NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Legal analysis of immigration or related rights & equality protections in Northern Ireland after Brexit

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This paper explores what immigration/ migration or related rights, if any, will be covered by potential future developments of the six EU equal treatment directives covered in Annex 1 to the Protocol on Ireland/ Northern Ireland to the UK-EU Withdrawal Agreement.[1]

[1] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [TS No.3/2020], https://eur-lex.europa.eu/legal-content/EN TXT/PDF/?uri=CELEX:12020W/TXT&from=EN [accessed 9 June 2022]. Note that this paper was finalised before the Protocol was renamed the Windsor Framework; all references to the Protocol should be understood as references to the Windsor Framework.

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Introduction

The analysis herein is correct as of 27 March 2021. Always check for updates.

This paper explores what immigration/ migration or related rights, if any, will be covered by potential future developments of the six EU equal treatment directives covered in Annex 1 to the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement.[2]

Those Directives are:

i. **Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ("Goods and Services Directive");**

ii. **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ("Recast Equal Treatment Directive");**

iii. **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("Race Directive")**

iv. **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("Framework Directive");**

v. **Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC5 ("Equal treatment in self-employment Directive");**

vi. **Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Equal Treatment Social Security Directive")**

[2] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [TS No.3/2020], https://eur-lex.europa.eu/legal-content/ENTXT/PDF/?uri=CELEX:12020W/TXT&from=EN [accessed 9 June 2022]. Note that this paper was finalised before the Protocol was renamed the Windsor Framework; all references to the Protocol should be understood as references to the Windsor Framework.

Background and Context

The Protocol and the Belfast (Good Friday) Agreement 1998

The significance of the six directives is that by Article 2 Rights of individuals of the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

The Belfast (Good Friday) Agreement provides:

Rights, safeguards and equality of opportunity, Human Rights

The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;

Article 2(1) of the protocol uses the word "including"; the Belfast (Good Friday) Agreement "in particular", a reminder that the six directives are a starting point not the end of the protection afforded under the Good Friday Agreement and protected by the Protocol.

The UK's Government's UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?[2] explains the "future facing" element of the commitment thus:

> 7. As well as preventing any reduction of the relevant rights, safeguards and equality of opportunity protections that are currently in place, the UK Government's commitment also has a future-facing element. This means that any relevant new protections implemented in domestic law in Northern Ireland between now and the end of the transition period will also fall within the scope of the 'no diminution' commitment. In addition, in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections [...]. Enforcement will be a matter for UK courts, and there will not be any direct application in Northern Ireland of the EU law in Annex 1. And, lastly, future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and the rest of the world will be taken into consideration as the commitment is implemented.
>
> [...].
>
> 12. [...] we have committed to ensuring that, if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this. This will ensure that Northern Ireland will not fall behind minimum European standards in anti-discrimination law

The areas in which protection is afforded by the instruments set out in Annex 1 thus assume a particular importance: as a result of the "non-diminution" commitment, protection could increase.

The Race Directive is the broadest in its material scope. It prohibits discrimination on the grounds of racial or ethnic origin in employment, self-employment, occupation, vocational training and guidance, professions and workers' associations, social protection including social security and healthcare, social advantages, education including access to education, and access to and supply of goods and services, including housing, available to the public.

[2] 7 August 2020 available at https://www.gov.uk/government/publications/protocol-on-irelandnorthern ireland-article-2 [accessed 27 February 2021].

The Framework Directive (2000/78/EC) protects groups identified by religion or belief, sexual orientation, disability, and age. In contrast to the Race Directive however, the Framework Directive covers employment and occupation but is much more restrictive in its scope as to sectors where discrimination is prohibited. It only applies to the fields of employment, occupation and related areas such as vocational training and membership of workers' organisations.

The other directives have more specific material scope and all focus on gender and sex.

"at least an equivalent level of protection of human rights as will pertain in Northern Ireland"

Paragraph 9 of the Rights, safeguards and equality of opportunity part of the Belfast (Good Friday) Agreement, under the heading Comparable Steps by the Irish Government provides

> 9. The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. [...] The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.

This has been read, including by the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission[3], as envisaging an ongoing equivalence of rights between Ireland and Northern Ireland. This reading draws inter alia on the UK's commitment to incorporate the European Convention on Human Rights and to consider signing the European Charter for Regional or Minority Languages[4], the duty of the Joint Committee to consider 'human rights issues in the island of Ireland' and the prospect of a charter for the protection of fundamental rights of "everyone living in the island of Ireland". This latter commitment covers migrants.[5]

Such a reading goes beyond the text of the Belfast (Good Friday) Agreement, which was written in a context in which it was anticipated that the UK and Ireland would both remain part of the EU. It stands to be tested in the new dispensation and may require the charter envisaged in the Belfast (Good Friday) Agreement if it is to be given effect.

Even while Ireland and the UK were both members of the EU the prospect of differential treatment in the two countries was significant because both had an opt-out in the areas of freedom, security and justice, an opt-out which Ireland has retained. Ireland does not afford to migrants or to persons seeking asylum the same package of rights as they enjoy in other countries of the EU, and for the UK to maintain equivalence with Ireland does not entail equivalence with other Member States of the EU.

Ireland has opted into a number of measures of practical cooperation in the areas of both asylum and national security. Ireland opted into the original Asylum Procedures Directive (2005/85/EC), the successive Dublin Convention and Regulations, the latest of which is the Dublin III Regulation (Regulation (EU) No 604/2013), the original and recast Eurodac Regulations (603/2013), and the original Qualification Directive (2004/83/EC). It has now opted in the recast Reception Directive (2013/33/EU) although not the other recast asylum directives. Ireland has opted into Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. Article 9 of this Directive obliges Member States to provide necessary medical or other assistance to trafficked third-country nationals, who do not have sufficient resources and have special needs, such as persons with disabilities.

Ireland has not opted into the Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, which makes provision for equal treatment at Article 11. It has not opted into migration instruments such as the "Blue Card" Directive (2009/50/EC), the seasonal workers Directive (2014/36/EU); the intra-corporate transfer Directive (2014/66/EU). Ireland has not opted into Directive 2002/90/EC which defines the facilitation of unauthorised entry, transit and residence.

Ireland has not opted into Schengen although in 2020 its application to join the Schengen Information System (SIS II) was accepted[6]. The Irish Immigration and Naturalisation Service will have access to the system.

In matters of entry and residence, arrangements for the Common Travel Area prioritise the UK affording migrants the rights they are afforded in Ireland (which must act in a way compatible with EU law) rather than under EU instruments such as the Blue Card Directive which do not apply in Ireland. Article 3 of the Protocol Common Travel Area provides:

> 1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.
>
> 2. The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.

[3] Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 'Policy statement on the United Kingdom withdrawal from the European Union', March 2018 available at https://www.nihrc.org/uploads/publications/Joint_Committee_Statement_on_the_UK_Withdrawal_from_the European_Union.pdf [accessed 19 February 2021].

[4] ibid.

[5] Chapter 6, Paragraph 10 of the Belfast (Good Friday) Agreement 1998.

[6] Council Implementing Decision (EU) 2020/1745 of 18 November 2020 on the putting into effect of the provisions of the Schengen acquis on data protection and on the provisional putting into effect of certain provisions of the Schengen acquis in Ireland (OJ L 393, 23 November 2020, p. 3).

