

## **Drawing the lines of demarcation: The difference between direct and indirect discrimination in the light of *Hall and another v Bull and another***

The decision of the Supreme Court in *Hall and another v Bull and another* [2013] UKSC 73 brings into focus that line of cases, which render unclear the boundaries between direct and indirect discrimination. It can and has been said that such cases fall into two different categories – criterion cases, namely cases where discrimination is due to the application of a criterion based on a protected characteristic, and cases where the reason for the treatment complained of is a characteristic indissociable from the protected characteristic. This article will explore the development of these concepts, consider the effect of *Hall* and conclude that the concepts unnecessarily blur the demarcation between direct and indirect discrimination, are thus wrong and should be dispensed with. Nonetheless, it will also be said that they can be useful as evidential tools – that is as means to determining the reason for the treatment complained of.

The issue is whether direct discrimination provides a subjective test meaning that the question of whether discrimination has occurred is dispositive of what was going on in the alleged discriminator's mind at the time discrimination is alleged to have occurred – i.e. why did he treat her the complainant as he did? Alternatively, does it provide for a broader, causative approach encompassing concepts of “effective” or “underlying” cause and “but/for”?

Section 1 (a) of the Sex Discrimination Act 1975 provided:-

(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man

The corresponding provisions in the other pre-Equality Act anti-discrimination legislation were materially identical although section 1 (a) of the Race Relations Act 1976 referred to “racial grounds” rather than “on the grounds of”.

In contrast section 13 (1) of the Equality Act 2010 provides:-

- 1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The notable difference is that the words “because of” make it clear that the subjective test applies. In contrast the words “on the grounds of” or “racial grounds” were more ambiguous possibly suggesting that a wider, causative approach applied. However, it seems that Parliament intended that the

subjective approach applied. Paragraph 3.11 of the EHRC Code of Practice (2011) provides:-

‘Because of’ a protected characteristic has the same meaning as the phrase ‘on the grounds of’ (a protected characteristic) in previous equality discrimination. The new wording does not change the legal meaning of what amounts to direct discrimination.

Further, Lord Nicholls in the decision of the House of Lords in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, a case under the Race Relations Act, held at paragraph 29:

Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575–576, a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.

### **Criterion cases**

However, a causative approach is clearly discernible in many of the authorities. Take the controversial and well known decision of the House of Lords in *James v Eastleigh Borough Council* [1990] ICR 554. Mr and Mrs James were 61. The Council granted free admission to its swimming baths to those who were of pensionable age. As the pensionable age for women was 60 and the pensionable age for men was 65 Mrs James got free admission but Mr James did not. The County Court and the Court of Appeal both held there had been no direct sex discrimination.

The House of Lords disagreed. In the Court of Appeal Sir Nicholas Browne-Wilkinson VC had held that “section 1 (1) (a) is looking to the case where, subjectively, the defendant has treated the plaintiff less favourably because of his or her sex. What is relevant is the defendant’s reason for doing an act, not the causative effect of the act done by the defendant”. In the House of Lords Lord Bridge noted and rejected this passage as:

The fallacy, with all respect, which underlies and vitiates this reasoning is a failure to recognize that the statutory pensionable age, being fixed at 60 for women and 65 for men, is itself a criterion which directly discriminates between men and women in that it treats woman more favourably than men “on the grounds of their sex”.

Similarly Lord Goff held:

But it does not follow that the words “on the grounds of sex” refer only to case where the defendant’s reason for his action is the sex of the complainant; and, in my opinion, the application by the defendant to the complainant of a gender-based criterion which favours the opposite sex is just as much a case of unfavourable treatment on the grounds of sex. Such a conclusion seems to me to be consistent with the policy of the Act, which is the active promotion of equal treatment of men and women.

How can this be reconciled with the passage from Lord Nichol’s judgment in *Khan* just cited? The Supreme Court explained in *R (E) v Governing Body of JFS* [2010] 2AC 728. JFS was a Jewish School. Under its oversubscription policy it gave priority to those who were Jewish on the basis of matrilineal descent. The Claimant wished to send his son to the school. The Claimant was Jewish. However, his wife, the child’s mother, was Jewish by conversion according to non-orthodox Judaism. The school, applying its policy, refused to admit the child. The Claimant sought judicial review claiming the school’s refusal amounted to direct race discrimination. The High Court refused the application. The Court of Appeal and, by a majority, the Supreme Court, however, found in his favour.

