article 5(1) to permit the UK to detain foreign nationals indefinitely under the Anti-Terrorism, Crime and Security Act 2001 was withdrawn on 16 March 2005	Yes	Incorporated into UK law by Human Rights Act 1998.
Protocol 12, ECHR	No	No	None	No	No
Revised European Social Charter	7.11.97	No	N/A	Ratified collective complaints protocol? No.	No

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Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
International Covenant on Civil and Political Rights	16.9.68	20.5.76	None	No	No
Framework Convention for the Protection of National Minorities	1.12.95	15.1.98	None	No	No
International Convention on Economic, Social and Cultural Rights	16.9.68	20.5.76	None	No	No
Convention on the Elimination of All Forms of Racial Discrimination	1.10.66	7.3.69	None	No	No
Convention on the Elimination of Discrimination Against Women	22.7.81	7.4.86	None	Proposed but not yet approved – but inquiry procedure has been acceded to 17	No

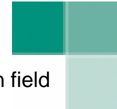
Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
				December 2004.	
ILO Convention No. 111 on Discrimination	?	8.6.99	None	No	No
Convention on the Rights of the Child	19.4.90	16.12.91	A reservation: “Where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom	No	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			reserves the right not to apply article 37 (c) in so far as those provisions require children who are detained to be accommodated separately from adults.”		
Convention on the Rights of Persons with Disabilities	30.3.07	8.6.09	*Reservations:* “The United Kingdom accepts the provisions of the Convention, subject to the understanding that none of its obligations relating to equal treatment in employment and occupation, shall	Yes	No

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			apply to the admission into or service in any of the naval, military or air forces of the Crown". "The United Kingdom reserves the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			other parents to state a preference for the school at which they wish their child to be educated." "The United Kingdom reserves the right to apply such legislation, insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it may deem		

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			necessary from time to time”. *Declaration:* “The United Kingdom Government is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children. The General Education System in the United		



Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
			Kingdom includes mainstream, and special schools, which the UK Government understands is allowed under the Convention."		

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ANNEX 3: PREVIOUS CASE-LAW

With thousands of discrimination cases a year and more than thirty years of case-law precedent, the UK case-law is too extensive to set out in detail here. The following are significant and/ or recent cases, broken down by subject area. Unless specified otherwise, the outcome in these cases would remain the same notwithstanding the implementation of the EqA.

Protected Grounds

"Disability"

Name of the court: Employment Appeal Tribunal
Date of decision: 23 July 2007
Name of the parties: *Paterson* v *Commissioner of Police for the Metropolis*
Reference number: [2007] IRLR 763, [2007] ICR 1522
Address of the webpage: http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2007/0635_06_2307.html&query=UKEAT+and+0635&method=boolean
Brief summary: In this case, the EAT interpreted the DDA's definition of disability in line with the approach adopted by the CJEU in the *Chacon Navas* case, which emphasised that disability should be understood as a "limitation which results in particular from physical, mental or psychological impairments and hinders the participation of the person concerned in professional life". On this basis, the EAT held that the complainant's dyslexia was sufficient to constitute a disability which interfered with his job as a police officer in that it hindered his chances of promotion.

Name of the court: Employment Appeal Tribunal
Date of decision: 29 July 2009
Name of the parties: *CC of Lothian and Borders Police* v *Cumming*
Reference number: UKEATS/0077/08 [2010] IRLR 109
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0077_08_2907.html
Brief summary: A disability discrimination claim was brought by a woman who failed the medical screening for appointment as a police constable because she had slightly reduced vision in one eye, although she did not need to wear glasses or contact lenses. She claimed that she was disabled because her vision, though unimpaired for normal purposes, substantially affected her participation in professional life, that is, by excluding her from access to the police. A tribunal accepted her argument but the EAT allowed the Chief Constable's appeal, ruling that the test under the DDA was whether her condition substantially impacted on her ability to carry out normal day-to-day activities and "the status of disability cannot be dependent on the decision of the employer as to how to react to the employee's impairment".

"Belief"

Name of the court: Employment Appeal Tribunal
Date of decision: 20 November 2008
Name of the parties: *Grainger plc* v *Nicholson*
Reference number: [2010] IRLR 4, [2010] ICR 360
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0219_09_0311.html
Brief summary: The EAT accepted that Mr Nicholson's belief in man-made climate change and the environment was capable of falling within the concept of "belief" under the Employment Equality (Religion and Belief) Regulations notwithstanding the fact that the belief was free-standing belief, rather than being part of a philosophy of life. The Court did not accept, however, that support for a political party would be protected by the Regulations, some limitation being required on the concept of "philosophical belief" to which the Regulations restricted protected beliefs. The Court further suggested that racist or other beliefs would be unprotected by the Regulations because unworthy of protection under Article 9 of the Convention which in his view applied only to beliefs "worthy of respect in a democratic society and not incompatible with human dignity".

There have been a number of tribunal decisions in 2011 on this issue, the outcome of which is set out briefly below:

Kelly and others v Unison:[186] an employment tribunal ruled that "philosophical belief" did not include political beliefs, there membership of the Socialist Party and the holding of views based on Marxism/Trotskyism by members and elected officials of the Unison union who claimed discrimination on grounds of religion or belief having been disciplined after they published and distributed leaflets objecting to decisions taken by the union.

Hashman v Milton Park (Dorset) Limited t/a Orchard Park:[187] an employment tribunal accepted that a strongly held belief in the sanctity of life, including opposition to fox hunting and hare-coursing, which went beyond strongly held opinion, amounted to a "philosophical belief" for the purposes of the Religion or Belief Regulations (now Equality Act 2010).

Maistry v BBC:[188] an employment tribunal accepted that a belief that "public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion" was protected as a "philosophical belief" for the purposes of the Religion or

[186] 28 January 2011, Case No. ET/2203854/08, available at http://employment.practicallaw.com/6-505-3354, accessed 1 March 2012.
[187] 31 January 2011, Case No. ET/31055552009, available at http://www.bindmans.com/documents/Hashman_judgment.pdf, accessed 1 November 2012.
[188] 29 March 2011, Case No. ET/1313142/2010 [2011] EqLR 549, available at http://employment.practicallaw.com/6-505-6183 accessed 1 November 2012.

Belief Regulations (now Equality Act 2010).

Alexander v Farmtastic Valley Ltd and others:[189] an employment tribunal accepted that beliefs about the relationship between human beings and animals, which included a commitment to vegetarianism and sympathy for Buddhism, were protected by the Religion or Belief Regulations (now Equality Act 2010).

Lisk v Shield Guardian Co and others:[190] an employment tribunal ruled that a belief that it was necessary to show respect to those who gave their lives by wearing a poppy was not a philosophical belief for the purposes of the Religion or Belief Regulations (now Equality Act 2010). The employment tribunal accepted the claimant's seriousness in this matter, but ruled that the belief lacked the "cogency, cohesion and importance" required by *Nicholson,* and could not "be fairly described as being a belief as to a weighty and substantial aspect of human life and behavior".

Nikiel-Wolski v Burton's Foods Ltd:[191] an employment tribunal accepted that a very strong belief in personal freedom and privacy, respect for personal property, freedom from authoritarianism and respect for human rights amounted to a philosophical belief for the purposes of the Equality Act 2010.

Multiple Discrimination

Name of the court: Court of Appeal
Date of decision: 30 July 2004
Name of the parties: *Bahl* v *Law Society*
Reference number: [2004] EWCA Civ 1070.
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2004/1070.html
Brief summary: In this case, the Vice-President of the Law Society of England and Wales, was dismissed from office on the basis that she had bullied and harassed junior staff.

She claimed that her dismissal was actually based on discrimination based on her identity as a British Asian woman: she alleged that senior officers in the Law Society had been prejudiced against her on the basis that she did not conform to their expectations as to how a British Asian woman would behave. The Law Society strongly denied this allegation. The Court of Appeal decided that in such a case of "intersectional" or multiple discrimination, the evidence that Bahl had been discriminated against on the basis of her ethnic origin and gender had to be considered separately and tribunals would have to decide whether the evidence was sufficient to show that one or the other type of discrimination existed. Bahl was not able to argue that she had been subject to a particular form of discrimination based

[189] 13 October 2011, Case No. ET/2513832/10, unreported.
[190] 27 September 2011, Case No.3300873/11 [2011] EqLR 1290, available at http://employment.practicallaw.com/4-511-0992, accessed 1 November 2012.
[191] 18 July 2012, Case No 2411204/11 [2013] EqLR 192.

on her status as a British Asian woman: she had to show that either race or sex discrimination had occurred, which she was unable to do.

The Equality Act 2010 makes provision for claims on the basis of two (but not more) combined grounds (s.14), but it was announced in March 2011 that the Coalition Government would not bring this provision into effect. The following decisions suggest, however, that this may not create significant difficulties for judicial recognition of multiple discrimination notwithstanding the *Bahl* decision:

Name of the court: Employment Appeal Tribunal
Date of decision: 12 October 2009
Name of the parties: *Ministry of Defence* v *DeBique*
Reference number: [2010] IRLR 471
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0048_09_1210.html
Brief summary: The claimant, a single mother, was a soldier in the British army who had originally been recruited from St Vincent and the Grenadines. She was originally allowed to work hours which accommodated her childcare arrangements, but she was later subjected to disciplinary sanctions when she was absent as a result of her child's illness or childcare difficulties. She suggested bringing her sister to assist with her childcare, but her sister was refused access to the UK other than on a temporary basis by the Home Office, and the Ministry of Defence took the view that there was nothing it could do about the policy. The claimant complained of indirect sex discrimination and also of indirect race discrimination against her as a Foreign and Commonwealth soldier in the British army. A tribunal found that the MOD applied a provision, criterion or practice that required soldiers to be available for duty 24 hours a day, seven days a week, and that though this could be justified of itself, justification was not available given the immigration restrictions applicable to the claimant's family members. The EAT dismissed the MOD's appeal, ruling that "the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage." In the instant case the disadvantage suffered by the claimant was the result of her combined sex and national origin.

