

Non-discrimination under the European Convention on Human Rights: a critique of the U.K. Government's refusal to sign and ratify Protocol 12

Nicholas Grief¹

The European Convention on Human Rights does not contain a general prohibition of discrimination. Article 14 is accessory to the Convention's other substantive guarantees and has no independent existence, with the result that certain forms of discrimination cannot be brought within its ambit. In order to cure this defect, the Committee of Ministers of the Council of Europe has adopted Protocol 12 which provides for a general prohibition of discrimination. However, the UK Government has declared that it has no immediate plans to sign and ratify Protocol 12. After outlining the scope of Article 14 with reference to recent Strasbourg and domestic case-law and explaining the main provisions of the new Protocol, this article offers a critique of the Government's position.²

¹ Head of the School of Finance & Law and Steele Raymond Professor of Law, Bournemouth University, and Chambers of Michael Parroy Q.C., 3 Paper Buildings, Temple.

² An earlier version of this paper was delivered at Oxford Brookes University in December 2001. I would like to thank colleagues there for their helpful comments. I also acknowledge the JUSTICE/TUC conference 'Ensuring Equality: Do We Need Protocol 12?' which was held in London on 15 April 2002, especially the discussion paper by Professor S. Fredman of Oxford University entitled 'Why the U.K. Government should sign and ratify Protocol 12'. I am grateful for permission to refer to the conference proceedings.

The principles of equality and non-discrimination are fundamental elements of international human rights law. This is reflected in Article 7 of the Universal Declaration of Human Rights 1948:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any such discrimination in violation of this Declaration and against any incitement to such discrimination.”

and Article 26 of the International Covenant on Civil and Political Rights 1966:

“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 ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The European Convention on Human Rights was intended to represent “the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.³ As far as the right to freedom from discrimination is concerned, however, the Convention does not yet fulfil the requirements of the Universal Declaration. Unlike Article 7 of the Universal Declaration and Article 26 of the International Covenant, Article 14 of the Convention does not provide a free-standing,

³ Preamble to the European Convention on Human Rights, fifth recital.

general prohibition of discrimination.⁴ The limitations inherent in Article 14 have led the Court of Human Rights to acknowledge that, while it has not been prevented from considering a wide range of issues under Article 14 read in conjunction with other Articles of the Convention, certain forms of discrimination cannot be brought within the provision's ambit.⁵

Article 14 – the current prohibition of discrimination

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁶

Article 14 has no independent existence since it relates only to the “enjoyment of the rights and freedoms set forth in this Convention”. It is merely accessory; that is, it can only be invoked in conjunction with one or more of the Convention's other substantive provisions.⁷ However, it is autonomous to the extent that the application of Article 14 does not presuppose a breach of the other provision(s): a breach of Article 14 can be found where another Convention right is engaged even if it is not

⁴ See further Grosz, Beatson and Duffy, Human Rights: The 1998 Act and the European Convention, Sweet & Maxwell, 2000, pp.324-332; Jacobs and White, The European Convention on Human Rights, Oxford, second edition, 1996, chapter 18; and Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights, Butterworths, 1995, chapter 15.

⁵ Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, adopted at the plenary administrative session of the Court on 6 December 1999 (Doc 8608).

⁶ Specific guarantees concerning equality between spouses were subsequently laid down in Article 5 of Protocol 7 to the Convention (1984).

violated. It suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.⁸ Where a substantive Article of the Convention is invoked both on its own and in conjunction with Article 14 and a separate breach of the former is found, the European Court does not usually consider the case under Article 14, unless “a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”.⁹

Article 14 is violated when a State treats persons in analogous situations differently without providing objective and reasonable justification; or when, without objective and reasonable justification, it fails to treat differently persons whose situations are significantly different.¹⁰ The applicant has the burden of establishing a difference of treatment (or the failure to ensure different treatment) and the State must then establish objective and reasonable justification. Objective and reasonable justification involves showing that the difference in treatment pursues a legitimate aim and that there is a reasonable relationship of proportionality between means and end. National authorities enjoy a margin of appreciation in assessing whether and to what extent differences between otherwise similar situations justify a difference of treatment in

⁷ *Belgian Linguistic case* (1968) 1 E.H.R.R. 252, para 9.

⁸ *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471: although there was no breach of Article 8 itself, the facts of the case (which concerned the application of the immigration rules) fell within the ambit of Article 8 and there was discrimination on the ground of sex. For a recent example of the “ambit test”, see *Thlimmenos v. Greece* (2001) 31 E.H.R.R. 15 where the applicant, a Jehovah’s Witness, was refused appointment as a chartered accountant because of his conviction for refusal to wear military uniform. The Court said that since the right to freedom of profession is not guaranteed by the Convention, he could not complain of exclusion from the accountancy profession on the ground of his status as a convicted person. However, he could complain of discrimination in the enjoyment of his right to freedom of religion as guaranteed by Article 9 (see below).

