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Discrimination by Association

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Summary

The concept of discrimination by association is the form of discrimination that occurs when the discriminatory ground applies to a person, but another person is detrimentally treated in consequence. Until recently it has had a low profile, appearing in just a handful of race relations cases concerning instructions to discriminate. However, the European Court of Justice, after a reference made to it by an employment tribunal, will rule on whether it has a wider application. If it does so, the effect in English law will be wide-ranging and of great importance. In addition, the government's Green Paper on the Single Equality Bill also addresses the issue. The present state of the law and the arguments for and against extending discrimination by association are discussed.

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Introduction

Unlawful direct discrimination typically occurs when A treats B less favourably than A does C, or would do, on a prohibited ground. Indirect discrimination occurs when the treatment is for another ground but which has thereby a disproportionate impact on a particular category of persons, that category being protected by law. That, at least, is how indirect discrimination is viewed as occurring under statute. However, discrimination of this type is not described as 'indirect' in any legislation. Neither is there any reason to restrict indirect discrimination to that description. Perhaps indirect discrimination is better viewed as any form of discrimination that is not direct.

Some discrimination may appear to be direct but be effected through indirect means, however. An example of this occurs when A discriminates against B (treats B less favourably than he treats, or would treat, C) but where the prohibited ground pertains to D. It includes the concept that has occasionally been termed 'discrimination by association'. So, if A discriminates against B because B is associated with (e.g. married to) D, then discrimination by association against B may be said to occur because of D's (not B's) characteristics. The reason for the discrimination against B is that D has certain particular characteristics.

The term 'transferred discrimination' is perhaps preferable to 'discrimination by association' in this context. Not all discrimination, as described above, is associative in any normal recognised sense. The bartender whose employer gives instructions that he is to refuse to serve ethnic minority or female would-be customers has no association as such with those people. Rather, the discrimination that is intended to be directed towards them (the would-be customers) has an additional discriminatory effect on another person – the bartender. In this sense, the discrimination is 'transferred' from one party to another, although the discrimination to the other party may well remain. However, the term 'discrimination by association', to be used here, has had a certain currency. For example, the Equality Commission for Northern

Ireland has been using the term since (at least) 2003. (See e.g. ECNI 2003 at p 24.) It was also the term favoured by the Disability Rights Commission (See e.g. DRC 2003 at p 83.) The government's recent Green Paper on the proposed Sex Equality Bill uses the term 'discrimination on the basis of association', (See Green Paper 2007 at pp 17 and 36.)

Coleman v. Attridge Law

Whichever term turns out to be the regular currency, it is certain that it will become much more familiar than to date. The importance and range of the concept will shortly come into sharp focus. In the existing case-law on discrimination by association, the emphasis until now has been overwhelmingly in the context of race. Before long, however, these issues will have to be addressed by government in that the European Court of Justice is due to examine discrimination by association with regard to disability discrimination in a case likely to be heard in 2008. Very unusually, *Coleman v. Attridge Law* Case C-303/06 is a reference by an employment tribunal directly to the ECJ and, if only for that reason, is remarkable. However, it is also of wider import in that it is the first time that discrimination by association has been judicially considered in a context other than race. Mrs Coleman, who is not disabled herself, is claiming that her dismissal was on the grounds that she was the carer for her disabled son, and she therefore brought her claim under the Disability Discrimination Act 1995 (DDA 1995). If she succeeds it will be a highly significant decision due to the expansion of the contexts of discrimination by association but also because of the financial importance and numerical incidence of further possible claims.

