UNDERCOVER POLICING INQUIRY

THE EQUALITY ACT 2010
MPS SUBMISSIONS

Introduction and Summary

1. In submissions published on 22 January 2021 on behalf of some non-state core participants (NSCPs), and responded to on 25 January 2021 by counsel to the inquiry (CTI), an issue has arisen as to when, and in respect of which functions, the duties under the Equality Act 2010 (EA2010) bite on a public inquiry. The specific question is how lawfully to afford access to the Inquiry's proceedings in April 2021 for (i) core participants, and (ii) the public.

2. As currently understood the Inquiry proposes to afford access to its April 2021 evidential proceedings by means which include:
    a. Permitting attendance at a designated live viewing room (subject to national lockdown rules), which will include attendance for legal representatives and journalists;
    b. Publication of documents (in advance to affected CPs and the media, and after the hearings to the public);
    c. Providing a 10-minute delayed audio-only feed of the evidence,[1] accompanied by a rolling transcript. The transcript (although not the audio) will be online and so can be paused, rewound and retained.

3. This combination of measures is referred to in these submissions for convenience as the audio-only feed, or "AOF", package (although, as above, the audio feed is only part of the

[1] Assuming that the Chair accepts the MPS submissions in respect of a delayed audio-only feed, as he has indicated he is minded to [**T210126/P114/L24**], subject to discussions as to the workability and effectiveness of necessary caveats.

overall package by which access is afforded). The NSCPs assert that the AOF package would be unlawful, because it would be indirectly discriminatory since those who cannot or are unwilling to attend the live viewing room, by reason of a protected characteristic (see s.4 EA2010)), are put at a disadvantage when compared to those who can so attend. They say that the only means by which the disadvantage could be avoided is by provision of a delayed audio-visual feed to the homes of CPs within the package, and that without the inclusion of a visual feed, the overall access package is said to be unlawful.

4. The legal questions which therefore arise, as the MPS understands it, are:
    a. In providing the AOF of its evidential proceedings, would the Inquiry be providing a service (which includes the provision of a service in the exercise of a public function) or exercising a public function which is not the provision of a service to the public or a section of the public (see s.29(2) and (6), and s.31(3) and (4) of the EA2010)?
    b. In deciding to provide the AOF, would the Inquiry be exercising a judicial function (see s.31(10) and sch 3 para 3 of EA2010)? (If the answer is yes then the Chair is exempt from the s.29 EA2010 duty not to discriminate in the exercise of that function.)
    c. If the decision is not the exercise of a judicial function, and so not exempt, the next question is whether the provision of the AOF is discriminatory, in particular, indirectly discriminatory (see s.19 EA2010). The provision of the AOF would be discriminatory if (i) the Inquiry provides the AOF package both to the persons with and without the protected characteristics; (ii) the AOF package would put the persons with the protected characteristics at a disadvantage compared to those who do not share it; (iii) it does put the person with the protected characteristic at that disadvantage; and finally, (iv) the Inquiry cannot show the provision of the AOF to be a proportionate means of achieving a legitimate aim.

5. As is developed fully below, the MPS submits that the answers are:
    a. For present purposes it does not matter whether the function is a service, or a public function which is not a service. In either case discrimination is prohibited. The critical issue is whether the provision is a judicial function.
    b. There is a strong case for concluding that the decision to provide an AOF is the exercise of a judicial function.

c. But even if it is not, the provision of the AOF is not discriminatory. The Inquiry would need to consider with care whether there is a disadvantage for certain groups with protected characteristics, but in any event the Inquiry can plainly demonstrate that the provision of the AOF is a proportionate means of achieving a legitimate aim. Indeed, it would be a truly startling outcome if the only means by which the Inquiry's EA2010 duty could be met would be to breach the Article 8 rights of its witnesses (as presently protected by the ROs made by the Chairman).

6. If the MPS is wrong about the above, and the only means by which unlawful discrimination can be avoided in April 2021 is the provision of a delayed audio-visual feed, the consequences would be stark. While noting the Inquiry's responsibilities under s.17(1) and (3) IA2005, the MPS submits that, the fairest and most cost-effective option would be to adjourn the hearing to allow for vaccine rollout to vulnerable groups,[2] thus meeting the alleged disadvantage for those who feel they cannot attend the live hearing venue. This is the case because an audio-visual feed would directly contravene the Inquiry's restriction orders ("ROs"), made pursuant to the duty at s.19(3)(a) IA2005 (and s.6 HRA1998).

