

# Complying With Its International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights<sup>1</sup>

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*In the third of three articles, the author examines the extent to which the UK law provisions on equality and non-discrimination meet the requirements of Art.26 ICCPR. The author finds that the combination of the common law, the Human Rights Act 1998 and anti-discrimination laws ensure that there is substantial compliance with Art.26. The protection for equality before the law meets Art.26 obligations. But significant gaps remain between domestic law and Art.26 in the equal protection of the law and most notably in the prohibition of discrimination. The author acknowledges that where there is protection from discrimination the domestic law often goes beyond the obligations created by Art.26. However, in the areas where there is no protection, where a ground of discrimination is not covered, or the discriminatory actions do not come under the scope of the legislation, UK law does not match the extensive reach of Art.26.*

## **Introduction**

Since 1976, when the United Kingdom ratified the International Covenant on Civil and Political Rights (“ICCPR” or “the Covenant”), it has been under an obligation in international law to “adopt such legislative or other measures as may be necessary to give effect to the rights” recognised in the Covenant.<sup>2</sup> This obligation covers Art.26, the Covenant’s principal provision on discrimination. The United Kingdom’s failure to meet its obligations in respect of Art.26 has been noted by the UN Human Rights Committee (“the Committee”). In its Concluding Observations on the United Kingdom’s fifth periodic report, the Committee, while welcoming the incorporation of many Covenant rights into the domestic legal order through the Human Rights Act 1998 (“HRA”), regretted the failure “to accord the same level of protection to other

<sup>1</sup> Many thanks to Professor Ian Leigh for helpful comments on earlier drafts. Responsibility for conclusions and errors remain with me.

<sup>2</sup> ICCPR, Art.2(2).

Covenant rights, including the provisions of Art.26".<sup>3</sup> The obligation on states parties to "respect and ensure the rights recognised in the Covenant" does not go so far as requiring a state to incorporate the treaty into domestic law.<sup>4</sup> Human rights groups have, however, called on the United Kingdom to incorporate the Covenant into domestic law. The United Kingdom's resistance to incorporation rests in part on an argument that Covenant rights are already protected within the existing constitutional structures.<sup>5</sup> This article assesses the validity of this claim and examines the extent to which the current patchwork of anti-discrimination legislation, combined with the common law and the HRA, meet the United Kingdom's obligations under Art.26.

Article 26 provides that:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The precise obligations and content of Art.26 have been fleshed out by the Committee in general comments and through its views on individual communications and concluding observations to state party reports.<sup>6</sup> The following sections examine the different aspects of the obligation placed on the United Kingdom by Art.26 and, in respect to each of these, compares the requirements of Art.26 to the protection that is already in place in UK domestic legislation. This provides a framework through which to assess whether, as claimed by the government, the provisions of domestic law meet its international law obligations.

### The three limbs of Art.26

It is possible to identify three limbs to Art.26. First, a right to equality before the law; secondly, equal protection of the law; and thirdly, a general prohibition of discrimination.<sup>7</sup> However, the Committee in discussing Art.26 does not always address the different limbs separately nor identify a violation of a specific limb.

<sup>3</sup> "Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001", CCPR/CO/73/United Kingdom, para.7 (emphasis added).

<sup>4</sup> See Human Rights Committee General Comment 3, Art.2 Implementation at the national level (Thirteenth session, 1981), para.1.

<sup>5</sup> "Core document forming part of the report of States Parties: United Kingdom of Great Britain and Northern Ireland. 23/06/97" HRI/CORE/1/Add 5/Rev 2, para.118; See also D. Fottrell, "Reinforcing the Human Rights Act—the Role of the International Covenant on Civil and Political Rights" [2002] P.L. 485.

<sup>6</sup> For a detailed account of the Committee's jurisprudence see T. Choudhury, "The Human Rights Committee's Interpretation of Article 26 of the ICCPR" [2003] E.H.R.L.R. 24.

<sup>7</sup> M. Nowak, *CCPR Commentary* (Kehl, N.P. Engel, 1993), p.461. See also Human Rights Committee General Comment 18, Article 26 Non-discrimination, (Thirty-seventh session, 1989), para.1: "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights".

The first limb, equality before the law, as a claim for formal equality, requires the application of the law in the same manner to all those subject to it. At the very least it is a protection against the arbitrary application of the law. In respect of equality before the law the Committee has suggested that the scope of Art.26 extends beyond the arbitrary application of laws to cover the arbitrary exercise of discretion.<sup>8</sup> The second limb of Art.26, the guarantee that all persons are entitled “without any discrimination to the equal protection of the law”, requires that the state “must refrain from any discrimination when enacting laws”.<sup>9</sup> General Comment 18 elaborates further: “when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory”.<sup>10</sup> The third limb requires the state to prohibit discrimination.

Turning to the domestic law, it is clear that equality before the law is a central tenet in the common law notion of the rule of law: “it is inherent in the very notion of law, and in the integrity of the law’s application, that like cases be treated alike over time”.<sup>11</sup> Lord Woolf, in *A v Secretary of State for the Home Department* appeared to be referring to equality before the law in this sense when he said that, “the right not to be discriminated against is one of the most significant requirements of the rule of law . . . long before the Human Rights Act (HRA) came into force the common law recognised the importance of non-discrimination. The importance of not discriminating explains why every judge on taking office makes a vow to ‘do right to all manner of people without fear or favour affection or ill will’.”<sup>12</sup> In line with the UN Human Rights Committee’s understanding, this common law notion of equality before the law is also violated by the arbitrary exercise of discretion. Lord Woolf, acknowledging the link between equality before the law and the protection from arbitrary behaviour, cited a passage from a judgment of the US Supreme Court:

“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”<sup>13</sup>

However, the limitations of the common law are also clear:

“[The common law’s] reach . . . is limited because its primary concern is not with the content of the law but with its *enforcement* and the *application* alone. The Rule of Law is satisfied as long as laws are applied or enforced equally, that is, evenhandedly, free from bias and without irrational distinction. The Rule of Law requires formal equality which prohibits laws from being enforced unequally, but it does not require substantive equality. It does not therefore prohibit unequal

<sup>8</sup> *Gauthier v Canada* (633/1995).

<sup>9</sup> M. Nowak, *op.cit.* p.468.

<sup>10</sup> General Comment 18, para.12.

<sup>11</sup> J. Jowell, “Is Equality a Constitutional Principle?” (1994) 47 C.L.P. 1 at 4.

<sup>12</sup> *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2003] 2 W.L.R. 564 at [7].

<sup>13</sup> *Railway Express Agency v New York* 336 U.S. 106 (1949) at 112–113, cited in *A v Secretary of State for the Home Department*, *ibid.*

laws. It constrains, say, racially-biased enforcement of laws, but does not inhibit apartheid-style laws from being enacted.”<sup>14</sup>

The common law guarantees equality before the law but does not guarantee equal protection of the law: it does not prevent discrimination in the enactment of laws, as required by the second limb of Art.26.

The protection from discrimination provided by the common law also fails to provide the protection required by the third limb of Art.26. Professor Jowell argues that the common law protection of equality before the law is supplemented by a further constitutional principle of equality that “requires government not to treat people unequally without justification”.<sup>15</sup> Lord Hoffmann, giving the judgment of the Privy Council in *Matadeen v Pointu* said that “. . . treating like cases alike and unlike cases differently is a general axiom of rational behaviour”.<sup>16</sup> Even this principle of equality is limited, since, as McColgan has pointed out, equality is only *one* test of official action; other considerations or interests can defeat it. Thus, equality “is not a free-standing entitlement in English law”.<sup>17</sup> Relying on a common law equality principle as a ground of judicial review will only assist in combating the “most bizarre” or “obviously unfair” cases of discrimination, while leaving untouched forms of discrimination which are “not generally regarded as problematic”.<sup>18</sup>

The failure of the common law to provide equal protection of the law and effective protection against discrimination led to the enactment of anti-discrimination legislation. However, this domestic legislation only prohibits specific forms of discrimination and only in defined areas of activity.<sup>19</sup> The HRA, by giving effect in domestic law to the non-discrimination provision of the European Convention on Human Rights (“ECHR”), Art.14, provides a further layer of legal protection. The principle of non-discrimination, contained in Art.14 ECHR, provides that the exercise of the Convention rights and freedoms must be secured without discrimination on any one of 12 specifically enumerated grounds or on the basis of “other status”. This is not a free-standing right to protection against discrimination; it is ancillary to other Convention rights.

The ability of such legislation to meet the requirement in the second limb of Art.26, of preventing the enactment of discriminatory laws, differs significantly. For example, the provisions of the Sex Discrimination Act 1975 (“SDA”) override the discriminatory provisions of legislation enacted prior to it.<sup>20</sup> The Fair Employment and Treatment (Northern Ireland) Order 1998 (“FETO”) contains an exemption for “anything done in

<sup>14</sup> J. Jowell, *loc.cit.* at 4.