Furthermore, however, it is very unlikely, important though this case will be to the issue of discrimination by association under the DDA 1995, that its impact will be confined to there. Mrs Coleman's argument is that Article 2.1 of the Equal Treatment Framework Directive (Council Directive No.2000/78/EC) states that the principle of equal treatment means that there shall be no direct or indirect discrimination whatsoever 'on any of the grounds' referred to in Article 1. These are, namely, religion or belief, disability, age and sexual orientation regarding 'employment and occupation'. There is no restriction of these grounds to those relating to the claimant only but, in addition, the wording reflects that in other Council Directives, namely the Equal Pay Directive (Council Directive No.75/117, Art.1), the Equal Treatment Directive (Council Directive No.76/207, Art.2)¹ and the Race Directive (Council

11. This is unaffected by the amendments introduced by Parliament and Council Directive No 2002/73 (ETAD) in Art. 1.2. Suggestions therefore that the new Directive could lead to an acceptance of discrimination by association in sex discrimination cases seem ill-founded - see e.g. Rose, http://www.blackstonechambers.com/pdfFiles/Blackstone_DR_HOTTOPIC

Directive No.2000/43, Art.2). It is therefore difficult to see how the ECJ's ruling, whichever way it may go, will not have highly significant repercussions for other areas of discrimination law.

The Respondents in *Coleman* appealed to the Employment Appeal Tribunal (EAT) on the basis that the ET should not have referred the issue to the ECJ, and comments made by the EAT there are of great interest. (See [2007] IRLR 88. In this case the EAT preferred the term 'associative discrimination'.) In deciding in Mrs Coleman's favour, the EAT recognised that the Directive is not directly enforceable between the parties. It also recognised that, on the face of it, the DDA does not cover discrimination by association (see para.6). The EAT concluded, nevertheless, that the DDA was capable of including discrimination by association without distortion of its wording so as to be consistent with the Directive which did prohibit such discrimination. Unfortunately, Judge Peter Clark (sitting alone) did not explain how it could do so, and seemed to assume that this would require additional wording to be added to the DDA to provide the necessary protection, but would leave that to the ECJ to decide (see para.19). He relied merely on the argument that the amending regulations to the DDA (SI 2003 No. 1673) were introduced to implement fully the disability strand of the Framework Directive (see para. 21). This he felt was preferable to a reliance on the UK government's earlier opinion that the Directive did not cover discrimination by association, and neither did the DDA (see para. 20). The position at the moment, then, regarding these several issues, is very unclear.

Discrimination by Association in Legislation

It is easy to see how discrimination by association might apply in all the areas of discrimination prohibited by law. Not all of these types of discrimination are peripheral or incidental to the purposes of the legislation, but some lie at its core. So, if A discriminates against B because B's spouse is black; because B's children are girls; because B is a carer for a disabled dependant relative; because B's friend is a Muslim; because B provides services to homosexuals or because B's spouse is of a particular age, then discrimination by association

[S.pdf](#) at para7(b). This seems to be borne out by the government's response document on its proposals for the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 (Statutory Rule 2005 No 426). It states there, in addressing calls for discrimination by association to be covered in sex discrimination cases, that it believed the ETAD was intended to be restricted to individuals' own sex or gender reassignment. It points out that Article 2 ETAD refers both to "the sex of a person" and "on the grounds of sex" and that therefore there is no material difference between the two. (At para.2.20 – see http://www.ofmdfmi.gov.uk/employment_equality_sex_discrimination_regulations-4.pdf.) But, of course, that begs the question as "sex of a person" does not necessarily refer only to the sex of the complainant.

has occurred. There are also areas of discrimination specifically covered by statutory provisions which may, nevertheless, be seen as a form of sex discrimination, namely gender reassignment (s 2A Sex Discrimination Act 1975 (hereafter SDA 1975) and pregnancy/maternity leave (s 3A SDA 1975). Discrimination on the ground of married or civil partnership status is also covered by the SDA 1975 (s 3).

