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Country report

Non-discrimination

United Kingdom
2022
including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

United Kingdom

Lucy Vickers

Reporting period 1 January 2021 – 31 December 2021

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EXECUTIVE SUMMARY

1. Introduction

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI), with the term Great Britain (GB) used to refer to England, Wales and Scotland. The UK formally left the EU on 31 January 2020, with EU law continuing to apply in the UK until the end of the transition period on 31 December 2020.

The UK is a parliamentary democracy, based around the core principle of parliamentary sovereignty. It has neither a written constitution nor an entrenched constitutional bill of rights, but an extensive set of constitutional conventions establish what has been described as an unwritten constitution.

The UK has always been a country of migration and the increase in the size and variety of different ethnic groups since the late 1940s, added to the constant influx of migrant labour from EU and non-EU states, has made the UK a multicultural state. Certain ethnic minorities, including the native Traveller communities, continue to suffer from high rates of unemployment, social exclusion and poverty. Gypsy, Roma and Traveller people have the worst outcomes of any ethnic group across a range of areas, including education, health, employment, criminal justice and hate crime. During 2021, a Law Commission report on hate crime recommended levelling up protection for hate crime based on sexual orientation, disability and transgender identity, and extending the offence of stirring up hatred to cover the grounds of sex or gender; the Scottish Parliament introduced the Hate Crime and Public Order (Scotland) Act 2021 to consolidate, modernise and extend its existing hate crime protection; and the Department of Justice Northern Ireland Hate Crime Review proposed amendments to strengthen its protection of race and religion and other protected characteristics with respect to hate crime.

In 2021, the Commission on Race and Ethnic Disparities, set up by the Government in response to the Black Lives Matter protests in the summer of 2020, published its report concluding that most of the racial disparities examined did not have their origins in racism. Many NGOs protested that the report downplayed the role of institutional racism, and the findings and the report's analysis were rejected and condemned by the UN Working Group of Experts on People of African Descent.

Some prejudice exists against gay/lesbian/bisexual/transgender people. In recent years, however, there has been much wider social acceptance of the rights of gay men and women to full equality. Since 2013, same-sex couples have been able to marry in Great Britain, and from 2020 in Northern Ireland.

Persons with disabilities continue to experience disadvantage, earning less per hour on average than persons without disabilities. Those persons with disabilities who cannot work are dependent on an increasingly restricted welfare regime, with persons with disabilities experiencing significant welfare cuts. They also face poorer health and lack of access to suitable housing.

In 2018 the House of Commons Women and Equalities Committee published a report on older people and employment, concluding that older workers experience discrimination at work, particularly with regard to recruitment.

In Northern Ireland, the ongoing tensions between the Unionist/Protestant majority and Nationalist/Catholic minority continue to generate sectarian division. Although much less so than during the period of 'the Troubles', some unrest was seen in 2021 as a result of the impact of post-Brexit trading rules on Northern Ireland. Sectarian divisions also feature in parts of Scotland.

There are some inequalities in experience between people of different religions, for example Muslims experience the lowest employment and poorest health outcomes of any religious group.

Since 2000 a series of positive duties have been imposed upon public authorities to promote equality of opportunity on all the equality grounds. Positive action strategies have been adopted at national, regional and local level across the various equality grounds.

During 2021, the significant health inequalities exposed in relation to COVID-19 continued, although steps were taken to address the higher risks of risk of dying from COVID-19 in Bangladeshi and Pakistani ethnic groups, including guidance on preventing household transmission, given the higher percentage of people from the Bangladeshi and Pakistani ethnic groups living in multi-generational homes, and measures to protect taxi drivers, over half of whom are from an ethnic minority background. Vaccine hesitancy was highest among Black people, followed by Bangladeshi/Pakistani people, and steps were taken to address this.

2. Main legislation

As the UK has no written constitution, legislation is the primary tool for establishing anti-discrimination law in the UK. The UK has ratified all the major international human rights treaties and the main Council of Europe human rights instruments, including the ECHR, the Charter on Minority Languages, the Framework Convention for the Protection of National Minorities, the European Social Charter and the Convention on Minority Rights. The UK has not ratified Protocol 12 ECHR. International treaties are not directly applicable in UK law unless incorporated by an Act of Parliament, although they can be used to interpret legislation in certain circumstances. The Human Rights Act 1998, gives effect to the ECHR in UK law, including Article 14, and this can provide valuable protection in some contexts against discrimination. The devolution settlements under which power is devolved to Scotland, Northern Ireland and Wales also include additional safeguards particularly as regards the protection of human rights.

Anti-discrimination legislation in the UK was first introduced in the field of race/ethnicity in the 1960s and is now contained in the Equality Act 2010. In Northern Ireland, a separate legislative framework of anti-discrimination protection has been introduced for political and constitutional reasons. In the UK there are, in addition, some criminal offences relating to racial and religious hatred, and tougher sentences can be imposed on crimes motivated by hatred based on sexual orientation, disability or being transgender.

The Equality Act 2010¹ now prohibits direct and indirect discrimination, harassment, victimisation and instructions to discriminate because of race (defined as ethnicity, colour, national origin or nationality), sex, marriage or civil partnership, pregnancy, gender reassignment, disability, sexual orientation, religion or belief and age in employment and occupation and (other than in the case of married or civilly partnered status or, in the case of housing, age) access to goods and services, education, housing and the performance of public functions. (There are a significant number of exceptions to the prohibition on age discrimination which does not, further, protect under-18-year-olds other than in the context of employment broadly defined.) Duties of reasonable accommodation are imposed in relation to disability.

The provisions of the Equality Act 2010 are broadly in conformity with the requirements of the 2000 directives, though its material scope is considerably broader. In particular, protection against discrimination in the provision of goods and services, healthcare and housing and education are protected for the grounds covered by the 2000 directives (except for age which is not protected as comprehensively). Northern Ireland's legislation

¹ Equality Act 2010, date of adoption: 08.04.2010; entry into force: 01.10.2010.

adopts broadly similar definitions of discrimination though there is no single equality provision and age discrimination is regulated only across the material scope of Directive 2000/78/EC.

3. Main principles and definitions

Three definitions of discrimination have been incorporated into the Equality Act 2010. Section 13 Equality Act 2010 provides: 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Section 13(2) goes on to provide that, 'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'. Section 13(3) states that, 'If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.' Only in relation to age can direct discrimination be justified. The Equality Act 2010 also makes segregation on racial grounds a form of direct discrimination (Section 13(5)).

The position in NI is broadly similar though the definition of direct discrimination refers to less favourable treatment 'on grounds of' rather than 'because of' the protected characteristic.

The Equality Act 2010 provides (Section 19) that, 'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's', Section 19(2) further providing that, 'A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.' The prohibition against indirect discrimination applies in GB to all the protected grounds whereas, in NI, there is not as yet any prohibition on indirect discrimination related to disability. The definition of indirect discrimination in NI is materially similar to that in the Equality Act 2010 except that, where the discrimination at issue falls outside the scope of the 2000 directives, the original definition of indirect discrimination that was used in the UK race and gender discrimination legislation continues to apply.

Insofar as it applies to disability, the Equality Act prohibits direct and indirect discrimination and also prohibits unjustified discrimination 'arising from disability' (Section 15) and failures to make reasonable adjustments (Sections 20, 21).

Section 15 defines discrimination arising from disability as occurring where 'A treats B unfavourably because of something arising in consequence of B's disability, and ... A cannot show that the treatment is a proportionate means of achieving a legitimate aim', unless 'A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'. In NI, the Disability Discrimination Act (DDA) does not prohibit indirect discrimination but does (s. 3A) prohibit three different concepts of discrimination:

- a) Discrimination for a reason relating to a person's disability, which cannot be objectively justified;
- b) Direct discrimination on the grounds of a person's disability in employment and occupation, i.e. where a person is treated differently because of the fact he or she is disabled and not for a related reason, which cannot be justified in law; and
- c) Discrimination by virtue of a failure to comply with the duty to make reasonable adjustments, which cannot be justified in the employment and occupation context but can in the context of goods and services.

Victimisation is prohibited across all the equality grounds in GB and NI, but the definition of victimisation is different in the legislation that applies to GB from that which applies to NI. In GB the Equality Act 2010 provides (Section 27(1)) that, 'A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act', Section 27(2) defining as a 'protected act' '(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act'. The approach in NI is similar save that the person alleging victimisation has to establish *less favourable* treatment on the ground of his or her having performed the protected act, a formulation which has given rise to significant difficulty at times. In both GB and in NI the protection from victimisation does not apply if the allegation made by the victim was *both* untrue *and* made in bad faith.

Discrimination by association with a protected ground is protected under the Equality Act, as is discrimination based on presumption.² There are no national rules to deal with situations of multiple discrimination in the UK. The Equality Act 2010 contains a provision (Section 14) prohibiting discrimination because of a combination of two protected characteristics, but this provision is not in force.

4. Material scope

The UK anti-discrimination legislation applies to all sectors of employment, both private and public. There is some uncertainty as to whether the Equality Act covers access to self-employment, although *Pimlico Plumbers v Smith* [2018] UKSC 29 confirmed that those who have a contract personally to do work are covered by the Equality Act 2010. *Uber BV v Aslam* [2021] UKSC 5 confirmed that those using platform sharing devices (the 'gig' economy) are 'workers' and thus also protected under the Equality Act 2010.

Discrimination in the provision of goods and services, housing, education, social protection including social security and healthcare, social advantages³ and the performance of public functions is also now prohibited across all the equality grounds except age in both GB and Northern Ireland. The Equality Act 2010 contains provisions providing protection against age discrimination for GB in relation to the provision of goods and services, healthcare, social advantages and the performance of public functions. These do not apply to children under the age of 18.

5. Enforcing the law

Individuals who consider they have been discriminated against can bring legal proceedings, with cases involving allegations of employment-related discrimination going to the employment tribunals (industrial tribunal or Fair Employment Tribunal in NI) and complaints concerning any other unlawful discrimination going to the civil courts.

The main remedy available is damages, which are calculated as in civil proceedings for tort ('delict' in Scotland). Injunctive relief can also be obtained. Compensation awards vary across the grounds and from context to context. Remedies are in general reasonably dissuasive, although the inability of courts and tribunals to order wider remedial measures to be adopted by discriminating organisations is a real problem.

Some support is available from trade unions, specialised NGOs and the equality bodies for individuals in bringing a discrimination claim. There are no restrictions on any organisation offering support to complainants in discrimination cases, however, such organisations cannot usually initiate a complaint. The only exception to this position is that the Equality

² See Section 2.1.3 below.

³ UK law does not contain a clear definition of social advantage, but judicial interpretation would be used to ensure protection as required.

Commissions can bring a case where instructions to discriminate or unlawful advertising is concerned.

Anti-discrimination cases are quite common and attract considerable publicity. However, complainants can suffer from a lack of available skilled advice, assistance and representation in discrimination cases. The Equality and Human Rights Commission (EHRC) and the Equality Commission for Northern Ireland (ECNI) provide assistance in a limited number of cases where the law needs clarification. In addition, the Government-commissioned Equality Advisory and Support Service runs a helpline that offers help and advice on issues relating to equality across England, Scotland and Wales.

All of the relevant UK legislation makes provision for a shift of the burden of proof in relation to each of the grounds of discrimination and to all of the activities considered to be within the scope of the directives.

Implementation of the Public Sector Equality Duty which applies to all grounds results in many national and local programmes targeting specific groups, such as support for Gypsy, Roma and Travellers accessing education and healthcare; and support to help persons with disabilities access employment.

6. Equality bodies

There is a single Equality and Human Rights Commission (EHRC) in GB which can support complainants in legal proceedings, has enforcement powers of its own and also has powers to promote and encourage respect for equality of opportunity through research, public comments and other methods. There is a separate Equality Commission for Northern Ireland, which has similar functions (and, in places, greater powers relating to positive action) to those of the EHRC, while in Scotland there is also a Scottish Human Rights Commission with which the EHRC shares its human rights remit.

7. Key issues

- The wide scope for schools to discriminate against teachers on the ground of religion remains a concern.
- It is unclear whether UK law adequately protects self-employed workers.
- Although legal aid is available for advice and representation in certain types of discrimination case, it does not cover representation in the Employment Tribunal. As a result, access to justice remains a serious concern. COVID-19 has also had an impact on access to justice.
- The hostile environment created around the employment and letting of premises to those with irregular migration status has some negative impacts on non-UK nationals living and working in the UK, as organisations are discouraged through the threat of criminal sanctions from providing services to, or employing, anyone who they suspect may not have full status. This can result in indirect discrimination on grounds of ethnicity or nationality.
- The conclusions of the Government's Commission on Race and Ethnic Disparities in its report were condemned by NGOs as well as UN experts.
- The 'Windrush generation' (Commonwealth citizens who settled in the UK before 1 January 1973), who often lack documentation to confirm their immigration status, continue to have difficulty accessing benefits and services, which can amount to indirect race discrimination.
- Significant inequalities are faced by Gypsy, Roma and Traveller communities.
- The material scope of the Equality Act 2010 extends beyond that of the 2000 directives, to broadly comply with the proposed equal treatment directive.
- The positive duties imposed on public authorities by the Public Sector Equality Duty (Section 149 Equality Act 2010) in GB and Section 75 Northern Ireland Act 1998 (in NI) are perhaps the most interesting feature of UK discrimination law.

- COVID-19 has exposed significant health inequalities, in particular in relation to black and ethnic minority groups and persons with disabilities.

INTRODUCTION

The national legal system

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

All UK-wide law-making powers are vested in the Westminster Parliament, which legislates through both primary legislation (Acts of Parliament) and secondary laws (Statutory Instruments). These laws are subsequently 'interpreted' by the courts to create a body of case law which is based on the binding rules of legal precedent. The Westminster Parliament can only legislate in the areas which have not devolved to the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly. However, it can legislate in those areas where one of those legislatures consents to legislation being passed on its behalf. Equalities legislation in Scotland and Wales is reserved to the Westminster Parliament - in other words, it is only Westminster that can legislate in the area of equalities for England, Wales and Scotland. For Northern Ireland, the Northern Ireland Assembly has competence to legislate in the area of equalities.

The UK formally left the EU on 31 January 2020. From 2021 onwards, GB courts should normally continue to interpret the Equality Act 2010 in line with EU court decisions made before the end of 2020. The Supreme Court and the Court of Appeal may depart in some circumstances from the case law of the CJEU, while being bound by the provisions of Directives 2000/78/EC and 2000/43/EC. From 2021 onwards, when interpreting UK laws that are based on EU Directives (such as the Equality Act provisions that implement EU Equality Directives), GB courts are not bound by post-2020 EU court decisions but may have regard to them. Under the UK-EU Withdrawal Treaty, Northern Ireland continues to be bound by the EU Equal Treatment Directives and to interpret them in conformity with post-2020 ECJ decisions.

The UK-EU trade agreement contains a non-regression clause, which means that parties cannot reduce their protection against discrimination below 2020 levels if the difference in protection affects trade or investment. This is likely to mean that there is no large-scale reduction in the scope of the Equality Act 2010, although smaller changes that do not have an impact on trade and investment will be possible.

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

List of main legislation transposing and implementing the directives

GB

- The Equality Act 2010⁴ (EqA):
 - o adopted 08.04.2010;
 - o grounds covered: sex, gender reassignment, marriage, a civil partnership, pregnancy, race (including colour, nationality, citizenship, ethnic origins, national origins), disability, sexual orientation, religion or belief, age;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing (except for age); provision of goods, facilities and services; membership organisations; functions of public authorities.

NI

- The Disability Discrimination Act 1995⁵ (DDA):
 - o adopted 08.11.1995;
 - o grounds covered: disability;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities.
- The Race Relations (NI) Order 1997⁶ (RRO):
 - o adopted 19.03.1997;
 - o grounds covered: race, colour, nationality (including citizenship), ethnic origins, national origins and belonging to the Irish Traveller community;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities.
- The Fair Employment and Treatment Order 1998⁷ (FETO):
 - o adopted 16.12.1998;
 - o grounds covered: religion/ belief/ political belief;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; functions of public authorities.
- The Employment Equality (Sexual Orientation) Regulations (NI) 2003⁸ (SOR 2003):
 - o adopted 01.12.2003;
 - o grounds covered: sexual orientation;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.).
- The Employment Equality (Sexual Orientation) Regulations (NI) 2006⁹ (SOR 2006):
 - o adopted 8.11.2006;
 - o grounds covered: sexual orientation;
 - o material scope: education; housing; provision of goods, facilities and services; functions of public authorities.
- The Employment Equality (Age) Regulations (NI) 2006¹⁰ (Age Regs):
 - o adopted 14.06.2006;
 - o grounds covered: age;

⁴ Equality Act 2010, 08.04.2010 (EqA), available at: www.legislation.gov.uk/ukpga/2010/15/contents.

⁵ Disability Discrimination Act 1995 (DDA), 08.11.1995, available at: www.legislation.gov.uk/ukpga/1995/50/contents.

⁶ Race Relations (Northern Ireland) Order 1997 (RRO), 19.03.1997, available at: www.legislation.gov.uk/nisi/1997/869/contents.

⁷ Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), 16.12.1998, available at: www.legislation.gov.uk/nisi/1998/3162/contents.

⁸ Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR 2003), 01.12.2003, available at: <https://www.legislation.gov.uk/nisr/2003/497/contents/made>.

⁹ Employment Equality (Sexual Orientation) Regulations (NI) 2006 (SOR 2006), 08.11.2006, available at: <https://www.legislation.gov.uk/nisr/2006/439/contents/made>.

¹⁰ Employment Equality (Age) Regulations (NI) 2006 (Age Regs), 14.06.2006, available at: <https://www.legislation.gov.uk/nisr/2006/261/contents/made>.

- o material scope: employment (broadly defined to include occupation, vocational training etc.).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The UK constitution is unwritten and so by definition contains no articles dealing with non-discrimination.

The Human Rights Act 1998,¹¹ however, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Article 14 ECHR *quasi*-constitutional force. Public authorities can only act contrary to that provision if required by primary law so to do, with a very strong interpretive obligation applying to the courts in their interpretation of such legislation, while the devolved Parliaments in Scotland, Wales and Northern Ireland may not pass legislation incompatible with the Convention, nor may their governments act incompatibly with Convention rights. The provisions of the Human Rights Act cannot be enforced against private individuals (although they can be enforced against the state).

¹¹ Human Rights Act 1998, 09.11.1998, available at: www.legislation.gov.uk/ukpga/1998/42/contents.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation (listed in the Introduction section, the main legislation transposing and implementing the directives) transposing the two EU anti-discrimination directives:

UK

- sex
- gender reassignment
- marriage and civil partnership status
- pregnancy
- race (incl. colour, nationality, citizenship, ethnic origins and national origins)
- disability
- sexual orientation
- religion or belief
- age

NI (in addition to the grounds above)

- belonging to the Irish Traveller community
- political belief

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

Race

The term 'racial origin' is not used in UK legislation. The RRO (Article 5(1)) (NI) provides that "'racial grounds" means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins'.

The EqA provides (Section 9) that 'race' includes colour, nationality and ethnic or national origin and that, 'A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls'. There is no definition in statute or case law of 'racial origin'; since the first Race Relations Act¹² (RRA) in 1965 it has been clear that, as in Recital (6) of the Race Directive, the term has never been used to imply an acceptance of any theories regarding separate human races.

Nationality is protected as part of the protection against race discrimination under Section 9 Equality Act 2010. 'National origins' is broader than citizenship and can cover discrimination against the Scottish or English. However, immigration status does not amount to nationality or race and is not protected under the Equality Act 2010.¹³

Ethnic origin

The Equality Act 2010 includes 'ethnic or national origins' as part of its definition of race under Section 9. The RRO (Article 5(1) (NI) also includes the concept of ethnic or national

¹² Race Relations Act 1965, 08.11.1995, available at: www.legislation.gov.uk/ukpga/1965/73/contents/enacted.

¹³ Supreme Court, *Taiwo v Olaigbe*; *Onu v Akwivu* [2016] UKSC 31, available at: <https://www.supremecourt.uk/cases/docs/uksc-2014-0105-judgment.pdf>.

origins as part of its definition of race. The definition of ethnic origins was discussed in the landmark case *Mandla and another v Dowell Lee*,¹⁴ and summarised thus:

‘For a group to constitute an ethnic group in the sense of the 1976 Act [precursor to the Equality Act 2010], it must...regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community....’¹⁵

The definition of ethnic origins in UK legislation therefore complies with definitions of ethnicity provided by the CJEU in *CHEZ C-83/14*.

In *Chandhok v Tirkey*¹⁶ the Employment Appeal Tribunal accepted that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.¹⁷

b) Religion and belief

In NI FETO provides (Article 2) that “religious belief” in relation to discrimination or harassment ... includes any religion or similar philosophical belief’, further that ‘references to a person’s religious belief or political opinion include references to

- (1) His supposed religious belief or political opinion; and
- (2) The absence or supposed absence of any, or any particular, religious belief or political opinion.’

In GB the EqA provides (Section 10) that:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

‘Religion’ itself is not defined. The Government made clear in Parliament, in introducing the Employment Equality (Religion or Belief) Regulations 2003 (by which religious discrimination was first regulated), that it expected religion or belief to be defined in accordance with case law developed under Article 9 ECHR, to protect both the *forum internum* and *forum externum*. The UK approach to defining religion and belief would appear to accord with definitions used in the CJEU in *Achbita C-157/15*.

¹⁴ House of Lords, *Mandla v Dowell Lee* [1983] 2 AC 548 24.03.1982, available at: www.bailii.org/uk/cases/UKHL/1982/7.html.

¹⁵ Per Lord Fraser in *Mandla v Dowell Lee*.

¹⁶ Employment Appeal Tribunal, *Chandhok v Tirkey* [2015] IRLR 195 19.12.2014, available at: www.bailii.org/uk/cases/UKLAT/2014/0190_14_1912.html.

¹⁷ Section 9 EqA, as amended, had required the Government to introduce secondary legislation to make caste an aspect of race, thus making caste discrimination a form of race discrimination. Following the *Chandhok v Tirkey* case the Government repealed the amendment to the Equality Act 2010.

Courts and tribunals have adopted a very broad approach to what can constitute a 'belief': see for example the landmark case of *Grainger v Nicholson* in which the Employment Appeal Tribunal (EAT)¹⁸ accepted that the predecessor to the EqA protected any belief which (1) was genuinely held; (2) was a belief and not an opinion or viewpoint based on the present state of information available; (3) concerned a weighty and substantial aspect of human life and behaviour; (4) attained a certain level of cogency, seriousness, cohesion and importance; and (5) was worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.¹⁹ There the EAT accepted that the claimant's belief in man-made climate change and the environment was capable of falling within the concept of 'belief' notwithstanding the fact that the belief was free-standing, rather than being part of a philosophy of life. The EAT did not accept that support for a political party would be protected by the Regulations, some limitation being required on the concept of 'philosophical belief' to which the Regulations restricted protected beliefs and suggested that racist or other beliefs would be unprotected.

