

## Treating like cases alike and unlike cases differently: Some problems of anti-discrimination law

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Lord Hoffmann's judgments and speeches contain many memorable observations. One of the best-known was in *Matadeen v Pointu*<sup>1</sup>, an appeal from Mauritius on a constitutional issue:

“... treating like cases alike and unlike cases differently is a general axiom of rational behaviour.”

I mean no disrespect to Lord Hoffmann, or to the importance of the subject, in pointing out that the frequent repetition of this quotation can become a bit like saloon bar philosophers quoting the Victorian poet Arthur Clough as a serious authority on assisted suicide:

“Thou shalt not kill, but needs not strive  
Officiously to keep alive.”

Not everyone knows that the couplet comes from *A Modern Decalogue*, a mordant satire which also includes the couplets,

“Thou shalt not steal, an empty feat  
When it's so lucrative to cheat.  
Do not adultery commit,  
Advantage seldom comes of it.  
Thou shalt not covet, but tradition

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<sup>1</sup> [1999] 1 AC 98, 109. This interesting case demonstrates Lord Hoffmann's knowledge of the history of the French Revolution and contains some seeds which came to flower in his famous lecture *The Universality of Human Rights* (2009) 125 LQR 412

Approves all forms of competition.”

Lord Hoffmann seems to have recognised this himself.<sup>2</sup> He immediately went on to say:

“The very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently?”

That is one of the questions that I want to discuss today. The discussion will, I hope, shed some light on a difficulty that confronts many people (even if they are lawyers, but especially if they are not) when they start to study discrimination law, whether in your Human Rights Act 1993 (as extensively amended) or equivalent UK statutes: why does the topic of discrimination get so abstract and complicated as soon as it gets into the hands of the lawyers?

Discrimination founded in prejudice is obviously unacceptable and wrong, especially in its crudest forms, as described (in perfectly concrete and simple terms) by Lady Hale:<sup>3</sup>

“My Lords, it is not so very long ago in this country that people might be refused access to a so-called “public” bar because of their sex or the colour of their skin; that a woman might automatically be paid three quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a “no blacks” notice in her

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<sup>2</sup> As have many legal scholars: see the introductory section to Aileen McColgan, *Cracking the Comparator Problem: discrimination, “equal” treatment and the role of comparisons* [2006] EHRLR 650

<sup>3</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 para 130

window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made; to whether he or she would be a fit and proper person to have a drink with others in a bar, to how well she might do the job, to how good a tenant or lodger he might be. It was wrong because it depended on stereotypical assumptions which had nothing to do with the qualities of the individual involved: even if there were any reason to believe that more women than men made bad customers this was no justification for discriminating against all women. It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about.”

Why cannot the topic be left to the intuitive decency and common sense of the right-thinking citizen? The answer may be that intuition and common sense are sufficient in clear cases, but cannot by themselves provide the answer in marginal cases. Marginal cases include (but are not restricted to) those on the margin of direct and indirect discrimination. The distinction between direct and indirect discrimination is long-established and important in UK anti-discrimination statutes, having got there initially from United States jurisprudence, and having developed under the influence of European Union employment law. Under our national law indirect discrimination may be justifiable, but direct discrimination never can be<sup>4</sup>. In the jurisprudence of the European Court of Human Rights at Strasbourg, by contrast, the distinction between direct and indirect discrimination has taken a surprisingly long time to get full recognition. Strasbourg takes a correspondingly freer line about justification.

Discrimination is defined in different ways, and with different degrees of precision, for the purposes of different international or national instruments. Article

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<sup>4</sup> See Lady Hale in *R (E) v Governing Body of JFS* [2010] 2 WLR 153 paras 55-57

14 of the European Convention on Human Rights does not offer a definition as such, but marks out two limits, which can be identified as ‘ambit’ and ‘grounds’<sup>5</sup>:

“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.”

Taking Article 14 as a starting point, we can begin to develop a model of the essentials of unlawful discrimination. It has five distinct elements, although in some cases there is a considerable overlap between them. We can tentatively assert that there is unlawful discrimination if [*first element - ambit*] in some particular field of rights (such as private life) or activity (such as employment) [*second element - grounds*] the complainant (typically the claimant) is on proscribed grounds (such as gender, colour or sexual orientation) [*third element - unequal treatment*] subjected by the discriminator (typically the defendant) to treatment worse than that accorded to another person or group of persons [*fourth element - analogous situation*] when the complainant and the other(s) are in an analogous situation and [*fifth element - justification*] the unequal treatment has no legitimate aim, or is disproportionate.

