DISCRIMINATION IN PUBLIC LAW

Justification, and disability discrimination

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1. This short talk will be a quarter of a seminar about discrimination in public law, for Doughty Street Chambers, on 29 June 2021. The aim of my talk is to highlight a handful of recent developments relating to the question of whether discrimination under article 14 of the European Convention on Human Rights is justified, and to disability discrimination.

Justification of discrimination under article 14 ECHR

2. To recap, the courts often ask four questions when deciding whether a measure breached article 14 (the prohibition of discrimination):

> (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
> (3) Is that difference of treatment on the ground of one of the characteristics listed or an "other status"?
> (4) Is there an objective and reasonable justification for that difference in treatment?[1]

3. The first three questions are increasingly easily satisfied:

   a. A wide interpretation has been given by the courts to the terms 'within the ambit'[2]. There are few cases in which an article 14 claim has failed because the facts fell outside the ambit of a substantive right[3]. It now appears that it only

[1] See, e.g. *Re McLaughlin* [2018] 1 WLR 4250 at §15
[2] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 ("*JCWI*") §100; *R (Akbar) v Secretary of State for Justice* [2020] HRLR 3 [2020] HRLR 3, §72
[3] *JCWI* §110

needs to be shown that the treatment or measure has a 'more than tenuous connection' with the core values protected by one of the Convention rights[4]. Recent examples of measures falling within the ambit of another article include access to publicly funded legal services[5], the refusal of an unlimited right to work to a victim of trafficking[6], and critical comments on a Facebook page[7].

b. The 'analogous situation' question has been applied with varying degrees of rigour[8]. But higher courts have repeatedly indicated that a claim should not fail on this basis, unless there are "very obvious" differences between the comparator groups[9]. It may be important to focus on the purpose of the measure. Married and unmarried people were analogous in respect of the provision of a benefit which aimed to support children[10], and a contributory and non-contributory pension scheme were analogous where the aim of both was to aid disabled people[11].

c. The courts have expanded the number of protected grounds by interpreting the expression 'other status' in a broad and generous way[12]. It has been said that in the majority of cases the need to establish status as a separate requirement has diminished almost to vanishing point[13] and that if the alleged discrimination falls within the ambit of a Convention right, it will normally amount to an 'other status'[14].

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[4] *Akbar*, §69; *JCWI* §104; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804, §55
[5] *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin), para 11
[6] *R (IJ (Kosovo) v Secretary of State for the Home Department* [2021] 1 WLR 2923, para 93
[7] *Beizaras and Levickas v Lithuania* (41288/15) 14 January 2020, para 117
[8] In *Stott* the Supreme Court narrowly concluded, by 3 Justices to 2, that prisoners with extended sentence were not in an analogous situation to prisoners with other types of sentence. Each type of sentence has its own detailed sets of rules, dictating how it operates in practice: §137-138 and 148
[9] *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, §25; to the same effect, *In Re McLaughlin* para 26, and *Stott* para 8.
[10] *In Re McLaughlin,* para 26
[11] *Belli and Arguier-Martinez v Switzerland* (65550/13) 11 Dec 2018, para 101
[12] *Stott* §56 and 81; *Akbar*, §81(i); *(RJM) v. Secretary of State for Work and Pensions* [2009] 1 AC 311, §42
[13] *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123, §41; *R (Moore) v Secretary of State for Work and Pensions* [2021] PTSR 495, §21
[14] *R (Mathieson) v. Secretary of State for Work and Pensions* [2015] 1 WLR 3250 (SC), para 22

4. In many claims involving article 14, the key question is whether the difference in treatment was justified. There is ordinarily a four-stage test for justification:

> (1) Is there a legislative objective (or legitimate aim) which is sufficiently important to justify limiting a fundamental right?
> (2) Are the measures which have been designed to meet it rationally connected to it?
> (3) Are they no more than are necessary to accomplish it?
> (4) Do they strike a fair balance between the rights of the individual and the interests of the community?[15]