<sup>15</sup> *ibid.* at 7.

<sup>16</sup> [1999] 1 A.C. 98 at 109. Though this case concerned the constitution of Mauritius these views were clearly expressed as having universal relevance.

<sup>17</sup> A. McColgan, “Discrimination Law and the Human Rights Act 1998” in T. Campbell, K.D. Ewing and A. Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press, 2001), p.220.

<sup>18</sup> *ibid.* p.223.

<sup>19</sup> Equal Pay Act 1971; Equal Pay Act (Northern Ireland) 1970; Sex Discrimination Act 1975; Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042, NI 15) (SD(NI)O); Race Relations Act 1976; Race Relations (Northern Ireland) Order 1997 (SI 1997/869, NI 6) (RR(NI)O); Disability Discrimination Act 1995; Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/1042, NI 15).

<sup>20</sup> Employment Act 1989, s.1.

order to comply with a requirement" of primary legislation *preceding* the Order, or of an "instrument made or approved under such legislation".<sup>21</sup> This creates a significant gap in the protection that FETO provides as many public bodies act in pursuance of such legislation. Compared to FETO and the SDA, significantly less protection is offered in respect of race and disability discrimination. The provisions of the Race Relations Act 1976<sup>22</sup> ("RRA") and the Disability Discrimination Act 1995<sup>23</sup> ("DDA") are subordinate to other primary and secondary legislation *whenever* it was enacted. The implementation of the Race Directive by the Race Relations Act 1976 (Amendment) Regulations 2003<sup>24</sup> will remove this exception, but only in respect of the grounds of "race, ethnic or national origins", thus excluding the grounds of colour and nationality.

The protection from discrimination in Art.14 ECHR is given domestic effect through the HRA. Under s.3 of the HRA "so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with", *inter alia*, Art.14 ECHR. This interpretive obligation applies to both past and future legislation. Subordinate legislation is invalid and ineffective to the extent that it cannot be interpreted to be compatible with Art.14. If a compatible interpretation of primary legislation is impossible then the incompatible legislation must continue to be given effect.<sup>25</sup> The courts can issue a declaration of incompatibility, but it remains for Parliament to decide whether to amend the legislation so as to achieve compatibility: "this subtle form of protection avoids entrenchment and therefore creates a compromise between leaving the protection of rights to the democratic process and entrusting them fully to the judiciary".<sup>26</sup> The potential within these provisions to protect against discrimination was seen in *Mendoza v Ghaidan*, where the Court of Appeal found that the HRA enabled it to read provisions in the Rent Act 1977 so that the words "as his or her wife or husband" were taken to mean "as if they were his or her wife or husband", thus ensuring the provisions avoided discrimination against same-sex co-habiting couples.<sup>27</sup>

Protection from discrimination may also achieve more direct domestic effect if the Convention jurisprudence enters UK law through legislation aimed at giving effect to EC law. This was the situation in *Chief Constable of South Yorkshire Police v A (No.2)*, which concerned the refusal of the Chief Constable of South Yorkshire Police to employ a male to female transsexual.<sup>28</sup> The Chief Constable contended that the discrimination was permitted by the exception in the SDA allowing discrimination where being a particular sex is a genuine occupational qualification ("GOQ"). While 'A' regarded herself as a woman, she was still legally male. The Chief Constable argued that being *legally* female was a genuine occupational qualification of a police constable as their employment included duties that could only be carried out by a female. While A

<sup>21</sup> FETO, art.78.

<sup>22</sup> RRA, s.41(1); RR(NI)O, art.40.

<sup>23</sup> DDA, s.59.

<sup>24</sup> SI 2003/00.

<sup>25</sup> HRA, s.3(2)(b).

<sup>26</sup> H. Fenwick, *Civil Liberties and Human Rights* (London, Cavendish Publishing, 2002), p.140.

<sup>27</sup> *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2003] 2 W.L.R. 478.

<sup>28</sup> *Chief Constable of the West Yorkshire Police v A (No.2)* [2002] EWCA Civ 1584; [2003] I.R.L.R. 32.

continued to be regarded by the law as male she could be excluded from the job that required her to carry out duties that could only be carried out by a person legally recognised as female. In the light of the Strasbourg decision in *Goodwin v United Kingdom*, in which it was held that a post-operative male to female transsexual is entitled to be regarded for all purposes as female, the Court of Appeal held that the GOQ could not be applied to A. The Strasbourg court placed the onus on the UK Government to “implement such measures as it considers appropriate to fulfil its obligations to secure” the rights of transsexuals under the Convention. The Court of Appeal, however, was able to give effect to the Strasbourg ruling ahead of any action by the government and Parliament: “in the field of employment law the matter cannot simply be left until Parliament decides how to react to the decision in *Goodwin* because through the medium of the Directive and the 1975 Act that decision has direct effect”.<sup>29</sup> Buxton L.J. highlighted the significance in the difference between Convention jurisprudence entering domestic law through the HRA and such jurisprudence entering through Community law. The Chief Constable’s action in respect of A was taken before the Strasbourg decision in *Goodwin*. This is significant as judgments of the European Court of Human Rights take effect from the date of the court’s decision. By contrast “it has always been assumed in Community jurisprudence that decisions on the meaning of treaties apply *ex tunc*, that is, from the date of the treaty not from the date of the decision”.<sup>30</sup> Thus Buxton L.J. was clear that “because of the date at which the acts complained of took place, the Convention jurisprudence is introduced into domestic law not by the medium of the HRA but by the medium of the Equal Treatment Directive”.<sup>31</sup> Convention decisions on Art.14 which enter UK law through EC law have effect that can be backdated to the date of the Treaty, while Convention jurisprudence entering through the HRA only applied from the date of the Strasbourg Court’s decision.

The devolution legislation provides the greatest scope for challenging discriminatory legislation and actions. Such legislation prevents the Welsh Assembly, Northern Ireland Assembly and the Scottish Parliament and Executive from acting in ways that are incompatible with Art.14 ECHR.<sup>32</sup> Legislation passed by the Scottish Parliament and Northern Ireland Assembly is regarded as secondary legislation.<sup>33</sup> It was on this basis that an (unsuccessful) challenge was brought against the Protection of Wild Mammals (Scotland) Act 2002 passed by the Scottish Parliament, claiming that the legislation was in violation of Art.14 ECHR.<sup>34</sup>

It is not clear that Art.26 requires the existence of entrenched constitutional provisions that can be used to challenge discriminatory legislation; rather it requires that the contents of legislation adopted by states must not discriminate. The anti-discrimination legislation, the HRA and the devolution legislation contribute in different ways and in varying degrees to ensuring that the contents of legislative Acts

<sup>29</sup> *ibid.* at [25]; this is a submission by counsel for A but with which Kennedy L.J. agreed at [27].

<sup>30</sup> *ibid.* at [33].

<sup>31</sup> *ibid.* at [42].

<sup>32</sup> Government of Wales Act 1998, ss.107–108; Northern Ireland Act 1998, s.6(2)(c); Scotland Act 1998, ss.29(2)(d) and 57.

<sup>33</sup> HRA, s.21.

<sup>34</sup> *Adams v Scottish Ministers* [2003] S.L.T. 366.

do not discriminate. It is unfortunate that there is such variation between the different anti-discrimination acts, in respect of their impact on other legislation.

The third limb of Art.26 requires a general prohibition of discrimination. The following three sections on the grounds of discrimination, the approach to discrimination and the rights affected show that domestic law falls short of the requirement in Art.26.

### Grounds of discrimination

#### *Grounds covered*

The list of prohibited grounds in Art.26 is not exhaustive. It prohibits discrimination on "any grounds". While eight specific grounds are listed, it also contains a more open category of "other status". It is not possible to identify all the grounds that could be included within "other status". Article 26 requires an author to claim that any difference in treatment was attributable to their membership of any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status".<sup>35</sup> Communications declared admissible have included allegations of discrimination on the grounds of being a grandparent,<sup>36</sup> marital status,<sup>37</sup> nationality,<sup>38</sup> citizenship,<sup>39</sup> age,<sup>40</sup> the distinction between "foster" and "natural parents",<sup>41</sup> the difference between employed and unemployed persons,<sup>42</sup> the difference between civilian and military national service,<sup>43</sup> a distinction between households shared with close relatives and households shared with others,<sup>44</sup> a distinction between persons with law degrees and persons without.<sup>45</sup> In its comments on state party reports the Committee has also indicated that Art.26 covers discrimination on the grounds of family responsibility, sexual orientation,<sup>46</sup> exile from the state<sup>47</sup> and illegitimacy.<sup>48</sup> The Committee provides little guidance on how it decides whether a difference in treatment comes within the rubric of "other status". Its approach to this issue lacks consistency and transparency.<sup>49</sup>

<sup>35</sup> *B.d.B. et al. v Netherlands* (273/1989), para.6.7.

