CHAPTER 1

Protected characteristics

Key points

- The Equality Act (EqA) 2010 requires an understanding of what the protected characteristics are.
- Direct discrimination is triggered by less favourable treatment because of one or more of these protected characteristics.
- The definition of many of the protected characteristics will vary from case to case and attention must be given to the nature of the protected characteristic in the particular case at every stage of the case.
- The definition of the protected characteristic may make a difference to the potential comparators for any case.
- The definition will also be relevant for the purposes of indirect discrimination, when considering a group sharing a protected characteristic.

Introduction

1.1 Part 2 of the Equality Act (EqA) 2010 contains the key concepts of equality. It deals with the types of unlawful conduct[1] and protected characteristics.[2] 'Protected characteristics' are the characteristics that trigger the prohibition against discrimination in the Act. They are defined in EqA 2010 s4 as:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.[3]

1.2 Protected characteristics play an important role in the Act, and their scope can sometimes be understood by reference to the international law on which they are based.[4] Unlawful discrimination will occur

1 EqA 2010 ss13–27.
2 EqA 2010 ss2–12.
3 EqA 2010 s4.
4 See chapter 19.

where the prohibited conduct is connected with the protected characteristic in the ways set out in the Act. As discussed in chapter 3, the characteristic does not need to be that of the complainant.[5]

Protected characteristics

Age[6]

1.3 Age is defined by reference to a person's age group which, in turn, is defined as a reference to a particular age or to a range of ages.[7] Where people fall within the same age group, they share the protected characteristic of age. Age means a person's chronological age, and it can mean their relative age, or an age group characteristic (such as being 'middle aged'). The age group must, however, be defined by reference to a chronological age or range of ages. It can be defined by reference to a series of ages or more than one range of ages.

1.4 It is important to be clear as to the formulation of the protected characteristic of age and be prepared to apply this analytic approach in each case. Sometimes the adviser will have to deal with a stereotype that is applied to everyone in a very broad and ill-defined age related band. In those circumstances the age group may appear to be defined by reference to vague concepts such as old age, middle age and youth. Yet these are age groups within the Act because they can be defined by reference to a range (or more than one range) of ages. The context of the case may mean that a very small difference in age is relevant to reveal the comparator. Thus in one Irish case a benefit was significantly greater by reference to a date of birth. Clearly a comparison between a person with that date of birth and a person born two days later could reveal the differential treatment based on age.[8] Thus age groups can be relatively narrow (such as '21-year-olds') or very wide (such as 'over 50s'). An age group can also be defined in

5 Direct discrimination can occur therefore because of (a) the complainant's characteristics, (b) the complainant's perceived characteristics, (c) a characteristic with which the complainant is associated (which may be that of another person) or (d) a perceived characteristic of a person with whom the complainant is associated.

6 See Equality Act 2010 Code of Practice: Employment Statutory Code of Practice (Equality and Human Rights Commission 2011) ('the Employment Code') paras 2.3–2.7 and examples.

7 See EqA 2010 s5.

8 *Perry v The Garda Commissioner* DEC-E/2001/29, 24 September 2001: two days difference either side of 60.

a relative way (for example, 'older than you'). Consequently, claims can be pursued on grounds of youth as well as on grounds of old age, depending on the circumstances.

1.5 Sometimes tribunals find this flexibility of definition troubling. However, race and ethnicity may be determined by reference to negatively defined groups (eg non-Africans) or by relative group references (non-English Europeans) or by references such as 'lighter skinned than Somalians'. The fact that one person may fall into many different protected characteristic categories does not create difficulties in defining the characteristic for the purposes of the particular case. What is important is to see the context of the case. In age cases the use of genuine occupational requirements makes understanding what is an age-related characteristic particularly important.[9]

1.6 Some age-related terms derive their meaning from their context and it is an area in which stereotyping can lead quickly into difficulties. The use of intuition in discrimination cases is unsafe because it leads to such stereotyping. For example, a person might have a stereotype whereby a youthful travel representative is more likely to denote a younger person by reference to chronological age than would a youthful managing director. Although these appear to be age-related terms, in fact they rely on age stereotypes relative to the expectations we have in respect of travel representatives and managing directors.[10]

1.7 In the same way that the Act does not prescribe the racial group to which the person seeks to compare themselves, the Act does not specify the age group with which comparison should be made in respect of age. So, for example, a 25-year-old victim of discrimination who was not promoted because she was thought to be too 'youthful'

9 See *Wolf v Stadt Frankfurt am Main* [2010] IRLR 244 and EqA 2010 Sch 9 Pt 1 para 1 and chapter 19.

10 *Wilkinson v Springwell Engineering Ltd* ET/2507420/07: an employer had made stereotypical assumptions about ability based on age that were not borne out by the evidence of the employee's work. In the Northern Irish Industrial Tribunal: *McCoy v James McGregor & Sons Ltd, Dixon and Aitken* 00237/07IT, an advert used the words 'youthful enthusiasm' for a job. The employer's focus on 'drive' and 'motivation' pointed towards a stereotypical view of the attributes to be associated with youth. The employer had rejected the 58-year-old claimant (with over 30 years' relevant experience), offering the jobs to significantly less experienced applicants, aged 15 years younger. The IT said that using 'youthful enthusiasm', in the whole context, raised a prima facie case of direct discrimination. The burden shifted to the employer. The other evidence included challenging drive and motivation in the claimant's interview and doing the scoring on an ad hoc basis.

might compare herself to 'over 25s' or 'over 35s' or 'older workers'. What matters is that there should be a proper basis for comparison.

1.8 The use of 'because of' in the formulation of direct discrimination in EqA 2010 s13, means that there is no longer any need to stipulate, as was done in the Employment Equality (Age) Regulations 2006 that reference to an individual's age includes reference to that person's 'apparent age'.[11]

1.9 The Court of Appeal has rejected any difference of approach except in the ways in which the legislation makes plain between age and the other protected characteristics.[12]

Disability

1.10 UK law sets out a specific definition of disability in EqA 2010 s6. An individual will need to meet that definition in order to claim discrimination arising from disability (s15), failure to comply with the duty to make reasonable adjustments (ss20 and 21) and indirect discrimination (s19). Direct discrimination and harassment (ss13 and 26), however, do not require the person claiming a breach to have a disability themselves – the treatment must be 'because of' disability. This is based on the wording of the Employment Framework Directive. It remains to be seen how courts will approach claims based on treatment because an employer perceives an individual to have a disability when they have a condition that does not meet the definition of disability set down in the Act. See further chapter 2 on direct discrimination.

1.11 In *Sonia Chacón Navas v Eurest Colectividades SA* ('*Chacón Navas*')[13] – the first case in which the Court of Justice of the European Union (CJEU) considered the definition of disability for the purposes of the Directive – the CJEU stated that despite the absence of a definition of disability in Directive 2000/78, it was not for the Member States to determine independent definitions. There must be a uniform interpretation across the States. The concept of 'disability' within the meaning of Directive 2000/78 is set out as:[14]

> ... a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life ... In order for the limitation to

11 See paras 2.54–2.66.

12 See *Homer v Chief Constable of West Yorkshire* [2010] EWCA 419, [2010] ICR 987, [2010] IRLR 619 at paras [35]–[36] and see [2012] UKSC 15.

13 C-13/05, [2006] ECR I-06467, 11 July 2006.

14 *Chacón Navas* [2006] IRLR 706 at paras 43–45.

> fall within the concept of 'disability', it must ... be probable that it will last for a long time.

1.12 'Disability' and 'sickness' are distinct concepts and the Directive did not require the protection of a person from the moment they develop any kind of sickness. The Court said that the Directive:[15]

> ... precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

1.13 The *Chacón Navas* definition of disability should, however, be regarded as being displaced by the definition of disability provided in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[16] as the latter definition is more inclusive. On 6 December 2012, Advocate General (AG) Kokott's Opinion in *335/11 HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab DAB* was published. Paragraphs 23ff discuss the impact of the UNCRPD definition of disability on the definition in Directive 2000/78 and the distinction between illness and disability. Noting that *Coleman v Attridge Law*[17] explained that *Chacón Navas* did not mean that the concept of disability in the Directive was to be narrowly interpreted, the AG recommended to the CJEU, in para 46 of the Opinion, that the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders (ie restricts) the participation of the person concerned in professional life. For the purposes of the definition of disability, it is irrelevant that the impairment has originated in a disease. The only decisive question is whether the restriction is lengthy. The use of special equipment is not part of the definition. If a person is not able to work full time they will fall within the notion of the disability within the meaning of Directive 2000/78. It remains to be seen whether the CJEU with follow this Opinion.

