

Equality and Human Rights
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Equality sounds a simple concept but the reality is very complicated. Is it about where you start – with equal opportunities - or where you end up – with equal outcomes - or something in between – like a level playing field?

To begin at the beginning, equality before the law is a fundamental principle of the rule of law as we know it. Everyone is subject to the same laws, no matter who they are, and is treated equally by the courts. This is embodied in article 1 of the Universal Declaration of Human Rights: ‘All human beings are born free and equal in dignity and rights’; and in article 7: ‘All are equal before the law and are entitled without any discrimination to the equal protection of the law’; also in article 26 of the International Covenant on Civil and Political Rights: ‘All people are equal before the law and are entitled without any discrimination to the equal protection of the law’. The United Kingdom is party to both, but the Universal Declaration is not a binding instrument and the ICCPR has not been turned into rights in UK law, unlike the European Convention on Human Rights.

Article of the 12th Protocol to the European Convention provides: ‘The enjoyment of any right set forth by law 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.’ But the UK (along with such diverse countries as Bulgaria, Denmark, France, Lithuania, Monaco, Poland, Sweden and Switzerland) has neither signed nor ratified this.

Why? It’s not as if we don’t believe in equality before the law. The government may be frightened that we still do have some discriminatory laws (for example, the Married Women’s Property Act 1964 only applied to housekeeping allowances made by a husband to a wife and not vice versa). But we’ve learned to live with laws being found to be incompatible with the Convention, so why not take the risk now?

We may not have article 1 of the 12th Protocol but we do have two completely different laws prohibiting discrimination. They address different problems and in different ways. I'm struggling to think of an example in which both might be involved at the same time. But in my view they both concern the basic human right to equal treatment.

Non-discrimination laws were built up piecemeal from the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Equality Act 2006 and associated regulations, now brought together and rationalised in the Equality Act 2010. These were largely prompted by European Union law but gold-plated – going further than required by the EU. They address the problem that providers of employment, education, accommodation, goods, facilities and services might well treat people less favourably because of their sex or their race or the later protected characteristics: well-known examples were landlords saying ‘no blacks, no Irish’; bars not letting women in or to order from the bar; mortgage lenders requiring female borrowers to have a male guarantor regardless of creditworthiness. The principle is that these characteristics should be ignored by such providers because they are irrelevant to the decision to provide. And of course it is a gross insult to any person's dignity to be denied such things because of some irrelevant characteristic which they can do nothing about. Those of us who have experienced such humiliations, petty though they may seem to others, can understand that.

The number of protected characteristics has greatly expanded. This has brought particular problems where there is a perceived clash between them – especially between sexual orientation and religion or belief. But it is still a closed list. Discrimination on many other grounds which might be thought equally irrelevant or irrational is still allowed – ‘no red-heads here’, perhaps, or ‘no public school boys there’.

These laws were originally aimed mainly at private providers but they also applied to public providers when supplying the same sorts of things that private providers could supply – such as jobs and education - but not to purely public functions such as policing and immigration. Following the recommendation of the Macpherson report into the murder of Stephen Lawrence that the full force of the race relations legislation should apply to the police, such public services were brought within the scope of the law (*The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny*, February 1999, Cm 4262, recommendation 11). This, for example, R

(Coll) v Secretary of State for Justice [2017] UKSC 40, [2017] 1 WLR 2093, dealt with discrimination against women in the provision of what used to be called bail hostels.

These laws have always gone further than prohibiting direct discrimination – that is, treating one person less favourably than another because he or she has a protected characteristic. They also prohibit indirect discrimination – applying the same rule or practice to everyone, when in fact it disadvantages a particular group with a protected characteristic and cannot be independently justified. This is a small step towards levelling the playing field, as is the duty to make reasonable adjustments to cater for people with disabilities. They still don't try to achieve equality of outcomes – merely that everyone faces a fair and equal competition.

But whereas the rule or practice which produces indirect discrimination can be justified, generally speaking there is no justification for direct discrimination (except on grounds of age). This sounds right but it can cause problems: it is just as unlawful to discriminate against men as it is to discriminate against women, against BAME people as it is against whites. So this largely rules out more favourable treatment which is intended to remedy historic disadvantage. It also largely rules out deliberately recruiting to achieve gender or ethnic balance in a workplace team – such as the UK Supreme Court.

