Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR

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Rory O'Connell

Abstract

Article 14 ECHR has often been derided as a Cinderella provision, but during the last few years, this has started to change. This article examines how Article 14 has developed, and may live up to its potential as a powerful non-discrimination principle. The case law developments in relation to the "ambit" requirement in Article 14, the development of indirect discrimination case law, and the approval of positive action, all point to a more substantive conception of equality, which offers protection to disadvantaged and vulnerable groups.

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Rory O'Connell[1]

Introduction

The right to equality is often seen as a fundamental right, perhaps the fundamental right. Equality is "the stuff of legend",[2] even the "sovereign virtue."[3] There is a sense of power and history behind the words of the 14th Amendment to the US Constitution, guaranteeing that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The more comprehensive language of Section 15 of the Canadian Charter equally leaves no doubt that equality is an important and demanding right. The language of the non-discrimination clause in the European Convention on Human Rights (ECHR) appears more modest than these formulations. Article 14 of the European Convention on Human Rights reads:

> "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."

The Article thus imposes a duty on the State and public authorities, acting within the scope of convention rights, not to discriminate on the listed grounds or "other status", unless the discrimination can be justified.[4]

Article 14 is sometimes regarded as a Cinderella provision; the European Court of Human Rights (ECtHR) not developing it to have significant "bite".[5] As a leading equality law scholar said in 2001, the ECHR approach to equality is "less than satisfactory".[6] This second class status is manifest in a number of ways. The

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[2] Along with freedom of expression: Noel Whitty, Therese Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Bath: Butterworths, 2001), 377.

[3] Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000).

[4] It should be noted that the Council of Europe has sponsored a Protocol 12 to amend the non discrimination principle to apply to "any right set forth by law", and not only to "Convention rights". This article concentrates on Article 14 jurisprudence. For discussions of Protocol 12, see Urfan Khaliq, "Protocol 12 to the ECHR-a step forward or a step too far?" (2001) *Public Law* 457; Nicholas Grief, "Non-Discrimination under the European Convention on Human Rights: a critique of the United Kingdom Government's Refusal to Sign and Ratify Protocol 12" (2002) *European Law Review HR Supp* HR1

[5] On the idea of equality review with "bite", see G. Gunther, "The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection" (1973) 86 *Harvard Law Review* 1.

[6] A. McColgan, "Women and the Human Rights Act" (2000) 51 (3) *Northern Ireland Legal Quarterly* 417, 433.

ECtHR often chooses to decide cases on the basis of Articles other than Article 14 even where non-discrimination is central to the case.[7] The requirement that Article 14 only applies within the spheres in which convention rights are enjoyed, has the potential to limit the application of Article 14. Article 14 has a narrower scope of application than free standing equality provisions like Article 26 ICCPR[8] or Section 15 of the Canadian Charter of Rights and Freedoms. This has been described as a "weakness" in Article 14,[9] and the term "parasitic" is sometimes even used to describe this feature.[10] More serious has been the failure to develop an understanding of discrimination that goes beyond clear cut cases of direct discrimination; until recently there have been few cases on indirect discrimination or positive action. The possibility to justify discrimination, and the spectre of the margin of appreciation, have further potential to dilute the strength of the non-discrimination principle.

These limitations point to the failure of the Strasbourg Court to promote a substantive conception of equality which would address questions of systematic disadvantage and oppression. Until recently, Article 14 jurisprudence was heavily oriented to a formal equality model, though with the scope to apply stricter standards of scrutiny to certain types of discrimination. The Court took as its starting point a formal conception of equality which asked the classic Aristotelian question, whether there was a difference in treatment between analogously placed persons or situations. Formal equality models typically look for a rational or reasonable justification for any such difference

Such a formal model of equality can be contrasted with substantive conceptions of equality. Substantive conceptions of equality come in different forms,[11] but tend to take as their starting point the idea that some persons, often because of their membership in a particular group, are systematically subject to

[7] This is sometimes done even in cases where the equality aspect of the case seems important. See for instance the cases on sexual orientation or the rights of persons who have had gender reassignment surgery: *Lustig-Prean* v. *United Kingdom* (1999) 29 EHRR 548, *Goodwin* v. *United Kingdom* (2002) 35 EHRR 18. The recent Grand Chamber decision in *S. and Marper v. United Kingdom*, (application numbers 30562/04 and 30566/04), is based on Article 8 and does not discuss Article 14, even though this was a major point of discussion in the House of Lords: *R. (S.) and R. (Marper)* v. *Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196.

[8] Article 26 is discussed in G. Moon, "Complying with its International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights" (2003) (3) *E.H.R.L.R.* 283.

[9] Lord Lester of Herne Hill, "Equality and UK Law: past, present and future" (2001) *Public Law* 77, 78.

[10] Whitty, et al, *Civil Liberties Law: The Human Rights Act Era*, 404.

[11] Bamforth et al note that critics of formal equality object to its symmetrical approach, its focus on individual acts rather than structures, and its refusal to engage with the public / private divide. See Nicholas Bamforth, Maleiha Malik and Colm O Cinneide, *Discrimination Law: Theory and Context, Text and Materials (Socio-legal)* (London: Sweet and Maxwell, 2008), 205. Fredman identifies four distinctive aims of substantive equality: to "break the cycle of disadvantage", promote equal dignity, "entail positive affirmation and celebration of identity within community", and promote participation: Sandra Fredman, "Providing Equality: Substantive equality and the positive duty to provide resources" (2005) 21 (2) *South African Journal on Human Rights* 163, 167. For Arnardottir, substantive equality is concerned with equal outcomes and not just equal treatment, is concerned with groups, and aims for a contextual understanding of inequality: O. Arnardottir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (The Hague: Kluwer, 2002) 31.

disadvantage, discrimination, exclusion or even oppression. A substantive conception of equality therefore is more concerned with the effects of the law in reality, rather than questions of whether the law on paper makes distinctions. The central question is not whether the law makes distinctions, but whether the *effect* of the law is to perpetuate disadvantage, discrimination, exclusion or oppression. A substantive equality model will appreciate that inequality is often covert (even unconscious[12]) or the product of an accumulation of discrete factors.[13] Therefore, a substantive equality model may be willing to draw inferences about the existence of prejudiced motives even where these are not explicit. It will be alive to the effects of structural inequality, where it is not possible to identify any one specific "wrong doer" and his (or her) actions which caused the discrimination. Many of these aspects are powerfully summarised by Freeman's notion of a "victim's perspective" in contrast to a "perpetrator's perspective".[14] As a substantive model of equality is concerned with groups that are systematically subject to discrimination, it departs from the assumption of symmetry inherent in formal equality. This means that a substantive model of equality will not adopt a "colour blind" or "gender neutral" approach to distinctions; rather it will look more favourably on measures which promote substantive equality for previously disadvantaged groups.