1.14 Under EqA 2010 s6 a person has a disability if they have a physical or mental impairment that has a long-term and substantial adverse effect on their ability to carry out normal day-to-day

15 *Chacón Navas* at para 51.

16 Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (Art 1). See chapter 19.

17 (Case C-303/06), [2008] ICR 1128.

activities. 'Substantial' is defined in the Act as meaning more than minor or trivial (s212). Physical or mental impairment includes sensory impairments, such as those affecting sight or hearing. Schedule 1 to the Act sets out the definition of some of these terms, such as long term, which means that the impairment has lasted or is likely to last for the rest of the affected person's life (Sch 1 para 2(1)). Of critical importance is the fact that where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day-to-day activities, it is still to be treated as though it does have such an effect (Sch 1 para 5). This means that 'hidden' impairments, for example mental health conditions, or those such as diabetes and epilepsy, may be disabilities within the meaning of the Act.

1.15 Cancer, HIV infection and multiple sclerosis are deemed to be disabilities under EqA 2010 (Sch 1 para 6). Where an individual is certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist, they are also deemed to have a disability.[18]

1.16 An impairment that consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities (Sch 1 para 3), meaning that they have simply to show that it is long term in order to meet the definition of disability.

1.17 Where an impairment ceases to have a substantial adverse effect, it will be treated as continuing to have that effect if the effect is likely to recur. Thus those with recurring, or fluctuating, conditions are covered (Sch 1 para 2(2)).

1.18 Where an individual has a progressive condition, which has some effect on their ability to carry out normal day-to-day activities but the effect is not, or was not, substantial, it will taken to be substantial if it is likely to become substantial at some point (Sch 1 para 8).

1.19 Taking each of these aspects in turn, a body of case-law now gives a settled approach to the recognition of disability. The burden of proving disability is on the claimant.[19] In many cases the employer will initially query whether the claimant has a disability. In an obvious case, denying or not admitting disability may be an unreasonable way of conducting the case. If the employer denies that there is a

18 Equality Act 2010 (Disability) Regulations 2010 SI No 2128 reg 7.

19 *Kapadia v Lambeth LBC* [2000] IRLR 699.

disability, particulars should be sought of that denial. Point out that there should be some basis for it, otherwise the employer may simply 'not admit' that there is a disability and await the evidence supporting the assertion of disability.[20] In the normal such case it is important to obtain medical evidence.[21] If an employer obtains medical reports that purport to deal with the question of whether the person is a disabled person for the purposes of the Act, point out that the issue of disability is one solely for the court or tribunal to decide on all the evidence, including any expert medical evidence. However, medical evidence cannot usurp the evidence of the claimant about how the impairment affects normal day-to-day activities (and whether it actually has a more than minor or trivial effect on ability to carry them out).[22]

1.20 EqA 2010 s6(5) provides the secretary of state with power to issue guidance about the matters to be taken into account in deciding the question of disability under section 6(1) – referred to here as 'the Guidance'. The Guidance (in this context) has a similar status to the Codes of Practice on Employment issued by the Equality and Human Rights Commission. While it does not by itself impose any legal obligations, a court or tribunal must take into account any aspect of the guidance which appears to be relevant.[23]

1.21 The components of disability under the EqA 2010 must be understood in the light of the Guidance:

- impairment;[24]
- substantial adverse effect;[25]

20 Expert evidence, particularly expert medical evidence, is always likely to be necessary in a case where a person's disability is not accepted and may be useful in any event to identify impairments which contribute to disadvantage.

21 An example of what can go wrong at first instance is illustrated by *F v Cleveland Police* [2012] UKEAT 10586/11, 14 March 2012, in which the claimant did not support her claim with medical evidence, materially affecting the ET's view of her credibility.

22 *Abadeh v British Telecommunications plc* [2001] IRLR 23. The adviser should always therefore take a witness statement dealing with the effects of the impairment on the person with disabilities in these cases.

23 The importance of the Code of Practice and Guidance as a source of assistance in identifying whether someone is disabled has been strongly emphasised: see *Goodwin v Patent Office* [1999] ICR 302. However, if the Guidance has misstated or misapplied the legislation, then it should not be followed: see *SCA Packaging Ltd v Boyle* [2009] ICR 1056.

24 See paras A3 to A8 *Guidance on matters to be taken into account in determining questions relating to the definition of disability* ('Guidance').

25 See Guidance section B.

- normal day-to-day activities;[26]
- a long term effect.[27]

Impairment

1.22 The threshold for establishing an impairment is very low, putting aside cases in which the claimant is simply lying about his or her impairment. The Guidance states that it is not necessary to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects that are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.[28] The dictionary definition[29] of impairment is 'the fact of being impaired; deterioration; injurious lessening or weakening' and 'impair' in turn means 'to make worse, less valuable or weaker; to lessen injuriously, to damage, to injure'.[30] Thus an impairment means anything that worsens the condition of the body or mind.[31] A person has a physical impairment if they have 'something wrong with them physically'.[32] In some circumstances, it may also be worth consulting the World Health Organisation publications on disability.

26 See Guidance section D.

27 See Guidance section C.

28 See Guidance para A6.

29 *McNicol v Balfour Beatty* [2002] IRLR 711, CA: 'impairment' has 'its ordinary and natural meaning ... It is left to the good sense of the ET to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects'. An individual who suffers from an impairment, or combination of impairments with different effects, to different extents over periods of time which overlapped can still be regarded as disabled within the statutory definition: *Ministry of Defence v Hay* [2008] ICR 1247.

30 The *Compact Oxford English Dictionary* (2nd edn).

31 The importance of the ordinary meaning is emphasised by para A3 in the Guidance: 'The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'

32 *College of Ripon & St John v Hobbs* [2002] IRLR 185.

1.23 'Mental impairment' covers 'a wide range of impairments relating to mental functioning, including what are often referred to as learning disabilities'.[33] In the case of mental impairments in particular (eg depression) the extent of the effects of the impairment and the length of the effect will therefore be key.[34] There is a close, but not total, correlation between the identification of impairments such as depression and their medical diagnosis. The requirement that a mental impairment should be 'clinically well recognised' has been absent from the definition of disability since 2004 and the early case-law should not be followed in so far as it insists on this aspect. On a practical level, advisers will be concerned about the medical evidence it is necessary to obtain. The EAT helpfully has remarked that a GP,[35]

> treating a condition such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a claimant on one occasion only. Those are matters of assessment for an Employment Tribunal.

The GP records may give a better idea of the effects on the ability to carry out normal day-to-day activities.

Excluded impairments

1.24 Regulations exclude certain impairments which are to be treated as not amounting to an impairment for the purposes of the Act. If an impairment is a consequence of one of the excluded conditions, it may nonetheless constitute a disability if it satisfies the other conditions.[36]

33 Employment Code, Appendix 1 para 6.

34 *J v DLA Piper UK LLP* UKEAT/0263/09: The ET's enquiry concerns principally the effect the impairment has on an employee's day-to-day activities. If the ET finds long-term substantial adverse effect, it normally follows 'as a matter of common sense inference' that the claimant is suffering from a condition which has produced that effect.

35 *Rayner v Turning Point* UKEAT/0397/10.

36 See the DDA case of *Power v Panasonic* [2003] IRLR 151. Depression caused by alcohol abuse was not automatically prevented from being a disability because addiction to alcohol is excluded. The EqA 2010 Guidance states that it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. Thus liver disease as a result of alcohol dependency will count as an impairment (para A7).

1.25 The excluded conditions are:[37]

- addiction to alcohol, nicotine or any other substance;[38]
- a tendency to set fires;
- a tendency to steal;
- a tendency to physical or sexual abuse of other persons;
- exhibitionism;
- voyeurism;[39] and
- seasonal allergic rhinitis.[40]

1.26 Where these tendencies are a consequence of an impairment that would meet the definition of disability the tendency is likely to be excluded following the Guidance issued under the EqA 2010 which summarises, perhaps too broadly, the significance of the case-law in this area:[41]

> The exclusions apply where the tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, or voyeurism constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act. It is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply.
>
> However, if the alleged discrimination was specifically related to the actual disability which gave rise to the excluded condition, the exclusion will not apply. Whether the exclusion applies will depend on all the facts of the individual case.