The way the law approaches discrimination by association varies from provision to provision. It is not specifically identified in any legislation (namely the SDA 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2007 and the Employment Equality (Age) Regulations 2006) as a head of claim. Indeed, the term 'discrimination by association' has no statutory or, it seems, even judicial uniform basis. Whether it is covered in any given instance is a matter of construction merely. Most of the judicial discussion of the issue to date has been in the context of the Race Relations Act 1976 (hereafter RRA 1976) which has been taken to cover the idea in that s 1(1) refers to discrimination occurring 'on racial grounds' without specifying that it is confined to the race of the applicant. (This, at least, is the position with regards to direct race discrimination. The position is not so clear when it comes to indirect discrimination – see below.) However, as we shall see, the issue is now becoming of live interest in other legislative contexts.

The equivalent provision in the SDA 1975 is in almost identical terms, the differences arising almost exclusively from the different subject matter of race and sex. However, it requires the discrimination, if direct, to be on the grounds of the applicant's sex ('on the ground of her sex'). It would thus appear that the SDA 1975 is narrower than the RRA 1976, the latter allowing for claims to be brought by an applicant whose own race is irrelevant to the claim but who relies on the race of another as the foundation of the action.

This is a curious distinction in that there have been various amendments to these provisions since they were first introduced and yet the opportunity has not been taken to iron out the inconsistency, if such it is. The distinction has, after all, been one that has been noticed for some time in the jurisprudence of the courts, even if the reasons for it have not been explored. That this has not happened suggests that it is thought that there is a rational basis for it. It is not at all clear what any justification could amount to for treating sex and race differently in this regard. However, the government in its recent Green Paper on harmonisation of discrimination law has indicated that it does not see the need for harmonisation in this particular regard. It merely states that, although discrimination by association on the grounds of race

(along with other grounds) is rightly covered in existing legislation, the law of sex discrimination is aimed at protecting people in relation to their actual sex, not their perceived sex or because they associate with someone of a particular sex. They see no 'practical benefit' in extending the law. (See the Green Paper at pp 35 and 36.) This suggests that the government does not envisage situations where discrimination by association with regard to sex is of significance, rather than because it sees any powerful arguments in principle for treating it differently to race discrimination. Indeed, apart from the possibly of gender reassignment (which clearly has no racial equivalent) and possibly a different degree of social impact (which would be highly questionable) there seems to be no difference between the two that could justify different treatment based on principle. The barman who is dismissed for refusing to obey instructions not to serve women should surely have the same protection as if he had been instructed not to serve blacks. Or the man who is discriminated against because he is refused a job because he is called Lesley, the employer having the mistaken belief that he is a woman, should surely have the same protection as if a woman called Lesley had been refused for the same reason. This would seem to be axiomatic.

There have, however, been divergent approaches in consequent discrimination legislation and there may be good reasons for this. The DDA 1995 requires the discrimination to be 'for a reason which relates to the disabled person's disability' (see s 3A DDA 1995 as inserted by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 S.I. 2003 No 1673) and it has been thought that this thereby excludes the possibility of discrimination by association, although on the wording that would not seem to be an inevitable conclusion. It does not appear that, in expanding the DDA 1995 in the DDA 2005, the Government considered including the possibility of discrimination by association in considering the definition of discrimination. (See the Memorandum from the Department for Work and Pensions (DDB 96) to the Joint Committee on the Draft Disability Discrimination Bill at para.4 - <http://www.parliament.the-stationery-office.com/pa/jt200304/jtselect/jtdisab/82/4033108.htm>.) However, the issue was raised by the Disability Law Association with the Disability Rights Commission when it was consulting on the definition of disability prior to the 2005 Act and it remains unconvinced that to do so would be 'proportionate'. (See the Green Paper at p 35.) It awaits the decision of the ECJ in *Coleman* before making a decision.

However, under Reg. 3 of the Employment Equality (Religion or Belief) Regulations (2003 SI 2003 No. 1660) as in their original form, a person (A) discriminated against B if A treated B less favourably 'on the grounds of religion or belief'. This suggests that discrimination by association was covered by the provision.