7. Whilst the Inquiry is empowered to reconsider those ROs (s.20 IA2005), any such reconsideration would need to be separate for each case, and permit a proper review of the position of the person protected by a RO (for the April 2021 hearings this is ten UCOs and two civilian witnesses), to establish whether, in each case, the amendment to the RO would comply with the Inquiry's duties under s.6 HRA1998 and s.19 IA2005. This is the nature of the s.6 HRA 1998 duty, and reflects the fact that although ROs have been made to avoid breaches of Article 8 ECHR, the underlying circumstances and reasons were (and are) varied and individual.

8. Doubtless, any review exercise would require the request for and provision of witness statements from each affected witness, and in some cases medical evidence, including for family members. The challenge of obtaining the same for elderly witnesses in the context of the pandemic (including given the current pressures on the NHS) should not be

[2] The Government's projection is for first doses to be offered to the most vulnerable groups by mid-February 2021:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951928/uk-covid-19-vaccines-delivery-plan-final.pdf

underestimated. The DLO will be best placed to assist as to likely timescales. Reviews of risk assessments would also be required. It is expected that at least some, if not all, would need updating to re-evaluate changes in, primarily, the strength or fragility of the sterile corridor and the effect on that of the provision of an audio-visual feed. Those updates would be prepared by the MPS, which has retained the services of two risk assessors for the purposes of ongoing the Inquiry work (with consultancy work carried out by a third).[3] This resource cannot be upscaled on the timescales required to be effective before April 2021. Meeting the current hearing timetable would be put (at best) in severe jeopardy.

9. It would also be unfair to divert the resources of the DLO and MPS CL teams (and, it is noted, the Inquiry team) to this exercise and away from preparation for the hearings. Finally, it would be unfair to the witnesses themselves, who are prepared to give evidence on the basis of ROs settled some time ago. There is – as CTI has noted – a very real risk that the Inquiry would lose the goodwill of those officers who have agreed to, and have been, assisting it (noting s.19(3)(b) and (4)(d)(i) IA2005). In any event, it is not clear this review process would resolve matters: amended ROs may be challenged by way of judicial review.

10. In summary, the appropriate course, <u>were</u> the Inquiry to conclude that proceeding with the AOF package in April 2021 would be discriminatory by reason of differential potential Covid-19 effects on those who wish to attend in person, would be to adjourn the hearing until such effects are minimised by the roll-out of the vaccine. However, as is stated above and developed below, the MPS's primary submission is that the AOF package is not discriminatory, <u>and the hearings can and should proceed in April 2021</u>.

The Equality Act 2010 (EA2010)

11. The EA2010 prohibits discrimination in various contexts. Discrimination is defined as being both direct (s.13 EA2010) and indirect. Indirect discrimination is defined at s.19:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ["PCP"] which is discriminatory in relation to a relevant protected characteristic of B's.

[3] For reference, the MPS engaged up to five risk assessors over a period of around two years to prepare the original risk assessments for the SDS officers.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

12. Section 23(1) EA 2010 ("Comparison by reference to circumstances") provides that, on a comparison of cases for the purposes of s.19 there must be no material difference between the circumstances relating to each case.

13. Indirect discrimination is prohibited, for present purposes, by reference to s.29 EA2010 ("Provision of services, etc"):

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

…

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

…

14. Section 31 ("Interpretation and exceptions") provides:

(1) This section applies for the purposes of this Part.

(2) A reference to the provision of a service includes a reference to the provision of goods or facilities.
(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
(4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.
…
(6) A reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service.
(7) A reference to a service-provider not providing a person with a service includes a reference to—

(a) the service-provider not providing the person with a service of the quality that the service-provider usually provides to the public (or the section of it which includes the person), or
(b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).

…
(10) Schedule 3 (exceptions) has effect.

15. Schedule 3 para 3 provides:

(1) Section 29 does not apply to—

(a) a judicial function;
(b) anything done on behalf of, or on the instructions of, a person exercising a judicial function;
(…)

(2) A reference in sub-paragraph (1) to a judicial function includes a reference to a judicial function conferred on a person other than a court or tribunal.