1.27 Prior to this guidance case-law had held that the condition must not be a freestanding condition in its own right.[42] It emphasised that the central issue will be causation of the less favourable treatment: was it because of the disability or the excluded condition?[43] The new

37 Equality Act 2010 (Disability) Regulations 2010 SI No 2128 from 1 October 2010.

38 However, addiction which was originally the result of administration of medically prescribed drugs or other medical treatment *will* be counted as an impairment (2010 SI No 2128 reg 3(2)).

39 Reg 4(1).

40 However, by reg 4(3) this does not prevent seasonal allergic rhinitis from being taken into account for the purposes of the Act where it aggravates the effect of any other condition. The implication of this exclusion is that all the other conditions are not to be taken into account when they appear to aggravate the effect of any other condition.

41 Guidance para A13.

42 *Murray v Newham CAB* [2003] IRLR 340.

43 See *Edmund Nuttall Ltd v Butterfield* [2006] ICR 77. The claimant's depression constituted a disability but his exhibitionism was an excluded condition. When

guidance reflects that position and does not simply exclude all manifestations of the excluded tendencies.

1.28 Other impairments are excluded by means of stipulating that they have no effect on the ability to carry out normal day-to-day activities. Thus although a severe disfigurement can constitute an impairment, it will be considered to have no substantial adverse effect on the ability to carry out normal day-to-day activities if it consists of either a tattoo (which has not been removed), or a piercing of the body for decorative or other non-medical purposes, including any object attached through the piercing for such purposes.[44]

Deemed impairments

1.29 On the other hand some situations are included. Thus where a child under six years of age has an impairment that does not have a substantial and long-term adverse effect on the child's ability to carry out normal day-to-day activities, the impairment is to be taken to have a substantial and long-term adverse effect on the child's ability to carry out normal day-to-day activities where it would normally have that effect on the ability of a person aged six years or over to carry out normal day-to-day activities.[45] The inclusion of children under six may be of significance when considering disability discrimination by association with such a child with a disability.

1.30 As set out above, a person who is certified by a consultant ophthalmologist as blind, severely sight impaired, sight impaired or partially sighted is deemed to be a person with a disability and hence a disabled person under the Act.[46] Similarly cancer, HIV infection and multiple sclerosis are deemed to constitute disabilities.[47]

an ET finds that there is a legitimate medical impairment underlying an excluded condition, it must consider whether the condition is the reason for the less favourable treatment. If so then disability will not be the reason. If the reason for the less favourable treatment was the excluded condition and not the legitimate impairment, the claim should fail. Applying the *Nuttall* approach, the High Court in *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal, Mr and Mrs T, The National Autistic Society* [2009] EWHC 1842 (Admin), [2009] ACD 70, held that even though physical abuse was a manifestation of T's ADHD it was excluded as an impairment, and the treatment complained of (exclusion) was due to the physical abuse, not the ADHD.

44 2010 SI No 2128 reg 5.

45 2010 SI No 2128 reg 6.

46 2010 SI No 2128 reg 7.

47 EqA 2010 Sch 1 para 6(1).

Substantial

1.31 Whether an effect is substantial is determined by considering:

- What are the actual effects? Are the effects of this impairment more than minor or trivial? If so the substantial condition is satisfied; if they are not
- Would the effects of the impairment be more than minor or trivial if 'medical' 'treatment' had not been in place at the relevant time? This requires consideration of what the effects of the impairment before treatment was sought were? Were these more than minor or trivial? If they were then it is likely that in the absence of treatment they would remain so.

1.32 The Guidance makes clear that the requirement for the effect to be a substantial adverse effect is satisfied if the effect is 'more than minor or trivial'.[48] It can be satisfied by the cumulative effect of two or more impairments.[49] The focus, when considering whether an adverse effect is more than minor or trivial must be on what the individual cannot do, and not on what they can do.[50]

1.33 The employment tribunal (ET) must establish how the individual carries out the activity compared with how they would carry it out if they did not have the impairment. As a rule of thumb, if the difference is more than the type of difference one might expect taking a cross-section of the population, the effects are substantial.[51]

1.34 In looking at the question of whether the effect is substantial the Guidance recommends that the ET looks at the following factors:

- the time taken to carry out an activity;[52]
- the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment;[53]

48 Note it was suggested in *Anwar v Tower Hamlets College* UKEAT/0091/10 that if either of these traits is missing the 'substantial' requirement is not satisfied. This must be doubted, because 'more than minor or trivial' is clearly disjunctive rather than conjunctive.

49 *Ginn v Tesco Stores* UKEAT 0917/05/MAA.

50 *Goodwin v Patent Office* [1999] ICR 302, approved in *Lewisham LBC v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399 at [126]. See also *Vicary v BT* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19.

51 *Paterson v Metropolitan Police Comr* [2007] ICR 1522.

52 Guidance B2.

53 Guidance B3.

- whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect;[54]
- how far a person can reasonably be expected to modify his or her behaviour;[55]
- environmental conditions that may exacerbate or lessen the effect of an impairment. When assessing whether adverse effects of an impairment are substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered.[56]
- whether an impairment is subject to treatment or correction. If so, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'.[57]

Medical treatment

1.35 The Act stipulates that where a person is taking measures to treat or correct an impairment and, but for those measures, the impairment would have a substantial adverse effect on the ability to carry out normal day-to-day activities, then the impairment is to be treated as though it has that effect.[58] Where a person is following a course of treatment[59] on medical advice, in the absence of any indication to the contrary, the employer can assume that the impairment is likely, without treatment (a) to recur and (b) to have a substantial effect (if

54 Guidance B4.

55 Guidance B7: for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

56 Guidance B11: factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress they are under, may have an impact on the effects.

57 Guidance B12.

58 EqA 2010 Sch 1 para 5.

59 Guidance B12 makes clear: 'medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs'.

it had a substantial effect prior to treatment).[60] The ET must judge how the impairment would affect the claimant's day-to-day activities if the medical treatment were stopped at the time of the discrimination. It should not ask itself what the position would be had the treatment never been received at all.[61] Permanent improvements from treatment are not to be excluded from consideration of the effects of the impairment.[62] The Guidance suggests that it would be reasonable to disregard such treatment if the final outcome of treatment cannot be determined, or removal of the treatment would result in a relapse or a worsened condition.[63]

1.36 The Act's approach to treatment does not apply to sight impairments to the extent that they are capable of correction by spectacles or contact lenses.[64]

Substantial adverse effects[65]

1.37 The Guidance suggests that the following should be taken into account in considering whether there is a substantial adverse effect:[66]

(a) physical impairments can result in mental effects and mental impairments can have physical manifestations;
  (i) a person with a physical impairment may, because of pain or fatigue, experience difficulties in carrying out normal activities that involve mental processes;
  (ii) a person with a mental impairment or learning disability may experience difficulty in carrying out normal day-to-day activities that involve physical activity.

60 *Boyle v SCA Packaging Ltd (ECHR intervening)* [2009] UKHL 37 at para 42. In the context of recurrence 'likely' meant that something 'could well happen'. This is an easier test than 'more probable than not'.

61 *Woodrup v Southwark LBC* [2003] IRLR 111.

62 *Abadeh v BT* [2001] IRLR 23.

63 Guidance B13. Counter-intuitive results from the *Woodrup* approach may also be avoided by addressing the commencement of disability status from a date earlier than the relevant act of discrimination.

64 EqA 2010 Sch 1 para 5(3). So the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used). This does not include the use of devices to correct sight that are not spectacles or contact lenses. Guidance B15.

65 Guidance D11–19 gives examples of situations in which it would, and would not, be reasonable to regard the effect as an adverse effect on the ability to carry out normal day to day activities.