The majority – Lords Philips, Kerr, Clarke and Mance and Lady Hale – drew a distinction between two types of cases – “reason why” and “criterion” cases. In “reason why” cases the matter is dispositive upon determination of the alleged discriminator’s state of mind. In “criterion cases” there is no need to consider the alleged discriminator’s state of mind when the treatment complained of is caused by the application of a criterion, which is inherently discriminatory (see Lord Philips paragraphs 21 to 23, Lady Hale paragraphs 64 and 65, Lord Clarke paragraph 145 and Lord Mance paragraph 78). *James* was an example of a criterion case. So too was the present case. The test of the school’s oversubscription policy – whether a child was Jewish by matrilineal descent – was a test of ethnic origin. Hence the policy constituted a criterion that was inherently discriminatory on racial grounds.

The Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783 considered further what amounts to an inherently discriminatory criterion. The Claimant, a Latvian national, sought UK State Pension Credit. However, by virtue of section 1 (2) (a) of the State Pension Credit Act 2002, this required a Claimant to be in “Great Britain.” Under regulation 2 (1) of the State Pension Credit Regulations 2002 a person was treated as not being present in Great Britain if they were not habitually resident in the common travel area of the UK, the Channel Islands, the Isle of Man and Ireland. The Claimant’s application was refused as she lacked a right of residence. She claimed that the requirements imposed by the regulations were directly discriminatory on racial grounds contrary to EU law. However, the Supreme Court did not agree.

Lord Hope described the requirement of being in Great Britain as “composite” meaning that both UK and non-UK nationals may or may not be resident in Great Britain. Both he and Lady Hale considered *James* and held that in that case there had been an “exact match” between those who were advantaged and disadvantaged by the criterion – all men aged 61 could not gain free admittance to the swimming pool, all women aged 61 could. Thus, it seems, a criterion is inherently discriminatory when only those of the Claimant’s protected characteristic can be adversely affected by it and no one

who does not share that protected characteristic can be. Thus given, as Lord Hope had observed, UK nationals can also not be habitually resident in Great Britain there was no exact match in the present case and hence no direct race discrimination.

The matter had earlier arisen before the CJEU in *Bressol v Gouvernement de la Communauté Française* [2010] ALL ER (D) 48. The Belgium Government was concerned about the number of foreign students taking up places in Belgium's universities. They hence introduced legislation, which meant that applicants would not be admitted if they did not satisfy the following criteria - (1) their principal residence was not in Belgium and (2) did not have a right of residence in Belgium. As for the first condition, Advocate General Sharpston opined, that did "not constitute direct discrimination on the basis of nationality. Belgians and non-Belgians alike may establish their principal residence in Belgium". However, she went on, the second condition did as all "Belgians automatically enjoy the right to remain permanently in Belgium" whereas no "non-Belgians automatically have such a right".

Lady Hale in *Patmalniece* explained the difficulty with this approach:

It suggests that there can be direct even when some members of the disadvantaged group do fulfill the requirement in question even though others do not

Further, as her Ladyship noted, whilst the CJEU did not expressly disapprove this approach it did not even address the question of direct discrimination but confined itself to considering indirect discrimination (a part of the decision that will be considered later in this article). Thus, as her Ladyship opined, the "court must therefore have rejected the Advocate General's view that this amounted to direct discrimination".

### **Indissociability cases**

Besides criterion cases it seems there is still direct discrimination if there is an indissociable link between the reason for the treatment and the protected characteristic.

The concept of "indissociability" stems from the days when, prior to the creation of a freestanding tort of pregnancy and maternity discrimination firstly by the insertion, in October 2005, of section 3A into the Sex Discrimination Act 1975 and then by section 18 of the Equality Act 2010, women, claiming mistreatment due to their pregnancy, had no alternative but to rely on section 1 (1) (a) of the Sex Discrimination Act. The difficulty, however, was that construed and applied literally, section 1 (1) (a) concerns gender rather than pregnancy. This was addressed by the House of Lords and the ECJ in *Webb v EMO Cargo Ltd*. A Mrs Stewart went on maternity leave. Mrs Webb was brought in to cover for her. However, she too discovered she was pregnant. This meant that she would not be available for work during the period of her confinement. Thus she was dismissed.

