Recent developments in discrimination in public law

- Adam Straw -

1. This talk will consider important points from some of the cases involving discrimination in judicial review over the last year or so. There have been a large number of recent cases of this type, which demonstrate the power of discrimination in public law. The courts have been prepared to quash or declare unlawful controversial legislation.

Equality Act 2010

Direct discrimination

2. In *R (Coll) v. Secretary of State for Justice* [2017] 1 WLR 2093, the Supreme Court decided that the limited national provision of probation hostels for women as compared to men was direct discrimination, contrary to s.13 EA 2010. That is because some (albeit not all) women would be less favourably treated by being placed further away from their homes than men. The Supreme Court held that, to establish direct discrimination, it was not necessary to show that all people who shared the protected characteristic would be less favourably treated.

3. Normally direct discrimination is unlawful, regardless of justification. But in the context of public functions, there are a series of exceptions to that set out in schedule 3. This discrimination was capable of being justified under para 26 that schedule. However, it was not justified in this case. The Secretary of State could not show that it was a proportionate means of achieving a legitimate aim, because he had breached the equality duty in s.149 EA 2010. This indicates the importance of considering s.149 EA 2010 in any discrimination claim.

4. The court also made the following helpful comment regarding whether cost can justify discrimination:

> ""budgetary considerations cannot justify discrimination". In other words, if a benefit is to be limited in order to save costs, it must be limited in a non-discriminatory way." §40.

Indirect discrimination

5. Indirect discrimination is prohibited by s.19 EA 2010. It occurs where a provision, criterion or practice is applied to all relevant people, but it puts persons who share a protected characteristic with the claimant at a particular disadvantage. It is lawful if it is a proportionate means of achieving a legitimate aim.

6. In *Essop v. Home Office* [2017] 3 WLR 1343 the Supreme Court considered a test for promotion in the civil service, for which the BME pass rate was 40% that of white people. The court indicated that this statistic was sufficient of itself to show that a provision, criterion or practice put BME people at a particular disadvantage. The reason why the pass rate was lower was irrelevant at this stage.

7. It appears this is enough to shift the burden to the Defendant. The SC remitted the case to the Tribunal, indicating that it would be for the Home Office to disprove indirect discrimination by showing that the claimant was put at the disadvantage (failing the test) solely because he or she performed poorly and not because of race, or to show it was justified.

8. There are many fields where people with a protected characteristic are at a statistical disadvantage. The Lammy Review identified a number of respects in which minorities in the criminal justice system are statistically worse off[1]. For example, among prisoners serving prison sentences for public order offences, 417 black offenders and 631 Asian offenders are placed in high security prisons, for every 100 white offenders. *Essop* would suggest that statistics of this nature may demonstrate prima facie indirect discrimination, and the burden passes to the government to prove a lawful reason for the disadvantage.

9. The defendant must produce concrete evidence to justify indirect discrimination, as *R (Gullu) v. Hillingdon LBC* [2019] EWCA Civ 692) demonstrates. A local authority's housing scheme provided that households with at least 10 years' continuous residence were qualified to join certain priority bands in the housing register. This put non-UK

[1] www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest

nationals at a disadvantage as compared to UK Nationals, and indirectly discriminated against them.

10. The court applied the four-stage test familiar in human rights cases (see below), in deciding whether the measure was proportionate and justified. It concluded that the local authority had failed to show justification. That was in part because it had not acknowledged that there was discrimination and had not put forward evidence to show that the 10 year rule would meet the legitimate aim of rewarding people with a local connection.

Age discrimination

11. In *Lord Chancellor v. McCloud* [2018] EWCA Civ 2844 the Court of Appeal concluded that the application of regulations making changes to the judicial pension scheme constituted unlawful age discrimination, contrary to s.13 Equality Act 2010. That was because more valuable provisions were made available for those born before a particular date.

12. Direct discrimination on the ground of age may be justified under s.13(2) Equality Act 2010 if it is shown by the defendant to be a proportionate means of achieving a legitimate aim. However, the Court of Appeal concluded it was not justified, because the government had not produced evidence that older judges had a greater need for a more valuable pension: §92. The government's rationale for choosing the ages at which pension changes are made had to be supported by evidence: §157 and 159. The absence of evidence supporting the claimed legitimacy of the aims meant the measure could not be justified: §164.