66 Guidance D15.

Normal day-to-day activities[67]

1.38 There is no definition in the Act of normal day-to-day activities. The Guidance gives examples of when it would be reasonable to regard something as having an adverse effect on the ability to carry out normal day-to-day activities. However, it states generally:

> In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport,

and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

1.39 Normal day-to-day activities do not include activities that are normal only for a particular individual or small group.[68] The question is whether an activity is normal or abnormal rather than how many people do it.[69] The fact that the activities take place at work makes no difference to whether they are normal day-to-day activities.[70] Participation in professional life may constitute a normal day-to-day activity.[71] However, participation in a specific profession will be unlikely to be a normal day-to-day activity without more.[72]

1.40 The most effective way of considering any situation that arises at work is whether it is constituted by activities that would commonly be regarded as normal day-to-day activities.[73] Thus if a person has a difficulty in communicating that is more than minor or trivial, it

67 Guidance Section D.

68 Guidance D4.

69 Guidance D5. Thus the fact that only some groups of people (rather than the majority of the population) perform night work does not stop night working being a normal day-to-day activity: see *Chief Constable of Dumfries and Galloway Constabulary v Adams* UKEATS/0046/08.

70 The ET should take account of the effect on an employee of circumstances which only arise at work (*Law Hospital Trust v Rush* [2001] IRLR 611 and *Cruickshank v VAW Motorcast* [2002] IRLR 24). It is sufficient if there is 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life' (see *Chacón Navas* para 1.11 above).

71 *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763.

72 *Chief Constable of Lothian and Borders Police v Cumming* EATS/0077/08.

73 See Guidance D10.

is highly likely that it will affect all activities whether carried out at work or not. It does not matter that the work requires a high level of communication at times, at other times it will only require ordinary communication. Thus the fact that the person does not tend to communicate when away from work (having modified his or her behaviour to cope with the effects of the impairment) will make no difference. It is only highly specialised activities that might be excluded. Thus if the impairment only ever had an impact on the speed with which the claimant could play virtuoso violin, it would not be regarded as having the substantial adverse effect.[74]

1.41 Normal day-to-day activities include activities required to maintain personal well-being or ensure personal (or other people's) safety. The ET should consider whether the effects of the impairment have an impact on whether the person is inclined to do or neglect basic functions (eg eating, drinking, sleeping, keeping warm or personal hygiene) or to exhibit behaviour that puts the person or other people at risk.[75]

1.42 Examples from the case-law of normal day-to-day activities include matters such as putting on makeup and[76] travelling by underground train.[77]

Long-term effects

1.43 To determine whether a person is disabled, a long-term effect of an impairment is one:

- that has lasted at least 12 months; or
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
- that is likely to last for the rest of the life of the person affected.[78]

1.44 'Likely' in this context means 'it could well happen', rather than 'more probable than not' or 'a greater than 50 per cent probability'.[79] However, the time at which likelihood is assessed is of the time when the act of discrimination occurs rather than when the ET hears the claim.[80]

74 See also Guidance D8–D9.
75 Guidance D16.
76 *Ekpe v Metropolitan Police Comr* [2001] IRLR 605.
77 *Abadeh v BT* [2001] IRLR 23.
78 EqA 2010 Sch 1 para 2.
79 *SCA Packaging Ltd v Boyle* [2009] ICR 1056 paras 2 and 52 and see C3 Guidance.
80 Guidance C4.

1.45 When considering the length of time for which the effects have lasted, the effects of an illness or condition likely to develop or which has developed from another illness or condition can be part of the assessment of whether the effect of the original impairment is likely to last or has lasted at least 12 months.[81]

1.46 A person who has a disability has the protected characteristic of 'disability' and, where people have the same disability, they share the protected characteristic of disability. Section 6(4) of the EqA 2010 makes it clear that for all purposes (except the transport and certain housing provisions) a person will have the protected characteristic of disability even if they no longer have that disability.

Recurring or fluctuating effects

1.47 A substantial adverse effect is treated as continuing to have that effect if it could well happen that it would recur.[82] The prospects of recurrence must be ascertained as at the time of the act of discrimination.[83]

1.48 Four questions can be asked:[84]

- Was there at some stage an impairment that had a substantial adverse effect on C's ability to carry out normal day-to-day activities?
- Did the impairment cease to have such an effect and, if so, when?
- What was the substantial adverse effect?
- Is that substantial adverse effect likely to recur?

Past disability

1.49 A person who has a disability, or who had a disability in the past,[85] or who is perceived to have a disability or is associated with a disabled

81 *Patel v (1) Oldham MBC, (2) The Governing Body of Rushcroft Primary School* [2010] IRLR 280.

82 Guidance C5.

83 *McDougall v Richmond Adult Community College* [2008] IRLR 227: the Court of Appeal stated that the existence of a disability should be assessed, especially when determining the 'likelihood' of a substantial adverse effect lasting for 12 months, recurring or occurring in the future at the date of the act of discrimination.

84 *Swift v Chief Constable of Wiltshire Constabulary* [2004] IRLR 540: C must show that the particular effect is likely to recur on at least one occasion during C's life. C can be disabled under the Act even if the condition is not likely to recur immediately. Note that in other respects *Swift* depended on *Latchman v Reed Business Information Ltd* [2002] ICR 1453, which was overruled in *SCA Packaging Ltd v Boyle* [2009] ICR 1056.

85 EqA 2010 s6(4).

person is protected against discrimination. The EqA 2010 does not on its face extend to cases where the discriminatory conduct occurs because the person is perceived to have had a disability in the past. Section 6(4) does not expressly provide this. However, such treatment is because of the characteristic of disability and hence, taking into account the breadth of interpretation of the Directive 2000/78 in *Coleman*,[86] is actionable.

Progressive conditions

1.50 Where a person has a progressive condition that is 'likely' in his case to change over time so as substantially and adversely to affect ability to carry out normal day-to-day activities, then they are taken to have an impairment that has a substantial adverse effect before that effect is fully manifested.

1.51 Claimants will have to establish three matters:

- they have a condition; and
- as a result of the condition, they have an impairment that has or had some effect on their day-to-day activities; and
- the condition is likely[87] to result in an impairment having a substantial adverse effect.[88]

1.52 Therefore the impairment is treated as having a substantial adverse effect from the time it first has 'an effect' on the person's ability to carry out normal day-to-day activities. Whether a meaningful difference between an impairment caused by a progressive condition and an impairment that results from medical treatment for the condition can be drawn will depend on the particular facts of the progressive condition. However, an impairment will arise as a 'result' of a condition if it follows in the ordinary course of events from the disease. The likely substantial effect does not need to be of the same nature as the first insubstantial effect. In one case the claimant suffered minor incontinence resulting from a standard response to prostate cancer (a surgical procedure). The 'progressive condition' requirements were satisfied and an ET finding to the contrary erred in law.[89]

86 *Coleman v Attridge Law* C-303/06 [2008] IRLR 722 (ECJ).

87 'Likely' means 'it could well happen': *SCA Packaging Ltd v Boyle* [2009] ICR 1056. The suggestion that likely meant more likely than not, made in the earlier EAT case of *Mowat-Brown v University of Surrey* [2002] IRLR 235 although not explicitly overruled in *Boyle*, must be regarded as inconsistent with this approach and implicitly overruled in this respect.

88 EqA 2010 Sch 1 para 8.

89 *Kirton v Tetrosyl* [2003] ICR 1237 [2003] IRLR 353.

Gender reassignment

1.53 The Employment Code is a particularly important source of information as the concept of gender reassignment is different to the previously used concepts in this area.[90] People who are proposing to undergo, are undergoing or have undergone a process (or part of a process) in order to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of 'gender reassignment'.[91] A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.[92] As such, a woman making the transition to being a man and a man making the transition to being a woman both share the protected characteristic of gender reassignment, as does a person who has only just started out on the process of changing his or her sex and a person who has fully completed the process.

1.54 The Code at para 2.23 gives the essential aspect of the characteristic: 'Under the Act "gender reassignment" is a personal process, that is, moving away from one's birth sex to the preferred gender, rather than a medical process.'

1.55 Thus 'the reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.'[93] The Act requires that a person should have at least proposed to undergo gender reassignment. It does not require such a proposal to be irrevocable. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.[94] So the question of whether a person has this characteristic may depend on whether the person has 'proposed' to undergo gender reassignment. The Code assists on this point, stating that protection is provided where, as part of the process of reassigning their sex, someone is driven by their gender identity to cross-dress, but not where someone chooses to cross-dress for some

90 See para 2.21. During the passage of the Act, there was much debate on the proper definition of 'gender reassignment'. The Code mirrors much of the Ministerial statements that were made in parliament about the new approach.