However, section 77(2) of the Equality Act 2006 now changes this to treatment of A by B 'on the grounds of the religion or belief of B or any other person except A (whether or not it is also A's religion or belief)'. It is interesting that this seems to make quite explicit that discrimination by association is still caught by the definition, but explicitly excludes the discriminator only. It is not clear why it was thought necessary to change this aspect of the definition, except for the obvious fact that it was to bring it into line with the definition in section 44 which extends protection against discrimination on grounds of religion or belief to the provision of goods, facilities, services, education, premises and the exercise of public functions.

Reg. 3(1)(a) of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003 No. 1661), generally considered to be the sibling of the Religion or Belief Regulations, likewise stated only that discrimination occurred when it is 'on grounds of sexual orientation'. Although this seemed to include the possibility of discrimination by association, it did not do so explicitly in the way that the Religion or Belief Regulations did. It was certainly the government's explicit intention that discrimination by association should be covered in new Regulations covering the provision of goods and services - see the DTI's *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods and Services* at http://www.stonewall.org.uk/documents/getting_equal_march_2006.pdf. It was also the government's understanding that the 2003 sexual orientation regulations already covered discrimination by association - see Green Paper at p 36. The Equality Act (Sexual Orientation) Regulations 2007 (SI 2007 No. 1263) therefore now explicitly do so in similar wording (see Reg. 3(1)).

Transsexuals (including those undergoing or intending to undergo gender reassignment) have protection from discrimination by employers (see s 2A SDA 1975) but it is not possible to claim on the basis of another person's gender reassignment. The government intends, however, to extend coverage to discrimination by association in this regard. (See the Green Paper at p 36.) A possible source of difficulty here is that the government does not intend to give protection to people who are *perceived* to be transsexuals. Presumably, therefore, it does not intend that discrimination by association should cover those who are associated with those *intending* to undergo gender reassignment if they are in the early, pre-operative, stages of that process.

The Employment Equality (Age) Regulations 2006 (SI 2006 No. 1031) seem to exclude entirely the possibility of discrimination by association on grounds of age by requiring that discrimination by A must be 'on grounds of B's age'. (Reg. 3(1)(a)). The government does not intend to alter this, the reason being, in effect, that too

many categories of persons are affected by discrimination by association on this ground, namely 'parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope' (see the Green Paper, at p 36). This is a most curious argument, and the mirror version of that for not extending coverage to cases of sex discrimination considered above. It seems that the government is not persuaded by views that there is a great need for such an extension in the law and neither by the argument that its effect would be minimal.

Existing Case-law on Discrimination by Association

The first case which became authority in this area was *Showboat Entertainment Centre Ltd. v. Owen* [1984] ICR 6. The employee was a white manager of an amusement arcade who was dismissed because he refused to carry out an instruction from his employers to exclude 'young blacks' from the premises. The EAT held that the wording of s 1 RRA 1976 allowed not only discrimination on the grounds of an applicant's race, but his attitude to race, to be taken into account. Thus the correct comparison to be made was not between the applicant and another manager who had refused to carry out the discriminatory instructions, but between the applicant and another manager who did not refuse obey those instructions (at p 73E.)

The issue had already been considered, but briefly, by the House of Lords in *Race Relations Board v. Applin* [1975] AC 259. The appeal tribunal in *Showboat* was not bound by dicta in the earlier case to the effect that discrimination by association was covered by the definition as only Lord Simon of Glaisdale dealt with the point on the rather different wording in the Race Relations Act 1968 (see p 73C). He based his reasoning on two different grounds. The first was one of construction, namely that to deny the inclusion of discrimination by association would necessitate implying a reference in the Act to the applicant's colour, whereas it referred merely to 'racial grounds'. His second reason was based on policy. For example, if a white woman were discriminated against because she had married a coloured (*sic*) man, if discrimination by association were not covered by the definition this would mean conduct plainly within the mischief of the Act would escape. (See pp 289-290.) This reasoning led to the statement in *Showboat*, which causes so much difficulty in other contexts, that:

"Once this point is reached, there seems to be no stopping short of holding that any discriminatory treatment caused by racial considerations is capable of falling within section 1 of the Act of 1976." (See p 73.)