⁹ See e.g. *Airey v. Ireland* (1979) 2 E.H.R.R. 305, para 30, and *Chassagnou v. France* (2000) 29 E.H.R.R. 615, para 89. In *Chassagnou*, the applicants complained that, despite their opposition to hunting on ethical grounds, they were obliged to transfer hunting rights over their land to municipal hunters’ organisations, had been made automatic members of those associations and could not prevent hunting on their land. The Court found violations of Article 1 of Protocol 1 (protection of property) and Article 11 (right to freedom of association) both alone and in conjunction with Article 14. There was discrimination because only large landowners could use their land in accordance with their conscience.

law, the scope of the margin of appreciation varying according to the circumstances and subject-matter.¹¹ In principle, all differences in treatment are capable of being justified.¹² However, “very weighty reasons” are required to justify differences based on sex,¹³ nationality,¹⁴ race,¹⁵ religion¹⁶ or illegitimacy.¹⁷ Moreover, positive discrimination to redress a pre-existing situation of inequality has been accepted as a legitimate objective of differential treatment.¹⁸

In appropriate circumstances, certain kinds of discrimination may be found to violate the Convention without the applicant having to rely on Article 14. In *East African Asians v. United Kingdom*,¹⁹ in which people who held United Kingdom nationality and passports did not have “right of abode” and were denied entry into their State on the grounds of colour and racial origin, the European Commission found a violation of Article 3. It observed:

“A special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might in certain circumstances constitute a special form of affront to human dignity; that the differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment

¹⁰ This was made clear by the Court in the recent case of *Thlimmenos v. Greece*, *loc. cit.*, para 44. The European Court of Justice had already articulated a similar position in EC law in Case C-479/93 *Francovich v. Italian Republic* [1995] E.C.R. I-3843.

¹¹ *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 371, para 40.

¹² *Belgian Linguistic case* (1968) 1 E.H.R.R. 252.

¹³ *Abdulaziz, Cabales and Balkandali v. United Kingdom*, *loc. cit.*

¹⁴ *Gaygusuz v. Austria* (1997) 23 E.H.R.R. 364.

¹⁵ *East African Asians v. United Kingdom* (1973) 3 E.H.R.R. 76.

¹⁶ *Hoffmann v. Austria* (1993) 17 E.H.R.R. 293.

¹⁷ *Inze v. Austria* (1988) 10 E.H.R.R. 394.

¹⁸ In *Lindsay v. United Kingdom* (1986) 49 D.R. 181, the European Commission held that a tax advantage which benefited working women but not men was justified because its aim was to encourage women back to work after having children. See also the *Belgian Linguistic case*, above.

when differential treatment on some other ground would raise no such question.”²⁰

As the Convention is a living instrument which must be interpreted in accordance with present day conditions,²¹ it is conceivable that in certain circumstances other forms of discrimination might now violate the Convention without reference to Article 14.²²

It is well established that the categories of discrimination prohibited by Article 14 are not closed. Thus, the term “other status” has been interpreted to include marital status, illegitimacy, disability and sexual orientation. In *Salgueiro Da Silva Mouta v.*

Portugal,²³ for example, the European Court held that granting custody of a child to the applicant’s former wife rather than to the applicant, purely because of the latter’s sexual orientation, violated Article 14 in conjunction with Article 8, which guarantees the right to respect for family life. The situation fell within the scope of Article 8 and there was no objective and reasonable justification for the difference in treatment.

Referring to that decision in the domestic case of *Pearce v. Governing Body of Mayfield Secondary School*,²⁴ which concerned homophobic abuse in a school playground, Hale L.J. observed that sexuality “may not be as visible as sex or race, but it is equally an inherent quality of the individual and one which may well lead to arbitrary unfavourable treatment for which there is no objective justification”. Her Ladyship concluded that for a public authority to subject a person to a sustained

¹⁹ (1973) 3 E.H.R.R. 76.

²⁰ *Ibid*, para 27.

²¹ See e.g. *Sigurjonsson v. Iceland* (1993) 16 E.H.R.R. 462.

²² For example, discrimination on the ground of sex or sexual orientation might violate Article 3 or Article 8.

²³ (2001) 31 E.H.R.R. 47.

campaign of homophobic abuse would be to act in a way which is incompatible with the Convention right to respect for private life under Article 8 when read with the prohibition of discrimination in the enjoyment of Convention rights under Article 14. But for the fact that the Human Rights Act 1998 did not operate retrospectively,²⁵ she considered that it would have been possible to read and give effect to the Sex Discrimination Act 1975 compatibly with those Convention rights, not by reading 'sex' to mean 'sexuality', but by regarding sexuality as an irrelevant circumstance for the purpose of the comparison required by s.5(3) of the 1975 Act²⁶ and by comparing the treatment of the applicant with that of a heterosexual person of the opposite sex.²⁷

Although the Court of Human Rights has not yet ruled explicitly that Article 14 prohibits indirect as well as direct discrimination, it has indicated that this is so.²⁸ As many writers and practitioners have observed, there is every reason in principle why the notion of discrimination should extend to measures and practices which, whether intentional or not, have a disproportionate and unjustifiable adverse impact on particular groups.²⁹ Indeed, it would be very surprising if indirect discrimination were outside the scope of Article 14 given that the concept is well established in EC law³⁰

²⁴ [2001] I.R.L.R. 669.

²⁵ See s.7(1)(b) of the Human Rights Act.

²⁶ Which states: "A comparison of the cases of persons of different sex...under s.1(1)...must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

²⁷ Bound by *Smith v. Gardner Merchant* [1998] IRLR 510, however, the Court of Appeal in *Pearce* held that the appropriate comparator was a homosexual person of the opposite sex.