When the matter first came before the House of Lords ([1993] IRLR 27) Lord Keith held that, just as pensionable age had been a gender based criterion in *James* so too was pregnancy. Hence, his Lordship concluded, there "can be no doubt that in general to dismiss a woman because she is pregnant or to refuse to employ a woman of childbearing age because she

may become pregnant is unlawful direct discrimination. Childbearing and the capacity for childbearing are characteristics of the female sex.”

However, his Lordship went on, what complicated the matter was that it was not such much pregnancy as Mrs Webb being temporarily unavailable for work that was the reason for dismissal. Hence the criterion approach of *James* was not applicable. Therefore their Lordships referred the matter to the ECJ [1994] IRLR 482. The ECJ expressly applied the principle set out at paragraph 15 of its decision in *Habermann-beltermann v. Arbeiterwohlfahrt* [1994] IRLR 364 where it had held that dismissal on account of pregnancy “concerns women alone and constitutes, therefore, direct discrimination on grounds of sex”. As for the question which concerned the House of Lords the ECJ held:

the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed

Accordingly, when the matter came back to the House of Lords their Lordships held there had been direct sex discrimination ([1995] 4 ALL ER 577). *Webb* thus seemed to provide an indissociability combined with an effective cause test. Pregnancy was the reason why Mrs Webb would be unavailable for work. Pregnancy too was indissociable from her gender. Thus her gender was the effective cause of her dismissal.

This approach was the basis of the decision of the EAT (Mummery J Presiding) in *O’Neil v Governors of St Thomas More Roman Catholic School* [1996] ICR 33. Mrs O’Neil was a teacher at the school. She had an affair with, and as a consequence was impregnated by, a Roman Catholic Priest. The school would not permit her to return to work after the birth of her child. This was not *per se* because of the pregnancy but because her being made pregnant by a Roman Catholic Priest made her position, at a Roman Catholic School, untenable. Thus the Tribunal found there had been no sex discrimination. The EAT disagreed. Pregnancy discrimination was a form of sex discrimination as “pregnancy is unique to the female sex”. A finding of sex discrimination is to be reached by “having regard to the question whether the treatment complained of was on the ground of sex, not by having regard to the subjective motives of the alleged discriminator.” The untenability of Mr O’Neil’s position was “casually related to the fact that [she] was pregnant”. It followed there had been direct sex discrimination.

Pregnancy is not only unique to the female sex but is a condition of nature. Thus the question arises of whether there can be direct discrimination when there is an indissociable link between the reason for the treatment complained of, when that reason is a characteristic formed by a legal requirement as opposed to being a natural condition, and the protected characteristic. The Court of Appeal in *R (Morris) v Westminster City Council and another* [2006] 1 WLR 505 considered whether there was an indissociable link between immigration status and national origin - immigration status, of course, being determined by law and national origin being part of the definition of race under section 9 of the Equality Act. Mrs Morris was a British Citizen by descent but her daughter was not. Section 185

(4) of the Housing Act 1996 provided that priority housing would not be afforded to those subject to immigration control. Accordingly, the Council decided that the daughter's status precluded them from treating Mrs Morris as if she were in priority need. She sought, and obtained, from the High Court and the Court of Appeal a declaration that section 185 (4) was incompatible with Articles 8 and 14 of the European Convention of Human Rights – Article 14 providing that convention rights must be enjoyed without discrimination on various grounds including national origin.

Section 185 (4), it was held, fell within the ambit of Article 8. Sedley LJ, with whom Auld LJ agreed, held that Article 14 applied as the differential treatment turned on nationality or a combination of nationality, immigration control and settled residence.

Thus *Morris* is an example of a characteristic born of a legal requirement forming an indissociable link with a protected characteristic, namely national origin (which in turn forms part of the definition of race under section 9 of the Equality Act). However, it must not be forgotten that this was a case determined under the Convention rather than domestic or EU equality law.