<sup>36</sup> *Gallicchio v Argentina* (400/1990).

<sup>37</sup> *Danning v Netherlands* (180/1984), *Sprenger v Netherlands* (395/1990), *Hoofdman v Netherlands* (602/1994).

<sup>38</sup> *Gueye et al. v France* (196/1985); *Griffin v Spain* (493/1992).

<sup>39</sup> *Adam v Czech Republic* (586/1994).

<sup>40</sup> *Jong v Netherlands* (855/1999).

<sup>41</sup> *Oulajin & Kaiss v Netherlands* (406, 426/1990).

<sup>42</sup> *Araujo-Jongen v Netherlands* (418/1990); but see *J.A.M.B-R. v Netherlands* (477/1991) and *A.P.L.v.d.M v Netherlands* (478/1991).

<sup>43</sup> *Jarvinen v Finland* (295/1988); *Foin v France* (666/1995).

<sup>44</sup> *Neefs v Netherlands* (425/1990).

<sup>45</sup> *Gomez v Spain* (865/1999).

<sup>46</sup> (1996) UN doc.CCPR/C/79/Add.57, para.13.

<sup>47</sup> (2001) UN doc.CCPR/CO/71/SYR, para.21.

<sup>48</sup> (2001) UN doc.CCPR/CO/73/UK, para.30; (2001) UN doc.CCPR/CO/72/NET, para.21.

<sup>49</sup> A.F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" 11 *Human Rights Law Journal* 1 at 6-7, compares the Committee's approach in *Blom v Sweden* (191/1985) and *Gueye et al. v France* (196/1985).

Within the domestic law, the most extensive list of protected grounds can be found in Art.14 ECHR. It covers discrimination on *any grounds* 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 enumerated grounds, with the exception of “association with a national minority”, are the same as those in Art.26. Like Art.26, this list is illustrative and not exhaustive. Sexual orientation,<sup>50</sup> marital status, illegitimacy,<sup>51</sup> status as a trade union, military status, conscientious objection, professional status and imprisonment<sup>52</sup> have all been taken into account in the phrase “other status”. Under the HRA the judiciary are handed the responsibility of developing the list of protected grounds. There are indications of judicial uncertainty surrounding the exercise of this discretion, in particular the extent to which the enumerated grounds constrain the understanding of “other status”. In *R. (on the application of S) v Chief Constable of South Yorkshire Police*<sup>53</sup> the claimants, who were suspects investigated by the police but never convicted of any offence, contended that the decision of the Chief Constable to retain their fingerprints and DNA samples resulted in innocent people who had been the subject of police investigations being treated differently from innocent people who had not. Lord Woolf CJ suggested that a difference in treatment such as this does not come within the scope of Art.14:

“It is important to note that Article 14 does not prohibit all discrimination. It is only concerned with discrimination on grounds ‘such as’ those specified by the article. It is difficult to treat discrimination based on a difference in the treatment between those from whom fingerprints or samples have been lawfully taken from those from whom they have not been taken as falling within the language of the Article.”<sup>54</sup>

“There is also the question of whether the discrimination relied upon is within the categories of discrimination referred to in Article 14. It is wholly different from the categories specifically mentioned in the Article and I do not consider that it does. It would be highly undesirable if it did.”<sup>55</sup>

Since the claimants did not contend that they came within one of the enumerated grounds it must be assumed that they failed to come within the category of “other status”, but Lord Woolf provided no indication as to the parameters of “other status” beyond saying that the claimants did not fall within them. The Court of Appeal, in *Southwark LBC v St Brice*, suggested that “other status” must involve a “personal characteristic” of the claimant. In this case a landlord issued a warrant of possession in a county court against the claimant. The tenant claimed discrimination on the grounds of the difference in treatment of those that faced a warrant of possession claim in the county court and in the High Court. The Court of Appeal held that the claimant did not face discrimination on the grounds of “other status” as “the landlord’s choice of forum

<sup>50</sup> *Dudgeon v United Kingdom* (1981) 4 E.H.R.R. 149.

<sup>51</sup> *Marckx v Belgium* (1979) 2 E.H.R.R. 330.

<sup>52</sup> D.J. Harris, M. O’Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (London, Butterworths, 1995), p.470.

<sup>53</sup> *R. (on the application of S) v Chief Constable of the South Yorkshire Police* [2002] EWCA Civ 1275; [2002] 1 W.L.R. 3223.

<sup>54</sup> *ibid.* at 3233.

<sup>55</sup> *ibid.* at 3238.

for its possession action was not based upon any personal characteristic of the tenant capable of founding a claim for discrimination under Article 14".<sup>56</sup>

The UK anti-discrimination legislation prohibits discrimination on only a limited number of protected grounds: sex,<sup>57</sup> gender reassignment,<sup>58</sup> marriage,<sup>59</sup> colour, race, nationality or ethnic or national origins,<sup>60</sup> disability<sup>61</sup> and, in Northern Ireland, religious belief, political opinion<sup>62</sup> and membership of the Irish Traveller community.<sup>63</sup> There is also protection from unfavourable treatment on the grounds of trade union membership<sup>64</sup> and for part-time workers.<sup>65</sup> In 2000 the European Community agreed a Directive for establishing a general framework for equal treatment in employment and occupation, the implementation of which will require the introduction of domestic legislation to cover for the first time discrimination in employment on the grounds of age, religion or belief and sexual orientation.<sup>66</sup> There is also protection from unfavourable treatment on the grounds of trade union membership,<sup>67</sup> for workers on fixed-term contracts<sup>68</sup> and for part-time workers.<sup>69</sup> The proposals for a Single Equality Bill in Northern Ireland consider extending the protected categories to persons with or without dependents, and family<sup>70</sup> or marital status.<sup>71</sup>

It is clear that UK anti-discrimination legislation is not as extensive as to the grounds it covers as Art.26. The open-ended nature of the prohibited grounds in Art.14 ECHR ensures that it meets the requirements of Art.26. However, discussion below will show that the protection this provides fails to meet the requirements of Art.26 in other respects.

### *Strict scrutiny*

Although in Art.26 there is a wide and open-ended set of grounds on which discrimination can be claimed, this does not mean that all protected grounds will be

<sup>56</sup> *Southwark LBC v St Brice* [2001] EWCA Civ 1138; [2002] 1 W.L.R. 1537 at 1546.

<sup>57</sup> SDA, s.1; SD(NI)O, art.3

<sup>58</sup> SDA, s.2A(1), as amended by the Sex Discrimination (Gender Reassignment) Regulation 1999 (SI 1999/1102); SD(NI)O, art.4A, as amended by Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 (SI 1999/311).

<sup>59</sup> SDA, s.3; SD(NI)O, art.5; this covers discrimination against a married person, but not against single or unmarried persons.

<sup>60</sup> RRA, s.3; RR(NI)O, art.5(1).

<sup>61</sup> DDA.

<sup>62</sup> FETO.

<sup>63</sup> RR(NI)O, art.5(3)(a).

<sup>64</sup> See Trade Union and Labour Relations (Consolidation) Act 1992.

<sup>65</sup> Dir.97/81 [1998] O.J. L14/9, implemented from July 1, 2000 by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551).

<sup>66</sup> Dir.2000/78 [2000] O.J. L303/16, hereafter "the Employment Directive".

<sup>67</sup> Trade Union and Labour Relations (Consolidation) Act 1992.

<sup>68</sup> Dir.99/70.

<sup>69</sup> Dir.97/81, n.65 above.

<sup>70</sup> *Murray v Navy Army Air Force Institute* 1997, case 3100459/96 36 EORDCLD. The tribunal rejected the argument that the ETD prohibited discrimination on the grounds of family status, cited in A. McColgan, *Discrimination Law: text, cases and materials* (Oxford, Hart Publishing, 2000), p.346, n.11.

<sup>71</sup> *A Single Equality Bill for Northern Ireland* (Belfast, Office of the First Minister and Deputy First Minister, 2001), p.31.

treated the same. Discrimination on the basis of race, sex and religion are regarded as grounds that require particularly strict scrutiny.<sup>72</sup> The importance of tackling sex discrimination as an objective of the Covenant is reinforced by Art.3, which highlights the duty on states parties to ensure the “equal right of men and women to the enjoyment of all civil and political rights” in the Covenant. In General Comment 28 the Committee stated that Art.3 combined with Art.26 required states to “review their legislation and practices and take the lead in implementing all measures necessary in order to eliminate discrimination against women, in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services”.<sup>73</sup> A further indication that certain forms of discrimination are regarded as particularly suspect under the Covenant can be gleaned from Art.4, which, while allowing states to derogate from certain Covenant articles in times of national emergency, prohibits derogation by measures that discriminate solely on the grounds of “race, colour, language, religion or social origin”.

