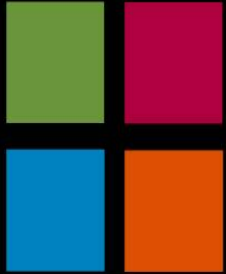




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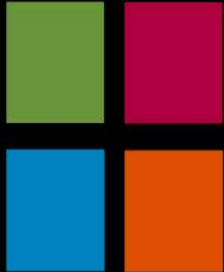
The public law lawyer's anti-discrimination toolkit:

the statutes, conventions and cases you
should always have to hand

John Halford, Bindmans LLP

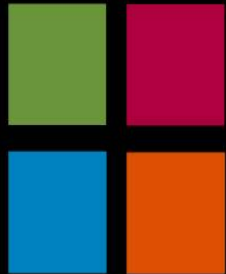


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Is there a public law remedy?

- Child E is a devout practicing Jew. He is refused a place at an oversubscribed Jewish school because the admissions policy is to prioritize children “recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth” and his mother’s conversion to Judaism was not recognised.
- Mrs Elias is refused ex gratia compensation by the MoD for her internment during World War II because only those with a “bloodlink” to the UK based on their own, or a parent’s or grandparent’s birth here qualify. She was born in India.
- W, a child in Swansea whose parents have a low income, wants to attend a Catholic secondary school, but the Council withdraws discretionary free school transport whilst maintaining it for W’s neighbour who wishes to attend a Welsh language school.
- Mrs Lunt’s wheelchair cannot safely fit into a conventional ‘London taxi’. Her Council refuses to change its licencing policy to allow more accessible taxis to be licenced.
- Planning permission is granted for a site currently occupied by a Latin America market without consideration of the impact on the community it serves.



The Equality Act 2010

- History

- Weak, then stronger, statutory protection
- Establishment of statutory enforcement bodies.
- Extended protection e.g. disability, sexual orientation

- Scope

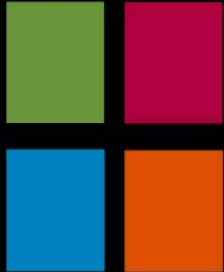
- Prohibits discrimination in private law contexts
- Plus, critically, social housing, education and, by s29, “public functions”
- Obliges adjustments to address disabilities.
- Harassment and victimisation are also prohibited.

- Protected characteristics:

- age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including religion or belief, sex and sexual orientation).

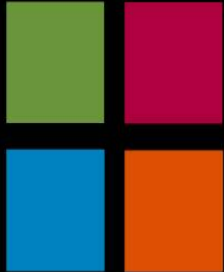


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Direct discrimination under the 2010 Act

- S13(1) “[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.”
- Direct discrimination on most grounds cannot be justified under the 2010 Act (the position is different under e.g. the Human Rights Act 1998). Direct age discrimination is lawful if it is “a proportionate means of achieving a legitimate aim”.
- E.g. the Jewish school admission case, *R (E) v Governing Body of JFS* [2009] UKSC 15.



Indirect discrimination under the 2010 Act

S19 provides:

- “(1) 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...”
- “(2) For the purposes of subsection (1), 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.”



Justification for indirect discrimination under the 2010 Act

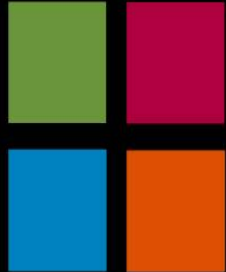
- Where a PCP has been shown to put persons with a protected characteristic at a particular disadvantage, it will be unlawful unless the defendant is able to show that its application is a proportionate means of meeting a legitimate aim.
- Elias: “A three-stage test is applicable to determine whether the birth link criteria are proportionate to the aim to be achieved... First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?”
- Huang: the proportionality analysis also requires the court to balance the interests of society with those of individuals and groups
- E.g. Elias, and the faith school transport case *R (Diocese of Menevia and others) v City and County of Swansea Council* [2015] EWHC 1436 (Admin).



Adjustments for disabled people

S20:

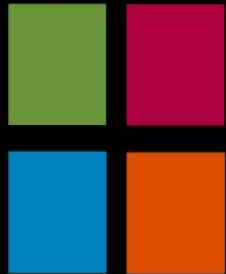
- “(2) where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;
- “(3) where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”; and
- “(4) where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”



The general public sector equality duty

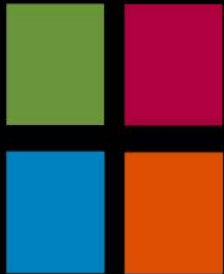
S149 demands “due regard to the need to—

- “(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act”;
- “(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it...
- “(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it [in particular, to the need to (a) tackle prejudice, and (b) promote understanding”].