Issue 1: is the provision of the AOF package a service, or the exercise of a public function?

16. Section 29 EA2010 prohibits discrimination in the provision of a service to the public, whether or not that service is also the exercise of a public function (s.29 (1) and (2), and s.31(3) EA2010). It also prohibits discrimination in the exercise of a public function which is not a service (s.29(6) EA2010).

17. The Act does not suggest that the provision of a service could not be judicial function, and sch 3 para 3 (the judicial function exemption) applies to the whole of s.29 (contrast with sch 3 para 4 containing exemptions applicable only to s.29(6) EA2010).

18. Accordingly, ascertaining the nature of the service/function does not affect the outcome for present purposes: discrimination is prohibited, unless the judicial function exemption applies.

Issue 2: is the decision to provide the AOF in April 2021 the exercise of a judicial function?

Judicial functions: law

19. The exemption applies to a judicial function, including one conferred on a person other than a court or tribunal (s.31(1) and sch.3 para.3 EA2010).

20. For example, it applies to the decision of the official receiver to revoke a debt relief order. The High Court in *R (Howard) v Official Receiver* [2013] EWHC 1839, [2014] QB 930 considered the meaning of the equivalent "judicial function" exemption in the EA2010 at sch.18 para.3(1)(a), and the policy underlying the Parliamentary intention to exclude the public sector equality duty (PSED) when exercising a judicial function (§153 *et seq*). Section 149 EA2010 contemplates that compliance with the PSED may lead to a different outcome to that which would have occurred in the absence of the duty. That is, an outcome which involves treating more favourably some persons than others. As the Court in *Howard* held:

> 155. It is not difficult to see why it was considered inappropriate as a matter of policy for such a duty to be imposed on judges in the exercise of their function of deciding civil or criminal cases before them. Inherent in the rule of law is the proposition that it is the function of a judge to apply the relevant law to the facts of a particular case in front of him or her and to do so even-handedly without regard to the nature, identity or particular characteristics of any of the parties or persons appearing in front of him or her.
>
> 156. Further there is a myriad of situations in which a judge is required by the law, whether derived from statute or binding authority, to reach a specified conclusion. In such a situation application of the public sector equality duty would come into head on conflict with the judge's obligation to apply the law binding on him or her without regard to any other considerations. The only way in which the public sector equality duty could be reconciled with the obligation of the judge to reach a conclusion which the application of the relevant mandatory provisions of the law would otherwise require him or her to reach would be to construe "due regard" in every such situation as meaning "no regard".
>
> …

158. There are of course many situations in which judges in hearing civil or criminal cases are vested, whether by statute or binding authority, with discretion. Although in such cases the conflict between the judge's duty to apply the relevant law to the facts and his or her duty to apply the public sector equality duty might not necessarily arise in such acute form, there would still be scope for conflict. There may for example be many legal situations in which it is clear from the circumstances or context that the factors by reference to which a judge is obliged to exercise a discretion are circumscribed and in particular such that if the discretion were to be exercised in a manner dictated by having due regard to the matters set out in section 149 it would lead to a result considered to be unfair or even open to challenge on appeal or judicial review absent the statutory obligation to have regard to such matters.

159. Moreover even if there were no scope for such conflict in cases where a judge exercised a discretion, the fact is that the exclusion of the section 149 duty in the case of judges exercising judicial functions is absolute and unqualified and in my judgment plainly extends to such cases. As it seems to me it follows that Parliament considered that as a matter of policy there should be an absolute exclusion of the section 149 duty in the case of judges deciding cases, irrespective of whether the decision is one which the judge is bound to make or one which he or she reached in whole or in part as a matter of the exercise of judicial discretion.

160. It would certainly offend common sense to suggest that a judge deciding a case expressly on the basis of the exercise of a discretion was for that reason not exercising a judicial function. A decision to refuse an application for an injunction on the grounds of delay is no less an exercise of a judicial function than a refusal of an injunction on the ground that the claim discloses no reasonable cause of action.

