

# Public Law webinar mini-series

## An update on discrimination law – where are we now?

28<sup>th</sup> April 2021

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# Article 14 and the test for justification.

Where are we now?

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# Recap on test for breach under A14

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

# Test for Justification

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

# Standard of review: duality of approach

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

# Duality of Approach (2)

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

# Which is the correct approach?

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

# Is that the end of the matter?

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



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# Discrimination in algorithmic decision-making

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# JCWI v Home Office

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

# Ofqual Exam Algorithm

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

# (1) Disclosure

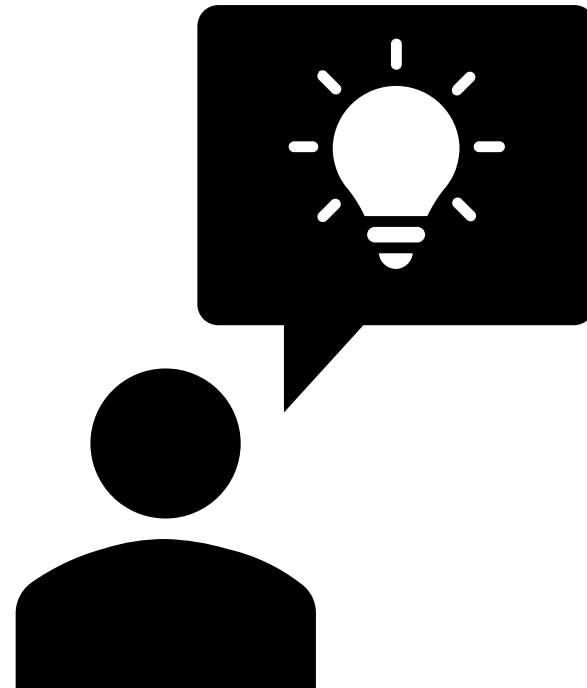
- *R (On the application of Eisai Limited) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 (at §36, §49-50, §66).
- Lord Sales, *Algorithms, Artificial Intelligence and the Law*, 12 November 2019 (p12):
  - “There should also be scope for legal challenges to be brought regarding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

## (2) Procedure

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

# (3) Expert Input

- Essential?
- Useful?



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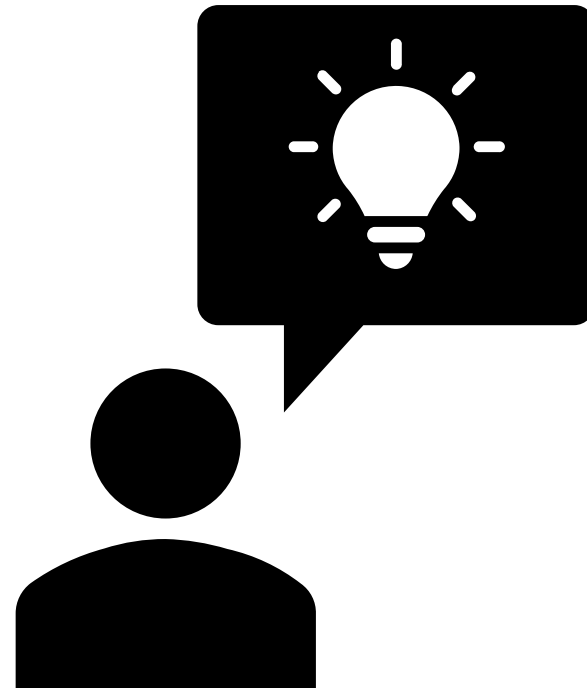
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# Positive action in the Supreme Court

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

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

Baroness Hale, *Guardian*, 1 January 2019

# Section 158, Equality Act 2010

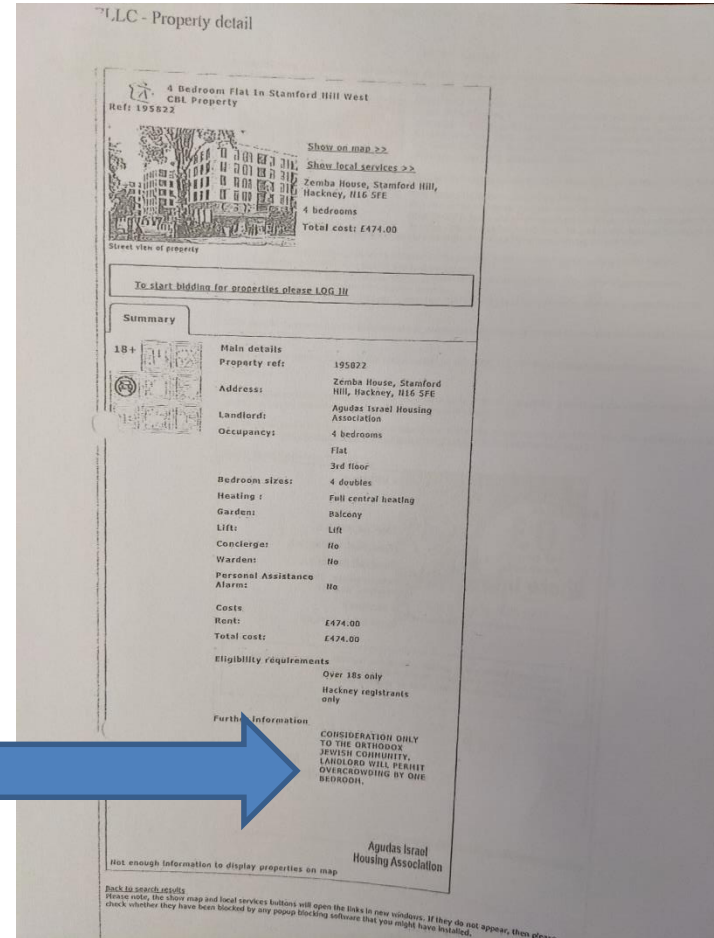
- (1) This section applies if a person (P) reasonably thinks that—
  - (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
  - (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share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

# Section 158 and positive discrimination

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

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

# AIHA's policy



“CONSIDERATION ONLY TO THE ORTHODOX JEWISH COMMUNITY”



# Case C-319/03 *Briheche*

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

(para 23)

# Proportionality on appeal (1)

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

(Lord Sales JSC at [74])

# Proportionality on appeal (2)

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

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

*Lord Sales*

*Annual ALBA Lecture, November 2020*

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