The ECHR, like Art.26, covers a broad set of grounds but does not treat them all equally. Discrimination solely on the ground of sex has been identified by the Strasbourg Court as requiring “weighty reasons” before it would be regarded as compatible with the Convention.<sup>74</sup> Discrimination on the grounds of race can also be regarded as a suspect classification since such discrimination can amount to “degrading treatment”<sup>75</sup>: the Commission found that “a special importance should be attached to discrimination based on race” and that such discrimination “could in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention”, ruling that “differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question”. Discrimination on the grounds of nationality is also said to require “very weighty justification”.<sup>76</sup> Distinctions on the grounds of religion<sup>77</sup> or against children on the grounds of their illegitimacy are also regarded as suspect.<sup>78</sup>

Sex, married status and race are clearly regarded as suspect grounds of discrimination as these have been the concern of anti-discrimination legislation of various types for over two decades in the United Kingdom. Legislation has expanded to cover further

<sup>72</sup> A.F. Bayefsky, “The Principle of Equality or Non-Discrimination in International Law” 11 *Human Rights Law Journal* 1 at 18–24: but see A. Lester and S. Joseph, “Obligations of Non-Discrimination”, in Harris and Joseph, eds, *The ICCPR and UK Law* (Oxford, Clarendon, 1995), p.590 where they submit that “religion is not yet genuinely accepted by the international community as a ‘suspect status’ on a par with distinctions based on race and sex”.

<sup>73</sup> Human Rights Committee, General Comment 28, Equality of rights between men and women (Article 3), (Twenty-first session, 2000), para.31.

<sup>74</sup> See e.g. *Abdulaziz, Cabales and Balkandali v United Kingdom* (A/94): (1985) 7 E.H.R.R. 471; *Schuler-Zraggen v Switzerland* (A/263): (1993) 16 E.H.R.R. 405 at [67]; *Burghartz v Switzerland* (A/280–B): (1994) 18 E.H.R.R. 101 at [27]; *Van Raatle v Netherlands* (1997) 24 E.H.R.R. 503 at [39]; *Schmidt v Germany* (A/291–B): (1994) 8 E.H.R.R. 513 at [24].

<sup>75</sup> *East African Asians v United Kingdom* (1970) XIII Yearbook 928 at 994.

<sup>76</sup> *Gaygusuz v Austria* (1997) 23 E.H.R.R. 364 at [42].

<sup>77</sup> *Hoffmann v Austria* (A 255–C): [1993] 17 E.H.R.R. 293 at [36]: “a distinction based essentially on a difference in religion alone is not acceptable”.

<sup>78</sup> *Marckx v Belgium* (A/31): (1979) 2 E.H.R.R. 330; *Inze v Austria* (A/126): (1987) 10 E.H.R.R. 394.

grounds either in response to political pressure and campaigning or as a consequence of developments in case law. Legislation to cover disability discrimination was only introduced in 1995. The SDA has been amended to cover direct discrimination on the grounds of gender reassignment. Discrimination on the grounds of religion is one of the suspect grounds under Art.26. There is protection from such discrimination in Northern Ireland. The lack of protection in Great Britain from discrimination on such a significant "suspect" ground may account for the specific mention this received from the Human Rights Committee.<sup>79</sup> The implementation of the EC Employment Directive is welcome, but its limitations, discussed below, ensure that the coverage of this "suspect" ground of discrimination remains inadequate. The prohibition of religious discrimination, other than in Northern Ireland, does not match the protection given to race and sex discrimination, and falls short of the standards of Art.26.

### Rights and freedoms affected

The scope of Art.26 was a critical issue finally confronted by the Committee in *Broeks*<sup>80</sup> and *Zwaan-de Vries*.<sup>81</sup> In one of its most radical decisions the Committee confirmed that Art.26 extended beyond the rights contained in the Covenant itself to all areas in which a government acted:

"Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligations with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant."<sup>82</sup>

General Comment 18 confirmed this interpretation of Art.26: "the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant".<sup>83</sup> Since the *Broeks* decision, Art.26 has been applied to other areas outside the rights in the Covenant, most frequently in areas involving social security and other forms of social protection payments including disability pensions,<sup>84</sup> unemployment benefit,<sup>85</sup> veterans' pensions,<sup>86</sup> severance pay,<sup>87</sup> children's benefits,<sup>88</sup> survivor's pensions<sup>89</sup> and retirement pensions.<sup>90</sup> They have also

<sup>79</sup> "Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland", CCPR/CO/72/United Kingdom, para.14.

<sup>80</sup> *S.W.M. Broeks v Netherlands* (172/1984).

<sup>81</sup> *F.H. Zwaan-de Vries v Netherlands* (182/1984).

<sup>82</sup> *Broeks v Netherlands* (172/1984), para.12.4.

<sup>83</sup> General Comment 18, para.12.

<sup>84</sup> *Danning v Netherlands* (180/1984); *Hendrika Vos v Netherlands* (218/1986).

<sup>85</sup> *Broeks v Netherlands* (172/1984); *A.P.L.-v.d.M. v Netherlands* (478/1991); *Zwaan-de Vries v Netherlands* (182/1984); *Araujo-Jongen v Netherlands* (418/1990); *Pons v Spain* (454/1991).

<sup>86</sup> *Gueye et al. v France* (196/1985).

<sup>87</sup> *Valenzuela v Peru* (309/1988).

<sup>88</sup> *Oulajin and Kaiss v Netherlands* (406, 426/1990).

<sup>89</sup> *Pauger v Austria* (415/1990); *Pepels v Netherlands*(484/1991); *Hoofdman v Netherlands* (602/1994).

<sup>90</sup> *Johannes Vos v Netherlands* (786/1997); (2001)UN Doc. CCPR/CO/72/NET, para.21.

covered educational subsidies,<sup>91</sup> employment,<sup>92</sup> the right of conscientious objection,<sup>93</sup> and schemes for restitution of confiscated property.<sup>94</sup>

The extensive reach of Art.26 is not matched by the UK law, which contains no general equality guarantee and where legislation only prohibits discrimination in specific areas of activity. The RRA, the SDA (in relation to sex) the DDA and FETO cover discrimination in employment,<sup>95</sup> education,<sup>96</sup> the provision of goods, services and facilities<sup>97</sup> and the disposal and management of premises.<sup>98</sup> The RRA also covers planning matters.<sup>99</sup> The SDA's prohibitions on discrimination against married persons and on the grounds of gender reassignment are restricted to employment.<sup>1</sup> Outside these areas discrimination on these grounds remains legal.

Even in the areas of activity covered by the legislation there are significant exemptions and exclusions. Some of these are explicitly set out in the legislation, for example the employment provisions of the DDA do not apply to small employers and the SDA allows religious bodies to discriminate on the grounds of sex where this is needed to comply with the doctrines of a religion or to avoid offending the religious susceptibilities of its followers.<sup>2</sup> Other areas have been taken out of the scope of the legislation as a consequence of judicial interpretation, for example, the House of Lords in *Amin* held that s.29 of the SDA only applied to acts done on behalf of the Crown which "are at least similar to acts that could be done by private persons".<sup>3</sup> Such judicial interpretation has limited the impact of the legislation in tackling discrimination by public bodies. The need to bring public bodies within the scope of the RRA became imperative following the finding in the Stephen Lawrence Inquiry Report that "institutional racism exists both in the Metropolitan Police Service and in other Police services and other institutions country wide".<sup>4</sup> In Great Britain the RRA has been amended so that it is unlawful for a public authority to discriminate in carrying out any functions.<sup>5</sup> A similar provision exists in Northern Ireland in relation to discrimination on the grounds of religious belief or political opinion.<sup>6</sup> It remains lawful for public

<sup>91</sup> *Blom v Sweden* (191/1985); *Lindgren et al. v Sweden* (198–199/1988); *Waldman v Canada* (694/1996).

<sup>92</sup> *Sprenger v Netherlands* (395/1990).

<sup>93</sup> *Brinkhof v Netherlands* (402/1990).

<sup>94</sup> *Simunek et al. v Czech Republic* (516/1992); *Somers v Hungary* (566/1993); *Adam v Czech Republic* (586/1994); *Drobek v Slovakia* (643/1995); *Schlosser v Czech Republic* (670/1995); *Malik v Czech Republic* (699/1995).

<sup>95</sup> SDA, ss.6–16; SD(NI)O, arts 8–18; RRA, ss.4–16; RR(NI)O, arts 6–17; DDA, ss.4–18; FETO, arts 19–26.

<sup>96</sup> SDA, s.22; SD(NI)O, art.24; RRA, s.17; RR(NI)O, arts 18–20; DDA, s.28A-X (as amended by the Special Educational Needs and Disability Act 2001); FETO, art.27 (this covers only further and higher education).