The clearest expression of the Court's failure to develop a substantive conception of equality was set out in strong terms in Judge Bonello's dissenting opinion in *Anguelova v Bulgaria*:

> "Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence."[15]

An academic survey in 2001 of the ECtHR jurisprudence concluded that the Court had moved to protect the marginalised in Europe, but had done so cautiously; significantly the authors examined the case law under Article 3 and Article 8 for the protection offered to the marginalised, not Article 14.[16]

Given the failure of the ECtHR to develop a substantive conception of equality, it is only natural that equality law scholars have looked to Canada and South Africa

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[12] Lawrence, Charles "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1986) 39 *Stanford Law Review* 317.

[13] Littleton cites Marilyn Frye's metaphor of a birdcage as exemplifying systematic oppression: it is impossible to see how any single wire keeps a bird trapped; you can only appreciate the cage by stepping back and seeing how all the wires work together: Christine Littleton, "Reconstructing Sexual Equality" (1987) 75 *Cal. L. Rev.* 1279, 1315, citing M. Frye *The Politics of Reality* (Crossing Press, 1983), 4-5.

[14] Alan D. Freeman, "Legitimising Racial Discrimination through Anti-Discrimination Law" (1978) 62 *Minn. L. Rev.* 1049, Alan D. Freeman, "Anti-Discrimination Law: A Critical Review" in Kairys (ed.) *The Politics of Law* (NY: Basic Books, 1998).

[15] *Anguelova* v. *Bulgaria* (2002) 38 EHRR 31 [O-13]. For an indictment of the ECtHR's record on racism, see Marie-Bénédicte Dembour, *Who believes in human rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006), 133-137.

[16] Colin Harvey and Stephen Livingstone, "Protecting the Marginalised: The role of the ECHR" (2001) 51 (3) *Northern Ireland Legal Quarterly* 445, 464.

for guidance on what a substantive equality model might look like.[17] Yet in the past ten years, there are signs that Article 14 is starting to play a more significant role,[18] and this is a development that has accelerated in the last three or four years. During the previous ten years, it became apparent that the Strasbourg court would expect "very weighty reasons" to be produced to justify discrimination on grounds of sex, race, nationality, religion and probably on grounds of birth outside of marriage or sexual orientation.[19] In 1996, the Court held that the refusal to pay an unemployment benefit, where that benefit was based on *contributions*, fell within the ambit of the right to property (*Gaygasuz* v. *Austria*).[20] Furthermore, in 2000, the Court of Human Rights indicated that the Convention had the potential to tackle problems of indirect discrimination. [21]

The following sections examine the developments in the jurisprudence of the Strasbourg court over the last four years. The paper examines different aspects of the Article 14 jurisprudence, specifically the requirement that an Article 14 claim has to be within the scope of a Convention right; the understanding of "other status", the topic of what constitutes discrimination under Article 14, the question of justification and finally the issue of positive action.[22] The paper stresses the shifts from a formal to a more substantive model of discrimination law, while also noting there are some points where a formal model is still influential.

"Within the Scope of Convention Rights"

The non-discrimination clause is restricted to the enjoyment of Convention rights. This is often called the "ambit" requirement: Article 14 can only be invoked if a situation is within the ambit of a Convention right. This is sometimes derided as a parasitic requirement. The ambit requirement, though often attenuated in the

[17] Evadne Grant and Joan Small, "Disadvantage and Discrimination: the emerging jurisprudence of the South African Constitutional Court" (2000) 51 *Northern Ireland Legal Quarterly* 174, G. Moon, "From Equal Treatment to Appropriate Treatment: What Lessons can Canadian Equality Law on Dignity and on Reasonable Accommodation teach the United Kingdom?" (2006) (6) *E.H.R.L.R.* 695-721, G. Moon and R. Allen, "Dignity Discourse in Discrimination Law: A Better Route to Equality?" (2006) (6) *E.H.R.L.R.* 610-649; R. O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) (2) *International Journal of Constitutional Law* 267-286. See Volume 23, issue 2 of the *South African Journal of Human Rights* for a symposium on substantive equality.

[18] Arnardottir argued for a substantive equality interpretation of Article 14 in *Equality and Non-Discrimination Under the European Convention on Human Rights* (The Hague: Kluwer, 2002).

[19] Arnardottir, *Equality and Non-Discrimination Under the European Convention on Human Rights*, 141-154.

[20] *Gaygusuz* v. *Austria* (1996) 23 EHRR 364.

[21] *Thlimmenos* v. *Greece* (2001) 31 EHRR 411.

[22] For a time, UK courts adopted a sharply defined analysis under Article 14, as set out in *Michalak* v. *Wandsworth London Borough* [2002] EWCA Civ 271, [2003] 1 WLR 617. The House of Lords has expressed doubt about the value of the formulation of the Michalak questions: *R (Carson)* v. *Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 2 AC 173 at [2] per Lord Nicholls, [28-33] per Lord Hoffmann, [64] per Lord Walker, [97] per Lord Carswell.

ECtHR jurisprudence can still trip up equality claims,[23] and at least some Law Lords have indicated that they take the ambit requirement seriously.[24]

The restriction of the non-discrimination principle to Convention rights is not an issue which divides formal and substantive theories of equality. The principle that likes should be treated alike is not one which should be limited in this manner. It is also difficult to see why an advocate of substantive equality would like to see it so limited. It would however be a particularly serious issue, from a substantive equality viewpoint, if a non-discrimination principle did not apply to areas of social life where discrimination and disadvantage were likely to be problems.

At Strasbourg, the ECtHR has addressed the problem of the ambit in a number of ways.[25] Most strikingly, in some cases it avoids the ambit discussion altogether by treating some discriminatory acts as, in and of themselves, amounting to inhuman or degrading treatment under Article 3,[26] or as violations of the right to respect for private and family life under Article 8.[27] It has been willing to give a wide interpretation of the ambit. Most importantly the ECtHR stresses that Article 14 is an "autonomous" provision, it can be violated even where the substantive article relied upon to invoke Article 14 has not been violated.[28]

Beyond recognising a degree of autonomy, the ECtHR has been willing to accept that many situations fall within the "ambit" of a right, thus allowing Article 14 to bite even though the substantive article may not have been violated. This is important as the ECHR includes a list of rights which is a much shorter list than that found in the Universal Declaration of Human Rights. The text does not include many social and economic rights, apart from education (Article 2 of Protocol 1), property (Article 1 of Protocol 1), and rights to join a union (Article 11 ECHR). Yet, problems of discrimination are often experienced in relation to social and economic matters, such as denial of employment opportunities, differential treatment in relation to housing, or uneven enjoyment of the right to health. The ECtHR has gradually extended the ambit requirement to fields which

[23] Most famously in the *Botta* case, where the right of access to a beach was treated as too tenuous a link with the Convention rights: *Botta* v. *Italy* (1998) 26 EHRR 241. See also *Vilho Eskelinen* v. *Finland* Application no. 63235/00.

[24] *Secretary of State for Work and Pensions* v *M.* [2006] UKHL 11, [2006] 2 AC 91 at [4-5] per Lord Bingham, [87-90] per Lord Walker.

