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PUBLIC LAW AND HUMAN RIGHTS
THE PRINCIPLE OF EQUAL TREATMENT

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(1) The Common Law principle of equal treatment

1. We expect public authorities to exercise their powers fairly and rationally. An essential component of both fairness and rationality is the principle of equal treatment. Lord Hoffmann, delivering the judgment of the Privy Council in **Matadeen v Pointu** [1999] AC 98, referred to the principle of equality as "*one of the building blocks of democracy*", and stated: "*treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.*"

2. Baroness Hale in **Ghaidan v Godin Mendoza** [2004] 2 AC 557, at paragraph 132 expressed the general common law principle of equal treatment thus:

> *"[Discriminatory treatment] is the reverse of the rational behaviour we now expect from government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions."*

3. It is important, given the limitations on the scope of Article 14 considered below, to stress that this general common law principle can, as Lord Hoffmann acknowledged, form the basis of a claim for judicial review, entirely independent of the Convention. The recognition of equal treatment as an essential component of the lawful exercise of power has been particularly well-developed in cases concerning taxation: see, for example, Lord Scarman in **R v IRC ex parte National Federation of Self-Employed and Small Business Ltd** [1982] AC 617, at 651:

> *"I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims."*

(2) Statutory prohibitions on discrimination

4. The principle of equal treatment is also expressed in English law through a series of national statutes and statutory instruments, some passed to implement EU Directives, which deal the prohibition of discrimination in employment, the supply of goods and services, and other fields. The approach so far has been to enact separate legislation to cover each ground of discrimination (such as the Race Relations Act 1976, the Sex Discrimination Act 1975, the Disability Discrimination Act 1995, and the 2003 regulations prohibiting discrimination on grounds of sexual orientation and religion).

5. Public lawyers should note that under section 19B of the Race Relations Act it is now unlawful for a public authority to do any act which constitutes race discrimination in carrying out any of its functions. The Act also imposes a general statutory duty on public authorities, under section 71, to have due regard in carrying out their functions to the need to eliminate unlawful race discrimination, and to promote equality of opportunity. These provisions were successfully relied on in **R (European Roma Rights Center) v Secretary of State for the Home Department** [2005} 2 WLR 1 to obtain declarations that the Home Office's operation of immigration control at Prague Airport had led to unlawful race discrimination against Roma seeking to travel to the UK, who were stereotyped as asylum seekers, and questioned with greater suspicion than non-Roma passengers.

(2) Article 14

6. Notwithstanding the availability (and potentially wider scope) of the common law principle of equal treatment, attention has inevitably shifted since the coming into force of the Human Rights Act 1998 to the more limited but better defined right to equal treatment afforded by Article 14 of the Convention. Article 14 provides:

> *"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."*

(i) The scope and limitations of Article 14

7. Article 14 does not confer a general, free-standing right to equal treatment by public authorities. That right is contained in Article 1 of the 12th Protocol to the Convention[1], which the UK has not ratified. Article 14 is limited in two important respects:

   a) It prohibits discrimination only in the enjoyment of Convention rights. Article 14 is not engaged unless the claimant can show that the discrimination complained of falls "*within the ambit*" of another Convention right.

   b) It prohibits discrimination only on grounds *"such as"* those listed in Article 14 itself.

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[1] Article 1 of the 12th Protocol provides:
"1. The enjoyment of any right set forth by law shall be secured without discrimination on any grounds 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.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

(a) <u>Discrimination within the ambit of a Convention right</u>

8. It has long been established that it is not necessary, in order for a claim under Article 14 to succeed, for the claimant to show that the State is actually in breach of another Convention right. It is sufficient for the claimant to show that the subject matter of the disadvantage "*constitutes one of the modalities*" of the exercise of the right, or that the treatment complained of is "linked" to the exercise of a Convention right: **Abdulaziz, Cabales and Balkandali v UK** (1985) 7 EHRR 471; **Petrovic v Austria** (1998) 33 EHRR 307, paragraphs 22 and 28. Thus, for example, the UK was not obliged under Article 8 to permit the spouses of UK nationals to settle on its territory. However, if the State chose to respect the right to family life by permitting the wives of UK nationals to settle here, Article 14 was engaged by the refusal to permit husbands to do the same: the difference in treatment constituted sex discrimination in the enjoyment of Article 8 rights.