<sup>97</sup> SDA, s.29; SD(NI)O, art.30; RRA, s.20; RR(NI)O, art.21; DDA, s.19; FETO, art.28.

<sup>98</sup> SDA, ss.30–31; SD(NI)O, arts 31–32; RRA, ss.21–24; RR(NI)O, arts 22–24; FETO, arts 29–31.

<sup>99</sup> RRA, s.19A.

<sup>1</sup> SDA, s.2A; SD(NI)O, art.4A.

<sup>2</sup> SDA, s.19; SD(NI)O, art.21.

<sup>3</sup> *R. v Entry Clearance Officer (Bombay) Ex p. Amin* [1983] 2 A.C. 818.

<sup>4</sup> *The Stephen Lawrence Inquiry*, Report of an Inquiry by Sir William MacPherson of Cluny, Cm. 4262-I (1999), para.6.39.

<sup>5</sup> RRA, s.19B, as amended by the Race Relations Amendment Act 2000, s.1.

<sup>6</sup> Northern Ireland Act, s.76.

authorities to discriminate in relation to carrying out their functions on all other grounds.

The implementation of the Race Directive will, as highlighted below, bring some significant changes, in particular to the definition of indirect discrimination. However, because the government has chosen to implement this by statutory instrument, the protected grounds are only those of "race" or "ethnic or national origins" and not those of "colour" or "nationality". This will create a two-tier system of protection for race discrimination which has been widely criticised.<sup>7</sup> The new regulations will create a new definition of indirect discrimination as well as a new definition of genuine occupational qualification. They will also remove the exclusion in relation to partnerships of less than six people, the exclusion for discrimination in the disposal and management of premises as well as the exclusion for events occurring after a dismissal or the termination of a relevant relationship.

The implementation of the Employment Directive will ensure protection from discrimination on the grounds of religion or belief, sexual orientation and age, but only in the area of employment, albeit widely defined.<sup>8</sup> Discrimination on these grounds in the provision of goods, services and facilities, and by public authorities in carrying out their public functions, remains unregulated.

The HRA, through Art.14 ECHR, only protects against discrimination in relation to the civil and political rights mentioned in the Convention. Protocol 12 aims to provide a more comprehensive protection from discrimination under the Convention. It provides that the enjoyment of any rights set forth by law shall be secured without discrimination on any grounds, and that no one shall be discriminated against by any public authority on any grounds.<sup>9</sup> The UK Government has so far refused to sign the Protocol.<sup>10</sup> In its view the Protocol is "too general and open ended" and "it does not make clear whether 'rights set forth in law' includes international law as well as national law".<sup>11</sup> The government is concerned that "the European Court of Human Rights might hold that a right set out in an international agreement, but not incorporated into United Kingdom law is covered by Protocol 12".<sup>12</sup> It also notes, "new rights are not necessarily cost free (especially when they are economic, social and cultural rights) and may affect the rights of others, as many rights have to be balanced against each other".<sup>13</sup> The government's objections have been criticised as unconvincing:

"The text of Protocol 12 is necessarily 'general and open ended' if it is to provide for a free-standing right against discrimination. It is no more general and open-ended than is the text of the free-standing right against discrimination in the International Covenant on Civil and Political Rights, or of similar guarantees in the written constitutions of other Commonwealth and European countries. It is not

<sup>7</sup> See, e.g. CRE and JUSTICE responses to the Government Consultation Paper, *Equality and Diversity: the way ahead* together with the draft regulations.

<sup>8</sup> Employment Directive, Art.3(1).

<sup>9</sup> This was opened for signature on November 4, 2000.

<sup>10</sup> *Hansard*, HL, WA 174 (November 9, 2000); see also WA 37 (October 11, 2000); WA 14, October 23, 2000; and WA 45, October 25, 2000.

<sup>11</sup> *Hansard*, HL, WA 37 (October 11, 2000).

<sup>12</sup> *Hansard*, HL, WA 14 (October 23, 2000).

<sup>13</sup> *Hansard*, HL, WA 45 (October 25, 2000).

clear why it matters to the government whether Protocol 12 applies to rights set forth by international law as well as by national law. The only relevant international law is the international law by which the states parties to Protocol 12 would already be bound. It is plain from the Preamble, that Protocol 12 is intended to allow states parties to take positive measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.”<sup>14</sup>

It is clear the domestic legislation in the United Kingdom falls far short of the requirement of Art.26 in the breadth of the rights and freedoms that are protected from discrimination. The anti-discrimination legislation only covers certain grounds of discrimination and in a limited set of areas; the ECHR covers discrimination on a broader set of grounds but only in respect of Convention rights. The simplest way in which the United Kingdom could remedy this gap would be to ratify Protocol 12 of the ECHR and give effect to it in domestic law through the HRA. Many of the current exemptions in the anti-discrimination legislation, for example, the current exemption for small employers from the DDA, will also have to be removed to meet the standards of Art.26.

### **Approaches to discrimination**

#### *Direct and indirect discrimination*

Article 26 provides no definition of discrimination. The Committee, in General Comment 18, understood discrimination to cover:

“... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>15</sup>

The definition thus covers both intended and unintended discrimination. It also covers any distinction, exclusion, restriction or preference the aim of which is to discriminate but which does not achieve that aim.

The reference to *effect* as well as to *purpose* in the General Comment indicates that Art.26 covers indirect discrimination. Intent is irrelevant to establishing indirect discrimination.<sup>16</sup> The Committee has, as yet, failed to develop an adequate jurisprudence for indirect discrimination, particularly in relation to rules for access to social security payments, where it repeats a mantra that “the scope of Article 26 of the

<sup>14</sup> A. Lester, “Equality and the United Kingdom Law: Past, Present and Future” [2001] P.L. 77 at 80 and S. Fredman, “Why the Government should sign and ratify Protocol 12” (2002) 105 E.O.R. 21.

<sup>15</sup> General Comment 18, para.7.

<sup>16</sup> *Simunek v Czech Republic* (516/1992), para.11.7.

Covenant does not extend to differences resulting from the equal application of a rule in the allocation of benefits".<sup>17</sup>

A carefully constructed articulation of indirect discrimination is also missing from the ECHR jurisprudence. The Convention's approach has been characterised as one based on "proportionality... rather than one based on direct or indirect discrimination".<sup>18</sup> The focus of Art.14 ECHR is therefore not on whether discrimination is direct or indirect but on whether it is justified (which is examined below). In theory the Convention can cover indirect discrimination, for example in the *Belgian Linguistics Case* the court held that "the existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration".<sup>19</sup> However, in other cases the court has failed to look at the disparate impact of a discriminatory provision.<sup>20</sup> More recently, though, the court has developed protection against indirect discrimination further. In *Thlimmenos v Greece*,<sup>21</sup> the court noted that:

"The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

The reception of the Convention into domestic law through the HRA does provide an opportunity for domestic courts to develop the protection Art.14 provides against indirect discrimination. The early signs are of judicial openness to this possibility. Sedley L.J. in *R. (on the application of S) v Chief Constable of the South Yorkshire Police* was particularly concerned that the Court of Appeal in applying Art.14 should ensure that it covered indirect discrimination.<sup>22</sup>

A more sophisticated approach to different forms of discrimination has been developed in UK legislation. Domestic anti-discrimination laws distinguish between direct and indirect discrimination. All UK anti-discrimination legislation and the EC Art.13 Directives cover direct discrimination, which is defined as less favourable treatment of a person on the prohibited grounds.<sup>23</sup> As in the case of Art.26, in domestic law the fact of less favourable treatment is sufficient to create liability; the motivation for the treatment is irrelevant.<sup>24</sup> It is not clear if UK anti-discrimination laws cover measures that have the purpose of discriminating on a prohibited ground but do not achieve their purpose; both the SDA and RRA require less favourable "treatment" for

<sup>17</sup> See *P.C.C. v Netherlands* (212/1986), para.6.3; *H.A.E.d.J. v Netherlands* (297/1988), para.8.2; *Oulajin and Kaiss v Netherlands* (406, 426/1990), para.8.2; and *A.P.L.-v.d.M v Netherlands* (478/1991), para.6.4.

<sup>18</sup> S. Fredman, *Discrimination Law* (Oxford University Press, 2002), p.116.

<sup>19</sup> (A/6): (1968) 1 E.H.R.R. 252 (emphasis added).

<sup>20</sup> See *Abdulaziz, Cabales and Balkandali v United Kingdom* (A/94): (1985) 7 E.H.R.R. 471; *Ahmad v United Kingdom* (1982) 4 E.H.R.R. 126.

<sup>21</sup> (2001) 31 E.H.R.R. 15.

<sup>22</sup> *R. (on the application of S) v Chief Constable of the South Yorkshire Police* [2002] EWCA Civ 1275; [2002] 1 W.L.R. 3223 at 3248.