[25] Noel Whitty, Therese Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Bath: Butterworths, 2001), 404.

[26] Most of these are cases of racial discrimination: *East African Asians v. United Kingdom* (1973) 3 EHRR 76, *Cyprus* v. *Turkey* (2001) 35 EHRR 30, *Moldovan* v. *Romania (No. 2)* (2007) 44 EHRR 16. Article 3 has also been successfully invoked in a disability discrimination context. A British court ordered that a wheelchair user be detained for contempt of court, without making any effort to see if there were facilities for wheelchair users. The Court of Human Rights found a violation of Article 3: *Price* v. *United Kingdom* [2002] 34 EHRR 53.

[27] This is especially so with cases that involve discrimination against gay men and lesbians, and persons who have had gender reassignment surgery: *Lustig-Prean* v. *United Kingdom* [1999] 29 EHRR 548, *Goodwin* v. *United Kingdom* (2002) 35 EHRR 18. Wintemute believes the "ambit" requirement can be attenuated by treating any discrimination based on "religion, political opinion, sexual orientation or gender identity" as falling within the ambit of Articles 8-11: Wintemute, R. ""Within the Ambit": How Big Is the "Gap" in Article 14 European Convention on Human Rights" (2004) (4) *European Human Rights Law Review* 366, 371.

[28] *Belgian Linguistic case* (1968) 1 EHRR 252, 283.

do not, at first glance, fall under the scope of a Convention right. These include social security, and to a lesser extent, the right to work.

As noted above, the ECtHR said in the 1996 case of *Gaygasuz* that decisions not to pay a particular welfare payment will fall within the ambit of the right to property if the welfare payment is based on contributions, rather than merely being funded by general taxation.[29] In *Stec* v *UK*, an admissibility decision in 2005, the ECtHR extended the ambit of property rights to cover any social welfare payment, even non-contributory ones, thus demanding that they respect the non-discrimination principle.[30] The admissibility decision in Stec was not disapproved of by the later decision of the Grand Chamber on the merits.[31] In that Grand Chamber decision, one concurring judge noted that the admissibility decision extended the "ambit" very far, and effectively amounted to the ECtHR bringing about the implementation of Protocol 12 to the ECHR in respect of social security benefits, even for those states that had not ratified Protocol 12.[32]

This extension of the ambit of property rights to social security matters, thus insisting on the non-discrimination principle, seems to be confirmed in *Luczak* v. *Poland*, where the ECtHR assumes that the property right is sufficiently engaged and concentrates on Article 14.[33] In that case, the Polish authorities refused to allow a non-national to join a social security system for farmers. The system was mostly (95%) financed by the public purse rather than contributions. As the applicant had not made any contributions to this scheme, it might have been thought the property right was not engaged, on a pre-Stec approach.[34]

Within the European Convention context, decisions to discriminate in respect of the right to work may fall foul of the non-discrimination principle. For example, a decision to prohibit persons from employment in the private sector, because of their past activities as members of Communist security services has been found to be within the ambit of Article 8, and to lead to violations of Article 14 in connection with Article 8 (*Sidabras v Lithuania*).[35] In reaching this conclusion, the European Court of Human Rights relied on other international material, including Article 1 European Social Charter (ESC), the opinion of the ESC expert committee, and International Labour Organisation texts.[36] A ban on employment affects the ability to earn a living and has a knock-on effect on the enjoyment of a private life. It is therefore possible to plead the non-discrimination right, which the European Court of Human Rights found was violated in *Sidabras*. Here, the legislation had come into force nearly a decade after the end of communism, it included vague definitions of the jobs affected, and applied to the private sector

[29] *Gaygusuz* v. *Austria* (1996) 23 EHRR 364.
[30] *Stec* v. *United Kingdom* [(2005) 41 EHRR SE18, at [47-55].
[31] *Stec* v. *United Kingdom* (App. nos. 65731/01 and 65900/01), [2006] 43 EHRR 47.
[32] See concurring opinion of Judge Borrego Borrego.
[33] *Luczak* v. *Poland* Application no. 77782/01.
[34] In the UK, domestic courts seem to have hesitated over whether to embrace the *Stec* reasoning. The House of Lords has now authoritatively settled the issue, and insisted that the *Stec* principle should be respected by domestic courts under the Human Rights Act 1998. See *R (RJM)* v *Secretary of State for Work and Pensions* [2008] UKHL 63, [29-32].
[35] *Sidabras v Lithuania* (2004) Applications nos. 55480/00 and 59330/00, at [47].
[36] *Ibid.*

where a requirement of loyalty was not so clearly required.[37] Accordingly, there was a violation of Article 14 in conjunction with Article 8.[38]

Whilst the ECtHR has extended the ambit of convention rights, it has not done away with the ambit requirement. An Article 14 complaint that fails to specify the relevant substantive right will be rejected as being manifestly ill founded.[39] Even the *Sidabras* case concerned a very extreme situation and does not necessarily entail that all cases involving a denial of employment will fall within the ambit of Article 8. The case involved an extreme and wide-ranging ban on an individual from working in the private sector, [40] and so does not bring all employment decisions within the scope of Article 8. Nevertheless, it is important, as it may mark a *Gaygasuz* moment in relation to employment, and we await a decision analogous to *Stec* in this area.

Meaning of Discrimination

The greatest weakness in traditional Article 14 jurisprudence has been the limited understanding of what was covered by the term "discrimination." Until recently, it has tended to prohibit only "direct and overt" discrimination,[41] and has failed to reach more covert or subtle forms of discrimination.

A comparator requirement?

Judgements at both the domestic and European levels frequently refer to the need for there to be a difference in treatment between the claimant and someone in an analogous position, thus imposing a comparator requirement. The experience of comparator requirements in domestic anti-discrimination laws is often an unhappy one; a comparator requirement is one of the key problems with formal models of equality. According to Fredman, the comparator approach has several flaws. The comparator in a formal equality model tends to take as the norm a male, white, able bodied, heterosexual Christian. In some cases, (pregnancy or workforces with de facto sex segregation) there is simply no suitable comparator. Finally, the comparator approach tends merely to ask if there is a difference, without asking whether the difference in treatment is proportionate to the difference in situation. [42]

The requirement for a comparator in Article 14 sometimes upsets discrimination claims[43] but overall the role of any such comparator requirement is ambiguous in the Strasbourg case law.[44] Some domestic judges and academics have commented

[37] *Sidabras* at [57].
[38] This was confirmed in *Rainys and Gasparavicius v Lithuania* (2005) Applications nos. 70665/01 and 74345/01.
[39] *Silih* v. *Slovenia* application no. 71463/01.
[40] *Secretary of State for Work and Pensions* v *M.* [2006] UKHL 11, [2006] 2 AC 91 per Lord Nicholls at [83].
[41] Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 2005), 19.
[42] See Sandra Fredman, *Introduction to Discrimination Law* (Oxford: OUP, 2002), 8-10.
[43] *Carson's Application for Judicial Review* [2005] NIQB 80 at [22].
[44] See the discussion in Arnardottir, *Equality and Non-Discrimination under the European Convention on Human Rights*, 182-4.