S149 (and its predecessor duties) interpreted by the Courts

- not a duty to achieve a result, rather a duty to have due regard to the need to achieve goals;
- but is onerous and to be exercise prospectively;
- the first and most fundamental step in having due regard is to properly understand “...the problem, its degree and extent”; and
- no statutorily prescribed way of discharging the duty, but many public authorities do so by means of an impact assessment.



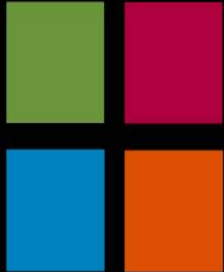
Impact assessments and s149

Where impact assessments are used, they must:

- show how due regard has been had to material “with the specific statutory considerations in mind”: see *R (Harris) v Haringey LB* [2010] EWCA Civ 703 at §40
- “must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact”: see *JM & NT v Isle of Wight Council* [2011] EWHC 2911 (Admin) at §122
- guidance – an authority’s own and that of the EHRC – will be relevant see *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) at §27



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The specific public sector equality duties in Wales

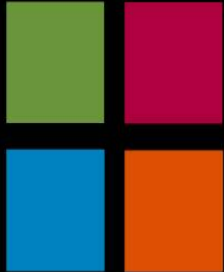
- Part 2 of schd 19 of the 2010 Act (supplemented and amended by the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011) identifies particular public authorities in Wales for the purpose of imposing additional planning, monitoring and reporting duties.
- The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 impose special duties on the listed bodies, intended to supplement the general public sector equality duty.



The 2011 Regulations

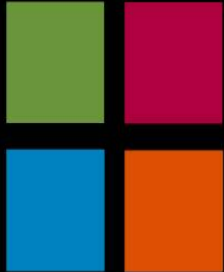
Require:

- publication of “equality objectives”;
- compliance with the “engagement” provisions;
- making publications accessible;
- identification of the relevant information that an authority holds and identification and collection of relevant information that it does not hold;
- making arrangements in order to assess the likely impact of proposed policies and practices on its ability to comply with the general duty, as well as the impact of any policy or practice that an authority has decided to review or any proposed revision to a policy or practice;
- publication of a gender pay action plan; and
- proactive thought to procurement as an equality tool.



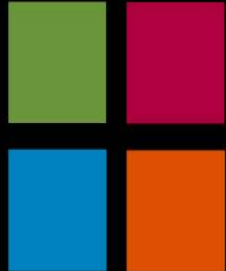
Art 14 ECHR

- To be ‘read with’ other ECHR rights: “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
- The concept of “status” is therefore much broader than “protected characteristic” under the 2010 Act.



Art 14 examples

- If a State, as a matter of its discretion and political judgment, makes arrangements to help ensure respect for particular rights (e.g. the right of parents to choose a certain form of education for their children), those arrangements must not unjustifiably discriminate on the basis of statuses including race, language and religion, or be such as to have an unjustified adverse impact on particular racial or faith groups. E.g. *Belgian Linguistic (No. 2)* (1968) 1 EHRR 252 and *DH v Czech Republic* (2008) 47 EHRR 3.
- Rights may not be compromised on a discriminatory basis either, unless this is justified. E.g. *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

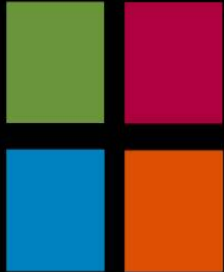


Art 14 justification

- However, discrimination may be justified, and so will be lawful, if it is a proportionate mean of meeting a legitimate aim.
- The degree of justification the law demands depends on whether the discrimination is on a suspect ground (e.g. race or gender, as opposed to country of residence, see *R (Carson) v SSWP* [2006] 1 AC 173) and context. A “wide margin” is usually allowed to the State under the ECHR in respect of general measures of economic or social strategy, see *James v United Kingdom* (1986) 8 EHRR 123 leading to the development of the *Stec v UK* (2006) 43 EHRR 47 test of “manifestly without reasonable foundation” in some benefits cases. This is not absolute, however. E.g. in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 Baroness Hale considered that it did not apply to discrimination in the context of the right to education under Article 2 of Protocol 1.