<sup>23</sup> SDA, ss.1(1)(a), 1(2)(a), 2A(1), 3(1)(a); SD(N)O, arts 3(1)(a), 3(2)(a), 4A(1), 5(1)(a); RRA, s.1(1)(a); RR(N)O, art.3(1)(a); FETO, art.3(1)(a); DDA, ss.5(1)(a), 20(1)(a), 24(1)(a) and 28B(1)(a); Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), art.5; Race Directive, Art.2(2)(a); Employment Directive, Art.2(2)(a).

<sup>24</sup> *R. v Birmingham City Council Ex p. Equal Opportunities Commission* [1989] A.C. 1155.

the Act to bite. Domestic anti-discrimination laws surpass the requirement of Art.26 in their recognition of harassment<sup>25</sup> and victimisation<sup>26</sup> as forms of direct discrimination.

Domestic legislation also provides protection from indirect discrimination on all protected grounds, with the exception of disability and gender reassignment.<sup>27</sup> However, there appears to be a significant gap in the definition of indirect discrimination under Art.26 and the definition that is used in parts of the domestic legislation. Article 26 applies to any discriminatory "distinction, exclusion, restriction or preference". As a consequence of piecemeal changes in response to EC Directives, in some parts, UK anti-discrimination legislation meets the Art.26 standard while in other parts legislation falls short of this standard. Prior to the changes brought about by EC Directives, indirect discrimination required the application of a "requirement or condition". The courts held that a condition must be an absolute bar before it can be termed a "requirement or condition".<sup>28</sup> This interpretation places a significant hurdle in the way of tackling indirect discrimination; it permits the application of discriminatory preferences as long as they are not expressed as absolute requirements.<sup>29</sup> This falls short of the standards of Art.26, which defines discrimination more loosely as occurring from the application of "any distinction, exclusion, restriction or preference which is" based on any of the protected grounds. Parts of the domestic legislation have been or are being changed in response to EC Directives which define indirect discrimination as resulting from the application of a "provision, criterion or practice".<sup>30</sup> This definition is in line with Art.26. As a consequence of EC law this definition is applied in areas that come under EC competence, namely discrimination in employment on the grounds of sex, race, religion, age, disability and sexual orientation.

#### *Justification for discrimination*

General Comment 18 clearly provides that a difference in treatment does not amount to discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".<sup>31</sup> This appears to suggest a three-stage test: first, the difference in treatment must be reasonable; secondly, it must be objective; finally, it must be in pursuit of a legitimate aim. Although at times the Committee makes a distinction between arguments as to whether a distinction is objective and those as to whether it is reasonable, there is no clarity in the approach taken under Art.26. The Committee often finds that a criterion is not discriminatory without explicitly relating the facts and the details in the

<sup>25</sup> *Porcelli v Strathclyde Regional Council* [1986] I.C.R. 564.

<sup>26</sup> SDA, s.4; SD(NI)O, art.6; RRA, s.2; RR(NI)O, art.4; DDA, s.55; FETO, art.3(4); Race Directive, Art.9; Employment Directive, Art.11.

<sup>27</sup> SDA, ss.1(1)(b), 1(2)(b), 3(1)(b); SD(NI)O, arts 3(1)(b), 3(2)(b), 5(1)(b); RRA, s.1(1)(a); RR(NI)O, art.3(1)(b).

<sup>28</sup> *Perera v Civil Service Commission and Department of Customs and Excise (No.2)* [1983] I.R.L.R. 166.

<sup>29</sup> See *Meer v Tower Hamlets* [1988] I.R.L.R. 399 at 403.

<sup>30</sup> Burden of Proof Directive 97/80 [1998] O.J. L.14/6, Art.2; Race Directive, Art.2(2)(b); Employment Directive, Art.2(2)(b).

<sup>31</sup> General Comment 18, para.13.

communication to the objective and reasonable criteria.<sup>32</sup> The Committee has also applied the test in a negative formulation finding that a difference in treatment was acceptable as it was “not unreasonable”.<sup>33</sup> Explicit references to a legitimate aim are also rare, but the connection between a requirement and a legitimate aim is often implied in the Committee’s reasoning.<sup>34</sup>

The Committee has shown itself to be reluctant to find discrimination where the state’s actions involve economic issues or where removing differential treatment has significant cost implications. The Committee appears to favour giving the state party considerable discretion in such situations:

“It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgement for that of the legislatures of States parties.”<sup>35</sup>

However, no elaboration of what constitutes a “manifestly discriminatory or arbitrary” distinction is provided. In an individual opinion, Committee member Ando urges the Committee to “exercise the utmost caution in dealing with questions of discrimination in the economic field”.<sup>36</sup>

As noted above, the approach in UK anti-discrimination legislation is shaped by the distinction the legislation makes between direct and indirect discrimination. In cases of direct discrimination the legislation provides specific exemptions. There is no general defence of justification to direct discrimination except in relation to disability discrimination and less favourable treatment of part-time workers. However, it is argued that the need for a comparator can operate covertly to permit the justification of direct discrimination.<sup>37</sup> Furthermore, the SDA, RRA and FETO provide statutory exemptions from direct discrimination where there is a genuine occupational requirement, excluding them from judicial scrutiny. Under the DDA, direct discrimination in employment is justified “if, but only if, the reason for it is both material to the circumstances of the particular case and substantial”.<sup>38</sup> In other parts of the DDA the test is expressed as one of “necessity”.<sup>39</sup> This has created a low threshold of justification where there is no duty to make adjustments which only operate to exclude the most trivial or minor justifications.<sup>40</sup> Where a disabled person is placed at a “substantial disadvantage”, the DDA creates duties to make “reasonable adjustments”. The failure to make such adjustments can be justified. The duty to make “reasonable adjustments” does not make this a wider duty than that imposed by other direct discrimination provisions, for instance those on the grounds of race or sex, however the absence of any indirect

<sup>32</sup> *Hoofdman v Netherlands* (602/1994), para.11.4.

<sup>33</sup> *M Schmit-de-Jong v Netherlands* (855/1999), para.7.2.

<sup>34</sup> See previous article on *Maille v France* (689/1996).

<sup>35</sup> *Oulajin and Kaiss v Netherlands* (406, 426/1990), individual opinion submitted by Committee members Kurt Herndl, Rein Müllerson, Birame N’Diaye and Waleed Sadi.

<sup>36</sup> *Adam v Czech Republic* (586/1994).

<sup>37</sup> A. McColgan, *Discrimination Law: text, cases and materials* (Oxford, Hart Publishing, 2000), p.36.

<sup>38</sup> DDA, s.5(3).

<sup>39</sup> *ibid.* s.20(4).

<sup>40</sup> *Clark v Novacold* [1999] 2 All E.R. 977, CA.

discrimination provision means that employers and others are under no anticipatory duty to prevent disability discrimination occurring. The Employment Directive imposes a duty on the Government to make provision for indirect discrimination on the grounds of disability so this is an area that will need to be dealt with by 2006.

For indirect discrimination there is a general justification defence. Initially the courts applied a very loose test. In *Ojutiku*, Eveleigh L.J. held that a discriminatory action was justified if the reasons for doing it were "acceptable to right thinking people as sound and tolerable reasons".<sup>41</sup> Kerr L.J. was clear that "justifiable" applies a lower standard than the word "necessary".<sup>42</sup> A more stringent test was formulated by the European Court of Justice ("ECJ") in *Bilka-Kaufhaus GmbH*, which held that rules with a disparate impact on women were only permissible if they "correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end".<sup>43</sup> The Burden of Proof Directive adopted the wording of the ECJ in *Bilka-Kaufhaus*, providing that an employer has the burden of showing that any adverse impact is "appropriate and necessary and can be justified by objective factors unrelated to sex".<sup>44</sup> The regulations implementing the Directive do not incorporate the reference to "necessity", but refer to a discriminatory provision being "justifiable".<sup>45</sup> Balcombe L.J. in *Hampson* held that "justifiable" required "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".<sup>46</sup> Different results could be arrived at depending on whether one considers reasonableness or necessity in relation to the needs of the party applying the discriminatory condition.<sup>47</sup>

In *Hampson*, Balcombe L.J. pointed to economic and administrative efficiency as among the "reasonable needs" that a party could point to in justifying the application of a discriminatory condition. The courts have shown willingness to subject arguments centred on economic need to some scrutiny. In *R. v Secretary of State for Social Security Ex p. Equal Opportunities Commission*, the House of Lords held that no effective justification was put forward to justify a rule treating part-time and full-time workers differently, when it had a disparate impact on women.<sup>48</sup> It was not sufficient for the government to assert that the difference in treatment would adversely affect the cost of employing part-time workers; evidence was needed to support their argument and the House of Lords found that the government had not provided the required evidence. However the House of Lords returned the courts to a more deferential examination of government policy decision-making in *Seymour-Smith*:

<sup>41</sup> *Ojutiku v Manpower Services Commission* [1982] I.R.L.R. 418 at 421

<sup>42</sup> *ibid.* at 422.

