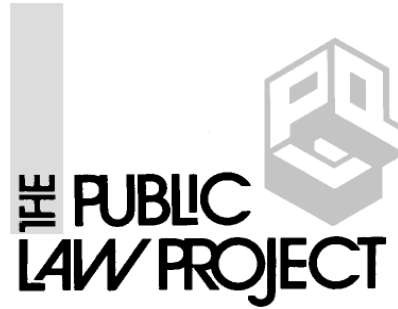


Article 14: what does “other status” mean?

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In a recent PLP victory in the Court of Appeal, Francis v Secretary of State for Work and Pensions [2005] EWCA Civ 1303, the central issue was whether the ground on which differential treatment was based was allowed under the definition in Article 14: *“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

Sara Francis cares for her nephew under a Residence Order and treats him as her own child. His mother is unable to look after him for health reasons. In June 2002, shortly after her infant nephew came to live with her she applied for a maternity grant to buy a cot and other essential items. She was refused. The eligibility conditions set out in Regulation 5 of the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 provided that the grant could only be paid to birth or adoptive mothers.

Having lost her appeals at the Social Security Appeal Tribunal and the Commissioner, Ms Francis’ local welfare benefits adviser sought help from the Public Law Project via the LSC Specialist Support service. Having initially provided telephone advice, PLP agreed to take on the case as ‘direct casework’. The Commissioner’s decision was set aside due to a technicality and further submissions were made basing the appeal on the contention that the differential treatment of those with a Residence Order as opposed to an Adoption Order was discriminatory and in breach of Article 14 (taken with Article 8 or Article 1 of the First Protocol). Although he dismissed the appeal the Commissioner thought the point sufficiently arguable to grant leave for the matter to be heard by the Court of Appeal.

At the Court of Appeal, the Secretary of State conceded that the facts were within the ambit of Article 8, so the main dispute centred on whether or not the distinction between an Adoption Order or a Residence Order could constitute an “other status”. Diverging somewhat from the recent Strasbourg jurisprudence which has allowed very broad grounds, the House of Lords has recently emphasised on three occasions that what is needed is a “personal characteristic”¹. In those cases where the difference in treatment is based on something that is no more than an “historical fact” Article 14 was not applicable.

¹ See Lord Steyn in R (S) v Chief Constable of S. Yorkshire Police [2004] 1 WLR 2196 at paras 46ff (the retention of DNA samples case), applied in R (Hooper) v Work and Pensions Secretary [2005] 1 WLR 1681 and R (Carson) v Work and Pensions Secretary [2005] 2 WLR 1369.

The question that obviously arises is what then is a personal characteristic? The Secretary of State argued that it should be something inherent or immutable, but that is clearly setting the bar too high. The European Court of Human Rights has accepted many "other statuses" including sexual orientation, marital status, military rank, trade union membership and imprisonment. Accepting therefore that the "personal characteristic" test encompasses a wide range of circumstances and statuses the Court of Appeal held, that whether a person has a Residence Order or an Adoption Order in respect of a child does fall within the definition.

The remaining questions – whether there was a relevant difference between the two types of order such that it could be said that holders of a Residence Order as opposed to an Adoption Order were not in an analogous position, or whether any rational justification could be put forward for the difference in treatment, were dealt with summarily by the court. The differences between the two types of order were held to be immaterial for the purposes of a maternity grant, so the two situations could be directly compared. Furthermore, "administrative convenience cannot in itself be a sufficient justification for discrimination without some other justification as to why those in an analogous or relatively similar situation are being excluded."

There are two important consequences of this case. The first is that many people who care for children in similar circumstances to the Appellant in this case will now be eligible for a maternity grant, which at £500 is a significant contribution to the costs of having a new baby to look after, particularly for income support claimants (who are the main beneficiaries of the grant). Those who will benefit are mainly going to be kinship carers – grandmothers, aunts and others who take in children who might otherwise be taken into care – who have until now been unfairly excluded. The Secretary of State will now have to amend the Regulations to reflect the judgment.

The second is that there is a good domestic law example of the way in which the "personal characteristic" test can be met even in circumstances where the difference in treatment relates to a different legal status, or other changeable circumstance. It is always going to be tricky to know where the courts will draw the line between "historical fact" and "personal characteristic" in any new case but this judgment shows clearly that the Court of Appeal at least, like Strasbourg, is not going to apply the test too restrictively.

The full text of the judgment handed down on 10 November 2005 is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1303.html>