161. It is of course open to Parliament to fetter judicial discretion or to require it to be exercised in a particular way or indeed to remove judicial discretion and require a judge to reach particular conclusions in particular situations in accordance with statute. Indeed that happens all the time. However that is very different from requiring judges, as would have been the case but for the exclusion in paragraph 3 of Schedule 18 to the 2010 Act, to have regard to a particular set of matters in every single decision in every kind of case which they ever have to decide.

21. It was against that policy background that the Court considered whether the revocation of a debt relief order by the official receiver was a judicial function. It plainly affected rights (§§165-166), but it also determined rights and liabilities of persons in accordance with the relevant law, and with binding legal effect (which was of importance). It did not matter than there was no adversarial procedure (§§173-174). A decision made in the exercise of a discretion is capable of falling within the ambit of a judicial function (§160). The same policy reasons which lay behind the disapplication of the PSED to the court, supported the disapplication of it in the context in *Howard* (§185). The Court found that the official receiver was exercising a judicial function in deciding whether or not to revoke a debt relief order.

22. The Court of Appeal in *R (Gourlay) v Parole Board* [2017] EWCA Civ 1003, [2017] 1 WLR 4107 looked at when the Parole Board makes a "judicial decision" for the purposes of determining whether it should be liable to pay the costs of a judicial review. The Court held that the Board makes a "judicial decision" not just when it makes decisions on release (e.g. where a prisoner's tariff has passed), but also when it makes a *recommendation* to the Secretary of State on transfer (e.g. between closed and open conditions) (§§64-66). It was relevant that the Board performs a similar function when it is making recommendations to when it is making art.5(4) ECHR decisions: in both cases it obtains the relevant material, evaluates that material, and makes assessments of the risk posed and whether the level of risk is appropriate to permit progress (by way of release or transfer, as the case may be). The same procedural standards apply in reaching both its recommendation and its decision. Given its approach, processes and expertise, in the vast majority of cases the Secretary of State will follow the recommendation of the Parole Board on transfer.

23. Indicators of what constitutes "judicial functions" (as opposed to administrative decisions or functions, for example), can therefore be drawn out:
    a. They are not limited to decisions made by 'courts and tribunals' (a point which is in any event express in the present context from sch.3 para.3 EA2010).
    b. They produce decisions (or sometimes even recommendations) which determine or affect rights.
    c. The function is exercised by someone independent of the executive and parties.
    d. The presence of judicial procedures is a key indicator. However, an adversarial procedure is not required.

Application to the Inquiry

24. There can be no serious doubt that the Chair, in at least some decisions, is exercising a judicial function. Consider:
    a. Although an inquiry panel does not determine liability (s.2(1) IA2005), it does make determinations of fact. See s.2(2) IA2005 in which the determination of facts is anticipated; s.5(6)(b) IA2005 which confirms that the terms of reference of an IA2005 inquiry may require an inquiry panel to determine facts; and s.24(1) IA2005 which provides that the inquiry report to the Minister will set out the facts which have been determined.

b. An inquiry panel determines questions affecting rights and receives evidence affecting the determination of any such question. The Chairman of the UCPI has already ruled that this is the case: see Minded To decision of 2 August 2017 and ruling dated 29 November 2017 in respect of the Rehabilitation of Offenders Act 1974. This ruling has not been challenged, and there is no reason to suppose these self-determinations are not of general application. In that ruling the Chairman held that the rights in issue were Articles 6 and 8 of the ECHR, and that they were affected by his determinations, which included whether or not to refer a matter to the miscarriage of justice panel; whether to grant or refuse a restriction under s.19 IA2005; and other procedural decisions, for example to require documents pursuant to the powers in s.21 IA2005, are also capable of affecting rights. In the present context, it is clear that decisions under s.18 (which are subject to s.19) affect rights, as to decisions under s.20 (whether to amend a s.19 RO).
c. The decisions of an inquiry chairman are made with guaranteed judicial procedures (see, for example, s.17(2) and (3) IA2005). IA2005 sets down factors an inquiry chairman is obliged to consider in certain cases (s.17(3) provides an example).
d. In addition to this s.17 duty to act with fairness, the Chair is required generally to be independent and impartial (see s.9 IA2005).