<sup>43</sup> Case C-170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] E.C.R. 1607.

<sup>44</sup> Burden of Proof Directive, Art.2(2).

<sup>45</sup> Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660) and Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001 (SI 2001/282).

<sup>46</sup> *Hampson v Department of Education and Science* [1990] 2 All E.R. 25 at 34; this was approved by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All E.R. 929 at 936.

<sup>47</sup> M. Connolly, "The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001 No 2660)" (2001) 30(4) I.L.J. 375 at 380.

<sup>48</sup> [1992] 3 All E.R. 577.

“Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors . . . National courts, acting with hindsight, are not to impose an impracticable burden on governments which are proceeding in good faith.”<sup>49</sup>

However, even this level of deference appears compatible with the Human Rights Committee’s approach to Art.26. The wide discretion that the Committee gives to states parties should be not be surprising as the Committee is an international body. In this respect the domestic courts should be prepared to take a more intrusive approach to questioning state justifications of discrimination.

A willingness to apply stricter scrutiny of state justifications of discrimination can be found in the domestic court’s examination of claims for a violation of Art.14 ECHR. The ECHR makes no formal distinctions between direct and indirect discrimination. Both forms of discrimination are therefore subject to its test for justification, which the domestic courts have formulated as a question of whether the difference had an objective and reasonable justification, in other words, “did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?”<sup>50</sup> The Court of Appeal has taken conflicting positions on the extent to which they should defer to Parliament when scrutinising the state’s justification for discrimination. A deferential attitude towards such justifications was advocated by Lord Woolf C.J. in *R. (on the application of S) v Chief Constable of South Yorkshire Police*. The court held that the case involved judgment in an area:

“ . . . where under the Human Rights Act 1998 the courts are required to exercise considerable deference to Parliament. This does not mean that this court has not to form its own judgment of the issues, which are raised. It does mean that we should not intervene without fully taking into account that the issues are of a category in relation to which Parliament should be recognised as having a special responsibility. A responsibility with which a court should not interfere without due cause.”<sup>51</sup>

The Court of Appeal decision in *Mendoza* indicates that a more robust approach to scrutiny of government policy can be taken:

“[O]nce . . . discrimination is demonstrated, it is for the discriminator, to establish an objective and reasonable justification for that discrimination . . . The form of the questions in *Michalak’s* case reflects the seriousness with which Convention jurisprudence views discrimination, and the limited extent to which such discrimination can be tolerated. In seeking to discharge that burden, it is simply not enough to claim that what has been done falls within the permissible ambit of Parliament’s discretion . . . A much more positive argument is required if the burden imposed by *Michalak’s* case is to be discharged.”<sup>52</sup>

<sup>49</sup> *R. v Secretary of State for Employment Ex p. Seymour-Smith and Perez (No.2)* [2000] I.R.L.R. 263.

<sup>50</sup> *Michalak v Wandsworth LBC* [2002] EWCA Civ 271; [2003] 1 W.L.R. 617 at [20].

<sup>51</sup> *R. (on the application of S) v Chief Constable of the South Yorkshire Police* [2002] EWCA Civ 1275; [2002] 1 W.L.R. 3223 at 3238–3239.

<sup>52</sup> *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2003] 2 W.L.R. 478 at 486.

Here, deference to Parliament and the executive only had a “minor role to play” as the right to protection from discrimination was one “of high constitutional importance” which the courts should not shrink from examining.<sup>53</sup> Having found that the courts were not required to defer to Parliament, the court held that it could examine not only whether the steps taken were reasonable and proportionate but also whether the discriminatory actions were “logically explicable as forwarding that policy”.<sup>54</sup> This more robust approach to scrutinising justifications for discrimination is to be preferred and should inform the approach taken by domestic courts to justification of indirect discrimination.

### **Affirmative action**

Achieving substantive equality may require action to assist disadvantaged groups. The terminology used to describe measures to redress disadvantage remains contentious, with the terms “affirmative” or “positive” action used here. From General Comment 18 it is clear that Art.26 allows positive action to be taken by states to assist disadvantaged groups:

“The principle of equality *sometimes requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State *should* take specific action to correct those conditions. Such action *may* involve granting *for a time* to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”<sup>55</sup>

In its Concluding Comments on states parties reports the Committee has provided more detail of the types of action that should be taken. In its Comments on the report by the Czech Republic, the Committee said that the state party, to assist the Roma community, should take “all necessary measures to eliminate discrimination against members of minorities . . . and to enhance the practical enjoyment of their rights”.<sup>56</sup> Specific measures included taking “immediate and decisive steps to eradicate the segregation of Roma children in its educational system by ensuring that placement in schools is carried out on an individual basis and is not influenced by the child’s ethnic group. Where needed, the State party should also provide special training to Roma and other minority children to secure, through positive measures, their right to education”.<sup>57</sup> These comments indicate that Art.26 can require measures that go beyond formal equality and aim to achieve substantive equality.

UK anti-discrimination law is drafted in terms of non-discrimination rather than equality. As there is no general justification defence for direct discrimination and the

<sup>53</sup> *ibid.* at 487.

<sup>54</sup> *ibid.* at 487.

<sup>55</sup> General Comment 18, para.10 (emphasis added).

<sup>56</sup> (2001) UN Doc.CCPR/CO/72/CZE, para.8.

<sup>57</sup> *ibid.* para.9.

legislation is symmetrical (covering men and women, black and white people, Catholics and Protestants), the SDA, RRA or FETO do not permit positive discrimination. Positive discrimination is allowed only to the extent that there are specific exceptions within the legislation from the prohibition on direct discrimination, for example where being of a particular race or sex is a genuine occupational qualification.<sup>58</sup> Under the SDA, trade unions are allowed to reserve female seats on elected bodies where “in the opinion of the organisation the provision is in the circumstances needed to secure a reasonable lower limit to the number of members of that sex serving on the body”.<sup>59</sup> Following a successful challenge under the SDA to all women shortlists used by the Labour Party in the selection of candidates for the 1997 General Election, the SDA was amended to allow political parties to take positive measures when selecting candidates where the measure is aimed at reducing inequality in the numbers of men and women elected to legislative bodies.<sup>60</sup> Furthermore, the legislation permits, but does not require, positive action to be taken to encourage workers and potential workers, and to provide training for workers from under-represented groups.<sup>61</sup> This does not, however, extend to the provision of jobs. The DDA only prohibits discrimination against disabled persons and so action that favours disabled persons is not illegal and does not require an express permissive exemption.

EC law has, since the Equal Treatment Directive, permitted positive action to be taken to promote equality between men and women. The current provision is contained in Art.141(4) of the Treaty of Amsterdam, which provides that:

“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

The EC Race and Employment Directives also *allow* but *do not require* positive action to be taken.<sup>62</sup> Thus the onus remains with the UK Government to develop policies that pursue positive action.

It is clear that Art.14 ECHR allows positive action, as it does not prohibit all differences in treatment, only those that are not in pursuit of a legitimate aim or where the discriminatory means are not proportionate to that legitimate aim. In the *Belgian Linguistics Case* the court recognised that “certain legal inequalities tend only to correct factual inequalities”.<sup>63</sup> The court has been willing to accept positive action measures adopted by states. The extent to which Art.14 can generate positive obligations on states to tackle discrimination is less clear. Such a positive obligation may be found in

<sup>58</sup> SDA, s.7; SD(NIO), art.10; RRA, s.5; RR(NIO), art.8.

<sup>59</sup> SDA, s.49; SD(NIO), art.50.

<sup>60</sup> See *Jepson v Labour Party* [1996] I.R.L.R. 116; SDA, s.42A; SD(NIO), art.43A (as amended by Sex Discrimination (Election Candidates) Act 2002).

<sup>61</sup> SDA, ss.47–48; SD(NIO), arts 48–49; RRA, ss.37–38; RR(NIO), arts 000.

<sup>62</sup> Race Directive, Art.5; Employment Directive, Art.7.

<sup>63</sup> *Belgian Linguistics Case (No.2)* (1979–80) 1 E.H.R.R. 352; see also *DG and DW Lindsay v United Kingdom* (1986) 49 D.R. 181—tax advantages for married women were not discriminatory as they had an “objective and reasonable justification in the aim of providing positive discrimination” to encourage married women back to work.

the text of Art.14, which provides that the “enjoyment of the rights and freedoms set forth in the convention *shall be secured* without discrimination . . . ” (emphasis added).