Subsequently, tribunals have accepted as 'philosophical beliefs' a strongly held belief in the sanctity of life, including opposition to fox hunting and hare-coursing;²⁰ and a belief that 'public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion'.²¹ Other tribunals have ruled that a belief that it was necessary to show respect to those who gave their lives by wearing a poppy was not a philosophical belief because it lacked the 'cogency, cohesion and importance' required by *Grainger*.²²

In *Arya v London Borough of Waltham Forest*, a tribunal rejected a claim for protection of anti-Semitic views on the basis that, although genuinely held, 'and affect[ing the claimant's] way of life and his view of the world' anti-Semitic (and racist) views were 'not worthy of respect in a democratic society' and were 'incompatible with human dignity'. They were, accordingly, not protected by the EqA.²³

In *Forstater v CGD Europe*, the Employment Appeal Tribunal (EAT) accepted a claim for protection for gender-critical beliefs, which include the belief that sex is immutable and should not be conflated with gender identity, and that trans women are not women. Forstater had alleged that she was discriminated against when her contract was not renewed following complaints from colleagues at work that her views, expressed on social media, were offensive and transphobic. At the preliminary hearing on whether her belief was protected, the Employment Tribunal (ET) had decided her belief was not protected under the Equality Act 2010, drawing particular attention to the fact that the beliefs were absolutist, and that it was a core component of the belief that she would refer to people by the sex she considered appropriate even if to do so were to violate individual dignity. The Employment Appeal Tribunal held that the belief was a protected belief. A belief should be excluded from protection only if it was the kind of belief akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) by virtue of Article 17 thereof. The EAT noted that the claimant's gender-critical beliefs were widely shared and did not seek to destroy the rights of trans persons. While the claimant's belief was offensive to some, it fell within the protection under Article 9(1) of the ECHR and therefore within the protection of the Equality Act 2010. The case was remitted to a freshly constituted tribunal to determine whether the treatment about which the claimant complained was because of or

¹⁸ To which cases go on appeal from employment tribunals in Great Britain.

¹⁹ Employment Appeal Tribunal [2010] IRLR 4, [2010] ICR 360 3.11.2009, available at: www.bailii.org/uk/cases/UKCAT/2009/0219_09_0311.html.

²⁰ Employment Tribunal, *Hashman v Milton Park (Dorset) Limited t/a Orchard Park*, 31.01.2011, Case No. ET/310555/2009, available at: [https://uk.practicallaw.thomsonreuters.com/0-505-1230?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-505-1230?transitionType=Default&contextData=(sc.Default)).

²¹ Employment Tribunal, *Maistry v BBC*, 29.03.2011, Case No. ET/1313142/2010 [2011] EqLR 549, available at: employment.practicallaw.com/6-505-6183.

²² Employment Tribunal, *Lisk v Shield Guardian Co and others*, 27.09.2011, Case No. 3300873/11 [2011] EqLR 1290, available at: employment.practicallaw.com/4-511-0992.

²³ Employment Tribunal 24.08.2013, Case No. 3200396/2011, [2013] EqLR 858.

related to her belief. It should be noted that the EAT took a different approach to the Employment Tribunal on one key issue, which led to the change of approach. The ET view had been that the claimant's beliefs would necessarily and always lead her to misgender trans people. However, the EAT referred to evidence which showed that the claimant would generally seek to be polite and respect their choice of pronoun, although she would not feel bound to do so in all circumstances. On this basis, the EAT was clear that it was determining only that the belief regarding gender identity was capable of meeting the statutory definition of belief. It was not determining that the claimant's manifestation of that belief through her activities on social media were necessarily protected. Indeed, the EAT was very clear that the decision does not mean that those with gender-critical beliefs can misgender trans persons with impunity; that trans people are protected against discrimination and harassment under the Equality Act; and that employers can continue to provide a safe environment for trans people.

Although the definition of religion or belief is thus not entirely clear, the EHRC's most recent review of the law on religion and belief discrimination concluded that there was no need for legislative reform, but that the definition of the protected characteristic of belief should continue to be clarified through case law.

c) Disability

The status protected by the EqA and, in NI, the DDA is that of being 'a disabled person', that is, 'a person who has a physical or mental impairment which has a substantial and long-term adverse effect on [the] ability to carry out normal day-to-day activities'.²⁴ 'Long-term' means lasting or likely to last at least 12 months, or for the rest of the person's life.²⁵ This definition covers physical, psychosocial and intellectual disabilities. Under DDA (for NI) an impairment is only taken to affect a person's ability to carry out normal day-to-day activities if it affects their mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or their perception of the risk of physical danger.²⁶ This list of capabilities has been removed in GB by the EqA, though the requirement for long-term substantial impairment of the ability to carry out normal day-to-day activities remains.²⁷

In 2021, in *Elliott v Dorset County Council*,²⁸ the Employment Appeal Tribunal confirmed that the term 'substantial' means 'more than minor or trivial'. If this statutory definition is met, on a consideration of the ordinary meaning of the words, that takes precedence over the Guidance and Code. The EAT confirmed that employment tribunals should consider whether the claimant is affected to a more than minor or trivial extent in carrying out day-to-day activities (which may include work activities) as a result of the impairment in comparison with what the situation would be if the claimant did not have the impairment.

The EqA covers progressive conditions from the time of the diagnosis of the condition, even while the person is able to carry out normal day-to-day activities if this is likely to result in an impairment at a later date. In addition to the above situations, the EqA and DDA cover a number of special conditions, including asymptomatic conditions, controlled or corrected conditions and severe disfigurement. A person who has cancer, HIV infection or multiple

²⁴ EqA s6, DDA s1(1). Note, however, the decision in Employment Appeal Tribunal, *Attridge Law v Coleman* (No.2), [2010] IRLR 10 30.10.2009, available at: www.bailii.org/uk/cases/UKCAT/2009/0071_09_3010.html, in which the EAT followed the decision of the CJEU in *Coleman v Attridge Law* Case C-303/06 and interpreted the DDA (now EqA) to apply to discrimination by association.

²⁵ DDA Sch 1, para 2.

²⁶ DDA Sch 1, para 4(1).

²⁷ Equality Act 2010 Schedule 1.

²⁸ Employment Appeal Tribunal, *Elliott v Dorset County Council*, 09.04.2021, UKEAT/0197/20/0904, available at: http://www.bailii.org/uk/cases/UKCAT/2021/0197_20_0904.html.

sclerosis is deemed to meet the definition of disability, effectively from the point of diagnosis.

The UK definitions differ from that adopted by the CJEU in Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring* in that they refer to hindrance in 'day-to-day activities' as distinct from 'professional activities' and do not make specific reference to the 'interaction with various barriers'. The UK approach, accordingly, appears less consistent with the social model of disability than is that of the CJEU. However, there are signs of some change in interpretation to align with the CJEU approach.²⁹ In *Banaszczyk v Booker*³⁰ the EAT interpreted day-to-day activity to include day-to-day activities of professional life, in accordance with the approach in *Ring*.³¹

d) Age

Neither the EqA nor the NI Age Regs define the term 'age', leaving it open to the courts and tribunals to define if necessary. Both provisions do define the term 'age group' as a 'group of persons defined by reference to age, whether by reference to a particular age or a range of ages': this may be important in indirect age discrimination claims.

e) Sexual orientation

The EqA defines 'sexual orientation' as 'a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex'. The SORs 2003 define 'sexual orientation' as 'a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex'. The definition of sexual orientation relates to the manifestation of that orientation in the form of sexual behaviour as well as to sexuality as such.

2.1.2 Multiple discrimination

In the UK, multiple discrimination is not explicitly prohibited in the law.

Express provision is made in the EqA which provides (Section 14) for the recognition of 'dual discrimination' in cases (involving direct discrimination alone) where 'because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics'. However, the provision has not come into force.

In the UK, the following case law deals with multiple discrimination, suggesting that judicial interpretation might allow for multiple discrimination cases to be heard. In *Hewage v Grampian Health Board* the Supreme Court accepted that a tribunal had been entitled to find that the claimant had been discriminated against on grounds of sex and race. The Supreme Court did not take issue with the fact that the claimant argued both race and sex discrimination and that the tribunal did not identify separate facts to support findings of race discrimination and sex discrimination.³²

There is no record of the combined nature of the discrimination having any impact on the level of the EUR 18 333 (GBP 15 000) damages awarded to the claimant in *Ministry of Defence v DeBique* in respect of injury to her feelings.³³

²⁹ *Paterson v Commissioner of Police for the Metropolis*, Employment Appeal Tribunal [2007] ICR 1522, [2007] IRLR 763 23.07.2007, available at: www.bailii.org/uk/cases/UKEAT/2007/0635_06_2307.html.

³⁰ Employment Appeal Tribunal [2016] UKEAT/0132/15/RN 01.02.2016, available at: www.bailii.org/uk/cases/UKEAT/2016/0132_15_0102.html.

³¹ Court of Justice of the EU, Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring* 11.04.2013.

³² Supreme Court [2012] UKSC 37, [2012] IRLR 870, [2012] EqLR 884 25.07.2012, available at: <https://www.supremecourt.uk/cases/uksc-2011-0050.html>.

³³ Employment Appeal Tribunal, *DeBique v Ministry of Defence (No.2)* 15.09.2011, UKEAT/0075/11/SM, available at: www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In GB discrimination based on a perception or assumption of a person's characteristics, is prohibited in national law:

- Section 13 EqA, which defines direct discrimination, refers to discrimination 'because of' a protected characteristic which is accepted as being sufficiently wide to encompass discrimination based on perceived or assumed characteristics. This is confirmed in the Explanatory Notes to the EqA (paragraph 59).³⁴
- In *Chief Constable of Norfolk v Coffey*³⁵ the claimant was rejected for a position due to the perception that her impaired hearing made her unsuitable, despite the fact that she had passed the hearing functionality test. The Court of Appeal upheld a finding of perception discrimination.
- In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*³⁶ a legal requirement on landlords to check the immigration status of tenants and potential tenants was found to be potentially discriminatory on the basis of tenants' actual or perceived nationality, because evidence showed that the risk of a penalty caused landlords to discriminate against those who did not have traditionally British-sounding names or did not appear ethnically British. The Court of Appeal held that this was potentially discriminatory on grounds of race but that any such effect was justified as the legal requirement was capable to being implemented in a proportionate way.³⁷

In NI discrimination based on perception or assumption of a person's race, sexual orientation, religious belief or political opinion or age is prohibited in national law:

- The definition of direct discrimination in the RRO (Article 3), FETO (Article 3) and SOR 2003 (Regulation 3), of less favourable treatment on the relevant grounds, is understood to extend to discrimination on the basis of assumed characteristics;
- The Age Regs expressly provide (Regulation 3) that the prohibition on less favourable treatment on grounds of the claimant's age (this being the definition of direct discrimination adopted by the Regs) 'includes [the claimant]'s apparent age'.

In NI discrimination based on perception or assumption of a person's disability does not appear to be prohibited in national law:

- The definition of direct discrimination in the DDA (Section 3A: less favourable treatment on grounds of the claimant's disability) is not generally understood to extend to discrimination on the basis of assumed characteristics.

b) Discrimination by association

In the GB, discrimination based on association with persons with particular characteristics, is prohibited in national law. National law is in line with the judgments in Cases C-303/06 *Coleman v Attridge Law and Steve Law* and C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*.

³⁴ <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/1>.

³⁵ *Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061, 21.06.19 available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2019/1061.html>.

³⁶ Court of Appeal [2020] EWCA Civ 542 available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2020/542.html>.

³⁷ The decision was a judicial review, relying on the non-discrimination provisions of the ECHR, as well as s149 Equality Act 2010.

Section 13 EqA, which defines direct discrimination, refers to discrimination 'because of' a protected characteristic which is accepted as being sufficiently wide to encompass discrimination based on association with persons with particular characteristics.

Discrimination by association only applies to direct discrimination. It does not extend to a duty to make reasonable adjustments. In *Hainsworth v Ministry of Defence*³⁸ the Court of Appeal rejected a claim that the employer had discriminated against the claimant by refusing to make reasonable adjustments to meet the disability-related needs of her daughter.

In NI discrimination based on association with persons with particular characteristics is not always prohibited in national law:

- The definition of direct discrimination in the RRO (Article 3), FETO (Article 3) and SOR 2003 (Regulation 3), of less favourable treatment on the relevant grounds, is understood to extend to discrimination based on association with persons with particular characteristics;
- The definition of direct discrimination in the DDA and the Age Regs (Section 3A and Regulation 3 respectively: less favourable treatment on grounds of the claimant's disability or age) does not on its face appear to extend to discrimination based on association with persons with particular characteristics but the Northern Irish courts are virtually certain to follow the approach of the EAT in *EBR Attridge Law LLP & Anor v Coleman (No.2)*³⁹ and interpret the relevant provisions of the DDA and NI Age Regs to cover discrimination by association.

Courts and equality bodies determine, by cross examination in the court proceedings, whether the discriminatory treatment was based on the victim's association with a third person or group.

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

a) Prohibition and definition of direct discrimination

In the UK, direct discrimination is prohibited in national law. It is defined.

GB

- Less favourable treatment 'because of a protected characteristic': Section 13 EqA:
 - o Section 23 EqA imposes an explicitly comparative approach except in the case of pregnancy (where the requirement is for unfavourable rather than less favourable treatment);⁴⁰
 - o In the case of age it is capable of justification;
 - o In the case of disability it protects only those with disabilities (or who associate with people with disabilities);⁴¹
 - o In the case of race it explicitly applies to segregation;
 - o In the case of disability the comparison is between the disabled person and a real or hypothetical comparator with 'the same abilities'.

NI

- The RRO, FETO SOR 2003 and SOR 2006 (Article 3, Article 3, Regulation 3 and Regulation 3) define direct discrimination as less favourable treatment 'on [the relevant] grounds'. The legal provisions are materially identical to the EqA (above);⁴²

³⁸ Court of Appeal [2014] EWCA Civ 763, available at:

<https://www.bailii.org/ew/cases/EWCA/Civ/2014/763.html>.

³⁹ Employment Appeal Tribunal [2010] IRLR 10 30.10.2009, available at:

www.bailii.org/uk/cases/UKLAT/2009/0071_09_3010.html.

⁴⁰ A hypothetical comparator is acceptable.

⁴¹ And in GB, those assumed to be disabled – this would require judicial interpretation based on the requirements of EU law.

⁴² The equivalents of s23 EqA are RRO 3(1c); FETO art. 3(3); and reg.3(2) SOR.

- The Age Regs and the DDA (Regulation 3 and Section 3A) define direct discrimination as less favourable treatment on grounds of the claimant's age or disability.

b) Justification for direct discrimination

The only form of direct discrimination which can be justified in the UK is age discrimination.⁴³

The 2018 Supreme Court decision in *Lee v Ashers & Ors*⁴⁴ decided that a baker could not refuse to provide a cake bearing a message supporting gay marriage to a claimant because he was a gay man, as this would be directly discriminatory. However, on the facts, this had not been the reason for the refusal to supply the cake. Instead, the refusal was because of the political opinion expressed on the cake. The Supreme Court held that whilst the refusal may have been because of political opinion, a ground of discrimination protected in FETO, the baker could not be compelled to supply the cake, unless the resulting interference with the baker's freedom of expression could be justified. This reasoning was the result of reading FETO to comply with the requirements in the Human Rights Act 1998 to interpret domestic legislation as far as possible to comply with the European Convention on Human Rights.

In reaching this conclusion, the Supreme Court was arguably accepting that direct discrimination under FETO may be capable of justification where necessary to uphold freedom of expression or freedom of religion, although it did not directly state that freedom of religion is a ground of justification for direct discrimination. Although the protection for political opinion in the provision of goods and services contained in FETO is beyond the scope of the 2000 directives, the reasoning could potentially be applied to other grounds and other contexts which are covered by the directives, allowing for the possibility of direct discrimination being justified where necessary to uphold human rights protections.⁴⁵

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

a) Prohibition and definition of indirect discrimination

In the UK, indirect discrimination is prohibited in national law. It is defined.

GB

- Section 19 EqA defines indirect discrimination as the application to the claimant of a provision, criterion or practice which is also applied to others but which places the claimant, and places or would place others with whom s/he shares a protected characteristic, at a particular disadvantage by comparison with those who do not share the characteristic, and which cannot be shown to be a proportionate means of achieving a legitimate aim.

NI

- Materially identical definitions apply in Northern Ireland to age and sexual orientation and, insofar as it overlaps with EU law, race and religion/ belief discrimination (respectively Regulation 3 each of the NI Age Regs and SOR 2003, Article 3 each of RRO and FETO);
- Indirect disability discrimination is not regulated in NI (although duties of reasonable adjustment apply);

⁴³ Section 13(2) Equality Act 2010.

⁴⁴ Supreme Court [2018] UKSC 49 18.10.2018, available at: www.bailii.org/uk/cases/UKSC/2018/49.html. See further in Section 12.2 below.

⁴⁵ After the cut-off date for this report, on 6 January 2022 the European Court of Human Rights declared application in the case of *Lee v. the United Kingdom* (application no. 18860/19) inadmissible, because the applicant had not invoked his Convention rights at any point in the domestic proceedings.

- Discrimination other than that falling within EU law (nationality or colour-related discrimination, for example, or race discrimination in the coercive function of the state, or religion/ belief discrimination other than in the context of employment/ occupation) falls to be considered according to an older definition which (RRO, Article 3(1)(b)) defines indirect discrimination as the application to the claimant of a requirement or condition which is also applied to others, but with which a considerably smaller proportion of the claimant's racial or religious group than of others can comply, with which the claimant cannot comply, to his or her detriment, and which cannot be shown to be justifiable irrespective of the race/ religion or belief of the claimant.

b) Justification test for indirect discrimination

The test for indirect discrimination falling within EU law is whether the application of the provision, criterion or practice is shown (by the person(s) applying it) to be a proportionate means of achieving a legitimate aim (Section 19 RRA, Regulation 3 each of the NI Age Regs and SOR 2003 and Article 3 each of RRO and FETO). This is compatible with the directives.

2.3.1 Statistical evidence

a) Legal framework

In the UK, there is legislation regulating the collection of personal data. The Data Protection Act 2018 implements and complies with the EU General Data Protection Regulation. It limits the processing of sensitive data. In accordance with section 35 of the Act and the GDPR, sensitive processing includes the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, data concerning health and data concerning an individual's sexual orientation. However, exceptions apply to the collection and processing of sensitive data for the monitoring of equality between persons with different racial or ethnic origins, different religious or philosophical beliefs, differing physical or mental health conditions or between persons of different sexual orientation. Processing does not meet this condition if it is carried out for the purposes of measures or decisions with respect to the particular data subject unless the data subject has consented. Processing also does not meet this condition if it is likely to cause substantial damage or distress to the data subject. An individual can give notice in writing to the controller requiring the controller to cease processing his or her data and the processor must cease processing within a reasonable period.⁴⁶

The collection and publication of statistics by public authorities is sometimes required by law. In Northern Ireland FETO imposes a positive duty on employers with a workforce of ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce. Such employers must monitor the 'community composition' of their workforce annually and review their recruitment, promotion and training practices every three years. This obligation falls within Article 6(1)(c) of GDPR (processing necessary for compliance with legal obligations).

In GB, there is a general statutory duty upon public authorities to eliminate unlawful discrimination related to sex, gender reassignment, pregnancy and maternity, race, disability, age, religion or belief and sexual orientation and to promote equality of opportunity related to each of these 'protected characteristics' (Section 149 EqA). In NI, Section 75 of the Northern Ireland Act 1998 imposes a duty on specified public authorities to have 'due regard to the need to promote equality of opportunity' across all the equality grounds. This can require the collection of data, including data on religious belief, age, disability and the other equality grounds.

⁴⁶ Data Protection Act 2018, date of adoption: 23.05.2018; entry into force: 23.05.2018. Schedule 1 part 2 para 8.

As part of giving effect to these duties, public authorities are often required to monitor the composition of their workforce and the relevant pools of service users. How authorities collect statistics and data may vary from ground to ground, however. These statutory obligations fall within Article 6(1) of GDPR which allows for processing necessary for compliance with legal obligations and processing necessary for the performance of a task carried out in the public interest or processing necessary for the purposes of the legitimate interests of the data controller.

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

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

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

In the UK statistical evidence may be admitted under national law in order to establish indirect discrimination. In *West Midlands Passenger Transport Executive v Singh*, the Court of Appeal set the legal precedent with guidance as to the use of statistics in race discrimination cases.⁴⁷ The use of statistical evidence follows the general admissibility requirements for such evidence. Statistical evidence is not conclusive and definite proof by itself but, in the absence of a satisfactory explanation of clear-cut statistical disadvantage, an inference of discrimination can be established depending upon the circumstances.

b) Practice

In the UK, statistical evidence is used in practice in order to establish indirect discrimination. The use of statistical evidence is common, especially in race and gender cases where its utility may be greatest. There are no real obstacles to the use of statistical evidence in the courts, if the evidence is probative and relevant. For example, in *Essop and others v Home Office (UK Border Agency)*⁴⁸ potential indirect discrimination was evidenced through the use of statistics showing that the success rate of Black and Minority Ethnic (BME) candidates in a core skills assessment (CSA) was 40.3 % that of White candidates and that of candidates aged 35 or over was 37.4 % that of younger candidates. The Supreme Court ruled the claimants did not have to point to the reason why the CSA had disadvantaged them as BME and older candidates. It was sufficient to show that a provision, criterion or practice causes the disadvantage suffered by the group and the individual claimant.

However, of course, in practice there can be circumstances where lawyers or applicants face difficulty in finding relevant statistical evidence.

⁴⁷ Court of Appeal [1988] ICR 614 18.03.1988.

⁴⁸ Supreme Court [2017] UKSC 27 5.04.2017 www.bailii.org/uk/cases/UKSC/2017/27.html.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In the UK, harassment is prohibited in national law. It is defined. The full material scope of the directives is covered. Harassment is defined (so far as relevant) as unwanted conduct related to a relevant protected characteristic the purpose or effect of which is to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him or her.⁴⁹ Section 26 EqA, which applies in GB, further provides that, in deciding whether conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, account must be taken of:

- the perception of the claimant;
- the other circumstances of the case;
- whether it is reasonable for the conduct to have that effect.

A similar definition of harassment applies in Northern Ireland under the RRO, DDA, FETO, SOR 2003, SOR 2006 and Age Regs,⁵⁰ insofar as the conduct falls within the scope of EU law. NI legislation uses the term 'on grounds of' rather than 'related to' but in *English v Thomas Sanderson Blinds Ltd* the Court of Appeal accepted that the subjection of a man who was not gay, and who was known by his harassers not to be gay, to homophobic abuse, amounted to harassment 'on the grounds of' the applicant's sexual orientation.⁵¹

In the UK, harassment does not explicitly constitute a form of discrimination, but it is regulated as a separate form of prohibited conduct in respect of which the same rules concerning burden of proof apply and the same remedies are available.⁵²

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in the UK both the employer and the employee will usually be liable, vicarious liability being established under all domestic provisions subject to an 'all reasonable steps' defence available to the employer. Domestic legislation also renders offending employees liable for having assisted their employer.⁵³

Until its amendment in 2013 the EqA provided (Section 40(2) & (3)) that employers are liable for harassment by third parties where they 'know[] that [the worker] has been harassed in the course of [his or her] employment on at least two other occasions by a third party ... whether the third party is the same or a different person on each occasion', and 'failed to take such steps as would have been reasonably practicable to prevent the third party from doing so'. This provision was repealed in 2013 as the Coalition Government regarded it as an unnecessary 'burden on business'. Therefore, liability is no longer imposed on employers for harassment by third parties. Although it had been suggested that employers could remain liable under direct discrimination provisions of the Equality Act 2010, it was confirmed that this is not the case in *Unite the Union v Nailard*.⁵⁴ Here the Court of Appeal confirmed that the Equality Act does not cover liability for third party

⁴⁹ Equality Act 2010 (EqA), S26; Race Relations (NI) Order 1997 (RRO), Art 3; Disability Discrimination Act 1995 (DDA), s3B; Fair Employment and Treatment Order 1998 (FETO), Art 3A; Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR 2003), reg 6; and Employment Equality (Age) Regulations (NI) 2006 (Age Regs), reg 5.