We have a completely different system of equality protection in human rights. Again, this starts with article 2 of the Universal Declaration: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. To the same effect is article 2 of the ICCPR. Such provisions are also common in the specialist human rights protection treaties, such as article 2 of the UN Convention on the Rights of the Child – which adds disability to the list and also protects children from all forms of discrimination on the basis of their parents' status, activities, expressed opinions or beliefs - and article 4.1 of the UN Convention on the Rights of Persons with Disabilities. These treaties are about adapting the general system of rights and freedoms to the special needs of children and disabled people.

In the same vein as the Universal Declaration is article 14 of the European Convention: '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.’

There are two differences between the English and French texts of article 14. Instead of ‘without discrimination’, the French text says ‘*sans distinction aucune*’. And instead of ‘other status’, it says ‘*toute autre situation*’. As to the first, the English reference to ‘discrimination’ has been used to cut down the scope of the French reference to ‘*distinction*’: not all differences in treatment are prohibited, only those which are unjustifiably less favourable. Thus we are looking for less favourable treatment in the enjoyment of a Convention right for which there is no objective justification. As to the second, the French ‘*autre situation*’ has been used to expand upon the scope of the English: ‘other status’ has been given a very broad meaning in order to make the rights practical and effective.

In this country, we analyse article 14 cases into four questions, although they tend to leech into one another.

First, the difference in treatment has to be ‘in enjoyment of a convention right’. This does not mean that a Convention Right has to be breached. Otherwise article 14 would add nothing to the substantive rights. A good example is *Stott v Secretary of State for Justice* [2017] EWHC 214 (Admin). The question is whether different early release regimes for different types of prisoner – those serving ordinary determinate sentence, those serving extended determinate sentences, and those serving life sentences - discriminate in the enjoyment of the right to liberty protected by article 5. There is no breach of article 5, because all are lawfully detained after conviction by a competent court. The usual way this is put is that the facts ‘fall within the ambit’ of a Convention Right or the rule under attack is one of ‘modalities’ or ways in which the state implements right in question. This was not disputed in *Stott* but it can be surprisingly problematic. *R (Steinfeld) v Secretary of State for Education* [2016] EWHC 128 (Admin) was about the fact that gay couples who want to enter into a legally binding commitment to one another now have a choice between civil partnership and marriage whereas straight couples can only get married. The High Court held that as they could get married the restriction complained of ‘did not impinge upon core values’ protected by article 8 – the right to respect for family life or private life – sufficiently to engage article 14. The Court of Appeal held otherwise: [2017] EWCA Civ 81. By the time it got to us, the government had given up that part of their argument: [2018] UKSC 32, [2018] 3 WLR 415. But I find it astonishing that it was ever made.

In *Re Siobhan McLaughlin's Application for Judicial Review* [2018] UKSC 48, [2018] 1 WLR 4250, I suggested that the UK courts had made 'rather heavy weather' of the 'ambit' requirement, particularly in connection with article 8, because of its broad and nebulous scope. *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, was about discrimination between same sex and opposite sex partnerships in the calculation of liability for child support. Lord Bingham accepted that the Child Support Act 1991 was 'one of the ways in which the United Kingdom evinces respect for children and the life of the family of which the child is part' (para 17) – what Strasbourg would call a modality - but he declined to hold that the complaint infringed the 'core values' in article 8 sufficiently to engage article 14:

'But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not.'

I think that by 'infringed' he must have meant 'impinged upon' because no infringement of the substantive right is required. In any event, as we pointed out in *McLaughlin*, 'core values' is a UK concept rather than a Strasbourg one. When the *M* case got to Strasbourg, the European Court of Human Rights found a violation of article 14 read with article 1 of the 1st Protocol and did not find it necessary to consider article 8: *JM v United Kingdom* (2011) 1 FLR 491. But this was before same sex relationships were held to constitute family life, so I have little doubt that it would be different today.

The second question is whether the less favourable treatment is on the ground of some protected 'status'. Unlike the list of protected characteristics in the Equality Act, this is not a closed list. 'Other status' is open-ended but how open? The early cases, such as *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 talked of 'personal characteristics'. These obviously include innate and involuntary characteristics, such as sex, race, colour, national or social origin, association with a national minority, or birth status, which a person can't change. To these listed characteristics have been added sexual orientation and mental or physical disability. And in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, we added degrees of disability – identifying a 'severely disabled child who needs lengthy treatment in hospital' as having a status