Any of you who are familiar with the UK jurisprudence will recognise this five-point model as a version of the so-called “*Michalak* questions”<sup>6</sup> which have in the course of the last decade been successively articulated, refined, and then rather

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<sup>5</sup> See Lord Hoffmann in *R (Carson) v Secretary of State for Work & Pensions* [2006] 1 AC 173, para 10, contrasting the position under the “equal protection” guarantee in the Fourteenth Amendment to US Constitution.

<sup>6</sup> *Wandsworth LBC v Michalak* [2003] 1 WLR 617

down-graded by our appeal courts. But they are at the least a useful check list as to some of the complexities. I will comment on the five elements in turn.

As to ambit, for our courts most of the problems would disappear if the United Kingdom were to sign and ratify the Twelfth Protocol to the Convention, Article 1 of which extends the scope of Article 14 to “the enjoyment of any right set forth by law” (rather than simply Convention rights). But the UK government regards this text as “too general and open-ended”. So the courts have to decide whether an alleged act of discrimination is within the ambit of one or more Convention rights. Recent authority indicates that the link must be more than tenuous, especially when the claimant is relying on the very wide Article 8 right to respect for private and family life.<sup>7</sup>

As to grounds, in Article 14 the words “or other status” at the end of the enumeration of proscribed grounds have in practice been interpreted as broadly equivalent to “personal characteristic”.<sup>8</sup> They certainly extend to sexual orientation and marital status. In one recent case I suggested an analogy<sup>9</sup>:

“‘Personal characteristics’ is not a precise expression and to my mind a binary approach to its meaning is unhelpful. ‘Personal characteristics’ are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion

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<sup>7</sup> See *M v Secretary of State for Work & Pensions* [2006] 2 AC 91 paras 56-84 (but cf paras 106-115 and (as to the width of Article 8) see NA Moreham, *The Right to Respect for Private Life in the ECHR: a re-examination* [2008] EHRLR 44

<sup>8</sup> *Kjeldsen Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56

<sup>9</sup> *R(RJM) v Secretary of State for Work and Pensions* [2009] 1AC 311, para 5

and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB)."

In United States jurisprudence there is a well-established concept of "suspect grounds": discrimination on grounds of gender, race, colour or sexual orientation is particularly offensive, and particularly hard to justify, because it involves treating a human being unfavourably because of some characteristic that is very personal, and largely innate and immutable. Discrimination on other grounds (such as age, education or wealth) may be justifiable. Lord Hoffmann has described two categories of grounds for discrimination<sup>10</sup>:

"Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the Fourteenth Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which *prima facie* appear to offend our notions of the respect due to the individual and those which merely require some rational justification: *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307.

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<sup>10</sup> Footnote 5, para 15

*Murgia* was the case in which the US Supreme Court upheld a mandatory retirement age for members of the police force.

Lady Hale has expressed reservations about introducing the notion of “suspect grounds” into Strasbourg jurisprudence.<sup>11</sup> The Strasbourg jurisprudence does not, I think, support the notion of two separate categories of grounds. But it does recognise that some grounds of discrimination call for the closest scrutiny and are particularly difficult to justify<sup>12</sup>.

Even within the “suspect” or “closely scrutinised” category of grounds there are significant differences, especially when they have to be considered in conjunction with ‘unequal treatment’ and ‘analogous situation’. Discrimination on grounds of gender and (to a more limited degree) sexual orientation is straightforward in the sense that the distinction between men and women (and to a lesser extent between heterosexuals and homosexuals) is basic and immutable. Every human being is male or female, except for the very small minority who are of doubtful gender, or are transsexual<sup>13</sup>.

By contrast ‘racial grounds’ are defined in the UK Race Relations Act 1976 as grounds of ‘colour, race, nationality or ethnic or national origins’. There is no simple either/or choice here. Most people will fall into several different groups

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<sup>11</sup> *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, paras 20-35

<sup>12</sup> Footnote 5, paras 57-58

<sup>13</sup> See *Bellinger v Bellinger* [2003] 2 AC 467, which led to the enactment of the Gender Recognition Act 2004

encompassed by this definition. A person may be black, Afro-Caribbean, of British nationality and of debateable ethnic or national origins, depending on how you understand ‘origins’ and how many generations you go back. Mrs Elias, the claimant in an instructive recent case<sup>14</sup>, was in her own words ‘British enough to be interned’ (in Hong Kong from 1941 to 1945) but ‘not British enough to be compensated’. Her parents (also British subjects) were Iraqi Jews permanently resident in Hong Kong, where Mrs Elias was born in 1924. So her ethnic and national origins were very much open to debate.