In the domestic anti-discrimination legislation there has been a move towards a focus on positive duties. The Race Relations (Amendment) Act 2000 created a duty on specified public authorities to “promote equality of opportunity and good relations between persons of different racial groups”.<sup>64</sup> The aim is to ensure that public authorities take positive steps to remove barriers to race equality and that race equality and good race relations are central considerations in their policy-making, service delivery and employment practices. The government has committed itself to extending to the duty to promote equality of opportunity between men and women and for persons with disabilities “when legislative time permits”.<sup>65</sup>

Positive duties to promote equality are also a feature of the various pieces of devolution legislation. The Scotland Act defines equal opportunities as “the prevention, elimination or regulation of discrimination between persons on grounds of sex, or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions”.<sup>66</sup> While the Scottish Parliament cannot legislate on designated “reserved matters”, including anti-discrimination legislation, there is an exception allowing “the encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements” and for imposing duties on office-holders in the Scottish Administration or any Scottish public authority to make arrangements to ensure their duties are carried out with due regard to the equal opportunities requirement. The Scottish Parliament has acted on this and included duties to promote equality in recent legislation.<sup>67</sup>

The National Assembly for Wales is required to ensure that its business and functions are conducted with due regard to the principle of equality of opportunity for all people.<sup>68</sup> Unlike in Scotland, there is no definition of equal opportunities in the Government of Wales Act, the legislation referring to equality of opportunity for “all people”.<sup>69</sup>

The most extensive equality duty is found in Northern Ireland. A public authority in carrying out its functions in Northern Ireland must have due regard to the need to promote equality of opportunity:

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (b) between men and women generally;
- (c) between person with a disability and persons without; and
- (d) between persons with dependents and persons without.

<sup>64</sup> RRA, s.71.

<sup>65</sup> Cabinet Office, Equality Statement, November 30, 2000.

<sup>66</sup> Scotland Act 1998, Sch.5, Pt II, L2.

<sup>67</sup> See Standards in Scotland’s Schools Act 2000, s.5(2)(b); Housing (Scotland) Act 2001, s.106; Regulation of Care (Scotland) Act 2001, s.(1)(2)(b).

<sup>68</sup> Government of Wales Act 1998, ss. 48 and 120.

<sup>69</sup> See P. Chaney, “New and Unexplored Possibilities—The Welsh Legislature’s Statutory duty to Promote Equality of Opportunity” (2002) 21(1) *Equal Opportunities International* 19.

FETO contains the most active obligations for achieving substantive equality. The aim of these duties is to secure “fair participation” in employment for members of the Roman Catholic and members of the Protestant communities. FETO does not define fair participation, but the Fair Employment Commission adopted an interpretation which involves redressing imbalances and under-representation in employment between the two communities in Northern Ireland. The aims are to secure greater fairness in the distribution of jobs and opportunities between the two communities, and to reduce the relative segregation of the two communities at work.<sup>70</sup> FETO contains a duty on employers to monitor their workforce on the basis of religious affiliation and it requires employers to undertake a periodic review (once every three years) of their employment practices to determine whether members of each community are enjoying or are likely to continue to enjoy fair participation in the employment of the firm. Where fair participation is not evident, the employer must engage in affirmative action.

The UK approach to affirmative action appears to reflect that of Art.26. In both cases duties to take positive action are evidence-based; there is a duty to take steps where there is evidence of disadvantage and discrimination experienced by specific groups. The drawback is that patterns of disadvantage revealed by data are in part a product of prior decisions about how to categorise people. These decisions in turn reflect political judgments about which patterns are likely to be important and which groups deserve protection. While the UK approach to positive duties is evidence-based, gaps in its protection remain. To meet fully the requirements of Art.26, the duty on public bodies to promote equality should be extended to the whole of the United Kingdom and should cover all protected grounds for which there is evidence of discrimination and disadvantage.

#### *Discrimination by non-state actors*

In *Nahlik v Austria*, the Committee took the view that “the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of State parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment”.<sup>71</sup> The Committee’s comments on state reports indicate that there is a duty to introduce legislation prohibiting discrimination in relation to employment, education and health care systems, housing and the provision of goods and services.<sup>72</sup> The Committee has indicated that the Covenant permits positive measures, including incentives to private sector employers aimed at improving the participation of ethnic minorities in the work force.<sup>73</sup> Where a group is particularly vulnerable, the Committee has suggested that compliance with Art.26 requires the state

<sup>70</sup> Northern Ireland Affairs Committee, Fourth Report, *The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On* (1998–99 HC 98), para.36–65. See also Fair Employment Code of Practice.

<sup>71</sup> *Nahlik v Austria* (608/1995), para.8.2.

<sup>72</sup> (2001) UN doc.CCPR/CO/72/CZE, para.9; *ibid.* CCPR/CO/71/HRV, para.19; *ibid.* CCPR/CO/71/VEN, para.23.

<sup>73</sup> (2001) UN doc.CCPR/CO/72/NET, para.14.

to provide strengthened protection in its labour laws.<sup>74</sup> So far the communications have not provided an indication as to the limits of state obligations regarding discrimination by non-state actors.

UK anti-discrimination legislation prohibits discrimination by “persons”, thus it covers discrimination by all legal persons, including private individuals, companies and public authorities. The protection is limited to the grounds covered by the legislation and to the areas to which the law applies. This means that even after the implementation of the EC Employment Directive, in the provision of goods, services and facilities, discrimination on the grounds of sexual orientation, age, and, outside Northern Ireland, religion or belief, will remain perfectly legal.

Further protection from discrimination by non-state actors may be found through a combination of Arts 8 and 14 ECHR. Article 8 includes the right to respect for private life, but under the HRA the duty to respect Convention rights is limited to public authorities; private bodies are not directly bound by the Convention guarantees under the HRA so its effect on private actors is limited. However, the Convention rights can have indirect horizontal effect, and the courts as public authorities could begin to develop a more robust protection from discrimination in the common law.

### Conclusion

The combination of the common law, the HRA and anti-discrimination laws ensure that there is substantial compliance with Art.26. The protection for equality before the law meets Art.26 obligations. But significant gaps remain between domestic law and Art.26 in the equal protection of the law and most notably in the prohibition of discrimination. Where there is protection from discrimination the domestic law can go far beyond the obligations created by Art.26. It is in the areas where there is no protection, where a ground of discrimination is not covered, or the discriminatory actions do not come under the scope of the legislation, that the UK law does not match the extensive reach of Art.26.

There is a variable hierarchy of protection within the domestic anti-discrimination legislation. This hierarchy emerges from the different levels of protection given to the different forms of discrimination. The highest levels of protection are given to discrimination on racial grounds (other than for colour or nationality against non-EU nationals). The prohibition of such discrimination is UK-wide and covers the broadest range of activity. Through the Race Relations (Amendment) Act it encompasses duties on public authorities not to discriminate in the exercise of their functions and to promote equality of opportunity and good relations between persons of different racial groups; with the implementation of the Race Directive it will extend to social protection including social security and healthcare. Below this is discrimination on the grounds of colour or nationality for non-EU nationals, which enjoys the same level of protection as other race discrimination but it is not clear that all areas covered by the Race Directive apply to discrimination on these grounds. Sex discrimination receives a similar level of protection to race discrimination in employment and the provision of goods, services and facilities but there is no duty on public bodies not to discriminate on the grounds of sex; or, outside Northern Ireland, to promote equality between men and women.

<sup>74</sup> *ibid.* para.23.

Disability discrimination also covers employment but its coverage of the provision of goods, services and facilities remains patchy, and only in Northern Ireland is there a duty to promote equality between persons with disabilities and persons without. Discrimination on the grounds of religious belief and political opinion receives significant protection in Northern Ireland. In Great Britain, however, such discrimination will be prohibited only in relation to employment once the Employment Directive is implemented. Implementation of the Directive will also ensure protection from discrimination on the grounds of age, sexual orientation and against married persons, but again only in relation to employment. Discrimination on the grounds of gender reassignment receives the lowest level of protection, since it is confined not just to employment but to direct discrimination in employment.

Not only is discrimination law within the United Kingdom varied in its provisions and coverage between the different grounds for protection, but it is also inaccessible and difficult to understand. In 2000 it was calculated that to get a comprehensive picture of our discrimination law you would have to consult 30 Acts, 38 statutory instruments, 11 codes of practice and 12 EC Directives and Recommendations. The complexity of the current law and proposed legislation has led to a gulf between what people think equality is about and what the law actually is. In Great Britain there is no general overriding legal principle of equality. Northern Ireland has already undertaken significant work to draft new laws in order to address this deficit to large public approval. The notorious complexity of the law has meant that it is not easily accessible to the public, especially employers, service providers and litigants in person. What is needed is the incorporation of a general principle of equality in a comprehensive unified code so that there is an overriding principle of UK domestic law that no unjustified discrimination is permissible. Article 26 could and should provide the foundation for this.