5. The first criterion is easily met. However, there have been some recent cases in which the courts have decided it was not satisfied[16]. Alternatively, they have doubted it was satisfied, and this was an important factor in holding the 'fair balance' criterion was not met. Examples are:

   a. No legitimate aim was put forward[17].

   b. The aim relied on in court was not the actual aim of Parliament or the government when making the measure[18].

   c. The aim was not sufficiently important or not intrinsically linked to the discrimination[19].

   d. The aim relied on was not legitimate, the measure did nothing to achieve the legitimate objective, or conflicted with it[20].

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[15] *R (Steinfeld) v Secretary of State for International Development* [2020] AC 1, §41
[16] There is overlap between the four questions.
[17] *Gilham v Ministry of Justice* [2019] 1 WLR 5905 (SC) §36-37, noting that it had not been explained how the exclusion of district judges from whistleblowing protections enhanced judicial independence.
[18] As in *In Re. Brewster* [2017] 1 WLR 519 (SC), where the aim relied on in court (limiting costs) was not the aim of Parliament (granting survivors' pensions to unmarried couples)
[19] As in *Steinfeld*, §42*:* the aim (waiting to see the impact of civil partnerships on same sex couples) was not intrinsically linked to the discrimination (preventing opposite sex couples having civil partnerships)
[20] In *Re McLaughlin* the Supreme Court said it was "doubtful in the extreme" that any couple was prompted to marry by the prospect of bereavement benefits; indicating there was no rational connection between the aim of promoting marriage and limiting bereavement benefits to married

e. The aim conflicted with another relevant aim and sufficient reasons had not been given for prioritising one aim over the other. An example is where the government did not explain why, in imposing the 'bedroom tax' it prioritised the aim of incentivising those with extra bedrooms to move to smaller properties, over the aim of protecting victims of domestic violence[21].

6. It appears that the need to save money alone cannot justify a difference in treatment, at least in respect of the 'suspect grounds' of sex, race, etc. If the government or Parliament wish to reduce costs, they must do so in a way which is not discriminatory[22]. However, discrimination has been justified, at least in part, by cost in certain circumstances. For example, discrimination against single young adults was justified in *AL (Serbia)* by the purpose of saving public funds and improving the system of asylum control[23].

Burden of proof

7. It is normally for the government to prove that discrimination was justified[24]. To do so, it is often necessary for the government to produce concrete evidence. There have been a number of cases in which the courts have concluded that a difference in treatment was not justified, where the government put forward no evidence to substantiate the justification that it had put forward[25]. However, in some circumstances, it may not be

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people. In *Re Northern Ireland Human Rights Commission* [2019] 1 All E.R. 173 (SC) "*NIHRC*" the aim of protecting the life of the unborn foetus was rejected as a justification for a prohibition on abortion in cases of fatal foetal abnormality, in part because the unborn foetus is not treated in domestic law as being a person; and in part because the foetus could not survive.

[21] *JD v United Kingdom* [2020] HRLR 5, §104

[22] *R (TP) v Secretary of State for Work and Pensions* [2020] P.T.S.R. 1785, paras 170-173, with further references

[23] *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 (HL) §6

[24] *Steinfeld* §20 and 39

[25] For example, *Brewster* §62, where submissions that the scheme was necessary to make it administratively workable were not supported by evidence; *R (TP) v Secretary of State for Work and Pensions* §127; *Bayev v Russia* (2018) 66 EHRR 10, §78; *Re A (Children)* [2018] 4 WLR 60 at §109; *R (Gullu) v. Hillingdon LBC* [2019] PTSR 1738. An older example is *R v. Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, at p30, where no evidence was produced to prove that removing protections from unfair dismissal resulted in greater availability of part-time work

necessary for the government to submit evidence, and common sense or logic may suffice[26].