different from severely disabled child who did not. The list also includes voluntary characteristics which a person could change but shouldn't have to, such as language, religion, political or other opinion. It has been extended to some other voluntary characteristics, such as habitual residence, as in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. And the list includes at least one matter which Strasbourg says isn't a personal characteristic at all, that is, property – large or small, owned or tenanted. This led the court to hold in *Clift v United Kingdom*, App no 7205/07, Judgment of 13 July 2010, that being sentenced to imprisonment for 15 years or more was a different status from being sentenced to less than 15 years or to life imprisonment. The discrimination in that case was particularly egregious – the other two groups had to be released on licence if the Parole Board said so, whereas for the group in question this was still a matter for the Home Secretary. Strasbourg takes a broad view of status because it wants the Convention Rights to be practical and effective, rather than theoretical and illusory, and distinctions like that reduce their effectiveness. But it makes it quite hard for us to work out what is and is not a status - differences in treatment between different courts (as in *Maktof and Damjanovic v Bosnia and Herzegovina* (2014) 58 EHRR 11, para 83), or between different parts of the United Kingdom (as in *Magee v United Kingdom* (2001) EHRR 35, para 50) were held not to be contrary to article 14 as they were not based upon personal characteristics.

Clift raises a difficult question: does the status have to exist independently of the treatment complained of? Strasbourg questioned this, citing *Paulik v Slovakia* (2008) 46 EHRR 10: a man who had been adjudged father of a child in legal proceedings complained that there was no way of correcting the record when DNA tests proved that he was not the father, whereas fathers whose paternity had been established in other ways, and mothers, did have such a possibility (para 48). But 'other status' was not questioned in that case, unsurprisingly perhaps, because those men who had been adjudged fathers in legal proceedings obviously had a different status from that of other fathers, and even more different from that of mothers, even if there was no other difference in treatment between them. His status was not *defined by* the difference in treatment complained of. That, it seems to me, is the true principle: the 'status' must not be defined solely by the difference in treatment complained of, for otherwise the words 'on any ground such as . . . ' would add nothing to article 14. Although it is quite hard to think of an example where the status would be defined by the difference in treatment, it is not hard to think of cases where there has been an argument about it.

As long as it is a status it does not matter what type of status it is at this stage of the analysis but it does matter when we get to justification.

Thirdly, there must be other people in an ‘analogous situation’ or ‘similarly situated’ who are treated more favourably than the complainant. In ordinary discrimination cases, now under the Equality Act 2010, the equivalent requirement, that the circumstances of the comparator must be the same or not materially different from those of the complainant, can generate a lot of argument. How different is different? I usually give the illustration of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337: the House of Lords held that the situation of a senior female police officer was not the same as the situation of male officers who had been treated more favourably, because there had been complaints against her from subordinates and not against them. This begs the question of whether the complaints themselves stemmed from discriminatory attitudes towards senior police officers. A better illustration now might be *Hewage v Grampian Health Board* [2012] UKSC 37, 2013 SC (UKSC) 54, where an Asian female consultant in orthodontics complained of bullying and harassment by her managers and the more favourable treatment given to white male consultants who’d made similar complaints. The Health Board tried hard to argue that their situations were different because of minor differences between them – but we did not agree.

These arguments arise because under the Equality Act it is not generally a defence to direct discrimination that the difference in treatment is justified. It is tempting, therefore, where a court or tribunal thinks that there might have been a justification to find that the cases are not the same. This is not a problem under article 14 where both direct and indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. So the approach to comparability ought to be more relaxed, as indeed it is. As Lord Nicholls put it in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL17, [2006] 1 AC 173, para 3:

“ . . . the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at

considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.”

Thus in most cases it comes down to justification. There is a link here with status. Discrimination on some grounds is more difficult to justify than discrimination on others. In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311, Lord Walker produced the illuminating idea that personal characteristics are ‘more like a series of concentric circles’ (para 5). The inner circle is innate, largely immutable, and closely connected with personality: gender, sexual orientation, colour, race, disability. Next come nationality, language, religion and politics, which may be innate or acquired, but are all-important to personality and reflect important values protected by the European Convention. Outside those are acquired characteristics, more concerned with what people do or with what happens to them than with who they are, such as military status, residence, or past employment. He put street homelessness into that category: ‘The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify’ (para 5). So denying disability premium to street homeless was justified. Strasbourg has also put immigration status into this category (*Bab v United Kingdom* (2011) 31 BHRC 609).

But there’s also a link with the subject matter. Discrimination in some areas is easier – much easier – to justify than in others. Generally speaking, we address justification in four questions: is there a legitimate aim; is there a rational connection between the means and the aim; could the aim be achieved by measure which would intrude less upon the fundamental right in question; and has a fair balance been struck between the end and the means? But the test to be applied in striking that balance does differ according to the subject-matter.