Under Article 23 of the Withdrawal Agreement British citizens and citizens of EU Member States and their family members (deriving from the definition of family members under EU free movement law[7]), resident on 31 December 2020, as well as frontier workers in possession of a permit by 1 July 2021, are to enjoy equal treatment with nationals in all matters with the material scope of Part Two of the Agreement on Citizens' Rights, in the State where they live and, in the case of frontier workers, where they work. Under Article 12 of the Withdrawal Agreement they are protected from discrimination on the grounds of nationality in all matters within the material scope of Part Two, subject to the provision made in the Agreement, which is the same as that made in Article 24 Equal Treatment of Directive 2004/38/EC,[8] and thus goes to matters of access to social assistance and to educational grants. As a result, for those who benefit from the UK's EU Settlement Scheme, and the equivalent provision in Member States, the broad lines of their status are familiar from the period when the UK was a member of the EU. Although the status of EU nationals in the UK after Brexit is codified in the Immigration Rules, it is underpinned by the terms of the Withdrawal Agreement.

Case law of the European Court of Justice after Brexit

Rights under EU law may be codified in directives and other instruments but are also developed through the case law of the European Court of Justice. Decisions of the court prior to 31 December 2020, the implementation period completion day, continue to bind all courts in areas of retained EU law save those designated in European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 1525 of 2020, which include the Court of Appeal of Northern Ireland and the Supreme Court. Those courts can depart from the decisions of the European Court of Justice made before 31 December 2020 in circumstances where they consider it right to do so: the non-test heretofore used by the Supreme Court in deciding whether to depart from one of its own decisions.

[7] See article 10 of the UK-EU Withdrawal Agreement 2020: Personal Scope.

[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

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The European Union (Withdrawal) Act 2018 provides that UK courts and tribunals are not bound by any principles laid down, or any decisions made by the Court of Justice of the European Union after 30 December 2020 but may have regard to decisions of the Court of Justice of the European Union after that date, as well as to new EU law.[9]

The "non diminution" commitment requiring the amendment of laws in Northern Ireland to reflect substantive enhancements to the protection afforded by the Directives listed in Annex 1, must, for the commitment to be meaningful, reflect the developing case law of the Court of Justice of the European Union on those instruments. Thus, one would expect UK courts to have particular regard to such case law.

There may be discussions as to the extent to which a particular decision on discrimination draws on the EU Charter of Fundamental Rights (the Charter) rather than on the text of a directive. The UK government explainer provides:

> 14. The Charter of Fundamental Rights does not form part of domestic law anywhere in the UK, including Northern Ireland, now that we have left the EU. The Charter did not create any new rights, but was instead intended to catalogue the rights that already existed in EU law.

Those rights, codified by the Charter, came from a wide variety of sources, including the treaties, EU legislation and case law, that recognised fundamental rights as general principles. We have brought EU underlying rights and principles into our domestic legal regime by the EU (Withdrawal) Act 2018. As a result, where the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law, or EU law which has been implemented in domestic law, or retained EU case law, that law will continue to be operational. In addition, the Act requires our domestic courts to interpret retained EU law that has not been modified in accordance with the general principles of EU law as those principles existed immediately before the end of the transition period.

This strongly suggests that a court respecting the principle of non-diminution would be giving rulings that afforded at least as much protection against discrimination as the Court of Justice of the European Union, regardless of the extent to which the Court had explained its reasoning in terms of provisions of the Charter. Complexity would be introduced in cases involving competing rights of individuals.

[9] Section 6 of the European Union (Withdrawal) Act 2018.

Much of the case law on the directives takes the form of preliminary rulings on cases referred by national courts. Future developments from case law are dependent upon the matters that are referred to the court. The European network of legal experts in gender equality and non-discrimination, in its legal analysis The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC identifies that "the evolution of EU law in this area is dynamic, rather than a steadily developing process". It points to there being relatively little jurisprudence on the Race Directive, to the emergence of cases on religious discrimination and to the decline in references on age discrimination. Cases may generate subsequent references, in particular where they are controversial.

There is no obligation to make a reference but, where one is made, the ruling will bind. Article 2 is not subject to the arrangements that apply to other parts of the Protocol, in respect of referral of questions to the Court of Justice of the European Union. While the incorporation of Article 267 of the Treaty on the Functioning of the European Union into Article 12 of the Protocol means that, in contrast to the procedures under Article 158 of the Withdrawal Agreement, a final court of appeal remains under a duty to refer a question on the Protocol to the Court of Justice of the European Union where the criteria for making a reference are met, those criteria do not extend to Article 2 of the Protocol.

The UK courts retain limited powers under Article 158(1) of the Withdrawal Agreement to make preliminary references, for a period of eight years, to the Court of Justice of the European Union to give rulings on matters relating to the interpretation of Part Two Citizens Rights of the Agreement[10].

[10] See section 7C of the European Union (Withdrawal) Act 2018.

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Discrimination Against Immigrants

Recitals 7, 10 and 11 of the Race Directive make express reference to xenophobia.

Recital (13) of the Race Directive provides:

> [...] any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

Article 3(2) of the Race Directive provides:

> 2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Thus, while persons under immigration control are within the personal scope of the Directive, their nationality, and the terms of their entry and residence, are not within its material scope.

Article 3(2) of the Framework Directive is in identical terms. Recital 12 of the Framework Directive provides:

> (12) [..] any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation

There is no equivalent in the directives concerned with equal treatment between men and women, which thus apply to persons under immigration control as they apply to other men and women.

On 2 July 2008, the European Commission adopted COM (2008) 426: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, a proposal that has yet to result in legislation.
Article 3(5) of the proposed directive echoes Article 3(2) of the Race and Framework Directives:

> 5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Given that the directives do not cover immigration status as a ground of discrimination and do not cover differences of treatment based on nationality, to what extent can they offer protection to immigrants and migrants?

This is an area in which future developments to EU law appear likely as the current state of EU law is confusing and arguably contradictory.

Nationality

While nationality is excluded from the material scope of the directives, an understanding of how discrimination on the grounds of nationality operates in EU law, and in Council of Europe human rights law, provides useful context for understanding the treatment of immigration law under the directives. It also provides an opportunity to examine how EU law addresses direct and indirect discrimination.

EU law prohibits discrimination on grounds of nationality within the scope of the treaties. Article 18 of the Treaty on the Functioning of the European Union is concerned with discrimination between nationals of Member States, albeit that third country nationals may derive benefit from it as family members of a citizen of the Union. Differences of treatment between EU citizens and third-country nationals or between nationals from different third countries have been held to fall outwith the scope of the treaties[11].

[11] See e.g. Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze,* Case 238/83. *Caisse d'Allocations Familiales de la Région Parisienne v* ***Meade*** [1984] ECR 2631; Case C47/91, *Ferrer Laderer,* [1992] ECR I-4097.

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Nationality: Direct discrimination

In Case C-73/08 Bressol v Gouvernement de la Communauté Française, [2010] 3 CMLR 559 the European Court of Justice held that discrimination on the basis of a criterion "indissociable" from a person's nationality is direct discrimination, following the approach taken in the sex discrimination C-79/99 Schnorbus v Land Hessen [2000] ECR I-1099.

In Bressol, a case challenging conditions for enrolment in higher education in Belgium, Advocate General Sharpston in her opinion had argued that one of the conditions of enrolment, that of a right to reside in Belgium, was necessarily linked to a characteristic indissociable from nationality because Belgians satisfied the condition automatically while non-Belgians, on the other hand, had to fulfil additional criteria to acquire a right of residence. In her opinion, the requirement was thus directly discriminatory. The Court of Justice did not agree, but, without detailed reasoning, treated the cumulative effect of the conditions as indirectly discriminatory[12].