Duty to make reasonable adjustments for disabled people

13. The duty to make reasonable adjustments is defined in s.20 and 21 EA 2010. Ordinarily it requires asking whether the disabled claimant has been placed at a substantial disadvantage. However, in public law claims, the court must decide whether *disabled persons generally* have been placed at a substantial disadvantage: s.20(1 and 13) read with sch.2, para 2 EA 2010.

14. In practice, this requires a focus on the particular type of disability, and the particular group of people, who are at issue in the claim. For example, the relevant group may be wheelchair users on buses (*Paulley v FirstGroup plc* [2017] UKSC 4; 1 WLR 423); or immigration detainees with mental disabilities (*R (VC) v. Secretary of State for the Home Department* [2018] EWCA Civ 57; 1 WLR 4781), or autistic prisoners (*R (Hall) v. Secretary of State for Justice* [2018] EWHC 1905 (Admin).

15. It follows that the first requirement (in s.20(3) EA 2010) would become this, where the claim involves autistic prisoners:

> "where a provision, criterion or practice of A's puts autistic prisoners 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."

16. It is not necessary to show that everyone in the chosen class is put at a substantial disadvantage. It is sufficient that a significant number of them will be. In *VC* the relevant PCPs included that immigration detainees with mental illness were not provided with assistance in understanding the reasons for segregating them or for their continued detention, or in making representations in respect of those matters. These PCPs would place some detainees who, as a result of mental illness were unable to understand or make representations, at a substantial disadvantage: §154. That was sufficient to engage the duty, even though many such detainees would not need assistance.

17. If the class of disabled persons is put at a substantial disadvantage, the next question is whether reasonable adjustments have been made. The question is also a general one: has the defendant taken reasonable steps to avoid the disadvantage to autistic prisoners as a class? In *Finnigan v. Chief Constable of Northumbria* [2014] 1 WLR 445 §38 and 42 the first instance judge erred insofar as he considered whether the defendant failed to make reasonable adjustments by reference to the needs of the claimant individually, rather than by reference to the needs of deaf persons as a class.

Burden of proof

18. Under s.136 EA 2010 the burden of proof shifts to the defendant if there are facts from which the court could conclude, in the absence of an explanation by the defendant, that

a provision was contravened. Examples of the strength of this provision for claimants are *TW* and *McCloud.*

19. In the context of the duty to make reasonable adjustments: "once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment was not a reasonable one to make shifts to the defendants": *Finnigan*, §38 and 42.

20. In *VC* there was a breach of the duty to make reasonable adjustments because the claimant outlined adjustments which could have been made. They included providing a system involving advocates to assess and assist those with mental illness. The Secretary of State failed to discharge her burden to show those adjustments were unreasonable, and so the court held she breached the duty: §156, 160 and 193.

21. If there was a breach of the duty to make reasonable adjustments for disabled persons, the court must go on to consider the impact on the claimant. The question is, had the duty had been complied with, was there a real prospect that this would have made a difference to the claimant (*Paulley* §60, *VC* §177)? If so, the breach will be unlawful.

Discrimination by association

22. It is direct discrimination to treat a person less favourably because of a protected characteristic, whether or not that person has that characteristic (s.13 Equality Act 2010, with certain exceptions). For example, it is unlawful to treat the mother of a disabled boy less favourably because he is disabled: *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128. However, there must be a sufficiently close association between the claimant and the protected characteristic.

23. In *Lee v. Ashers Baking Co Ltd* [2018] UKSC 49; 3 WLR 1294 a bakery refused to produce a cake with the words "support gay marriage" on it, due to a sincere belief that gay marriage was inconsistent with biblical teaching. The Supreme Court held this was not a case of associative discrimination. There was not a sufficiently close association because the less favourable treatment was on the ground of a message, not a particular person or persons.

24. *Lee v. Ashers* also considered Northern Ireland legislation which prohibits discrimination on the ground of religious belief or political opinion. (The Equality Act 2010 is slightly different: religious or philosophical beliefs[2] are protected in s.10, but there is no explicit mention of political opinion.) The Supreme Court decided that support for gay marriage was a political opinion. However, the discrimination was not unlawful. That was because to require the bakers to produce the cake would be contrary to their rights under articles 9 and 10 ECHR, which included that they should not be forced to express an opinion with which they disagreed.

Article 14 of the European Convention on Human Rights

25. Article 14 states:

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

26. Article 14 has certain limitations, and certain advantages as compared to the Equality Act 2010. For example, a court may declare legislation incompatible with article 14, whereas preparing or making legislation are excluded from the protections in the provisions of the Equality Act 2010 (by paras 1 and 2 of sch.3 EA 2010).