²⁸ See, for example, the *Belgian Linguistic case* (1968) 1 EHRR 252, where the Court emphasised the measure's aim and effects, and the *Building Societies case* (1998) 25 EHRR 411, where it recognised that allegations of discriminatory effect are covered by Article 14.

²⁹ See, for example, Grosz, Beatson and Duffy, *op. cit.*, C14-05, p 326.

³⁰ See, for example, Case C-167/97 *R v. Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] 2 C.M.L.R. 273 and Case C-237/94 *O'Flynn* [1996] All E.R. (E.C.) 541. See also Council Directive 2000/43/E.C. implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: O.J. 2000 No. L180/22; and Council Directive 2000/78/E.C. establishing a general framework for equal treatment in employment and occupation: O.J. 2000 No. L303/16 (both based on Article 13 E.C.).

and elsewhere.³¹ However, the burden of proving indirect discrimination is likely to be heavy.³²

The European Court's recent judgment in *Thlimmenos v. Greece*³³ seems to confirm its acceptance of the concept of indirect discrimination. The applicant, a Jehovah's Witness, was denied appointment as a chartered accountant because he had a conviction for refusing to wear a military uniform. The Court found a violation of Article 14 in conjunction with Article 9 (freedom of thought, conscience and religion). Although the Court did not express itself in these terms, the State's failure to distinguish between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences arguably had a disproportionate adverse impact on the members of a particular group. Furthermore, the equal treatment of all felons (exclusion from the accountancy profession) did not pursue a legitimate aim since a conviction for refusing on religious or philosophical grounds to wear military uniform did not imply dishonesty or moral turpitude, and the sanction was disproportionate since the applicant had already served a prison sentence.

Recognition in principle of the concept of indirect discrimination was also evident in *Hugh Jordan v. United Kingdom*,³⁴ where the applicant claimed, *inter alia*, that the circumstances of his son's killing by a police officer in Northern Ireland disclosed discrimination on grounds of national origin or association with a national minority.

³¹ The concept of indirect discrimination originated in U.S. law. See *Griggs v Duke Power Co* 401 U.S. 424 (1971). However, the U.S. Supreme Court recognises only intentional indirect discrimination. The concept is also well established in United Kingdom and Canadian law.

³² See *Abdulaziz, Cabales and Balkandali v. United Kingdom*, *loc. cit.*, where indirect discrimination on grounds of racial origin was argued unsuccessfully. See also the *Jordan* case, below.

³³ (2001) 31 E.H.R.R. 411

The Court held: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”³⁵ However, even though statistically it appeared that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court said that the statistics did not in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14.

Protocol 12

In March 1998, in the light of a desire to strengthen the European Convention’s guarantees with regard to equality and non-discrimination, the Committee of Ministers gave the Steering Committee for Human Rights (C.D.D.H.) terms of reference to draft an additional protocol to the Convention which would broaden the field of application of Article 14. The C.D.D.H. and its committee of experts elaborated the draft protocol and an explanatory report in 1998 and 1999. After consulting the Court of Human Rights and the Parliamentary Assembly, the C.D.D.H. finalised the text of the draft protocol and transmitted it to the Committee of Ministers, which adopted the text of Protocol 12 on 26 June 2000.³⁶ Protocol 12 was opened for signature on 4 November 2000.³⁷ Its entry into force requires 10

³⁴ 4 May 2001.

³⁵ At para 154.

³⁶ For the background to Protocol 12 and a commentary on its provisions, see the Explanatory Report available at <http://www.humanrights.coe.int/Prot12>. See also J. Schokkenbroek, ‘Stronger European Protection Against Discrimination: The new Protocol No.12 to the ECHR’, discussion paper, JUSTICE/TUC conference, above, n.2.

³⁷ E.T.S. no. 177.

ratifications.³⁸ As at 1 May 2002, 29 States had signed it³⁹ and two of those States had also ratified it.⁴⁰ The Protocol is expected to be in force by the end of 2003.⁴¹

Article 1 of the new Protocol contains a general prohibition of discrimination:

“1. The enjoyment of any right set forth by law shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

The Protocol’s relationship with the Convention is governed by Article 3 of the Protocol, which provides:

“As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.”

³⁸ Article 5 of Protocol 12. Article 4 provides that a Member State may not ratify, accept or approve the Protocol without previously or simultaneously ratifying the Convention.

³⁹ Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Moldova, Netherlands, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia, Turkey and Ukraine. (Interestingly, according to Lord Bassam of Brighton, formerly Minister of State at the Foreign and Commonwealth Office, Germany was one of several States which did not vote for the adoption of the text of Protocol 12: *Hansard*, H.L., 23 October 2000, Column W.A.13.)

⁴⁰ Cyprus and Georgia.