As for EU law the ECJ considered the matter in *Schnorbus v Land Hessen* [2001] 1 CMLR 40. Domestic law required Mrs Schnorbus to have practical legal training to take up a place in the judicial service. She applied to the relevant ministry for the training. This was refused due to the number of applications. The ministry relied on domestic legislation, which entitled them to defer appointment for up to 12 months provided this did not cause particular hardship. Examples of particular hardship, given in the legislation, were the completion of military service, overseas aid work and community service work. She claimed the selection procedure was discriminatory on the grounds of sex as only men can undertake military service.

The ECJ held there was no direct sex discrimination. Advocate General Jacobs opined (in a passage which Advocate General Sharpston in *Bressol* was later to cite with approval) that:

The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex.

He then noted that ECJ jurisprudence made it clear that “since only women can be refused employment on grounds of pregnancy, such a refusal constitutes direct discrimination on grounds of sex.” However, he was not satisfied that military service was a characteristic indissociably linked with being male (and hence, by implication, not being able to undertake military service was a characteristic indissociably linked with being female). He explained:

No amount of legislation can render men capable of bearing children, whereas legislation might readily remove any discrimination between men and women in relation to compulsory national service.

Whilst the Court, in its judgment, agreed there was no direct discrimination it did not expressly apply the same reasoning. Persons

favoured by the selection process were not favoured on the basis of their gender but on the basis of disadvantages arising from a deferment. The court held that “only provisions which apply differently according to the sex of the persons can be treated as constituting discrimination based on sex”. The disadvantages suffered by a deferment could be suffered by men as well as women – the court was perhaps mindful that, unlike military service, not all the examples of particular hardship could only be suffered by men. Thus the requirement for a deferment applied to both sexes.

Thus *Schnorbus* failed on the facts. On the facts the link was not so much between a characteristic formed by a legal requirement and the treatment complained of. It was between the deferment, which was not gender based, and the treatment. Thus *Schnorbus* left it unclear whether an indissociable link between a characteristic born of a legal requirement and a protected characteristic can constitute direct discrimination.

What however is the domestic position? Again the starting point is *James*. True, their Lordships expressly described the requirement that free entry to the swimming pool depended on whether one had reached pensionable age as a criterion. However, it could perhaps, equally have been said that pensionable age was a characteristic, born of law, indissociable from gender. Indeed in *Patmalniece* Lady Hale described *James* as a case “where the discrimination between male and female swimmers was linked to a legal requirement, the statutory retirement age, was indissociable from sex”.

Her Ladyship applied this approach when the question arose before the Supreme Court in *Bull*. Mr Preddy and Mr Hall were homosexual and civil partners. They booked a double bedroom in a hotel. Mr and Mrs Bull were the proprietors of the hotel. They were devout Christians who sincerely believed that the only moral acceptable sexual relationship was one within the bounds of matrimony. Thus they had a policy of only permitting married couples to stay in their hotel. Accordingly, upon discovering that Mr Preddy and Mr Hall were not married they cancelled their booking (at the time, it must be noted, homosexuals were not legally entitled to marry). This was not so much because they were homosexual but because they were not married. They would have cancelled the booking of a heterosexual non-married couple. Nonetheless, the County Court, the Court of Appeal and the Supreme Court all agreed that there had been direct discrimination on the grounds of sexual orientation.

That said Lady Hale opined that the case was “not on all fours with *James*”. This was because there was “not an exact correspondence between the disadvantage and the protected characteristic”. In other words other, non-married, heterosexual couples would also have been denied accommodation. In contrast in *James* no men aged 61 would have been entitled to free admittance to the swimming pool whereas all women were so entitled. On what basis, then, was their direct discrimination? Her ladyship noted that Mr and Mrs Bull’s policy referred to “heterosexual married couples” and described marriage as “the union of one man to one woman for life to the exclusion of others”. In these circumstances her Ladyship regarded “the criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it...They were applying a criterion that their legal relationship was not that of one man and one woman, in other words a criterion indistinguishable from sexual orientation”.