So I come to the third element, less favourable treatment. This always involves the notion of a comparison, but the Strasbourg jurisprudence (unlike the UK legislation) does not insist on the identification of an actual individual (generally described in the English courts, with a painful disregard for the Latin language, as a comparator) with whom the complainant is to be compared. Strasbourg may not even insist on identification of a notional comparator. When gender discrimination is in point, the exasperated protest of a woman subjected to a bit of casual sexism, ‘you wouldn’t have done that [or said that] to a man’ usually speaks for itself. Any man will do. One is reminded of the comment by Jo Brand (she is not a legal scholar but a stand-up comedian) that women, as well as men, do have sexual fantasies. The difference is that the husband wishes he was with some other woman but the wife wishes she was with any other man.

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<sup>14</sup> *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, para 6



Sometimes gender discrimination is systemic and the discriminator is the official body responsible for the system. That was the position in one of the earliest important UK cases<sup>15</sup>. Birmingham City Council had five boys' grammar schools with an annual intake of 540 boys and three girls' grammar schools with an annual intake of 360 girls. This inequality antedated the Sex Discrimination Act 1975. The city council had no wish to continue it but could not put it right at short notice. Nevertheless it was guilty of a breach of the legislation.

Gender equality in education raises a particular problem because in many societies teenage girls are markedly superior to teenage boys in aptitude and attention to work. So arguably Birmingham City Council should have been making available to girls not half, but some larger proportion of its grammar school places. This problem arose recently in Hong Kong, where the public sector schools are co-educational, but girls and boys were separately graded to ensure that equal numbers proceeded to a more advanced level of education. That meant that a girl with a mark of (say) 60% might not go forward, but a boy with (say) 55% would be successful. Hartmann J<sup>16</sup> held that that was discriminatory, since the legislative purpose was to protect the rights of individuals, not groups.

Lady Hale quoted from Hartmann J's judgment in her opinion in the *Roma Rights*<sup>17</sup> case in 2004:

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<sup>15</sup> . *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155

<sup>16</sup> *Equal Opportunities Commission v Director of Education* [2001] 2 HK LRD 690. There has been a similar decision in Northern Ireland, *Re Equal Opportunities Commission (No. 1)* [1988] NI 223.

<sup>17</sup> *R (European Roma Rights) v Immigration Officer at Prague Airport* [2005] 2 AC 1, para 113.

“What may be true of a group may not be true of a significant number of individuals within that group.”

The *Roma Rights* case is an important and difficult case which brings us back to the distinction between direct and indirect discrimination. That distinction is, as I have already mentioned, firmly embedded in the UK’s own anti-discrimination legislation, latterly under the influence of European Union Directives.<sup>18</sup> Its clear recognition by the Strasbourg Court came as recently as 2008, in the case of *DH v Czech Republic*.<sup>19</sup>

Indirect discrimination is where an apparently neutral requirement (for instance, an aptitude test taken by all prospective employees) is for some group of prospective employees (such as black workers) a disproportionately difficult obstacle for them to overcome. That was the situation in the seminal United States case of *Griggs*.<sup>20</sup> The US Supreme Court held that the test could be justified only by showing (as the employer failed to show) that the test was a business necessity.

That is an example of what might be called a common detriment unfairly distributed. Another example of this type of indirect discrimination – in fact much the most common example in the UK and continental Europe<sup>21</sup> - is when part-time workers are given less favourable terms of employment (as regards pensions, holidays and so on) than those accorded to full-time workers. This is indirect discrimination

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<sup>18</sup> Notably the Equal Pay Directive 75/117/EEC, the Equal Treatment Directive 76/207/EEC, The Burden of Proof Directive 97/80/EEC, The Race Directive 2000/43/EEC and the consolidating “Recast” Directive 2006/54/EEC.

<sup>19</sup> (2008) 47 EHRR 59.