Accordingly, there is an overlap between Article 14 of the Convention and Article 1 of Protocol 12 which, being an additional Protocol, does not amend or abrogate Article 14, which will continue to apply in respect of States Parties to the Protocol. Any questions concerning the relationship between these provisions will be within the European Court's jurisdiction.⁴² In particular, the Explanatory Report notes⁴³ that Article 53 of the Convention will apply to the relationship between Protocol 12 and the Convention. This safeguards existing human rights by providing that:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

The list of discrimination grounds in Article 1 of Protocol 12 is identical to that in Article 14. The inclusion of additional grounds (*e.g.* physical or mental disability, sexual orientation, age) was considered unnecessary since the list is not exhaustive and because the inclusion of any particular additional ground might have given rise to *a contrario* interpretations as regards discrimination based on grounds not so included:⁴⁴ if only certain new grounds had been added, it might have been argued that other new grounds were implicitly excluded.

The protective scope of Article 1 of Protocol 12 is much broader than that of Article 14 because it extends beyond the “enjoyment of the rights and freedoms set forth in

⁴¹ According to J. Schokkenbroek, Head of the Human Rights Law & Policy Development Division, Directorate General of Human Rights, Council of Europe.

⁴² Explanatory Report, para.33. See also Article 32 of the Convention.

⁴³ In para.32.

[the] Convention”. According to the Explanatory Report, the additional protective scope of Article 1 of Protocol 12 concerns cases where a person is discriminated against:

- in the enjoyment of any right specifically granted to an individual under national law;
- in the enjoyment of a right which may be inferred from a public authority’s clear obligation under national law to behave in a particular manner; that is, where a public authority is under a clear obligation to act in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- or by any other act or omission of a public authority (for example, the behaviour of police officers when controlling a riot).⁴⁵

The principal objective of Article 1 is to protect individuals from discrimination by public authorities.⁴⁶ As the Explanatory Report makes clear, the Article is not intended to impose a general positive obligation on the parties to take measures to prevent or remedy all instances of discrimination in relations between private

⁴⁴ Explanatory Report, para.20.

⁴⁵ Explanatory Report, para.22. The Report goes on to state that it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second: “The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1.”

⁴⁶ The term “public authority” in Article 1(2) of Protocol 12 is intended to have the same meaning as in Articles 8(2) and 10(1) of the Convention. It covers not only the administrative authorities but also the courts and legislative bodies. See Explanatory Report, para.30.

persons.⁴⁷ Nevertheless, it is acknowledged that the State's duty to "secure" the enjoyment of any right set forth by law may entail positive obligations:

"For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 could come into play."⁴⁸

However, the Report goes on to state that the extent of any positive obligations flowing from Article 1 is likely to be limited by the fact that the first paragraph is circumscribed by the reference to the "enjoyment of any right set forth by law" and the second paragraph prohibits discrimination "by any public authority". In addition, it recalls that "Article 1 of the Convention sets a general limit on State responsibility which is particularly relevant in cases of discrimination between private persons". These considerations, it says, "indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the State has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons make available to the public such as medical care or utilities such as water and electricity)."⁴⁹

⁴⁷ Explanatory Report, para.25. The Report explains: "An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character."

⁴⁸ Explanatory Report, para.26. The Report cites the example of *X and Y v. Netherlands* (1986) 8 E.H.R.R. 235, where the Court found a breach of Article 8 because Dutch law did not allow the guardians of a mentally-handicapped child to bring criminal proceedings against a man who had assaulted her.

⁴⁹ Explanatory Report, paras.27 - 28.

The Explanatory Report states that the term “law” in Article 1 (“any right set forth by law”) may cover international law but adds that this does not mean that the Court of Human Rights will have jurisdiction to examine compliance with rules of law in other international instruments.⁵⁰ There is no mention of Union law. However, it is arguable that that “set forth by law” should also include rights under Union law. For example, supposing a Member State, when implementing Union law, denied someone equal enjoyment of a right contained in the Charter of Fundamental Rights.⁵¹ While the Charter is not itself legally binding,⁵² “it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments”.⁵³ Accordingly, to the extent that they are enshrined in other instruments,⁵⁴ the rights contained in the Charter may be said to be “set forth by law” for the purposes of Protocol 12. The Charter has its own equality and non-discrimination provisions⁵⁵ and any discrimination by a Member State in relation to a Charter right or freedom, within the scope of Union law, could be considered by the Court of Justice in appropriate

⁵⁰ Explanatory Report, para. 29. This is discussed more fully below in the context of the Government’s objections to Protocol 12.

⁵¹ Article 51 of the Charter provides that the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity “and to the Member States only when they are implementing Union law”.

⁵² See further Allan Rosas, “The European Union and International Human Rights Instruments” and Jörg Polakiewicz, “Relationship between the European Convention on Human Rights and EU Charter of Fundamental Rights”, in V. Kronenberger (ed), The European Union and the International Legal Order: Discord or Harmony?, T.M.C. Asser Press, The Hague, 2001, pp. 53 and 69 respectively.

⁵³ Opinion of Advocate General Tizzano in Case C-173/99 *R v. Secretary of State for Trade and Industry ex parte BECTU*, para.27.