In the UK context, the UK Supreme Court followed Bressol, when the UK was a member State, in Patmalniece v Secretary of State for Work and Pensions, [2011] 1 WLR 783. To succeed in a claim to state pension credit the claimant had to have a right to reside in the UK or elsewhere in the common travel area. The UK Supreme Court found that conditions of entitlement were a right to reside in the common travel area, which all UK nationals would satisfy, and an habitual residence test, which some UK nationals would fail to satisfy, and which was thus not "indissociable" from nationality. Therefore the case was not one of direct discrimination.

The UK Supreme Court has expressly considered the question of whether discrimination on the grounds of immigration status could constitute discrimination on the grounds of race, a protected characteristic under the England and Wales Equality Act 2010, s 13(1). By s 9(1) of the Equality Act 2010 race expressly includes colour, nationality, and ethnic or national origins, as is the case in the Race Relations (Northern Ireland) Order 1997 which provides:

> 5. — (1) Subject to paragraphs (2) and (3), in this Order—
>
> "racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
>
> "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

In Taiwo v Olaigbe (et anor) & Onu v Akwiwu (et ors) [2016] UKSC 31 the Court followed its approach in *Patmalneice* in holding that the abuse that the appellants had suffered as a result of their precarious immigration status as overseas domestic workers was not direct discrimination on the grounds of race or of nationality.

[12] See the discussion in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783, paragraphs 32 and 33.

The court held that a person who is not a British national may have a secure immigration status, rather than be vulnerable because of their immigration status. Lady Hale, giving the judgment of the Court, held that immigration status, while a "function" of nationality, was not so closely linked to nationality that the two were 'indissociable' from each other. Not nationality, but the particular immigration status of the domestic workers, had motivated their employers. The case was not put on the basis of indirect discrimination.

Nationality: Indirect discrimination

Article 18 of the Treaty on the Functioning of the European Union also prohibits indirect discrimination between nationals of Member States[13]. Article 2(2)(b) of the Race Directive expresses the common definition of indirect discrimination thus:

> where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

Article 3(1)(b) and (1A) of the Race Relations (Northern Ireland) Order 1997/869 express it thus:

> 3.— (1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—
>
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but–
>
> (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
>
> (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
>
> (iii) which is to the detriment of that other because he cannot comply with it.
>
> (1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph
>
> (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –
>
> (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;
>
> (b) which puts or would put that other at that disadvantage; and
>
> (c) which he cannot show to be a proportionate means of achieving a legitimate aim.

In Bressol the Supreme Court held that the requirements imposed, read cumulatively, placed nationals of Member States other than Belgium at a particular disadvantage. This was indirectly discriminatory and fell to be justified. It left the question of objective justification to the national courts but gave guidance.

In *Patmalneice* the Supreme Court held that the test for state pension credit was more likely to be satisfied by a UK national than by a national of another Member State and was therefore indirectly discriminatory on grounds of nationality. It fell to be justified in terms of objective considerations.

Those had to be independent of the nationality of the persons concerned and to be proportionate to a legitimate aim of the national provisions. The aim of protecting the UK's social security system was held to be legitimate and proportionality was not in issue before the court, therefore the different treatment did not constitute unlawful discrimination.

Ms Patmalniece argued that as entitlement to State pension credit was extended to Irish nationals, it was discriminatory not to extend it to nationals of other member States.

The Supreme Court disagreed. The position of Irish nationals was protected by Article 2 of Protocol (No 20) on the application of certain aspects of Article 14 EC (now Article 26 of the Treaty on the Functioning of the European Union), the Protocol on the Common Travel Area. There was a sufficient connection between social security arrangements and the aim of promoting free movement between the two countries for the arrangements to be protected by the Protocol, which also provided for nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union, or in any other provision of that treaty, or in the Treaty on European Union, or any measure adopted under those treaties, to affect those arrangements.

Article 3 Common Travel Area of the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is couched in similar terms. It reads:

> The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.

[13] Case C-212/05 *Hartmann v Freistaat Bayern* [2007] ECR I-6303, paragraph 29.

Thus, on the reasoning in *Patmalneice*, it does not exclude the possibility that the differential treatment of Irish nationals could be found to be sufficiently removed from the aim of promoting free movement between the UK and Ireland to give rise to discrimination, but makes it extremely difficult to envisage a provision on which an immigrant from the EU might wish to rely to advance a case of discrimination against him/her qua immigrant that would not attract the protection of the Protocol.

All EU member States, as well as the UK, are parties to the European Convention on Human Rights which prohibits discrimination in respect of any of the rights protected by the Convention on the grounds of any status, including nationality. Protocol 12 to the European Convention on Human Rights establishes a free-standing right to non-discrimination, thus allowing claims of discrimination in areas not protected by the Convention. The UK has neither signed nor ratified Protocol 12. Ireland has signed but not ratified it, making it the only protocol to the European Convention on Human Rights not ratified by Ireland.

In *Biao* v Denmark (Application no. 38590/10) Mr Biao, Danish by naturalisation and married to a third country national, challenged a requirement of Danish law whereby, because he had not been born or brought up in Demark, he needed to have been a Danish national for 28 years to qualify for family reunification. He argued that the rule was indirectly discriminatory on the basis of racial or ethnic origin under Article 14 of the Convention read with Article 8 of the European Convention on Human Rights. The Grand Chamber was prepared to accept, on the basis of rough and ready calculations in the absence of detailed evidence, that naturalised citizens were disproportionately affected[14] and was prepared to assume that, at least the vast majority of, Danish expatriates and Danish nationals born and resident in Denmark would usually be of Danish ethnic origin, whereas persons acquiring Danish citizenship later in life would generally not be of Danish ethnic origin. It therefore held that the rule amounted to indirect discrimination the grounds of race or ethnic origin.

It recalled that no difference in treatment based exclusively, or to a decisive extent, on a person's ethnic origin is capable of being justified in a contemporary democratic society; that discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination;[15] and that a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons[16].

[14] Paragraph 111, *Biao v Denmark*, Application no. 38590/10

[15] Paragraph 94, *Biao v Denmark* Application no. 38590/10 relying on *D.H. and Others v. the Czech Republic*, Application no. 57325/00; *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, ECHR 2005-XII; and *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, §145, ECHR 2005-VII.

[16] Paragraphs 93 and 112, *Biao v Denmark* Application no. 38590/10 relying on *Gaygusuz v. Austria*, Application No. 17371/90, ECHR 1996-IV; *Koua Poirrez v. France*, Application. no. 40892/98, ECHR 2003-X; Andrejeva v. Latvia, appl. no. 55707/00, ECHR 2009; and Ponomaryovi v. Bulgaria, Application. no. 5335/05 ECHR 2011

The purported justification was that in the resident population there was a pattern of persons not born or brought up in Denmark marrying persons from their countries of origin. The court recalled that "general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification"[17]. The court made reference to EU law in coming to its conclusion that no compelling or very weighty reasons unrelated to ethnic origin had been put forward and that Mr *Biao* had established his claim of indirect discrimination under Article 8 read with Article 14.

As stated above, in *Taiwo v Olaigbe (et anor) & Onu v Akwiwu (et ors)* [2016] UKSC 31 the case was not put on the basis of indirect discrimination within the meaning of s 19 of the England and Wales Equality Act 2010, which uses the same language as Article 3(1A) of the Race Relations (Northern Ireland) Order 1997/869. This was because no one had identified a "provision, criterion or practice", that the employers would have applied to all their employees that was being applied to the appellants in a way that led to their differential treatment on the grounds of their nationality. The Supreme Court, however, left open the possibility of identifying such a provision, criterion or practice in future. Lady Hale held at paragraph 33:

> Mr Allen urges the court not to rule out the possibility that, in other cases involving the exploitation of migrant workers, it may be possible to discern a [provision criterion or practice] which has an indirectly discriminatory effect. I am happy to accept that: in this context "never say never" is wise advice.