⁵⁰ Art 4A, s3B, Art 3A, reg 5, reg 3 and reg 6 of the RRO, DDA, FETO, SOR 2003, SOR 2006 and Age Regs respectively.

⁵¹ Court of Appeal [2008] EWCA Civ 1421 [2009] IRLR 206 19.12.2008. See also Employment Appeal, *Austin v Samuel Grant (North East) Ltd*, [2012], Case no 25039956/11, EqLR 617 29.03.2012.

⁵² S26 EqA, Arts 32 & 33 RRO, ss57&58 DDA, Arts 35 & 36 FETO, regs 26 & 27 Age Regs and reg 5 SOR 2003. It is the author's view that, for this reason, no question of (non)compatibility with the directives arises.

⁵³ Ss109 & 110 EqA, Art 3 RRO, s3B DDA, Art 3A FETO, reg 6 Age Regs and regs 25 & 25 SOR 2003.

⁵⁴ *Unite the Union v Nailard* [2018] EWCA Civ 1203 24.05.2018, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1203.html>.

harassment and that the employer can only be liable if their actions and omissions in not addressing the third-party harassment were themselves motivated by the claimant's sex.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In the UK, instructions to discriminate are prohibited in national law and the material scope of the directives is covered. Instructions are not defined. Section 111 EqA, which applies in GB, prohibits the causing or inducement of discrimination as well as the issue of instructions to discriminate. The position in NI is similar.⁵⁵

In the UK, instructions do not explicitly constitute a form of discrimination, though issuing instructions to A to discriminate against B may amount to direct discrimination against A (the courts having recognised that such an instruction may involve a detriment to A and that the detriment is 'on grounds of' or 'because of' the relevant characteristic: *Weathersfield Ltd v Sargent*).⁵⁶

b) Scope of liability for instructions to discriminate

In the UK, the instructor is liable for issuing the instruction to discriminate and the discriminator is liable if s/he acts on the instruction.⁵⁷

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

a) Implementation of the duty to provide reasonable accommodation for persons with disabilities in the area of employment

In the UK, the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law and is defined, although it is termed the duty to make reasonable adjustments. The terms reasonable adjustment and reasonable accommodation are used interchangeably in this report. It is defined in GB by Section 20 EqA and in NI by Section 4A DDA.

The duty applies in UK (in the context of employment/occupation) where 'a provision, criterion or practice' or 'a physical feature' or the lack of an 'auxiliary aid' 'puts a disabled person at a substantial disadvantage ... in comparison with persons who are not disabled'. The duty is a duty 'to take such steps as it is reasonable to have to take' to avoid the disadvantage or to provide the auxiliary aid.⁵⁸

The term 'reasonable' is not defined in legislation, although case law provides some guidance; and cases suggest that an adjustment will not be 'reasonable' if it amounts to a disproportionate burden on the employer. The EqA does not use or define the concept of 'disproportionate burden' but the question of whether any particular adjustment is 'reasonable' involves, in essence, the determination of this question. The EHRC guidance provides examples such as allowing a person with a disability to work flexible hours to enable them to have additional breaks to overcome fatigue arising from their disability; and providing special equipment, such as an adapted keyboard for someone with arthritis.

⁵⁵ Art 30 RRO, s 16C DDA, Art 35 FETO, reg 5 Age Regs and reg 21 SOR 2006.

⁵⁶ Court of Appeal, *Weathersfield Limited t/a Van & Truck Rentals v Sargent* [1998] EWCA Civ 1938.

⁵⁷ Ss109 & 110 EqA, Art 3 RRO, s3B DDA, Art 3A FETO, reg 6 Age Regs and regs 25 & 25 SOR 2003.

⁵⁸ S20 EqA, s4A DDA.

The Employment Statutory Code states that the availability of financial assistance from the state (such as an Access to Work grant) can be taken into account in assessing whether an adjustment is reasonable/whether there is a disproportionate burden on the employer.⁵⁹

b) Case law

It is likely that a failure to comply with general guidelines (such as those provided by the Equality and Human Rights Commission⁶⁰ and the Advisory, Conciliation and Arbitration Service),⁶¹ accessibility or building regulations would be relevant and that it would be difficult for an employer to argue that a disproportionate burden exists if they have not complied with relevant regulations and guidelines.

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

The EqA contains no examples of the types of steps an employer may take to comply with the reasonable adjustment duty. However, some guidance is available in the case law and some recent examples are provided below.

In *United First Partners Research v Carreras*⁶² the term 'provision, criterion or practice' (PCP) in the definition of reasonable adjustments did not mean that there must be a 'requirement' imposed, but only a strong form of request. Where a claimant was expected to work long hours by a pattern of repeated requests, creating pressure on him to agree, this could amount to a PCP.

In the UK case law is used to provide guidance on how to interpret when an accommodation or adjustment is reasonable. In the landmark case of *Archibald v Fife CC*⁶³ the House of Lords decided that the obligation to make reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a person with a disability. In 2016 in *G4S Cash Solutions (UK) Ltd v Powell*⁶⁴ the Employment Appeal Tribunal confirmed that the duty of reasonable adjustment could include continued payment at a higher rate for work usually paid at a lower rate. The Claimant had become disabled through a back injury and was moved to a new role which was usually paid at a lower rate. His pay was reduced. The Employment Appeal Tribunal found that a reasonable adjustment would be to continue to pay at the higher rate. In 2017, in *Home Office (UKVI) v Kuranchie*,⁶⁵ the Employment Appeal Tribunal considered that an employer had failed to make reasonable adjustments for an employee's dyslexia and dyspraxia by failing to reduce her workload, even though she had not herself suggested such an adjustment at the time.

⁵⁹ See: <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>, paras 6.28 and 6.36.

⁶⁰ See: <https://www.equalityhumanrights.com/en/multipage-guide/reasonable-adjustments-practice>.

⁶¹ See: <https://www.acas.org.uk/reasonable-adjustments>.

⁶² Court of Appeal, [2018] EWCA Civ 323. See Section 12.2 below.

⁶³ House of Lords [2004] UKHL 32, [2004] ICR 954; [2004] IRLR 651 01.07.2004, available at: www.bailii.org/uk/cases/UKHL/2004/32.html.

⁶⁴ Employment Appeal Tribunal Appeal No. UKEAT/0243/15/RN. 26.08.2016, available at: www.bailii.org/uk/cases/UKEAT/2016/0243_15_2608.html.

⁶⁵ Employment Appeal Tribunal [2017] UKEAT/0202/16/BA 19.01.2017, available at: www.bailii.org/uk/cases/UKEAT/2017/0202_16_1901.html.

In 2020, in *Hill v Lloyds Bank Plc*⁶⁶ the Employment Appeal Tribunal held that it would have been a reasonable adjustment to ensure that an employee with a disability linked to mental health would not be required to work with two colleagues who she claimed had bullied and harassed her and that, if this were not possible, a severance package should be offered. This was despite the fact that the employer did not have a practice of giving such undertakings.

These cases confirm that tribunals take a fairly expansive view on what the duty of reasonable accommodation can entail, and that they allow for workers with disabilities to be treated more favourably than other workers. In the view of the author the interpretation of the duty is in line with EU law.

The EqA contains no direct guidance on how to determine reasonableness, relying only on case law. However, NI is governed by the DDA which sets out a list of factors which should be considered in determining whether in the particular circumstances it is reasonable for the employer to have to make a particular adjustment. The factors Section 18B(1) DDA lists can be summarised in general as follows:

- Effectiveness in preventing the particular disadvantage;
- Practicability;
- Financial and other costs which would be incurred and extent of any disruption caused;
- The employer's financial or other resources;
- The availability to the employer of financial or other assistance;
- Increased risk to the health and safety of any person;
- The nature of the employer's activities and size of its undertaking.

c) Definition of disability and non-discrimination protection

The definition of disability for the purposes of claiming a reasonable accommodation does not differ from the definition for claiming protection from discrimination in general (EqA Section 6, DDA Section 1(1), see Section 2.1.1 above).

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In the UK, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination. There is no justification defence for a failure to make reasonable adjustment in GB or, in the context of employment/ occupation, in NI. However, although there is no formal justification defence, where a failure to adjust can be justified it will be unlikely that the adjustment will be 'reasonable'; moreover, an adjustment will not be 'reasonable' if it amounts to a disproportionate burden on the employer. In NI a failure to make reasonable accommodation may be justified in relation to a matter falling outside the scope of Directive 2000/78/EC.⁶⁷

The potential sanction for failure to meet the duty is financial compensation and/or a recommendation that the employer takes particular steps to obviate the impact of the discrimination on the individual. Under Section 136 Equality Act and Section 17 (1C) DDA, once a claimant has established sufficient facts, which in the absence of any other explanation point to a breach of the Act having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. This provision

⁶⁶ Employment Appeal Tribunal [2020] UKEAT/0173/19/LA & UKEAT/0233/19/LA, available at: www.bailii.org/uk/cases/UKEAT/2020/0173_19_0603.html.

⁶⁷ For example, provision of goods and services, DDA ss20. The types of interest that may justify a failure to adjust are likely to be the same as those which would make an adjustment unreasonable, so there is no practical difference in terms of the obligation or limits on the obligation.

applies to discrimination under the Equality Act, including discrimination by failure to make a reasonable adjustment.⁶⁸

- e) Duties to provide reasonable accommodation in areas other than employment for persons with disabilities

In the UK, there is a legal duty to provide reasonable accommodation for persons with disabilities outside the employment field. The duties of reasonable adjustment found in Section 20 EqA and (in NI) Section 4A DDA apply not only to employment but also to education, housing, membership organisations, the provision of goods, facilities and services and the functions of public authorities. As the duty is owed to persons with disabilities generally, it is, in relation to the duty outside of employment, an anticipatory duty. This means that public and private organisations need to think about and make reasonable adjustments in advance, and not as individual cases arise. As above, there is no definition of 'disproportionate burden' in the EqA or the DDA but the question whether an adjustment is 'reasonable' requires an objective analysis by the court/ tribunal. What is a reasonable adjustment in any particular case is a fact-sensitive question but what is reasonable in the case of an existing employee is likely to be different from what is reasonable in relation (for example) to a casual shopper?

- f) Duties to provide reasonable accommodation in respect of other grounds

In the UK, there is no legal duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

In some cases, however, a failure to make reasonable accommodation of the needs of minority groups (Gypsies/ Travellers, for example, or religious minorities) may amount to a breach of the prohibition on indirect discrimination. The issue was discussed in the case of *Bull & Anor v Hall & Anor*.⁶⁹ The case involved the refusal to honour the booking of a double room by a same-sex couple on the basis that such rooms were reserved for married couples only. At the time of the case, only heterosexual couples could marry. At the Supreme Court, a number of issues were discussed including the scope of direct and indirect discrimination on grounds of sexual orientation, and the Court concluded that denying civil partners a service because they were unmarried (and were unable to marry as same-sex marriages were not legally recognised at the time) amounted to direct discrimination. In further comments relating to the role of the right to freedom of religion in the consideration of the case, the Supreme Court suggested that the scope for reasonable accommodation could be part of the proportionality assessment in an indirect discrimination claim,⁷⁰ at least in some cases. It is possible that the same approach might be taken in relation to a failure to make reasonable accommodation for other protected characteristics.

Although there is no legislation providing a duty to make accommodation for other characteristics, guidance for employers from both the Advisory, Conciliation and Arbitration Service (ACAS) (see Section 6.1) and the Equality and Human Rights Commission (EHRC) (see Section 7) suggests that it is good practice to accommodate requests for time off for religious observance where possible.⁷¹

⁶⁸ Though in NI only in relation to discrimination in the context of employment/ occupation – s136 EqA, s17(1C) DDA.

⁶⁹ See, for example, Supreme Court, *Bull & Anor v Hall & Anor* [2013] UKSC 73, 27.11.2013, available at: www.bailii.org/uk/cases/UKSC/2013/73.html, at para 47.

⁷⁰ Equality Act s.19; Art 3 RRO; Art 3 FETO; Reg 3 Age Regs; Reg 3 SOR 2003.

⁷¹ These guidelines apply to all religions and beliefs.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In the UK, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.⁷²

The protection of the directives applies to people on grounds of nationality but does not cover irregular migration status. Discrimination against irregular migrants on other grounds such as race would be covered.

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

a) Protection against discrimination

In the UK, the personal scope of anti-discrimination law generally covers legal and natural persons for the purpose of protection against discrimination.⁷³ In relation to legal persons in GB, the Equality Act it has been confirmed that companies are protected as legal persons for all grounds apart from disability.⁷⁴ For NI, judicial interpretation would be required for legal persons for all categories apart from disability.⁷⁵

In the case of disability discrimination, although there is no express exclusion of legal persons from protection against disability discrimination, protection under the EqA and (in NI) the DDA is provided to 'a disabled person', which, on the basis of the statutory definition, will always be a natural person.

b) Liability for discrimination

In the UK, the personal scope of anti-discrimination law covers all natural and legal persons for the purpose of liability for discrimination.⁷⁶

There has never been any doubt that the discriminator, as employer, provider of goods and services, provider of education or training, etc. may be a natural or a legal person though it is not spelled out explicitly in the legislation (and would not be expected to be expressly provided).

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In the UK, the personal scope of national law covers the private and public sectors including public bodies for the purpose of protection against discrimination. There is no relevant legal

⁷² *Hounga v Allen and another* [2014] UKSC 47 confirms that protection against discrimination covers those with irregular or undocumented migration status.

⁷³ GB: Equality Act 2010 throughout. NI Disability Discrimination Act 1995; Race Relations (NI) Order 1997; Fair Employment and Treatment Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Employment Equality (Sexual Orientation) Regulations (NI) 2003 throughout.

⁷⁴ Employment Appeal Tribunal, *EAD Solicitors LLP and Ors v Abrams* UKEAT/0054/15/DM, 05.06.2015, available at: www.bailii.org/uk/cases/UKEAT/2015/0054_15_0506.html. For disability the definition of disability refers to the person with a disability and so can only apply to natural persons.

⁷⁵ For disability, the definition of disability refers to the person with a disability and so can only apply to natural persons.

⁷⁶ GB: Equality Act 2010 throughout. NI Disability Discrimination Act 1995; Race Relations (NI) Order 1997; Fair Employment and Treatment Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Employment Equality (Sexual Orientation) Regulations (NI) 2003 throughout.

distinction between the two, so the legislation applies to both. National law complies with the directives in this regard.⁷⁷

b) Liability for discrimination

In the UK, the personal scope of anti-discrimination law covers the private and public sectors including public bodies for the purpose of liability for discrimination.⁷⁸

3.2 Material scope

3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In the UK, national legislation⁷⁹ prohibits discrimination in relation to conditions for access to employment, or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds and in both the private and public sectors as described in the directives, with the following exceptions:

- a) Conditions for access to self-employment are currently not settled, as UK anti-discrimination legislation covers some, but not all, forms of self-employment. In the landmark case of *Jivraj v Hashwani* the Supreme Court ruled that the arbitrators concerned were not 'employed' for the purposes of the anti-discrimination provisions⁸⁰ and, more significantly, that the prohibition of employment 'under a contract personally to do work' did not cover independent providers of services who were not in a relationship of subordination with the person who received the services. The extent to which domestic law protects self-employment is uncertain following *Jivraj* except where (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such people are expressly covered by the legislation. However, other workers who are not employees but who have a contract personally to do work are covered by the Equality Act 2010. This was confirmed by the Supreme Court in 2018 in *Pimlico Plumbers v Smith*, where a plumbing and heating engineer was able to make a discrimination claim even though his contractual status was unclear, his contract containing some terms that suggested employment status and some which suggested self-employed status. This entitled the Employment Tribunal to conclude that the claimant was protected under the Equality Act 2010.⁸¹ This outcome was confirmed in the 2021 case of *Uber BV v Aslam*.⁸² Uber provides a private hire vehicle booking services in the UK whereby journeys are booked through a smartphone app, which connects passengers to drivers. The respondents were drivers who were users of that app, and their case was brought as a test case to

⁷⁷ GB: Equality Act 2010 throughout. NI Disability Discrimination Act 1995; Race Relations (NI) Order 1997; Fair Employment and Treatment Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Employment Equality (Sexual Orientation) Regulations (NI) 2003 throughout.

⁷⁸ GB: Equality Act 2010 throughout. NI Disability Discrimination Act 1995; Race Relations (NI) Order 1997; Fair Employment and Treatment Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Employment Equality (Sexual Orientation) Regulations (NI) 2003 throughout.

⁷⁹ Equality Act 2010 (EqA), ss39-56, 58-59; Disability Discrimination Act 1995 (DDA), ss4-12, 14A-14D, 15A-15C; Race Relations (NI) Order 1997 (RRO), Arts 6-7, 9, 11-12, 15-17, 26; Fair Employment and Treatment Order 1998 (FETO), Arts 19-24A, 26, 32; Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR), regs 6-7, 9, 12-16, 20-21; Employment Equality (Age) Regulations (NI) 2006 (Age Regs), regs 7-8, 10, 13-18, 22-23.

⁸⁰ Supreme Court [2011] UKSC 40, [2012] 1 All ER 629, [2011] IRLR 827, 27.07.2011, available at: <https://www.supremecourt.uk/cases/uksc-2010-0158.html>.

⁸¹ Equality Act 2010, S 83 (2). *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, available at: <https://www.bailii.org/uk/cases/UKSC/2018/29.html>. See Section 12.2 where the case is discussed further.

⁸² Supreme Court [2021] UKSC 5, 19.2. 2021, available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>.

establish their employment status. The Supreme Court found unanimously that the drivers were 'workers' for the purposes of the protective legislation.

- b) Discrimination in access, selection criteria, recruitment conditions and promotion in relation to voluntary work falls outside the anti-discrimination legislation with the effect that the material scope of UK law may not fully reflect that of the directives in every respect.⁸³
- c) Anti-discrimination legislation prohibits discrimination in access to employment, self-employment, selection criteria, recruitment conditions and promotion on grounds of nationality, but does not cover irregular migration status. Under Sections 34 and 35 Immigration Act 2016 it is illegal to work while disqualified by reason of immigration status and illegal to employ a person who is so disqualified. Irregular migration status is not protected by the directives. Moreover, it does not amount to discrimination on grounds of race⁸⁴ and so any discrimination in relation to employment on the basis of immigration status does not amount to non-compliance with the directives. However, the threat of serious penalties for non-compliance means that employers may be discouraged from employing anyone who they suspect may not have full status to work and this can result in indirect discrimination on grounds of ethnicity or nationality.

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

In the UK, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment.⁸⁵

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

In the UK, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.⁸⁶

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

In the UK, national legislation prohibits discrimination in relation to membership of, and involvement in, workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.⁸⁷

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

In the UK, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive.⁸⁸

⁸³ Supreme Court, *X v Mid-Sussex Citizens Advice Bureau* [2013] UKSC 59, [2013] IRLR 146, [2013] ICR 249, 12.12.2012, available at: www.bailii.org/uk/cases/UKSC/2012/59.html.

⁸⁴ Supreme Court, *Taiwo v Olaigbe*; *Onu v Akwivu* [2016] UKSC 31, available at: <https://www.supremecourt.uk/cases/docs/uksc-2014-0105-judgment.pdf>.

⁸⁵ EqA ss39-52, 61-63; DDA ss4-12, 15A-15C, 17-18; RRO Arts 6-7, 9, 11-12, 17, 26; FETO Arts 19-24A, 25A, 26, 32; SOR 2003 regs 6-7, 9, 11-16; Age Regs reg 7-8, 10, 13-18.

⁸⁶ EqA ss53-54, 90-97; DDA ss14A-14D; RRO Arts 14-15, 18; FETO Arts 24-25; SOR 2003 regs 18-22; Age Regs 20-24.

⁸⁷ EqA s57; DDA ss13-14; RRO Art 13; FETO Art 23; SOR 2003 regs 17; Age Regs reg 19.

⁸⁸ EqA s29; DDA s19, 21B; RRO Arts 20, 20A; FETO Art 28; SOR 2006 regs 5,12.

Although 'social protection' is not defined in UK law the EqA prohibits discrimination on all the grounds by public or private sector organisations in the provision of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include any publicly provided social protection as well as social security and publicly provided healthcare and the provision of social housing (see also Section 3.2.10). There are extensive exceptions in the case of the prohibition on age discrimination which does not in this context protect those under 18.⁸⁹

In Northern Ireland, the RRO⁹⁰ prohibits discrimination in the functions of public authorities that consist of the provision of any form of social security, healthcare and any other form of social protection. The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include healthcare, and prohibits discrimination on the grounds of disability in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including healthcare, as well as social security.⁹¹ FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public.⁹² Healthcare would be included, but it is unlikely that all forms of social protection and social security including inequality in levels of state benefits would be wholly within FETO. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SOR 2006) prohibit discrimination on the ground of sexual orientation in the performance of public functions, again covering social protection including healthcare and social security.⁹³ Age discrimination is not regulated in NI outside the scope of Directive 2000/78/EC.

The various positive duties imposed upon British and NI public authorities discussed at 2.3.1 above require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social protection.

a) Article 3(3) exception (Directive 2000/78)

Although the exception could be relied on, to the best of the author's knowledge this does not cause problems. It should be noted that in Northern Ireland age discrimination in this context is not regulated.⁹⁴

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

In the UK, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive though judicial interpretation is required as none of the legislation makes explicit reference to social advantages.⁹⁵

The EqA, which covers all five grounds in GB, prohibits discrimination in the provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include much of what might be regarded as 'social advantages'. There are exceptions in the case of the prohibition on age discrimination which does not in this context protect those under 18.⁹⁶

⁸⁹ EqA S28 (1)(a).

⁹⁰ RRO Art 20A.

⁹¹ DDA Ss19, 21B.

⁹² FETO Art 28.

⁹³ SOR 2006 Regs 5, 12.

⁹⁴ EqA s29; DDA ss29, 59; RRO Arts 20, 20A & 40; FETO Arts 28, 78; SOR 2006 regs 5,12 & 49.

⁹⁵ EqA s29; DDA ss19, 21B; RRO 20, 20A; FETO Art 28; SOR 2006 regs 5,12.

⁹⁶ EqA S28 (1)(a).

In Northern Ireland, the RRO⁹⁷ prohibits discrimination by public authorities in providing any form of social advantage (Article 20A). The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include healthcare, and prohibits discrimination on the grounds of disability in the exercise of public functions by public authorities, which would include much of what might be regarded as 'social advantages'.

FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public and the SOR 2006 prohibit discrimination on the ground of sexual orientation in the performance of public functions. Both should catch at least some areas of 'social advantages'. Age discrimination is not regulated in NI outside the scope of Directive 2000/78/EC.

The various positive duties imposed upon GB and NI public authorities referred to at 2.3.1 above require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social advantages. UK law does not, however, contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the CJEU.