Lord Toulson agreed. He held that that one “cannot separate the sexual orientation of Mr Preddy and Mr Hall from the resulting legal branding of their relationship, and to treat them differently from a married couple amounts to a treating them differently because their relationship is homosexual and not heterosexual”. He accepted that “it is not their sexual orientation which causes Mr and Mrs Bull to treat them differently from married heterosexuals, but the fact that the couple have not chosen to marry”. However, he went on, “it is a *non sequiter* to reason from this that the differential treatment of persons in a civil partnership from that of married heterosexuals (or, similarly, of same sex married couples from opposite sex married couples) is not due to their sexual orientation, when that is the very factor which separates them”.

Lord Kerr also agreed there was direct discrimination. However, he took a different approach. Unlike Lady Hale and Lord Toulson he did not stress the closeness of the link between the Claimants’ sexual orientation and them being unmarried. Rather his reasoning turned on regulation 3 (4) of the Employment Equality (Sexual Orientation) Regulations 2003. This provides that for the purposes of both direct and indirect discrimination under the regulations the fact their either the alleged discriminator or the complainant is in a civil partnership and other is married is not material. Thus his Lordship held there was no “material difference between Mr Preddy and Mr Hall and a married couple”. This prevented Mr and Mrs Bull from saying that them not being married was the reason for the treatment complained of as the “refusal by the hotel to allow them to have this accommodation was rooted in religious conviction that marriage was only legitimate if contracted between a man and a woman. This was a state which Mr Preddy and Mr Hall, by reason of their sexual orientation, could not aspire to together”.

However, his Lordship was quick to stress, had “it not been for regulation 3 (4), the discrimination in this case would have been indirect”. In other words in the absence of regulation 3 (4) the criterion would simply have been being a heterosexual married couple. That would not have been an appropriate criterion for the purposes of direct discrimination as heterosexual non-married couples would not have satisfied the criterion. However, the effect of the regulation was that Mr Preddy and Mr Hall were to be regarded as married and hence their sexual orientation, and not their marital status, was all that separated them from heterosexual couples married or otherwise.

Lords Neuberger and Lord Hughes both found there was no direct discrimination. Rather they held this was a case of indirect discrimination. As for direct discrimination Lord Neuberger noted that “Mr and Mrs Bull would have treated an unmarried heterosexual couple in precisely the same way” and the fact the Claimants were in a civil partnership “adds nothing”. Lord Hughes held that the “flaw” in the direct discrimination argument is that it “concentrates on the characteristics of these claimants rather than the defendants’ reasons for treating them as they did”.

Hence the decision of the Supreme Court makes it unclear whether direct discrimination is made out when the reason for the treatment complained of is a characteristic, born of a legal requirement, which is indissociably linked with the protected characteristic. The judgments of Lady Hale and Lord Toulson suggest it so made out. Lord Kerr’s judgment turned on regulation 3 (4) and he made it clear that otherwise he would find indirect

rather than direct discrimination. However, he did not comment on let alone expressly disapprove the concept of indissociability. Lords Neuberger and Lord Hughes found there was no direct discrimination.

In any case the decision perhaps renders it questionable whether there is, in fact, any distinction between criterion cases and cases where the reason for the treatment complained is a characteristic which is indissociably linked to the protected characteristic. *James*, as has been said, can be seen as coming within both categories. Both criterion and indissociability cases concern a requirement that has to be satisfied. In *Hall* the requirement was that the couples be married.

If there is a difference it perhaps lies in the concept of the “exact match”. In criterion cases there must be an exact match between those who are advantaged by the criterion and thus who are disadvantaged. All those disadvantaged by it must share the Claimant’s protected characteristic. All those advantaged by it must not. This may not be so in indissociability cases. In *Hall*, for example, there was no such match – a heterosexual non-married couple would not have been given accommodation at the hotel. Thus did being homosexual making it impossible to be married constitute an indissociable link between not being married and being homosexual? Nonetheless, it is clear that Lady Hale, who found there was direct discrimination, looked for and found an exact match. She accepted that if the case were “solely about discrimination against the unmarried” it would not be a case of direct discrimination. What drove her reasoning was the fact that only heterosexual couples could marry and only same sex couples could enter a civil partnership. This approach, she concluded, meant “there is an exact correspondence between the advantage conferred and the disadvantage imposed in allowing a double bed to the one and denying it to the other”.