8. In certain circumstances, if the applicant raises a *prima facie* case of discrimination, it will be for the government to reject that case, to convincingly show that the difference in treatment was not discriminatory, or to provide a justification for it. That may be the case if the relevant facts or information is held by the government and not the applicant. An example if *Cinta v Romania* (3891/19) 18 Feb 2020, paras 79-80. There was a violation of article 14 when a court restricted the applicant's contact with his child on the basis of his mental health. The government did not rebut the presumption of discrimination.

9. This 'reverse burden' may also be helpful in challenges to law or policy. For example, if there is *prima facie* evidence that DWP policy on the assessment of claimants with mental disabilities is discriminatory, but the information necessary to prove whether or not that is the case is held by the DWP, then there may be a violation of article 14 if the information is not disclosed. This argument might be useful in seeking disclosure of the necessary information, alongside the government's duty of candour.

10. Where the defendant has not fulfilled the PSED, it will be unable to show a measure is justified[27]. That is one reason why it is important to consider bringing a PSED claim alongside other discrimination claims.

The rise and fall of 'manifestly without reasonable foundation'

11. In some contexts, discrimination will be justified unless it is 'manifestly without reasonable foundation'. This 'MWRF' approach has been applied to legislation on welfare benefits or general measures of social or economic strategy[28], and some other contexts involving the allocation of scarce public resources, such as social housing and immigration[29], or even a local authority's school transport policy[30].

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[26] *R (Simonis) v Arts Council England* [2021] 1 All E.R. (Comm) 3, §100
[27] *R (Coll) v. Secretary of State for Justice* [2017] 1 WLR 2093
[28] *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289; *R (Z) v Hackney LBC* [2020] 1 WLR 4327 (SC) §108
[29] *JCWI*, §133; *Simawi v Hackney* [2020] PTSR paras 55-65; *R (Turley) v Wandsworth LBC* [2017] HLR 21, §25; *R (Drexler) v Leicestershire County Council* [2020] ELR 399 (CA) §25
[30] *Drexler*

12. It has not been applied in a large number of other contexts[31]. The European Court of Human Rights held in *JD v. United Kingdom* that the MWRF test is limited to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a legislative scheme carried out in order to correct an historic inequality. (An example is removing preferential treatment to women in pension schemes, which had been adopted to account for the fact that women had lower incomes on average.) Outside that context, at least in relation to gender and disability, "very weighty reasons" would have to be put forward before different treatment would be compatible with the Convention[32].

13. Until recently, this was considered to be a binary issue, normally determined solely by the nature of the provision challenged: either the MWRF test applied or it did not. But the courts have begun to indicate that this should not be a binary issue. A more flexible approach should be taken, whereby the margin of discretion[33] given to the government or Parliament, will depend on a range of relevant considerations[34]. 'MWRF' is merely a shorthand for one end of the spectrum where the margin is broadest[35].

14. This development is consistent with wider authority and principle. There is a great deal of caselaw in which the courts have identified the factors which are normally relevant to a margin of discretion, not only in the context of discrimination, but also in respect of other qualified ECHR rights, public law, and EU Law. They are based on well-developed principles. The binary approach to MWRF overlooks that caselaw and the principles upon which it was based.

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[31] *Gilham v Ministry of Justice* §34; *Steinfeld; Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700; *In re G* [2009] 1 A.C. 173; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, paras 27 – 28, and 32; and more recently *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) at §194; *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWHC 580 (Admin) at §259; and *Smith v Secretary of State for Housing, Communities &. Local Government* [2021] EWHC 1650 (Admin) §69.