Indirect discrimination cases very much depend on having accurate and comprehensive information that allows the identification of comparators and the making of a detailed comparison. The Permits Foundation[18] promotes 'open' work permits for legally resident expatriate partners, giving them immediate access to the employment market for the same duration as the main work permit holders. It demonstrated in its September 2015 response to the UK Migration Advisory Committee Call for Evidence- Tier 2: *The impact of removing the unrestricted right of dependants to work in the UK* that some 71% of partners accompanying skilled workers are female, and thus that any restrictions on access to the UK labour market for the spouses and partners of those workers were likely disproportionately to affect women and to constitute unlawful discrimination.

[17] Paragraph 126, *Biao v Denmark,* Application no. 38590/10.

[18] https://www.permitsfoundation.com/

Discrimination against immigrants under the Race Directive

Against this background we can turn to the case law under the Race Directive. The law in this area is contested. First, the cases are reviewed then their implications are considered cumulatively.

Feryn

In *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn* NY (Case C-54/07), the European Court of Justice considered direct discrimination under Article 2(2)(a) of the Race Directive 2000/43/EC.

The Belgian national equality body, the Centrum voor gelijkheid van kansen en voor racismebestrijding contended that the company *Feryn*, a Belgian sales and installation company, had applied a discriminatory recruitment policy because it had stated that it would not recruit immigrants, on the basis that its customers did not want immigrants in their homes.

The UK and Ireland both submitted observations on the issue of whether it was necessary to identify a person who had been denied a job for the claim to succeed: they argued that there could not be direct discrimination without an identified victim.

The Court held that the statements could constitute direct discrimination, it was not necessary to identify a person who had been denied a job as a result.

It held that:

> 25 The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

It held that the statements created a presumption of direct discrimination within the meaning of Article 8(1) of the Race Directive[19]. It was thus for the employer to prove that there was no breach of the principle of equal treatment[20]. The court held that it could do so by showing that the undertaking's actual recruitment practice did not correspond to those statements.

[19] Paragraph 21, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NY* (Case C-54/07).

[20] Paragraph 32, ibid.

The Court further held that sanctions for such discrimination adopted in the transposition of the Directive had to be effective, proportionate and dissuasive[21]. It suggested that where there was no identifiable victim this could mean those sanctions may, where necessary, include a finding of discrimination, in conjunction with an adequate level of publicity, the cost of which would be borne by the employer, may include or a prohibitory injunction, ordering the employer to cease the discriminatory practice, in conjunction with a fine, where appropriate, and/or an award of damages to the body bringing the proceedings.

The reference to employees of "a certain ethnic or racial origin" has become significant in subsequent cases. The judgment of the court mentions no nationality but this would be read by anyone familiar with the Advocate General's opinion[22] as a reference to persons of a single national origin: Moroccan.

CHEZ

CHEZ Razpredelenie Bulgaria, Case C-83/14, involved alleged discrimination by an electricity company which placed meters high up in, and only in, districts inhabited predominantly by Roma, allegedly to prevent their being tampered with.

The complainant was not of Roma origin. She lived in the area and her electricity meter was too high up for her to read.

The court found that the siting of electricity meters was based on ethnic stereotypes or prejudices. Ethnic origin determined the decision to site the meters high up[23]. *CHEZ's* assertions that the meters were tampered with mainly by Roma were unsupported by evidence. A finding of direct discrimination was thus open to the national court. It was for *CHEZ* to establish that the siting of the meters was not because the districts were inhabited mainly by Bulgarian nationals of Roma origin, but for objective reasons unrelated to any discrimination on the grounds of racial or ethnic origin.

The court highlighted not only the practical disadvantage of being unable to read your meter, but "that practice's offensive and stigmatising nature"[24]. Commentary has suggested[25] that the foregrounding of stigma and humiliation may be a particular feature of the case because it involves discrimination on the grounds of race.

[21] Paragraph 38, ibid.

[22] Advocate General Poiares Maduro of 12 March 2008 see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CC0054 [accessed 18 February 2021]

[23] Paragraph 74, *CHEZ Razpredelenie Bulgaria*, Case C-83/14.

[24] Paragraph 8, ibid.

[25] McCrudden, C. (2016), 'The New Architecture of EU Equality Law after *CHEZ*: Did the Court of Justice reconceptualise direct and indirect discrimination?' European Equality Law Review, 1-10. http://ec.europa.eu justice/gender-equality/document/files/elr_2016-1_web.pdf

While the complainant was not of Roma origin, the practice from which she suffered, the siting of the electricity meters, was "on the grounds of" the Roma ethnic origin of the majority of persons in her district. The grounds were what mattered,[26] irrespective of whether persons not of Roma ethnic origin suffered less favourable treatment or particular disadvantage alongside the Roma.

The court, however, went on to consider indirect discrimination. It held that the siting of meters high to prevent tampering in Roma areas resulted in discrimination against Roma. It held that the requirement that persons be put at a 'particular disadvantage' in Article 2(2)(b) of the Race Directive must "be understood as meaning that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue"[27] rather than connoting the degree of disadvantage suffered. The words used have become an issue in subsequent cases.

The Court adopted a purposive interpretation of the Race Directive, which promotes "the development of democratic and tolerant societies"[28].

In finding that the Claimant could claim to be a victim of discrimination the court made reference to its judgment in Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, where the claimant employee was held to be entitled to claim direct discrimination on the grounds of disability as the mother of a disabled child, herself able-bodied. This is sometimes described as "associative discrimination".

CHEZ, while focused on direct discrimination, extends "associative discrimination" to cases of indirect discrimination[29]. If direct discrimination were not established, the referring court should consider the claim under the head of indirect discrimination.

Jyske Finans and Maniero

Jyske Finans Case C 668/15 was not a case about a migrant but, like the case of *Biao* in the European Court of Human Rights, about a Danish national cited above. Two partners were both Danish: one born Danish, the other naturalised in Denmark, having been born in Bosnia Herzegovina. When they applied for a loan to buy a car, the partner born outside the EU and the European Free Trade Area was required to produce additional security information. This was stated to be to address the risks of money laundering and related national security questions. He complained of discrimination.

[26] Paragraphs 56, 59 dd, *CHEZ Razpredelenie Bulgaria,* Case C-83/14.

[27] Paragraph 100, ibid. At paragraph 109, summing up, the court uses the expression "given racial or ethnic origin",

[28] Paragraph 65, ibid.

[29] Contrast *Essop & Ors v Home Office (UK Border Agency)* [2017] IRLR 558, [2017] WLR(D) 244, a case under the Equality Act 2010 which, as stated, uses the same definition of indirect discrimination as the Race Relations (Northern Ireland) Order 1997.

The court found no direct discrimination because it held that place of birth does not create a presumption that that person is of a particular ethnic origin, indeed, opined the Advocate General[30], to suggest this would be to reinforce stereotypes: "to hold that there is an inalienable bond between a person's place of birth and his being of a particular ethnic origin serves, in the final analysis, only to maintain certain ill-begotten stereotypes"[31]. The link was not indissociable[32].

