

STATUS and COMPARATORS

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ARTICLE 14

In order for a difference in treatment to fall foul of Article 14, Qs (1) – (3) must be answered affirmatively and Q (4) negatively:

- (1) Does the treatment complained of fall within the ambit of one of the Convention rights?
- (2) Is that treatment on the ground of some recognised “status”?**
- (3) Is the situation of the claimant analogous to that of some other person who has been treated differently?**
- (4) Is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?

“Discrimination must always be on some ground. Completely blind, motiveless malevolence may be anti-social and abhorrent but it cannot amount to discrimination, because it is indeed indiscriminate.”

R (Carson) v SSWP [2005] UKHL 37, Lord Walker at [50]

- Discrimination is prohibited:
 - (i) on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth
 - (ii) on the ground of ‘any other status’

‘ANY OTHER STATUS’: KEY POINTS

- Key authority is *R (Stott) v Secretary of State for Justice* [2018] UKSC 59
 - Authorities usefully summarised in judgment of Leggatt LJ (as he then was) in *R (SC & Ors) v SSWP* [2019] EWCA Civ 615 at [60] to [69].
- **The test is broad.** *"In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point":* *Stevenson v SSWP* [2017] EWCA Civ 2123 at [41].
- **The boundaries of the test are not entirely clear.** *"The question of what amounts to "other status" for Article 14 purposes is a complicated and often very difficult one."* *R (Bloomsbury Institute Limited) v The Office for Students* [2020] EWHC 580 (Admin) at [337].

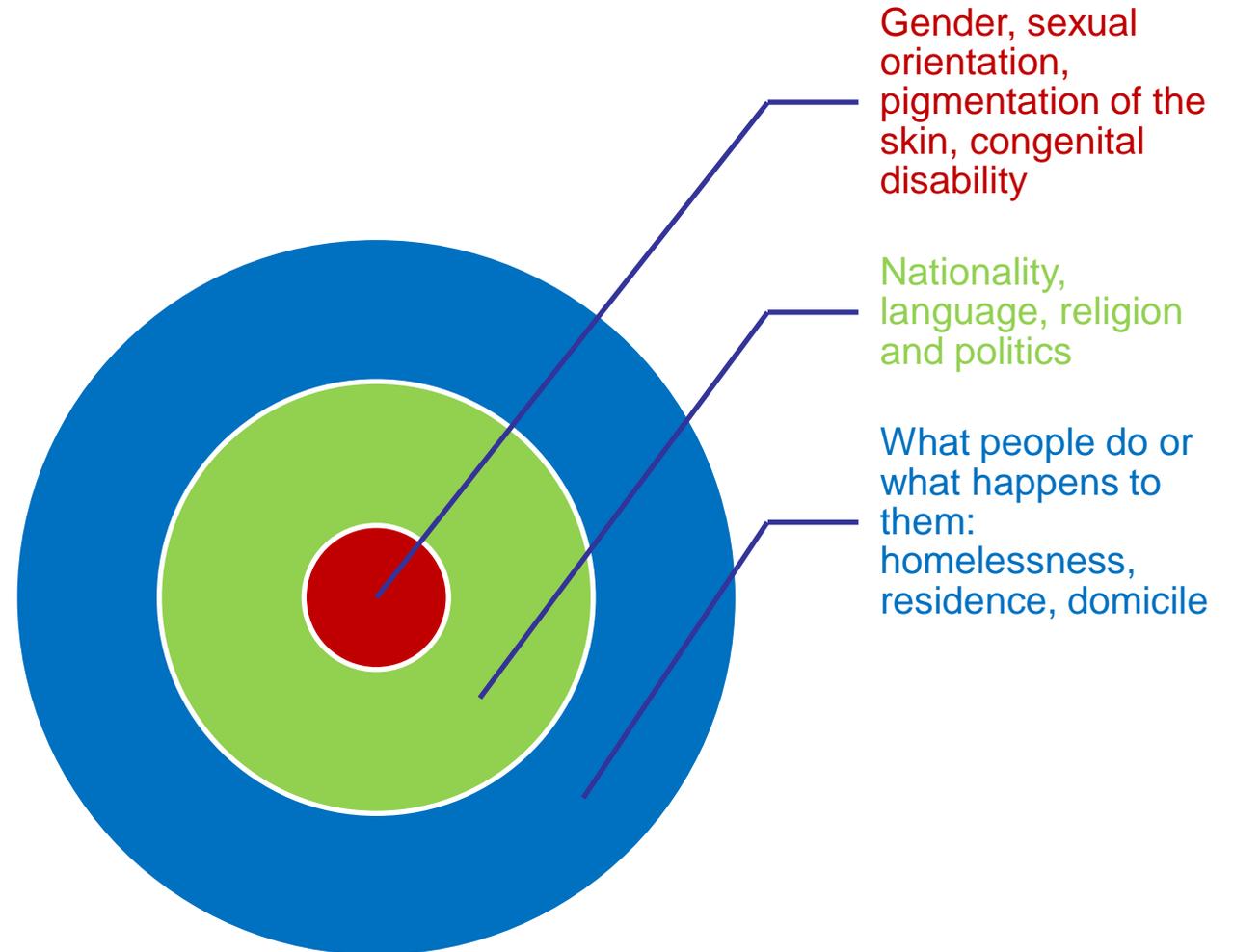
STATUS: Relation to other parts of the test for discrimination