[32] [2020] HLR 5, paras 88-89

[33] That is, the intensity of the court's review, or how easy it is for the defendant to justify discrimination

[34] *R (C) v Secretary of State for Work and pensions* [2019] 1 WLR 5687; *JCWI* §140

[35] E.g. *R (Akbar) v Secretary of State for Justice* [2021] EWCA Civ 898 §59

15. The following factors have been held to be relevant to the breadth of the margin of discretion:

    a. The nature of the ground on which the difference in treatment is based. The more sensitive the status (for example if it is a core ground such as race or sex), the more difficult it will be to justify[36].

    b. The importance and severity of the adverse impact of the interference with a Convention right[37].

    c. The nature of the decision-maker, in particular the extent to which Parliament had control over the matter[38].

    d. The extent to which the decision-maker (whether the government or Parliament) recognised the discrimination, addressed its mind to the values or interests which are relevant to the question of justification, and made a conscious, deliberate decision that it was proportionate[39].

    e. The measure is defended on grounds that had not been present to the decision-maker at the time the decision was made[40].

    f. The purpose of the measure, for example where a purpose was to remove a difference in treatment or was inconsistent with the discriminatory effect[41].

    g. The measure involves a contentious social, economic, moral or political issue, which the legislature is better placed to assess; rather than a procedural or legal

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[36] *R (SC) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, §78; *Akbar* §75-78; *R (Stott) v Secretary of State for Justice* [2020] AC 51, §56; *Steinfeld* §32; *Mathieson*, §21; *JD v United Kingdom*.
[37] *Re NIHRC* §38
[38] *Akbar* paras 77-79
[39] *Gilham v Ministry of Justice*, §35; *Re. Brewster*, paras 50-52 and 64; *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 [SC] paras 93-95; *R (Gullu) v. Hillingdon LBC*; and *Hirst v United Kingdom* (2005) 42 EHRR 41, §79
[40] *Brewster* 38–41 and 59; *Langford* 61
[41] As in *Brewster*

issue, which the court is better placed to assess. However, the courts have held that the protection of minorities, and discrimination in an area of social policy, is a matter for the constitutional responsibility of the courts[42].

h. The relief sought. For example, where a declaration of incompatibility is sought, there is less need for the courts to defer to Parliament, because the DOI does not oblige the government or Parliament to do anything[43].

16. When analysing the extent to which these factors are relevant, it is important to focus on the specific measure in question. For example, in *R (British Medical Association) v Secretary of State for Health and Social Care*[44] legislation providing for suspension of a pension was not a decision about the distribution of limited resources, so the discretionary area of judgment was more narrow.

17. When exploring a challenge in this context, it is often useful to consider the above factors at an early stage, in particular (d, e and f). If you are challenging legislation, look at Hansard, white papers, and other material which may help you show the extent to which proper consideration was given to discrimination, and what the aims of the measure in question were.

18. Even when the MWRF test is applied, the discrimination must have a legitimate aim, be rationally connected to that aim, and be a proportionate means of achieving that aim in the sense that it strikes a fair balance[45].

19. Where the MWRF test is applicable, it has been said that while it is for the complainant to establish that the justification put forward by the government was MWRF, any burden of proof is more theoretical than real. The court will proactively examine whether, and the state must in essence persuade the court that, the foundation is reasonable[46]. Following that approach, in *Langford v Secretary of State for Defence*[47]

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[42] *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, §48
[43] *Steinfeld* §60
[44] [2020] Pens LR 10, §79
[45] *JCWI* §139; albeit that it must be manifestly disproportionate to the legitimate aim: *R (SC) v Secretary of State for Work and Pensions* §89; see also *Valkov v Bulgaria* (2016) 62 E.H.R.R. 24, §91
[46] *R (DA) v Secretary of State for Work and Pensions* §66
[47] [2020] 1 WLR 537, §66-67

the Court of Appeal rejected the government's justifications for a discriminatory law on benefits, in part on the basis that no evidence had been adduced to substantiate them.

20. In *R (SM) v Lord Chancellor* the High Court decided that the absence of a scheme for legal advice for immigration detainees in prison, while one was available in Immigration Removal Centres, was MWRF. That was in part because the evidence produced by the Lord Chancellor did not properly explain why a scheme could not be adopted in prison[48]. It was also relevant that the issue was important, and the government had not properly addressed its mind to it.