9. Some members of the House of Lords have in recent judgments shown a reluctance to accept a broad view of what treatment falls within the ambit of a Convention right. For example, in **R (Carson) v Secretary of State for Work and Pensions** [2005] 2 WLR 1369, Lord Hoffmann made it clear that he doubted whether a social security benefit (or, at least, a non-contributory benefit) could be said to be a possession, within the ambit of Article 1 of the First Protocol until it had actually fallen due. On this reasoning, discrimination in the conditions on which individuals are given access to state benefits would not fall within the ambit of Article 1 of the First Protocol, and thus would not engage Article 14: denying a person access to a social security benefit on a ground prohibited by Article 14 would not interfere with their right to the peaceful enjoyment of their possessions, since they *had* no possessions.

10. This approach to the scope of Article 14 has now been clearly rejected by the Grand Chamber of the European Court of Human Rights, in the case of **Stec v UK** (6 July 2005), which concerned sex discrimination in the conditions of access to a non-contributory state benefit.

11. The Court held that the prohibition of discrimination extends beyond the enjoyment of the rights which the Convention requires each state to guarantee. It applies also to "*those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide.*" (paragraph 40). Thus, although Article 1 of the First Protocol does not create a right to acquire property, and places no restriction on a State's freedom to decide whether or not to have in place any form of social security scheme, a claimant who has been denied access to all or part of a benefit on a ground prohibited under Article 14 (whether or not access to the benefit is conditional on the payment of social security contributions), may rely on Article 14 if, but for the condition of entitlement about which he complains, he would have had an enforceable right to receive the benefit in question. In other words:

> *"Although Article 1 of the First Protocol does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14"*(paragraph 55).

12. This important judgment has wide implications: it appears to bring within the scope of Article 14 any legally enforceable right which a State chooses (though not obliged under any Convention right) to provide to any of its citizens. As John Howell QC pointed out in his article *Has Ratification of the new Protocol to the ECHR on discrimination been rendered otiose?*[2] , the logical effect of the decision is that a law cannot confer a right to anything on a discriminatory basis compatibly with Article 1 of the First Protocol read together with Article 14, thereby rendering Article 1 of Protocol 12 largely redundant.

(b) <u>The grounds on which discrimination is forbidden</u>

13. Article 14 applies only to grounds "*such as*" the grounds listed in the Article, including the general sweep-up provision "*other status*". The examples given do not purport to be exhaustive, but the phrase "*such as*" certainly suggests that, in order to engage Article 14, discrimination must be on a ground analogous with those set out in the article. As Lord Nicholls explained in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, at paragraph 9:

> *"The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. ... Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory."*

14. The breadth of the grounds of discrimination prohibited by Article 14 remains a matter of some controversy. In the case of **R (S) v Chief Constable of South Yorkshire Police** [2004] 1 WLR 2196, the House of Lords considered a complaint brought by a number of individuals who had been arrested and charged with offences, and whose fingerprints and DNA samples had been taken by police. They were not convicted of any offence, but were informed that the police intended to retain the fingerprints and samples taken. The appellants argued that they had suffered discrimination (in relation to their right to respect for their private life) by comparison with other members of the populations whose fingerprints and DNA samples had not been taken by police, and whose prints and samples could not be kept by them.

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[2] Blackstone Chambers public law Focus, October 2005.

15. The House of Lords held that the discrimination complained of did not fall within the ambit of Article 14. Article 14 only prohibited discrimination on grounds expressly identified in the Article, and other analogous "*personal characteristics*".

16. In this case, the difference in treatment of which complaint was made was on the ground that the appellants had already provided samples and fingerprints to the police in a criminal investigation, while the comparators had never been required to do so (paragraph 47). This was not a "*personal characteristic*", or "*status*" within Article 14, but merely a "*historical fact*".

17. In taking this relatively narrow approach to the interpretation of Article 14, the House of Lords relied on an old decision of the European Court of Human Rights, **Kjeldsen and others v Denmark** (1976) 1 EHRR 711. However, they did not address the point, to which attention was drawn by the Court of Appeal in **Wandsworth London Borough Council v Michalak** [2003] 1 WLR 617, paragraph 33, that in cases subsequent to **Kjeldsen**, the Commission and Court of Human Rights appeared to have taken a much wider approach to the grounds of discrimination covered by Article 14, admitting claims including complaints of discrimination brought by the owners of non-residential as opposed to residential buildings[3], the owners of a pit bull terrier as opposed to the owners of other breeds of dog[4] and small landowners as opposed to large landowners[5]. Lord Hoffmann in **Carson** at paragraph 13 noted the inconsistency between the two approaches, and sidestepped any discussion of the later Strasbourg case law by assuming that the characteristic in question in **Carson** (residence in South Africa) amounted to a personal characteristic. Notwithstanding the decision in *S*, there remains scope for argument on this point, which may have to be finally resolved in Strasbourg.