27. There are generally four questions to be considered (see *Re McLaughlin* [2018] 1 WLR 4250 at §15:

> "(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 "other status"?
> (4) Is there an objective justification for that difference in treatment?"

Within the ambit

28. To engage article 14, it is necessary for the facts to fall "within the ambit" of another Convention right. What this means is not entirely clear, but it may be satisfied even if the measure does not engage the relevant Convention article.

[2] The key case defining what is a philosophical belief is *Grainger Plc v. Nicholson* [2010] ICR 360

29. In *McLaughlin* the claimant lived in a relationship with a man for 23 years, and they had four children together, but they were not married or in a civil partnership. After he died, her claim for widowed parent's allowance, under s.39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, was rejected on the grounds that it could only be paid to a spouse of the deceased. That was despite the man having paid enough contributions during his life as would have entitled the claimant to the allowance had they been married or civil partners. The Supreme Court declared this was incompatible with article 14 read with article 8.

30. The court reiterated that the denial of a contributory social security benefit falls within the ambit of the protection of property within article 1 of protocol 1 ('A1P1' – the protection of property[3]). It also concluded that the payment of the widow's parents allowance fell within the ambit of article 8. The Supreme Court referred to some of the cases currently going through the courts relevant to the question of whether a measure falls within the ambit of article 8, but did not come up with a clear answer to that question. It held that the provision of the benefit had a *more than tenuous connection with the core values protected by article 8*, namely securing the life of children within their families. There was no need to show an adverse impact other than the denial of the benefit. This was sufficient to engage article 14.

Analogous situation

31. Unlike in domestic anti-discrimination law, article 14 does not require the identification of a comparator, real or hypothetical, with whom the complainant has been treated less favourably. The test is more flexible: there must be a difference in treatment between two people or groups *in an analogous situation*.

32. For example, married people may or may not be in an analogous situation with unmarried people, depending on the specific context. In *Re McLaughlin* the unmarried claimant was in an analogous situation to a married woman in respect of widowed parent's allowance. That was because that allowance was paid only when the survivor was responsible for children: its purpose was to benefit the children. From the

[3] In *R (Mathieson) v. Secretary of State* [2015] UKSC 47; 1 WLR 3250 the Supreme Court held that denial of disability living allowance fell within the ambit of A1P1.

children's perspective it makes no difference whether their parents were married or not. The Supreme Court said:

> "26 It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation."

33. The opposite conclusion to *McLaughlin* was reached in *R (Harvey) v. Haringey LBC* [2019] Pens LR 3 (which has been appealed), in respect of a pension paid for the survivor's benefit. Where the unmarried deceased partner had not paid sufficient contributions, but the comparator survivor's deceased spouse had done, the survivors were not in an analogous situation.

34. The courts apply this test with different degrees of vigour. For example, in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, §25 Lady Hale said: "unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.". Autistic children with a tendency to physical abuse were held to be in an analogous position to children with no such tendency in *C v. Governing Body of a School* [2018] UKUT 269 (AAC).

35. An example of a case in which the 'analogous situation' test was applied in a more exacting way is *R (Stott) v. Secretary of State for Justice* [2018] 3 W.L.R. 1831 (SC). The 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.

Protected status

36. Article 14 specifies a number of grounds upon which discrimination is prohibited, which include "other status". That is interpreted in an increasingly broad way. It is no longer limited to a personal or innate characteristic, but includes:
    - Being a victim of domestic violence[4];

[4] *R (HA) v. Ealing London Borough Council* [2016] PTSR 16, and *Talpis v Italy* (App. No. 41237/14) 2 June 2017

- Being married, or not being married[5];
- Being a prisoner, having a particular sentence length[6] or type[7], and being on remand[8];
- Having unspent convictions[9];
- Being employed, or unemployed[10];
- Place of residence, and having moved from one local authority to another[11]; and
- Immigration status[12].

37. "Other status" can have more than one component, such as a woman who was black and a prostitute: *R (A) v. Health Secretary* [2017] 1 WLR 2492 §27.

38. The circumstances in which discrimination occurs on the ground of age, are under-developed. Being in a particular age range will ordinarily amount to a protected status. For example, in *Khamtokhu v. Russia* [2017] 65 EHRR 6 the Grand Chamber held that article 14 was engaged in respect of national legislation which exempted offenders who were aged under 18 or over 65 from life imprisonment: §59-62.