on this, in particular suggesting that the Strasbourg jurisprudence tends to conflate the requirement that there be a difference in treatment between analogous persons or situations, with the application of the justification test. Baroness Hale has produced some thoughtful comments on Article 14 in the *AL* case. She suggests that the Article 14 jurisprudence is not so much obsessed with the need for a comparator as domestic anti-discrimination law, and that the Strasbourg Court usually focuses on questions of justification.[45]

There is some evidence for this in the Chamber decision in the case of *Burden and Burden v UK*. The applicants were sisters who complained that though they lived together they did not enjoy the special legal privileges accorded to married couples or civil partners. The ECtHR decided not to focus on the comparator question but instead focused on the issue of justification.[46] However, on referral to the Grand Chamber, the Grand Chamber arrived at the same conclusion but focusing more on precisely the question as to whether the sisters were in a suitably analogous situation.[47]

Even in cases where the ECtHR devotes some attention to the comparator question, the issue of justification is not far away. In *Ismailova* v. *Russia,* a Russian court had granted custody of children to their father rather than their mother. The mother alleged discrimination, but the ECtHR noted that there were many differences between the parents' situations, and that these differences amounted to justification of the decision.[48] In the recent *Carson* decision, the Court of Human Rights discussed both the analogous situation requirement and the question of justification. The case concerned the general policy of the UK to index link pensions paid to UK residents, but not to index link the pensions paid to UK citizens abroad, unless they happened to live in a country with a specific treaty providing for this. The Court held that such pensioners resident abroad were not in an analogous position to those resident in the UK, nor were they in an analogous situation to those pensioners resident in countries with a treaty arrangement.[49] The Court also said that any difference in treatment could be justified.[50]

The question of whether a comparator is in an analogous position is one which Strasbourg treats therefore as being closely related to the question of justification,

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[45] See *AL Serbia (FC)* v *Secretary of State for the Home Department* [2008] UKHL 42, [22-25]. Also emphasising that Article 14 ECHR is about justification, see Sandra Fredman, *Human rights transformed : positive rights and positive duties* (Oxford: Oxford University Press, 2008), 187.

[46] *Burden and Burden* v. *United Kingdom* (2007) 44 EHRR 51, at [58]. The Grand Chamber adopted the same approach as in the Chamber decision in *Burden* in the much publicised case of *Evans* v. *United Kingdom* Application no. 6339/05. The case concerned a separated couple who had previously made plans to have a genetically related child, but where the male partner had withdrawn his consent to the use of his sperm. The female partner argued that this violated a number of Convention rights; a subsidiary argument was that she was being treated differently from a woman who could conceive without the benefit of IVF. At [95] the Grand Chamber notes that it does not need to decide whether the applicant was in an analogous position to a woman who could conceive without IVF, as in any event any distinction could be justified as the justification test was already satisfied under Article 8.

[47] *Burden and Burden* v. *United Kingdom* (2008) 47 EHRR 38, [61-66].

[48] Application no. 37614/02 [57-61]

[49] *Carson* v *United Kingdom* Application no. 42184/05, (2008) [78-79].

[50] *Carson*, [80].

though it has not been supplanted by the justification test. It therefore continues to be an issue which could trouble the development of a substantive equality jurisprudence under Article 14.

Covert discrimination: Prejudiced motivation of official decisions regulating rights

The traditional focus of the ECtHR has been on formal distinctions between persons in analogous positions. This is satisfactory for dealing with straightforward cases of direct, explicit distinctions. In some instances, this approach may not always recognise some situations as being discrimination. This is so when dealing with facially neutral measures (i.e. measures that make no explicit distinctions) that have a disparate impact on members of different groups. This is the problem of indirect discrimination addressed in the next section. Such a formal approach may also be inadequate when dealing with measures that have been taken due to prejudiced motivation, but which do not make formal distinctions. During 2007, the ECtHR indicated that Article 14 may be able to deal with such cases, and in particular, that it may be possible to derive inferences about the existence of prejudiced motives from the statements of elected officials.

In one case during 2007, the ECtHR criticised an elected official for making prejudiced comments about "homosexual propaganda". In *Baczkowski* v. *Poland*, a civil society organisation wished to conduct a demonstration to promote a number of equality issues. [51] They were denied permission for their demonstration though other organisations and demonstrations were permitted. The reasons cited for the denial were the failure to provide a "traffic organisation plan", and to avoid clashes with other demonstrations. The ECtHR found a violation of Article 11 ECHR as the denial of permission did not satisfy the "prescribed by law" requirement in Article 11.2. Prior to the official denial of permission by civil servants, the Mayor had indicated he opposed "propaganda of homosexuality". The ECtHR, while recognising the right to free expression, also noted that elected officials had to be careful in what they said, as their comments might be interpreted as being instructions for officials.[52] By analogy with the principle that "justice must not only be done, but be seen to be done", the Mayor's statement, at a time when officials were considering the request for the demonstration, was sufficient to conclude the denial of permission was a violation of Article 14.[53]

This case is perhaps exceptional, though not unique.[54] Generally, the ECtHR requires strong evidence before it will conclude that actions of public officials are motivated by prejudice. In some cases it has even spoken of the need to prove (eg racial) prejudice "beyond reasonable doubt", though qualifying this by saying proof appropriate to a criminal case was not required. Such proof beyond reasonable doubt may arise from a collection of clues which give rise to a clear

[51] *Baczkowski v. Poland*, Application no. 1543/06.
[52] *Ibid.* [98].
[53] *Ibid.* [99-101].
[54] In the French cases involving single persons who were denied the authorisation to adopt children, the ECtHR was prepared to draw the conclusion that the decisions were based on sexual orientation even though this was not explicit in the reasoning of the national authorities: *Frette* v. *France* (2004) 38 EHRR 21, *E.B.* v *France* application no. 43546/02.

inference, or presumptions that are not rebutted.[55] However, the ECtHR will not presume, from the existence of a general social problem of discrimination against a minority, that any ill treatment of a member of that minority is motivated by prejudice. The applicant must refer to specific aspects of his or her case.[56] Even if there is a specific example of a racist comment by a public official, the ECtHR will not necessarily conclude this demonstrates that treatment of a victim has been motivated by a discriminatory purpose.[57]

Indirect discrimination

Despite some cases dealing with indirect discrimination,[58] and some dicta favourable to the notion of indirect discrimination,[59] the bulk of the case law of the Strasbourg Court deals only with direct discrimination, and the ECtHR is reluctant to accept indirect discrimination cases.[60] This is partly for the reason just discussed, that the ECtHR does not want to draw inferences from statistical patterns of disadvantage.