Name of the court: Employment tribunal
Date of decision: 11 January 2011
Name of the parties: *O'Reilly v (1) British Broadcasting Corporation (2) Bristol Magazines Ltd*
Reference number: Case No.2200423/10
Address of the webpage: http://www.judiciary.gov.uk/media/judgments/2011/o-reilly-v-bbc-judgment
Brief summary: The claimant was replaced by younger presenters when the programme on which she worked as a highly regarded presenter was moved to a

more prominent slot. She and three other women aged from mid forties to early fifties were replaced by two presenters in their thirties and an older man supported by three secondary presenters aged between 26 and 38. The claimant claimed age and sex discrimination. The tribunal accepted that a claim of "combined discrimination" could be brought if it could be shown that more than one protected ground was a factor in the decision that is alleged to be discriminatory, although it only found evidence of age discrimination in this case. The respondent had sought to argue that, the EqA's provisions on multiple discrimination not yet having come into effect, a criterion that prevented women (but not men) over 40 from appointment would not have been unlawful. The tribunal ruled that the factor relied upon in a discrimination claim "need not be the sole reason, or even the principal reason, why a person suffers detrimental treatment. Part of the reason that a woman over 40 is precluded from applying for the job, in [such an] example, is the fact that she is a woman. Another part of the reason is that she is over 40. Both of them are significant elements of the reason that she suffers the detriment. In such circumstances, we consider it is clear that the woman is subject to both sex and age discrimination."

The tribunal accepted that the wish to appeal to a primetime audience which included younger viewers was a legitimate aim, but did not accept that the respondent had shown that younger viewers required younger presenters. Further, even if this had been established, "it would not be proportionate to do away with older presenters simply to pander [to] the assumed prejudice of some younger viewers."

Forms of Discrimination

Direct Discrimination

Name of the court: Employment Tribunal /Employment Appeal Tribunal /CJEU
Date of decision: 31 January 2008 (CJEU)/30 September 2008 (ET)/ 30 October 2009 (EAT)
Name of the parties: *Coleman* v *Attridge Law*
Reference number: C-303/06 (CJEU), [2008] ICR 1128, [2008] IRLR 722/ Case No. ET/2303745/2005 (ET)/ UKEAT/0071/09, [2010] IRLR 10 (EAT)
Address of the webpage:
http://www.bailii.org/eu/cases/EUECJ/2008/C30306_O.html (CJEU)
Brief summary: The claimant complained that she was discriminated against because of her association with her disabled son, who needed considerable care from her. An employment tribunal decided that, as she was not "disabled" within the DDA definition, she could not bring a claim for disability discrimination as the DDA did not prohibit discrimination based upon association with a person with a disability. However, the tribunal considered that a strong case existed that the UK legislation was not compatible with the Framework Equality Directive on this ground, and referred the question directly to the CJEU. The CJEU confirmed that the prohibition contained in Articles 1 and 2 of the Directive on discrimination based "on the grounds of" disability includes direct discrimination and harassment based on association. The Employment Tribunal subsequently decided, and the EAT confirmed, that the DDA

could be read in conformity with the judgment of the CJEU and that Ms Coleman's case could be adjudicated under the framework of existing UK disability discrimination law.

The EqA applies to discrimination "because of" a protected ground and the explanatory notes make clear that it is intended to cover discrimination by association and discrimination by reason of perceived status.[192]

Name of the court: Employment Appeal Tribunal
Date of decision: 24 October 2008
Name of the parties: *Saini* v *All Saints Haque Centre*
Reference number: [2009] IRLR 74
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2008/0227_08_2410.html
Brief summary: Mr Saini, a Hindu advice worker, claimed that he had been bullied and harassed by managers who wished to get rid of another Hindu worker on grounds of the latter's religion. The EAT accepted that harassment "on grounds of religion or belief" extended to cover harassment of the Claimant because of the religion or belief of his colleague.

This case would be decided in the same way under the EqA despite the replacement, in the definition of direct discrimination, of the words "on grounds of" with "because of".

Name of the court: House of Lords
Date of decision: 21 November 2007
Name of the parties: *Ahsan* v *Watt*
Reference number: [2007] UKHL 51, [2008] 1 AC 696
Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2007/51.html
Brief summary: In this case, the complainant alleged that he had been discriminated against by the UK Labour Party during the process of selecting candidates for parliamentary elections. The House of Lords upheld his claim, clarifying that discrimination in the selection of a parliamentary candidate should be classified as a case of discrimination within a private association. The Court of Appeal had taken the view that the wish of the Labour Party not to select a candidate that was very closely associated with a particular community was a objective justification for the exclusion of the complainant from selection, when there were legitimate concerns that members of that community were involved in attempts to fix the selection process. The House of Lords ruled, however, that discrimination on the grounds of association with a particular ethnic group could not be excused or classified as "legitimate", with the result that the claim was upheld.

[192] Note however the decision of the Court of Appeal in *J* v *DLA Piper* [2010] IRLR 936 in which Lord Justice Elias expressed doubt as to whether discrimination on the basis of perceived disability fell within the Directive.

Name of the court: Supreme Court
Date of decision: 16 December 2009
Name of the parties: *R (E) v Governing Body of JFS*
Reference number: [2009] UKSC 15, (2009) 27 BHRC 656, [2010] ELR 26, [2010] IRLR 136
Address of the webpage:
http://www.supremecourt.gov.uk/docs/uksc_2009_0105_judgmentV2.pdf
Brief Summary: The claimant was refused access to the school because he was not considered "Jewish" by the Chief Rabbi, this because his mother had converted to Judaism in a ceremony not recognised by Orthodox Jewry. Religious discrimination in access to faith schools is permitted by law in the UK, but the same is not true of race discrimination. The question for the Supreme Court was whether the policy which restricted admission to a Jewish school to those recognised as "Jewish" by the Chief Rabbi, who applied a test based on maternal descent, amounted to direct race discrimination, or merely to direct religious discrimination. The Supreme Court ruled that, notwithstanding the fact that the school was not motivated by racism, the approach it took to the recognition of Jewishness crossed the line into impermissible race discrimination. The Claimant had been treated less favourably in relation to admission to the school on the basis that he was not recognised as "Jewish", and this was a test which turned on ethnicity and therefore on race for the purposes of the RRA. No relevant defence was available to the school.

This case was highly controversial, commentators differing as to whether the outcome was a victory for non-discrimination or a blow against religious freedom, in particular, the freedom of religious communities to define the tests for membership.

Name of the court: Employment Appeal Tribunal
Date of decision: 13 August 2009
Name of the parties: *Ahmed* v *Amnesty International*
Reference number: UKEAT/0447/08, [2009] ICR 1450, [2009] IRLR 884
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0447_08_1308.html
Brief summary: The Claimant, a woman of Sudanese origin, claimed that she had been directly discriminated against on racial grounds by the Respondent, an international campaigning organisation, when it refused to appoint her to a position which involved visiting the Sudan because of concerns that her origin would result in increased risk to her and her colleagues on the ground in Sudan. The EAT ruled that the decision at issue amounted to unlawful direct race discrimination and was unlawful regardless of the benign intent of the Respondent.

It is possible that the revised approach to Genuine Occupational Requirements in the Equality Act 2010 might result in a different outcome in this case, though it is perhaps more likely that "not being Sudanese" would not be accepted as a "GOR".
Name of the court: Northern Ireland Court of Appeal
Date of decision: 17 January 2007
Name of the parties: *McDonagh* v *Thom (t/a The Royal Hotel Dungannon)*

Reference number: [2007] NICA 3
Address of the webpage: http://www.bailii.org/nie/cases/NICA/2007/3.html
Brief summary: In this case the Northern Irish Court of Appeal found that a refusal by a hotel to book any more functions organised by particular Irish Traveller families following an outbreak of violence at a previous function did not constitute race discrimination in the circumstances, as the hotel's actions were motivated by fear of violence and not by racial prejudice. Other decisions, however, have resulted in findings of discrimination in similar circumstances.

Name of the court: Employment tribunal
Date of decision: 18 April 2011
Name of the parties: *Richards v Menzies Aviation (UK) Ltd and others*
Reference number: Case No.1402185/10, [2011] EqLR 661
Address of the webpage: N/A
Brief summary: An employment tribunal accepted that the employer's failure to take the Claimant's complaint about a racially offensive drawing seriously amounted to direct discrimination on the part of the employer against the Claimant. The tribunal accepted that there was no conscious racial motive, but found that the employer lacked understanding of what could be offensive to a black employee. The Claimant, a black British man of Jamaican origin, complained of a poster in which an "O" had been turned into a monkey's face. His manager agreed to speak to staff but advised the Claimant that she did not think there was racism in the organisation. The Claimant's harassment claim failed because it was found that the employer was not liable for the drawing "in light of the fact that [it] had systems and codes of practice in place". But his discrimination claim succeeded because the employer's failure to take the matter seriously, fully to investigate and to take steps to ensure that staff understood the importance of not acting in a way that could be racially offensive related to race.

Name of the court: Employment Appeal Tribunal
Date of decision: 11 January 2011
Name of the parties: *Lisboa v (1) RealPubs Ltd (2) Pring (3) Heap*
Reference number: UKEAT/0224/10/RN
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0224_10_1101.html
Brief Summary: The claimant complained of sexual orientation discrimination arising out of the efforts made by his employer to transform what had been a "gay pub" which had been in decline into a "gastropub" serving food and drink to all. The employer had intended to place a board outside the pub saying "this is not a gay pub", although the claimant managed to avert this action. The employer had also encouraged staff to seat customers who did not appear to be gay in prominent places where they could be seen from outside the pub, and had introduced more women staff. A tribunal had dismissed the claims relating to the respondent's efforts to change the pub's clientele. The EAT allowed the claimant's appeal, ruling that while the respondent was perfectly entitled to reposition itself so as to appeal to a wider

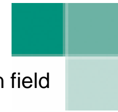
market, it could not do so by discriminating against its gay clientele, or by treating the claimant less favourably by pressurising him to participate in that process.

Name of the court: Employment tribunal
Date of decision; 27 May 2011
Name of the parties: *Jain v Teachers 2 Parents Ltd*
Reference number: Case No.1900007/11 [2011] EqLR 800
Address of the webpage: N/A
Brief summary: A tribunal found that an employee of Indian origin whose employers required him to use an Anglicised name in his telesales work was directly discriminated against on grounds of race because a worker of white British origin would not have been required to use a different name, and because the requirement was based on the claimant's ethnic origin.