<sup>20</sup> *Griggs v Duke Power* (1971) 401 US 424

against women, for whom part-time employment is much more common than it is for men. Another variety of indirect discrimination is common treatment which is particularly disadvantageous to some only of those subjected to it, whether or not that group is statistically a disproportionate part of those affected. For instance a rule against pupils at a boys' school wearing any headdress was a real disadvantage to only one prospective pupil who was a Sikh; to other pupils the rule was a matter of indifference. The indirect discrimination could not be justified because any justification must stand up "irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied."<sup>22</sup>

The background to the *Roma Rights* case is that the Roma people are, in the Czech Republic and some other eastern European states, a seriously disadvantaged minority. At the turn of the century large numbers of them wished to get to the United Kingdom in order to seek asylum on the grounds of ethnic persecution. Their applications were very seldom successful, since though they were certainly disadvantaged, the requisite degree of persecution was rarely established. In order to reduce the flow of applications for asylum (which could be made only within the United Kingdom) the governments of the United Kingdom and the Czech Republic agreed to establish UK immigration officers at Prague Airport, the principal point of departure. The legality of this procedure was challenged on two grounds: first that the process was contrary to the Refugee Convention, or customary international law; and secondly that the procedures adopted by the immigration officers infringed the Race

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<sup>21</sup> See for instance *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607.

Relations Act. Would-be travellers who were Roma (and readily identifiable as such by the colour of their skin) were questioned much more rigorously than others.

The first ground of challenge failed at every level. As to the second ground, in the Court of Appeal the majority upheld the judge's view that the close questioning of Roma travellers could not (in Simon Brown LJ's words<sup>23</sup>) "realistically be regarded as less favourable treatment of Roma qua Roma". But the House of Lords unanimously preferred the reasoning in the dissenting judgment of Laws LJ,<sup>24</sup>

"The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified; whereas it is entirely plain that the legislature has advisedly chosen to allow justification of indirect, but not direct, discrimination.

One asks Lord Steyn's question: why did he treat the Roma less favourably? It may be said there were two possible answers: (1) because he is Roma; (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible."

Lord Brown (as he had become) revisited this topic in *Gillan*<sup>25</sup>, in the context of random stop and search powers exercisable by the London police under the UK Terrorism Act 2000. He had to some extent anticipated this point in his judgment

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<sup>22</sup> See *Mandla v Dowell Lee* [1983] 2 AC 548.

<sup>23</sup> Footnote 17, [2004] QB 811, para 81

<sup>24</sup> Paras 108-109

<sup>25</sup> *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307, paras 83-90 (The Strasbourg Court has recently disagreed: *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105)

in *Roma Rights*.<sup>26</sup> His measured observations show, I think, that this is an area where the sharp distinction between direct and indirect discrimination becomes unrealistic and almost unmanageable. Discrimination was not as such an issue in *Gillan*, as the two complainants stopped and searched in that case were a white student and a white journalist observing people going to an arms fair.

Cases like *Roma Rights* can be seen as turning on an issue of causation: what was the real reason for the unequal treatment? The same might also be said of the *Jewish Free School* case<sup>27</sup>, which recently attracted a great deal of public interest in Britain, especially among the Jewish community. A boy had been refused admittance to an oversubscribed faith school in north London, which could lawfully decide admissions on religious grounds, but not on racial grounds (including grounds of ethnic origins). The boy was refused a place because he was not recognised as Jewish by the office of the Chief Rabbi (the leader of Britain's orthodox Jews). Was the real reason why he was refused a place because his mother had been converted in a non-orthodox Italian synagogue (prima facie a religious reason) or because he did not have unbroken matrilineal Jewish ancestry (prima facie a reason depending on ethnic origins)? The Supreme Court sat with nine justices who were far from unanimous: five concluded that it was direct discrimination on grounds of ethnic origins, two that it was indirect discrimination on those grounds, and two that it was not discrimination at all.

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<sup>26</sup> Footnote 23, para 86.

<sup>27</sup> *R (E) v Governing Body of JFS* [2010] 2 WLR 153

But the *Roma Rights* case can also be analysed in terms of the fourth element in the model, that is being in an analogous situation. If the claimant/complainant is not in an analogous situation to the actual or notional comparator, there will be no unlawful discrimination. But in deciding that question the court may not rely on the very ground complained of as a reason for concluding that the situations are not analogous. So to say that the Roma would-be immigrants were not in an analogous situation to other passengers who had no pressing need to claim asylum was only, at one remove, to rely on their ethnic origins as a suggested reason for differential treatment.