Nonetheless, some support for the proposition that it suffices that the Claimant’s protected characteristic makes it impossible for them to possess the characteristic which in turn is the reason for the treatment complained of can be found in the opinion of Advocate General Sharpston in *Bressol*. It will be recalled that she opined that the requirement to have a right to residence in Belgium was discriminatory in that Belgians *automatically* had that right whereas foreign students did not. In so finding she adopted a “but for” approach:

It is clear that, ‘but for’ the fact that student A has Belgian nationality, he would not *automatically* have satisfied the second cumulative condition

Applying this approach to *Hall* it could have been said that being unmarried was indissociably linked to sexual orientation in that Mr Hall and Mr Preddy could have been legally married had they not been homosexual. However, as has been seen, the CJEU did not find direct discrimination and hence must be regarded as not having accepted what the Advocate General said in this regard. Hence Lady Hale, in *Hall*, felt that she needed and, indeed, found an exact match. Thus if both indissociability and criterion cases require an exact match it is questionable to what extent they are different concepts.

## Are the concepts of criterion and indissociability correct?

Be that as it may it is submitted that the concepts of “criterion” and “indissociability” cases unnecessarily blur the distinction between direct and indirect discrimination. Indeed in *Hall* whilst their Lordships disagreed on direct discrimination they all agreed that, in any case, there was indirect discrimination. Similarly, in both *Schnorbus* and *Patmalniece* the ECJ and the Supreme Court both held respectively that whilst there was no direct there was indirect discrimination.

The reason why it can be said that criterion and indissociability cases are best regarded as cases of indirect discrimination is that the concept of a criterion is expressly referred to in section 19 of the Equality 2010 – namely, the statutory provision defining indirect discrimination. Section 19 provides:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 19 (1A), in referring to a provision, criterion or practice (PCP), clearly encompasses the concept of a criterion. Its equivalent in the legislation prior to the Equality Act referred, instead, to a “requirement or condition”.

Nonetheless, it was accepted that this was a species of criterion. Why then was *James* not a case of indirect discrimination? Lord Bridge explained:

Pensionable age cannot be regarded as a requirement or condition which is applied equally to persons of either sex precisely because it is itself discriminatory between the sexes

This seems to suggest a distinction between two different types of criterion – criterion, which are neutral and criterion which are inherently discriminatory. Neutral criterion are appropriate for indirect discrimination cases. Discriminatory criterion, are appropriate for direct discrimination cases.

The difficulty with this analysis is that section 19 does not, and its predecessor legislation did not, use the adjective “neutral” to describe either a PCP or a “requirement or condition”. However, the same cannot be said of Article 2 (b) of Council Directive 2000/78/EC. This provides that “indirect discrimination shall be taken to occur where an apparently *neutral* provision, criterion or practice....”

However, it is submitted, it is not apparent why the word “neutral” should refer to the nature as opposed to the application of the PCP? In other words can it

not be said that the PCP, to be valid for the purposes of an indirect discrimination claim, need only be applied to persons not sharing the Claimants' protected characteristic? Lord Lowry, who gave a dissenting judgment in *James*, thought as much:

It seems to me, so far as the point has any relevance, that it can be argued that the council have *applied equally* to men and women the requirement of their having reached state pension age, although the requirement itself was discriminatory.

It is submitted that this approach must be right in order, as Lord Neuberger, said in *Hall*, to "avoid reaching a decision which risks blurring that clarity" – i.e. the clarity between direct and indirect discrimination.

Furthermore, confining criteria to indirect discrimination cases need not necessarily mean there can never be direct discrimination when ostensibly the reason for the treatment complained of is the application of criterion rather than the protected characteristic. This is for two reasons. Firstly because of the effect of the following passage from the judgment of Lord Nicholls in the House of Lord's decision in *Nagarajan v London Regional Transport* [1999] 1 AC 501:

All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn

His Lordship went on to find that the protected characteristic need not be the only or even the main reason for the treatment:

Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.