(c) <u>A hierarchy of grounds</u>

18. Both the US Supreme Court and the Strasbourg court have recognised for many years that there are some forms of discrimination that are particularly offensive, and that will be unlawful unless very weighty reasons or compelling grounds are adduced to justify them. Such grounds include race, sex, legitimacy and sexual orientation. This analysis was accepted by the House of Lords in **Carson**. Lord Hoffmann at paragraphs 14 – 17 distinguished between grounds of this type "*which prima facie appear to offend our notions of the respect due to the individual*" and other grounds (such as ability, wealth, education or occupation), which may fall within the scope of Article 14, but "*which merely require some rational justification*".

19. In an important passage, Lord Hoffmann recognised that:

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[3] *Spadea and Scalabrino v Italy* (1995) 21 EHRR 482.
[4] *Bullock v United Kingdom* (1996) 21 EHRR CD 85.

[5] *Chassagnou v France* (1999) 29 EHRR 615.

> *"Discrimination in the first category cannot be justified merely on utilitarian grounds, e.g., that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit*". (paragraph 16).

20. In other words, a generalisation or stereotype about the characteristics of women or of a particular racial group cannot, even if true, be used to justify the less favourable treatment of that group, because the members of that group are entitled to be treated as individuals. The same point was forcefully made by Baroness Hale (in the context of discrimination contrary to national discrimination legislation) in **R (European Roma Rights Center v Secretary of State for the Home Department** [2005] 2 WLR 1, at paragraph 74:

> *"The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it."*

(ii) <u>The identification of unlawful discrimination</u>

21. As the European Court of Human Rights held in **Thlimmenos v Greece** (2001) 31 EHRR 411, at paragraph 44, discrimination occurs when States treat differently persons in analogous situations without providing an objective and reasonable justification; and when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

22. The overwhelming majority of cases brought under Article 14 (with the notable exception of **Thlimmenos** itself, which concerned a Greek conscientious objector, motivated by religious belief, who suffered discrimination by being treated in the same way as other serious offenders) concern less favourable treatment. Such cases generally raise the closely interrelated, and overlapping questions:

    a) What was the ground of the treatment of which complaint is made?

    b) Was the claimant is in fact in a similar or analogous situation to chosen comparators who have been more favourably treated?

    c) Was the difference in treatment justified?

23. The Court of Appeal in **Michalak** treated each of these issues as a separate question to be addressed in turn by the Court[6]. However, this step by step approach has now been rejected by the House of Lords, which recommends what it calls a "*simple, and non-technical approach*". As Lord Nicholls put it in *Carson* at paragraph 2:

> "*Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.*"

24. In the same case, Lord Hoffmann considered that the single crucial question in seeking to identify the presence of discrimination was: "*is there enough of a relevant difference between X and Y to justify different treatment?*" (paragraph 31).

25. The House of Lords' concern about the **Michalak** "*catechism*" is understandable: it is often particularly difficult to draw a clear line between the question whether the claimant and the comparator are truly in similar situations; and the question whether the difference in their treatment is justified – very often, the difference in their treatment is explained, and justified, by a difference in their circumstances. However, the preferred approach adopted by the House of Lords in recent cases, which appears to be "s*tand back, squint and decide whether the treatment should be unlawful*" runs the risk of short-circuiting a proper analysis of the elements of discrimination, which may result in impressionistic and poorly-reasoned decisions.

26. The inconsistency in the House of Lords' approach to discrimination, and, in particular, the justification of discrimination, can be seen from a comparison of two decisions: **Carson** and **R (Secretary of State for Work and Pensions) v Hooper** [2001] 1 WLR 1681.

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[6] Brooke LJ at paragraph 20 formulated the questions to be addressed by a court in a discrimination claim as follows: "*(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) if so, did the difference in treatment have an objective and reasonable justification?*" A fifth question, whether the discrimination was on a ground prohibited by Article 14, was added in subsequent cases.