The most obvious example of this fallacy is that it is no answer to a complaint of discrimination against a pregnant woman to point out that men do not get pregnant. Lady Hale spelled this out in a recent case:<sup>28</sup>

“It would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situations are not analogous.”

Falling into this fallacy or error has, I think, become the most heinous charge that can be made against judges by legal scholars and commentators specialising in discrimination law. I say that as one of the majority in *Carson*<sup>29</sup>, a decision which has attracted a good deal of criticism, some of it on that ground. I am

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<sup>28</sup> *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, para 27

<sup>29</sup> Footnote 5

not here to defend the decision, but it does call for mention, especially as it has recently been upheld (by eleven votes to six) by the Grand Chamber of the Strasbourg court.<sup>30</sup>

The facts were that Ms Carson worked in England for most of her career, but emigrated to South Africa in about 1990. When she retired in 2000 she became entitled to a UK retirement pension of about £100 a week. For pensioners resident in the United Kingdom, the rate of pension is adjusted annually to reflect rises in the UK cost of living. Some pensioners resident overseas (including residents of EU countries or the United States) receive comparable increases under reciprocal treaty arrangements. But many UK pensioners are resident in countries (including South Africa, Australia and New Zealand) where there are no reciprocal arrangements. As matters stand, Ms Carson will receive about £100 a week for the rest of her life, with no cost of living increases. She sought judicial review, relying on Article 14 of the European Convention and the First Protocol, Article 1 (peaceful enjoyment of possessions).

Lord Hoffmann, giving the leading opinion, was prepared to accept that Ms Carson's pension (to which she had contributed during her working life) was a possession. He then discussed "what is discrimination", including the passage which I have already quoted<sup>31</sup> beginning "Whether cases are sufficiently different is partly a

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<sup>30</sup> 16 March 2010, upholding a 6-1 decision of the Chamber (2009) 48 EHRR 941.

<sup>31</sup> Footnote 10

matter of values and partly a question of rationality.” In that passage he distinguished between the two categories of “suspect” and other grounds. He went on:<sup>32</sup>

“There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I observed, there are shifts in the values of society on these matters. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 recognised that discrimination on grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human-being is at stake or merely a question of general social policy. In the present case, the answer seems to me to be clear.

The denial of a social security benefit to Ms Carson on the ground that she lives abroad cannot possibly be equated with discrimination on grounds of race or sex. It is not a denial of respect for her as an individual. She was under no obligation to move to South Africa. She did so voluntarily and no doubt for good reasons. But in doing so, she put herself outside the primary scope and purpose of the UK social security system.”

Three other Law Lords (Lord Nicholls, Lord Rodger and I) agreed. Lord Carswell dissented. The majority’s primary ground of decision was that the positions of Ms Carson and a UK-resident pensioner were not sufficiently analogous. But the majority also found the rigid framework of the *Michalak* questions unhelpful.<sup>33</sup>

The decision has attracted a good deal of academic comment. Clayton and Tomlinson, the authors of a leading textbook, comment<sup>34</sup> that the approach of the majority could be regarded as equivalent to dismissing a sex or race discrimination claim on the bare ground that men and women, or people of different ethnicity, are

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<sup>32</sup> Footnote 5, paras 17 and 18

<sup>33</sup> Footnote 5, paras 2-3 (Lord Nicholls), 28-33 (Lord Hoffmann), 43 (Lord Rodger), 61-65 (Lord Walker)

<sup>34</sup> *The Law of Human Rights*, 2<sup>nd</sup> Ed. (2009) para 17.142



“materially and relevantly different” from each other. Aileen McColgan<sup>3536</sup> has robustly attacked the decision on several fronts, concluding that its effect is that “only patently absurd or offensive grounds of discrimination are likely to be subject to further scrutiny.”

These criticisms raise an issue of political philosophy that is how far discrimination law ought to develop in the direction of a wider and more general principle of equality. As the law now stands, the crucial question is whether the court perceives the differentiating matter (in *Carson*, residence in South Africa) as an internal or personal characteristic (part of who the complainant is) or as part of the external context (how the complainant is circumstanced). Only the external context is admissible in considering whether the complainant and the comparator are in an analogous situation.