⁵⁴ For the sources of the rights which inspired the Charter, see ‘How the Charter was drawn up – the sources of rights’ in http://www.europa.eu.int/comm/justice_home/unit/charter02.html

⁵⁵ Article 20 of the Charter states that “Everyone is equal before the law.” Article 21 provides: “(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.” Article 23 enshrines the principle of equality between men and women.

cases.⁵⁶ In addition, however, while a breach of the prohibition of discrimination by a Union institution could not be the subject of an admissible complaint to Strasbourg against the Union or Community itself,⁵⁷ a breach of the prohibition by a Member State when implementing Union law might be actionable against the State concerned in Strasbourg.⁵⁸

The Government's objections to Protocol 12

The Government did not sign Protocol 12 when it was opened for signature and have no present plans to do so, but it has not indefinitely ruled out signature and ratification.⁵⁹ Accordingly, when Protocol 12 comes into force, assuming that the Government maintains its objections, the new free-standing right to freedom from discrimination will not be a "Convention right" for the purposes of the Human Rights Act.⁶⁰ The objections are outlined in the following statement by Lord Bassam of Brighton, formerly Minister of State at the Foreign and Commonwealth Office:

“... the text is too general and open-ended. In particular, it does not make clear whether ‘right set forth by law’ includes international law as well as national

⁵⁶ In infringement proceedings (Article 226 E.C.) or on a reference for a preliminary ruling (Article 234 E.C.).

⁵⁷ Since neither the Community nor the Union is a party to the Convention. See T. Eicke, ‘The European Charter of Fundamental Rights – unique opportunity or unwelcome distraction’ [2000] E.H.R.L.R. 280 at 294. However, the Court of Human Rights is currently considering a case brought against the Member States concerning the imposition of fines for infringements of the E.C. Treaty’s competition rules: *DSR-Senator Lines GmbH v. the E.U. Member States*, App. No. 56672/00. See further Rosas and Polakiewicz, above, n.52, pp.65 and 81 respectively.

⁵⁸ See *Matthews v. United Kingdom* (1999) 28 E.H.R.R. 361 and Eicke, *op. cit.*, p.293.

⁵⁹ *Hansard*, H.L., 9 November 2000, Column W.A.175.

⁶⁰ Under s.1(4) of the Human Rights Act, the Secretary of State may by order make such amendments to the Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol. According to s.1(5), ‘protocol’ means a protocol to the Convention which the United Kingdom has ratified or signed with a view to ratification. Under s.1(6), no amendment may be made by an order under s.1(4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

law; it does not make provision for positive measures; and it does not follow the case law of the European Court of Human Rights in allowing objective and reasonably justified distinctions”.⁶¹

The scope of “any right set forth by law”

The Government’s concern in this regard is that the 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:

“There are a number of provisions in international agreements – for instance the International Covenant on Economic, Social and Cultural Rights – which it has not been thought appropriate to incorporate into the law of the United Kingdom because, for example, they are aspirational. There is nothing in the text of Protocol 12, or even in its Preamble, to exclude these rights from the coverage of the Protocol.”⁶²

Under Protocol 12, however, the Court would not be able to examine the United Kingdom’s respect for with those rights as such. It could only consider a complaint of discrimination in the enjoyment of the right; in other words, if the right were recognised by the State but on a discriminatory basis.⁶³ The same applies to the Government’s related objection that

⁶¹ *Hansard*, H.L., 11 October 2000, Column W.A.37. Those objections were reiterated by Mark de Pulford of the Lord Chancellor’s Department at the JUSTICE/TUC ‘Ensuring Equality’ conference in April 2002.

⁶² *Hansard*, H.L., 9 November 2000, Column W.A.175.

⁶³ The notion of discrimination within the meaning of Article 14 includes cases where a person or group is treated, without objective justification, less favourably than another, even though the more

“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”.⁶⁴

Again, the Court would not enforce the rights as such, but merely ensure their enjoyment on a non-discriminatory basis. Furthermore, the Government’s concerns about the cost of ensuring economic, social and cultural rights (and, implicitly, its denial of their justiciability) should be considered in the light of the judgment of the Constitutional Court of South Africa in *Grootboom*,⁶⁵ in which it declared that s.26(2) of the South African Constitution required the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing. The Court recalled an earlier judgment⁶⁶ in which it had held that the fact that socio-economic rights⁶⁷ almost inevitably give rise to budgetary implications was not a bar to their justiciability since many civil and political rights have similar budgetary implications without compromising their justiciability, and that at the very minimum, socio-economic rights can be negatively protected from improper invasion.⁶⁸ The judgment is also important for its recognition that civil and political rights, on the one hand, and social and economic rights, on the other, are inter-related and mutually supporting:

favourable treatment is not required by the Convention. Accordingly, where the State chooses to do more than is strictly necessary to secure a Convention right in domestic law, Article 14 applies to all aspects of the right provided. See *Abdulaziz, Cabales and Balkandali v United Kingdom* and the *Belgian Linguistic case*, *op. cit.*

⁶⁴ *Hansard*, H.L., 25 October 2000, Column W.A.45.

⁶⁵ Case CCT 11/00, 4 October 2000.

⁶⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744; 1996 (10) B.C.L.R. 1253 (CC) at para 78.

⁶⁷ Such as the right of access to land and the right to adequate housing and health care, food, water and social security.

⁶⁸ Para 20 of the *Grootboom* judgment.

“There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”⁶⁹

This is one reason why, regardless of any cost implications, it is important that social and economic rights should be considered “set forth by law” for the purposes of the prohibition of discrimination in Protocol 12.