Name of the court: Court of Appeal
Date of decision: 29 July 2010
Name of the parties: *Aylott* v *Stockton-on-Tees Borough Council*
Reference number: [2010] EWCA Civ 910, [2010] ICR 1278, [2010] IRLR 994
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2010/910.html
Brief summary: The claimant, who had bipolar disorder, was subjected to pressure in the form of deadlines and performance monitoring, and was subsequently dismissed, after returning to work following a period of illness. A Tribunal ruled that he had established a *prima facie* case of direct discrimination such as to shift the burden of proof to the employers, this because "a comparator who had a similar sickness record in respect of, for example, a complicated broken bone or other surgical problem, would not have been subjected to the same treatment." The Tribunal did not accept that the employers had discharged the burden of proof. The EAT allowed the employer's appeal, however, ruling that "an appropriate hypothetical comparator for the purpose of considering whether Mr Aylott had been discriminated against in monitoring his performance and setting deadlines, in addition to having a similar sickness absence record, would have been a person who had recently been moved to a different post and whose past behaviour and performance had caused concern." The Court of Appeal disagreed, ruling that the tribunal had been entitled to compare the claimant's treatment with that of a hypothetical comparator who did not have the claimant's particular disability, but who had a similar sickness absence record. The Court went on to uphold the tribunal's finding of direct discrimination based on the council's "stereotypical view of mental illness."

Victimisation

Name of the court: Employment Appeal Tribunal
Date of decision: 9 December 2010
Name of the parties: *Martin v Devonshires Solicitors*
Reference number: UKEAT/0086/10
Address of the webpage:
www.bailii.org/uk/cases/UKEAT/2010/0086_10_0812.html



Brief Summary: The claimant was dismissed after she made false allegations of discrimination as a result of a mental illness which resulted in psychotic episodes during which she experienced paranoid delusions. The allegations, though false, were made in good faith and amounted therefore to a "protected act" for the purposes of the victimisation provisions. But the EAT ruled that the dismissal was based not on the allegations but on the surrounding circumstances, including the fact that they were the result of her illness and that her continued employment would have placed staff at risk of having serious and unwarranted allegations made against them by the claimant.

Name of the court: Employment tribunal
Date of decision: 18 May 2011
Name of the parties: *Woods v (1) Pasab Limited t/a Jhoots Pharmacy (2) Jhooty*
Reference number: Case No.1303106/10
Address of the webpage: N/A
Brief Summary: The claimant, a Muslim, was dismissed after she complained that her employer was "a little Sikh club" which looked after only Sikh employees. A tribunal accepted that the complaint amounted to an allegation that people who were not Sikhs were treated less favourably and was a protected act for the purposes of the victimisation provisions. The claimant had been dismissed after making the remark which was regarded by her employers as racist. The tribunal found that the remark was not a generalisation that *all* Sikh people only looked after their own, which "would be an offensive generalisation and reveal a discriminatory attitude to the group", but was a complaint about the claimant's specific situation and the behaviour of her employers.

Harassment

Name of the court: Court of Appeal
Date of decision: 19 December 2008
Name of the parties: *English* v *Thomas Sanderson Blinds Ltd*
Reference number: [2008] EWCA Civ 1421, [2009] ICR 543, [2009] IRLR 206
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html
Brief summary: The Court of Appeal accepted that a man had been subject to harassment "on grounds of" sexual orientation where he was subject to homophobic abuse by colleagues who knew that he was not gay. The Court ruled that, because the harassment occurred "on the grounds of" the applicant's sexual orientation, in the sense of being based upon or linked to his real or imagined sexual orientation, this was sufficient to bring the complaint within the scope of the Employment Equality (Sexual Orientation) Regulations 2003.

The same analysis would apply under the EqA which prohibits harassment "related to" a protected ground.
Name of the court: Employment Appeal Tribunal
Date of decision: 21 February 2011
Name of the parties: *English* v *Thomas Sanderson Blinds Ltd (No.2)*

Reference number: [2011] UKEAT 0316_10_2102
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0316_10_2102.html
Brief summary: Following the decision of the Court of Appeal immediately above the case returned to a tribunal to determine whether the Claimant had in fact been subject to harassment. The tribunal found that his willing participation in the office banter of which he subsequently complained indicated that the conduct was not such as to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Although the comments directed at the Claimant included "distasteful, demeaning and degrading" descriptions of him as a "faggot" and constant innuendos about the fact that he lived in Brighton and had been educated at a public school, the Claimant had written articles for the employer's internal magazines which were "riddled with sexist and ageist innuendo" and had had to apologise to a woman for an offensive remark about her breasts. One article written by his colleagues, which contained homophobic innuendo, did cross the line and had a degrading effect but his complaint pertaining to that article had not been brought in time and was rejected on that basis. The EAT refused his appeal.

Note that in *Ruda v Tei Ltd* a tribunal accepted that the use of the words "gay" and "wanking" to and about the claimant amounted to harassment on grounds of sexual orientation, though it was accepted on the facts that there was no intention to create a degrading, humiliating and offensive working environment.[193]

Name of the court: Court of Appeal
Date of decision: 15 April 2010
Name of the parties: *Grant v H M Land Registry*
Reference number: [2011] EWCA Civ 769, [2011] ICR 1390
Address of the webpage: www.bailii.org/ew/cases/EWCA/Civ/2011/769.html
Brief summary: The Court of Appeal upheld the decision of the Employment Appeal Tribunal allowing an appeal from the finding of an employment tribunal that the Claimant, a gay man, had been subjected to unlawful harassment on grounds of sexual orientation when his manager disclosed his sexual orientation to his fellow employees. The tribunal found that the *effect* of this disclosure (though, by implication, not the *purpose*) was to create a humiliating working environment for the Claimant. One of the questions which followed under the Employment Equality (Sexual Orientation) regulations, as (now) under the Equality Act 2010 was whether it is reasonable for the Claimant to take offence. The Court of Appeal ruled that "by putting [his sexual orientation] into the public domain" the claimant had taken the risk of becoming the "focus of conversation and gossip" and that "to describe" the publication of that sexual orientation by his manager as creating for the claimant a humiliating environment "is a distortion of language which brings discrimination law into disrepute".

[193] 2 June 2011, Case No.1807582/10 [2011] EqLR 1108.

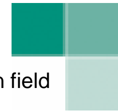
Name of the court: Employment Appeal Tribunal
Date of decision: 10 November 2009
Name of the parties: *Aberdeen City Council v McNeill*
Reference number: [2009] UKEAT 0037_08_101 [2010] IRLR 374
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2010/0232_09_1504.html
Brief summary: The Employment Appeal Tribunal ruled that a senior employee who had referred at senior management meetings to a junior employee as "big boobs" or "big tits", in her presence, had committed such a fundamental breach of his contract of employment that he could not rely on a subsequent breach of contract by the employer to found a claim of constructive dismissal. An employment tribunal had dismissed the senior employer's conduct as mere "sexual banter" amongst friends. The EAT, however, ruled that "[e]ven if there are friendships which involve sexual banter ... that does not make verbal sexual harassment in the workplace any less serious. Nor does the fact that the victim does not complain at the time. Nor, we consider, would the fact that a victim herself engaged in the banter where the employee perpetrating it was a senior manager who ought to be able to be relied on to set appropriate behavioural standards."

Name of the court: House of Lords
Date of decision: 12 July 2006
Name of the parties: *Majrowski* v *Guy's and St Thomas's NHS Trust*
Reference number: [2006] UKHL 34, [2007] 1 AC 224, [2006] ICR 1199, [2006] IRLR 695
Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2006/34.html
Brief summary: The House of Lords in this case established that the Protection from Harassment Act 1997, which gives individuals protection in both the criminal and civil law against harassment by others, can apply to workplace bullying and harassment. Before this decision, it was not clear that the Act, which was introduced to deal with stalkers, covered harassment and bullying at work.

This case involved a claim that an employer was vicariously liable for the homophobic bullying the worker had experienced from his manager. The Law Lords ruled that an employer could be held to be vicariously liable and ordered to pay damages for harassment of one worker by another, as long as the bullying was closely linked to performance of the duties of the job. (See, more recently, *Veakins v Kier Islington Ltd* [2010] IRLR 132, *Marinello v City of Edinburgh Council* [2010] IRLR 778, *Rayment v Ministry of Defence* [2010] IRLR 768, discussed at 2.4 below.)

Disability discrimination

Name of the court: House of Lords
Date of decision: 25 June 2008
Name of the parties: *London Borough of Lewisham* v *Malcolm*
Reference number: [2008] UKHL 43, [2008] 1 AC 1399, 102 BMLR 170, [2008] LGR 549, [2008] IRLR 700



Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2008/43.html
Brief summary: This case involved a tenant who rented a flat from a public housing authority and who suffered from schizophrenia. He was not permitted to sub-let his property (as it was subsided public housing), but did so anyway, while he lived elsewhere.

When the local authority brought eviction proceedings against him, the tenant claimed that he had only sub-let the property because he had not been taking medication for his schizophrenia, and his lawyers argued that any eviction would constitute less favourable treatment against the tenant for a reason related to his disability, contrary to the Disability Discrimination Act 1995 (the DDA). The local authority argued that there was no less favourable treatment, as it would have evicted any tenant who had unlawfully sub-let their property. In addition, it did not know about M's schizophrenia at the time. The House of Lords reversed the earlier decision of the Court of Appeal and decided the case in favour of the local authority.

This judgment had a very restrictive impact on the scope of the UK legislative prohibition of unjustified "less favourable treatment" related to disability. The House of Lords reversed a decade of case-law that had been decided on the basis that the test to identify the correct comparator in cases involving claims of less favourable treatment related to disability was a non-disabled person to whom the reason for the less favourable treatment in question did not apply. In this case, this would have meant that the comparator would be a person who had not sub-let his flat. However, the House of Lords decided that in determining whether less favourable treatment has occurred, the treatment of a person with a disability should be compared with the treatment of a non-disabled person to whom the same circumstances apply. This meant that, in this case, the treatment of the tenant was compared with the treatment of a non-disabled person who had sub-let his flat, with the result that the local authority was able to show that no less favourable treatment had occurred.

The reasoning in this case is now applicable only in Northern Ireland, the EqA having introduced a different approach to disability discrimination (see section 2.2 below).

Name of the court: Court of Appeal
Date of decision: 30 March 2007
Name of the parties: *O'Hanlon* v *Commissioners for HM Revenue and Customs*
Reference number: [2007] IRLR 404
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2007/283.html
Brief summary: The Court of Appeal held that it would be rare that an employer would be obliged under the requirement to make reasonable adjustment to continue to pay full sick leave allowance to a person who was sick for a long time period as a result of their disability.