27. **Carson** concerned the difference between the treatment of pensioners living in countries with which the UK had a bilateral agreement allowing for the reciprocal uprating of benefits, and pensioners living in other foreign countries. The former were entitled to receive their state retirement pension uprated annually to account for inflation. The latter were precluded from receiving the annual cost of living increase. The House of Lords were unanimous in concluding that the difference in treatment was not discriminatory, both because the two groups of pensioners were not in materially similar situations, and because the difference in treatment was justified. Lord Hoffmann identified the case as one in which the ground of the difference in treatment, place of residence, did not fall in the first "*suspect*" category of grounds such as race and sex. It was thus appropriate to leave to parliament the assessment of the public interest in the allocation of public resources.

28. **Hooper**, one might have thought, was a case which merited very different treatment from **Carson**. It concerned discrimination against men in the provision of social security survivors' benefits. Until a reform of the legislation which came into effect as late as 2001, widows were entitled to a range of social security benefits, including a non-means tested pension. Widowers received no benefits at all, regardless of need. The discrimination in the provision of the widow's pension was overtly on the grounds of sex, and the Government sought to justify it by a gender stereotype. Women, they argued, and particularly older women, were more likely to have been financially dependent on their husbands, and therefore, as a group, had historically been protected by the widow's pension, which had taken some time to phase out.

29. On the basis of Lord Hoffmann's own analysis of the hierarchy of grounds of discrimination in *Carson*, one might have expected the House of Lords to apply strict scrutiny to the Government's purported justification of direct sex discrimination in this case. However, no proportionality analysis of the Government's justification was undertaken by the House of Lords at all. Instead, Lord Hoffmann at paragraph 32 announced that decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, were "*matters for the judgment of the elected representatives of the people*"; and that "*the fact that the complaint concerns discrimination on grounds of sex is not in itself a reason for a court to impose its own judgment.*"

30. With respect to Lord Hoffmann, although it is clear that the motivation for both decisions is the House of Lords' determination not to intervene in cases concerning social and economic policy and the allocation of public resources, the reasoning in **Carson** and **Hooper** is impossible to reconcile. The question whether the UK can in fact justify the sex discrimination in the payment of the widow's pension remains live in Strasbourg, in the pending case of **White v UK**.

(iv) <u>Remedies</u>

31. Traditionally, the remedy for unlawful discrimination has always been to provide to the disadvantaged party compensation to place him or her in the position of the advantaged

comparator. The discriminator who has been found to act unlawfully may for the future reduce the benefits available to both classes, provided that he does so on an equal basis, but for the past, the discrimination must be remedied by providing the victim with the benefit he was denied on a prohibited ground.

32. The House of Lords has, however, rejected that principle in the case of **R (Wilkinson) v Inland Revenue Commissioners** [2004] 1 WLR 441. In that case, a widower had been denied, on the ground of his sex, a tax allowance payable to widows. The Government did not seek to justify the discrimination, which they conceded was contrary to Article 14 read with Article 1 of the First Protocol. However, they argued that the IRC had had no power to grant the equivalent allowance to widowers, and that, in any event, no compensation should be paid to the disadvantaged widower who had been denied the allowance. The tax allowance for widows should actually have been abolished sooner: its continuation was an "*unjustified windfall*" for widows, which should not be extended to men by the payment of compensation for the discrimination. The House of Lords accepted that argument.

33. Again, this is a point which remains live in Strasbourg, to which Mr Wilkinson has now appealed.

Conclusion

34. It can thus be seen that the House of Lords has in a series of recent cases explored the limits of Article 14, and sought to refine its approach to complaints of discrimination, with somewhat mixed and inconsistent results; and that a number of the issues considered in these cases are now pending in Strasbourg. Pragmatically, it is clear that the Court is hostile to challenges to decisions involving the allocation of public money, even where they involve discrimination on grounds such as sex (**Hooper**), but much more prepared to apply a strict proportionality approach where the same "*floodgates*" or "*resources*" questions do not apply (**Ghaidan**). Public lawyers should not forget that equal treatment is a common law principle, as well as a Convention right, and that the common law, untrammelled by the limits of Article 14, may in some circumstances provide a more flexible basis than the Convention for a successful challenge to unfair and discriminatory treatment by a public authority.