25. In particular, the Chair certainly exercises a judicial function when making ROs pursuant to s.19 IA2005. Section 19(3) envisages restrictions which are required in law: s.19(3)(a) (for example, required by a statutory provision such as s.6 HRA1998); or which are considered necessary in the public interest: s.19(3)(b), (4) and (5). The Chair has decided these questions in accordance with a published legal principles ruling (made in May 2016 following legal argument from those affected by the process) setting out the applicable law and considerations, and pursuant to published procedures designed in accordance with s.17(1) and (3) to facilitate as much involvement as is possible by CPs who are unaware of the content of the material. The decisions were made by minded to rulings, which could be challenged, and final rulings. They are given effect in binding orders which subject to a penal warning notice.[4]

[4] It is of note that when some of these s.19 rulings were challenged by judicial review by the NSCPs, the Chair identified them as judicial decisions: at Section A of his Acknowledgement of Service in *R(oao Da Silva) v Chairman of the UCPI* the Chair described his position as being "*a court or tribunal*". This option in Section A in the current forms is designed to identify those bodies to whom the costs practice applies of making no order for costs against judicial decisions of an 'inferior court or tribunal' which does not make itself a party and plays

26. The nature of the function in issue – to provide access to proceedings via the AOF package – therefore requires careful consideration.

27. In respect of facilitating the engagement of CPs, the guiding provisions are s.17(1) and (3) IA2005 ("Evidence and procedure"), which provide:

> (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
> (…)
> (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

28. It is submitted that the Chair's decisions under s.17 as to the conduct and procedure of the Inquiry are judicial decisions, exempt from the PSED and the duty not to discriminate:
    a. Their purpose is to facilitate the Chair in his ultimate goal: fact finding and making recommendations in fulfilment of his terms of reference (see s. 5(5) and (6), and 24(1) IA2005).
    b. The policy reasons in favour of the exemption articulated in *Howard* (cited above) apply.
    c. The decisions are the result of a balance of considerations, including competing considerations.
    d. As they have to be fair and made by the Chairman, who must be independent, they can be described as judicial procedures.
    e. They can affect rights – notably Article 8 is in issue and the Chairman was satisfied that the ROs were required to avoid the Inquiry breaching its statutory duty not to act incompatibly with (inter alia) Article 8 ECHR (s.6 HRA1998).

29. In respect of the <u>public</u> the Chairman is under a duty pursuant to s.18 IA2005 ("Public access to inquiry proceedings and information") as follows:

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no active part in a judicial review of one of its decisions unless it has behaved improperly or unreasonably. The Court of Appeal in *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739 confirmed this costs practice will ordinarily apply to the judicial decisions of justices (§§9-20), tribunals (§§21-25), ombudsmen (§26, §54), and coroners (§§28-47)).

(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able–

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

30. The provisions of s.18(1) concern *public* access, as opposed to CP engagement. The section reflects the open justice principle, which is a judicial concern (in the Inquiry just as it is in the courts). Section 18 requires the Chairman (notably, not any other person) to decide what steps are *reasonable* to secure the attendance of the public or the right to view a simultaneous live transmission of proceedings. This is plainly describing a judicial exercise: the independent Chairman balancing the open justice principle (the importance of which was articulated in the legal principles ruling) and any other relevant factor to reach a judgment about what is reasonable in the circumstances. Finally, but importantly, the provisions are *subject to* the provisions of s.19 (which delineates the required and necessary restrictions). As above, the decisions made under s.19 are undoubtedly made in the exercise of a judicial function exempt from the duty not to discriminate. It is therefore submitted that decisions made by the Chairman under s.18 as to public access are also decisions made in the exercise of a judicial function. Accordingly, they are exempt.

31. The above position does not mean that whatever access is provided need not be delivered in a non-discriminatory manner. For example, the building in which the live viewing room is contained ought to be wheelchair accessible. Put simply, the Chairman's decisions as to what public access to evidence is fair and necessary (s.17), lawful (s.19) and reasonable (s.18) are judicial functions and so are exempt.

Issue 3: would the provision of the AOF in April 2021 be discriminatory?

32. If not exempt as a judicial function, it would be necessary to consider whether the provision of the AOF package in April 2021 would be discriminatory. The MPS submits that it is very plainly not.