Nevertheless, ever since the *Thlimmennos* case in 2000, the ECtHR has moved to deal with problems of indirect discrimination. In some of the cases on the Article 14 duty to investigate (see later), the ECtHR seems to base the positive obligation to investigate on an indirect discrimination argument: that there is a factual difference that calls for a different treatment (i.e. an investigation into prejudice).[61] In a 2005 admissibility decision, the court actually found that the facially neutral decision to withdraw certain disability benefits had a differential impact as between men and women and that this was prima facie discrimination under Article 14, but it was held to be justified.[62] Also, in the somewhat exceptional case of *Zarb Adami* v *Malta*, the Court of Human Rights was willing to find that there was a situation of discrimination in fact and practice, even though not on the face of the law. Maltese law governing juries allowed for men and women to serve, but administrative practices meant that in practice far more

[55] *Celniku v. Greece*, Application no. 21449/04 at [79-81]; *Cobzaru* v. *Romania*, application no. 48254/99 at [93].
[56] *Cobzaru* v. *Romania*, application no. 48254/99 at [95].
[57] *Karagiannopoulos v. Greece*, Application no. 27850/03 at [77]. A member of the Roma community had been shot in the head during a police operation. A police officer only tangentially involved in the operation made a comment in court later about the majority of gypsies being criminals. The ECtHR held this did not point to any discriminatory motivation in the original operation. It did however find a substantive violation of Article 2.
[58] *Thlimmenos* v. *Greece* (2001) 31 EHRR 411; *Zarb Adami* v. *Malta* (2007) 44 EHRR 49.
[59] *Belgian Linguistic case* v. *Belgium* (1967) 1 EHRR 252, section 10; *Jordan* v. *United Kingdom* Application no. 24746/94, (2003) 37 EHRR 2, [154]; *Kelly and others* v. *United Kingdom* (Application no. 30054/96) at [148].
[60] *Ahmad* v. *United Kingdom* (1981) 4 EHRR 127; *Stedman* v. *United Kingdom* (1997) 23 EHRR CD 168; *D.H.* v. *Czech Republic* Application no. 57325/00, but now reversed by the Grand Chamber.
[61] *Angelova and Iliev* v *Bulgaria* Application no. 55523/00, at [115].
[62] *Hoogendijk* v *Netherlands* Application number 58641/00. The Netherlands modified the rules on the payment of the disability benefit partly to remove discriminatory aspects of the system, but also for financial reasons. Interestingly the Court accepted that both motives were legitimate, though it is not clear from the discussion on Article 14 that "seeking to keep the costs of the … scheme within acceptable limits" by itself would have been a sufficient purpose.

men than women served on juries, and the Court found that this situation was one of unjustified sex discriminatory.[63] The *Thlimmennos* and *Zarb Adami* cases thus point the way to a greater willingness to tackle the problem of indirect discrimination.

In what is perhaps the most important Article 14 case of 2007, the European Court of Human Rights extended its Article 14 jurisprudence significantly in a case involving indirect racial discrimination. The *DH* case involved the education system in the Czech Republic. The Czech Republic had a network of special schools for children with mental "deficiencies". The majority of children in these special schools were of Roma origin. The applicants claimed their education suffered and they were subject to segregation; they invoked Article 14 in conjunction with the right to education in Article 2 of Protocol 1 to the European Convention. The Grand Chamber ruled that Article 14 may require efforts to correct factual inequality, even if this required differential treatment, and the Grand Chamber strongly condemned racial discrimination.[64] The Grand Chamber held that it was not necessary to prove any intention to discriminate and that once a discriminatory effect was shown, the burden then switched to the State to justify it under the Court's proportionality test.[65] In this case, the State failed to justify the policies with this discriminatory effect (though noting they had made efforts to address the inequalities[66]).

The *DH* case is a major breakthrough for a more substantive model of equality in Strasbourg. It recognises that Article 14 covers problems of indirect discrimination, rules that it is not necessary to demonstrate a prejudiced motivation and it provides that where the applicant can demonstrate a discriminatory situation, the burden switches to the State to provide a justification for it. The *DH* case has been discussed and confirmed in more recent cases involving the apparent exclusion of Roma children from mainstream education.[67]

On the listed grounds or "other status"

Formal and substantive models of equality tend to differ on what sorts of distinctions deserve scrutiny. A formal model will be concerned with any kind of distinction, as it protects a principle that any distinction or legislative classification should be rationally justifiable. A substantive model of equality will be more concerned with those distinctions that have a particular tendency to reinforce patterns of disadvantage and discrimination, such as race, or sex or religion. These are only starting points of course. A formal model of equality might well be modified to allow for more rigorous scrutiny of certain types of distinction, along a "sliding scale".[68] A substantive model of equality needs to be

[63] *Zarb Adami* v. *Malta* (2007) 44 EHRR 49.
[64] *D.H.* v *Czech Republic* Application no. 57325/00, at [175-176].
[65] At [193-5].
[66] At [71-72].
[67] *Sampanis* v *Greece* application no. 32526/05, *Orsus and others* v *Croatia,* application no. 15766/03.
[68] On suggestions for a "sliding scale" approach to equal protection in the US, see *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1 (per Justice Thurgood Marshall), *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432 (per Justice Stevens).

attuned to the possibility that disadvantage or discrimination might not be easily recognised.

There is a long list of enumerated grounds in Article 14 which may give rise to a complaint of discrimination. This includes some not found in domestic law of the United Kingdom (other than the HRA), such as language.[69] More importantly, Article 14's list of grounds is open-ended as it includes "any other status". Therefore, Article 14 may include unenumerated grounds such as sexual orientation,[70] health,[71] marital status,[72] or others that would not necessarily be considered under domestic anti-discrimination laws.

Often interpreted very widely in Strasbourg, it would seem that almost any distinction within the ambit of a Convention right can trigger an Article 14 inquiry.[73] This willingness to look at almost any type of distinction is confirmed by the case law in recent years, though with a major qualification in the recent decision in *Carson*.

In *Beian v. Romania*, the claimant had been a military conscript in the Romanian military beginning service in 1953.[74] He had refused to accept military training. In 2002, the Romanian state established certain social benefits for former members of units who had been forced to engage in labour. The legislation provided the benefits for former members of units under the direction of the so called DGT, which generally coordinated most of the units in which such conscripts served. This particular claimant had not served in one of these units. The ECtHR found violations of Article 6 and 14. There was a violation of Article 6 as the highest domestic court had caused uncertainty in the law leading to contradictory decisions.[75] As regards Article 14, the claimant objected to the differential treatment accorded based on the different units to which people

[69] The ECtHR has considered a case during 2007 on language policy, concerning the Ukrainisation of Russian names in official Ukrainian documents. The ECtHR ultimately found the policy did not violate Article 14, largely because the policy preserved a role for individual choice as to how an individual's names should appear. See *Bulgakov* v. *Ukraine*, Application no. 59894/00 at [58].

[70] *Salguero da Silva Mouta v. Portugal* (2001) 31 EHRR 1055.