- Status pleaded must actually capture the entirety of the discrimination alleged; see e.g. challenge to two-child limit to universal credit and child tax credit awards in SC & Ors at [72]-[77]. Was status:
 - Being a child with multiple siblings? No, because non-siblings captured and siblings for whom adult is not responsible not captured
 - Household/family? Yes

Concentric circles: Lord Walker in *R (RJM) v SSWP* [2008] UKHL 63 – relation to proportionality analysis

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“..most personal characteristics are those which are innate, largely immutable, closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, ...congenital disabilities. Nationality, language, religion and politics may be almost innate (...) or may be acquired (...); but all are regarded as important to the development of an individual's personality (...). Other acquired characteristics are further out in the concentric circles; ..more concerned with what people do, or with what happens to them, than with who they are (...). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.”



‘ANY OTHER STATUS’: Personal characteristics?

- Focus in some, particularly earlier ECtHR authorities on ‘personal characteristics’. The following extract often cited: “*discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other*”: Kjeldsen v Denmark (1976) 1 EHRR 711
- Problem with such extracts:
 - Circular; not much of a guide
 - the approach is not really reconcilable with where the case law has got to, where the approach is much broader

‘ANY OTHER STATUS’: Current test is broad

- *“The words ‘other status’ have generally been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent.”: Clift v UK (7205/07) at [89]*
- Status need not be immutable, but can be a matter of choice or circumstance

‘ANY OTHER STATUS’: Examples

- Examples:
 - Country of residence: Carson v UK (2010) 51 EHRR 13
 - Immigration status: Bah v UK (2012) 54 EHRR 21; R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57
 - Prisoner serving a sentence of over 15 years: Clift v UK
 - Homelessness: R (RJM) v SSWP
 - Different categories of property owners: James v UK (1986) 2 EHRR 123
 - Military rank: Engels v Netherland (No 1) (1976) 1 EHRR 647
 - Person who, when a victim of a violent crime, was living together as a member of the same family as her assailant: JT v First-tier Tribunal [2018] EWCA Civ 1735

‘ANY OTHER STATUS’: Stott

- In Stott, the majority (Lord Carnwath dissenting) held that being a prisoner serving an extended determinate sentence (“**EDS**”) was a ‘status’ for purposes of Article 14
- Claimant argued that the more restrictive early release provisions for prisoners serving an EDS constituted discrimination in comparison with prisoners serving (ordinary) determinate sentences and discretionary life sentences
- Majority dismissed Article 14 challenge on basis of comparators/proportionality

‘ANY OTHER STATUS’: Stott

- The requirement of status must add something to the four-stage test
- Mere difference in treatment does not by itself constitute a status
- Need to consider “*the situation as a whole*”: per Lady Black in Stott
- An central q raised in Stott: Is there a requirement that the differential treatment exist independently of the status?
 - House of Lords in Clift: yes
 - ECtHR in Clift v UK: Definitely not
 - Relied on in R v Docherty (Shaun) [2016] UKSC 62

THE INDEPENDENT EXISTENCE CRITERION?

- Majority in Stott:
 - Lady Black deprecated criterion; but it did not arise on the facts [75]
 - Lord Hodge: status test met, no desire to make broader comments: [184]
 - Lady Hale: status test met, Stott is stronger on facts than Clift [212]
 - Lord Mance: ‘No’ - no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status: [231]; but does not arise on facts [236]

THE INDEPENDENT EXISTENCE CRITERION?