There was no ethnic group that corresponded to the Moroccans hidden in the *Feryn* judgment, a case the court in *Jyske Finans* did not cite. The court, following the court in *CHEZ*, held that ethnic origin is based on elements including common nationality, religious faith, language, cultural and traditional origins and backgrounds[33]. Nationality was but one criterion and not decisive, and no one criterion could be used to determine ethnic identity[34]. Moreover, "it cannot be presumed that each sovereign State has one, and only one, ethnic origin"[35]. The Court identified that discrimination on the grounds of nationality is not covered by the Race Directive, recalling the exclusion set out in recital 13 and Article 3(3) of that Directive [36].

The Court found no indirect discrimination because the requirement was applicable without distinction to all those born outside the EU. It held that it had not been established that the practice put persons of a "particular" ethnicity at a disadvantage compared to Danish nationals and therefore it did not constitute unlawful indirect discrimination.

The judgment is to be contrasted with the European Court of Human Rights' judgment in *Biao*, cited above. The European Court of Human Rights did not require the identification of a particular ethnic group affected.

It commented with ease "de facto the vast majority of persons born Danish citizens would be of Danish ethnic origin, whereas persons who acquired Danish citizenship later in life would generally be of foreign ethnic origin"[37].

[30] Opinion of Advocate General Wahl, 1 December 2016, https://eur-lex.europa.eu/legal-content/enTXT/?uri=CELEX:62015CC0668..

[31] Paragraph 3, ibid.

[32] Paragraph 20, ibid.

[33] Judgment of the Court of Justice of 6 April 2017 (C-668/15), Paragraph 17, citing paragraph 46 of *CHEZ*.

[34] Paragraph 19, ibid.

[35] Paragraph 21, ibid.

[36] Paragraph 24, ibid.

[37] Paragraph 14, ibid.

The Court in *Jyske Finans*, having found no indirect discrimination on the grounds of race or ethnic origin, did not examine justification, although the Advocate General had expressed the view that the practice could not be justified objectively by reference to the aim of preventing money laundering and counter-terrorism, applying as it did to all those born outside the EU and the European Free Trade Area. Just as no evidence had been produced in *CHEZ* in support of the claim that persons of Roma origin were more likely to tamper with their electricity meters than others, so *Jyske Finans'* assertion that persons born in third countries were more likely to be involved in money laundering, or to use the money for purposes threatening national security, was unsupported by evidence[38].

It went on to identify:

> 50. There is nothing in the documents before the Court to show that persons belonging to a given ethnic group would be more affected by the requirement relating to the First State Law Examination than those belonging to other ethnic groups.
>
> 51. Thus, it would appear that a finding of indirect discrimination arising from such a condition can, in any event, be ruled out.

There is no sophisticated reasoning in *Maniero*, it simply cites *CHEZ* and *Jyske Finans* without elaboration.

Jyske Finans was followed in Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, C-457/17, which concerned scholarship awards. These were held in the case to fall within the Race Directive under the rubric of education. That the awards were restricted to those who had completed successfully the German law exam was challenged on the grounds that it discriminated against foreigners. The Court applied *Jyske Finans* holding that the concept of a particular disadvantage must be understood as meaning that it is persons of a particular racial or ethnic origin, because of the provision, criterion or practice in question, who are disadvantaged[39].

[38] Paragraph 88 of the opinion of Advocate General Wahl.

[39] Paragraph 47, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, C-457/17.

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Implications of the cases for migrants

The cases of *Feryn* and *CHEZ* point to developments in the area of standing which could benefit migrants, particularly those without leave who may be reluctant to bring claims themselves. In *Feryn* an organisation, in *CHEZ* an individual who was not part of the group targeted by discriminatory measures, were able to bring claims. That discrimination, as in *Feryn*, may not yet have produced an identifiable victim is particularly important where measures such as the UK's "hostile environment" are designed to have deterrent effects on migrants. There are risks however. Commentators have suggested that while allowing a broader class of persons to bring challenges may increase challenges to structural discrimination, it could do so while marginalising those primarily affected, citing parallels with the sex discrimination claims brought by men.[40]

The decision in *CHEZ*, extending the concept of associative discrimination (although the Court, unlike the Advocate General, does not use the term) to cases of indirect discrimination, is more controversial. Some commentators fear that, unlike a case of direct discrimination such as *Coleman*, cited above, such an extension affords no additional protection to the groups the directive was designed to protect[41].

They argue that the language of Article 2(2)(b) of the Race Directive: "put persons of a racial or ethnic origin at a particular disadvantage compared with other persons", appears to require the claimant to possess the relevant characteristic of race or ethnicity in cases of indirect discrimination.

Those who take the contrary view and consider that the court in *CHEZ* got it right[42] praise it for focusing on how discrimination is constructed by majority perspectives over time.

Race or ethnicity is often the basis of an assumption that a person is a migrant. The prejudice lies in extrapolating from that ethnicity or race to an assumption that persons are migrants. It is not necessary in such cases to call on the concept of associative discrimination. As to those who face discrimination or harassment because of their relationships with migrants, they could have relied on *Coleman* to bring claims of associative direct discrimination; they did not need *CHEZ*'s extension of this to cases of indirect discrimination.

[40] See, for example: The New Architecture of EU Equality Law after *CHEZ*: Did the Court of Justice reconceptualise direct and indirect discrimination? op.cit. n.24

[41] See, for example: https://www.cloisters.com/indirect-discrimination-by-association-a-regressive-step/

[42] See, for example: https://www.sistersforchange.org.uk/wp-content/uploads/2020/docs/01-SFC-DB-FILES/196-EuropeanCommission-2018.pdf

The Court's reasoning in *CHEZ*: that the language of the Race Directive prohibits discrimination 'on grounds of racial or ethnic origin', read within the constraints imposed by the judgment in *Jyske Finans*, does create the prospect of, inter alia, migrants bringing claims on the basis of being perceived as holding a particular, targeted ethnicity although they are of a different ethnic origin.

Jyske Finans is an extremely problematic case. The Advocate General's, and the court's, desire, in recognition of the diverse ethnicities and races who are nationals of Member States, not to adopt national stereotypes and racist attitudes, not to regard nationality as a marker for ethnicity or race, arguably blinds them to one of the very menaces that the Race Directive was designed to tackle: stereotyping by national origin. Xenophobia, fear of strangers, of "them" of "the other", proceeds on the assumption that "they" can be differentiated from "us" and lumped together. It is combined with attitudes that treat nationality as a marker for ethnicity and race, and vice versa. Therein lies its potential to harm. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, for example, refers to groups "defined by reference to race, colour, religion, descent or national or ethnic origin"[43].

What matters is that to which reference is made in defining people as objects of hate, not the essential qualities of members of the group. Perception, not identity, is what matters. The European Court of Human Rights in *Biao* was quick to unpack the perception of the foreign born: assumptions and prejudices, advanced without evidence, were the very essence of the discrimination that prevented Mr *Biao* and his wife from enjoying their right to family life.

One can envisage the squeamishness displayed by the Advocate General and by the Court in *Jyske Finans* being carried over into cases of, for example, religious discrimination where the desire not to make assumptions about persons of a particular faith could blind the court to the assumptions that are made about them on a daily basis and lead to discrimination against them.

As Shera Atrey explains in her careful article about *Jyske Finans*[44] it delimits the possibility of claiming race discrimination under EU law by subsuming race and racism within ethnic origin, the head of discrimination identified by the referring court. She identifies the Advocate General and the European Court's "unease" at having to determine race as resulting in their not considering race discrimination separately from discrimination on the grounds of ethnic origin, and thus, at all.