Name of the court: Employment Appeal Tribunal
Date of decision: 9 November 2009
Name of the parties: *Secretary of State for Work and Pensions v Alam*

Reference number: [2009] UKEAT 0242_09_0911, [2010] IRLR 283
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0242_09_0911.html
Brief summary: The Employment Appeal considered the provision in the Disability Discrimination Act 1995 (section 4A(3)(b)) that there is no duty to make adjustments in favour of a disabled employee 'if the employer does not know, and could not reasonably be expected to know ... that that person has a disability and is likely" to be placed at a substantial disadvantage in comparison with persons who are not disabled. According to the EAT, the two questions which had to be addressed were (1) "Did the employer know both that the employee was disabled and that his disability was liable to" place him at a substantial disadvantage and, if not (2) "Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him" in that manner. Knowledge of the disability was insufficient to impose a duty if the employer "could not reasonably have been expected to be aware" of the disadvantaging impact.

Name of the court: House of Lords
Date of decision: 1 July 2004
Name of the parties: *Archibald* v *Fife County Council*
Reference number: [2004] UKHL 32, [2004] IRLR 651
Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2004/32.html
Brief summary: In this important case, the House of Lords decided that the obligation to make reasonable accommodation for disabled employees could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

See also, more recently, *Chief Constable of South Yorkshire Police* v *Jelic* [2010] IRLR 744 in which the EAT ruled that it would have been reasonable for the police service to require another police officer to swap duties with the claimant, who became disabled through chronic anxiety and could no longer perform public-facing duties. The Chief Constable had the power to require the other police officer to swap duties whether he wished to or not, so it would have been a reasonable adjustment for him to have done so.

Name of the court: Employment Appeal Tribunal
Date of decision: 5 October 2011
Name of the parties: *Cordell v Foreign and Commonwealth Office*
Reference number: UKEAT/0016/11/SM
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0016_11_0510.html
Brief summary: The Employment Appeal upheld a tribunal decision that the respondent had not directly discriminated against the claimant diplomat when, having offered her a posting in Kazakhstan, it withdrew the offer on the basis that it would cost over £1 million over the three year posting to provide her with the necessary lipspeakers to accommodate the fact that she was profoundly deaf**.** Nor was it clear that such lipspeakers could in fact be found were the posting made. The EAT further

ruled that the respondent had not failed to make a reasonable adjustment in this matter. The respondent had previously posted the claimant to Warsaw at an annual cost of £146,000 and would provide up to £25 000 per child per year to fund residential schooling in the UK for children whose parents were posted abroad. But the adjustments which the claimant sought could not be regarded as reasonable in view, among other things, of the uncertainty as to whether lipspeakers would be willing to be posted in Kazakhstan and the fact that the cost involved was some 500% of the claimant's salary**.**

Indirect Discrimination

Name of the court: Court of Appeal
Date of decision: 12 February 2010
Name of the parties: *Eweida* v *British Airways plc*
Reference number: [2010] EWCA Civ 80, [2010] ICR 890, [2010] IRLR 322
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2010/80.html
Brief summary: Nadia Eweida, a devout Christian, was employed by British Airways as a member of its check-in staff. BA's uniform policy permitted an employee to wear any item of jewellery he or she wished under the uniform, provided it was not visible: however, items of religious clothing such as hijabs or turbans which could not be concealed under the uniform were allowed to be worn.

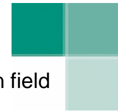
In 2006, Ms Eweida began wearing a silver crucifix on a necklace outside her uniform. When she refused to conceal the cross, she was suspended. Ms Eweida then brought claims of direct discrimination, indirect discrimination and harassment against BA. At first instance, the Reading employment tribunal dismissed the case, finding in particular that the key claim of indirect discrimination was not established on the basis that the British Airways' policy did not disadvantage Christians as a group. However, the tribunal went on to suggest that *if* BA's policy had given rise to such group disadvantage, then the policy would not have been objectively justified. On appeal, the EAT took the view that the onus was on Ms Eweida to prove group disadvantage. It considered that while in some cases (such as Sunday working), a tribunal could assume the existence of a group disadvantage that would affect some Christian groupings, this was not the case where a disadvantage stemmed from "subjective personal religious views" particular to the claimant. In this case, there was no evidence of any form of group disadvantage stemming from BA's policy. The EAT also agreed with the employment tribunal, however, that had there been evidence of group disadvantage, the inflexibility of BA's policy would not have been a proportionate response to a legitimate aim. Ms Eweida appealed, arguing that the EAT had been wrong to require her to show that she was part of a group of people within the employer's workforce who were disadvantaged because their religion or belief made it harder to comply with the requirement not to wear visible jewelry. She argued that it was sufficient to show that she had suffered a disadvantage on the grounds of her religion. The Court of Appeal rejected her appeal, relying on the tribunal's finding that Ms Eweida's complaint arose from a personal objection which did not result from any doctrine of faith, and that there had

been no interference with her ability to practice her faith, and insisting that indirect discrimination required some element of group disadvantage.

The claimant in *Eweida* is bringing her claim to the European Court of Human Rights claiming a breach of Article 9. Her claim will be heard with the materially similar claim in *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2011] EqLR 548, in which a nurse unsuccessfully challenged a prohibition, based on health and safety grounds, on wearing a crucifix around her neck.[194]

Name of the court: Employment Appeal Tribunal
Date of decision: 6 July 2011
Name of the parties: *Chatwal v Wandsworth Borough Council*
Reference number: UKEAT/0487/10/JOJ [2011] EqLR 942
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0487_10_0607.html
Brief summary: The claimant was employed as a customer services adviser for the respondent's technical services department. As an Amritdhari Sikh, and a member of the Guru Nanak Nishkam Sewak Jatha (GNNSJ) branch of the Sikh religion, the claimant understood that he was not allowed to come into contact with alcohol, tobacco, drugs or meat. Accordingly he objected to being required, on a rota basis, to clean the staff fridge where meat was stored. He was refused access to the kitchen as a result, and claimed indirect discrimination on grounds of religion or belief and race when he was eventually dismissed. Expert evidence was called and differed as to whether those in the GNNSJ sect were permitted to touch meat. A tribunal rejected the claimant's indirect discrimination claim on the basis that he "did not produce convincing evidence of the number of Sikhs that share his belief that touching meat or meat products is forbidden." The EAT allowed the appeal, ruling that the tribunal had failed to consider whether the claimant had established group disadvantage by reference to a sub-category of Sikhs, that is, Amritdhari Sikhs or those of the GNNSJ branch. It did not, however, doubt that such a step was a necessary ingredient of establishing indirect discrimination.[195]

[194] On 13 January 2013 the ECtHR ruled in favour of Ms Eweida, against Ms Chapman: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":["001-115881"]}
[195] See also *Dhinsa v (1) SERCO (2) Secretary of State for justice* Case No. 1315002/2009 18 May 2011, unreported (ET), in which a Tribunal accepted that the Claimant, as an Amritdhari, was disadvantaged in his job as a prison officer by being prevented from wearing the kirpan (ceremonial Sikh knife the wearing of which is required of Amritdhari Sikh men (who comprise fewer than 10% of Sikh men), it ruled that the indirect religious discrimination was justified by the particular security issues concerned.



Justification

Indirect discrimination

Name of the court: Court of Appeal
Date of decision: 10 October 2006
Name of the parties: *R (Elias)* v *Secretary of State for Defence*
Reference number: [2006] EWCA Civ 1293, [2006] IRLR 934
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2006/1293.html
Brief summary: This case concerned the exclusion of British civilians who had been interned by the Japanese Army during World War Two from a compensation scheme if they had not been born in the UK, or did not have a parent or grandparent born there. Elias J. in the High Court (who was no relation to the claimant) decided that this policy constituted unjustifiable indirect discrimination on the grounds of national origin, contrary to the Race Relations Act. Alternative criteria could have been used, such as requiring a period of residence or domicile in the UK before eligibility could arise, which would have focused less upon the "racial" or "bloodline" element of citizenship, and more on whether a tangible link existed with the UK.

Elias J. also decided that the failure of the Secretary of State to consider whether this policy raised issues relating to racial equality, or to assess whether any adverse impact was possible upon particular ethnic groups or groups with a particular national origin, was a violation of the positive duty imposed upon public authorities to promote race equality in the Race Relations (Amendment) Act 2000. On appeal, the Court of Appeal upheld the decision of the High Court,[196] with Arden LJ emphasising that the "whole tenor of the preamble [to the Race Directive] is that great importance is to be attached to the elimination of racial discrimination" and that the level of intensity of scrutiny to be given by courts to assessing whether a measure alleged to constitute indirect race discrimination was objectively justified should reflect this emphasis.

Name of the court: Employment tribunal
Date of decision: 29 May 2008
Name of the parties: *Noah* v *Sarah Desrosiers (trading as Wedge)*
Reference number: ET 2201867/2007
Address of the webpage: N/A
Brief summary: The claimant, a Muslim hairdresser, succeeded in her claim that she had been indirectly discriminated against on grounds of religion as a result of her employer's requirement that she remove her headscarf while at work. The employment tribunal found that the requirement for hairdressers to have their own hair visible was not a proportionate means of achieving a legitimate aim.

[196] [2006] EWCA Civ 1293.

Name of the court: High Court
Date of decision: 29 July 2008
Name of the parties: *R (Watkins-Singh)* v *Governing Body of Aberdare Girls School*
Reference number: [2008] EWHC 1865 (Admin), [2008] ELR 561
Address of the webpage:
http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html
Brief summary: A Sikh girl wished to wear a "Kara", a Sikh religious symbol, while going to school: Sikhs are expected as a matter of religious belief to wear these bangles as an expression of their faith. The school had a uniform policy which prohibited the wearing of all forms of personal jewellery and therefore excluded the Sikh girl when she refused to remove the bangle. However, the High Court held that the exclusion of the girl constituted indirect race discrimination and indirect religious discrimination, as the ban on wearing such a religious symbols disproportionately placed members of the Sikh ethnic group (who are also a faith group) at a disadvantage and it could not be justified in the circumstances. The school argued that it was necessary to have a uniform policy applicable to all students to ensure that differences in wealth, ethnic background and status could not be expressed through the wearing of certain types of body ornaments: the High Court held that this justification was insufficient to justify the substantial disadvantage inflicted on Sikh pupils. The school was also found to have violated the positive race equality policy imposed on public authorities in the UK, on the basis that it had no effective equality policy in place, and was ordered to re-admit the girl.