The Grand Chamber has upheld the Lords’ decision in *Carson* on broadly similar grounds, coupled with the state’s margin of appreciation on matters of macro-economic policy. The Court noted that the United Kingdom’s social security system was intended to provide a minimum standard of living for those resident within its territory. As regards social security, the complainants were not in a relevantly analogous situation to individuals ordinarily resident in the UK, or in countries which had reciprocal arrangements with the UK. They did not pay UK tax and there was a range of economic and social variables.

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<sup>35</sup> Footnote 2

The fifth element, justification, is closely connected with analogous situation, and the Strasbourg Court often elides the two.<sup>37</sup> Justification, if considered separately, needs a legitimate aim and a reasonable relationship of proportionality.<sup>38</sup> The way in which the notions of “analogous situation” and “justification” are intertwined is strikingly illustrated by the way in which United Kingdom and Strasbourg jurisprudence has developed away from the traditional view that the married heterosexual couple has a special place in society and may be accorded special tax and social security benefits without any objectionable discrimination. It was often treated as self-evident, either that the position of traditional married couples is not analogous to that of unmarried cohabitants, or that special treatment for married couples is justified on social grounds. As recently as ten years ago the Strasbourg Court said<sup>39</sup> in *Shackell* that married couples and cohabitants

“are not [in] analogous situations. Though in some fields, the de facto relationship of cohabitants is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit.”

What broke the mould was the recognition that it is unfair and objectionable to discriminate against same-sex couples who live in a stable relationship but cannot get married. Same-sex couples can now obtain official recognition of their status under the UK Civil Partnership Act 2004. For different-sex

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<sup>37</sup> Footnote 5, paras 65-70

<sup>38</sup> Footnote 3, para 18

couples the choice is still between marriage and no official recognition: civil partnership is not an option for them. But the tendency of the jurisprudence, both in the United Kingdom and at Strasbourg, seemed to be towards reducing the special potency of the marriage bond or the status of civil partnership. There is a full review of the authorities in a recent appeal about adoption in Northern Ireland, *Re G (Adoption: Unmarried Couple)*.<sup>40</sup> As noted in that case,<sup>41</sup> the Strasbourg Court has effectively departed from its decision in *Frette*,<sup>42</sup> decided in 2002.

But the latest chapter takes the problem a stage further (or, arguably, a stage back). In the case of *Burden*<sup>43</sup> two elderly sisters, who had never married and had lived together for at least 30 years, complained that the survivor of them would be deprived of an inheritance tax exemption available to either a married couple or the partners in a civil partnership, and might therefore be unable to continue to live in their family home for the rest of her life. That was, they said, unjustified discrimination in the enjoyment of possessions.

The Strasbourg Court dismissed the complaint by the narrow margin of four to three. The majority relied mainly on the state's margin of appreciation in fiscal matters.<sup>44</sup>

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<sup>39</sup> *Shackell v United Kingdom* 27 April 2000.

<sup>40</sup> [2009] 1 AC 173

<sup>41</sup> Paras 21-26 (Lord Hoffmann), 51-52 (Lord Hope), 163-140 (Lord Mance)

<sup>42</sup> *Frette v France* (2002) 38 EHRR 438

<sup>43</sup> (2007) 44 EHRR 1023 (ECtHR), (2008) 47 EHRR 857 (Grand Chamber)

<sup>44</sup> Para 60

“Any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of taxpayers. The implementation of any such scheme must, inevitably, create marginal situations and individual cases of apparent hardship or injustice, and it is primarily for the state to decide how to strike the balance between raising revenue and pursuing social objectives.”

The case then went to the Grand Chamber which reached the same result by a wider margin, fifteen to two. The majority relied less on the margin of appreciation and more on a perceived (but not clearly articulated) view that the cases were not analogous. The majority judgment referred to consanguinity being “the very essence of the connection between siblings” and to both marriage and civil partnership being in the nature of a “public undertaking, carrying with it a body of rights and obligations of a public nature.” The Grand Chamber referred favourably to *Shackell*<sup>45</sup>, which might be thought to have been overtaken by later jurisprudence.

Clayton and Tomlinson<sup>46</sup> describe the decision as “highly unsatisfactory.”

This is another area of discrimination law in which there will certainly be further developments. It is hard to predict what form they will take, since intuitive decency and common sense are no longer (if they ever were) adequate and reliable guides.

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<sup>45</sup> Footnote 38

<sup>46</sup> Para 17.165