Disability discrimination

21. In the short time available, I will look at three issues concerning disability discrimination, arising from recent cases: article 14, the PSED, and certain types of challenges to policies.

Article 14

22. One benefit of article 14 over the Equality Act 2010 is that a far wider range of statuses are protected. Under article 14, the following amount to a protected status:

    a. Mental capacity[49].

    b. A specific type of disability, such as a severely disabled child in need of lengthy in-patient hospital treatment[50].

    c. Specific medical conditions or genetic features[51].

    d. Combined statuses, such as a severely disabled person who moved across a local authority boundary[52], or a claimant who was entitled to legacy disability

[48] [2021] EWHC 418 (Admin), §33 and 37
[49] *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796, §25
[50] *Mathieson* at §23; or alternatively a child hospitalised free of charge in an NHS hospital
[51] *Kiyutin v Russia* (2700/10) §57 - HIV infection; *GN v Italy* (43134/05), paras 126-127 haemophilia
[52] *R (TP) v Secretary of State for Work and Pensions* [2020] P.T.S.R. 1785

benefits but who was erroneously moved to universal credit, as compared to one in respect of whom no such error was made[53].

23. Some recent examples of findings of a breach of article 14 in this context are:

a. The loss of disability benefit premiums, caused when a disabled person moved across local authority boundaries[54].

b. A change in the way a local authority calculated charges made to disabled people in respect of their care needs, which discriminated against the severely disabled[55].

c. Regulations bringing disability living allowance payments to an end for a child who had been in hospital for longer than 84 days[56].

d. Regulations limiting the number of bedrooms permitted, for the purpose of housing benefit, where a disabled person had a transparent medical need for an additional bedroom[57].

e. Failure by a court to properly assess the applicant's mental health before restricting contact with his child[58].

f. A regulation that exempted from the Equality Act 2010's protections, a disability which involved a tendency to physical abuse, which meant autistic children could be excluded from school on the basis of that tendency[59].

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[53] *R (TD) v. Secretary of State for Work and Pensions* [2020] EWCA Civ 618, §42
[54] *R (TP) v Secretary of State for Work and Pensions*
[55] *R (SH) v Norfolk CC* [2020] EWHC 3436 (Admin)
[56] *Mathieson*
[57] *R (MA, Carmichael and Ors) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550 and *R (Rutherford) v Secretary of State for Work and Pensions* [2016] HLR 8
[58] *Cinta v Romania* (3891/19) 18 February 2020 §79
[59] *C v. Governing Body of a School* [2019] PTSR 857

24. As these examples demonstrate, another advantage of article 14 ECHR over the Equality Act 2010, is that the latter does not apply to making or preparing legislation, or to judicial functions[60], whereas article 14 does.

25. Article 14 also covers discrimination by association, that is where an individual is treated less favourably on the basis of another person's status or protected characteristics[61]. For example, the refusal of tax exemption to the applicant was discriminatory, where the authorities failed to take into account his disabled child's specific needs[62].

The public sector equality duty

26. Section 149 of the Equality Act 2010 requires a public authority, in the exercise of its functions, to have due regard to specified needs, including the needs to eliminate discrimination and to remove or minimise disadvantages.

27. There have been a number of recent decisions regarding the PSED and disability. These have mostly been in the housing context. In *Hotak v Southwark LBC* [2016] AC 811 the Supreme Court held:

> "each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c) [of the Housing Act 1996], must be made with the equality duty well in mind… [It requires] the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable"." §78.

28. Similarly, when a local authority assessed whether accommodation it supplied to a disabled homeless man was suitable, the following was required by the PSED:

> "(i) A recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long-term adverse effect on his ability to carry out normal day to day activities; ie that he was disabled within the meaning of the EA section 6, and therefore had a protected characteristic.
> (ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of room 315 as accommodation for him.