91 EqA 2010 s7(1).

92 EqA 2010 s7(2).

93 Employment Code para 2.24.

94 Employment Code para 2.25.

other reason.[95] Note that there is no requirement for the employer to know that the person has the characteristic.[96]

1.56 Once a person can show that they have reached a definitive position and are 'proposing' to undergo gender reassignment, they are protected under the Act. Nevertheless, the Act does not require that person to have reached a decision that they will transition away from their birth sex and never turn back. There are many ways in which a person may show that they have reached a definitive position and are 'proposing' gender reassignment:

- starting to dress or behave like someone who is changing their gender or living in the new sex;
- making their intention known to someone, even if no further steps are taken at that point;
- cross-dressing, even where this is intermittent;
- attending counselling sessions related to the medical processes of gender reassignment.

1.57 The definition of 'gender reassignment' goes much wider than the precursor concept that required consideration of complex practical issues arising during the process of gender reassignment.[97]

1.58 The Employment Code examples point to a broad interpretation of the characteristic. For example, a person who was born female decides to spend the rest of life as a man. He starts to live as a man and decides not to seek medical advice as he successfully passes for a man without the need for any medical intervention. He would be afforded protection under the Act.[98] People who have started a gender reassignment process but then withdraw still have the protected characteristic because they have undergone part of a process. So, by way of example from the Employment Code, a person born male lets her friends know that she intends to reassign. She attends counselling sessions to start the process but decides to go no further. Although she no longer intends or proposes to undergo reassignment, she will remain protected against discrimination based on her

95 Employment Code para 2.26.

96 Employment Code para 2.27. However, it is plain that in certain situations alleged to involve direct discrimination it may not be possible to argue any causal link between the characteristic and the treatment if the employer knows nothing about the characteristic and it played no role in the decision-making process.

97 In effect cases such as *Croft v Royal Mail Group plc* [2003] ICR 1425, in so far as they deal with the issue of the nature of the protected characteristic are now not to be used.

98 See example in Employment Code para 2.24.

gender reassignment characteristic because she has undergone part of a process to change attributes of sex.

1.59 As with other protected characteristics (with the exception of marriage and civil partnership and pregnancy/maternity), a person is protected against direct discrimination and harassment because they are perceived to be proposing, undergoing or having undergone the process of gender reassignment or because they are associated with someone proposing, or undergoing or who has undergone gender reassignment. Therefore, where someone is a transvestite but is not driven by their gender identity to cross dress, they will be protected from direct discrimination and harassment if they are perceived to be proposing to undergo gender reassignment. Similarly, if someone were directly discriminated against because they lived with a transsexual, they too would be protected under the characteristic of gender reassignment. In other cross-dressing cases the reason for the direct discrimination may be the protected characteristic of sex, or of sexual orientation, whether perceived, associative or actual.[99]

1.60 The existence of a condition known as 'Gender Dysphoria' or 'Gender Identity Disorder' (GID) means that it is possible sometimes that the person will be a person with a disability if the GID has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities. Hence the employer may need to make adjustments and avoid other forms of discrimination in relation to the person in respect of the additional characteristic of disability.[100]

1.61 The Code makes two other points about this characteristic. Where a person holds a gender recognition certificate they must be treated according to their acquired gender.[101] Transsexual people 'should not be routinely asked to produce their gender recognition certificate as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If an employer requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation'.[102]

99 Constructing the hypothetical comparator to help tease out the operative 'reason why' requires particular care, so as to avoid taking into account features associated with a different protected characteristic. For a helpful starting point in the context of an employer's dress code see *Smith v Safeway plc* [1996] ICR 868.

100 See Employment Code para 2.28.

101 Gender Recognition Act (GRA) 2004; Employment Code para 2.29.

102 Employment Code para 2.30.

Marriage and civil partnership

1.62 Persons who are married or in a civil partnership share the same protected characteristic of 'marriage and civil partnership'.[103]

1.63 Marriage is not defined in the Act but will cover any formal union of a man and a woman that is legally recognised in the United Kingdom as a marriage. A civil partnership refers to a registered civil partnership under the Civil Partnership Act 2004, including those registered outside the United Kingdom.

1.64 Only people who are actually married or in a civil partnership are protected against discrimination on this ground so the status of being unmarried or single is not protected. This asymmetrical protection, as is the case with disability, originates in the need to prohibit the historic discrimination that occurred against married women. Only people who are in fact married or civil partners are protected. So, people who are co-habiting but not legally married or civil partners are not protected, even if they are engaged to be married or are planning to become civil partners.[104] Equally, a person who is divorced or whose civil partnership has been dissolved is not protected.

1.65 Therefore, if an employer refuses to promote a woman who is about to be married, this will not be discrimination because of marital status. However, it may be an act of discrimination because of sex if the dismissal is based on sexual prejudices held by the employer.[105] Similarly, discrimination against a person who is about to enter into a civil partnership would not be unlawful discrimination because of the protected characteristic of marriage and civil partnership. However, it may well amount to unlawful discrimination because of sexual orientation. While discrimination against people because they are parents would not be direct discrimination because of marriage and civil partnership, it may constitute indirect discrimination, eg on gender grounds.[106]

1.66 Unlike the other protected characteristics discrimination based on association or perception of this characteristic is not prohibited.[107] Only discrimination because the person is actually married or in a civil partnership is protected against in the Act: 'It is the status that is

103 EqA 2010 s8. So a married man and a woman in a civil partnership share the protected characteristic of marriage and civil partnership: s8(2)(b).

104 EqA 2010 s13(4).

105 *McLean v Paris Travel Service Ltd* [1976] IRLR 202.

106 *Hurley v Mustoe* [1981] ICR 490.

107 The same is true of pregnancy and maternity. See para 7.65.

protected. However, the fact that I am married or civil partnered to A rather than B can, it seems, form the basis for a claim.'[108]

1.67 Note that there is no remedy under the Act for harassment because of marriage and civil partnership.[109]

Race

1.68 Race includes colour, nationality and ethnic or national origins.[110] The Act does not give an exhaustive list.[111] The term 'race' itself has not been the subject of judicial definition.

1.69 Ethnic origins are determined by reference to the individual's ethnic group. For a group to be an ethnic group it must regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.[112] It must have:

- a long, shared history, the memory of which the group keeps alive and that consciously distinguishes it from other groups; and
- a cultural tradition of its own including family and social customs and manners, often, but not necessarily, associated with religious observance.

1.70 In addition, there are other relevant characteristics, one or more of which will commonly be found and will help to distinguish the group from the larger community, either:

- a common geographical origin or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to the group;
- a common literature peculiar to the group;
- a common religion different from that of the neighbouring groups or from the general community surrounding it; and/or
- a sense of being a minority or being an oppressed or dominant group within a larger community.

1.71 The definition given by the House of Lords needs revisiting in the light of the development of international law on race and in particular the inclusion of 'descent' as an aspect of race. This is because 'ethnic

108 *Dunn v The Institute of Cemetery and Crematorium Management* UKEAT/0531/2 December 2011; but see *Hawkins v Atex Group Ltd* [2012] IRLR 807 at paras 21–23.

109 EqA 2010 s26.

110 EqA 2010 s9.

111 See chapter 19 for the international materials which are available to assist in the interpretation of the term 'race'.

112 *Mandla v Lee* [1983] ICR 385. Sikhs are such an ethnic group.

origins' may include the concept of lineage or descent.[113] Discrimination based on genealogical descent from a particular ethnic group has been held capable of forming the basis of direct discrimination because of race (that is, ethnic origins).[114] A pub putting up a 'no travellers' notice could discriminate indirectly on the grounds of ethnic origin against Roma.[115] Where a characteristic is 'indissociable' from the protected characteristic, discrimination on the ground of that characteristic will be because of the protected characteristic.[116]

1.72 The significant characteristics of the racial group in question may be both ethnic and religious. Muslims are not a distinct ethnic group.[117] Refusal to permit a religious observance or a traditional practice of a religious group not amounting to an observance could amount to unlawful indirect racial discrimination.[118] Information will need to be provided on the statistical ethnic/racial makeup of the particular religious group.

1.73 Rastafarians, although a separate group with identifiable characteristics, have yet to establish a separate identity by reference to their ethnic origins.[119] Neither the English nor the Scots have the requisite racial element required for recognition as an ethnic group[120] although they may be captured under 'national origins'. Irish

113 See *Mandla* para 11.

114 *R (E) v The Governing Body of JFS* [2010] 2 WLR 153, where the reference to the international material on descent in ICERD was made, but the broader point was not conclusively determined. The SC concluded that there had been direct discrimination on the ground of ethnic origins because E had been refused admission to the school due to a lack of matrilineal connection to Orthodox Judaism. E's ethnic origins encompassed his paternal Jewish lineage and his descent from an Italian, Roman Catholic mother who had converted to Judaism but under the auspices of a non-Orthodox synagogue.