Justification

39. The key question in many article 14 cases, is whether the discrimination is justified.

40. In *R (Steinfeld) v. Secretary of State for International Development* [2018] UKSC 32; 3 WLR 415 the Supreme Court declared that sections 1 and 3 of the Civil Partnership Act 2004 were incompatible with article 14 taken with article 8, to the extent that they precluded a different sex couple from entering a civil partnership. It reiterated the four-

[5] *Re McLaughlin* §31
[6] See e.g. *Shelley v. UK* (223800/06), 4 Jan 2008; *Clift v. United Kingdom* (7205/07) 13 July 2010.
[7] Suspended sentence: *Alexandru Enache v. Romania* (16986/12), 3 October 2017 §69; expulsion order: *Rangelov v. Germany* (5123/07) 22 March 2012
[8] *Aleksandrov v. Russia* (14431/06) 27 March 2018
[9] *R (McNeice) v. Criminal Injuries Compensation Authority* [2018] EWCA Civ 1534
[10] *Arras v. Italy* (17972/07) 14 Feb 2012
[11] *R (TP) v. Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) and *Carson v. United Kingdom* [2010] 51 EHRR 13, §70-71
[12] *Bah v. United Kingdom* [2012] 54 EHRR 21.

stage test[13] for deciding whether an interference with a Convention right (including article 14) is justified:

> "(a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right;
> (b) are the measures which have been designed to meet it rationally connected to it;
> (c) are they no more than are necessary to accomplish it; and
> (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

(a) Legitimate aim/legislative objective

41. Normally, it will be easy for the government to establish that there was a legitimate aim. However, in *Steinfeld* the government put forward a 'wait and see' justification. Following a debate in Parliament and two public consultations, the government decided it should examine how the fairly recent extension of marriage to same-sex couples impacted on civil partnerships, before making a final decision. The Supreme Court held that this was not a legitimate aim which was sufficiently important to justify discrimination. The aim was not "intrinsically linked" to the discriminatory treatment. The government had been obliged to eliminate immediately the inequality of treatment.

42. It is important to correctly identify the legislative objective. In *Re. Brewster* [2017] UKSC 8; 1 WLR 519 the Supreme Court considered Northern Ireland legislation which limited a survivor's pension to the spouse, civil partner, or a co-habiting partner who had been nominated by an existing member of the scheme. It held this was incompatible with article 14 read with A1P1 ECHR.

43. The government argued that the legitimate aim involved a proportionate means of limiting administrative costs. This was rejected, principally because that had not been the objective of the legislation in question. Rather, that objective had been to extend survivors' pensions to unmarried couples, and remove the difference in treatment between cohabitees and married people or civil partners. The Supreme Court decided that there was no rational connection between this objective, and the imposition of the nomination requirement.

[13] The test is put in slightly different ways in the authorities. See, for example *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, §20 and §74; and *In Re Medical Costs for Asbestos Diseases* [2015] AC 1016, §45.

44. The objective of the legislation at issue may be relevant to other stages of the analysis. For example, in *Brewster*, the legislative purpose described above supported a stricter standard of review of whether discrimination between cohabitees, and married people/civil partners, was justified. A central reason for deciding that the survivor's allowance legislation in *McLaughlin* was incompatible with article 14, was that the legislative purpose was to diminish the financial loss caused to families with children by the death of their parent. The loss is the same whether or not the parents were married to each other.

(b) Rational connection

45. As seen in *Brewster* there must be a rational connection between the legislative objective/legitimate aim pursued, and the measure challenged. In *Re. McLaughlin* the court identified the legitimate aim as being to promote the institutions of marriage and civil partnership. The court said it was debatable that there was a rational connection between that and the limitation on widowed parent's allowance: it seemed "doubtful in the extreme" that any couple is prompted to marry by the prospect of bereavement benefits. The Supreme Court also said that, where means-tested benefits are concerned, it seems difficult to see a justification for granting them to those who are married, but denying them or paying them at a lower rate to couples who are not married.

46. The case was ultimately decided on the basis that denying the claimant and her children the benefit was not a proportionate means of achieving the legitimate aim of privileging marriage.

(c) No more than necessary

47. This also means that there is no less intrusive way of achieving the aim pursued, without unacceptable compromising the achievement of that aim: e.g. *R (A) v. Health Secretary* [2017] 1 WLR 2492 at §32. In that case, a policy which limited free abortion services to those ordinarily resident in England was narrowly held to be justified discrimination. That was in part because the policy aim was to preserve devolved decision-making as to this type of health service, and there was no less intrusive way of achieving that aim.