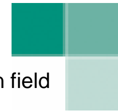
Name of the court: Court of Appeal
Date of decision: 14 May 2009
Name of the parties: *Rolls Royce Plc* v *Unite*
Reference number: [2009] EWCA Civ 387, [2009] IRLR 576
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2009/387.html
Brief summary: The Court of Appeal upheld the decision of the High Court that an employer's use of length of service as part of a scheme used to select employees for redundancy was lawful under the Employment Equality (Age) Regulations 2006. In this case, Rolls Royce's redundancy selection scheme was established under a union-agreed collective agreement. Under the scheme, employees scored one point for each year of service, as well as scoring points for other criteria e.g. expertise. The employees with the fewest points were selected for redundancy. The effect was that younger workers were more likely to be selected for redundancy than older workers. In general, selecting an employee for redundancy based on length of service could constitute indirect age discrimination, unless it can be objectively justified. The Court of Appeal accepted, however, that the discrimination at issue was covered by an exception (Regulation 32) which permitted employers to award "benefits" to employees based on length of service (see further below). It went on to accept that, even had the scheme at issue not fallen within the exception, the indirect age discrimination it entailed would be objectively justified: "viewed objectively, the inclusion of the length of service criterion is a proportionate means of achieving a legitimate aim. The legitimate aim is the reward of loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy

selection. The proportionate means is … amply demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employees suitability for redundancy, and that it is by no means determinative. Equally, it seems to me, the length of service criterion is entirely consistent with the overarching concept of fairness". (The case is curious in that the employer was arguing that their own redundancy scheme was unlawful in order to end the existing collective agreement and to negotiate another one more favourable to the employer's interests, while the union was defending the scheme.)

Name of the court: Employment Appeal Tribunal
Date of decision: 24 May 2011
Name of the parties: *Cherfi v G4S Security Services Ltd*
Reference number: UKEAT/0379/10
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0379_11_2405.html
Brief summary: The EAT ruled that an employment tribunal had been entitled to find that a practice requiring employees to remain on site for the full duration of a shift, although it caused a particular disadvantage to a Muslim employee who needed to attend his local mosque on Friday lunchtimes, was a proportionate means of achieving a legitimate aim. The claimant was a security guard based on a site operated by one of the employer's clients which Attendance at Friday prayer required a journey and at least an hour's absence from work by the claimant. He was told in October 2008 that he could no longer have this period of absence on a Friday because the employer's clients insisted that the particular number of security guards assigned to each site had to be present during their paid lunchbreak. He was offered a different working pattern which would have allowed him to be absent on a Friday but refused to work at the weekend and took Fridays as sick leave, authorised annual leave or authorised unpaid leave until March 2009 when he was advised that the situation could not continue. A tribunal rejected his claim of indirect religious discrimination, ruling that the disparately impacting provision, criterion or practice was justified. The claimant's appeal failed, the EAT rejecting the argument that the employer could not rely on the contractual requirements imposed by the client without at least having put to the client the particular situation of the claimant.

In *Abdulle v River Island Clothing Company* a tribunal found that a Muslim employee was indirectly discriminated against when she was refused time off for prayers on a single occasion by a junior manager because of staff shortages.[197] The tribunal took the view that the respondent, as a large employer, should have had procedures in place to deal with this type of situation. It did not accept, however, that an employee who was Muslim, or of any other faith "is entitled to a 100% cast iron right to a particular time off every day", and awarded the claimant only £500 in respect of injury to feelings.

[197] 10 May 2011, Case No.2346023/10.



Name of the court: Employment tribunal
Date of decision: 7 November 2011
Name of the parties: *Patrick v IH Sterile Services Ltd*
Reference number: Case No.3300983/11 [2012] EqLR 92
Address of the webpage: N/A
Brief summary: The claimant, a Jehovah's Witness, complained of direct and indirect religious discrimination when he was dismissed for refusing to work on Sundays after his employer, by reason of a decision to reduce reliance on agency staff, started to require all employees to take turns in working Sundays. The respondent sterilised hospital instruments and so operated on a continual basis. The requirement was consistent with the employee's contract but he had had an arrangement whereby he was not required to work on Sundays prior to the respondent's change in policy. The respondent sought to accommodate the claimant's concerns about Sunday working by offering him night shifts or the early shift on Sundays but he would not compromise and was subsequently dismissed for aggressive conduct, absence and lateness. The tribunal rejected his discrimination claims on the basis that he had not been treated less favourably than others by being required to work on Sundays and that even if the requirement placed the claimant at a particular disadvantage when compared with non-religious people it was justified by the respondent's obligations to its customers to provide sterile instruments on a Sunday, and the equitable distribution of the obligation to work Sundays was a proportionate means to achieve that aim.

Name of the court: Employment tribunal
Date of decision: 13 April 2011
Name of the parties: *Bamber v Greater Manchester Police*
Reference number: Case No.2401829/09
Address of the webpage: N/A
Brief summary: An employment tribunal found that a requirement to complete a physical test within a specified time served the legitimate aim of ensuring that candidates were sufficiently fit to operate as police officers but that it was not a proportionate means to achieve that aim, given its disproportionate impact on women and older candidates. The claimant was a serving police officer who was involved in public order work but who failed to complete a 500-metre "shield run" (that is, a run dressed in full riot gear) within 2 minutes and 45 seconds. She passed the test on a second attempt but claimed that the shield indirectly discriminated against her as a female officer, and as a more mature officer. The time limit for the shield run was extended to 3 minutes but Ms Bamber claimed indirect sex and age discrimination. The tribunal ruled in her favour, in part because "The fact that [the police force] altered the time required to complete the test to 3 minutes as an interim position undermines the argument that there is an operational requirement for all officers to complete the test in 2 minutes 45 seconds." Other forces did not use the shield run to test fitness, and the abilities tested by the run amounted to "only one, occasional, part of the duties of [relevant] officer".

Direct age discrimination

Name of the court: Employment tribunal
Date of decision: 9 October 2007
Name of the parties: *Bloxham* v *Freshfields Bruckhaus Deringer*
Reference number: 2205086/2006 (ET)
Address of the webpage: N/A
Brief summary: An Employment Tribunal upheld the introduction of special transitory pension arrangements for partners of a leading London law firm over the age of 55 (which reduced or in some cases effectively eliminated future payments into their already generous pension fund) on the basis that this measure was objectively justified as necessary to maintain the financial well-being of the law firm's pension scheme.

"Conflict" cases

Name of the court: Employment Appeal Tribunal
Date of decision: 30 March 2007
Name of the parties: *Azmi* v *Kirklees Metropolitan Council*
Reference number: UKEAT/0009/07, [2007] ICR 1154, [2007] ELR 339, [2007] IRLR 484
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2007/0009_07_3003.html
Brief summary: A Muslim classroom assistant was suspended by a primary school for wearing a face-veil (or *niqab*) in lessons, after she had refused to remove the veil following complaints by students that they found it hard to understand her through the face covering. The Employment Appeal Tribunal ruled that the Employment Tribunal had been correct to dismiss Ms Azmi's claims of direct and indirect religious discrimination and harassment. The Tribunal had concluded that she had not been less favourably treated than a non-Muslim comparator would have been in similar circumstances, and the EAT accepted that, while discrimination on the basis of wearing clothing associated with a particular religion could constitute indirect religious discrimination, the Tribunal had been entitled to find that her employer had been objectively justified in asking her to remove the face-veil because the evidence was that it interfered significantly with her ability to teach the children.

Name of the court: Court of Appeal
Date of decision: 15 December 2009
Name of the parties: *Ladele* v *London Borough of Islington*
Reference number: [2009] EWCA Civ 1357, [2010] ICR 532, [2010] IRLR 211
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html
Brief summary: In this important case, the applicant was a registrar employed by the London Borough of Islington: part of her duties was to conduct weddings. When the Civil Partnerships Act 2004 came into force, which enables gay partners to enter into a "civil partnership" that has equivalent legal rights as marriage, she refused to participate in registering any civil partnerships, because to do so was inconsistent

with her Christian religious beliefs. The council insisted that she should undertake at least some of the duties associated with registering civil partnerships.

When she refused, the council disciplined her and threatened her with dismissal. Ms Ladele then alleged that she had been subjected to direct discrimination, indirect discrimination and harassment on the grounds of her religious belief. At first instance, an Employment Tribunal upheld her claim on all three grounds, finding in particular that the failure to accommodate Ms Ladele's beliefs meant that she had been subjected to less favourable treatment as a result of her religious beliefs. However, on appeal, the EAT held that there was no direct discrimination as Ms Ladele had not been discriminated against or subjected to harassment on the basis of her religious beliefs: she had been disciplined solely on the basis that she had failed to perform work duties. It also concluded that there was no indirect discrimination, on the basis that the requirement in question that all registrars perform civil partnerships, while adversely affecting persons who shared Ms Ladele's religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect. The Court of Appeal upheld the decision of the EAT, further ruling that, because both the employer and the Appellant, as an office holder, were prohibited by law from discriminating on grounds of sexual orientation, the indirect religious discrimination involved in insisting that the Appellant perform her duties relating to civil partnerships was *necessarily* justified.

An appeal in *Ladele* to the ECtHR was communicated on 27 August 2010 and 24 June 2010 together with a complaint by Gary Macfarlane.[198]

Name of the court: Employment Appeal Tribunal
Date of decision: 30 November 2009
Name of the parties: *McFarlane* v *Relate Avon Ltd*
Reference number: [2010] 1 507, [2010] IRLR 196
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0106_09_3011.html
Brief summary: The Claimant a Christian counsellor sought to change his job function by providing sexual counseling. Relate's equal opportunities policy provided that sexual counsellors should counsel both gay and heterosexual couples in connection with their sexual activity. The Claimant took the view that his Christian beliefs prevented him from providing sexual counseling to same sex couples. He was dismissed and his claim that he had been discriminated against, directly and/or indirectly, on grounds of religious belief was dismissed. In relation to his direct discrimination claim the EAT ruled that "in some cases where an employer objects to [the] manifestation [of a religious belief] it may be impossible to see any basis for the objection other than objection to the belief which it manifests; and in such a case a

[198] Application nos. 51671/10 and 36516/10. The Government successfully defended both claims, the judgment of the Court being issued on 13 January 2013: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":["001-115881"]}.

claim by the employer to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference". In such cases, discrimination on grounds of manifestation would amount to direct discrimination. In other cases, however, "there will be a clear and evidently genuine basis for differentiation between the two, and in such a case the fact that the employee's motivation for the conduct in question may be found in his wish to manifest his religious beliefs does not mean that that belief is the ground of the employer's action." The EAT further accepted that the indirect discrimination in this case was justified because the employer was, as in *Ladele*, entitled to treat the issue as one of principle, in which compromise was inappropriate.