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

In the UK, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive.⁹⁸

Both the EqA and (in NI) the RRO prohibit discrimination and segregation across their scope of application, so segregation in schools between people of different racial or ethnic groups would be unlawful, including segregation of Traveller or Roma children. Despite this, concerns persist as to the concentration of ethnic minority students in particular schools, which reflect wider issues of divided communities and social segregation,⁹⁹ and at times a tendency for white families to avoid schools which are seen to contain few white pupils. Further, state funding is provided for schools which select their pupils by religious adherence, which has implications for racial diversity in intake. While various initiatives exist at local level which attempt to deal with this problem, this produces at times a pattern of segregation: however, studies have shown that the national situation is complex and it is difficult to make generalisations in this area.¹⁰⁰

The EqA regulates discrimination on grounds of religion in education in GB but there is no equivalent provision in NI except in relation to further and higher education. The EqA does not prohibit harassment in education related to religion or belief, though such harassment will amount to direct discrimination where it amounts to *less favourable treatment* because of religion or belief.¹⁰¹ The EqA contains an extensive series of exceptions to prohibitions on religious discrimination in education designed to protect the status of public state-funded denominational schools and private schools with a particular religious ethos. None have as yet given rise to legal issues involving segregation. Segregation of Catholic and

⁹⁷ Article 20A RRO.

⁹⁸ EqA ss84-99; The Special Educational Needs and Disability (Northern Ireland) Order 2005, Art 14-16;; RRO Arts 18-20; FETO Art 27; SOR 2006 regs 9-11.

⁹⁹ See the study carried out by the iCoCo Foundation, School Dash and The Challenge *UNDERSTANDING SCHOOL SEGREGATION IN ENGLAND: 2011 TO 2016* available at: <https://the-challenge.org/uploads/documents/TCN-Understanding-School-Segregation-in-England-2011-to-2016.pdf>.

¹⁰⁰ Department of Education (2006) *Ethnicity and education*, pp. 28-9; Runnymede Trust (2007), School choice and ethnic segregation. www.runnymedetrust.org/uploads/publications/pdfs/School%20ChoiceFINAL.pdf.

¹⁰¹ The reason for the exception for harassment in education on grounds of religion and belief and sexual orientation was to avoid the situation where pupils and teachers may be prevented from explaining their point of view on matters of religion and belief and sexual orientation in order to avoid harassment claims.

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

The EqA and the SOR 2006 prohibit discrimination in access to and the provision of education on the grounds of sexual orientation in GB and NI respectively, subject to certain narrow exceptions. They do not prohibit harassment in education related to sexual orientation or gender reassignment, though such harassment will amount to direct discrimination where it amounts to *less favourable treatment* because of (or, in Northern Ireland, on grounds of) sexual orientation or gender reassignment.

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

In the UK, the general approach to education for pupils with disabilities gives rise to some problems. In particular, problems relate to accessing and funding support.

Disability discrimination in education is regulated in GB and NI by the EqA and the Special Educational Needs and Disability (Northern Ireland) Order 2005, respectively.¹⁰² Duties of reasonable accommodation are imposed in relation to school pupils and in relation to further and higher education; and a variety of policy initiatives and legislative provisions are intended to encourage integrated education within the educational mainstream for persons with disabilities.

Children with more severe special educational needs (SEN) have their needs documented and the educational resources required to meet them stipulated in an 'education, health and care plan' (EHCP), the child then being entitled as of right to the required provision (funded by the state). The systems of education for children with SEN/ disabilities are fairly developed in the UK but funding is limited and has been impacted by government austerity measures. It is often not easy for parents to negotiate the bureaucracy involved; large numbers of cases are rejected and only upheld on appeal, and the number of appeals is increasing.¹⁰³ The number of successful appeals is over 85 %.¹⁰⁴ The Local Government and Social Care Ombudsman has reported many failures to deal with children's special needs, including delays in assessment and failures to carry out annual reviews.¹⁰⁵ Cuts to local authority budgets have resulted in decreases in spending on support for children with disabilities in schools, although a legal case challenging government policy found that the funding was not discriminatory.¹⁰⁶ Cuts to Disabled Students' Allowances for higher education have also had an adverse impact on students with disabilities.¹⁰⁷

¹⁰² EqA ss84-99, The Special Educational Needs and Disability (Northern Ireland) Order 2005.

¹⁰³ See evidence submitted to Parliament's Education Select Committee SEND inquiry: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/education-committee/special-educational-needs-and-disabilities/written/98819.html>.

¹⁰⁴ For more information see: <https://www.specialneedsjungle.com/what-costs-103-7-million-and-makes-disabled-children-miserable/>.

¹⁰⁵ Local Government and Social Care Ombudsman (2017) *The 2017 focus report: learning lessons from complaints*, available at: <https://www.lgo.org.uk/make-a-complaint/fact-sheets/education/special-educational-needs>.

¹⁰⁶ See 'Families fight government in court over chronic underfunding for special needs', *The guardian* (2019) available at: https://www.theguardian.com/education/2019/jun/26/families-fight-government-in-court-over-chronic-underfunding-for-special-needs?CMP=Share_AndroidApp_Gmail and 'Families lose high court challenge', *The guardian* (2019) available at: <https://www.theguardian.com/education/2019/oct/07/families-lose-high-court-challenge-over-special-needs-funding>, <https://www.theguardian.com/education/2018/nov/10/councils-face-crisis-special-needs-education-funding>.

¹⁰⁷ Cuts announced in 2014: <https://www.gov.uk/government/speeches/higher-education-student-support-changes-to-disabled-students-allowances-dsa>.

COVID-19 and the resulting lockdowns have had a significant impact on education. The negative impact was greater for some groups, in particular students with disabilities.¹⁰⁸

The various positive duties imposed upon public authorities in GB and NI referred to at 2.3.1 above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of education.

a) Trends and patterns regarding Roma pupils

In the UK, there are specific societal trends and/or patterns in education regarding Roma and Traveller pupils, such as some social segregation resulting from the concentration of ethnic minority students in particular schools. Any resulting segregation is not directed at, nor limited to, Roma. 'Roma' is used here to include Gypsies/Travellers/Irish Travellers as well as Roma from Eastern and Central Europe.

The Government's 2021 Race Disparity Audit found that pupils from Gypsy or Roma backgrounds and those from a Traveller or Irish Heritage background had the lowest attainment of all ethnic groups in relation to key indicators such as A-level attainment.¹⁰⁹ In 2020 data confirmed that Traveller of Irish Heritage and Gypsy/Roma pupils made the least educational progress between 11 and 16 years:¹¹⁰ 9 out of 10 leave school without meeting the national standard level of educational attainment (five good GCSEs), and they are ten times less likely to progress to higher education.¹¹¹ Levels of absence from school are highest for Gypsy, Roma and Traveller pupils.¹¹² These children also leave school at a much earlier age than children in other ethnic groups and are excluded from school at a higher rate. Additional funding provided to schools to improve the attainment of disadvantaged children (known as Pupil Premium) is often not available with respect to Roma children due to the fact that eligibility is based on welfare benefit entitlements to which many Roma children are not entitled due to their migrant status; even where eligible, Pupil Premium is allocated on the basis of the number of children present in school on a given census date in June each year. If an eligible child arrives in the school after the date of the census there will be a significant delay until funds are made available to the school.¹¹³ As a result, some of the additional educational support that is available to other disadvantaged groups is not available to Roma children.

Various local level initiatives exist to address this problem and most local authorities continue to provide specialist Traveller Education Support Services which help Traveller pupils and parents to access education and provide practical advice and support to schools enrolling Traveller pupils. In 2020 government funding was provided for training programmes to help Gypsy, Roma and Traveller children catch up on education lost during the COVID-19 pandemic.¹¹⁴

¹⁰⁸ Ofsted (2020), *COVID-19 series: briefing on special educational needs and disabilities provision*, November 2020, available at: <https://www.gov.uk/government/publications/covid-19-series-briefing-on-local-areas-send-provision-november-2020>.

¹⁰⁹ See: <https://www.ethnicity-facts-figures.service.gov.uk/education-skills-and-training>. The same data is not collected for every educational stage and so clear trends are difficult to identify.

¹¹⁰ Office of National Statistics (2020), *Child poverty and education outcomes by ethnicity*, available at: <https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/compendium/economicreview/february2020/childpovertyandeducationoutcomesbyethnicity>.

¹¹¹ Centre for Education and Youth (2017), *The underrepresentation of Gypsy, Roma and Traveller pupils in higher education*, available at: https://cfey.org/wp-content/uploads/2017/07/KINGWIDE_28494_FINAL.pdf.

¹¹² Government data on Absence from School, available at: <https://www.ethnicity-facts-figures.service.gov.uk/education-skills-and-training/absence-and-exclusions/absence-from-school/latest#overall-absence-by-ethnicity>.

¹¹³ House of Commons Women and Equalities Committee Seventh Report of Session 2017–19, *Tackling inequalities faced by the Gypsy, Roma and Traveller communities*, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/360.pdf>.

¹¹⁴ <https://www.gov.uk/government/news/gypsy-roma-and-traveller-children-and-young-people-to-get-extra-education-support>.

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

In the UK, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive.

The EqA prohibits discrimination related to race, disability, religion, belief, age (other than in the case of those aged under 18) and sexual orientation, by public or private sector bodies in the provision of goods, facilities or services to the public or a section of the public in GB (Section 29). In NI the RRO (Article 21), DDA (Section 19), FETO (Article 28) and SOR 2006 (reg 5) prohibit discrimination in access to goods, facilities and services provided to the public or a section of the public on grounds of race, disability, religion/ belief and sexual orientation respectively.

Failure to adapt goods or a service to meet the needs of a person with a disability is a form of discrimination.¹¹⁵

Discrimination on grounds of sexual orientation in the provision of services was considered in *R v Cornerstone (Northeast) Adoption and Fostering Service Ltd) v OFSTED*.¹¹⁶ Cornerstone, a charity founded on a perception of evangelical Christian principles, operated as an independent fostering agency. It required staff, volunteers and carers to be evangelical Christians and to refrain from 'homosexual behaviour' as described in its Code of Practice. Ofsted, the statutory body charged with regulating fostering agencies, concluded after an inspection that Cornerstone's recruitment policy violated provisions of the Equality Act 2010 (EA 2010) prohibiting discrimination on grounds of sexual orientation in the provision of goods and services, and required Cornerstone to change its policy.

Ofsted argued that Cornerstone applied a provision, criterion or practice (PCP) that required carers to be evangelical Christians who comply with the Code of Practice and in particular to refrain from 'homosexual behaviour'. The PCP applies to all potential carers, but places prospective lesbian and gay carers at a particular disadvantage compared to prospective heterosexual carers because gay or lesbian carers will be less likely to be able to comply with the Code of Practice. Cornerstone then challenged Ofsted's conclusions on the basis that it did not offer a service, and that any discrimination was because of homosexual behaviour, rather than because of sexual orientation, so that there was no discrimination on grounds of sexual orientation. Cornerstone also argued that Ofsted's report infringed its rights to religious freedom and freedom of expression.

The High Court held that Cornerstone was offering a service to potential foster parents and fulfilling a public function as it provided carers for children who were under the care of the state. It also held that the recruitment policy did discriminate on grounds of sexual orientation, both directly and indirectly. Cornerstone's policy, which required carers not to engage in homosexual behaviour, was directly discriminatory because of the characteristic of sexual orientation. Alternatively, any indirect discrimination caused by the fact that the policy would put same-sex couples at a particular disadvantage compared with other couples could not be justified. It held that there was no breach of Cornerstone's rights to freedom of religion (the non-recruitment of gay and lesbian foster carers was not a manifestation of religious belief and, in any event, any interference was a proportionate means of achieving a legitimate aim) and freedom of expression (any interference was a proportionate means of achieving a legitimate aim). The case was appealed to the Court of Appeal, which upheld the High Court decision.¹¹⁷

¹¹⁵ Equality Act 2010, S 29 (7).

¹¹⁶ *R (Cornerstone (North East) Adoption and Fostering Service Ltd) v The Office for Standards In Education, Children's Services and Skills* [2021] EWCA Civ 1390; 24.9.2021 Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1390.html>.

¹¹⁷ [2021] EWCA Civ 1390 <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1390.html>.

a) Distinction between goods and services available publicly or privately

In the UK, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants and banks) and those only available privately (e.g. those restricted to members of a private association).

There are separate provisions prohibiting discrimination by associations with 25 or more members because of race, disability, religion or belief, age (other than in the case of those aged under 18) or sexual orientation against any member or associate in access to any benefits, facilities or services in GB (EqA, Part 7) and, in NI, on grounds of race, sexual orientation and disability (RRO Article 25; SOR 2006 Regulation 17, DDA Section 21F). Insofar as they apply to disability these provisions require the making of reasonable adjustments. The provisions of the Equality Act do not apply to associations with fewer than 25 members.¹¹⁸

The various positive duties imposed upon GB and NI public authorities referred to at 2.3.1 above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of state services.

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

In the UK, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive.¹¹⁹ The protection also covers disability, religion or belief and sexual orientation, but not age.

In *R (on the application of Z and another) v London Borough of Hackney Council and another*¹²⁰ the Supreme Court considered a case of potential discrimination in housing provision on grounds of religion and belief and race. It involved a charity set up to provide social housing to members of the Orthodox Jewish community. Z was a single mother who required social housing but was not from the Orthodox Jewish community and so was not offered housing through the charity. The Supreme Court had to determine whether the discrimination involved in refusing housing on grounds of religion amounted to lawful positive action, on the basis that it was a proportionate means to compensate a disadvantaged community. The Divisional Court¹²¹ accepted that there was a correlation between poverty and deprivation in the Haredi community and their religion and found that the religion and belief discrimination was lawful as a proportionate means of compensating for that disadvantage. This finding was upheld by both the Court of Appeal and, in 2020, by the Supreme Court. The Supreme Court did not consider whether the case involved the positive action exception under Directive 2000/43/EC Article 5 (because the case was argued on the basis of religious discrimination rather than race discrimination) but suggested that such an exception might well apply.

The various positive duties imposed upon British and NI public authorities referred to at 2.3.1 above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of housing. These duties may influence how other statutory duties are performed by public authorities, such as their duties to provide housing for local populations.

a) Trends and patterns regarding housing segregation for Roma

In the UK there are trends and patterns of housing segregation and discrimination against the Roma.

¹¹⁸ Equality Act 2010, S 107.

¹¹⁹ EqA ss32-35; RRO Arts 22-24; FETO Arts 29-31; DDA ss22-24M; SOR 2006 regs 6-7.

¹²⁰ [2020] UKSC 40 available at: <https://www.bailii.org/uk/cases/UKSC/2020/40.html>.

¹²¹ [2019] EWHC 139 (Admin), <https://www.bailii.org/ew/cases/EWHC/Admin/2019/139.pdf>.

As above, 'Roma' here is taken to include Gypsies/ Travellers and Irish and Scottish Travellers who have been resident in significant numbers in the UK for a much longer period than Eastern and Central European Roma. One of the issues which arises in connection with Gypsies/ Travellers and Irish and Scottish Travellers is the preference of many to live in caravans rather than in fixed homes. Caravans need sites and may not be parked even on land owned by the owners of the caravans without appropriate planning permission. Such planning permission is very difficult to obtain in large areas of the country which are designated 'green field' sites. Thus, many Gypsies/ Travellers/ Irish Travellers can find themselves unable to park their own caravans on their own land.

In July 2019, the total number of Traveller caravans in England was 23 125. This is 463 more than the 22 662 reported in July 2018. Of these, 6 633 were on socially rented sites; 13 410 were on privately funded sites; 2 047 were unauthorised developments on land owned by Travellers (a decrease from 2018); and 1 035 were unauthorised encampments on land not owned by Travellers. Overall, the July 2019 count indicated that 87 % of Traveller caravans in England were on authorised land and that 13 % were on unauthorised land.¹²²

Many privately-owned caravan sites are reluctant to accommodate Gypsies/ Travellers and Irish and Scottish Travellers and, although direct refusals based on ethnicity would be unlawful, many private sites do not offer long-term facilities such as many Gypsies/ Travellers and Irish Travellers require. The position as regards public authorities has varied over time. Prior to 1996 local authorities in England and Wales had a statutory duty to provide caravan sites for Gypsies and Travellers under the Caravan Sites Act 1968.¹²³ This was removed by the Criminal Justice and Public Order Act 1994¹²⁴ which gave local authorities and the police broad powers to evict Gypsies and Travellers from unauthorised sites. Even where Gypsies/ Travellers and Irish and Scottish Travellers can park on local authority sites in England and Wales they do not have security of tenure and can be required to quit with four weeks' notice. Between 2017 and 2019 there were a large number of injunctions prohibiting encampments, with the injunctions not identifying any named defendants.¹²⁵ These injunctions have had the effect of forcing the Gypsy and Traveller community out of those boroughs which have obtained injunctions, thereby imposing a greater strain on the resources of those boroughs or councils which have not yet applied for such an order.

In 2020, in *The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown*¹²⁶ such injunctions were ruled to be unlawful as borough-wide injunctions are inherently problematic, comprising a potential breach of both the European Convention on Human Rights and the Equality Act 2010. The Court of Appeal noted in the case that a nomadic lifestyle is an integral part of Gypsy and Traveller tradition and culture, and that in the UK there is a longstanding and serious shortage of sites for Gypsies and Travellers.

During 2021, the Police, Crime and Sentencing Bill was introduced in Parliament. Part 4 of the Bill will create a new criminal offence for England and Wales and an accompanying power for the police to seize property (including vehicles) where individuals reside or intend to reside on land with a vehicle. The offence will be committed if a person who resides or intends to reside with a vehicle on land fails to leave the land or remove their property without reasonable excuse when asked to do so by the occupier of the land, their representative or a constable and they have caused, or are likely to cause, significant damage, disruption, or distress (including anti-social behaviour). The Bill does not explicitly mention travellers, but its provisions are clearly aimed at them, as it criminalises those

¹²² See Ministry of Housing, Communities and Local Government (2019), *Count of Traveller caravans, England, July 2019*, available at: <https://www.gov.uk/government/statistics/traveller-caravan-count-july-2019>.

¹²³ Caravan Sites Act 1968, 26.06.1968, available at: www.legislation.gov.uk/ukpga/1968/52/contents.

¹²⁴ Criminal Justice and Public Order Act 1994, 03.11.1994, available at: www.legislation.gov.uk/ukpga/1994/33/contents.

¹²⁵ *London Borough of Kingston Upon Thames v Persons Unknown* [2019] EWHC 1903.

¹²⁶ [2020] EWCA Civ 12 available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2020/12.html>.

who reside on land with vehicles. It applies to private, public and common land. The Bill has not yet completed its passage through Parliament and so was not in force during 2021.

Section 124 of the Housing and Planning Act 2016 revoked an obligation on local authorities in England to carry out a separate accommodation needs assessment for Gypsies and Travellers, although they still have a general duty to assess the housing needs of everyone in their area. A consultation from the Ministry of Housing, Communities and Local Government, the Home Office and the Ministry of Justice was announced in April 2018 to review the law and powers to deal with unauthorised caravan sites and developments in England. The Scottish Government published a set of standards for all landlords running Gypsy/ Traveller sites to comply with by June 2018. These are designed to bring the quality of accommodation on sites up to a minimum standard.¹²⁷

A report by the Traveller Movement in 2016, commissioned by the National Inclusion Health Board, looked at how the living conditions of Gypsies and Travellers lead to poor health.¹²⁸ It found that two-thirds of Gypsies and Travellers reported poor, bad or very bad health and that the living conditions of Gypsies and Travellers significantly contribute to their physical and mental health. The poor health of Gypsies and Travellers was reported to be made worse by their living environment and accommodation insecurity.

¹²⁷ See report of the Equality and Human Rights Commission (2018), *Is Britain fairer? The state of equality and human rights 2018*, London, available at: <https://www.equalityhumanrights.com/en/publication-download/britain-fairer-2018>.

¹²⁸ Available at: <https://www.gov.uk/government/publications/gypsy-and-traveller-health-accommodation-and-living-environment>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In the UK, national legislation provides an exception in accordance with Article 4 for genuine and determining occupational requirements. The words 'genuine and determining', which are used in Article 4 Directive 2000/78/EC, were removed in the Equality Act 2010 on the basis that the words are superfluous. The assumption is that the objective of such a requirement will not be legitimate or proportionate if it is not genuine or determining.

In GB, the EqA applies a general occupational requirement defence across all the protected grounds (Schedule 9 paragraph 1). There are, in addition, broader exceptions applicable to religious organisations. Schedule 9 paragraph 3 permits organisations with an ethos based on religion or belief to discriminate on grounds of religion or belief but not on other grounds. Schedule 9 paragraph 2 allows discrimination on grounds of sexual orientation, sex, marriage or civil partnership for where employment is for the purposes of an organised religion (discussed in 4.2 below). (A general justification defence also applies in respect of age discrimination.)

In NI, the RRO (Article 8(2)) lists four types of jobs where being of a particular colour or nationality may be a genuine occupational qualification.¹²⁹ In the case of race and ethnic and national origins, however, the RRO applies a new generic GOR defence for race, ethnic or national origins, which is the same as that which applies under the SOR 2003 and the Age Regs (i.e., whether having a particular protected characteristic is a genuine and determining occupational requirement which it is proportionate to apply in the particular case).¹³⁰ The DDA does not provide a GOR but FETO permits discrimination on grounds of religious belief in the recruitment of teachers (Article 71), police (Article 71A) and clergy (Article 70). In addition, Article 70(3) provides for an exception where the holding, or not holding, of a particular religious belief is an occupational requirement and the application of the requirement is a proportionate means of achieving a legitimate aim.

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

In the UK, national law provides an exception for employers with an ethos based on religion or belief.

GB

The EqA provides, in relation to religion or belief, an additional occupational requirement defence (Schedule 9, paragraph 3) where an employer has an ethos based on religion or belief and, having regard to that ethos and the nature and context of the job, being of a particular religion or belief is an occupational requirement, 'the application of the requirement is a proportionate means of achieving a legitimate aim, and the person to whom ... the requirement [is applied] does not meet it (or [the person applying it] has reasonable grounds for not being satisfied that the person meets it)'.

¹²⁹ a) participation in a dramatic performance, b) participation as an artist's or photographer's model, c) working where food or drink is provided to the public in a particular setting where a person of a particular racial group is required for reasons of authenticity, and d) providing persons of a particular racial group with personal services promoting their welfare which can most effectively be provided by a person of that racial group. The only case law in this area makes it clear that these provisions are to be narrowly interpreted: in particular, *Lambeth London Borough Council v Commission for Racial Equality* [1990] ICR 768, [1990] IRLR 231.

¹³⁰ Race Relations (NI) Order 1997 (RRO) Art 7A, 8(2) Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR 2003) reg 8; Employment Equality (Age) Regulations (NI) 2006 (Age Regs) reg 9. RRO Art 8 contains a narrower GOR and applies to colour and nationality, grounds not protected within the EU Race Directive.

The EqA does not replicate the wording of Article 4(2) that requires that the religious ethos exception need only be genuine, and not determining, in contrast to the general GOR which has to be both genuine and determining. Instead, the EqA says that in assessing the legitimacy and proportionality of the aim of an occupational requirement, regard must be to the ethos and the nature and context of the job. Given that the EqA must be interpreted to accord with Article 4, this difference in wording between the two instruments may not be of significance in practice. However, it is arguable that the removal of these terms, particularly the term 'determining' from the face of the domestic legislation has hidden from view an important distinction between the two levels of occupational requirement.¹³¹

The EqA's prohibitions on discrimination related to religion or belief are made subject to Sections 58–60 of the School Standards and Framework Act 1998¹³² (Regulation 39), which permit voluntary aided schools (publicly maintained schools with a degree of independent management) with a religious character to discriminate in the recruitment of teachers and their dismissal. Specifically, Section 60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character to have regard 'in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination'. This exception applies only to teachers, according to Section 60(6).

