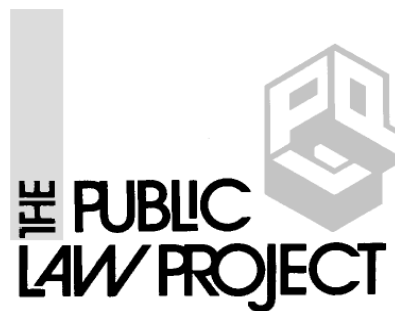


Article 14 & Discrimination – two (small) steps forward?

By Conrad Haley, Director, PLP

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This article updates readers on two key issues – does the claimant need to show that h/she has been discriminated against on the basis of some ‘personal characteristic’, and does the concept of indirect discrimination fall within article 14.

As readers will be aware, Article 14 seeks to address the situation where the State discriminates against a readily identifiable class in the manner in which it respects, or fails to respect, Convention rights. It forbids 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’.

In the UK, the State has consistently argued that in order to make out a claim of discrimination, the claimant must establish that s/he had been discriminated on the basis of some “personal characteristic”. Claimants on the other hand have argued that this is far too restrictive a test, which effectively reduces the protection offered by the Article. This had resulted in two conflicting decisions of the Court of Appeal - St Brice v Southwark LBC¹ and Michalak v LB Wandsworth².

In St Brice, Kennedy LJ accepted that the requirements of article 14 included the need to show discrimination based on a “personal characteristic”. This narrow approach was based on the Strasbourg case of Kjeldsen Busk Madsen and Pedersen v Denmark³.

By contrast, in Michalak, Brooke LJ considered the ambit of Article 14 and formulated in his judgment a model for courts to follow. He specifically considered and rejected the submission that it was necessary to find some “personal characteristic,” referring to more recent Strasbourg authorities which he considered demonstrated that the narrow approach in Kjeldsen had been superseded by Strasbourg case law. His model was as follows:

“(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions?”

¹ [2002] 1 WLR 1537 (CA)

² [2002] EWCA Civ 271 (CA).

³ (1976) 1 EHHR 711

- (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison on the other?
- (iii) Were the chosen comparators in an analogous situation to the complainant's situation?
- (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

Two cases decided by the Court of Appeal in June 2003 now appear to have endorsed the wider approach of Michalak. In Hooper & Others v Secretary of State for Work & Pensions⁴, Michalak was expressly approved. The day earlier, in Carson & Reynolds v Secretary of State for Work & Pensions⁵, Laws LJ sought to refine the Michalak test and by replacing step (iii) with:

“are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X?”

This approach has to be welcomed. The mischief the article seeks to deal with is that of unjustifiable discrimination. If there is discrimination, then the State must objectively justify its actions by reference to the principles of proportionality, and not seek to evade the issue altogether by raising technical arguments as to the ambit of Article 14.

What about indirect discrimination? It is not the case that Strasbourg jurisprudence does not deal with or even rejects the concept of, indirect discrimination. In C v Netherlands⁶ it was said that absent justification, such discrimination falls within the ambit of article 14 – “a rule which is formally not discriminatory, can nevertheless be discriminatory in its practical application” and in Marchx v Belgium⁷, it was said that recourse should not be had to measures which have as their “object or effect” a prejudicial impact on a particular group and see also McShane v United Kingdom⁸ and Thlimmenos v Greece⁹. The Court of Appeal appears to have signalled its acceptance of indirect discrimination¹⁰, which has now been followed in the social security context by Mr. Commissioner Jacobs in CH/5125/2002.

⁴ 18th June 2003[2003] EWCA Civ 813

⁵ 17 June 2003[2003] EWCA Civ 797

⁶ (1992) 15 EHHR CD 26

⁷ (1979) 2 EHHR 330

⁸ ECtHR 28 May 2002

⁹ Application no. 34369/97

¹⁰ R (S and Marper) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275