The Court of Appeal refused permission to appeal, rejecting a highly unusual intervention from the former Archbishop of Canterbury who suggested that Mr McFarlane's appeal be heard before the Lord Chief Justice and a specially constituted panel of five Lords Justices who had "a proven sensibility to religious issues" (this instead of the normal three judge panel): see [2010] IRLR 872, (2010) 29 BHRC 249.

The appeal in *McFarlane* is to be heard by the ECtHR with that in *Ladele.*

Material Scope of the Legislation

Name of the court: Employment Appeal Tribunal
Date of decision: 17 February 2010
Name of the parties: *May & Baker Ltd v Okerago*
Reference number: [2010] UKEAT 0278_09_1702, [2010] IRLR 394
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2010/0278_09_1702.html
Brief summary: The question for the Employment Appeal Tribunal was whether an employer could be regarded as aiding the unlawful act of a third party (an agency worker) who was alleged to have subjected the Claimant to racist remarks. An employment tribunal found that the employers could be regarded as having aided the agency worker contrary to section 33 of the Race Relations Act 1976 (now section 112 of the Equality Act 2010) by failing properly to investigate the incident. The EAT allowed the employer's appeal, ruling that a person could not aid another person to do something which the latter had already done. Further, even if the company had assisted the agency worker to do an act, that act would not have been unlawful as it would have fallen outside the RRA (and will fall outside the EqA).

The EqA allows employers to be pinned with liability for harassment by third parties if and only if they "know[] that [the worker] has been harassed in the course of [his or her] employment on at least two other occasions by a third party … whether the third party is the same or a different person on each occasion", and, further, "failed to take such steps as would have been reasonably practicable to prevent the third party from doing so" (section 40). On 23 March 2011 it was announced that the government would consult on the removal of this provision from the Act. It is of interest that, in

Sheffield City Council v Norouzi [2011] EqLR 1039, [2011] IRLR 897 the EAT ruled that the claimant could rely on the Race Directive to hold his employer liable for harassment by a third party where the employer had failed to take adequate steps to protect an Iranian social worker from the abusive conduct of a child in care.[199]

Name of the court: Court of Appeal
Date of decision: 24 February 2011
Name of the parties: *British Airways plc v Mak & Ors*
Reference number: [2011] EWCA Civ 184, [2011] ICR 735
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2011/184.html
Brief summary: The Court of Appeal ruled that cabin crew, all born and based in Hong Kong, but who did part of their work in Great Britain (because they staffed flights between Hong Kong and Heathrow) were to be regarded as employed at an establishment in Great Britain for the purposes of the Race Relations Act 1976 and the Age Regulations. The staff had all been required to retire at 45, a retirement age which did not apply to British-based employees of BA.

By contrast with the predecessor legislation the EqA contains no provisions on territorial extent. It is likely, as a result, that the claimants in this case would not have been able to bring claims under the EqA, the normal principle (as applied by the House of Lords in *Lawson v Serco Ltd* [2006] IRLR 289) being that peripatetic workers (there pilots) were employed at the base where their assignment started and ended.

Name of the court: Supreme Court
Date of decision: 27 July 2011
Name of the parties: *Jivraj v Hashwani*
Reference number: [2011] UKSC 40, [2012] 1 All ER 629, [2011] IRLR 827
Address of the webpage:
http://www.supremecourt.gov.uk/docs/UKSC_2010_0170_Judgment.pdf
Brief summary: The Supreme Court ruled that arbitrators were not "employed" for the purposes of the Religion and Belief Regulations, with the effect that a provision in an arbitration agreement in a commercial contract which provided that the arbitral tribunal was to be drawn from members of the Ismaili community (a religious group) fell outside the scope of the Regulations. The Supreme Court took the view that European case law distinguished between those who are, in substance, employed and those who are independent providers of services who are not in a relationship of subordination with the person who receives the services. Even if an arbitrator was "employed" for the purposes of the Regulations, within the meaning of the 2003 Regulations, the stipulation that the arbitrator was Ismaili would have fallen within the GOR exception which does not require that a particular religion or belief is an essential or necessary requirement for the job, rather simply that the requirement is

[199] UKEAT/0497/10/RN [2011] EqLR 1039, available at: http://www.bailii.org/uk/cases/UKEAT/2011/0497_10_1406.html, accessed 1 November 2012.

not genuine, legitimate and justified. The Ismaili community's significant and characteristic enthusiasm for dispute resolution was an ethos based on religion and that religion was relevant to the discretion which the arbitrator would be expected to exercise. In these circumstances the requirement that the arbitrator be Ismaili was legitimate and justified.

Cases on the Shift in the Burden of Proof

Name of the court: Court of Appeal
Date of decision: 18 February 2005
Name of the parties: *Igen Ltd & Ors* v *Wong*
Reference number: [2005] EWCA Civ 142, [2005] IRLR 258, [2005] ICR 931
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html
Brief summary: The Court of Appeal set out the following guidelines on the application of the burden of proof in a number of cases dealing with various grounds of discrimination:

(1) it is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful;
(2) If the claimant does not prove such facts he or she will fail.
(3) it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, rather to determine to see what inferences of secondary fact *could* be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the protected ground of sex.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected ground was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

The Court of Appeal also confirmed that it was possible for employment tribunals to find that unreasonable behaviour by an employer that appeared to be linked to one of the grounds covered by the Directives could by itself result in the burden shifting to the employer to show an adequate non-discriminatory explanation for the behaviour in question.

Name of the court: Court of Appeal
Date of decision: 26 January 2007
Name of the parties: *Madarassy* v *Nomura International Plc*
Reference number: [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2007/33.html
Brief summary: Here the Court of Appeal clarified elements of the approach set out in *Igen* v *Wong*, stating that the burden of proof should only shift to the respondent when the claimant had provided sufficient material from which a reasonable tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. If the respondent was unable to provide an adequate explanation for the behaviour in question, this only became relevant if a prima facie case is proved by the complainant, i.e. the respondent's inability to give a satisfactory explanation for his conduct would only establish liability when sufficient evidence existed to shift the burden. The Court of Appeal also concluded that the same approach to the burden of proof should apply where a hypothetical comparator was used.

Name of the court: Employment Appeal Tribunal
Date of decision: 25 September 2009
Name of the parties: *Eagle Place Services Ltd v Rudd*
Reference number: [2009] UKEAT 0151_09_0207, [2010] IRLR 486
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0151_09_0207.html

Brief summary: The employers dismissed the Claimant, a personal injury solicitor who had detached retinas in both eyes, because they decided that it was commercially unprofitable to continue to employ him having made the adjustments which were required to permit him to continue to work (which adjustments an employment tribunal found would have permitted him to work perfectly well). The question for the Employment Appeal Tribunal was whether the employers could argue that, while their treatment of the Claimant was unreasonable, they would have acted equally unreasonably towards a hypothetical non-disabled comparator, this because it was common practice in large law firms such as theirs summarily to dismiss highly-paid employees on the assumption that any legal claim would be settled. (This is an example of what is colloquially known as the "bastard defence"). The EAT ruled that "It is simply not open to the respondent to say that it has not discriminated against the claimant because it would have behaved unreasonably in dismissing the comparator. It is unreasonable to suppose that it in fact would have dismissed the comparator for what amounts to an irrational reason. It is one thing to find … that a named individual has behaved unreasonably to both the claimant and named comparators; it is quite another to find that a corporate entity … would behave unreasonably to a hypothetical comparator when it had no good reason to do so." Unreasonable treatment could not of itself give rise to an inference of discrimination. But "where an employment tribunal has rejected an explanation on the part of the employer for what might be regarded as unreasonable behaviour it is perfectly proper for it to draw an inference of discrimination, assuming ... there is other evidence pointing to discriminatory conduct."

Exclusions/ Exceptions

Sexual Orientation

Name of the court: High Court
Date of decision: 26 April 2004
Name of the parties: *R (Amicus & Ors)* v *Secretary of State for Trade and Industry*
Reference number: [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] ELR 311, [2004] IRLR 430
Address of the webpage:
http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html
Brief summary: Amicus and six other leading UK trade unions applied for the annulment of certain provisions of the Employment Equality (Sexual Orientation) Regulations 2003. The unions challenged certain regulations as incompatible with the Employment Framework Directive and incompatible with the ECHR. The case highlighted the potential conflict between the doctrines of particular religious faiths and protection against discrimination on grounds of sexual orientation.

One of the provisions at issue before the High Court was reg.7(3) of the Sexual Orientation Regulations that, in the case of employment for the purposes of an organised religion permits discrimination on grounds of sexual orientation in order to comply with the doctrines of the religion or to avoid conflicting with strongly held

religious convictions of a significant number of the religion's followers. The High Court ruled that this regulation was a lawful implementation of Article 4(1) of the Directive and gave legislative clarity to the balance between competing rights.

The EqA now provides (Schedule 9 para 2) that employment-related discrimination on grounds of sexual orientation, marriage or civil partnership status does not breach the Act where the employment is for the purposes of an organised religion and the discrimination is for the purposes of complying with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

Age

The UK's default retirement age of 65 was abolished from 6 April 2011, from which date employers have to justify all age-related dismissals.

Name of the court: Court of Appeal
Date of decision: 14 May 2009
Name of the parties: *Rolls Royce Plc* v *Unite*
Reference number: [2009] EWCA Civ 387, [2009] IRLR 576
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2009/387.html
Brief summary: The Court of Appeal upheld the decision of the High Court that an employer's use of length of service as part of a scheme used to select employees for redundancy was lawful under the Employment Equality (Age) Regulations 2006. Rolls Royce's redundancy selection scheme was established under a union-agreed collective agreement. Under the scheme, employees scored one point for each year of service, as well as scoring points for other criteria e.g. expertise. The employees with the fewest points were selected for redundancy.

The effect was that younger workers were more likely to be selected for redundancy than older workers. In general, selecting an employee for redundancy based on length of service could constitute indirect age discrimination, unless it can be objectively justified. However, Regulation 32 of the Age Regulations provides an exemption that an employer can lawfully award "benefits" to employees based on length of service provided that (a) it is in relation to up to 5 years' service; or (b) if it is in relation to more than 5 years' service, it must reasonably appear to the employer to fulfil a business need (for example, by encouraging the loyalty or motivation or rewarding the experience of some or all of its staff). This establishes a lower justification threshold for individual employers than is required under the "standard" objective justification test for age discrimination, which the UK government justifies on the basis that it provides clarity for employers and can be objectively justified as a general policy measure.)