A similar provision exists for Scottish Catholic schools in Section 21(2A) of the Education Act (Scotland) 1980.¹³³

In addition, in voluntary controlled schools (also publicly maintained schools with a slightly different management system from voluntary aided schools) religion can be taken into account in appointing the head teacher and regard may be had to his or her 'ability and fitness to preserve and develop the religious character of the school'.¹³⁴ In addition the school can 'reserve' up to a fifth of its teaching staff who can be 'selected for their fitness and competence' to give religious education in accordance with the tenets of the faith of the school.¹³⁵

These provisions permit wide scope for discrimination in selection and dismissal, as schools are not required to demonstrate that the person's religion or belief constitutes a genuine, legitimate and justified occupational requirement for the job in question (for example teaching mathematics). By taking the School Standards and Framework Act and/or the Education Act (Scotland) Act into account, the EqA may fail to comply with Article 4(2) and judicial interpretation may be required to ensure that direct effect is given to Article 4(2). However, there may be little room for judicial interpretation of the School Standards and Framework Act 1998 which is clear in its scope.

The provisions of the School Standards and Framework Act do not provide an exception for other non-discrimination provisions of the Equality Act and so would not create an exception to the prohibition on direct discrimination on grounds of sex or sexual orientation. In *O'Neill v Governors of St Thomas More RCVA Upper School*¹³⁶ a teacher in a Catholic school became pregnant and was dismissed when it became known that the father of the child was a priest. Her dismissal was found to be discriminatory on grounds of sex, because it was related to pregnancy. The employer's argument that the reason for dismissal was not the pregnancy, but the failure to comply with religious standards, was not accepted, because the pregnancy precipitated and permeated the decision to

¹³¹ There has not yet been case law on this issue to test whether the EqA will be construed in broader terms than Art. 4(2).

¹³² School Standards and Framework Act 1998 (SSFA), 24.07.1998, available at: www.legislation.gov.uk/ukpga/1998/31/contents.

¹³³ Education Act (Scotland) 1980, 01.08.1980, available at: www.legislation.gov.uk/ukpga/1980/44.

¹³⁴ S 60 SSFA 1998, as amended by s 37 of the Education and Inspections Act 2006.

¹³⁵ S 58 SSFA 1998.

¹³⁶ [1996] IRLR 372.

dismiss.¹³⁷ The requirement to comply with the tenets of the religion could, depending on the religion involved, give rise to a claim of indirect discrimination on grounds of sexual orientation.

NI – Religious belief

FETO¹³⁸ provides exceptions for employment as a clergyman or minister of a religious denomination and discrimination 'where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief' (which, under the FETO Regulations, would include any religion or similar philosophical belief). As pointed out above (4.2), this exception is considerably wider than Article 4(1) or 4(2) of the directive and judicial interpretation of the regulations will be required to ensure that direct effect is given to the directive. In addition, as discussed below, SOR (reg 8(3)) provides that, in relation to employment by an organised religion, the employer does not discriminate by applying a requirement related to sexual orientation if the discriminator shows that: (1) the employment is for the purposes of an organised religion; (2) the requirement is applied to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In the UK, there are specific provisions and case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment.

These provisions only apply to organised religions and not to other organisations with an ethos based on religion or belief. The compatibility of the (materially identical) predecessor provisions to Schedule 9 paragraph 2 with the Directive and with the ECHR was challenged in the *Amicus* case.¹³⁹ The Court accepted the Government's argument that the provision was intended to have a narrow scope and was therefore not outside Art 4(1) of the Directive. The Court was clear that the words 'for the purposes of an organised religion' referred to the appointment of religious leaders and teachers such as priests and imams and would not apply to jobs with religious organisations such as schools and hospitals run by religious organisations.

Schedule 9, paragraph 2 EqA provides that a person does not contravene any of the Act's prohibitions on discrimination in relation to employment by an organised religion by applying a 'requirement related to sexual orientation' (or sex, marriage or civil partnership) if (broadly) the discriminator shows that: (1) the employment is for the purposes of an organised religion; (2) the requirement is applied to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The relevant provisions of the SOR (reg 8(3)) are materially similar. They appear to go beyond the exceptions permitted under the Employment Equality Directive in that they do not provide that the 'requirement related to sexual orientation' (e.g. not engaging in any sexual activity at all, or not doing so outside of a different-sex marriage and accepting the religious organisation's doctrines on same-sex sexual activity) must be 'proportionate' to any legitimate aim, especially considering the nature of the job to which the requirement is applied (priest vs. cleaner in a convent). Nor do they appear to comply with Article 4(2) (second para.) of the Directive, as they create (as drafted) a blanket exception, without regard to the conduct of the individual

¹³⁷ O'Neill was decided before the entry into force of the School Standards and Framework Act, but its reasoning would still apply.

¹³⁸ Fair Employment and Treatment Order 1998 (FETO) Art 70.

¹³⁹ High Court, *R (Amicus & Ors) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] IRLR 430, 26.04.2004, available at: www.bailii.org/ew/cases/EWHC/Admin/2004/860.html.

employee or prospective employee, for any employment 'for the purposes of organised religion'. However, judicial interpretation of the Regulations¹⁴⁰ and the EqA suggests that these provisions will be very narrowly interpreted, so as to apply only to clergy or their equivalent. In such cases, it would be likely that occupational requirements to comply with religious doctrine would be proportionate.

In *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham*¹⁴¹ the Schedule 9(2) exception was applied in the context of the appointment of a chaplain in a National Health Service (NHS) hospital. The claimant, an ordained clergyman in the Church of England, entered a same-sex marriage with his long-term partner, contrary to the current doctrines of the Church of England regarding clergy. As a result, his Bishop revoked his Permission to Officiate and the relevant ministry licence. The licence and permission were needed to enable him to take up a post as a hospital chaplain in an NHS hospital trust. The Court had to decide whether the exceptions allowing such discrimination in relation to employment for the purposes of an organised religion would apply, given that the employer was to have been the NHS trust and not the Church. The Court of Appeal upheld the lower court's reasoning that the employment was for the purposes of an organised religion and so the exception applied. Although the work itself was for a secular employer (the NHS trust), for this particular position the employee had to be authorised by the Church, as the employee was going to be working in the role of a Church of England priest.

It is arguable that the special exception for employment for the purposes of an organised religion is unnecessary, as requirements relating to the sex or sexual orientation of religious personnel would be covered in any event by the general occupational requirement provisions of Schedule 9 Paragraph 1: a requirement relating to sex or sexual orientation which is applied by a religious group in order to comply with religious doctrine¹⁴² would in many cases be judged to be proportionate if the provisions are interpreted to accord with the provisions of the ECHR. ECHR case law is clear that where an employee is playing a key role in the group's manifestation of religion (for example, carrying out religious rites), the autonomy of the religious group should be accorded great weight when set against other interests.¹⁴³

To date the controversial cases in the UK have arisen where individuals have alleged that they have been subject to religious discrimination for refusing to perform functions relating to same-sex partnership and family rights (see *Ladele & McFarlane v United Kingdom*).¹⁴⁴ In *Ladele* the Court of Appeal held that the refusal of a Christian registrar's request to be exempt from carrying out civil partnerships did not amount to indirect religious discrimination as it was justified. The employer was entitled to rely on its policy of requiring all staff to offer services to all service users regardless of sexual orientation.¹⁴⁵ The ECtHR confirmed that this decision did not breach Articles 9 and 14 ECHR.¹⁴⁶

¹⁴⁰ High Court, *R (Amicus & Ors) v Secretary of State for Trade and Industry*, Ibid.

¹⁴¹ Court of Appeal, *Pemberton v Inwood* [2018] EWCA Civ 564, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2018/564.html>.

¹⁴² Or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

¹⁴³ See, for example, European Court of Human Rights *Hasan v Bulgaria* App No 30985/96, (2002) 34 EHRR 55 26.10.2000, available at: www.bailii.org/eu/cases/ECHR/2000/511.html; European Court of Human Rights, *Serif v Greece* App No 38178/97 (2001) 31 EHRR 20 14.12.1999, available at: www.bailii.org/eu/cases/ECHR/1999/169.html.

¹⁴⁴ Decided with European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15.01.2013, available at: www.bailii.org/eu/cases/ECHR/2013/37.html.

¹⁴⁵ Court of Appeal *Ladele v Islington Borough Council* [2009] EWCA Civ 1357, 15.12.2009, available at: www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html.

¹⁴⁶ Decided with European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15.01.2013, available at: www.bailii.org/eu/cases/ECHR/2013/37.html.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19 Directive 2000/78)

In the UK, national legislation provides for an exception for the armed forces in relation to age and disability discrimination (Article 3(4), Directive 2000/78/EC). The EqA disapplies the prohibition on employment-related age and disability discrimination in relation to service in the armed forces (Schedule 9, paragraph 4). In NI, the Age Regs do not extend to the armed forces and the DDA includes an exception in relation to service in the armed forces (Regulation 50(4), Section 64(7) respectively).

In the UK, the scope of the exception is limited to safeguarding the combat effectiveness of the armed forces (Schedule 9, paragraph 4 EqA).

In the UK, the scope of the exception does not extend to other non-combating staff, such as civilians employed in administrative positions in the army.¹⁴⁷

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In the UK, national law includes limited exceptions relating to difference of treatment based on nationality. These exceptions relate for the most part to immigration. Schedule 18, paragraph 2 EqA disapplies Section 149 (the Public Sector Equality Duty) on grounds of nationality (and ethnic or national origins) in the carrying out of specified immigration control functions. The RRO also permits discrimination on grounds of nationality in the immigration function. Under the Race Relations (Immigration and Asylum) Authorisation 2011 there is a list (not in the public domain) of nationalities and a person of a nationality on the list seeking to enter the UK can be subjected to more rigorous examination than other people, detention pending examination, refusal of leave to enter and imposition of conditions on temporary admission and a person of a nationality on the list wishing to travel to the UK can be refused leave to enter or can be required to provide information and documents.

In the UK, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law and generally receives the same level of protection as ethnicity, national origins and colour (EqA Section 9, RRO reg 5).

However, the UK does distinguish between discrimination because of nationality and discrimination because of immigration status. Those with a precarious immigration status, for example without the right to work, remain vulnerable to poor treatment in employment. However, any unequal treatment on the basis of immigration status is not covered by the equality law framework. This was confirmed in *Taiwo v Olaigbe; Onu v Akwivu*¹⁴⁸ where the Supreme Court held that discrimination because of immigration status did not amount to discrimination because of nationality. The bad treatment experienced by the claimant was discrimination because of vulnerable immigration status, but this status is not a protected characteristic under the Equality Act 2010.¹⁴⁹

b) Relationship between nationality and 'racial or ethnic origin'

Claimants choose how to categorise the discrimination of which they complain and may choose to advance their claim on a single, alternative or multiple grounds. A Zimbabwean African woman might, for example, be treated less favourably because she is Black, or

¹⁴⁷ The Ministry of Defence employs civil servants in civilian roles.

¹⁴⁸ Supreme Court, *Taiwo v Olaigbe; Onu v Akwivu* [2016] UKSC 31, available at: <https://www.supremecourt.uk/cases/docs/uksc-2014-0105-judgment.pdf>.

¹⁴⁹ People without legal leave to remain in the UK are protected generally under the Equality Act, so a claim could be brought for discrimination on other grounds. *Hounga v Allen and another* [2014] UKSC 47.

because she is of African origin, or specifically because of her Zimbabwean nationality. Or she may be discriminated against precisely because she is a Black Zimbabwean. Alternatively, a Zimbabwean woman may be discriminated against directly due to nationality and indirectly due to race or ethnic origin. Very little attention is paid in domestic case law to the overlaps between these types of categories because, for the most part, the protection afforded then under national law does not differ.¹⁵⁰

4.5 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In NI, but not GB, there are some limited exceptions in relation to disability and health and safety as allowed under Article 7(2), Directive 2000/78/EC.

In GB, there is no justification defence for direct discrimination, which is narrowly defined, though there is a general justification defence for other forms of disability discrimination (such as where, for example, a person with a disability is treated less favourably for reasons which result from his or her disability, rather than because of the disability itself: Section 15 EqA). In such cases the question will be whether the treatment was 'a proportionate means of achieving a legitimate aim'.

In NI, disability-related discrimination in the provision of goods and services can be justified under the DDA (Section 20(4)) on the grounds of health and safety, where the treatment is necessary in order not to endanger the health and safety of any person (including the person with disability).

Other than in relation to pregnant women, the EqA does not contain any exceptions relating to health and safety. NI legislation outlawing discrimination on grounds other than disability does not include specific exceptions relating to health and safety law.

A number of cases alleging indirect discrimination on grounds of race or religion have been brought where employers or educational institutions have imposed dress codes on health and safety grounds that disadvantaged members of particular racial groups who were not able to comply with the dress requirements. Examples of such codes include a 'no beards' requirement applicable, for reasons of hygiene, to those involved in food preparation or packaging,¹⁵¹ and a requirement that all railway repair workers wear protective head gear.¹⁵² *Chaplin v Royal Devon and Exeter NHS Foundation Trust*¹⁵³ involved a challenge to the imposition of a health and safety prohibition by a hospital of the wearing of necklaces (in the claimant's case, a crucifix). The claimant's challenge to the ECtHR failed. The restriction on religious freedom was justified as it served the legitimate aim of protecting health and safety.¹⁵⁴

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

¹⁵⁰ For a rare exception see Court of Appeal *R (Mohammed) v Secretary of State for Defence*, [2007] EWCA Civ 1023, [2007] All ER (D) 9 01.05.2007, available at: www.bailii.org/ew/cases/EWCA/Civ/2007/1023.html.

¹⁵¹ Court of Appeal *Panesar v Nestle Co. Ltd.* [1980] IRLR 64 27.11.1979.

¹⁵² Employment Appeal Tribunal *Singh v British Rail Engineering Ltd* [1986] ICR 22, 29.07.1985.

¹⁵³ Employment Tribunal *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2011] Eqlr 548 (21.04.2010) [2010] ET 1702886/2009.

¹⁵⁴ European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15.01.2013, available at: www.bailii.org/eu/cases/ECHR/2013/37.html.

It should be noted that Sikh men wearing turbans are exempted from otherwise generally applicable statutory requirements to wear motorcycle helmets when riding motorcycles and to wear hard hats when working on construction sites.¹⁵⁵

4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In the UK, national law provides for specific exceptions for direct discrimination on the ground of age (EqA Section 13(2), Regulation 3 Age Regs).

Specific exceptions allow age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers (see EqA, Schedule 9, paragraphs 11 and 12, Age Regs Regulation 33). Paragraph 14 provides specific exemptions allowing the payment of insurance benefits to older workers: in NI the equivalent exemption covers the payment of life assurance benefits to retired workers (Regulation 36) while special and complex exceptions are also made for the use of some age-based criteria in invalidity and occupational pension schemes, as permitted by Article 6(2) of the Directive: see 7.4.1 (c) below.

Provision is also made for positive action in training and encouraging workers from particular age groups: this is much narrower in NI (Regulation 31) than in GB following the implementation of the positive action provisions of the EqA. Another specific exemption allows older workers to receive higher levels of redundancy payment (Schedule 9, paragraph 13 EqA/ Regulation 35 Age Regs). Although controversial, these latter exceptions would appear to comply with CJEU case law such as *Odar v Baxter Deutschland GmbH*.¹⁵⁶

b) Justification of direct discrimination on the ground of age

In the UK, national law provides for justifications for direct discrimination on the ground of age. (Section 13(2) and Schedule 9 EqA, Regulations 3, 28-31 and 33-36 Age Regs.)

Direct discrimination on the ground of age can be justified where the discriminator can show that the discriminatory treatment on the grounds of age is a proportionate means of achieving a legitimate aim.

Most cases on age discrimination have involved indirect discrimination (see for example *Harrod & Ors v Chief Constable of West Midlands Police & Ors*).¹⁵⁷ In relation to the justification of direct discrimination in *Homer v Chief Constable of West Yorkshire Police* the Supreme Court ruled that the aims which could justify direct age discrimination were narrower than the aims which could justify indirect discrimination generally, being limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive.¹⁵⁸ *Seldon v Clarkson Wright & Jakes* (discussed below at 4.7.4) involved direct discrimination in the case of mandatory retirement age. The Supreme Court accepted that

¹⁵⁵ Highway Code Rule 83; Employment Act 1989 S11.

¹⁵⁶ Court of Justice of the European Communities [2012] EUECJ C-152/11 6.12.2012, available at: www.bailii.org/eu/cases/EUECJ/2012/C15211.html.

¹⁵⁷ Court of Appeal [2017] EWCA Civ 191, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2017/191.html>.

¹⁵⁸ Supreme Court [2012] UKSC 15, [2012] IRLR 601, 25.04.2012, available at: www.bailii.org/uk/cases/UKSC/2012/15.html.

direct discrimination could be justified, relying on the interests of staff retention, workforce planning and congeniality accepted as potentially legitimate aims.¹⁵⁹

*Lord Chancellor v McCloud; Home Secretary v Sargeant*¹⁶⁰ involved justification of direct discrimination. McCloud and others were members of the Judicial Pension Scheme (JPS). The JPS was closed on 31.03.2015 and serving judges were compulsorily transferred into a replacement scheme. Transitional provisions were put in place to allow older judges to remain members of the JPS, either until retirement ('full protection members') or until the end of a period of tapered protection of approximately ten years ('tapered protection members'), depending on their age. Sargeant and others were members of the Firefighters' Pension Scheme, subject to similar pension reforms. The Court of Appeal upheld the claims of direct discrimination brought by younger pension members who were denied the benefit of the more favourable transitional provisions. The Court of Appeal confirmed the lower court's decision that a legitimate aim had not been identified. Although a social policy had been identified (to protect older people from the 'harm' of reduced pension) this was not capable of being a legitimate aim justifying the discrimination, as it was not based on evidence, but instead on instinct (the belief that such an approach 'felt right', and 'was a moral decision'). Instead, supporting evidence was required to substantiate the legitimacy of any justification claim. In 2019 the Supreme Court refused permission to the Government to appeal against the Court of Appeal decision.

The test applied in the UK would appear to be consistent with that in Article 6(2), account being taken of the Court of Justice of the European Union in the Case C-144/04, *Mangold* and Case C-555/07 *Kucukdeveci*.

c) Permitted differences of treatment based on age

In the UK, national law permits differences of treatment based on age for some activities within the material scope of Directive 2000/78/EC.

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

In contrast, discriminating between employees on the basis of length of service requirements which are longer than five years may still be justified, but will not be automatically so. Regulation 34(2) Age Regs provides that 'Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers)'. By contrast, Schedule 9, paragraph 10(2) EqA provides only that, 'If B's period of service exceeds 5 years, A may rely on sub-paragraph (1) [which permits the reward of service] only if A reasonably believes that doing so fulfils a business need.'

¹⁵⁹ Supreme Court [2012] UKSC 16, [2012] IRLR 590 [2012] EqLR 579, 25.04.2012, available at: <https://www.supremecourt.uk/cases/uksc-2010-0201.html>.

¹⁶⁰ Court of Appeal [2018] EWCA Civ 2844, available at: <https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-judgment.pdf>.

d) Fixing of ages for admission to occupational pension schemes

In the UK, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

The EqA (Age Exceptions for Pension Schemes) Order 2010 provides wide exceptions including in relation to the application of length-of-service provisions; minimum and maximum age limits and minimum pay limits on admissions to pension schemes; the use of age criteria in actuarial calculations and contributions; minimum age for age-related benefits; the specification of normal retirement dates and payment of early and late retirement pensions; the payment of ill-health early retirement pensions without reduction and/or with enhancement, etc. Similar exceptions are provided in NI.¹⁶¹ Some of these exceptions may be potentially wider in scope than the exception set out in Article 6(2) of the Directive and any exceptions still in the regulations that lie outside the scope of Article 6(2) will have to be shown to be objectively justified under Article 6(1).

4.6.2 Special conditions for younger or older workers

In the UK, there are special conditions set by law for younger workers in order to promote their vocational integration. There are no special conditions set for older workers.

The national minimum wage (NMW) is paid to those under 25. For those over 25 it is called the national living wage. The rates vary by age. The rates as of April 2020 have increased to: under 18 EUR 5.29 (GBP 4.55) per hour; 18-20 EUR 7.51 (GBP 6.45) per hour; 21-24, EUR 9.54 (GBP 8.20), 25 and over EUR 10.12 (GBP 8.72) per hour. Apprentices under 19, or 19 and over but in their first year of apprenticeship, are entitled only to EUR 4.84 (GBP 4.15) per hour.

The EqA and NI Age Regulations, as discussed above, contain exemptions allowing for the payment of age differentiated NMW, but not otherwise permitting different rates according to age. The UK Government argues that the exception is objectively justified as necessary to promote the integration of younger workers into the workforce.¹⁶²

4.6.3 Minimum and maximum age requirements

In the UK, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training.

Leaving aside the possibility of positive action, there are national laws and local by-laws (along with specific NI legislation) regulating the employment of children (up to minimum school leaving age (age 16, although they must continue with some education until 18))¹⁶³ consistent with EC Directive 94/33/EC. Currently, a wide variety of trades and professions set minimum age for entry as trainees: the use of such entry ages will have to be objectively justified under the age regulations. Health and safety considerations may influence minimum age for certain types of jobs. In some cases, there are also maximum ages for entry while some jobs, notably judicial office, are subject to maximum age limits (broadly 70 or 75 depending on date of appointment). In fixing age limits which are not prescribed by law employers will have to take care to avoid unjustifiable age discrimination and unlawful discrimination on other grounds. A maximum age for entry to the Civil Service, for example was held to be unlawful indirect discrimination on grounds of sex prior

¹⁶¹ Age Regs Sch 1.

¹⁶² <https://minimumwage.blog.gov.uk/2020/03/09/why-do-young-people-have-lower-minimum-wages/>.

¹⁶³ Young people can leave school at 16 but until the age of 18 they must stay in full-time education, start an apprenticeship or traineeship, or spend 20 hours or more a week working or volunteering, while in part-time education or training.

to the implementation of the legislative prohibition of age discrimination as such.¹⁶⁴ Any difference in age limits for men and women would be unlawful sex discrimination.

4.6.4 Retirement

a) State pension age

In the UK, there is no state pension age at which individuals must begin to collect their state pensions. If an individual wishes to work beyond the state pension age, the pension can be deferred.

State pensions can be collected from 66. The age will increase to 67 for those born on or after April 1960, with a plan to increase to 68 between 2044 and 2046 for those born on or after April 1977.

An individual can collect a pension and still work.

b) Occupational pension schemes

In the UK, there is no standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes can usually be deferred.

An individual can usually collect a pension and still work.

c) State imposed mandatory retirement ages

In the UK, there is no state-imposed mandatory retirement age, though for certain public sector employment that is regulated by statute there are national laws specifying a retirement age. (Examples include the judiciary, the police and some civil servants.) Where no statutory retirement age is specified, mandatory retirement ages have been unenforceable since April 2011 unless justifiable by the employer.

d) Retirement ages imposed by employers

In the UK, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally, subject to the justifiability of the resulting age discrimination.