[43] Article 1(1)(a), Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[44] S Atrey, S. (2018), 'Race discrimination in EU Law after *Jyske Finans*'. Common Market Law Review, 55(2), 625 642 https://research-information.bris.ac.uk/ws/portalfiles/portal/145995432/CaseNote_Atrey_rev_10.1.2018.pdf [accessed 26 February 2021].

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What if electricity meters were sited at inaccessible heights in a district inhabited mainly by migrants? Would it be necessary to show that one group of migrants were believed above all others to be tampering with their meters and that the others, like the claimant in *CHEZ*, were disadvantaged by living in that community? There is a difference between associative indirect discrimination and indirect discrimination affecting more than one group.

That what is at issue is the wording of the Race Directive is demonstrated when one considers cases of discrimination on the grounds of nationality under Article 18 of the Treaty on the Functioning of the European Union. It was not suggested in *Patmalneice* that there was a need for nationals of one member State to be at a particular disadvantage. Similarly, in a recent case on Article 18, C-591/17, *Republic of Austria v Federal Republic of Germany* in which the complaint was that the burden of a German road toll fell only on the owners and drivers of vehicles registered in Member States other than Germany, the vast majority of whom are nationals of Member States other than Germany. Perhaps it would have been possible to show that nationals of Austria were at a particular disadvantage, but no one felt the need to do so. It is arguable that *Jyske Finans* was an accident waiting to happen given the exclusion of nationality from the scope of the Race Directive.

If the Race Directive is to tackle xenophobia, it seems necessary that it should permit claims to be brought where the belief was not that a certain group of migrants but that "migrants" are more likely to tamper with their electricity meters than citizens. Yet this *Jyske Finans* appears to rule out. *Jyske Finans* treated everyone not born in Denmark as more likely to be engaged in money-laundering and terrorist finance, that case's equivalent of tampering with your electricity meter, than everyone born in Denmark.

Like those who criticise *CHEZ*, Shera Atrey appeals to the text of Article 2(2)(b). In her critique of *Jyske Finans*, she argues that "persons of a racial or ethnic origin" is not the same as "a specific" racial or ethnic origin.

Everyone has a racial or ethnic origin. There is no "not applicable" box on the census. The criticism of *Jyske Finans* is that the requirements of Article 2(2)(b) should be satisfied where one can point to a differential effect on one or more racial or ethnic groups as compared to others. That does not do violence to the language of Article 2(2)(b), rather violence is done by the reading adopted in *Jyske Finans*.

While the decision in *Jyske Finans* does not appear to have been motivated by a desire to rein in *CHEZ*'s acceptance of associative indirect discrimination, it has this effect. Without the limitations imposed by *Jyske Finans* it might have been possible for persons in the UK who are not migrants to challenge elements of the "hostile environment" by pointing to its effects on them: whether in seeking employment, renting a property, or seeking a licence to sell alcohol or to drive a taxi.

Standing to bring a case, associative discrimination, the demand that one ethnic group be affected above all others, and the refusal to recognise constructs of race, are all areas in which developments can be anticipated, with implications for migrants and for those seeking to challenge measures of migration control.

It is to be anticipated that the UK courts will be watching very closely to see how the Court of Justice of the European Union resolves the tensions between these pre-31 December 2020 cases, and will certainly wish to "take account of" decisions addressing this in making decisions on discrimination against immigrants after that date. It is conceivable, however, that the difficult cases will come before the UK courts before they come before the Court of Justice of the European Union.

Non-diminution: post 31 December 2020 decisions

A test of how the UK courts deal with decisions of the Court of Justice made after 31 December 2020 may be the application of the recent case C 16/19 VL v Szpital Kliniczny im. dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, in which judgment was given after 31 December 2020. In that case the court found indirect discrimination on the grounds of disability. Employees who submitted their disability certificates after a cut-off date were treated differently in respect of payment of an allowance from employees who submitted them before.

The Court held that the comparator group for the purposes of discrimination on the grounds of disability could be disabled persons. Thus far, seemingly uncontroversial. Those who are blind could take as a comparator group those who are deaf. One ethnic group could take as its comparator another ethnic group. But the judgment appears to go further and suggest that persons can compare themselves with others with the same disability, thus suggesting that the choice of an appropriate comparator is a different exercise from the question of whether the difference in treatment was because of disability.

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The approach of the Court to the question of whether the difference in treatment was because of the claimant's disability was to look at whether it was "indissociable" from the person's disability; inextricably linked to it. If so, direct discrimination could be established:

> it is for the referring court to determine...whether the temporal condition imposed by the employer for receiving the allowance ..., constitutes a criterion which is inextricably linked to the disability of the workers who were refused that allowance, in which case a finding of direct discrimination on the grounds of that disability would be necessary.[45]

Despite what looks like a clear steer, it is difficult to understand how a cut-off date could ever be identified as inextricably linked to disability.

The Court also held that if the criterion for the difference in treatment put workers at a particular disadvantage because of the nature of their disabilities, for example disadvantaging those whose disabilities are not visible, this could constitute indirect discrimination, even though disability was not the factor that had prompted distinction between the two groups.

This approach appears to have potential for all forms of discrimination: for example, where measures designed to protect minority ethnic groups appear to be designed around the needs of a particular minority ethnic group, and to forget others.

The judgment is hard to understand and looks set to generate further case law, in the Court of Justice and in the courts of Member States. The Supreme Court and the Northern Ireland Court of Appeal may well need to grapple with it in the context of the non-diminution provisions. While the UK courts are not bound, its approach has the potential to generate controversial decisions involving discrimination on all grounds.

[45] Paragraph 51, *VL v Szpital Kliniczny im. dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie,* C 16/19.

Gender Identity

The Equal Treatment Directives have been used to address the protection of trans and intersex individuals. They may increasingly be used to do so. Alternatively, the EU may go down the route of developing separate new instruments on gender identity in EU law. Or there may be a combination of the use and revision of existing legislation and new instruments, for example to address anti-intersex discrimination. A wide-ranging survey of developments to date and possible future developments can be found in the European network of legal experts in gender equality and non-discrimination's Trans and intersex equality rights in Europe – a comparative analysis[46].

It is anticipated that legal challenges in these areas are likely to seek to bring EU law closer to the 'Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity'[44].

Recital 3 to the Recast Equal Treatment Directive (2006/54/EC) states that it applies to discrimination arising from the gender confirmation of a person. It does not require that gender confirmation be included as a protected characteristic transposing the Recast Equal Treatment Directive as long as States interpret their sex discrimination legislation to cover gender confirmation. The Gender Goods and Services Directive (2004/113/EC) does not make express reference to gender confirmation, but Trans and intersex equality rights in Europe – a comparative analysis sets out the evidence that it was always intended to cover it[47].

As set out in that report, there are calls for 'gender identity' and 'gender expression' to be included in Article 19 of the Treaty on the Functioning of the European Union, while the Court of Justice of the European Union has yet to decide intersex cases.

Meanwhile gender recognition has the potential to affect a person's ability to assert particular claims of discrimination on the grounds of sex, as in Case C-423/04 Sarah Margaret Richards v Secretary of State for Work and Pensions in which Ms Richards was refused a State pension when she reached 60 because she was recognised as a man and therefore could not apply for one until she reached the age of 65. The Court of Justice held that this was unequal treatment on the

[44] See Yogyakartaprinciples.org – The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity [accessed 9 November 2023]

[46] Van den Brink, M. & P. Dunne, 'Trans and intersex equality rights in Europe – a comparative analysis', Luxembourg: Publications Office of the European Union, 2018 (European network of legal experts in gender equality and non discrimination) https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf [accessed 23 February 2021].

[47] See notes 136 and 37 therein and accompanying text.