In this case, the High Court and Court of Appeal held that awarding points for length of service constituted the award of a "benefit" under Regulation 32, and that the fact

that the redundancy scheme had been negotiated with a union would satisfy the requirement of "reasonably satisfying a business need" under Regulation 32.

Disability

Name of the court: High Court
Date of decision: 23 July 2009
Name of the parties: *X Endowed Primary School* v *Special Educational Needs and Disability Tribunal & Ors*
Reference number: [2009] EWHC 1842 (Admin), [2009] IRLR 1007, [2010] ELR 1
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2006/0364_06_1912.html
Brief summary: A 10 year old boy claimed that his school had failed to make appropriate adjustments to his disorder in dealing with him in relation to his assault on a member of staff. The school had excluded him following the incident. The DDA listed a number of antisocial conditions which did not qualify as disabilities under the Act. These include a tendency to physical abuse of other persons. The question for the Court was whether this exclusion applies so as to exclude from protection those whose tendency to physical abuse is the result of another mental impairment (here Attention Deficit Disorder and Hyperactivity Disorder). The High Court ruled that the school was not obliged by the DDA to make any adjustment in relation to the tendency to physical abuse. In this case, however, because the school had failed to make any adjustments of its normal practices in relation to the management of pupils with Attention Deficit Disorder and Hyperactivity Disorder generally, it was in breach of the DDA.

Religion/ belief

Name of the court: Employment Appeal Tribunal
Date of decision: 17 January 2007
Name of the parties: *Glasgow City Council* v *McNab*
Reference number: UKEAT/0037/06, [2007] IRLR 476
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2007/0037_06_1701.html
Brief summary: In this case, an atheist who applied for a temporary position as acting head of a Catholic state school was not successful on the basis that he was not Catholic. The EAT held that this constituted a violation of the Religion and Belief Regulations 2003, as the school could not establish that being a Catholic was a genuine occupational requirement for that particular post and it was not necessary for an acting principal to be Catholic to maintain the religious nature of the school. This shows that the employment tribunals may give a narrow interpretation to the permitted "ethos" exceptions to the prohibition on discrimination based on religion or belief.

Remedies

Name of the court: Employment tribunal
Date of decision: 6 April 2006
Name of the parties: *Husain* v *Chief Constable of Kent*
Reference number: N/A
Address of the webpage: N/A
Brief summary: Kent Police twice rejected job applications from Shujaat Husain, of south London, for employment as an intelligence analyst in 1999 and 2000. Following this, the Kent police prepared a report on Mr Husain, on the basis that there had been "material differences" between his applications for the two jobs: the report specifically suggested that he had falsified elements of his academic qualifications and professional experience. The report was circulated to other police forces, and warned them to be aware of a "potentially fraudulent" application. Mr Husain was then later arrested and detained for 10 hours when he applied for a job at Avon and Somerset police force. The employment tribunal decided that Mr Husain had been subject to serious race discrimination by Kent police. In particular, the tribunal found that the difference in his applications for the two jobs, which had caused the report to be prepared by the Kent Police, was the result of Mr Husain taking steps in the period between the two applications to become more familiar with the job of an intelligence analyst: therefore, the suggestion by the police that he was falsifying his qualifications was the result of racial stereotyping.

The tribunal considered that this case should result in exemplary damages due to the seriousness of the discrimination at issue, and awarded Mr Husain £65,000 UK sterling (76, 361 euros) in damages, including £25,000 (29,369 euros) for injury to feelings, £4,000 (4,698 euros) in aggravated damages resulting from his detention, and £5,000 (5873 euros) in exemplary damages to directly penalise the Kent police. Such damages are rare in the UK legal system, and reflect the seriousness of the case.

Name of the court: Employment Appeal Tribunal
Date of decision: 2 September 2009
Name of the parties: *Da'Bell* v *NSPCC*
Reference number: [2009] UKEAT 0227_09_2809, [2010] IRLR 19
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2009/0227_09_2809.html
Brief summary: Here the EAT uprated guidelines on compensation for injury to feelings set in the earlier decision of the Court of Appeal in Chief Constable of West Yorkshire Police v Vento (No. 2). The most serious cases may now attract between EURO 22 000 and 36 666 (£18 000 and £30 000); the middle band EUR 7 333 to 22 000 (£6 000 to £18 000) and the lower band is up to EUR 7 333 (£6 000). It is probable that the minimum award should not be below EUR 733 (£600).

Name of the court: Court of Appeal
Date of decision: 13 November 2009

Name of the parties: *Chagger* v *Abbey National plc*
Reference number: [2009] EWCA Civ 1202, [2010] ICR 397, [2010] IRLR 47
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2009/1202.html
Brief summary: Here the Court of Appeal ruled that where an employer has unlawfully discriminated against an employee by dismissing him, and the employee has taken discrimination proceedings and has subsequently had difficulty in being employed elsewhere, the employer can be liable for compensation reflecting the stigma resulting from the fact that the employee has taken the discrimination proceedings.

A tribunal had awarded Mr Chagger EUR 1 619 808 (£1 325 322) for future loss on the basis that he would never again be able to work in the financial services industry. The EAT overturned this award but the Court of Appeal reinstated it, ruling that “the original employer must remain liable for so-called stigma loss”, even where the actions of the third party employers in victimising the employee are unlawful.

Name of the court: Employment tribunal
Date of decision: 18 April 2011
Name of the parties: *Richards v Menzies Aviation (UK) Ltd and others*
Reference number: Case No.1402185/10, [2011] EqLR 661
Address of the webpage: N/A
Brief summary: The facts of this case are set out above (in the section on harassment). In this case, which involved a one-off failure to react appropriately to a complaint about a racially offensive, the tribunal awarded only £1 000 in respect of injury to feelings, this on the basis that there was a single act of discrimination over a short period of time which did not upset the Claimant greatly. It also, however, recommended that "the respondent as a matter of urgency undertakes to provide regular training on equal opportunities and dignity at work for its managers and its staff”.

Name of the court: Employment Appeal Tribunal
Date of decision: 11 May 2011
Name of the parties: *Wardle v Credit Agricole Corporate and Investment Bank*
Reference number: [2011] EWCA Civ 545 [2011] IRLR 819
Address of the webpage: www.bailii.org/ew/cases/EWCA/Civ/2011/545.html
Brief summary: The Court of Appeal ruled that a tribunal erred in awarding compensation to the claimant on a “whole career” basis other than in exceptional cases. The court’s job was to assess the full extent of the claimant’s loss and compensate accordingly, but this should be done to the point in time at which the employee would be likely to obtain an equivalent job to that he had lost as a result of the discrimination rather than (as here) the point at which the tribunal thought it certain that he would do so.

Name of the court: Employment Appeal Tribunal
Date of decision: 27 May 2011
Name of the parties: *London Borough of Hackney v Sivanandan & Ors*

Reference number: UKEAT/0075/10/CEA
Address of the webpage:
www.bailii.org/uk/cases/UKEAT/2011/0075_10_2705.html
Brief summary: The EAT ruled that, where multiple respondents were responsible for a single act of discrimination, any award made against them should be made jointly and severally (such that each was responsible for the whole of the award, subject to a right of recovery from the other respondents) rather than by way of apportionment between the respondents unless it could be said that each was responsible for a particular aspect of the claimant's loss or damage. Here an award of EUR 500 000 (£421 415) had been made against the respondent council and a number of individuals.

Name of the court: Employment Appeal Tribunal
Date of decision: 15 September 2011
Name of the parties: *Debique v Ministry of Defence (No.2)*
Reference number: UKEAT/0075/11/SM
Address of the webpage:
http://www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html
Brief summary: The decision in the first *Debique* case is in Annex 3. Very briefly, it was accepted that the claimant, a single mother, had been discriminated against as a Foreign and Commonwealth soldier in the British army by being subject to requirements to be available for duty 24 hours a day while also being denied permission by the government, in its immigration control function, to have her sister come from the Caribbean to help her look after her child. The matter went back to the tribunal for the assessment of compensation. The tribunal made an award of EUR 18 000 (£15 000) in respect of injury to feelings but refused to make any award of compensation in respect of loss of earnings because the claimant was found unreasonably to have refused an offer of redeployment into a position where her childcare needs could have been more easily accommodated. The EAT rejected Ms Debique's appeal. The offer of redeployment had been a serious one which would have resolved the claimant's childcare difficulties and came with a guarantee that she would not be subject to any further redeployment for five years. It would have been accompanied by the removal of disciplinary warnings which had been placed on her file. Despite the fact that the claimant refused the offer because she was not convinced that it would result in stability, this because she would have been required by the military regulations to be available for deployment at any time, with the effect that the offer of redeployment would not in fact have been legally binding, the tribunal had been entitled to find that her refusal was unreasonable; she should have realised an offer made in such formal terms, in writing, by a senior officer, made it very unlikely that she would be redeployed in breach of it.

Name of the court: Employment tribunal
Date of decision: October 2011
Name of the parties: *Burke v (1) Clinton Cards plc (2) Walker*
Reference number: ET/2407264/07, ET/2405865/08, ET/2408501/08,
Address of the webpage: N/A

Brief summary: The claimant was constructively dismissed after she was diagnosed with breast cancer, an incoming manager having increased her workload, criticised her performance, paid no regard to the effect of a heavier workload on her health and showed no interest in the effect on her work of the treatment for cancer that she was undergoing. A tribunal awarded her EUR 30 357 (£24,838) for losses of earnings to date and a further three years' losses. It also made clear that it would have given favourable consideration to a claim for career-long loss if it had it been put forward by the claimant, which it was not. The tribunal went on to remark that, had the Equality Act 2010 been in force, it would have made recommendations relating to the method of recording meetings with employees, the training of individuals and training in respect of disability discrimination.

Name of the court: Employment tribunal
Date of decision: 8 December 2011
Name of the parties: *Browne v Central Manchester University NHS Foundation*
Reference number: Case Nos. ET/2407264/07, ET/2405865/08, ET/2408501/08
Address of the webpage: N/A
Brief summary: This case involves one of the largest awards in a race discrimination claim. Elliot Browne aged 55, was unfairly dismissed from his position as a director at Central Manchester University NHS Foundation. He had worked for the National Health Service for 34 years and had been subjected to race discrimination over a period of years. The pay-out of almost £1 million (1,110,186 euro) reflected the fact that the discriminatory treatment which he suffered, and his eventual dismissal, resulted in serious damage to his health. The large majority of the payment related to future loss of earnings and pension. Despite evidence that Black employees comprised 2% of the Trust's workforce but 25% of those dismissed for disciplinary reasons the Trust denied that Mr Browne had been discriminated against and announced its intention to appeal.