Indirect discrimination: law

33. Guidance on indirect discrimination and in particular, disadvantage, has been provided by the Supreme Court in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343. Baroness Hale (giving the judgment of the Court) held that it is not necessary to show *why* a provision, criterion or practice ("PCP") puts a group at a particular disadvantage when compared with others (§24), but there must be a causal link between the PCP and the particular disadvantage suffered by the group and the individual (§25, §33). The reason for the disadvantage need not be unlawful in itself, or even under the control of the provider. The point is that the PCP (and the reason for the disadvantage) are "but for" causes for the disadvantage: removing one or the other would solve the problem (§26). It is not necessary that the PCP would put every member of the group sharing the particular protected characteristic at a disadvantage, it is enough that a proportion have the disadvantage (§27). It is common for the disparate impact or particular disadvantage to be established on the basis of statistical evidence. Statistical evidence is designed to show correlations and assess their significance – but a correlation is not the same as a causal link (§28). It is always open to the provider to show that the PCP is justified. There should not be reluctance to do this – there is no shame, shadow or stigma in doing so, and a PCP is not unlawful discrimination unless all four elements of the definition are met (§29).

34. As to the pool for comparison, the Court held that the pool should consist of all those affected by the PCP in question (§41). Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it. This matches the language of s.19(2)(b).

35. The Court of Appeal in *R (Independent Workers Union of Great Britain) v Mayor of London*) [2020] EWCA Civ 1046, [2020] 4 WLR 112 ("*Independent Workers Union*") confirmed, at §37, that the approach to s.19(2)(d) is that set out in *MacCulloch v ICI plc* [2008] ICR 1334 at §10 (predating the EA2010):

> The legal principles with regard to justification are not in dispute and can be summarised as follows: (1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways [2005] UKEAT 306; [2005] IRLR 862*, para 31. (2) The classic test was set out in *Bilka-Kaufhas GmbH v Weber Von Hartz (Case 170/84) EU:C:1986:204; [1986] ECR 1607; [1987] ICR 110* in the context of indirect sex discrimination. The Court of Justice, at para 36, said that the court or tribunal must be satisfied that the measures must 'correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end' (para 36). This

involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see *Rainey v Greater Glasgow Health Board (HL) [1987] AC 224* , 142–143, per Lord Keith of Kinkel. (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax [2005] EWCA Civ 846; [2005] ICR 1565* , per Pill LJ, at paras 19–34, Thomas LJ, at paras 54–55 and Gage LJ, at para 60. (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax*.

36. As to proportionality the Court of Appeal in *Independent Workers Union* held at §77:

> … As section 19(2)(d) of the Equality Act 2010 makes clear, the putative discriminator must show that the PCP is a proportionate means of achieving a legitimate aim in order to justify what would otherwise be unlawful indirect discrimination. That involves determining first whether the measure (or PCP) is directed at achieving a legitimate aim; in other words, an aim that corresponds to a real need, is appropriate to achieving the objective in question and reasonably necessary to achieve the aim. Secondly, the measure adopted must be a proportionate means of achieving that aim. Although the terms proportionate and justified are often used interchangeably … they are different. Justification involves two stages, the second of which involves the application of the proportionality principle. … Further, as is well settled, the test of proportionality is in essence, a balancing exercise between the discriminatory effect of the measure (or PCP) on the disadvantaged group, and the needs of (or benefit to be achieved by) the putative discriminator on the other. As Mummery LJ put it in *Elias* at para 151, "it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group." In other words, the judge had to evaluate the extent of the adverse impact of the measure adopted by the respondent on individuals with the protected characteristics of race, sex and disability, weigh that against the benefits and importance of the measure and determine where the balance lay.

37. The proportionality test is that set out in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 (Lord Sumption at §20 and Lord Reed at §74) in the context of ECHR rights. Using Lord Reed's words:

> …it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.…In essence, the

question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

Application to the Inquiry

38. Turning to the four-part definition of indirect discrimination in s.19 EA2010, it is accepted that the AOF package is a PCP (comprising a package of means of access to the Inquiry's proceedings, including real time sight and sound at the hearing venue, and delayed audio and transcript access outside it) applied to those who share, and who do not share, protected characteristics (s.19(1) and (2)(a)).