[71] During 2007, the ECtHR considered a complaint alleging discrimination based on health (HIV status). It rejected the complaint on the grounds there was no evidence of discrimination, but did not query that "health" could be a "status" for the purpose of Article 14: *V.A.M.* v. *Serbia*, Application no. 39177/05.

[72] *In re P.* [2008] UKHL 38, [2008] 3 WLR 76.

[73] It would seem almost any distinction can come within the Article 14 concept of "other status" *Paulik* v. *Slovakia* (no. 10699/05) which concerned distinction made between different types of fathers (those fathers whose paternity was based on a rebuttable presumption and fathers whose paternity could not be rebutted). See also, on distinctions between different types of litigants: *Stubbings* v. *United Kingdom* (1996) 23 EHRR 213 and *Mizzi* v. *Malta* (2006/01/12). A distinction based on being former members of the security services was held to be a distinction under Article 14 in *Rainys and Gasparavicius* v. *Lithuania* Applications nos. 70665/01 and 74345/01. Finally, a distinction between farmers holding farms of different sizes triggered a successful Article 14 inquiry in one French case: *Chassagnou* v. *France* (2000) 29 EHRR 615.
For an example of this wide approach within the UK see *Application for Judicial Review Landlords Association for Northern Ireland* [2005] NIQB 22, [2006] NI 16.

[74] *Beian v. Romania* (application no. 30658/05). See also the similar cases of *Zainescu v. Romania* (application no. 26832/08), *Tara Lunga v. Romania*, (Application 26831/03), *Tehleanu v. Romania*, (Application no. 1578/03).

[75] [39-40].

belonged. The ECtHR noted that Article 14 was not limited to the enumerated grounds and that the State failed to provide any objective and reasonable justification for this distinction.[76]

In *Grande Oriente d'Italia di Palazzo Giustiniani* v. *Italy*, the ECtHR was dealing with an Italian measure in the region of Friuli-Venezia Giulia that required candidates for public office to declare if they were Freemasons or members of secret organisations. The measure therefore treated members of the Freemasons differently from members of other non-secret organisations. The Italian Government did not offer any "objective and reasonable" justification for this distinction, so there was a violation of Article 14 in combination with Article 11. For our purposes, we note that a distinction between Freemasons and other non-secret organisations does not fall neatly under one of the enumerated grounds in Article 14 or similar type of status.[77]

This case underlines that potentially any distinction in the enjoyment of Convention rights calls for objective justification.[78] Article 14 is not limited to distinctions based on "suspect grounds" typically used to express prejudice, but can cover any arbitrary distinction.[79] This means that purely arbitrary distinctions are not permitted. It also means that the ECtHR does not have any problems dealing with claims that raise "intersectional" issues, i.e. do not neatly raise one particular ground for distinction, but raise more than one ground.

Contrary to the position in Strasbourg, the UK courts are not so generous in their interpretation of "other status". In 2004, the House of Lords indicated that "other status" in Article 14 referred to personal characteristics, and not just to any distinction.[80] This principle has been followed in subsequent House of Lords decisions[81] and in the lower courts.[82] However, in 2008, the House of Lords has offered significant qualifications as regards the question of "status" or "personal characteristic". In *AL Serbia*, the House of Lords accepts that being a young adult without parents or a family can amount to a status, and so distinction on this ground calls for Article 14 justification. Crucially however this status was not one which required especially strict scrutiny, and the decision to grant permission to one group to remain in the UK but not the other was held not to violate Article 14.[83] In *RJM*, the claimant had been in receipt of a disability premium social welfare payment, but this was ended when he became homeless, and started to sleep rough. The Court of Appeal ruled that being homeless was not a personal characteristic under Article 14. The House of Lords disagreed and offered some

[76] [62, 64].
[77] *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (Application no. 26740/02) at [56].
[78] To underline this point, the ECtHR considered an allegation that Belgian authorities engaged in a policy of selected and arbitrary prosecution for violations of planning regulations in *Hamer* v. *Belgium* Application no. 21861/03. The ECtHR concluded there was no difference of treatment [67], but did not suggest that this sort of distinction did not fall under the heading of "other status".
[79] *Wagner v. Luxembourg* Application no 76240/01.
[80] *R. (S.) v Chief Constable of Yorkshire Police* [2004] UKHL 39 at [48-9].
[81] See for instance *R. (Clift)* v *Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484.
[82] *R (RJM)* v *Secretary of State for Work and Pensions* [2007] EWCA Civ 614, [2007] H.R.L.R. 35.
[83] *AL Serbia (FC) v Secretary of State for the Home Department* [2008] UKHL 42, (2008/06/25).

important comments on when a distinction will be considered to be based on a personal characteristic. Lord Walker explains that the idea of a personal characteristic is like a set of "concentric circles". The inner core includes those innate characteristics that are most intimately linked to one's personality, and which are difficult to change. Second, come those personal decisions that are "almost innate" and which concern the exercise of classic liberal rights of freedom expression, association and religion. The third circle includes certain grounds that are more in the nature of what people do, or what is done to them. This last includes questions of military status, domicile, residence and homelessness.[84] Significantly, the intensity of the review will be affected by the distance between the characteristic in question and the core characteristics.[85] Having agreed in *RJM*, that Article 14 applied to the distinction in question, the Law Lords ultimately ruled that the distinction was justified.

Whilst the *RJM* case suggests the UK courts are moving towards the broader conception of status found in Strasbourg, the Strasbourg court seems recently to have moved some way towards the British focus on "personal characteristics". In the *Carson* decision, the Strasbourg court accepts that a distinction has to be based on a personal characteristic. It endorses a wide conception however of personal characteristic, including choice of residence as a "status" under Article 14. Crucially however the Court endorses the position that this is not a status that calls for very strong justification, and in fact accords the UK a wide margin of appreciation.[86]

Justification

Any distinction found *prima facie* to violate Article 14 can nevertheless be justified under the proportionality test of the ECtHR, that is to say it can be justified if it is for a legitimate purpose and if the distinction is proportionate:

"…a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[87]

In applying the justification test, the ECtHR operates with a version of the American "suspect classifications" doctrine. Certain types of classifications (e.g. those based on sex, race, nationality, birth status, religion, sexual orientation) are treated as being suspect and calling for an extremely persuasive justification from the State for using them.

The ECtHR has also referred to the concept of the margin of appreciation (MOA). This allows a greater degree of discretion to a state in circumstances where the international court feels it is ill-placed to second guess the national judgment (e.g. national security, public morality, planning decisions, and areas where there is no common European standard).

[84] Lord Walker at [5]. All the Law Lords agree with this short speech.
[85] Lord Walker at [5], Lord Neuberger at [56].
[86] *Carson* v *United Kingdom* Application no. 42184/05, (2008/11/04)
[87] *Religionsgemeinschaft der Zeugen Jehovas* v *Austria* application no. 40825/98, (2008) [87].