115 *CRE v Dutton* [1989] IRLR 8. Although the words 'Traveller' and 'Gypsy' were ambiguous, the latter constituted a racial group if defined in the narrow sense of 'Romanies'. This was the case if there remained a discernible minority of the group which adhered to the group even though a substantial proportion of it had become assimilated in the general public. NB, if the same notice were to appear today the case might have to be approached on the basis that the 'no travellers' sign was a provision criterion or practice excluding new age travellers as well as the ethnic groups Irish Travellers and Roma.

116 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783 at para 32, thus treatment because of the characteristic will be treatment because of the protected characteristic.

117 *Nyazi v Rymans Ltd*, 10 May 1988, EAT. They are of course protected due to the provisions relating to religion and belief.

118 *Hussain v J H Walker Ltd* [1996] IRLR 11.

119 *Crown Suppliers (PSA) Ltd v Dawkins* [1993] ICR 517.

120 *BBC Scotland v Souster* [2001] IRLR 150.

travellers constitute an ethnic group,[121] having their own language 'Shelta', beliefs and social customs.

Nationality and national origins

1.74 'National origins' refers only to a particular place or country of origin.[122] There is no discrimination because of national origins where the complainant is treated less favourably on the grounds that he was born abroad, without reference to any particular place or country of origin, notwithstanding that a person born in the United Kingdom would not have been treated in the same way.[123] There are clearly identifiable separate nations of the English and the Scots. Therefore there are different national origins.[124] While 'Welsh' is a group defined by national origin, the group could not be further sub-divided into Welsh speakers and English speakers.[125] The Code makes the point that national origins 'must have identifiable elements, both historic and geographic, which at least at some point in time indicate the existence or previous existence of a nation'.[126]

1.75 Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins.[127] If the precise nationality status is ever relevant specialist nationality books can be consulted.[128] However, for the most part the precise nationality will not be relevant as the perceived nationality or attributed nationality will be sufficient to show that the characteristic of race is involved under the Act.

121 *O'Leary v Allied Domecq Inns Ltd* CL 950275, July 2000 (unreported).

122 *Tejani v The Superintendent Registrar for the District of Peterborough* [1986] IRLR 502.

123 See *MOD v Elias* [2006] 1 WLR 3213. If discrimination is based on 'born abroad', although indirect discrimination its justification must be scrutinised rigorously.

124 *Northern Joint Police Board v Power* [1997] IRLR 610. The Employment Code now makes the point that 'A person's own national origin is not something that can be changed, though national origin can change through the generations' (Employment Code para 2.45).

125 *Gwynedd County Council v Jones* [1986] ICR 833.

126 'For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a "nation" that was never a nation state in the modern sense.' Employment Code para 2.43.

127 Employment Code para 2.38 and at para 2.44: 'National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries.'

128 Such as Laurie Fransman QC, *Fransman's British Nationality Law* (Bloomsbury Professional, 3rd edn, 2011).

'Racial group' and 'Race'

1.76 A racial group is a group of people who have or share a colour, nationality or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act.[129] References to someone's racial group include any racial group into which he falls and is therefore inclusive in its scope. If a racial group comprises two or more distinct racial groups it can still form a particular racial group. For example:

- the concept of 'race' includes 'African' even though it is possible that many different colours, ethnic groups and nationalities exist in Africa;[130]
- the words 'bloody foreigners' and 'get back to your own country' can racially aggravate an offence in criminal law.[131] Those who are not of British origin constitute a racial group, as do 'foreigners'. Racial groups can be defined by exclusion so discrimination against someone who is not English or who is not white or who is not of European descent is prohibited;[132]
- a Nigerian may be defined by colour, nationality, ethnic or national origin.[133]

Caste

1.77 Section 9(5) of the EqA 2010 enables the Secretary of State to amend the Act by way of secondary legislation to add 'caste' to the current definition of 'race' or to provide for exceptions to provisions of the Act so as to make particular provisions apply or not to apply in respect of 'caste'. Existing legislation has not marked the seriousness of caste discrimination by giving it a specific express status. Some have felt that the concept of 'caste' does not sit neatly into the established concepts of 'race' or 'religion or belief'. The National Institute of Economic and Social Research had conducted a study of the extent of caste discrimination in the United Kingdom. [134] The Government

129 Employment Code para 2.46 and EqA 2010 s9(3).

130 *R v White* [2001] EWCA Crim 216.

131 *R v Rogers* [2007] UKHL 8.

132 *Orphanos v Queen Mary College* [1985] IRLR 349 and Employment Code para 2.49.

133 Employment Code para 2.47.

134 Hilary Metcalf and Heather Rolfe, *Caste discrimination and harassment in Great Britain*, December 2010: www.homeoffice.gov.uk/publications/equalities/research/caste-discrimination/caste-discrimination?view=Binary (accessed 12 March 2012).

response indicates that it is likely to bring in legislation to deal with this.[135]

1.78 The Employment Code is silent on caste. However, the Explanatory Notes to the Act state that the term 'caste' denotes a hereditary, endogamous (that is, marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. 'Caste' is generally, but not exclusively, associated with South Asia and its diaspora (particularly India). It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Muslim, Christian or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed, 'untouchable') are known as Dalit.

1.79 It is suggested that for the most part caste is within the concept of race. That term must be interpreted to give effect to Directive 2000/43. It, in turn, gives effect to the international law on discrimination in ICERD.[136]

Religion or belief

1.80 Religion or belief includes any religion and any religious or philosophical belief.[137] It also includes a lack of any such religion or belief so that atheists, agnostics and humanists are all protected.[138] Therefore, Christians are protected against discrimination and non-

135 www.homeoffice.gov.uk/publications/equalities/research/caste-discrimination/caste-discrimination-summary?view=Binary (see p 4/5 for the government's conclusions). 'The study found evidence of caste discrimination and harassment in Britain in areas relevant to the Equality Act 2010, namely in work ... The consequences of these could be severe for the victims ... Because some religions are almost wholly low caste, some cases of caste discrimination and harassment may be covered by religious discrimination provisions of the Equality Act 2010. However, for caste discrimination and harassment, religious provisions are likely to be less effective than caste-specific provisions and are unlikely to provide protection for members of a mixed-caste religion (including many Hindus, Sikhs, Christians and Muslims) or for atheists ... The Government might tackle caste discrimination and harassment through: extending anti-discrimination legislation to cover caste (ie using the power in the Equality Act 2010 to make caste an aspect of race); through educative routes ... Education without legislation could be effective in the public sector, but is unlikely to be so in the private sector.'

136 See para 1.79 and chapter 19.

137 EqA 2010 s10 and Employment Code para 2.55.

138 EqA 2010 s10(1), (2).

Christians are protected against discrimination because they are not Christians, whether they have another religion, another belief or no religion or belief.

1.81 The Employment Code states that the 'meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion)'.[139]

1.82 As with the other protected characteristics (except for marriage and civil partnership and pregnancy/maternity), a person is protected against direct discrimination and harassment because of their religion or belief, their perceived religion or belief or because of the religion or belief of someone they associate with.

Religion

1.83 The Employment Code states that 'Religion' means any religion and includes a lack of religion. The term 'religion' 'includes the more commonly recognised religions in the United Kingdom such as the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for the courts to determine what constitutes a religion.'[140]

1.84 A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.[141]

1.85 How will the courts determine whether something is a religion? The religion must have a clear structure and belief system.[142] Scientology has been accepted as a religion by the European Commission

139 Employment Code para 2.52.

140 Employment Code para 2.53.

141 Employment Code para 2.54. The ECtHR or EComHR have found the following to be religions: Scientology (*X and Church of Scientology v Sweden* 16 D & R 68 (1978)), the Moon Sect (*X v Austria* 26 D & R 89 (1981)), the Divine Light Zentrum(*Omkarananda and the Divine Light Zentrum v UK* 25 D & R 105 (1981)), Druidism (*Pendragon v UK* (1998) EHRR CD 179) and Krishna Consciousness (*ISKCON v UK* 76A D&R 90 (1994)).