48. By contrast, in *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 the Supreme Court decided that a law limiting student loans to those with indefinite leave to remain ('ILR'), breached article 14. The aim of the rule was to ensure that limited funds were targeted at those most likely to stay in the country and to make an economic contribution. The rule was unjustified, in part because there would be some migrants who would be just as likely to remain in the country as those with ILR, and a rule could have been chosen which more closely fitted the aims of the measure (§32-41).

(d) Fair Balance

49. This is the key part of the justification analysis in many cases. The considerations relevant to the first, second and third stages are often also relevant here: *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, §20 and §74.

50. In *C v. Governing Body of a School* [2018] UKUT 269 (AAC), the Upper Tribunal considered the Equality Act 2010 (Disability) Regulations 2010. Reg.4(1) states that a number of conditions, including (c) a tendency to physical abuse, do not amount to impairments for the purpose of the EA 2010. That means the EA 2010 does not provide any protection from discrimination on the basis of any such condition, even if it is a symptom of a disability. The claimant was autistic and was excluded from school because of his tendency towards physical abuse, which arose from his autism. The Upper Tribunal held that reg.4(1)(c) breached article 14 ECHR, read with article 2 of protocol 1 (A2P1 the right to education).

51. The case turned on the fourth stage: the measure did not strike a fair balance. The consequences of the measure were serious, as it allowed special educational needs schools to exclude children such as L, or to refuse to make reasonable adjustments for them. Aggressive behaviour was not a choice for autistic children. The Secretary of State had not properly considered the balancing exercise between the respective interests, which meant little weight should be given to his view. He put forward no evidence to show the measure is justified, and so there was a breach of the ECHR.

Burden of proof

52. As *C* demonstrates, once a relevant difference in treatment has been established, it is for the government to prove justification. That principle is reiterated in a number of the recent cases, for example in *Steinfeld.* It appears to have been a basis for the conclusion in that case. The court concluded that a fair balance had not been struck. That was because the interests of the community in denying opposite sex couples the option to form civil partnerships was "unspecified and not easy to envisage" (§52); while the consequences for the couples themselves were potentially far reaching.

Margin of appreciation/discretionary area of judgment

53. The margin of appreciation is not directly applicable in domestic courts, as it is based on the principle that the ECtHR will permit different member states taking different approaches to some issues. However, the government may have a discretionary area, depending on factors such as the nature of the right at issue, the purpose of the legislative measure, whether the legislature made a fully informed choice, and whether the measure is a contentious political issue.

54. In *Steinfeld* the Supreme Court rejected the argument that, because this was a law regarding social policy which had been made by Parliament, it should be given a broad discretionary area of judgment. The Supreme Court held that any margin is narrow in respect of sexual orientation discrimination, the court must apply "strict scrutiny" to any justification, and "convincing and weighty reasons" are required (§32). The fact that Parliament created the inequality, and that the government did not appear initially to recognise that the measure interfered with Convention rights, were also relevant.

55. Similarly, in *Brewster* the Supreme Court noted that the pension scheme was chosen by the legislature, and was in the field of social-economic policy. However, the fact that the impact of the scheme had not been addressed by the government department responsible for it, or the scheme was defended on different grounds to those given by the government department initially, meant the court need be less reticent about intervening.

56. In some cases (such as on social security legislation) the courts have said they will not intervene unless the measure was "manifestly without reasonable foundation". However, in *R (A) v. Health Secretary* and In *Re Medical Costs for Asbestos Diseases* [2015] AC 1016 the Supreme Court held that the court must decide for itself whether

a fair balance had been struck, even in respect of a controversial social and economic issue such as payment for abortion services. The "manifestly without reasonable foundation" has no application at this stage of the analysis.

Bright line rules

57. The government often argues that a bright line rule is justified for the sake of good administration, even if it leads to unfair results in some cases. *Brewster* held that the government must produce evidence to establish that any bright line rule has administrative advantages. Further, the bright line rule must be rationally connected to the aim and a proportionate way of achieving it. *R (F) v. Secretary of State for Justice* [2011] 1 AC 331; and *Tigere*, §37-38 indicated that a rule will not be justified if has irrational results in a legally significant number of cases, and a less intrusive measure could have been chosen. However, *Re. Gallagher* [2019] 2 WLR 509 (SC) suggested that the extent to which there are 'hard cases' is a relevant factor to consider alongside whether the rule is itself justified.