This brings me to the most fraught area of all – welfare benefits. Welfare benefits do more than try to ensure a level playing field on which all start equal and then make of life what they can. Welfare benefits are trying to do something to redress inequality of results: to lift people out of absolute poverty; to redress some of the disadvantage suffered by children growing up in poverty; to make reasonable adjustments to cater for disability. They are not of course trying to achieve absolute equality – just to prevent the worst effects of gross socio-economic inequalities.

Strasbourg is quite clear that the Convention does not require the state to provide housing or other welfare benefits or even post-elementary education. This is a matter of socio-economic policy for

the individual member states. The problem we have in the courts is that it is quite obvious – indeed it is conceded – that many recent changes to the benefits system impact more harshly on women, children and disabled people than they do on other groups: the Equality and Human Rights Commission Report, *Is Britain Fairer? The State of Equality and Human Rights* states that ‘UK wide reforms to social security and taxes since 2010 are having a disproportionate impact on the poorest in society and particularly affecting women, disabled people, ethnic minorities and lone parents’ (p 87). ‘Government policies on social security and taxation have increased pressure on living standards for some groups, particularly disabled people, women and some ethnic minorities’ (p 193).

Strasbourg is also clear that to the extent that what the state does provide falls within the ambit of a convention right it must be provided without unjustified discrimination. It was a comparatively small step to regard contributory social security benefits as a species of property right protected by article 1 of the 1st Protocol. It was a larger step to extend this to means-tested benefits but it happened in *Stec v United Kingdom* (2006) 43 EHRR 47. The case was about a difference in treatment between men and women for the purpose of reduced earnings allowance (REA). This was an earnings-related additional benefit under the statutory occupational accident and disease scheme. It was non-contributory and funded out of general taxation rather than the national insurance fund. Originally it continued into retirement. Changes which limited post-retirement age entitlement obviously impacted earlier on women than on men because of the earlier state retirement age for women. Was this justifiable? In a famous passage, Strasbourg said this:

‘As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention [citing *Van Raalte*, para 37; *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405, para 67]. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy [citing *James v United Kingdom* (1986) 8 EHRR 123, para 46; *National Provincial Building Society v United Kingdom*, para 80]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”.’

Differential retirement ages had been justified by the need to correct factual inequalities between men and women in the workplace: Strasbourg is not against positive discrimination to redress factual inequalities. Also, linking REA to retirement age was justified because it was intended to replace lost earnings. Phasing out of differential treatment for retirement purposes as the socio-economic condition of women improved depended on local conditions. Hence the discrimination was not ‘manifestly without reasonable foundation’.

We applied the ‘manifestly without reasonable foundation’ test in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] I WLR 1545. This concerned the rule that child tax credit should not be split between parents who shared their children’s care but should go to the one with the main responsibility for looking after the children. This indirectly discriminated against fathers, because they were much more likely to be looking after the children for a smaller proportion of the time than mothers. But we pointed out that the complaint would be the same whichever way that went – this was really discrimination between majority and minority care givers – and not related to gender in such way as to show a lack of equal respect for men and women (para 21). We also said that the less stringent ‘manifestly without reasonable foundation’ test did not mean that the justifications put forward for the rule should escape careful scrutiny (para 22). This was a case where the government had in fact considered the pros and cons of the no-splitting rule quite carefully.

The test was applied again in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449. The benefit cap – limiting the total sum in benefits which any household could receive even if this took them below subsistence level as represented by the means-tested benefit rates – was admitted to be indirectly discriminatory against women because it affected lone parent households more harshly than dual parent or no parent households and lone parents are overwhelmingly women. One question was whether the effects upon the children could be taken into account when considering the justification for the rules discriminated against women. There was a majority for the view that the government had not fulfilled its obligation under article 3.1 of the UN Convention on the Rights of the Child to treat the best interests of the children concerned in the decision to cap benefits as a primary consideration. But there was also a majority for the proposition that the complaint was not of discrimination against children but against women. The impact upon the children was the same whether the lone parent was a man or a woman. So it was not appropriate to use an unincorporated international treaty like the UNCRC in this indirect way.

A minority took a different view and would have held that the interests of the children could be taken into account in deciding whether the discrimination against their carers was justified.

The curious thing about the ‘manifestly without reasonable foundation’ test is that it is said to be derived from, principally, *James v United Kingdom* (1986) 8 EHRR 123 – the Duke of Westminster’s challenge to the leasehold enfranchisement laws. But in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, the court held that this test only applied to whether there is a legitimate aim: the fair balance between the public and private interests involved is the same in all cases. Should there be a difference in approach to expropriation and welfare benefit cases?