142 This is the main limitation according to the Act's Explanatory Notes. The ACAS Guidance issued under the previous legislation, the Employment Equality (Religion or Belief) Regulations 2003 SI No 1660, stated that a court or tribunal would be likely to consider things such as 'collective worship, a clear belief system and a profound belief affecting the way of life or view of the world'. Denominations or sects within a religion can be considered to be a religion or belief.

on Human Rights.[143] On the other hand, the European Human Rights Commission invoked the need to have clear evidence of the rules and structure to rule inadmissible a claim that 'Wicca' was a religion. The claimants could not establish a clear structure for the belief system.[144]

Religious belief or other belief

1.86 To qualify for protection a belief must have sufficient cogency, seriousness, cohesion and importance and be worthy of respect in a civilised society.[145] 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.[146]

1.87 The Code makes clear that a 'belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism'.[147]

1.88 A distinction must be drawn between beliefs which qualify for protection and opinions which are simply 'based on some real or perceived logic or based on information or lack of information available'.[148] The latter will not be protected against discrimination. The following test can be applied:[149]

- Is the belief genuinely held?
- Is it a belief and not an opinion or viewpoint based on the present state of information available?

143 *X and Church of Scientology v Sweden* (1979) 16 DR 68; UK courts declined to recognise Scientology as a religion, although Scientology would be likely to qualify for protection under the Act as a philosophical belief, even if not a religion or a religious belief.

144 *X v United Kingdom* 11 DR 55 (1977), EComHR.

145 See *Campbell v UK* (1982) 4 EHRR 293.

146 Employment Code para 2.56.

147 Employment Code para 2.57.

148 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29. A magistrate who objected to adoptions involving same sex adoptive parents could not claim protection. He acknowledged that his objections to same sex adoptive parents were not based on matters of principle, but on an absence of cogent scientific evidence showing that same sex adoptions were in the interest of the child. How far domestic law is compatible with ECtHR cases is questionable. See *Eweida v United Kingdom* (48420/10) [2013] ECHR 37, para 81. However, systemic lack of knowledge (agnosticism) can be distinguished from ignorance of particular facts.

149 See *Grainger Plc v Nicholson* [2010] IRLR 4, where the claimant's beliefs concerning man-made climate change were philosophical beliefs and protected. Now see Employment Code para 2.59.

- Is it a belief as to a weighty and substantial aspect of human life and behaviour?
- Does it attain a certain level of cogency, seriousness, cohesion and importance?
- Is it
  - worthy of respect in a democratic society,
  - not incompatible with human dignity and
  - not in conflict with the fundamental rights of others?[150]

1.89 Thus the belief 'need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world'.[151] However, as the example in the Code illustrates, there is an objective judgment to be made as to conflicts with the fundamental rights of others etc that may override the subjective value to the claimant of the beliefs. Thus a woman who believes in racial superiority and makes the most important decisions in her life based on that philosophy will nonetheless not have belief as a protected characteristic.[152]

1.90 A belief based on political philosophy or on science is capable of qualifying for protection on this analysis. Political beliefs should not be excluded from protection[153] and even one-off beliefs, not shared by others, could be protected so long as the five-part test would otherwise be met.

1.91 However, caution needs to be exercised in respect of claims based on philosophical beliefs. The claimant must be prepared to adduce evidence to establish the genuineness of the belief (if this is in doubt), and to establish that the action complained about was done because of this belief. Cross-examination is likely to be needed on both of those areas. This is a different situation to that of a litigant relying

150 So a belief in the racial superiority of a particular racial group would not constitute a 'belief' under the Act for these reasons.

151 Employment Code para 2.58.

152 This approach is consistent with *Jersild v Denmark* (A/298) (1995) 19 EHRR 1; and the human rights cases dealing with abuse of the right of free expression for race hate purposes, see for example *Hennicke v Germany* Application No 34889/97. Note also in *Redfearn v United Kingdom* (47335/06) [2012] ECHR 1878, the ECtHR declared mainfestly unfounded the claim based on Article 9 ECHR, as disclosing no appearance of violation of Article 9.

153 There is a strong argument that they must be covered (a) due to the provisions of the Social Charter (see chapter 19) and (b) because they were initially excluded expressly under the precursor legislation. However, an amendment to the Employment Equality (Religion or Belief) Regulations 2003 under the Equality Act 2006 removed the requirement that beliefs needed to be 'similar' to religious beliefs. Consequently, any genuine philosophical belief, including political beliefs, must be covered, as many political beliefs meet the *Nicholson* test.

upon a religious belief. To establish a religious belief, a litigant need only show that he is an adherent to a particular religion.

Manifestation

1.92 The question of when a characteristic is indissociable from a protected characteristic is particularly sharp in the case of religion and belief. Some beliefs require behaviour. If the behaviour is indissociable from the belief, discrimination in respect of the behaviour will be discrimination because of the belief. However, the Employment Code says:[154]

> While people have an absolute right to hold a particular religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) or the right to freedom of expression (Article 10).

Whilst this may be right in terms of the HRA 1998, it cannot be taken to be determinative of any aspect of belief discrimination.

1.93 Considerable case-law has examined the difference between freedom to hold a belief and freedom to express or 'manifest' a belief in the human rights context. This is because while in the ECHR, the freedom to hold a belief is absolute, the freedom to manifest a belief is qualified so that interference with that freedom is capable of being justified.[155] However, this distinction does not exist in the Act. Thus if the employer treats a Muslim less favourably for wearing hijab, than it treats a non-Muslim who also wears a head scarf, this is simply direct discrimination.[156] The question of whether one is dealing with a manifestation of a belief or a belief itself can never be determinative of whether the treatment is direct or indirect discrimination.

1.94 The Code says:[157]

> Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount

154 Employment Code para 2.60.

155 *Kurtulmus v Turkey* [2006] ECHR II-297.

156 See *Azmi v Kirklees* BC [2007] ICR 1154 at para 76.

157 Employment Code para 2.61.

to unlawful discrimination; this would usually amount to indirect discrimination.

1.95 Unfortunately the reason why it would usually amount to indirect discrimination needs more explanation than the Code gives to it. It is also not clear whether this analysis can be upheld in the light of the Supreme Court's judgment in *Patmalniece*.[158] There is not always a clear distinction between a religion or belief and the manifestation of that religion or belief. Thus if a woman believes that a woman should cover her face in the presence of unrelated adult men, it is a belief with a behavioural content. The woman could not be said to hold it if she did not attempt at least some times to follow that content by her behaviour. It could be argued that in such behavioural beliefs the behaviour is 'indissociable' from the characteristic of belief.

1.96 However, in practice most manifestations of religious or other beliefs are affected by neutral rules and hence the form of discrimination is indirect. For example if there is a rule banning the wearing of jewellery at work, this may prevent certain people with beliefs exhibiting the signs of those beliefs. So the rule may in effect prohibit the wearing of a particular garment or having a particular hair style.[159] Notoriously this question of manifestation has arisen from the interface of certain religious beliefs and sexuality. If a claimant is dismissed for refusing to comply with his employer's (neutral) Equal Opportunities Policy by refusing to work with homosexual couples, that is a dismissal for refusing to comply with the Equal Opportunities Policy, and is not because of his beliefs.[160]

1.97 The ECtHR in *Eweida v United Kingdom*[161] accepted that in such cases the right to manifest religious belief was in issue but held that such neutral rules are capable of being justified. The Court accepted that the prohibition on wearing a cross amounted to an interference with Ms Eweida's right to manifest her religion. The same was true of the requirement on Ms Ladele to act as registrar on civil partnerships and the requirement on Mr McFarlane to counsel same sex couples. The Court looked at whether the United Kingdom was in breach of its positive obligations arising out of Article 9 to secure that right in domestic law (ie discrimination law). The lack of specific protection

158 [2011] UKSC 11.

159 Eg the wearing of dreadlocks by Rastafarians: *Harris v NKL Automotive Ltd* UKEAT/0134/07.

160 *McFarlane v Relate Avon Ltd* [2010] ICR 507 and see *Eweida v United Kingdom* [2013] ECHR 37 paras 107–110; *Islington LBC v Ladele* [2010] ICR 532 and paras 102–106 of the ECtHR judgment in *Eweida*.