39. As to the disadvantage which those with protected characteristics are said to be put by the provision of the AOF package, and whether a particular CP would be so put (s.19(2)(b) and (c)), the Inquiry will no doubt wish to consider this with care. As was made clear in *Essop*, there must be a causal link between the PCP and the particular disadvantage suffered by the group and the individual (*Essop* at §25, §33). The disadvantage is said to be a risk of worse outcomes for those with the protected characteristics of disability, age and race in the event of contracting Covid-19 (and catching Covid-19 is said to be more likely by reason of attendance at the live hearing venue). The comparator pool would be all CPs.

40. It should be noted that elderly participants are more likely to be vaccinated by the date of the hearings in April 2021.[5]

41. Also, applying the "but for" test, the alleged disadvantage as between those with the protected characteristics of disability, age and race compared to those who do not have those characteristics would be avoided if **no** CP were permitted to attend the hearing venue and **all** accessed the proceedings by means of a delayed audio feed and transcript (i.e. the playing field could be 'levelled' by levelling down). In fact, because of the various means of access within the AOF package, CPs can choose the aspects of the package which they wish to use for access. Many without protected characteristics will choose to engage with the Inquiry without attendance at the hearing venue, and some with protected characteristics may nonetheless attend.

[5] As noted above, recent Government statements remain that all persons over 70 should have been offered a first vaccination dose by mid-February 2021.

42. If, however, there is a disadvantage within the meaning of s.19(2)(b) and (c) caused by the provision of the AOF package, the Inquiry would need to show that the provision of the AOF package is justified – is a proportionate means of achieving a legitimate aim.

43. Whilst of course the justification is for the Inquiry to show, the following would seem to be relevant:

    a. The legitimate aim/objective to be met in providing the AOF package is to enhance access to the proceedings during the pandemic, whilst also protecting of security of the proceedings and respecting ROs (required to meet a statutory duty to avoid acting incompatibly with the HRA 1998/Article 8 ECHR). This is a real need.
    b. The measure (the AOF package) is rationally connected to the legitimate aim/objective. It offers enhanced access in recognition of the pandemic and the difficulties this will cause for attendance in person. The AOF is an appropriate means to meet the need: the ROs expressly prohibit publication of images and so an AOF (rather than audio-visual) package would be required.
    c. The AOF package is reasonably necessary to meet the need. The less intrusive measure proposed by the NSCPs is an audio-visual feed. Plainly this compromises the objective (it breaches the ROs). The AOF is the least intrusive package and a notable enhancement upon the provision on November 2020. It should also be noted that in exceptional cases (such as with Rosa) the Chair has been willing to take a different course.
    d. The Inquiry should balance the importance of the objective/aim, that is the protection of ROs, against the fact that those who do not attend the venue to watch the proceedings live will nonetheless from their homes be able to hear the evidence (including pauses, hesitation, tone of voice and manner of delivery), and read and retain a transcript of it with a short delay. They will also have access to the papers referred to, at latest the end of the day in question.

44. It is submitted that the outcome of that balance must be that the provision of the AOF package, with the impact that some people with the protected characteristics (and indeed others without them) will not be able to see the evidence being given, <u>is</u> a proportionate means of meeting a legitimate aim, namely that the Article 8 rights of witnesses are not breached.

Issue 4: if the only way to meet the alleged discrimination in April 2021 would be to provide an online audio-visual feed of its proceedings, what should the Inquiry do?

45. If, contrary to the above (and the Commissioner would say, wrongly), the Inquiry concludes that the only way to meet its duties under the EA2010 would be to provide an audio–visual feed, the fact remains that it cannot at present because of the ROs in place. The ROs prohibit publication by the Inquiry of the image of the witnesses.[6]

46. Accordingly, the Inquiry would have two options: adjourn for a period, or review and reconsider all ROs to see whether in each case the RO can be lawfully amended.