Not surprisingly, therefore, an all-out attack on the ‘manifestly without reasonable foundation’ test was mounted in *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2015] 1 WLR 4550. This was a challenge to the ‘removal of the spare room subsidy’ from disabled people who needed an extra room because of their disability. The Supreme Court applied the test – the balance between entitlement to housing benefit and reliance on discretionary housing payments was one of social policy for legislature unless it was manifestly without reasonable foundation. But if there was a clear medical need for an extra bedroom – where a married couple could not share because of the disability of one or an extra bedroom was needed for an overnight carer – then it could not be justified. The same result might have been reached on simple *Wednesbury* grounds – so are there double standards here?

On the other hand, in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, a majority did not apply the ‘manifestly without reasonable foundation’ test when considering whether a rule requiring applicants for student loans to have indefinite leave to remain here (ILR) was justified. A right to non-discriminatory access to education was different from a right to cash welfare benefits. Education plays a particularly important part in a democratic society – close to its core values, one might say. The connection between the stated aim of targeting loans on those most likely to stay here and to contribute to society in future and requiring ILR was not obvious: if anything, those without ILR would be more likely to stay so that they could get it and would not have difficulties in getting back in. And it was not difficult to think of a different and less intrusive bright line rule which the government could devise to achieve their objectives. A powerful dissent saw no reason to depart from the manifestly without reasonable foundation test when dealing with student loans, which they classed as a type of state benefit, especially when

dealing with discrimination on the ground of immigration status. The combination of the type of rule complained of – socio-economic policy - and the type of status in question – immigration - left the state a particularly wide margin of appreciation.

This raises a fundamental question which troubles us all. Strasbourg will usually allow member states a wide margin of appreciation in matters of socio-economic policy. If the matter is within the margin of appreciation it is for national courts to decide what national law requires. Does it follow that in deciding what national human rights law requires, the courts should defer to decisions made by the other branches of government? Strasbourg may have said ‘legislature’ in *Stec*, but it was talking of its own rule, not ours. They might just as well have said ‘national authorities’. The Supreme Court Justices have a range of views on this.

In *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, somewhat to my surprise, the House of Lords decided that even if denying the right to adopt to unmarried couples was within the margin of appreciation which Strasbourg would allow us, it was unjustifiably discriminatory and thus incompatible with the convention rights. Lord Hoffmann pointed out that by saying that something was within the margin of appreciation, Strasbourg was not saying whether the decision must be made by the legislature, the executive or the courts (para 32). There was no principle in domestic law that it was automatically for the legislature (para 37). Lord Hope was clear that cases about discrimination, even in an area of social policy, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area rests with the courts (para 48). I repeated that it is a particular duty of the courts in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination (para 122). Lord Mance agreed that the meaning of the Convention Rights in the Human Rights Act is a matter of UK law for the courts to interpret, taking account of the relative institutional competence of the courts, government and Parliament (paras 128-130). It is worth bearing in mind in that case that the Northern Ireland legislature was unlikely to take action any time soon. The prohibition in question was in secondary legislation and so could simply be ignored. (Quite what view we should take of relative institutional competence at present, when the Northern Ireland Assembly is not operative, is an interesting question.)

In *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, a majority of 5 to 4 took the same view as in *In re G* in relation to the primary legislation which bans assisting suicide: it was open to the court to find an incompatibility even if Strasbourg would regard the matter as within

our margin of appreciation. But 3 of the 5 thought it premature to make a declaration of incompatibility while the matter was under active consideration by Parliament. This was not, of course, a discrimination case. It is just illustrative of a wider problem of the relationship between the courts and the other organs of government in relation to those Convention Rights where the Strasbourg court would allow a wide margin of appreciation to member states. But this is a particularly acute problem in relation to discrimination in the enjoyment of entitlement to welfare benefits.

So what conclusions can we draw?

- (1) Equality is a complex subject. Equal treatment is one thing and substantive equality is another.
- (2) Combatting unjustified discrimination is not the same as achieving substantive equality, although it can make an important contribution towards it by levelling the playing field.
- (3) Giving greater scope for justifying direct discrimination might be beneficial in ordinary discrimination law, bringing less concentration on minor differences between otherwise comparable cases and enabling a more structured approach, and maybe allowing redress for historic disadvantage or recruiting to achieve a balanced team.
- (4) We are still struggling with the proper relationship between the courts, government and Parliament in matters of socio-economic policy, which loom large in European Convention discrimination cases.
- (5) Whichever system we are dealing with, equal treatment is a fundamental human right, essential to the dignity of all human beings. Those of us who have suffered the indignity of unequal treatment can understand that.