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[60] Schedule 3 EA 2010
[61] *Molla Sali v Greece* (2019) 69 EHRR 2, para 134 and 161
[62] *Guberina v Croatia* (2018) 66 EHRR 11

(iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using room 315 as his accommodation, by comparison with persons without those impairments: see section 149(3)(a) .
(iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which room 315 met those particular needs: see section 149(3)(b) and (4).
(v) A recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see section 149(6).
(vi) A review of the suitability of room 315 as accommodation for Mr Haque which paid due regard to those matters."[63]

29. In those cases, the PSED required a relatively detailed analysis of the relevance of disability at each specific stage of the decision-making process. Whilst they concerned housing, there is no reason the same approach should not apply to other contexts, such as the DWP's assessment of benefits claims, when the applicant is or may be disabled. There are a number of respects in which DWP processes fail to take sufficient account of disability, such as assessing whether a claimant has limited capability for work, or whether to apply benefits sanctions. (That may also amount to a breach of the duty to make reasonable adjustments in ss.20 and 21 Equality Act 2010).

30. The PSED also contains a duty of inquiry. It requires a body exercising a public function to take reasonable steps to make enquiries about the potential impact of a proposed decision or policy on people with the relevant protected characteristic[64]. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate third parties is required[65]. For example, in *MDA* the Secretary of State failed to gather the necessary information to enable her to properly take account of the Claimant's mental disabilities in the context of the decision to detain him in immigration detention (§261).

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[63] *Hackney LBC v Haque* [2017] PTSR 769 (CA), §43; See also *Lomax v Gosport BC* [2019] PTSR (CA) 167, §43
[64] *R (Bridges) v Chief Constable of South Wales* [2020] 1 WLR 5037 §181
[65] *Bridges* §175(5); *R (MDA) v Secretary of State for the Home Department* [2017] EWHC 2132 (Admin) §260

31. Similarly, the PSED may contain a duty to monitor. The duty has been breached by failure to monitor the provision and impact of accommodation for disabled destitute failed asylum seekers[66].

Challenges to policies

32. A policy or guidance may be unlawful if it (a) provides a materially misleading impression of what the law is, (b) permits or encourages unlawful decisions, or (c) gives rise to a risk of unlawful outcomes in a significant number of cases[67].

33. For example, the policy in *W* was unlawful because it did not identify the fact that, in certain circumstances, there was a duty (pursuant to article 3 ECHR) not to impose on a migrant the condition of no recourse to public funds. Instead: "the message conveyed seems to us to be that, in that category of case, the decision-maker has a discretion whether to impose, or lift, the condition. This, in our view, has the potential to mislead caseworkers in a critical respect."[68].

34. *R (IJ (Kosovo)) v Secretary of State for the Home Department*[69] accepted that a policy would be unlawful where it failed to identify a residual discretion, and also where this created a real risk that caseworkers would make discriminatory decisions in a significant number of cases.

35. In *R (Turner) v Secretary of State for Work and Pensions*[70] the High Court rejected an argument that the DWP policy on employment support allowance was unlawful as it discouraged decision-makers from applying the PSED duty of inquiry in respect of disability. The Judge's reasons included that decision-making in this area was broadly concerned with the needs of people with disabilities, and this was sufficient to satisfy the PSED. That conclusion overlooks the caselaw which held that the PSED requires far more specific regard to be had to the statutory criteria at each stage of the process,

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[66] *R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin) §325
[67] *R (Letts) v. Director of Legal Aid Casework* [2015] 1 WLR 4497, §16, 118; and *R (W) v. Secretary of State for the Home Department* [2020] WLR 4420 §58-59
[68] §66. Similarly, see *R (A) v Secretary of State for Health* [2010] 1 WLR 279 (CA) §75
[69] [2021] 1 WLR 2923, §66 and 103
[70] [2021] 24 C.C.L. Rep. 75

and the PSED duty of inquiry (see above). The claimant has sought permission to appeal.