In the landmark case of *Seldon v Clarkson Wright & Jakes* the Supreme Court accepted that an employer could in principle impose a mandatory retirement age on a partner in a law firm in the interests of retention ('ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm'), workforce planning ('facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise') and congeniality ('limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm').¹⁶⁵ The Court referred back to the lower courts the question whether the retirement age selected was in fact justifiable. In *Seldon v Clarkson Wright & Jakes (No.2)* the EAT ruled that the enforced retirement at 65 of the equity partners was justified. The EAT did not accept that the employer was under a heavy burden to justify the choice of the

¹⁶⁴ Employment Appeal Tribunal, *Price v Civil Service Commission*, [1977] 1 WLR 1417, [1977] IRLR 291, 15.07.1977, available at: www.bailii.org/uk/cases/UKCAT/1977/1_77_1507.html.

¹⁶⁵ Supreme Court [2012] UKSC 16, [2012] IRLR 590 [2012] EqLR 579, 25.04.2012, available at: <https://www.supremecourt.uk/cases/uksc-2010-0201.html>.

particular age (there 65) in circumstances in which the aims pursued required that an age be selected, but there was no strong reason for selecting 65 instead of (say) 66 or 67.¹⁶⁶

Determining precisely when employer-imposed retirement can be justified remains difficult. In 2021, the Employment Appeal Tribunal (EAT) heard the appeal of two university professors required to retire by their employer, the University of Oxford, one of a small number of employers to adopt an employer justified retirement age (EJRA).¹⁶⁷ The EJRA has three legitimate aims: inter-generational fairness; succession planning by maintaining predictable retirement dates; and equality and diversity. The EJRA is said to achieve these aims by ensuring vacancy creation is not delayed; and recruitment into senior academic roles might take place from a younger, more diverse cohort. These aims were accepted as legitimate by the EAT. The original Employment Tribunal decisions had decided that in one case the retirement was justified and in the other it was not, but the EAT held that neither tribunal had erred in law in assessing the whether the application of the EJRA was justified as a proportionate means to achieve the legitimate aims. Each had reached a conclusion which was based on evidence before them and after proper assessment of the proportionality of imposing the EJRA on the case before it. The EAT held that the nature of the proportionality assessment was that different tribunals could reach different conclusions even when considering the same measure adopted by the same employer. For example, the impact of retirement differed in the two cases. Whereas the literature professor could continue with his research as an emeritus professor, the lab-based science professor required access to university facilities as part of a project team in order to continue to research. This meant that the evidence regarding detriment differed between the two cases.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

f) Compliance of national law with CJEU case law

In the UK, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

The possible justification of mandatory retirement ages would appear to be in line with EU case law, this being the starting point adopted by the Supreme Court in *Seldon*.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the UK, national law permits age and seniority to be taken into account in selecting workers for redundancy as long as this is justified.¹⁶⁸

b) Age taken into account for redundancy compensation

In the UK, national law provides compensation for redundancy. Such compensation is affected by the age of the worker.

¹⁶⁶ Employment Appeal Tribunal [2014] IRLR 748, 13.05.2014.

¹⁶⁷ *Pitcher v University of Oxford and University of Oxford v Ewart*, EA-2019-000638-RN EA-2020-000128-RN 27.9.21 available at: <https://www.bailii.org/uk/cases/UKCAT/2021/2019-000638.pdf>.

¹⁶⁸ *Rolls Royce Plc v Unite*, Court of Appeal [2009] EWCA Civ 387, [2009] IRLR 576, 14.05.2009, available at: www.bailii.org/ew/cases/EWCA/Civ/2009/387.html. The case is curious in that the employer was arguing that their own redundancy scheme was unlawful in order to end the existing collective agreement and to negotiate another one more favourable to the employer's interests, while the union was defending the scheme.

Older workers may receive higher levels of redundancy payment (Schedule 9, paragraph 13 EqA/ Regulation 35 SOR 2003). The UK Government considers that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers, but this remains controversial.

Age discrimination is capable of justification so could be taken into account in redundancy decisions, subject to the employer's ability to justify it. Taking into account seniority may amount to indirect age discrimination but this, again, is capable of justification (see 4.6.1 above).

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

In the UK, national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

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

The RRO (Article 41), FETO (Article 79), SOR 2003 (Regulation 26) and Age Regs (Regulation 29) provide an exception for an act done for the purpose of protecting public safety or public order: 'Nothing ... shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order' and 'the doing of the act is justified by that purpose'.

4.8 Any other exceptions

In the UK, other exceptions to the prohibition of discrimination (on any ground covered by this report) provided in national law are the following:

- The DDA, which applies in NI, contains an exception (Section 59) for acts done in pursuance of primary legislation, including any passed after the date of the DDA or to comply with secondary legislation made after the date of the DDA or any condition or requirement imposed by a Minister of the Crown. Such an exception, which (unlike the statutory authority exceptions in the EqA) applies to discrimination falling within the scope of EU law, may be in breach of the Employment Equality Directive (Article 16).
- Outside of the scope of the directives the EqA, the RRO and the Age Regulations retain exceptions for all acts done under statutory authority.¹⁶⁹

¹⁶⁹ EqA Sch 22 para 1, RRO Art 40 and Age Regs reg 28.

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

a) Scope for positive action measures

In the UK, positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability, age and sexual orientation. In addition, Section 149 Equality Act 2010 creates the Public Sector Equality Duty. This provides that public authorities must have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; advance equality of opportunity between persons who share a protected characteristic and persons who do not share it; and foster good relations between persons who share a protected characteristic and persons who do not share it. In response, many public sector organisations have put in place processes to try to promote equality in the workplace and in the provision of their services, as part of a process of mainstreaming equality. Section 75 Northern Ireland Act 1998 imposes a similar duty on public authorities.

In GB, the EqA provides quite broad provisions permitting the taking of any proportionate positive action where a person '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' (Section 158). Where employment is concerned, Section 159 allows more favourable treatment of those from a disadvantaged or under-represented group as regards recruitment or promotion where (but only where) the person appointed/ promoted is as qualified as others over whom s/he is preferred.

Positive action provisions were discussed in *R (on the application of Z and another) v London Borough of Hackney Council and Another*¹⁷⁰ (discussed in 3.2.9 above). Here the Supreme Court accepted a housing association giving priority to members of the Orthodox Jewish community, on the basis that it was a proportionate means to compensate a disadvantaged community. The lower courts had accepted the correlation between poverty and deprivation in the Haredi community and their religion, and the Supreme Court upheld its finding that religion and belief discrimination was lawful as a proportionate means of compensating for that disadvantage.¹⁷¹

The EqA also makes provision (Section 104) for positive action across all the protected grounds in the selection of candidates for election, something which previously was available only in relation to gender. Those provisions are intended to enable parties in GB to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration. They are not, however, permitted to adopt wide-ranging positive action measures to ensure the selection of ethnic minority candidates for parliamentary seats such as by introducing all-minority shortlists for candidate selection in certain constituencies. (Women-only shortlists, by contrast, are and will remain lawful.)

In NI, as in GB, only persons with disabilities are protected from discrimination related to disability, so all positive action related to disability is lawful. In addition, some limited training and encouragement measures are permitted in the employment context in relation to race/ ethnicity and sexual orientation (RRO Articles 35 and 37, SOR 2003 Regulation 29). Examples include placing advertisements in the press welcoming gay, lesbian and bisexual people; or offering training facilities in the workplace aimed at combating disadvantage. Regulation 31 of the Age Regs provides a specific exception is made for positive action that gives people of a particular age access to training facilities to help them take on particular work, or that allows them to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to

¹⁷⁰ [2020] UKSC 40 available at: <https://www.bailii.org/uk/cases/UKSC/2020/40.html>.

¹⁷¹ Although it also raised issues of race discrimination, the case only considered the religion and belief aspects of the case.

prevent or compensate for disadvantages linked to age. However, because the DDA prohibits disability-related discrimination only against those recognised by the Act as 'disabled', there was no need to include in the DDA specific positive action provisions like those in other anti-discrimination legislation that operate as exceptions to the prohibition of discrimination.

Prior to the implementation of the positive action provisions of the EqA, the most comprehensive positive action provisions relating to employment in the UK were found in FETO. Article 4 FETO permits and in certain cases requires employers to take 'affirmative action' which is defined as:

'...action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including –

- 1) The adoption of practices encouraging such participation; and
- 2) The modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.'

In addition, Article 55 requires employers to review the composition of the workforce to determine whether each community is enjoying fair participation; Article 60 allows the Equality Commission for Northern Ireland to set timetables for the achievement of equality goals; and Article 74 allows measures to encourage applications, etc. from an under-represented community.

b) Quotas in employment for persons with disabilities

In the UK, national law does not provide for quotas for the employment of persons with disabilities.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In the UK, the following procedures exist for enforcing the principle of equal treatment. The procedures are the same for employment in the private and public sectors.

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

Employment/industrial tribunals were established to consider the full range of employment disputes. Each tribunal has a legally qualified chair and two lay members, one broadly representing employers and the other employees. In the county/sheriff court, cases are decided by a single judge; for cases under the EqA, however, the judge must generally be assisted by two lay assessors, people selected from a list maintained by the Secretary of State, unless the parties agree that the judge should sit without assessors (Section 114). Decisions of tribunals and courts are binding, subject to any successful appeal by the losing party.

The EHRC and ECNI have powers to investigate whether or not a person has committed an unlawful act under the equality acts.¹⁷²

In terms of alternative dispute resolution procedures, all claims to the employment tribunal for unfair dismissal or unlawful discrimination are referred to the Advisory Conciliation and Arbitration Service (ACAS), or in NI the Labour Relations Agency, which have statutory duties to promote settlements. Claimants in GB must contact ACAS with a view to determining whether early conciliation is possible. Settlements agreed through ACAS or the Labour Relations Agency are binding on the parties. Employment cases may also, with the agreement of the parties, be selected for judicial mediation which is also available in the county courts. Criminal proceedings are not available.

b) Barriers and other deterrents faced by litigants seeking redress

Research consistently reveals that the majority of people who consider they have been victims of unlawful discrimination or harassment are very slow to seek legal redress. The main reasons are generally lack of confidence that they will be believed or fear that they will face some form of retaliation or victimisation.¹⁷³ Individuals who are confident and determined enough to consider bringing legal proceedings face a number of barriers. There are statutory time limits for the initiation of complaints of discrimination (three months for employment-related cases and six months in the county/sheriff court, though the court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so).

¹⁷² Equality Act 2006 s 20; Northern Ireland Act 1998 Sched 9 para 10.

¹⁷³ Aston J, Hill D, Tackey N. (2006), *The experience of claimants in race discrimination employment tribunal Cases*, Department of Trade and Industry, Employment Relations Research Series, ERRS55.

Legal aid is available for discrimination claims, but limits in terms of means testing of support, as well as limits on what can be paid for, results in a significant barrier for litigants. An inability to afford legal representation can create an 'inequality of arms' when an opponent has more financial resources.

Employment tribunals do not normally order the unsuccessful party to pay the costs of the winner, though a tribunal may order costs against a party who has acted 'vexatiously, abusively, disruptively or otherwise unreasonably', or whose bringing or conduct of the proceedings is 'misconceived', i.e. has no reasonable prospect of success. The maximum amount of such costs is EUR 23 290 (GBP 20 000). It may be difficult for unrepresented claimants to know if their case is 'misconceived'. In the county/sheriff court, with few exceptions, an unsuccessful applicant will be ordered to meet the costs of the respondent. It is difficult to overstate how much of a barrier this places in practice to litigation.

Persons with disabilities may have additional barriers to seeking legal redress; while the courts have a duty as service providers to make reasonable adjustments in anticipation of the needs of persons with disabilities (Section 19, 20B & 21B DDA, Sections 20 & 29 EqA), there continue to be occasions when persons with disabilities are significantly disadvantaged. Some courts and tribunals are not physically accessible and there are examples where no interpreters or unsuitable interpreters were provided or documents not provided in alternative formats, e.g. Braille, large font size.

A person may bring a case after the employment relationship has ended subject to the applicable time limits. Section 108 of the EqA provides that, 'A person (A) must not discriminate against another (B) [or harass B] if— (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act'. Section 108(4) provides further that, 'A duty to make reasonable adjustments applies to A [if B is] placed at a substantial disadvantage as mentioned in Section 20'. Similar provision is made in NI.¹⁷⁴

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

Success rates for discrimination complaints are not high, even with representation; complaints of race discrimination are least likely to succeed (see paragraph c. below). The EHRC and ECNI are able to assist relatively few applicants; public funding generally involves strict means testing and is not available for legal representation in tribunals. The lack of available skilled advice, assistance and representation in discrimination cases is a matter of growing concern.

c) Number of discrimination cases brought to justice

In the UK, statistics are not available on the number of cases related to discrimination brought to justice. However, there are statistics showing the number of employment discrimination claims which were accepted by the employment tribunals in 2020-21.¹⁷⁵ There is no equivalent data on the amount of goods and services, education or social protection cases brought before the county courts.

¹⁷⁴ Race Relations (Northern Ireland) Order 1997 (RRO) Art 27A, Fair Employment and Treatment Order 1998 (FETO) Art 33A, Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR 2003) reg 23; Employment Equality (Age) Regulations (NI) 2006 (Age Regs) reg 25; Disability Discrimination Act 1995 (DDA) s16A.

¹⁷⁵ At the time of compiling the report, figures for 2021 were not available.

Employment Tribunal Disposals, 2017-20¹⁷⁶

Year	2017-18	2018-19	2019-20 ¹⁷⁷
Disability discrimination	3 649	4 935	6 265
Race discrimination	1 684	2 346	2 807
Age discrimination	1 732	1 917	1 754
Religion/ belief discrimination	386	504	599
Sexual orientation discrimination	200	329	405

The following tables indicate the outcome of cases disposed of by the employment tribunals in 2017-2020. The very low rate of success and high rates of settlement are noteworthy. High rates of settlement may reflect an unwillingness to pay the additional hearing fee (from July 2013 to July 2017), as well as the work of ACAS, which provides a free voluntary conciliation service.

Outcome of Employment Tribunal cases, 2017-18^{178 179}

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	3 649	19 %	40 %	4 %	2 %
Race discrimination	1 684	18 %	34 %	3 %	2 %
Age discrimination	1 732	27 %	18 %	1 %	1 %
Religion/ belief discrimination	386	22 %	32 %	3 %	4 %
Sexual orientation discrimination	200	20 %	38 %	4 %	2 %

Outcome of Employment Tribunal cases, 2018-19¹⁸⁰

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	4935	24 %	37 %	3 %	8 %
Race discrimination	2346	26 %	31 %	3 %	13 %
Age discrimination	1917	49 %	21 %	1 %	5 %
Religion/ belief discrimination	504	24 %	32 %	3 %	11 %
Sexual orientation discrimination	329	25 %	33 %	2 %	7 %

¹⁷⁶ Source: Ministry of Justice annual statistics and Employment Tribunal Statistics, available at: <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2021>.

¹⁷⁷ Data for latter part of 2020 is not available, but it is anticipated that case numbers will fall due to the impact of COVID-19. Fewer cases were brought, and the number of claims being heard has been reduced as many cases were put on hold, despite some hearings continuing online.

¹⁷⁸ Totals do not amount to 100 % as a varied number of cases were subject to other forms of disposal such as dismissed without full trial; struck out (not at a hearing); and dismissed at a preliminary hearing.

¹⁷⁹ Source: Ministry of Justice annual statistics and Employment Tribunal Statistics, available at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2018>.

¹⁸⁰ Source: Ministry of Justice annual statistics and Employment Tribunal Statistics, available at: <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2019>.

Outcome of Employment Tribunal cases, 2019-20¹⁸¹

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	6 265	27 %	33 %	3 %	8 %
Race discrimination	2 807	25 %	28 %	2 %	13 %
Age discrimination	1 754	21 %	39 %	2 %	6 %
Religion/ belief discrimination	599	26 %	24 %	3 %	15 %
Sexual orientation discrimination	405	28 %	30 %	2 %	8 %

d) Registration of national court decisions on discrimination cases

In the UK, court decisions on discrimination cases are registered as such by national courts. The ground of discrimination is recorded, and cases are available to the public.

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

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In the UK, associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination because the only persons who can bring any claims are those to whom the non-discrimination duties are owed.¹⁸² Associations may support and assist, (for example, they may fund or provide legal advice or representation) but may not engage in litigation on behalf of, victims of discrimination. Further, as regards judicial review proceedings, any legal or natural person with 'sufficient interest' in a matter may bring a claim whether in NI, England and Wales or Scotland; the exact approaches to judicial review vary across these jurisdictions but the test for standing is materially similar.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In the UK, associations/organisations/trade unions are entitled to act in support of victims of discrimination (for example by providing legal advice or representation), as organisations may do that which they are not prohibited to do and no law prohibits the provision of support to litigants. There is scope for intervention in litigation by bodies or persons recognised by the court hearing the litigation as appropriate to intervene. NGOs have a record of intervention in equality cases.¹⁸³ The various rules of civil procedure and common law precedent which regulate proceedings in UK courts and employment tribunals limit the circumstances in which associations may intervene in an ongoing case as independent parties in support of a claimant. The rules of procedure vary across the jurisdictions (England and Wales, Scotland and Northern Ireland), but the test for standing is materially similar.

¹⁸¹ Source Ministry of Justice annual statistics and Employment Tribunal Statistics, available at: <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020>.

¹⁸² See for example, Court of Appeal, *R (MM) v SSWP* [2013] EWCA Civ 1565, 04.12.2013, available at: www.bailii.org/ew/cases/EWCA/Civ/2013/1565.html.

¹⁸³ E.g. Stonewall intervened in a case on transgender rights: Court of Appeal, *In the matter of M* [2017] EWCA Civ 2164 20.12.2017, available at: www.bailii.org/ew/cases/EWCA/Civ/2017/2164.html; and the Equality and Human Rights Commission intervened in the case brought by the trade union Unison challenging the imposition of tribunal fees in July 2017 Supreme Court, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf>.

c) Actio popularis

In the UK, national law allows associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*) only in limited circumstances.

The rules of procedure vary across the jurisdictions (England and Wales, Scotland and Northern Ireland), but in each jurisdiction associations / organisations / trade unions may act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*), only where the association etc. has a 'sufficient interest' (*locus standi*) in the matter in dispute to bring a claim for Judicial Review of a decision, action or failure to act of a public authority (such claims being available only against public authorities).¹⁸⁴ This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts and trade unions, NGOs and the Equality Commissions have brought important actions against public authorities through judicial review proceedings, such as *R (on the application of UNISON) v Lord Chancellor*, the case challenging the imposition of tribunal fees, heard by the Supreme Court in July 2017.¹⁸⁵

There are no rules setting out what type of organisation may litigate but, where an association etc. claims, 'sufficient interest' the court will want to be satisfied that it is a suitable claimant as distinct from a 'busy body'.¹⁸⁶ There are no special rules concerning the shifting burden of proof in this context. As to remedies, in *actio popularis* cases these generally consist of declarations that the public authority has acted unlawfully and/ or of orders that the authority do or cease to do something, but awards of damages are generally not made (except where someone is litigating as a victim of a breach of European Convention rights). There are no differences between GB and NI in this matter. The costs of bringing judicial review can be very high.

d) Class action

In the UK, national law does not allow associations/organisations/trade unions to act in the interest of more than one individual victim (*class action*) for claims arising from the same event.

Organisations cannot bring representative or 'class' actions in the name of victims. In this respect rules of procedure across the UK may not be fully compliant with the directives (Articles 7(2)/9(2)) and does not follow the Commission 2013 Recommendation on Collective Redress Procedural. Case management mechanisms exist to hear representative or group actions, though each individual makes an individual claim. Section 24 of the Equality Act 2006¹⁸⁷ permits the EHRC to seek injunctive relief to prevent a person from committing an unlawful act (see, similarly, RRO Article 59, FETO Article 41). This power is not used in practice.

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

In the United Kingdom, national law requires a shift of the burden of proof from the complainant to the respondent.

All UK anti-discrimination legislation provides for a shift of the burden of proof in relation to each of the grounds of discrimination, either (in GB) across the material scope of the

¹⁸⁴ Senior Courts Act 1981 (England and Wales) S31(1); Court of Session Act 1988 (Scotland) s27B; and Rules of the Court of Judicature (Northern Ireland) Order 53(5).

¹⁸⁵ Supreme Court, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf>.

¹⁸⁶ *(R v Secretary of State for the Environment ex p Rose Theatre Trust)* Queen's Bench Division [1990] 1 All ER 754; [1990] 1 QB 504, 17.07.1989.

¹⁸⁷ Equality Act 2006, 16.02.2006, available at: www.legislation.gov.uk/ukpga/2006/3/contents.

EqA¹⁸⁸ or (in NI)¹⁸⁹ in relation to all of the activities considered to be within the scope of the directives.¹⁹⁰ By way of example, Section 136 EqA provides that, 'If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred' unless A shows that s/he did not contravene the provision.¹⁹¹ DDA Section 17A; FETO Articles 38A and 40A, RRO Articles 52A and 54B; SOR, Regulations 35 and 38 and Age Regs Regulations 42 and 45 are in materially similar terms.

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

In the UK, there are legal measures of protection against victimisation.

The EqA, which applies in GB across all the protected grounds, prohibits the subjection to a detriment of any person because s/he has, or is believed to have, done a protected act, or because it is thought that s/he may do such an act (Section 27). 'Protected acts' are then defined by reference to bringing proceedings, giving evidence or information in connection with proceedings, doing any other thing for the purposes of or in connection with the discrimination legislation or making an allegation of its breach. There is an exception where false evidence is given, or a false allegation is made, in bad faith. The same rules concerning the burden of proof apply to victimisation as to discrimination.

In NI, the provision made by FETO, the RRO, DDA, SOR and Age Regs is broadly similar, except that victimisation requires 'less favourable treatment' because the person victimised has done, or is thought to have done or be about to do, a protected act.¹⁹² The EqA approach is an improvement on that which applies in NI because case law has demonstrated how difficult it is for an individual to establish that because she/he had done one of the protected acts, she or he was treated 'less favourably', that is to find an appropriate comparator.¹⁹³ The NI requirement for a comparator-driven approach may not be consistent with that in the directives which state simply that a person should not receive 'adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

The anti-discrimination legislation specifies the remedies available where complaints of discrimination or harassment are upheld by a court or tribunal.¹⁹⁴ The same remedies are available against public sector and private sector respondents.

By far the most common remedy in practice is the award of damages, which are calculated as in civil proceedings for tort, and may include 'compensation for injury to feelings' whether or not damages are awarded for any other reason.

In addition to compensation, other potential remedies are a declaration of the rights of the parties or recommendations to protect the position of the complainant. The EqA provides

¹⁸⁸ S136.

¹⁸⁹ S17A DDA, Arts 52A, 54B RRO, Arts 38A, 40A FETO, regs 35, 38 SOR 2003, regs 42, 45 Age Regs.

¹⁹⁰ The shift of the burden of proof does not apply in cases under the RRO where the alleged discrimination is on grounds of colour or nationality, in cases under the FETO for activities outside art. 3(2B) and in cases under the DDA other than under Part II or employment services (s.21A).

¹⁹¹ This does not apply to the very limited number of criminal offences created by the Act (s136(5)).

¹⁹² DDA s55; RRO Art 4; FETO Art 3(4); SOR 2003 reg 4; Age Regs reg 4.

¹⁹³ See, for example, Court of Appeal, *Aziz v Trinity Taxis*, [1988] QB 463 26.02.1988, available at: www.bailii.org/ew/cases/EWCA/Civ/1988/12.html and House of Lords *Chief Constable of the West Yorkshire Police v Khan*, [2001] IRLR 830, 11.10.2001, available at: www.bailii.org/uk/cases/UKHL/2001/48.html.