Fredman has argued that the Government’s concern in this regard is unfounded because the phrase “rights set forth by law” in Article 1(1) of Protocol 12 means rights which are established in law and, under our dualist system, rights derived from international sources which have not been expressly incorporated are not “set forth by law”.⁷⁰ The test for “set forth by law” may be similar to that which is used to determine whether provisions are “law” for the purposes of the “no punishment without law” principle in Article 7(1) of the Convention⁷¹ or whether restrictions on the enjoyment of Convention rights are “in accordance with the law” or “prescribed by law” for the purposes of Articles 8⁷² and 9 to 11,⁷³ respectively. Thus, the Court of Human Rights has stated that in referring to “law”, Article 7(1) “alludes to the very same concept as that to which the Convention refers elsewhere when using that term,

⁶⁹ *Ibid*, para 23. Cf. the separate opinion of Judge Weeramantry in the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, 25 September 1997: “The protection of the environment is... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”

⁷⁰ Fredman, “Why the government should sign and ratify Protocol 12”.

⁷¹ Article 7(1) provides, *inter alia*, that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...”

⁷² Right to respect for private and family life, home and correspondence.

⁷³ Freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association.

a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability”.⁷⁴ The same is true of Articles 8 to 11. In *Groppera Radio AG v. Switzerland*,⁷⁵ for example, the Court held that provisions of international telecommunications law contained in the International Telecommunications Convention and the Radio Regulations (which under monistic principles were part of Swiss law) satisfied the “prescribed by law” requirement of Article 10(2).⁷⁶

In contrast, it is perhaps conceivable that a rule contained in an unincorporated treaty might not satisfy the “set forth by law” requirement as far as the United Kingdom is concerned. However, it is arguable that the test which determines whether provisions are “in accordance with the law” or “prescribed by law” for the purpose of restricting the enjoyment of an individual’s Convention rights should not also be used to determine whether a right is “set forth by law” to the detriment of the State for the purposes of Protocol 12. After all, in terms of international law the United Kingdom is bound by the provisions of an unincorporated treaty to which it is party and any rights which such a treaty enshrines are “set forth”. What should matter is whether the rule in question is binding on the United Kingdom under international law. Thus, in *V v. United Kingdom*,⁷⁷ when considering whether the boys’ trial at Preston Crown Court violated Article 3 of the Convention, the Court discerned an international tendency in favour of the protection of the privacy of juvenile defendants and noted in particular

⁷⁴ See e.g. *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 E.H.R.R. 442, para 37. This was recently reiterated in *Streletz, Kessler and Krenz v. Germany*, *loc. cit.*, para 50 and *K-HW v. Germany*, *loc. cit.*, para 45.

⁷⁵ (1990) 12 E.H.R.R. 321.

⁷⁶ The Court held that although the relevant provisions of international telecommunications law were highly technical and complex, the rules in issue were such as to enable the applicants and their advisers to regulate their conduct in the matter. Accordingly, they fulfilled the requirements of foreseeability and accessibility. Nor could it be said that they were lacking in the necessary clarity and precision.

⁷⁷ (2000) 30 EHRR 121.

that the UN Convention on the Rights of the Child was “binding in international law on the United Kingdom in common with all the other Member States of the Council of Europe”.⁷⁸

In any event, treaties are not the only source of international law or of human rights.⁷⁹

In particular, rules of customary international law, based on State practice accompanied by *opinio juris*,⁸⁰ are without more part of our common law.⁸¹ They do not require express incorporation. Under certain conditions, moreover, a treaty (whether incorporated or not) can codify or generate a customary rule.⁸² When this happens, the two rules co-exist.⁸³ Accordingly, in circumstances where an unincorporated treaty has codified or generated a customary right, the “set forth by law” requirement of Article 1 of Protocol 12 should be considered fulfilled.

The Government’s objection that there is nothing in Protocol 12 to exclude unincorporated treaties from the scope of Protocol 12 similarly ignores the fact that such treaties can codify or generate rules of customary international law which are, without more, part of UK law. The importance of customary international law was recently acknowledged by the Court of Human Rights. In *Streletz, Kessler and Krenz v. Germany*,⁸⁴ for example, it took account of the principles of international law and observed that the relevant conventions “and other instruments” (including the

⁷⁸ *Ibid*, para 77.

⁷⁹ See R. Higgins, *Problems & Process*, Oxford, 1994, p.103: “The existence of a treaty may not be the only test as to whether a right exists. Rights may, of course, exist in customary international law.”

⁸⁰ See Article 38(1)(b) of the Statute of the International Court of Justice.

⁸¹ See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 A.C. 147 at 276B, 285A. See also *Oppenheim’s International Law*, 9th edition, vol. 1, pp 56-57.

⁸² See *North Sea Continental Shelf Cases* I.C.J. Reports 1969, p 3, paras 70-74.

⁸³ See *Nicaragua v. United States (Merits)*, I.C.J. Reports 1986, p.14, para.175: “even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability”.

Universal Declaration of Human Rights) had constantly affirmed the pre-eminence of the right to life.⁸⁵ And in *Al-Adsani v. United Kingdom*,⁸⁶ on the basis of authorities which included Article 5 of the Universal Declaration, the Court accepted that the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm of international law,⁸⁷ that is, “a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”.⁸⁸ In addition, of course, Article 1 of Protocol 1 to the Convention⁸⁹ refers to another source of international law, namely “general principles of international law”. Arguably, therefore, rights which are enshrined in the principles and rules of customary international law are no less “set forth by law” for the purposes of Protocol 12.