In other words it may not be difficult to infer, depending on the circumstances of the case, that where, ostensibly, the reason for the treatment complained of is the application of a criterion and that was in the mind of the alleged

discriminator at the time of alleged discrimination that, albeit unconsciously, the protected characteristic loomed sufficiently large in his mind. As the protected characteristic need not be the only or main reason it matters not that the criterion was also operative in his mind.

This approach, perhaps, explains *Webb*. There it will be recalled the House of Lords, whilst accepting that pregnancy is a gender based criterion, thought it might be said that the reason for dismissal was not so much Mrs Webb's pregnancy as her being unavailable for work. However, it could equally be said that the requirement to be available for work was a criterion and that when applying that to Mrs Webb the employers had in mind, perhaps unconsciously, the fact that it was her pregnancy that made her unavailable for work. True being required to be available for work is a neutral rather than a discriminatory criterion. Nonetheless, the fact remains it can be said that the criterion and hence inferentially, albeit possibly unconsciously, the protected characteristic were present in the mind of the alleged discriminator at the moment of alleged discrimination.

Secondly and similarly, the application of an inherently discriminatory criterion will often be strong evidence that the protected characteristic was in the mind of the alleged discriminator at the time of alleged discrimination. Lord Hope, in his dissenting judgment in *JFS*, explained:

The question which divides us is whether his approach is supported by Lord Nicholls' statements in *Nagarajan* and later in *Khan*. Lord Clarke's reading of the passage in *Nagarajan* which he has highlighted in para 139 of his opinion is that in the "obvious cases", where discrimination is inherent, there is a prohibition on looking at the motivation of the alleged discriminator: see also his para 142. But Lord Nicholls does not say this. He makes no mention of any such prohibition. It may be that the tribunal will not *need* to look at the alleged discriminator's mental processes in "obvious cases", as his mental state is indeed obvious. But he does not say that the tribunal is precluded from doing so. Lord Steyn said in *Nagarajan* at pp 520H-521A that conscious motivation is not required. But, as he made clear, this does not mean that the alleged discriminator's state of mind is always irrelevant.

Confirmation that this is not Lord Nicholls' approach is to be found in the last full paragraph on p 511 of *Nagarajan*, where he explains Lord Bridge's description of the test which Lord Goff adopted in *Birmingham*. Lord Bridge described it as objective. But Lord Nicholls said that he is not to be taken as saying that there is no investigation into the mind of the alleged discriminator. He does not draw any distinctions here between cases like *Birmingham* and *James*, which Lord Clarke describes as cases of inherent discrimination (see para 142, above), and other types of cases. The point that he is making is that even in "obvious cases" such as *Birmingham* the tribunal is not precluded from looking at the state of mind of the discriminator. The passage from his speech in *Khan* to which I refer in para 193 supports this conclusion. He describes the test as a "subjective" one. Here again he does not distinguish between different types of cases. I believe therefore that an accurate reading of what Lord Nicholls actually said, and did not say, supports my analysis.

In other words this approach which, it is submitted, is the correct approach, merely uses a discriminatory criterion as an evidential tool in determining whether the protected characteristic is the *reason* for the treatment complained of. In other words the criterion does not mean that the mental processes of the alleged discriminator are irrelevant. All that is irrelevant is the reason for the discrimination.

It is submitted that developments in the law render unnecessary the concepts of criterion and indissociability, as alternatives to simply asking what was the reason why in direct discrimination cases. There are three such developments. Firstly, the Equality Act replacing the words “on grounds of” and “racial grounds” with “because of”. Secondly, the creation of the free standing tort of pregnancy and maternity discrimination rendering it unnecessary, for the purposes of direct sex discrimination, to think of pregnancy as a characteristic indissociable from sex. Thirdly, the principles in *Nagarajan* of unconscious discrimination and significant influence. In these circumstances, it is submitted, there can be no continued justification for blurring the clarity between direct and indirect discrimination. Accordingly, it is hoped that the effect of *Hall* – given that Lord Highes and Neuberger found no direct discrimination and Lord Kerr would not have done but for regulation 3 (4) – is that the distinction between direct and indirect discrimination has been re-asserted.

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