58. An interesting example in the age context is *Hunter v. Student Awards Agency for Scotland* [2016] CSOH 71. The Scottish Court of Session concluded that an age limit of 55 for student loans was unjustified discrimination, contrary to article 14 read with A2P1. Although there was a rational purpose of the limit, which was to target funds to those who could still enter the workforce, it was not lawful because there would be some people aged over 55 who could enter the workforce and repay the loan.

Discrimination, vulnerable groups and articles 2/3

59. The ECtHR has on many occasions emphasised that more stringent duties are owed under articles 2 and 3 to children and other vulnerable individuals, e.g. *DMD v. Romania* (23022/13) 3 October 2017, §41 and 51. Similarly, the court has noted that, in determining whether there was a violation of article 2 or 3, an important factor is whether the individual is particularly vulnerable.

60. Vulnerability may arise, for instance, because the individual is suffering from a mental disorder, is young, or belongs to a category at heightened risk of abuse such as those with HIV, those convicted of war crimes, gay people, police collaborators, relatives of prison guards, or sexual offenders (e.g. *Martzaklis v. Greece* (20378/13) 9 July 2015,

and *Dimcho Dimov v. Bulgaria (No. 2)* (77248/12) 29 September 2017 §61, with further references). Groups who have been targeted in the past, whether because of their race, health or other status, require special protection under the Convention: *DH v. Czeck Republic* (57325/00) 13 Nov 2007 §182; *Balazs v. Hungary* (15529/12) 20 Jan 2016, §53).

61. This may mean that a relatively low threshold of mistreatment against those in a vulnerable position will breach article 2 or 3. Treatment that is lawful if inflicted on an adult, may breach article 3 if inflicted on a child: *Zherdev v. Ukraine* (34015/17) 27 July 2017, §86. In *Zherdev* the applicant was a minor who was handcuffed in his underwear in a police cell for 2 ½ hours. The authorities had a valid reason for taking his clothes, no-one of the opposite sex was present; and the applicant was in a relatively enclosed space with no public exposure. Nevertheless, there was a violation of article 3 (§93). Similarly, in *Lyalyakin v. Russia* (31305/09), 12 March 2015, §§75-78, there was a violation of article 3 due in part to the stripping of a nineteen-year-old army recruit down to his briefs.

62. A discriminatory motive, and a background of discrimination against a particular group, means violence is more likely to reach the threshold necessary to breach article 3: *M.C. and A.C. v. Romania* (12060/12) 12 July 2016, §116-119. Discrimination can of itself amount to degrading treatment within the meaning of article 3: *Balazs v. Hungary* (15529/12) 20 Jan 2016, §49; *Abdu v. Bulgaria* (26827/08) 11 June 2014, §38.

63. Special diligence is required when dealing with complaints concerning domestic violence: *Talpis v. Italy* (41237/14), 2 March 2017. In *Talpis* the ECtHR concluded that there was a violation of article 14, taken together with articles 2 and 3. The principle bases for the finding were that the applicant presented statistical data to show domestic violence primary affects women; and the domestic authorities had failed in the particular case to provide the applicant with effective protection. In *Bălşan v. Romania* (49645/09) 23 May 2017 there was a breach of article 3 and article 14 for failure to protect the applicant from a known risk of domestic violence. The fact that the woman was said by the authorities to have provoked the violence, weighed in favor of the finding of a breach.

64. The authorities are under a duty to take all reasonable steps to investigate the existence of any possible discriminatory motive behind acts of violence, whether racist, sexist, homophobic or otherwise: *M.C. and A.C. v. Romania* (12060/12) 12 July 2016, §105 and 113; *Skorjanec v. Croatia* (25536/14) 28 June 2017 §54-57. The court describes this as "a difficult task" §113. In *M.C.* the police investigation did not properly examine possible homophobic motives behind an attack, in breach of the article 3 procedural duty: §124-125.

65. Where there is a credible allegation that a person was killed as a result of his political journalism, the authorities must explore "with particular diligence" whether that is correct: *Huseynova v. Azerbaijan* 10653/10, 13 April 2017.

Public law discrimination?

66. In *R (Gallaher) v. Competition Markets Authority* [2018] UKSC 25; 2 WLR 1583 the Supreme Court was called upon to decide whether there are distinct principles in public law of equal treatment or substantive fairness. It essentially decided there are not. It noted that issues of consistency may arise, but they generally do so as aspects of the standard grounds for review, such as rationality or legitimate expectation. Similarly, while procedural fairness is well established, substantive fairness is not a distinct legal criterion.

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29 April 2019