The scope for positive action

With regard to the Government’s objection that Protocol 12 does not make provision for positive measures, it is true that the Protocol does not impose an obligation upon States to adopt positive measures to promote full and effective equality. However, it does not prevent them from doing this; indeed, it encourages the adoption of such measures. Furthermore, the preamble to Protocol 12 contains the following recital:

“Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality,

⁸⁴ (2001) 33 E.H.R.R. 31.

⁸⁵ See paras. 90 and 92. See also the concurring opinion of Judge Loucaides. *Cf. K-HW v. Germany*, App. No. 37201/97, 22 March 2001, paras 94-96.

⁸⁶ App. No. 35763/97, 21 November 2001.

⁸⁷ *Ibid*, para 61.

⁸⁸ International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija* (1999) 38 I.L.M. 317, para 30, to which the Court of Human Rights referred in para 60 of *Al-Hadsani*. See also Article 53 of the Vienna Convention on the Law of Treaties 1969.

⁸⁹ Protection of property.

provided that there is an objective and reasonable justification for those measures”.

The Government’s response to this is that the preamble does not have the same force as a substantive provision in the Protocol:

“It may be that the European Court of Human Rights would hold that positive and proportionate action to overcome the effects of past discrimination did not constitute discrimination for the purposes of Protocol 12... We consider, however, and have argued without success, that there should be some specific provision to this effect in the text of the Protocol itself.”⁹⁰

Again, the Government’s concern is unfounded. While the Court has always stressed the importance of giving full and practical effect to the Convention as a living instrument for the protection of human beings, it has also acknowledged that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention on the Law of Treaties.⁹¹ In other words, although the Court is mindful of the Convention’s special character as a human rights treaty, it takes the relevant rules of international law into account.⁹² More specifically, it has acknowledged the general rule that a treaty should be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms... in their context and

⁹⁰ *Hansard*, H.L., 9 November 2000, Column W.A.174.

⁹¹ See *Al-Adsani v. United Kingdom*, *loc. cit.*, para 55.

⁹² *Loizidou v. Turkey* (1997) 23 E.H.R.R. 513, para 43. *Al-Adsani v. United Kingdom*, *loc. cit.*, para 55.

in the light of its object and purpose”.⁹³ In this regard it is significant that the context of a treaty for the purposes of interpretation includes its preamble.⁹⁴

Strasbourg case-law regarding objective and reasonable justification

The Government objects that according to Protocol 12, the enjoyment of any right set forth by law shall be secured without discrimination on the ground of any status and that there is no provision for any exception.⁹⁵ However, as the Court of Human Rights itself recalled in its opinion on draft Protocol 12,⁹⁶ the notion of discrimination as consistently interpreted by the Court means that a difference of treatment is only discriminatory if it has no objective and reasonable justification; that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued.⁹⁷ In other words, the justification defence is part of the definition of discrimination within the meaning of Article 14 and Protocol 12. While the European Court’s interpretation of the Convention certainly evolves and it is not bound by its previous judgments, it is not true that current Strasbourg case-law merely “suggests” that objective and reasonably justified distinctions do not constitute discrimination for the purposes of Article 14.⁹⁸ As

⁹³ Article 31(1) of the Vienna Convention on the Law of Treaties 1969. For an application of the Vienna Convention’s rules by the European Court, see *Golder v United Kingdom* (1979-80) 1 E.H.R.R. 524.

⁹⁴ Article 31(2) of the Vienna Convention.

⁹⁵ *Hansard*, H.L., 23 October 2000, Column W.A.14.

⁹⁶ See above, n.4.

⁹⁷ In para 5 of its opinion, the Court observed that the Protocol refers to the notion of discrimination as consistently interpreted in its case-law.

⁹⁸ *Hansard*, H.L., 9 November 2000, Column W.A.174.

Fredman observes, the Article 14 case-law is very stable.⁹⁹ As long ago as 1968, moreover, in one its earliest judgments, the Court recognised that:¹⁰⁰

“the competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions”.

The Court’s approach to Article 14 is further reflected, consistently with the subsidiary nature of the Convention system, in the margin of appreciation accorded to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment in law.¹⁰¹ Accordingly, the Government’s concern that Protocol 12 might generate many frivolous cases is misplaced.

Conclusion

Protocol 12 is a welcome (and overdue) addition to the Convention system. As stated in the preamble, it reflects the principle enshrined in the Universal Declaration of Human Rights that “all persons are equal before the law and are entitled to the equal protection of the law” and represents “further steps to promote the equality of all persons”. The Court of Human Rights itself has endorsed the introduction of a general prohibition of discrimination and welcomed the Protocol as “a further substantial step

⁹⁹ In ‘Why the U.K. Government should sign and ratify Protocol 12’, a discussion paper at the JUSTICE/TUC conference, above, n.2.

¹⁰⁰ *Belgian Linguistic case, loc. cit.*, para 10.