¹⁹⁴ EqA ss119, 124-126, 132-134, 139; DDA s17A & Sch 3; RRO Art 53; FETO Art 39; SOR 2003 reg 36, Age Regs reg 43.

(Section 124(3)) that: 'An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant'¹⁹⁵ Section 124(7) provides that, 'If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation the tribunal may— (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid; (b) if no such order was made, make one.'

In NI, except under FETO, tribunals may only make recommendations to, 'obviate or reduce the adverse effect on the complainant of any act of discrimination to which the complaint relates', although the Fair Employment Tribunal has the additional power, when upholding a complaint, to make a recommendation that the respondent take action to prevent or reduce the adverse effect *on a person other than the complainant* (the author's emphasis) of any unlawful discrimination or harassment to which the complaint relates. None of the legislation gives a tribunal the power to order a respondent to hire, promote or reinstate (after dismissal) the complainant or to take any steps to prevent discrimination in future.

b) Compensation – maximum and average amounts

There is no upper limit to the amount of compensation that can be awarded. In 2020 an award of EUR 5.4 million was confirmed in a disability discrimination claim.¹⁹⁶ In the vast majority of cases, however, awards are much more modest (see the tables below, which refer to tribunal awards in England, Wales and Scotland). Figures are all from the Ministry of Justice Tribunal statistics quarterly reports.¹⁹⁷

Employment tribunal awards **age** 2015-2020

Year	Average award	Median award	Maximum award
2015-16	GBP 9 025	GBP 8 417	GBP 16 263
2016-17	GBP 35 663	GBP 15 198	GBP 154 309
2017-18	GBP 6 796	GBP 6 184	GBP 10 432
2018-19	GBP 26 148	GBP 12 365	GBP 172 070
2019-20	GBP 38 794	GPB 11 791	GPB 243 636

Employment tribunal awards **disability** 2015-2020

Year	Average award	Median award	Maximum award
2015-16	GBP 21 729	GBP 11 309	GBP 257 127
2016-17	GBP 31 988	GBP 10 235	GBP 302 258
2017-18	GBP 30 698	GBP 16 523	GBP 242 130
2018-19	GBP 28 371	GBP 12 156	GBP 416 015
2019-20	GBP 27 043	GBP 13 000	GBP 265 719

¹⁹⁵ The power to make recommendations extending beyond the respondent's treatment of the claimant was repealed under the Deregulation Act 2015 from 01.10.2015.

¹⁹⁶ Employment Appeal Tribunal *Royal Bank of Scotland PLC v AB UKEAT/0266/18/DA, 0187/18/DA* 27.2.20, available at: https://www.bailii.org/uk/cases/UKEAT/2020/0266_18_2702.html. The original award was prior to 2020 and so does not appear in the statistics for 2020 below.

¹⁹⁷ Source: Ministry of Justice annual statistics and Employment Tribunal Statistics <https://www.gov.uk/government/collections/tribunals-statistics>.

Employment tribunal awards **race** 2015-2020

Year	Average award	Median award	Maximum award
2015-16	GBP 14 185	GBP 13 760	GBP 43 735
2016-17	GBP 36 853	GBP 13 141	GBP 456 464
2017-18	GBP 34 322	GBP 11 299	GBP 124 979
2018-19	GBP 12 487	GBP 7 882	GBP 33 660
2019-20	GBP 9 801	GBP 8 040	GBP 30 330

Employment tribunal awards **religion/belief** 2015-2020

Year	Average award	Median award	Maximum award
2015-16	GBP 19 647	GBP 16 174	GBP 45 490
2016-17	GBP 20 344	GBP 12 045	GBP 74 648
2017-18	GBP 5 074	GBP 5 696	GBP 6 846
2018-19	GBP 4 767	GBP 1 500	GBP 12 000
2019-20	GBP 0	GBP 0	GBP 0

Employment tribunal awards **sexual orientation** 2015-2020

Year	Average award	Median award	Maximum award
2015-16	GBP 20 192	GBP 20 192	GBP 20 192
2016-17	GBP 6 026	GBP 6 314	GBP 8 460
2017-18	GBP 12 550	GBP 12 550	GBP 24 100
2018-19	0	0	0
2019-20	GBP 27 936	GBP 9 245	GBP 96 645

Most successful discrimination cases result at least in an award of compensation for injury to feelings. In 2002, the Court of Appeal¹⁹⁸ fixed a wide range for injury to feelings compensation – from EUR 690 to EUR 35 000 (GBP 500 to GBP 25 000) - divided into three bands depending on the seriousness of the case.¹⁹⁹ An award can include aggravated damages to take account of the way the respondent treated the complainant or conducted their case. More recent case law suggests that the appropriate brackets now range from about EUR 1 000 to EUR 42 000 (GBP 660 to GBP 33 000).²⁰⁰

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

c) Assessment of the sanctions

There are concerns that the existing remedies do not meet the standard of 'effective, proportionate and dissuasive' set by the directives. Arguably, this is intrinsic in a scheme in which remedies are based on the principle of restitution, which is concerned to put the

¹⁹⁸ Court of Appeal, *Vento v Chief Constable of West Yorkshire Police (No.2)*, [2003] IRLR 102, 20.12.2002, available at: www.bailii.org/ew/cases/EWCA/Civ/2002/1871.html.

¹⁹⁹ These guidelines are applicable across the UK.

²⁰⁰ Employment Appeal Tribunal, *Da'Bell v NSPCC*, [2010] IRLR 19 and *Cadogan Hotel v Ozog*, (2014) UKEAT/0001/14, [2014] EqLR 691, 15.05.2014, available at: www.bailii.org/uk/cases/UKEAT/2014/0001_14_1505.html.

victim in the position s/he would have been had the act of discrimination not been committed. Of course, the payment of damages could have a deterrent effect, but the fact that certain organisations are repeatedly subject to discrimination proceedings suggests that more 'dissuasive' sanctions are required. The repeal by the Deregulation Act 2015²⁰¹ of the power to make recommendations extending beyond the respondent's treatment of the claimant further weakened the effectiveness of available sanctions.

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

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

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

²⁰¹ Deregulation Act 2015, 26.03.2015, available at: www.legislation.gov.uk/ukpga/2015/20/contents.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) was established by the Equality Act 2006. It is a single equalities and human rights body for GB. It has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB and is the designated body for GB in relation to Article 13 of Directive 2000/43/EC. The Commission has devolved authorities in Wales and in Scotland and there is a Scottish Human Rights Commission which shares the human rights remit of the EHRC in Scotland.

The Equality Commission for Northern Ireland (ECNI)

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

- b) Political, economic and social context of the designated body

There is generalised political support for equality, with a House of Commons Women and Equalities Select Committee created in 2015 to examine the Government's performance on equalities. In 2021, the Committee has held inquiries on matters including how the Government Equalities Office (GEO) is delivering on its responsibilities; examining the Government's proposed changes to the Gender Recognition Act 2004; and the fairness of the UK asylum process, looking at the experiences of people seeking asylum who have a range of protected characteristics (as defined in the UK's Equality Act).

However, the Government commitment to equality is not reflected in terms of financial support for the EHRC and ECNI. Although the cuts can be seen in the context of cuts to many public services, these cuts are disproportionate compared to other public bodies. Moreover, concern has been expressed about the Government's commitment to equality, reflected in appointments to the EHRC made in 2020;²⁰² and Brexit also gives rise to concerns, given the removal of EU supervision of UK commitments to equality laws.

In terms of popular debate, there is a mixed picture. Some elements of the press are critical of public spending on organisations such as the Commission. At the same time, there is considerable public support for equality and diversity, and considerable concern at the unequal impact of coronavirus, particularly on ethnic minorities, older people and people with underlying health conditions. Many workplaces are governed by the Public Sector Equality Duty as well as sectoral equality standards, which means that many organisations operate in an environment in which equality concerns are formally recognised.

²⁰² See Flash Report United Kingdom – Appointment of new commissioners to the EHRC available at: <https://www.equalitylaw.eu/country/united-kingdom>.

c) Institutional architecture

GB

In GB, the designated body forms part of a body with multiple mandates. The EHRC has a mandate as a national human rights institution and is recognised as such by the UN.

The EHRC structures its equality and non-discrimination work by theme (for example, access to justice; education; employment) rather than by creating specific services for non-discrimination or for different equality grounds.

NI

In NI, the designated body does not form part of a body with multiple mandates. The Equality Commission for Northern Ireland has an equality mandate and the human rights mandate is held by the Northern Ireland Human Rights Commission (NIHRC).

The ECNI structures its equality and non-discrimination mandate through strategic priorities rather than by equality strand.

d) Status of the designated bodies – general independence

i) Status of the bodies

GB

The EHRC is a statutory non-departmental public body, which operates independently of Government. The Board of Commissioners is appointed by the Minister for Women and Equalities. The appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission

The Commission is funded by the Government. Funding is determined by the designated Secretary of State out of his or her departmental budget. In March 2021, the EHRC had 200 staff (199 full-time equivalent). Its resource budget for 2020-21 (excluding depreciation) consisted of GBP 17.1 million administration and programme funding.²⁰³

The Board of Commissioners is responsible for strategic oversight. Management of the Commission's operations is delegated to the CEO and the Commission's staff, who recruit and manage the staff.

The EHRC is accountable to the Secretary of State, to whom it reports annually. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. Members of Parliament can choose to stage a debate on the contents of the report, but this rarely if ever happens. In addition, the Joint Committee on Human Rights of the UK Parliament has the ability to inquire into the work of the EHRC and its relationship to the Secretary of State.

NI

The ECNI is a non-departmental public body. Its sponsor Department is the Office of the First and Deputy First Minister which carries responsibilities for equality policy and legislation in the Northern Ireland Executive. Members of the ECNI are appointed by the Secretary of State for Northern Ireland to serve for a fixed term. As with the EHRC, the appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission. Management of the Commission's operations is led by the Chief Executive and Commission staff.

²⁰³ In addition, it received funding of £0.5 million for capital expenditure.

Funding is determined by the designated Secretary of State out of his or her departmental budget. In 2020-21 the ECNI received GBP 5.391 million. The ECNI has responsibility for the recruitment and management of staff. In 2020-21, it employed 73 full-time equivalent staff.

The ECNI reports annually to the designated Secretary of State. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. Again, as with the EHRC, this rarely generates active parliamentary debate. In addition, committees of the UK Parliament have the ability to inquire into the work of the ECNI and its relationship with the Secretary of State, although so far this has not taken place to any significant degree.

ii) Independence of the bodies

The EHRC and ECNI operate independently of the UK, Scottish and Welsh Governments and the Northern Ireland Executive.²⁰⁴ Although funded by the Government, as non-departmental public bodies they are separate and independent of Government and do not carry out Government business or perform their functions on behalf of the Government. In the professional opinion of the author the independence of the bodies is effective, although they note the concerns about the commitment to equality of recent appointments to the EHRC made in 2020.²⁰⁵

e) Grounds covered by the designated bodies

The EHRC covers the protected grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation and human rights. The ECNI covers age, disability, race, religious or similar philosophical beliefs and political opinion, sex and sexual orientation. They therefore cover all the protected grounds covered by Directives 2000/43/EC and 2000/78/EC, as well as nationality (which is included within 'race').

Both equality bodies organise their work by theme. Both equality bodies undertake reviews to ensure that all strands are accorded appropriate levels of attention.

Organisation by theme means that it is impossible to assess whether equivalent attention is given to all grounds; and it is difficult to tell whether this would be appropriate in any event. In its review of its strategic plan, the EHRC noted that religion or belief, sexual orientation and transgender status were relatively less visible in terms of the number of projects that are relevant to them, the scale of the projects which involve them and/or the extent to which the protected characteristic is a significant element of a project. However, given the current priorities, the variation in levels of attention is not necessarily inappropriate and the focus of work varies over time.

f) Competences of the designated bodies – and their independent exercise

i) Independent assistance to victims

In Great Britain and Northern Ireland, the Equality Commissions have the competence (if not necessarily the resources) to provide independent assistance to victims, for example by providing legal assistance to victims of discrimination, intervening in legal proceedings and making applications to court for injunctions.²⁰⁶

²⁰⁴ See Northern Ireland Act 1998, para 12 Schedule 8; see Equality Act 2006, para 42 Schedule 1.

²⁰⁵ See Flash Report United Kingdom – Appointment of new commissioners to the EHRC available at: <https://www.equalitylaw.eu/country/united-kingdom>.

²⁰⁶ Eq A ss28-29, Northern Ireland Act 1998 ss73-74.

Individual advice and support on discrimination is provided by the Equality Advisory and Support Service (EASS), a Government-funded helpline which is independent of the EHRC. The helpline, with a budget of around EUR 2.2 million (GBP 2 million) and around 30 staff, advises and assists individuals on issues relating to equality and human rights, across England, Scotland and Wales. It supports individuals to resolve their issue using alternative informal dispute resolution and does not provide legal advice. However, EASS refers cases to the Commission which it thinks might be strategic.

The Commissions provide assistance in an independent manner. However, budget cuts to the Commissions' budgets mean that the level of resource is insufficient for them to fulfil their general mandate in an optimal manner.

ii) Independent surveys and reports

In the UK, the designated bodies do have the competence to conduct independent surveys and publish independent reports. Details of investigations and inquiries can be found on the Commissions' websites, and in 2021 include an inquiry into how older adults, persons with disabilities and unpaid carers can challenge local council decisions about social care and support in England and Wales; an investigation after a whistle-blower suggested that the owners of a holiday company were using a booking policy that excluded Gypsies and Travellers; and an inquiry into the treatment and experience of ethnic minority workers in lower-paid roles in the health and social care sectors.²⁰⁷

In the author's opinion, this competence is effectively exercised in an independent manner, in practice.

iii) Recommendations

In the UK, the designated bodies have the competence to issue independent recommendations on discrimination issues. This competence is exercised in an independent manner. Where the activities occur, they can be effective. However, funding constraints mean that this power is not used very often in practice.

iv) Other competences

The EHRC engages in the promotion of good practice, policy advice and guidance and awareness raising. It maintains a research database and a Religion or Belief Network. The Network was started in 2009 to develop the EHRC's knowledge of research on the religion or belief protected characteristic and also to publicise forthcoming events to Network members. The key goals are now to publicise new publications and forthcoming events amongst members. The EHRC also provides advice and guidance on issues such as reasonable adjustments for persons with disabilities.

The provision of guidance and advice, commissioning research and creation of briefing papers etc. are all undertaken effectively.

g) Legal standing of the designated bodies

In the United Kingdom, the designated bodies do not have legal standing to:

- bring discrimination complaints (on behalf of identified victims).²⁰⁸

In the United Kingdom, the designated bodies do have legal standing to:

²⁰⁷ EHRC: <https://www.equalityhumanrights.com/en/our-legal-action/inquiries-and-investigations>; ECNI: <https://www.equalityni.org/Investigations>.

²⁰⁸ See Section 6.2a above.

- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example as *amicus curiae*.

Section 30 EqA 2006 makes explicit statutory provision in respect of the EHRC's ability to apply for judicial review and to intervene in court proceedings that relate to discrimination. The ECNI has similar powers and functions as the EHRC as regards discrimination.²⁰⁹

The EHRC has powers to bring proceedings in relation to discriminatory advertisements and instructions or inducement to discriminate and to take enforcement action against public authorities which fail to comply with their positive duties.

h) Quasi-judicial competences

In the UK, the bodies are not quasi-judicial institutions.

i) Registration by the bodies of complaints and decisions

In the UK, the bodies do not register the number of complaints of discrimination made and/or decisions (by ground, field, type of discrimination, etc.) because they do not receive complaints and make decisions as such. They do provide evidence of their activities in Annual Reports.

j) Roma and Travellers

EHRC

The Equality and Human Rights Commission has made support for Travellers and Roma a central part of its legal strategy.²¹⁰ It has also identified their concerns about housing and discrimination as a significant part of its policy agenda over the next years. The Commission intends to support appropriate cases using both anti-discrimination law and the ECHR and to continue to campaign in the media and in the elected parliaments for Traveller and Roma rights. It has published several authoritative research publications on the treatment of Traveller families in the UK, which can be accessed via the Commission's website. In 2021, after a whistle-blower suggested that the owners of a holiday company were using a booking policy that excluded Gypsies and Travellers, the EHRC investigated, leading to the holiday company signing a legally binding agreement with the EHRC to ensure that such acts of discrimination do not happen again.

ECNI

The ECNI has also identified Roma and Traveller issues as a priority issue and has worked to develop a strategy for promoting equality for Travellers in education,²¹¹ as well as emphasising Traveller issues in much of its case-work and legal reform campaigning.

²⁰⁹ The absence of such an explicit power to intervene in court proceedings in the legislation establishing the Northern Irish Human Rights Commission required a decision by the House of Lords to confirm that the Commission did have this power: see House of Lords, *In re the Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236 20.06.2002, available at: www.bailii.org/uk/cases/UKHL/2002/25.html.

²¹⁰ See https://www.equalityhumanrights.com/sites/default/files/strategic_plan_-_web_accessible.pdf.

²¹¹ See www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/MainstreamingequalityforTravellerchildreninschools2008.pdf?ext=.pdf.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

To a considerable extent the Governments in GB and NI rely on the Equality Commissions (including the devolved Commissions in Scotland and Wales) to increase public awareness of existing anti-discrimination laws and the directives. The GB EHRC and the ECNI publish a great deal of information about current protection against discrimination which is available in hard copy from the EHRC and the ECNI, and which is also on the EHRC and ECNI websites.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

As consultation requires a baseline of information, the steps above have served as a way to facilitate consultation with NGOs.

The UK Parliament's Women and Equalities Select Committee undertakes inquiries and publishes information about equalities in the UK. Examples of recent inquiries include how the Government Equalities Office (GEO) is delivering on its responsibilities; and the fairness of the UK asylum process, looking at the experiences of people seeking asylum who have a range of protected characteristics (as defined in the UK's Equality Act). Other inquiries include 'The use of non-disclosure agreements in discrimination cases', 'Health and social care and LGBT communities', 'Mental health of men and boys' and 'Tackling inequalities faced by Gypsy, Roma and Traveller communities'.²¹²

There exist in the UK a very large number of NGOs that represent or support particular groups or communities or special interests and are concerned to combat discrimination. Some receive some financial support from central or local government while most are dependent on non-government funding. There has been nothing to indicate that arrangements for consultation or 'dialogue' have been initiated in GB or NI specifically to meet the requirements of Article 12; it is more likely that the greater attention paid to NGOs has been to inform Government and to seek to secure wider acceptance of its policies.

There are no formal structures for central (or devolved) Government dialogue with NGOs, but there are no barriers to such dialogue. Government departments often establish ad-hoc groups by means of which Ministers or senior officials can consult with NGOs on difficult or controversial issues. The positive duties require public authorities to consult on the equality impact of their policies and practices, which has encouraged greater engagement with civil society and local communities.

Implementation of the Section 75 positive duty in NI has seen widespread consultation with community groups. In NI, NGOs have established themselves as significant stakeholders in any discussions on equality issues. They have played an active role in consultation on measures to transpose the directives. NGOs act as effective watchdogs of the performance by public authorities of their equality duties under Section 75 of the Northern Ireland Act 1998, which requires public authorities to consult on the equality impact of their policies and practices, and many NGOs with specialised interests, for example in disability issues, are more likely to be listened to within the equality impact assessment carried out by NI public authorities.

²¹² See <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/>.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

There are no particular measures designed to promote dialogue between social partners.

In the various consultation documents concerning transposition of the directives and establishment of a single equality body in GB, it appears that one aim of the Government has been to reassure business and employers generally that neither the existing nor the proposed legislation should be unduly burdensome, that guidance and support will be available and, more positively, that equality is good for business. This message has not included a role for trade unions in combating discrimination or promoting equality in the workplace, through collective agreements, joint working or any other methods. Again, however, the positive equality duties may have an impact in this respect.

- d) Addressing the situation of Roma and Travellers

Formal consultation with Traveller groups is increasingly common, both at central government level and also within the devolved administrations (see, for example, the Scottish Government's Gypsy/ Traveller Strategy).²¹³ The UK Parliament's Women and Equalities Committee, a select committee of the House of Commons, undertook an inquiry on tackling inequalities faced by Gypsy, Roma and Traveller communities and reported in 2019.²¹⁴ In the same year the Ministry of Housing, Communities and Local Government launched a national strategy to tackle entrenched inequality and improve the lives of Gypsy, Roma and Traveller communities, and in 2020 additional support was provided to help overcome gaps in learning caused by COVID-19.

There is no specific body appointed at national level to address Roma issues, but these issues would fall within the scope of the EHRC and there are a number of charitable organisations dedicated to improving the plight of Gypsies and Travellers generally and Roma specifically. Among these are the Friends Families and Travellers,²¹⁵ the Community Law Partnership²¹⁶ the Traveller Movement²¹⁷ and the Roma Support Group.²¹⁸

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) Compliance of national legislation (Articles 14(a) and 16(a))

In the UK, the necessary measures have been taken to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. (Article 14(a) of Directive 2000/43 and Article 16(a) of Directive 2000/78).

It is not unreasonable to assume that there may be laws, regulations or rules contrary to the principle of equality that are still in force; nothing in the UK anti-discrimination legislation has the effect of striking out or disapplying primary or secondary legislation.

However, as part of the transposition process, government departments were required to review the legislation for which they are responsible to ensure that any which was contrary to the directives' principles of equal treatment in relation to disability, religion or belief and sexual orientation was repealed or amended. That procedure was repeated in respect of

²¹³ www.gov.scot/Topics/People/Equality/gypsiestravellers/strategy.

²¹⁴ House of Commons Women and Equalities Committee Seventh Report of Session 2017–19: *Tackling inequalities faced by the Gypsy, Roma and Traveller communities*, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/360.pdf>.

²¹⁵ Friends Families and Travellers: www.gypsy-traveller.org/.

²¹⁶ Community Law Partnership: www.communitylawpartnership.co.uk/.

²¹⁷ Traveller Movement: travellermovement.org.uk/.

²¹⁸ Roma Support Group: romasupportgroup.org.uk.

age. Legislative provisions found contrary to the principle of equal treatment on grounds of age have been repealed or retained where they can be objectively justified under the provisions of the directive. Following the departure of the UK from the EU on 31 January 2020, from 2021 onwards, GB courts should normally continue to interpret the Equality Act 2010 in line with EU Court decisions made before the end of 2020. The Supreme Court and the Court of Appeal may depart in some circumstances from the case law of the CJEU, while being bound by the provisions of Directives 2000/78/EC and 2000/43/EC. From 2021 onwards, when interpreting UK laws which are based on EU Directives (such as the Equality Act provisions which implement EU Equality Directives), GB courts are not bound by post-2020 EU court decisions but may have regard to them. Under the UK-EU Withdrawal Treaty, Northern Ireland continues to be bound by the EU Equal Treatment Directives and to interpret them in conformity with post-2020 ECJ decisions.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

In the UK, the necessary measures have been taken to ensure compliance with Article 14(b) of Directive 2000/43 and Article 16(b) of Directive 2000/78).