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grounds of her gender reassignment, and discrimination contrary to Article 4(1) of the Equal Treatment Social Security Directive (79/7/EEC).

While the UK's Gender Recognition Act 2004 extends to Northern Ireland, the Equality Act 2010 does not. Instead, the Sex Discrimination (Northern Ireland) Order 1976 as amended to address discrimination on the grounds of gender reassignment. These instruments, read with Section 75 of the Northern Ireland Act 1998, prohibit direct discrimination, harassment and victimisation on the grounds of gender reassignment in the fields of employment and vocational training (including higher education), access to goods, facilities and services and disposal or management of premises.

Migrants, including forced migrants, may be differentially affected as the law develops in these areas. Refugees include those fleeing violence and discrimination because of their gender identities, but practices such as detention, accommodation provision and identity documents for persons seeing asylum may mean that in addition they are at particular risk navigating the asylum and resettlement process.

The UK's Gender Recognition Act 2004 contrasts with the gender recognition Acts of a number of other EU member States including Ireland, in that self-identification is not permitted under UK law. Although the Northern Ireland (Executive Formation etc) Act 2019 has made same sex marriage lawful in Northern Ireland it is still the case that in Northern Ireland, in contrast to the rest of the UK, the only application process for a gender recognition certificate is by the "standard route" whereby a person over 18 must show that they:

- have been diagnosed with gender dysphoria
- have lived in their acquired gender in the UK for at least two years
- will live permanently in their acquired gender.

The "overseas route" whereby persons who can prove that their acquired gender has been legally accepted in an 'approved country or territory', as defined, is not currently available to persons in Northern Ireland. Nor is the approved route for persons who are inter alia in a "protected" marriage or civil partnership as defined. Both these exclusions have the potential to affect migrants' ability to obtain recognition of their gender and may have the potential adversely to affect their ability to rely on the protection of the directives.

Multiple and Intersectional Discrimination

A primary concern for those working with persons under immigration control is the extent to which the discrimination against them on other grounds, such as age, disability, pregnancy or maternity, or sexual identity, may be exacerbated by their immigration status and/or ethnicity, and vice versa. Considerable concern has been expressed about the detention of the lesbian and gay asylum seekers, for example, and about persons with disabilities, pregnant women and mothers in asylum support accommodation.

There is considerable scope for the future development of EU law on multiple and intersectional discrimination. The judgments in *Achbita & Anor v G4S Secure Solutions NV* [2017] CJEU C-157/15, and *Bougnaoui and ADDH v Micropole SA* [2015] CJEU C-188/15, the first two cases in the Court of Justice on religious discrimination, both involved Muslim women who wished to wear a hijab at work. There is no consideration of their sex in the judgments, or of whether this served to compound or to aggravate the alleged discrimination on religious grounds. A further reference, on a complete ban on the hijab, is pending in Case C-341/19 *MJ v MH Müller Handels GmbH* but the questions referred do not explicitly raise intersectional discrimination.

Intersectional discrimination was considered in Case 443/15 *Parris v Trinity College Dublin*. The claim on each of the grounds pleaded was unsuccessful, thus this was not a case of multiple discrimination. It was held that a claim on the combined grounds, a claim of intersectional discrimination, could not succeed. *Parris* was a case where it was very clear that the intersection of the effects of the way in which Mr Parris was treated because of his age and because of his sexual orientation were the cause of the disadvantage he suffered. His partner could only claim a survivor's pension if their marriage or civil partnership had been entered into when Mr Parris, the member of the pension scheme, was under 60. But although the couple had been together for decades, their civil partnership, contracted in the UK, was not recognised in Ireland before Mr Parris was 60. The Court of Justice found no discrimination on the grounds of sexual identity and none on the grounds of age. It went on to hold that 'no new category of discrimination resulting from the combination of more than one of those grounds may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'[48]. This is a straightforward rejection of intersectional discrimination.

[48] Paragraph 82. *Parris v. Trinity College*, Dublin, Case 443/15

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The European network of legal experts in gender equality and non-discrimination identifies that the court's ability to take context into account when assessing whether treatment is less favourable, and in assessing proportionality, may be the way in which the court seeks to deal with multiple or intersectional discrimination. It cites the case of Case C-152/11, *Odar v Baxter Deutschland GmbH*, in which factors of age and disability were both in play and the court reflected on the particular effects of aging on the severely disabled. The case concerned the calculation of Mr Odar's redundancy payment. The formula that weighted redundancy payments by reference to age was held not to be discriminatory on the grounds of age. It was however found to be indirectly discriminatory on the grounds of disability. The level of redundancy payment was affected by the age at which a person would first receive a pension, which was different for a person with a severe disability. The court took into account that:

> They disregarded the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age. Severely disabled people have specific needs stemming both from the protection their condition requires and from the need to anticipate possible worsening of their condition. ..., regard must be had to the risk that disabled workers may throughout their lives have financial requirements arising from their disability which cannot be adjusted and/or that, with advancing age, those financial requirements may increase.[49]

That someone is a migrant or refugee, and in particular the relative powerlessness so often associated with those statuses, especially for those whose claim for asylum has yet to be determined, or who have no lawful leave, is part of the context in which other discrimination against them falls to be assessed.

It may indeed prove easier, post *Jyske Finans*, to take immigration status into account as part of context in examining other grounds of discrimination than to found the claim on immigration status through the prism of race or ethnicity.

In other cases, while the comparator group could be others seeking asylum, it could be demonstrated that the disadvantage faced by members of particular groups is exacerbated by the privations of the asylum and immigration system: for example, in detention, in asylum support accommodation or in dealing with interviewing and reporting procedures.

Migrant workers whose visa is tied to their job, because of their insecure immigration status, may be more vulnerable to discrimination in the work-place than other employees. They may easily may the victims of harassment, for example on the grounds of sex. The approach taken in *Odar* may be deployed at a domestic level whether or not the law develops further at the EU level.

[49] Paragraph 69. *Odar v. Baxter Deutschland GmbH*, Case 152/11

Procedural Protection

The directives require the member States to establish judicial and/or administrative procedures so that individuals can enforce the rights they protect.

As set out above, Freyn is an example of a human rights organisation being able to bring an action challenging xenophobia and racism without an identifiable victim: no Moroccan immigrant who had been denied a job had been identified, quite possibly because, in the light of the public statements, none would have applied.

In cases C-81/12 *Asociatia Accept v Consiliul National pentru Combaterea Discriminarii* and C 507/18 *NH v Associazione Avvocatura per i diritti LGBT- Rete Lenford* statements comparable to those made in *Freyn* were made about hiring gay men.

These were cases brought under the Framework Directive. Article 9(2) of that Directive provides:

> 2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

In *NH v Associazione Avvocatura per i diritti LGBT- Rete Lenford* the court held that while Article 9(2) did not require that organisations have standing in national law, absent a claimant, it did not preclude this. Italian national law made provision for an organisation to have standing in these circumstances. Similarly, the court held that whether only not for profit, as opposed to for profit, organisations should have standing was a matter for national law.

Article 17 of the Directive requires sanctions to be effective, proportionate and dissuasive. The requirement was held not to be limited to cases where there was an identifiable person discriminated against. Effective, proportionate and dissuasive sanctions could include the payment of damages to the organisation bringing the case.