The doctrine of the margin of appreciation has frequently stymied efforts to promote equality in relation to sexual orientation. The margin of appreciation has been invoked in relation to differential age limits for sexual activity as between gay men and heterosexual couples. While this was done in cases in the 1980s, the margin of appreciation had evolved by the end of the century, and such discrimination was held to no longer be compatible with the Convention.[88] The appearance of the margin of appreciation in a 2002 case was more startling. In *Frette* v *France*, the applicant had sought to adopt a child as a single person, and was refused due to reasons of his lifestyle, which in reality meant due to his sexual orientation. The ECtHR held that such a case fell within the ambit of Article 8, and examined the Article 14 argument.[89] At this point, the margin of appreciation was invoked: the court found there was no general policy across Europe on the question of whether, if single persons could adopt children, this possibility extended to a single gay man.[90] Given this position, the fact that the best interests of the child had to be considered, and the divided views of the scientific community on adoption by gay persons, the Court found the distinction to be justified.[91] This is certainly not an example of an exacting proportionality inquiry. The reference to scientific evidence seems to be based on the respondent Government's assertion: no scientific reports are actually cited. In an earlier case, involving the exclusion of gay men and lesbians from the UK armed forces, the ECtHR had been critical of the failure to produce satisfactory scientific evidence of any necessity for the policy. Indeed, in that case, a report was produced by the government and the Court examined it closely to see if it was convincing, concluding that it was not.[92]

In 2008, the Court revisited this issue as a Grand Chamber in the case of *E.B. v France*.[93] This concerned a woman who sought an authorisation as a single person to adopt. The domestic authorities refused this, making reference to the absence of a paternal figure in the applicant's household, and the attitude of her female partner. The ECtHR concluded that this amounted to a refusal on the grounds of her sexual orientation.[94] Then, in a striking contrast to *Frette* the Court reiterates that only "particularly weighty and convincing reasons" could justify a distinction on grounds of sexual orientation.[95] The Government's arguments did not provide such a reason, and the discrimination on grounds of sexual orientation was "not acceptable".[96] Significantly, the Grand Chamber's discussion of these issues does not even mention the term "margin of appreciation".[97] There were a large number of dissenting opinions (the Grand Chamber split 10-7 on a finding of a violation), but most of these do not challenge the central holding of the

[88] *Sutherland* v. *United Kingdom* (1997) 24 EHRR CD 22.
[89] *Frette* v. *France* (2004) 38 EHRR 21, [32-3].
[90] [41].
[91] [42-3].
[92] *Lustig-Prean* v. *United Kingdom* [1999] 29 EHRR 548, [88-98].
[93] *E.B.* v *France* application no. 43546/02.
[94] [89].
[95] [91].
[96] [96].
[97] See [72-98].

Grand Chamber, that a denial of a possibility to adopt based on the sexual orientation of the applicant is a violation of the Convention.[98]

The *E.B.* case implicitly disapproves of the invocation of the margin of appreciation doctrine in *Frette.* This does not mean that the margin of appreciation doctrine has no application. Where a subject matter calls for a difficult balancing of interests, and where the distinction is not based on a "suspect" ground, then the Court of Human Rights continues to speak of a margin of appreciation, and continues to apply a more relaxed standard of justification in these areas.

Taxation policy is another area where a margin of appreciation is employed, as indicated in the case of *Burden and Burden v. UK*. The ECtHR accepted that the UK could promote marriage and also long term same sex relationships, even if this meant drawing a distinction between spouses and civil partners on the one hand and other people living in "long-term settled relationship[s]". Such a distinction was deemed well within the margin of appreciation.[99] Similarly, in the *Carson* case, the ECtHR accepted that a margin of appreciation was appropriate in cases involving the social security system, specifically pensions.[100] The Court went so far as to speak of the "very wide margin of appreciation which it enjoys in matters of macro-economic policy".[101] The Court has recognised that the margin of appreciation can cover the sorts of fine judgements that states have to make when creating features like cut-off dates for entitlements to benefits.[102]

Nevertheless, the fact that a case involves social policy does not mean that the courts should abandon their duty to examine policy choices. The House of Lords has recently indicated that the State must make choices as between *rational* schemes. Where the State's choice is not rational then the national courts may say so[103] - and they may say so even if they believe the Strasbourg Court would not disturb the State's judgement because of the margin of appreciation appropriately accorded by an international court to national authorities.[104]

Positive action: Affirmative Action and Positive Obligations

The issues raised by affirmative action or positive action are often critical in testing the differences between a formal and a substantive theory of equality.

[98] Several of the dissenting opinions disagreed with the majority's characterisation of the national decision as one based on sexual orientation, or argued that if this affected one of the reasons for the national decision, then the national authority had other reasons that were not so tainted. See the dissents by Costa (joined by three other judges), Loucaides and Mularoni.

[99] *Burden and Burden* v. *United Kingdom* (2007) 44 EHRR 51, at [60-61]. On referral to the Grand Chamber, the ECtHR held that the sisters were not in an analogous situation to married couples or civil partners: *Burden and Burden* v. *United Kingdom* (2008) 47 EHRR 38.

[100] *Carson* v *United Kingdom* Application no. 42184/05.

[101] *Carson*, [81]. This margin of appreciation does not mean that taxation policy will never be found to violate Article 14: see *Darby* v. *Sweden* (1991) 13 EHRR 774.

[102] *Twizell v. United Kingdom*, (Application no. 25379/02), [24].

[103] *In re P.* [2008] UKHL 38, [2008] 3 WLR 76 [20] per Lord Hoffmann. The case concerned a discriminatory provision in Northern Irish law allowing married couples to adopt a child but not allowing unmarried couples to do so.

[104] *In re P.* [31-38] per Lord Hoffmann.

Formal theories of equality, where they are given a "colour blind" or "neutral" interpretation tend to disfavour schemes of positive action or affirmative action which are designed to redress situations of systemic disadvantage, often brought about by a history of discrimination. At best, a formal theory of equality may regard affirmative action as a justified form of discrimination. Substantive equality models on the other hand tend to see such measures as being an aspect of equality itself.[105] On such a model, affirmative action is permitted, and it may also be seen as an obligation on the State: positive action is essential to tackle structural discrimination.[106]

A difference of treatment that is prima facie discrimination under Article 14 can be justified where it is intended to "correct factual inequalities"[107] and so bring about a greater degree of material equality. The Grand Chamber, in *Stec*, indicated that the difference in pensionable ages in the UK was intended to respond to the economically disadvantaged position of women. The Grand Chamber underlined that such affirmative action measures were only permissible so long as they were justified by the need to respond to a factual inequality. Once the factual inequality is diminished the justification for the measure would disappear.[108] The ECtHR relied on the same reasoning to uphold, at one point in time, the different treatments of widows and widowers in respect of the provision of a special widow's pension.[109]

The European Court of Human Rights has concluded that affirmative actions measures are permitted under Article 14. Does it require positive action? In at least one situation, the ECtHR has gone further and imposed positive obligations in respect of Article 14. By analogy with the duty to investigate under Articles 2 and 3 (suspicious deaths and allegations of torture), there is a positive obligation to investigate allegations of prejudiced motivations in criminal acts.[110] This duty applies equally where the alleged perpetrator is a non-state actor, eg members of a skinhead group.[111] Most of these have been cases involving racial hatred. In *Angelova and Iliev* the ECtHR explicitly says the State must consider the problem of :

> "widespread prejudices and violence against Roma … and the need to reassert continuously society's condemnation of racism and to

[105] This is seen in Section 15 of the Canadian Charter of Rights and Freedoms. Section 15(1) contains a comprehensive prohibition of discrimination, but such discrimination may be justified under Section 1 of the Charter. Section 15(2) of the Charter makes it clear that the prohibition on discrimination in Section 15(1) "does not preclude any law … that has as its object or effect the amelioration of conditions of disadvantaged individuals or groups ….".