Section 142 EqA provides, in GB, that contractual terms are unenforceable insofar as they 'constitute[], promote[] or provide[] for treatment of [a]... person that is of a description prohibited by this Act'. Similar provision is made by Section 145 of the Act as regards collectively agreed terms and rules of undertakings. Discrimination in the rules governing independent occupations, professions, workers' associations or employers' associations falls within the provisions of the EqA also. The same is true in NI under the various equality provisions there in force.²¹⁹

The EqA states, however (Schedule 11, paragraph 5), that its prohibitions on discrimination related to religion/ belief are without prejudice to Sections 58–60 of the School Standards and Framework Act 1998 (which permit religious discrimination in appointment and dismissal of teachers in schools with a religious character, without the need to show legitimate aim or proportionality – see also Section 21 of the Education (Scotland) Act 1980 (management of denominational schools)).

²¹⁹ In particular, Arts 68 and 68A Race Relations (NI) Order 1997 (RRO) applying in respect of contractual and collectively agreed terms and rules of undertakings. The corresponding provisions of the Employment Equality (Sexual Orientation) Regulations (NI) (SOR) are reg 42 and Sch 4; of Fair Employment and Treatment Order 1998 (FETO) Arts 99 and 100A; of the Disability Discrimination Act 1995 (DDA) ss16B and 16C and of the Employment Equality (Age) Regulations (NI) 2006 (Age Regs) reg 49.

9 COORDINATION AT NATIONAL LEVEL

At governmental level in GB there has traditionally been less than complete clarity as to which government department was responsible for anti-discrimination measures, and there has been a history of constantly shifting responsibility between different departments to reflect the differing interests of different ministers. The Government Equalities Office, formed in October 2007, is an independent department and has had various ministerial sponsors. Since the end of 2019, the Rt Hon Elizabeth Truss MP, Secretary of State for International Trade, and then Secretary of State for Foreign, Commonwealth and Development Affairs has been the Minister for Women and Equalities. The Government Equalities Office has responsibility within Government for equality strategy and legislation in the UK.²²⁰

The Scottish Government and Welsh Government have race equality frameworks and action plans.²²¹

There is no anti-racism or anti-discrimination National Action Plan in the England or Northern Ireland, beyond the work of the respective equality commissions.

The UK Government has a Race Disparity Unit within the Cabinet Office, which collects, analyses and publishes Government data on the experiences of people from different ethnic backgrounds. In 2021, the Race Disparity Unit supported a Commission on Race and Ethnic Disparities, which reported in April 2021.²²²

²²⁰ See: <https://www.gov.uk/government/organisations/government-equalities-office/about>.

²²¹ See: <https://www.gov.scot/policies/race-equality/scotlands-race-equality-framework/>;
<https://gov.wales/race-equality-action-plan-anti-racist-wales>.

²²² See: <https://www.gov.uk/government/publications/the-report-of-the-commission-on-race-and-ethnic-disparities/foreword-introduction-and-full-recommendations#full-recommendations>.

10 CURRENT BEST PRACTICES

- The positive duties imposed on public authorities by the Public Sector Equality Duty (Section 149 EqA) in GB and Section 75 Northern Ireland Act 1998 (in NI) (see 2.3.1).
- The positive duties are embedded in the practice of many public and private organisations with many schemes dedicated to enhancing and developing equality. Example include: Advance HE's Race Equality Charter, which aims to improve the representation, progression and success of Black, Asian and Minority Ethnic staff and students within higher education;²²³ LGBT+ history month²²⁴ celebrated annually across workplaces, education settings and businesses; and the Disability Confident employer scheme for employers.²²⁵
- The broad coverage in the UK beyond employment and occupation of discrimination on grounds of disability, sexual orientation, religion or belief (and, in GB, age) (see 3.2.6-3.2.10).
- The coverage by the EqA of discrimination on grounds of caste (see 2.1.1).
- Despite the recent budget cuts, the work of the EHRC and ECNI is strong, with a significant number of high-quality research reports and investigations published each year.
- Regarding artificial intelligence, in November 2020 the Government published an independent review into bias in algorithmic decision-making.²²⁶ This review considers the impact that an increasing use of algorithmic tools is having on bias in decision-making, the steps that are required to manage risks, and the opportunities that better use of data offers to enhance fairness.

<https://www.advance-he.ac.uk/equality-charters/race-equality-charter>.

²²⁴ See: <https://lgbtplushistorymonth.co.uk/>.

²²⁵ See: <https://www.gov.uk/government/collections/disability-confident-campaign>. An independent Steering Group reported on the Public Sector Equality Duty (PSED) in 2013 (<https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response>). This review, and alternative views of its effectiveness is discussed in Manfredi, Vickers, and Clayton Hathway. 'Public sector equality duty: enforcing equality rights through second-generation regulation', *Industrial Law Journal* 47 (3) (2018) pp. 365-398.

²²⁶ Available at: <https://www.gov.uk/government/publications/cdei-publishes-review-into-bias-in-algorithmic-decision-making/main-report-cdei-review-into-bias-in-algorithmic-decision-making>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

- One concern is the wide scope for schools to discriminate against teachers on grounds of religion which is, in the author's view, incompatible with Article 2 of Directive 2000/78/EC (see 4.1).
- There is some concern over whether UK law adequately protects self-employed workers as required by Articles 2 and 3 of Directives 2000/43/EC and 2000/78/EC (see 3.2.1).
- There are concerns that the existing remedies do not meet the standard of 'effective, proportionate and dissuasive' set by the directives. A particular concern is the lack of power to make recommendations extending beyond the respondent's treatment of the claimant. Article 15 Directive 2000/43/EC and Article 17 Directive 2000/78/EC (see 6.5c).
- No prohibition of indirect discrimination on grounds of disability in NI (Article 2 Directives 2000/43/EC and 2000/78/EC).
Following the departure of the UK from the EU, in GB the Supreme Court and the Court of Appeal may depart in some circumstances from the case law of the CJEU, while being bound by the provisions of Directives 2000/78/EC and 2000/43/EC. From 2021 onwards, when interpreting UK laws that are based on EU Directives (such as the Equality Act provisions that implement EU Equality Directives), GB courts are not bound by post-2020 EU court decisions but may have regard to them. This creates a risk that non-discrimination law could be less well protected in GB. However, in 2021 there are no examples of any divergence in interpretation of non-discrimination law.

11.2 Other issues of concern

There are now fewer obstacles to Parliament undermining aspects of the Equality Act 2010 (EA), as the UK is no longer directly bound by EU law. The executive can now amend primary legislation without full Parliamentary scrutiny under the EU Withdrawal Act (which allows changes to be made using secondary legislation). This could include the power to amend aspects of equality law without full Parliamentary safeguards.

Other concerns:

There are ongoing concerns noted above about the difficulties in accessing additional education funding (Pupil Premium) for Traveller children (see 3.2.8a above).

There are ongoing concerns that the current uncertainty around the coverage of self-employed workers and volunteers with the effect that the material scope of UK law may not fully reflect that of the directives in every respect (see 3.2.1.a and b above).

The Government's policy of creating a hostile environment for those with irregular immigration status has had an impact on migrants, including many people who are legally resident in the UK.

Prominent examples include immigrants in the 1960s from Jamaica (named the 'Windrush generation' after the ship that brought one of the first groups of West Indian migrants to the UK) who have not been able to prove their right to be in the UK due to documents being lost. Many such individuals have been denied healthcare, lost their jobs and homes, been threatened with deportation and in some cases deported and refused the right to return. Their plight was raised by journalists and charities, and the political scandal that resulted led ultimately to the resignation of then Home Secretary Amber Rudd in 2018. Although efforts have been made by the Government to address the needs of these individuals, difficulties continued to be reported in 2020. It is feared that following the UK

exit from the EU, those EU citizens without settled status may face similar difficulties to those faced by the 'Windrush generation'.²²⁷

The hostile environment has led to dismissal of staff who have the right to remain in the UK as employers are not satisfied that they have provided the correct proof of status. The rules about which documents are accepted are very complex and are listed alongside a threat that penalties apply if the employer makes a mistake. They therefore encourage employers to err on the side of caution and refuse employment rather than risk a penalty. The hostile environment also explains rules imposing liability on landlords, if they let premises to those with irregular immigration status. The effect is to make employers and landlords act as proxy immigration enforcers. Again there is concern that similar difficulties may be faced for EU citizens without settled status following the UK exit from the EU.

In 2020, the COVID-19 pandemic revealed systemic inequalities in the UK, which continue in 2021. In particular, the impact of the virus was greater for ethnic minorities, older people and people with underlying health conditions.²²⁸

During 2020, a number of new commissioner appointments were made to the Equality and Human Rights Commission. Concerns have been raised by equalities campaigners about the commitment of some appointees to the principles of equality, and about diversity within the senior management of the Commission.²²⁹

In April 2021, the Commission on Racial Disparities reported. While the Commission's report included data on racial disparities, concerns were raised about the extent to which the role of racism was downplayed.²³⁰ The Commission noted the many instances of success among minority communities, while concluding that many cases of educational failure and crime were the result of family breakdown rather than racism, and noting the social and economic problems facing the white working class.

AI:

Concerns related to the equality implications of the increasing use of AI are well documented in the UK. Examples include concerns about discrimination in the provision of online services created by discriminatory assumptions, including in relation to sexual orientation, embedded in algorithms;²³¹ and concerns about the equality impact of the use of AI in hiring decisions, including concerns about race discrimination.²³² A number of reports have been commissioned by Government considering the equality implications of AI, for example a report on risks of bias in the use of facial recognition technology,²³³ and a House of Lords Liaison Committee report on 'AI in the UK: No room for complacency' which notes issues regarding bias and prejudice in AI.²³⁴

²²⁷ See <https://www.euractiv.com/section/uk-europe/news/eu-nationals-face-delays-difficulties-with-brexitt-settlement-scheme-new-report-finds/>.

²²⁸ Public Health England (2020), *Disparities in the risk and outcomes of COVID-19*, available at <https://www.gov.uk/government/publications/covid-19-review-of-disparities-in-risks-and-outcomes>.

²²⁹ For a general assessment of these appointments see: <https://www.theguardian.com/society/2020/nov/30/politicising-ehrc-five-controversial-appointments>.

²³⁰ See, for example, this report: <https://www.theguardian.com/world/2021/mar/31/racial-disparities-in-the-uk-key-findings-of-the-report-and-what-its-critics-say>.

²³¹ Documented at <https://ai-lawhub.com/ai-and-discrimination/>.

²³² Documented at <https://www.ifow.org/publications/artificial-intelligence-in-hiring-assessing-impacts-on-equality>.

²³³ <https://www.gov.uk/government/publications/cdei-publishes-briefing-paper-on-facial-recognition-technology/snapshot-paper-facial-recognition-technology>. The report does not specify which grounds suffer from bias.

²³⁴ <https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/196/19602.htm>. The report does not specify which grounds suffer from bias.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

Amendments to the Equality Act 2010 are listed with the online version of the Act.²³⁵ There has been no significant legislative amendment in 2021 for the purpose of this report.

12.2 Case law

Age

Name of the court: Employment Appeal Tribunal

Date of decision: 27 September 2021

Name of the parties: *Pitcher v University of Oxford* and *University of Oxford v Ewart*

Reference number: EA-2019-000638-RN, EA-2020-000128-RN

Link: <https://www.bailii.org/uk/cases/UKEAT/2021/2019-000638.pdf>

Brief summary: Professor Pitcher was an Associate Professor of English Literature at Oxford University as well as being employed as an Official Fellow and Tutor in English at St John's College. On reaching the age of 67, he was compulsorily retired from both employments, the employers relying on the Employer Justified Retirement Age (EJRA) to justify any resulting age discrimination. The EJRA scheme operated by the employers allowed employees to apply for an extension, but Professor Pitcher's application for an extension of his employment was refused. An ET dismissed Professor Pitcher's claims of direct age discrimination and unfair dismissal, finding that the EJRAs were justified and the dismissals fair. Professor Pitcher appealed. Professor Ewart was an Associate Professor in Atomic and Laser Physics at Oxford University. He initially obtain an extension of his employment by taking up a fixed-term position. His application for a further extension was unsuccessful and he was also compulsorily retired. A different ET upheld Professor Ewart's claims of direct age discrimination and unfair dismissal, finding that the University had not shown the EJRA to be justified. The University appealed the decision on the age discrimination claim.

The two appeals were combined and heard by the Employment Appeal Tribunal, which found that the EJRA has three legitimate aims: inter-generational fairness; succession planning by maintaining predictable retirement dates; and equality and diversity. The EJRA is said to achieve these aims by ensuring vacancy creation is not delayed; and recruitment into senior academic roles might take place from a younger, more diverse cohort. These aims were accepted as legitimate. The EAT held that neither ET had erred in law in assessing the whether the application of the EJRA was justified as a proportionate means to achieve the legitimate aims. Each had reached a conclusion which was based on evidence before them and after proper assessment of the proportionality of imposing the EJRA on the case before it. The EAT held that the nature of the proportionality assessment was that different ETs could reach different conclusions even when considering the same measure adopted by the same employer.

Religion and belief

Name of the court: Employment Appeal Tribunal

Date of decision: 10 June 2021

Name of the parties: *Maya Forstater v CGD Europe and Others*

Reference number: UKEAT/0105/20/JOJ

Link: <https://www.gov.uk/employment-appeal-tribunal-decisions/maya-forstater-v-cgd-europe-and-others-ukeat-slash-0105-slash-20-slash-joj>

²³⁵ See: <https://www.legislation.gov.uk/ukpga/2010/15/resources>.

Brief summary: The claimant holds gender-critical beliefs, which include the belief that sex is immutable and should not be conflated with gender identity, and that trans women are not women. She alleged that she was discriminated against when her contract was not renewed following complaints from colleagues at work that her views, expressed on social media, were offensive and transphobic. At the preliminary hearing on whether her belief was protected, the Employment Tribunal decided her belief was not protected under the Equality Act 2010, on the basis that these beliefs were incompatible with human dignity and fundamental rights of others, and thus did not meet the criteria for being a protected belief. The Tribunal drew attention to the fact that the beliefs were absolutist, and that it was a core component of the belief that she would refer to people by the sex she considered appropriate even if to do so were to violate their dignity. The claimant appealed.

The Employment Appeal Tribunal (EAT) held that the belief was a protected belief. A belief should be excluded from protection only if it was the kind of belief akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) by virtue of Article 17 thereof. The claimant's gender-critical beliefs, which were widely shared, and which did not seek to destroy the rights of trans persons, clearly did not fall into that category. The claimant's belief, while offensive to some, and notwithstanding its potential to result in the harassment of trans persons in some circumstances, fell within the protection under Article 9(1), ECHR and therefore within the protection of the Equality Act 2010. The case was remitted to a freshly constituted tribunal to determine whether the treatment about which the claimant complained was because of or related to her belief.

Religion and belief and sexual orientation

Name of the court: Court of Appeal

Date of decision: 24 September 2021

Name of the parties: *R (Cornerstone (Northeast) Adoption and Fostering Service Ltd)) v The Office for Standards In Education, Children's Services and Skills*

Reference number: [2021] EWCA Civ 1390

Link: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1390.html>

Brief summary: Cornerstone is a charity which offers foster and permanent homes to children in the care of local authorities. The charity operates according to its perception of evangelical Christian principles. Carers have to abide by its Statement of Beliefs and Code of Practice which requires staff, volunteers and carers to be evangelical Christians and to refrain from 'homosexual behaviour' as described in the Code of Practice. In effect, the only potential carers Cornerstone accepts are evangelical married heterosexual couples of the opposite sex. Ofsted is a statutory body whose functions include the registration, regulation and inspection of adoption and fostering agencies. Following an inspection, Ofsted concluded that Cornerstone's recruitment policy violated provisions of the Equality Act 2010 (EA 2010) prohibiting discrimination on grounds of sexual orientation in the provision of goods and services. It required Cornerstone to change its policy.

In this legal claim, Cornerstone challenged Ofsted's conclusions. First, it argued that Cornerstone was not involved in the provision of services. Secondly, it argued that any discrimination was because of homosexual behaviour and not because of sexual orientation such that the refusal to recruit gay and lesbian foster carers did not discriminate either directly or indirectly on grounds of sexual orientation. Thirdly, it argued that it was covered by an exception available for charities that limit their benefits to persons who share a protected characteristic, in this case religion or belief. Cornerstone also argued that that Ofsted's report infringed its rights to religious freedom and freedom of expression.

The High Court held that Cornerstone was offering a service to potential foster parents. It also fulfilled a public function as it provided carers for children who were under the care of the state. Also, the recruitment policy did discriminate on grounds of sexual orientation, both directly and indirectly. Any indirect discrimination could not be justified. Moreover,

the exception for charities did not apply in this case as the limit was based not on the religion or belief of carers, but on their sexual orientation. It held that there was no breach of Cornerstone's rights to freedom of religion (the non-recruitment of gay and lesbian foster carers was not a manifestation of religious belief and, in any event, any interference was a proportionate means of achieving a legitimate aim) and freedom of expression (any interference was a proportionate means of achieving a legitimate aim).

The case was appealed to the Court of Appeal on several grounds including that Cornerstone's policy did not directly discriminate on grounds of sexual orientation; and that the policy was a proportionate means of achieving a legitimate aim and so any indirect discrimination was lawful. The Court of Appeal upheld the decision of the High Court. Cornerstone's policy which specifically requires carers not to engage in homosexual behaviour, 'is as clear an instance of direct discrimination 'because of' a protected characteristic as can be imagined'. Alternatively, any indirect discrimination could not be justified. Moreover, the Court of Appeal refused the right to appeal on the question of whether Cornerstone was a 'service provider', effectively confirming the High Court's decision on this point.

Status

Name of the court: Supreme Court

Date of decision: 19 February 2021

Name of the parties: *Uber BV v Aslam*

Reference number: [2021] UKSC 5

Link: <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>

Brief summary: Uber provides a private hire vehicle booking service in the UK whereby journeys are booked through a smartphone app, which connects passengers to drivers. The respondents are drivers who are or were active users of that app, and their case was brought as a test case to establish their employment status. The drivers claimed that they were 'workers' for the purposes of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998 while actively using the app. This status would also give rise to rights under the Equality Act 2010. The claimants argue that the respondents were independent, third-party contractors and not 'workers'. In the lower courts, the drivers had been found to be 'workers' when they had the claimants' app switched on and were able and willing to accept assignments. The claimants appealed to the Supreme Court. The Supreme Court unanimously rejected Uber's appeal and found that the drivers were 'workers' for the purposes of the protective legislation

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: United Kingdom

Date: 1 January 2022

UK

Title of the Law: Equality Act 2006

Abbreviation: EqA 2006

Date of adoption: 16.02.2006

Latest relevant amendment: 01.10.2010

Entry into force: various from 06.04.2007

Web link: <http://www.legislation.gov.uk/ukpga/2006/3/contents>

Grounds covered: sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age

Civil law

Material scope: Enforcement and promotion, goods and services, housing, education, functions of public authorities. Applies to GB only insofar as it establishes the EHRC. It also provides the basis for the enactment in NI of regulations prohibiting sexual orientation discrimination outside employment

Principal content: Extended protection against discrimination on grounds of sexual orientation to provision of goods and services, housing, education, public functions. Also established the EHRC

GB

Title of the Law: Equality Act 2010

Abbreviation: EqA

Date of adoption: 08.04.2010

Latest relevant amendment: 26.03.2015

Entry into force: 01.10.2010

Web link: <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Grounds protected: sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age

Civil law

Material scope: All sectors of employment and employment-related activities, access to goods facilities and services (thereby covering most areas of social advantages and social protection), disposal and management of premises, education. Applies only to GB

Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, imposes positive obligations on public authorities, provides individual rights of redress

NI

Title of the Law: Disability Discrimination Act 1995

Abbreviation: DDA

Date of adoption: 08.11.1995

Latest relevant amendments: 01.08.2011

Entry into force: various dates from November 1995

Webpage address:

<http://www.legislation.gov.uk/ukpga/1995/50/contents> (this is not up to date)

Grounds covered: disability

Civil law

Material scope: All sectors of employment and employment-related activities, access to goods, facilities and services, further and higher education, some aspects of transport. Now applies only to NI

Principal content: Prohibits discrimination and requires reasonable adjustments. Prohibits victimisation and instructions to discrimination and provides right to seek legal redress

NI

Title of the Law: Race Relations (NI) Order 1997

Abbreviation: RRO

Date of adoption: 19.03.1997

Latest relevant amendments: 9.07. 2012

Entry into force: various dates from March 1997

Web link: www.legislation.gov.uk/nisi/1997/869/contents/made (this is not up to date)

Grounds covered: race, colour, nationality (including citizenship), ethnic origins, national origins and belonging to Irish Traveller community

Civil law

Material scope: All sectors of employment and employment-related activities, education, access to goods facilities and services, disposal and management of premises. Applies only to NI

Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate. Rights of individual to seek legal redress

NI

Title of the Law: Fair Employment and Treatment Order 1998

Abbreviation: FETO

Date of adoption: 16.12.1998

Latest amendments: 10.12.2003

Entry into force: 01.03.1999

Web link: www.legislation.gov.uk/nisi/1998/3162/contents

Grounds covered: religion/ belief/ political belief

Civil law

Material scope: All sectors of employment and employment-related activities, education, access to goods facilities and services, disposal and management of premises. Applies only to NI

Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, provides rights to individuals to seek legal redress, and affirmative action and reporting provisions

NI

Title of the Law: Employment Equality (Sexual Orientation) Regulations (NI) 2003

Abbreviation: SOR 2003

Date of adoption: 01.12.2003

Latest relevant amendments: 01.06.2007

Entry into force: 02.12.2003

Web link: <http://www.legislation.gov.uk/nisr/2003/497/contents/made> (this is not up to date)

Grounds covered: Sexual orientation

Civil law

Material scope: All sectors of employment, employment-related activities, further and higher education. Applies only to NI

Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate. Provides rights to individuals to seek legal redress

NI

Title of the Law: Employment Equality (Age) Regulations (NI) 2006

Abbreviation: Age Regs

Date of adoption: 14.06.2006

Latest relevant amendments: 06.04.2011

Entry into force: 01.10.2006

Web link: www.legislation.gov.uk/nisr/2006/261/contents/made (this is not up to date)

Grounds covered: age

Civil law

Material scope: All sectors of employment, employment-related activities, further and higher education. Applies only to NI
Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate and provides rights to individuals to seek legal redress

ANNEX 2: INTERNATIONAL INSTRUMENTS**Country: United Kingdom****Date: 1 January 2022**

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	08.03.1951	A derogation from Article 5(1) to permit the UK to detain foreign nationals indefinitely under the Anti-Terrorism, Crime and Security Act 2001 was withdrawn on 16.03.2005	Yes	Incorporated into UK law by Human Rights Act 1998, Northern Ireland Act 1998, Scotland Act 1998 and Government of Wales Act 2006.
Protocol 12, ECHR	No	No	None	No	No
Revised European Social Charter	07.11.1997	No	N/A	Ratified collective complaints protocol? No.	No
International Covenant on Civil and Political Rights	16.09.1968	20.05.1976	Yes	No	No
Framework Convention for the Protection of National Minorities	16.09.1968	20.05.1976	None	No	No
International Covenant on Economic,	01.12.1995	15.01.1998	None	No	No

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Social and Cultural Rights					
Convention on the Elimination of All Forms of Racial Discrimination	16.09.1968	20.05.1976	None	No	No
ILO Convention No. 111 on Discrimination		08.06.1999	None	No	No
Convention on the Rights of the Child	19.04.1990	16.12.1991	A reservation applies as regards the obligation to detain children and adults separately	No	No
Convention on the Rights of Persons with Disabilities	30.03.2007	08.06.2009	Reservations apply as regards access to the military; the special education of children with disabilities; and immigration	30.03.2007	08.06.2009

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