- Issue: What is relationship between status and difference in treatment?
- Tension between:
 - Need to identify a ground for the difference in treatment in terms of a characteristic or classification which **is not merely a description of the difference in treatment itself**: Stott per Lady Hale at [209]-[212]; SC & Ors at [67]; also Simawi v London Borough of Haringey [2019] EWCA Civ 1770
 - Deprecation of independent existence criterion. Lord Mance in Stott: status need not have social or legal importance outside of the difference in treatment;
- Cases suggest this distinction is not clear.

THE INDEPENDENT EXISTENCE CRITERION?

- Cases that test the boundaries:
 - *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47: Art.14 (A1P1) challenge by a child with disabilities whose parents' disability living allowance ceased once he had been an in-patient in a NHS hospital for more than 84 days. Lord Mance accepted as a status: "*a child hospitalised free of charge ... in a NHS ... hospital ... for a period longer than 84 days*"
 - *Paulík v Slovakia* (2006) 46 EHRR 10. Applicant found in paternity proceedings to be the father of a child who could not disprove paternity by DNA testing was a status. But this was also the difference in treatment..

What is *not* a status? Examples

- Introduction of a new sentencing regime for prisoners sentenced after a particular date: *Minter v UK* (2017) 65 EHRR SE6, *R v Docherty (Shaun)*
- Being a Zambrano carer: *HC v SSWP* [2017] UKSC 73 at [31]
- Differences in treatment between different courts or different parts of the UK, which are based on the geographical location of the person concerned: *Magee v United Kingdom* (2001) 31 EHRR 35

Post-Stott

Case citing Stott seem to fall into three broad categories:

- (1) Stott as authority for status being broad; therefore test is met.
- (2) Status is complicated. Let's assume it is made out and deal with proportionality.
- (3) Reliance on a more restrictive approach in spite of Stott. E.g.
 - (a) relying on independent existence criterion (Banks v HMRC [2020] UKUT 101)
 - (b) Relying on a personal characteristics or ejusdem generis approach: Banks and also NUPFC v Certification Officer (23 July 2019) (on appeal)

ANY OTHER STATUS': Post-Stott

- Revised benefit cap challenge – R (DA) v SSWP [2019] UKSC 21
 - Argt: benefit cap discriminated against lone parents with young children;
 - Pleaded statuses include: lone parents; lone parents of children aged under two (and/or under five); children aged under two (and/or under five) of lone parents;
 - Lords Wilson and Kerr, Lady Hale: in light of Stott, no doubt all meet test
 - Lords Hodge, Hughes, Carnwath, Reed: assumed status but doubtful.
Lord Hodge: “*the boundaries of "other status" in Article 14 is a subject on which there is, as yet, little clarity.*”

COMPARATORS

- Difference in treatment is defined in relation a comparator group: the class of persons said to receive more favourable treatment than the claimant.
- **Situations of claimant group and comparator group must be similar in all relevant respects apart from the ground of alleged discrimination;** otherwise no discrimination.
 - the court looks to the essence of the (substantive) right in question to ask whether claimant and comparator are in a *relevantly similar* situation: two need not be identical
- Often elided with justification: *R (Carson) v SSWP* [2006] 1 AC 173 at [3].

Is there a relevant difference between claimant and comparator?

- Discrimination not made out where there is a relevant difference, e.g.:
 - Two-child limit case: discrimination argument on basis of status as children failed at this hurdle, because the comparator group is **adults**; however, adults are not in a relevantly similar position because they do not receive the benefit in question, child tax credit: [81]
 - Non-resident persons in UK not analogous to resident in the UK for the purposes of pension provision; the former did not contribute to the UK economy and pay tax: ***Carson v UK***
 - Self-employed not in analogous situation with employed persons for the purposes of tax legislation: ***X v United Kingdom*** (19843) 7 EHRR 135

KEY POINTS

STATUS

- Test for ‘any other status’ is broad, but boundaries not clear.
- Key case is Stott.
- Status must be pleaded to capture the entirety of the discrimination alleged.
- Status should not simply recite difference in treatment.
- Nature of status will bear on extent of justification required: concentric circles.

COMPARATORS

- Situations of claimant group and comparator group must be similar in all relevant respects apart from the ground of alleged discrimination. This is assessed in light of the essence of the substantive right.
- Unless comparator case is obviously wrong, court will normally consider this with proportionality.

Thank you for listening

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