CHEZ raises another aspect of standing: the prospect, as discussed above, of persons not the primary target of discriminatory measures bringing cases based on the effect on them. British citizens are affected by the hostile environment in ways described by Anuerin Bevan, defending access of foreign visitors to the National Health Service:

> there are a number of more potent reasons why it would be unwise as well as mean to withhold the free service from the visitor to Britain. How do we distinguish a visitor from anybody else? Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified.[50]

Those who object to being counted may have cases to bring. Similarly, employers, private landlords and universities, those who are made the agents of immigration control and are forced in the hostile environment to do the counting, may wish to assert the burdens that these responsibilities place on them.

It will be particularly important to have regard to the EU law on procedural protection in the context of the dedicated mechanism.

[50] In place of fear, Aneurin Bevan, Chapter 5.

Harassment and victimisation

These are underdeveloped areas of case law under the directives. As described above, there was in *CHEZ* a focus on stigma and humiliation as effects of race discrimination, which are closely linked to the concept of harassment. The Race Directive defines harassment as unwanted conduct related to the grounds of discrimination which "takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment". This describes the hostile environment in terms and, again, but for the limitations imposed by the reading of the law in *Jyske Finans*, would offer fertile ground for challenge.

S. Coleman v Attridge Law and Steve Law,[51] where the claimant employee was held to be entitled to claim direct discrimination on the grounds of her treatment because of her son's disability, was pleaded as a harassment case. On her return to work after maternity leave *Ms Coleman* complained that she had not been allowed return to her existing job, she had not been allowed flexible working, she was described as lazy when she asked for time off, all in circumstances where colleagues with no disabled child were treated differently. She complained that her grievance was not dealt with properly, and that abusive and insulting comments about her and her child, and threats of dismissal in circumstances where they were not made of and to colleagues who sought time off or flexibility to look after able-bodied children. There is no suggestion in the judgment that the claim was wrongly characterised as one of harassment.

In Case C-394/11 *Valeri Hariev Belov*, in which the Court found that it did not have jurisdiction for technical reasons, Mr Belov complained, also against the *CHEZ* company, of the same siting of electricity meters as formed the substances of the complaint in *CHEZ* but the reference, unlike that in *CHEZ* was framed in terms of "direct discrimination and/or harassment".

As to victimisation, it is accepted that a person who does not share a protected characteristic may be victimised for standing up to discrimination and thus those who stand up for colleagues discriminated against because of their race or ethnicity enjoy protection.

[51] Case C-303/06.

Areas to Monitor

Based on the above analysis I set out below areas to monitor. These are areas where discrimination against persons under immigration control has already been identified and thus where there is likely to be scope to bring challenges.

Discrimination on grounds of sex, sexual identity and gender recognition

Particular categories of migrant are more likely to be women than men: spouses of skilled workers, or domestic workers, are two examples. Their rights can be compared to those in other groups of migrants and, where there are no legitimate reasons for the difference, or it is disproportionate, it may found a claim of discrimination.

There is evidence of discrimination against LGBT and trans migrants in immigration detention facilities[52]. Disadvantage may occur where a claim or asylum or an immigration case turns at least in part on sexual identity and securing relevant evidence is not possible from within detention.

Disability discrimination

Treatment of disabled persons in immigration detention merits examination. It is important that both mental and physical disability are considered. The questions of having to travel from Northern Ireland to other parts of the UK to be detained, and of being detained far from family, may be areas in which insufficient account is taken of disability.

Accessible housing for disabled asylum seekers is an area that should be examined. In *R (DMA) v The Secretary of State for the Home Department* (Rev 1) [2020] EWHC 3416 (Admin) the Home Office was found to have failed to monitor its private contractors who provided housing to persons seeking asylum, resulting in lengthy delays in the provision of appropriate, or in some cases any, accommodation for disabled people.

More generally, the extent to which contracts with commercial providers, whether of accommodation, detention facilities, or application processing centres, make adequate provision for disabled people, is also worthy of consideration. The person with a disability could be the migrant, or a citizen relative. Again, both mental and physical disability need to be considered.

[52] No safe refuge: experience of LGBT migrants in detention facilities, Stonewall and UKLGIG 2016, https://wwwstonwall.org.uk/system/files/no_safe_refuge.pdf [accessed 16 March 2021].

Accessibility is also a consideration within the courts and tribunals' system. Anyone who has been to an immigration and asylum tribunal hearing centre knows how badly set up they are for those with mental and physical disabilities, with the lack of private and comfortable places to wait compounded by lengthy delays. Listing rarely seems tailored to accommodate any special needs. Again, the question of having to travel from Northern Ireland to other parts of the UK may arise. Remote hearings present their own challenges, including where translation is required.

Transport of disabled people, whether seeking asylum or held in the detention estate, to and from their accommodation, or to hearing centres, is another area in which there may be a failure to accommodate disabled people. Similarly for biometric enrolment, interviews in connection with immigration applications, and citizenship ceremonies. It is important that services catering exclusively for persons under immigration control, or for them and family members, are held to standards of accessibility as other facilities.

Race discrimination

Immigration/migration related rights do not only affect persons under immigration law. Family members and other nationals, whether in their capacity as employers, service users or friends, are also affected. For example, women who are victims of familial and domestic abuse are at risk where services for them are predicated on having access to public funds if, because of ethnicity, language or accent they are assumed not to have such access in circumstances where they were unable to scoop up documents before they fled.

Here, as in many examples based on race and ethnicity, the victims of discrimination will be those assumed to be migrants. It may be easier to challenge aspects of the hostile environment by supporting citizens from ethnic minorities to do so than by supporting migrants. A black worker may be asked to prove a right to work in the UK where a white worker is not, a black patient may be asked to prove an entitlement to health care; a landlord or landlady may make assumptions about whether potential tenants have a right to rent based on ethnicity, name or accent. All constitute unlawful discrimination. The hostile environment risks operating on the basis of unlawful assumptions.

Abuse against women, or even children, may be ignored where, due to stereotypes, behaviour is assumed to be normal in a particular culture. It is important to consider carefully whether the discrimination complained of is on the grounds of race, or of sex, and indeed whether it is on grounds that, for the reasons set out above, are more problematic, such as immigration status or the intersection of race and sex discrimination.

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Overall

In summary:

- Collect data on which migrants have which visas: detailed information is needed to establish comparator groups.
- In trying to get at the way in which migrants are treated, it may be particularly helpful to look at whether persons of a certain race or ethnicity are assumed to be migrants and thus singled out for the treatment in question. Again, collect your data.
- Similarly, be alive to associative discrimination: the ways in which the privations of the immigration and asylum systems affect the family members of migrants or those who work, or rent, with them.
- When faced with cases of intersectional discrimination look to see if one form of discrimination can be redescribed as the context in which the other takes place;
- Look for differential effects on migrants of certain races or groups. There may also be scope for people to bring claims on the basis of being perceived as holding a particular, targeted ethnicity although they are of a different ethnic origin;
- Look for contexts in which the discrimination faced by particular groups is exacerbated by the immigration status of members of the group, whether because of particular challenges in the immigration and asylum systems or because it leaves them vulnerable to exploitation by third parties.
- Be ready to compare one group of migrants with other migrants, for example in cases of sex discrimination.
- Where the treatment constitutes harassment, plead this.
- Similarly, where stigma and humiliation form part of the discriminatory treatment, plead this.
- Look out for victimisation of those who stand up for their migrant colleagues: but always identify the ground of discrimination first;
- Bear in mind that cases of gender identity and gender recognition are a developing area of the law;
- Recognition of documents held by migrants may be of particular importance. Also check where they cannot use measures designed to facilitate recognition of a person's chosen gender.
- Remember that you do not always need an identifiable victim where the discriminatory intent and likely effect are clear.
- Consider damages claims where an organisation brings the challenge.

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