161 [2013] ECHR 37.

for Article 9 rights before the ETs was not conclusive as the uniform code and the other rules applied to the other claimants were examined in detail. The aims in each case were also considered legitimate. In Mr McFarlane and Ms Ladele's cases in particular the aims of promoting equal treatment were considered legitimate. The ECtHR then considered whether the code and rules were proportionate in each case. In *McFarlane* and *Ladele* they were considered proportionate to that aim. However, in Ms Eweida's case the aim of BA was to communicate a certain image of the company and to promote recognition of its brand and staff and the ban was not proportionate. It was not a means of protecting the rights of others. The right to manifest her religion was a fundamental right and there was no evidence that previously allowed religious symbols had affected the corporate image.[162]

1.98 There is a specific rule in respect of the wearing of turbans by Sikhs on construction sites, which provides that where an employer requires a Sikh wearing a turban to wear a safety helmet on a construction site, this is to be treated as unjustifiable and so unlawful indirect race discrimination.[163]

Sex

1.99 The protected characteristic of sex refers to a man or a woman[164] so that a reference to persons who share the protected characteristic of sex is a reference to persons of the same sex – that is, men or women.[165] Consequently, a comparator for the purposes of showing unlawful sex discrimination will be a person of the opposite sex. This is a new provision as the Sex Discrimination Act 1975 did not define 'sex' as meaning a reference to a man or a woman. Sex does not include gender reassignment, sexual orientation or pregnancy and maternity which are all dealt with separately.[166]

Pregnancy and maternity

1.100 Although pregnancy and maternity is listed as one of the 'protected characteristics' this characteristic is not further defined in Chapter 1 of Part 2.[167] It receives treatment in Chapter 2 of Part 2, which deals with

162 See paras 92–95 of the judgment.
163 Section 12 of the Employment Rights Act 1989 remains in force.
164 See Employment Code para 2.62.
165 EqA 2010 ss11 and 212(1).
166 Employment Code para 2.63.
167 EqA 2010 s4.

'prohibited conduct'. Discrimination based on pregnancy or maternity is afforded particular protection under European law, in that a woman subjected to such discrimination during the protected period is not required to compare her treatment with a man or with someone who did not have the characteristic of pregnancy/maternity.[168]

1.101 The protected period, broadly speaking, starts when a woman becomes pregnant and finishes at the end of her statutory maternity leave.[169] Sections 17 and 18 of the Act prohibit discriminatory 'unfavourable treatment' based on the protected characteristic of pregnancy and maternity, as opposed to 'less favourable treatment'.[170] So no comparison is required. The protected characteristic of pregnancy and maternity is tied up with the way in which discrimination is defined in the Act.

1.102 The Code deals with pregnancy and maternity in Chapter 8. However, some points are worth noting at this stage. First, for pregnancy and maternity discrimination, the unfavourable treatment must be because of the woman's own pregnancy. However, the Code implies that a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.[171] If a man is treated less favourably because of his partner's pregnancy, then this could amount to sex discrimination by association. For example if a man and a woman expecting a child work for the same employer and bring to the attention of the employer that the woman needs to sit down at work due to her pregnancy and the man is dismissed for raising this as a health and safety issue, he could claim sex discrimination because of his association with the pregnant woman. However, the EAT rejected this argument in the case of *Kulikaoskas v MacDuff Shellfish*.[172] The Court of Session has now referred the question of whether this treatment is prohibited under the Directive to the CJEU.

1.103 Second, unfavourable treatment will only be unlawful if the employer is aware the woman is pregnant. The employer must know, believe or suspect that she is pregnant – whether this is by formal notification or through the grapevine.[173]

168 *Webb v EMO Air Cargo (UK) Ltd* [1994] ICR 770.

169 See para 7.57.

170 These seem to be compatible with the specific prohibition against discrimination based on pregnancy and maternity in the Equal Treatment Directive (as amended – 2002/73/EC).

171 Employment Code para 8.16.

172 [2011] ICR 48.

173 Employment Code para 8.18.

1.104 Third, if a woman is subjected to discrimination based on pregnancy/maternity after the end of the protected period (or before the protected period, for example, where she tells her employer that she intends to have a baby), then this will be considered as sex discrimination and she will then have to rely on the ordinary provisions of direct and indirect discrimination and the comparative exercises required by those provisions. If she experiences unfavourable treatment after the end of the protected period, but which results from a decision taken during it, the conduct will be regarded as having occurred during the protected period.[174]

1.105 Fourth, indirect discrimination and harassment[175] do not apply to the protected characteristic of pregnancy and maternity. Therefore, a woman who is indirectly discriminated against or harassed because of pregnancy and maternity will need to bring her claims as indirect sex discrimination and sexual harassment.

Sexual orientation[176]

1.106 Sexual orientation is defined[177] by reference to a person's sexual orientation towards:

- persons of the same sex (ie the person is a gay man or a lesbian);
- persons of the opposite sex (ie the person is a heterosexual);
- persons of either sex (ie the person is bisexual).

1.107 Sexual orientation relates to how people feel as well as their actions.[178] So there is no requirement that a person be sexually active in order to be regarded as being of a particular 'sexual orientation'. A reference to people who share the protected characteristic of 'sexual orientation' is a reference to people who are of the same sexual orientation.[179] Therefore, a gay man and a lesbian share the same sexual orientation because they have a sexual orientation towards persons of the same sex as them. If a gay man is treated less favourably than a lesbian, then this might amount to direct sex discrimination, not

174 Case C-460/06 *Paquay v Societe d'architects Hoet + Minne SPRL* [2008] ICR 420. This has been given statutory effect in EqA 2010 s18(5).

175 EqA 2010 ss19 and 26 respectively.

176 The Employment Code points out that 'Gender reassignment is a separate protected characteristic and unrelated to sexual orientation – despite a common misunderstanding that the two characteristics are related': para 2.68.

177 EqA 2010 s12.

178 Employment Code para 2.65.

179 Employment Code para 2.67.

sexual orientation discrimination because they share the same sexual orientation.

1.108 Being asexual, celibate, or having particular sexual preferences (for example sadomasochism, bestiality etc) has nothing to do with sexual orientation and is not covered by the Act. However, as with religion and belief certain behaviour may be closely connected with a particular sexual orientation. Where an employer's reason for subjecting a gay man to a detriment is the employer's objection to certain forms of behaviour he assumes are prevalent in the gay community rather than any objection to homosexuality itself, this is unlikely to succeed as a defence. Moreover as with religion and belief where the treatment is given to the person as a result of a characteristic which is indissociable with the protected characteristic, that is likely to be direct discrimination.[180]

1.109 Examples are given in the Explanatory Notes to the Act. So, for example, a man who experiences sexual attraction towards both men and women is 'bisexual' even if he only has relationships with women.

1.110 Practical points

- Careful scrutiny of the basis of discrimination is always necessary. Consider whether 'multiple' discrimination is in issue.[181]
  - Is the characteristic on which the treatment is based 'indissociable' (inseparable) from a protected characteristic?
- While many advisers feel comfortable with race and sex, there are some issues surrounding other characteristics. Such as:
  - Disability needs medical evidence in many cases in relation to (a) likelihood of duration of impairment (b) the usual effects of an impairment (c) the presence of a physical or psychological impairment having some effects.
  - In age cases involving comparators it may be necessary to be precise in the description of the relevant age group, to enable a more telling comparison to be made.
  - Religion and belief cases require a careful analysis of the belief said to be the cause of the treatment. What looks like a case of discrimination because of religion may, on closer scrutiny,

180 See paras 2.15–2.26 (direct discrimination) and the discussion of *Patmalniece v Secretary of State for Work and Pensions* there.

181 See paras 2.77–2.80 for discussion.

relate to a belief held only by a subset of the relevant religion. The witness statement should carefully identify precisely what the claimant says caused the respondent to behave as it did. Assumptions about the nature of a belief due to the religious or other belief group to which the person is supposed to belong should be avoided.

  - In cases involving 'manifestations' of all of the protected characteristics, it is important to ascertain whether the manifestation is 'indissociable'(ie inseparable') with the protected characteristic. Understanding and demonstrating that connection may be the difference between being able to mount a direct discrimination claim and not being able to do so.

- In none of these cases, save pregnancy, marital status and civil partnership status, is it necessary for the person to be able to show that they have the protected characteristic themselves in order to claim direct discrimination. However, the associative link should always be made clear in the direct discrimination claims in which it is used.