This case, and others in which successful discrimination claims lead to very significant awards, illustrate the damage that discrimination can do to a person's career and well-being. Only a small proportion of such awards will relate to non-pecuniary damages, typically injury to feelings. By far the greatest element in awards such as that made to Mr Browne, and the £4.4 million (5.3 million euro) awarded by a tribunal in December 2011 to a woman doctor subjected to harassment and false allegations by colleagues at Mid Yorkshire Hospitals NHS Trust after she took maternity leave, relates to loss of earnings and pension.[200]

Selected Decisions on the Interpretation of the UK Human Rights Act 1998

Name of the court: House of Lords
Date of decision: 26 May 2005

[200] *Michalak v The Mid Yorkshire Hospitals NHS Trust & Ors* 15 December 2011,case no.181081/08, http://www.judiciary.gov.uk/media/judgments/2011/dr-michalak-v-mid-yorkshire-hospitals-nhs-trust-others-tribunal-decision.

Name of the parties: *R v Secretary of State for Work and Pensions, ex p. Reynolds/ R v Secretary of State for Work and Pensions, ex p. Carso*n
Reference number: [2005] UKHL 37, [2006] 1 AC 173
Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2005/37.html
Brief summary: In one (*Reynolds*) of these two combined Article 14 ECHR cases, the payment of lower amounts of social security to younger persons was challenged under the UK Human Rights Act 1998 (see below) as incompatible with Article 14 of the ECHR. Having considered the case-law of the European Court of Human Rights, the House of Lords decided that the use of certain "suspect" grounds, such as race, ethnic origin, sexual orientation and gender, to justify differences of treatment between individuals would have to satisfy a very high threshold of justification to survive a challenge under Article 14. However, the use of other grounds, such as age, would face a lower level of scrutiny, and the difference of treatment in making social security payments was held to be justified on the basis of the special characteristics of younger workers.

Name of the court: Court of Appeal
Date of decision: 25 July 2005
Name of the parties: *Copsey v WWB Devon Clays Ltd*
Reference number: [2005] EWCA Civ 932, [2005] IRLR 811
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2005/932.html
Brief summary: An employee who had been dismissed for a refusal to work on Sundays claimed that his employer had violated his rights to religious freedom under Article 9 and 14 of the ECHR. (The case arose before the legislation transposing the Directive came into effect.) However, the Court of Appeal decided that the dismissal of Mr Copsey was not based upon his religious beliefs, but rather upon his refusal to agree new employment terms and conditions, and that the dismissal was justified due to the economic needs of his employer and the desire to have similar working conditions for all employees, agreed after consultation with the relevant trade union. It appears to have also been relevant to the Court of Appeal's decision that the employer had offered Mr Copsey some form of alternative employment.

Name of the court: House of Lords
Date of decision: 22 March 2006
Name of the parties: *R (B) v Denbigh High School*
Reference number: [2006] UKHL 15, [2005] 2 AC 246
Address of the webpage: http://www.bailii.org/uk/cases/UKHL/2006/15.html
Brief summary: The Court of Appeal decided that a Muslim schoolgirl's right to freedom of religion under Article 9 ECHR had been violated, as her school had failed to give adequate weight in deciding its school uniform policy to her religiously-motivated desire to wear a particular form of Islamic dress. The House of Lords has subsequently reversed this decision, on the basis that the school had consulted with Muslim groups and alternative schooling options were available for the girl, which would allow her to wear her religious dress.

Cases on Roma and Travellers

Prior to EU enlargement, the bulk of cases concerning Roma in the UK involved immigration and asylum claims, including the *Prague Airport* case decided by the House of Lords in 2003 which decided that UK immigration officers in Prague Airport had engaged in direct race discrimination by subjecting Roma travellers to the UK to extra scrutiny based on their ethnic origin.[201] This decision was subsequently cited by the ECHR in *DH v Czech Republic* in 2007. Since EU enlargement, there appear to be few if any cases involving Roma, and none in superior courts of record involving a claim of discrimination.

The majority of cases involving Travellers (a generic term, which includes Irish Travellers, Bargees, New Age Travellers and "Gypsies", who are a distinct group from the Roma) in the UK in recent years have involved issues of housing and accommodation rights. Many of these cases (perhaps the majority) have involved eviction proceedings brought against Traveller families for illegal encampments, which is a serious and persisting problem. Traveller groups have also occasionally brought judicial review actions (administrative review) against local authority housing policies, resulting in a complex case-law emerging in respect of issues such as housing allocation and the treatment of Traveller families in the planning permission process.

Name of the court: Court of Appeal
Date of decision: 29 April 2004
Name of the parties: *First Secretary of State v Chichester District Council*
Reference number: [2004] EWCA Civ 1248, [2005] 1 WLR 279
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2004/1248.html
Brief summary: In this case the Court of Appeal decided that the right of members of the travelling community to respect for their home life under Article 8 of the ECHR had to be given due weight in planning decisions.[202] This followed the decision of the European Court of Human Rights in *Connors v UK* that the legal framework governing when eviction from property was possible failed to take account the special needs and position of the Travelling community, and therefore constituted a violation of the positive obligations imposed under Article 8 of the ECHR.[203]

The Sports Council of Northern Ireland reported in 2004 that awards of EUR 1222 (£1000) each had been made in an out-of-court settlement in August 2003 to five Irish Travellers who had been refused access to Dungannon Golf Club in June

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[201] *R (European Roma Rights Centre & Ors, R (on the application of) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.
[202] [2004] EWCA Civ 1248. See also *Clarke v Secretary of State for the Environment* [2001] EWHC Admin 800.
[203] [2004] ECHR 223 (27 May 2004). For an analysis of the scope of positive obligations under the ECHR in general, see A.Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

2000.[204] According to the report: “the men had previously played the course along with non-travellers in the past but when they later returned unaccompanied they were refused permission and asked to leave. The case was brought to the County Court under the Race Relations (NI) Order and was assisted by the Equality Commission. In the settlement the golf club apologised to the plaintiffs and admitted liability for the complaints, accepting that its practices and procedures were unlawful. The golf club agreed not to discriminate against the men in the future and to fully consider any future applications by them or either temporary or full membership”.

Name of the court: House of Lords
Date of decision: 8 March 2006
Name of the parties: *Kay & Ors* v *Lambeth Borough Council*
Reference number: [2006] UKHL 10, [2006] 2 AC 465
Address of the webpage:
http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060308/leeds-1.htm
Brief summary: In this case the House of Lords ruled that, while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances where a local government policy or regulation could be challenged under the ECHR before the administrative courts.

Name of the court: Court of Appeal
Date of decision: 22 January 2009
Name of the parties: *Basildon District Council* v *McCarthy & Ors*
Reference number: [2009] EWCA Civ 13
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html
Brief summary: The appellant local authority appealed against a High Court judgment which had overturned the authority’s decision under planning control legislation to enforce compliance with enforcement notices requiring Irish Traveller and Gypsy families resident on unauthorised sites in the Council’s district to leave these sites. The trial judge held that the local authority could not evict the families, as the authority had failed to give due consideration in reaching its decision to the general lack of sufficient camping sites for the UK’s Gypsy and Traveller population. The Court of Appeal held that the Council had not erred in failing to give adequate consideration to the lack of camping sites or other forms of suitable accommodation for the Gypsy and Traveller population. The Court took the view that that the local authority had discharged its statutory obligations by considering the impact of eviction on each individual family and their duties under the UK’s homelessness legislation: no wider consideration of housing matters was required. Policy factors also considered by the Court in reaching its decision included the fact that the Gypsy and Traveller families remained on the sites in question in conscious defiance of the relevant planning law, and also that there was no positive obligation in UK legislation

[204] *Equity Training Pack: Sports Equity & The Law*, http://www.vagaassociates.com/eqss/docs/Sports%20Equity%20%20the%20Law.pdf, accessed 1 November 2012.

on local authorities to provide the number of camping sites sought by the UK's Gypsy and Traveller communities.

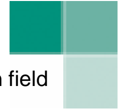
Subsequent to the decision in *McCarthy & Ors* there was an extended period during which travellers refused to leave the site (Dale Farm). Eventually the Council commenced with eviction proceedings which were carried out on 19 October 2011 after last-ditch legal efforts by the travellers to halt the evictions failed: *R (Sheridan & McCarthy) v Basildon District Council* 12 October 2011, [2011] EWHC 2938 (Admin).

Selected Decisions on the Application of the Positive Obligations on Public Authorities

Name of the court: Court of Appeal
Date of decision: 10 October 2006
Name of the parties: *R (Elias)* v *Secretary of State for Defence*
Reference number: [2006] EWCA Civ 1293, [2006] IRLR 934.
Address of the webpage: http://www.bailii.org/ew/cases/EWCA/Civ/2006/1293.html
Brief summary: This case concerned the exclusion of British civilians who had been interned by the Japanese Army during World War Two from a compensation scheme if they had not been born in the UK, or did not have a parent or grandparent born there. Elias J. in the High Court (who was no relation to the claimant) decided that this policy constituted unjustifiable indirect discrimination on the grounds of national origin, contrary to the Race Relations Act. Part of the reason for this decision lay in the failure of the Secretary of State to consider whether his policy raised issues relating to racial equality, or to assess whether any adverse impact was possible upon particular ethnic groups or groups with a particular national origin, in violation of the positive duty imposed upon public authorities to promote race equality in the Race Relations (Amendment) Act 2000. On appeal, the Court of Appeal upheld the decision of the High Court.[205]

Name of the court: High Court
Date of decision: 29 July 2008
Name of the parties: *R (Kaur and Shah) v Ealing*
Reference number: [2008] EWHC 2062 (Admin)
Address of the webpage:
http://www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html
Brief summary: A successful administrative law action was brought against a decision by Ealing Council in London to withdraw funding that they had previously provided for support services provided by a prominent NGO, the Southall Black Sisters, for black and minority ethnic women who had been victims of domestic violence.

[205] [2006] EWCA Civ 1293.



Ealing Council justified its decision on the basis that it was more appropriate and efficient for public money to be used to fund general support services for the victims of domestic violence, and not to support services targeted primarily at particular minority groups, such as those provided by the Southall Black Sisters. However, the High Court held that the Council in considering the impact of its decision had failed to give due weight to the statutory duty to promote race equality which has been imposed upon public authorities in GB, and that the duties imposed upon local authorities to promote community cohesion and good relations between different ethnic groups should not be interpreted as requiring local authorities to stop funding services targeted at particular ethnic groups.