47. It is submitted that the correct course would be to adjourn in order to cure the ill, to a date by which the Covid-19 vaccination programme is sufficiently advanced to avoid the disadvantage to those with protected characteristics which the Inquiry would have found to exist. The Commissioner suggests this would be the only option that would ensure:

    a. There is no breach of the HRA1998. The ROs are in place to avoid a breach, and extend to visual image.
    b. Costs are minimised (noting unnecessary cost is to be avoided: s.17(3) and s.19(3)(b) and 4(d)(ii)). There are 12 witnesses affected – ten former UCOs and the civilian witnesses "Mary" and "Madeleine". Although the NSCPs' argument can draw no legal distinction between the state and civilian witnesses for the purposes of the EA2010 duty, the Commissioner deals here only with the UCOs. Each UCO's position would need to be reviewed individually. This is the nature of the s.6 HRA 1998 duty, and reflects the fact that although ROs have been made to avoid breaches of Article 8 ECHR, the underlying circumstances and reasons were varied and individual. This review will be costly for the MPS and the Inquiry. The MPS would have to facilitate a reconsideration of risk in each case (considering changes since the last assessment, the strength of the sterile corridor and the effect of publication of images) and make updated submissions to the Inquiry. The DLO would presumably also need to seek additional impact accounts from witnesses, and may

[6] A representative example is https://www.ucpi.org.uk/wp-content/uploads/2018/10/20181009-HN80_Real_only_RO.pdf. See §2.

additionally require updated or fresh medical evidence (noting the cohort is of course older than when the ROs were originally granted). The Inquiry will need to review and decide upon each revision separately.

c. Fairness to witnesses. Each of the witnesses has assisted the Inquiry with a witness statement on the reasonable expectation that their identity – including their image – would not be published. The Inquiry will need to consider whether the amendment to the RO is conducive to the Inquiry fulfilling its terms of reference, and could impair its efficiency and effectiveness (noting s.19(3)(b) and (4)(d)(i)).

d. Fairness to Police CP teams. It is unfair to add this additional work burden to the CL and DLO teams shortly before the hearing when they reasonably expected to be preparing for those hearings.

48. In any event there is no guarantee – and considerable reason to doubt – that embarking on a review of the 12 ROs would be practically possible in time to make the April 2021 hearing tenable. The CL currently estimates that carrying out a review of the risk position in respect of the ten UCOs with real name restriction orders who are due to give live evidence in T1P2 would take up to 10 weeks, including the provision of updated applications/submissions to be Chair:

a. The MPS now has two risk assessors able to complete work updating risk assessments (a reduction on the team in place working full time on this strand of work when the original exercise was conducted). Whilst this exercise would become their priority, the overall size of the risk assessor team could not be upscaled within 12 weeks – meaning increase in resources could not improve the above time estimate.

b. Although each assessment would be an update on the UCO's current position, and focussed on the specific question of publication of images online, there would still need to be a debrief with the witness to provide that update, and there is the potential need for research (on and offline), following it.

c. The witnesses are all elderly and vulnerable as a result of their age, particularly in the context of the pandemic. This means additional precautions would be required in respect of meeting, and there is the potential that some would be unwilling to meet in person at this time. Methods to meet online will be explored, depending on the UCO's accessibility, but can place limits upon topics which can be discussed.

d. Separately to this, the DLO would need to update impact accounts and medical evidence, and time estimates for this task should be referred to them.
e. The Commissioner's legal team would then need to review each updated risk case and provide updated applications or submissions to the Chair.

49. Of course, after this the Chairman and CTI team would need to review the updated evidence. The Chairman would need to provide 'minded to' decisions (permitting a period for internal challenge) and final decisions. It is conceivable that, if amended, the ROs would be challenged by judicial review. Or, if the Chair concludes the ROs cannot be removed/amended, and his duties under the HRA1998 and EA2010 are irreconcilable, the result would be an adjournment anyway.

50. For all these reasons, if the Chair determines that because of the pandemic the ROs, their consequences for ss.17 and 18 and what he can do by way of access is incompatible with the duty not to discriminate under the EA2010, the correct course is to adjourn the hearings to a date after April 2021 when the alleged discrimination occasioned by the pandemic has subsided.

Conclusion

51. The Commissioner submits that the provision of an audio-only feed and associated access package will be lawful for the purposes of the EA2010, and that the T1P2 hearings can proceed in April 2021. If the Chairman concludes otherwise, then the only fair and practical course would be to adjourn the April 2021 hearing until physical attendance at the Inquiry's hearings no longer presents a risk.

2 February 2021

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