[106] Sandra Fredman, "Providing Equality: Substantive equality and the positive duty to provide resources" (2005) 21 (2) *South African Journal on Human Rights* 163, 166-9.

[107] *Belgian Linguistic case* (1967) 1 EHRR 252, section 10.

[108] Ibid., at [66].

[109] *Runkee and White v. United Kingdom* Application no. 42949/98 at [40]. The failure to provide a lump sum payment to widowers however was found to violate Article 14, and indeed the UK did not contest this: [45]. The UK has now changed the law to remove the discrimination.

[110] *Angelova* v *Bulgaria* Application no. 55523/00, *Cobzaru* v *Romania* application no. 48254/99; *Koutropoulos* v. *Greece* Application no 15250/02. Dembour has suggested that it would be preferable to reverse the burden of proof in such cases: Marie-Bénédicte Dembour, *Who believes in human rights? Reflections on the European Convention*, 136-7.

[111] *Secic v. Croatia,* Application no. 40116/02.

> maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence…." [117]

The ECtHR stresses that the authorities must seek to uncover racial motives and will also examine the attitudes of investigating officials and others to ensure they do not disclose any discriminatory attitude.[112] During 2007, the ECtHR has also indicated that allegations of sectarian prejudice must be investigated under Article 14 in conjunction with Article 9.[113]

The duty to investigate is one instance of a positive duty in relation to equality in the Convention. There are important dicta in many of the cases which point to a stronger conception of positive duties to promote material equality. In cases dealing with the permissibility of positive action, and in cases dealing with indirect discrimination, there are clear implications that the state should take steps to achieve material equality, i.e. the failure to take steps to address factual inequalities might itself be a violation of Article 14.[114] The ECtHR summarised this principle in the *D.H.* case, drawing on earlier decisions: "indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article".[115]

These dicta could have far reaching consequences if further developed by the court, amounting to a legal duty to promote equality in fact, in at least some circumstances. For example, the law of the United Kingdom contains several statutory duties to promote equality, but it is an oft perceived weakness that these powers tend to be oriented to procedures and not outcomes and are not intended to be legally enforceable in the courts.[116] A positive duty to promote equality under Article 14 would overcome some of these limitations.

Conclusion

The European Court of Human Rights has taken huge strides in its understanding of Article 14 in recent years. It has attenuated the "ambit" requirement so that Article 14 extends to the sphere of social security, and arguably the employment sphere. The concept of discrimination has been definitively extended to deal with the problem of indirect discrimination. The Court continues to look at discrimination on a wide range of grounds, but insists that some types of distinction call for very weighty justification. In its analysis of the justification

[112] *Petropoulou-Tsakiris v. Greece*, Application No. 44803/04 at [63-66].
[113] *97 members of the Gldani Congregation of Jehovah's Witnesses* v. *Georgia*, application no. 71156/01.
[114] *Stec* v. *United Kingdom* App. nos. 65731/01 and 65900/01, (2006) 43 EHRR 47, at [51-64].
[115] *D.H.* v. *Czech Republic* Application no. 57325/00, (2007) 47 EHRR 3, [175].
[116] Section 75 of the Northern Ireland Act 1998 is the clearest example of this. The Northern Irish courts have been reluctant to allow this statutory equality duty to be enforced by judicial review: *Neill's Application for Judicial Review* [2006] NICA 5. For a consideration of some of the perceived weaknesses in this type of pro-equality measure, see Sandra Fredman, *Human rights transformed: positive rights and positive duties* (Oxford: Oxford University Press, 2008), Ch. 7. For a survey of the UK statutory equality duties, see Nicholas Bamforth, Maleiha Malik and Colm O Cinneide, *Discrimination Law: Theory and Context, Text and Materials (Socio-legal)* (London: Sweet and Maxwell, 2008), 428- 439; A. McColgan, C. Palmer, B. Cohen, T. Gill, K. Monaghan, G. Moon and M. Stacey, *Discrimination Law Handbook* (London: LAG, 2007), Ch. 21.

test and the margin of appreciation the Court has moved to undo the damage done in the *Frette* case, while confirming that affirmative action type measures can be justified under Article 14. The Court has imposed a positive obligation to investigate allegations of racial or sectarian bias in the commission of crimes.

These evolutions in the case law produce an understanding of Article 14 that is more likely to be a tool of substantive equality, rather than formal equality. A model of substantive equality will be keen to tackle problems of indirect discrimination and not merely direct discrimination, and will certainly be permissive of well designed affirmative action measures. It will also be alive to the discriminations faced by minorities in spheres like social security and employment.

The jurisprudence has not entirely shed all aspects of a formal equality model. In particular, there is still talk of comparisons in the requirement that there be a difference in treatment as between persons in analogous situations, and also in the fact that the Court interprets "any other status" as covering nearly any type of distinction at all. Comparator requirements and a willingness to look at any type of distinction might distract a Court from looking at central questions in substantive equality inquiries. Even here, however there are grounds for optimism. The Court's discussion of analogous situations is often treated as an aspect of justification, rather than a search for a comparator. The willingness to look at any type of distinction is kept under control by the adoption of a "sliding scale approach" to justification, most recently endorsed in *Carson*.

These developments still leave some questions to be explored, but the Article 14 jurisprudence has undergone important changes. The contrast is most marked when reviewing the critical words of Judge Bonello in *Anguelova* quoted in the Introduction of this paper, and comparing them to the evident concern for racial minorities expressed by the Court itself in *Angelova and Iliev*, cited in the last section. One can also look to the cases on exclusion of Roma children from education where the Court refers to the necessity to accord special attention to the needs of Roma, as they constitute a "vulnerable and disadvantaged minority".[117]

During the past few years, the Cinderella provision of the Convention has definitely gone to the Ball. More importantly, Convention equality law is now focused not merely on the rationale behind formal distinctions, but has the potential to tackle the discrimination, disadvantage and oppression faced by vulnerable and disadvantaged groups.

[117] *Sampanis* v *Greece* application no. 32526/05, [72, 94-96].