¹⁰¹ See, for example, *Rasmussen v Denmark, loc. cit.*, para 40.

in securing the collective enforcement of fundamental rights through the European Convention on Human Rights”.¹⁰²

Inevitably, the terms of the Protocol raise several questions of interpretation whose resolution must await the intervention of the Court. It would have been helpful if some of those questions (such as the meaning of “set forth by law”) could have been referred to the Court for an advisory opinion. Article 47(1) of the Convention states that the Court may, at the request of the Committee of Ministers, give advisory opinions on “legal questions concerning the interpretation of the Convention and the protocols thereto”.¹⁰³ However, Article 47(2) provides that:

“Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.”

Unfortunately, therefore, there would appear to be no possibility of an advisory opinion on the interpretation of Protocol 12.¹⁰⁴

¹⁰² Opinion on draft Protocol 12, above, n.4, paras.2 and 7. However, in para.6 of its opinion the Court foresees that the Protocol’s entry into force will lead to a substantial increase in its case-load and requests that this be taken into account in mid- and long-term planning and provision for the Court and the Convention system.

¹⁰³ Article 47(3) provides that decisions of the Committee of Ministers to request an advisory opinion shall require a majority vote of the representatives entitled to sit on the Committee.

¹⁰⁴ The restrictive framing of the Court’s advisory jurisdiction is discussed by Jacobs and White, *op. cit.*, p.13 and by Harris, O’Boyle and Warbrick, *op. cit.*, pp.689-690.

The Government's objections to Protocol 12 are all unconvincing, especially as the United Kingdom is already bound by Article 26 of the International Covenant on Civil and Political Rights. They call into question its commitment to the protection of human rights and the fundamental principle of non-discrimination. In terms of positive reasons for signing and ratifying the Protocol, Fredman identifies three in particular:¹⁰⁵ to set a good example – she cites Lord Lester's observation¹⁰⁶ that Governments in the new democracies of Central and Eastern Europe may well ask why they should sign and ratify Protocol 12 when the United Kingdom is unwilling to do so; the fact that Article 14 of the Convention is "a threadbare right" which has proved "woefully inadequate as a constitutional equality guarantee"; and because the Protocol will be a welcome addition to domestic anti-discrimination law, which is currently fragmented and unsystematic.¹⁰⁷ To these Fredman adds a fourth reason, namely the possible development of the Charter of Fundamental Rights, which contains a chapter on equality,¹⁰⁸ into a legally binding instrument.¹⁰⁹

At the recent JUSTICE/TUC conference,¹¹⁰ the spokesman for the Lord Chancellor's Department observed that Protocol 12 had emerged at a time when the Human Rights Act was about to be introduced and explained that although the Government takes discrimination very seriously, it is concerned about the uncertainty which such developments engender. He also explained that it is Government policy not to sign a treaty unless it intends to ratify it.¹¹¹ That much is understandable. What is less so is

¹⁰⁵ See above, n.2.

¹⁰⁶ In a letter to the Prime Minister, 2 October 2000.

¹⁰⁷ See further Fredman, Discrimination Law, Clarendon series, O.U.P., 2002, chapter 3.

¹⁰⁸ See above, n.50.

¹⁰⁹ See A Vitorino, The Charter of Fundamental Rights as a Foundation for the Area of Freedom, Security and Justice, Exeter Paper in European Law no.4 (2001), p.16.

¹¹⁰ See above, n.2.

¹¹¹ Previous Governments did not sign or ratify Protocols 6, 7 and 9 to the Convention. However, Protocol 4 was signed but not ratified. As a matter of international law, the Government could, if it

the assertion that the Government will not sign Protocol 12 because it is unsure about its meaning, and that it will review its position in the light of the Protocol's interpretation by the Court of Human Rights. Even if the Government's fears were justified, it would surely make more sense for the United Kingdom to be a party to the Protocol at the outset and thus have the opportunity to influence its interpretation.¹¹² In any event, a reassessment by the Government of its present position may come sooner rather than later. It has embarked upon a comprehensive review of the United Kingdom's human rights obligations and the as yet unsigned human rights instruments.¹¹³ The Lord Chancellor's Department spokesman said that Protocol 12 would feature prominently in that review and even suggested that the Government might not need much persuading to change its mind. For the sake of the promotion of equal treatment throughout society – and the credibility of the Government's own commitment to the protection of human rights - let us hope that it does so.

wished, sign Protocol 12 and defer ratification. Under Article 18 of the Vienna Convention on the Law of Treaties 1969, the United Kingdom would then be obliged to refrain from acts which would defeat the Protocol's object and purpose.

¹¹² If, as expected, Protocol 12 enters into force at the end of 2003, it will probably be a further four or five years before Strasbourg case-law interpreting it emerges. If the United Kingdom were a party to it and the Human Rights Act had been amended (see n.59), however, British courts could begin interpreting it when it came into force and thus possibly influence Strasbourg jurisprudence.

¹¹³ The Government signed the Political Declaration adopted by the Committee of Ministers of the Council of Europe on 13 October 2000 at the conclusion of the European Conference Against Racism. It thereby committed itself to considering signature and ratification, as soon as possible and without reservations, of relevant universal and European human rights instruments for which such action has not yet been taken. See *Hansard*, H.L., 9 November 2000, Column W.A.175.