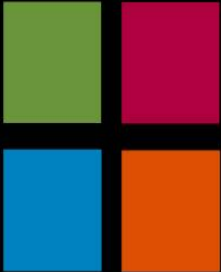


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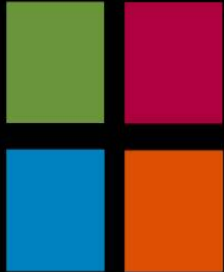
Art 3 discrimination

- Discrimination or harassment may, in some circumstances reach the threshold of inhuman and degrading treatment which Article 3 prohibits absolutely.
- The violation may be by the state directly e.g. *East African Asians v. United Kingdom* 3 E.H.R.R. 76. Discrimination based on race could in certain circumstances amount to degrading treatment
- But state failure to prevent others' discrimination will also be a breach in serious cases e.g. *Dorđević v. Croatia* No. 41526/10. The authorities were obliged to take reasonable measures to prevent further abuse. Isolated reactions to specific incidents (like the prompt arrival of police officers, interviews with the children and police reports) were not sufficient in a situation where incidents of harassment and violence had persisted over a long period of time.



Articles 14 and 3 made enforceable in the UK through the Human Rights Act 1998

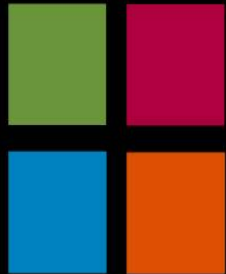
- S3 interpretive obligation.
- S6 duty to act to avoid breach of scheduled ECHR rights, save where legislation makes doing so impossible.
- Declarations.



The common law

No 'general principle of equality', but:

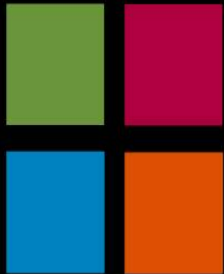
- the common law does not permit secondary legislation which is unjustifiable because it is “partial and unequal”;
- the principle of legality may demand the clearest justification for measures that infringe fundamental rights e.g. the denial of access to justice on an equal basis challenged in *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin);
- discrimination between similarly placed persons and other forms of inconsistent treatment of like cases may be a form of irrationality e.g. *Gurung, Pun and Thapa v Ministry of Defence* [2002] EWHC Admin 2463; and
- apparently inconsistent decisions must be justified.



Other sources of equality law

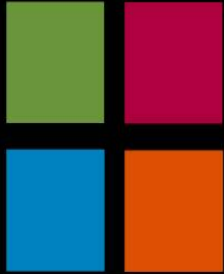
E.g.:

- EU Treaties, Regulations and Directives and the Charter of Fundamental Rights, Art 21.
- Unincorporated equality-promoting treaties made relevant (sometimes) by the common law, e.g. CERD, CEDAW, CRPD and UNCRC, a convention which Welsh public authorities have undertaken to ‘embed’ in their decision-making (a commitment underpinned by the due regard obligation in the the Rights of Children and Young Persons (Wales) Measure 2011), creating a legitimate expectation they will do so (note, this issue was raised but was not dealt with by the Court in the *Diocese of Menevia* case).



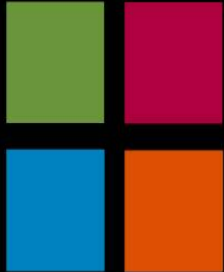
Case-specific resources

- The critical importance of the pre action protocol letter.
- The Defendant's decision making material and justification.
- Statistical evidence.
- Impact evidence.



Courts

- The Administrative Court.
- The County Court (exclusive jurisdiction on damages claims, so parallel claims may be needed when a claim is issued in the Administrative Court).
- The Technology and Construction Court (some procurement disputes).



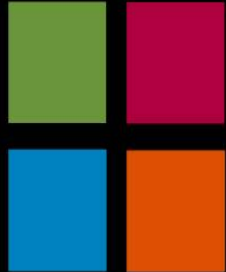
Potential EHRC action and support

- Formal investigations.
- Enforcement action on the County Court.
- Legal action in its own name in the Administrative Court.
- Funding power in discrimination cases (or mixed discrimination and Human Rights Act 1998 cases).



Ombudsmen investigations into maladministration (and, in the health context, service failure)

- No power to investigate illegality as such and no jurisdiction to determine whether torts have been committed.
- In practice, the ombudsmen seem to take a reviewing role when discrimination is alleged and check whether authorities have been proactive in minimising the risk that it might occur and responding to concerns in line with their own procedures. They can be interventionist and recommend significant remedies.



The future?

- S1(1) public sector duty regarding socio-economic inequalities. (thus far not brought into force): “[a]n authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.”
- The Well Being of Future Generations (Wales) Act 2015, includes duties to set objectives and publish progress reports relating to goals including “a more equal Wales”.
- Transparency litigation, perhaps in Wales.
- Equality under the EU/UK Withdrawal Agreement, Treaty.
- Action on failure to prevent hate speech and hate crime.
- Development of common law equality and dignity principles.