The only other reported case to have considered the possibility of discrimination by association before *Showboat* was decided seems

to be *Zarczyńska v. Levy* [1979] ICR 184. (A further case in an industrial tribunal was in 1977 in *Wilson v. T B Steelwork Co. Ltd* (Case No.23662/77). There a white woman was turned down for a job as her husband was not white. This was held to be on 'racial grounds'.) *Zarczyńska* was another instance involving an instruction by an employer, who was the licensee of a public house, to the bar staff not to serve 'coloured people' as customers. The EAT in this case relied on statements made by Lord Denning MR and Stephenson LJ in the *Applin* case in the Court of Appeal (although, as we have seen, that case went on to the House of Lords) to the effect that discrimination by association was covered by the RRA 1976. It was important to take into account the purpose of the Act in order to avoid an absurdity. The EAT said, at p 184:

"We are of opinion here that if Parliament had had pre-knowledge of this unfortunate complainant's predicament they would have made clear that the great civilised principle on which the Act was based was one which overrode all apparent limitations expressed in other sections which had the effect of denying justice to someone who was victimised."

Unfortunately, the EAT did not make it clear which particular civilised principle they were referring to, nor did they make clear which other sections of the Act were causing difficulties.

The issue of discrimination by association did not appear again in the law reports until 1999 when the Court of Appeal decided *Weathersfield Ltd v. Sargent* [1999] ICR 425. Again, this was a decision under the RRA 1976 and a case where an employee had been given instructions to discriminate against potential customers from ethnic minorities. Pill LJ stated that *Showboat* should not be overruled, and the phrase 'on racial grounds' should be given a broad meaning. Thus, discrimination by association was covered despite the fact that the narrower interpretation had to be given to the SDA 1975. The broad meaning was "justified and appropriate" (pp 428-429.) Swinton-Thomas LJ made an interesting distinction in reaching the same conclusion, and Beldam LJ agreed with him. He thought it was unhelpful to try to ascertain the intention of the draftsman of the 1976 Act, nor the intention of Parliament, because it was unlikely that discrimination by association – he did not use the term - was considered by either. Rather, the "intention underlying the Act itself and the words used" were more helpful (at p 434).

The EAT returned to the issue again in the unreported case of *Carter v. Ahsan* UKEAT/0907/03/(2)/DM in 2004. The facts were very complicated, but the simple issue arose as to what characteristics a proper comparator should and should not have. The EAT felt that, what it called 'discrimination by association', was covered by the RRA 1976 - indeed, it stated that this was now

“settled law” (at para.68).

Each of the cases considered above was uncontroversial in that the result in each was in accordance with the clear policy of the RRA 1976. Much more difficult was the highly significant case of *Redfearn v. Serco Ltd* [2006] IRLR 623. The employee, who was white, was unable to bring an unfair dismissal claim against his employers because of insufficient continuity of employment. He thus brought a claim under the RRA 1976 that he had been dismissed 'on racial grounds'. The grounds were his membership of the British National Party, restricted to whites, and which espouses right wing views on racial matters. He claimed that he was dismissed on the grounds of the ethnic origin (primarily Asian) of the members of the public with whom he closely worked. The employers claimed that they dismissed him on grounds of health and safety, fearing violence from fellow employees and Asian members of the public. The employers also feared annoyance and anger would be directed towards them for continuing to employ someone with his views, even though these had never been aired at work. Unsurprisingly, perhaps, Mr Redfearn lost his case in the employment tribunal, but unexpectedly won in the EAT. The Court of Appeal took the view that the reasoning in *Showboat* justified a finding that the dismissal was on health and safety grounds rather than racial grounds but furthermore that *Showboat* was not confined to cases of unlawful instruction to discriminate. Discrimination by association did not, however, cover all cases where race was a significant factor in the act of the alleged discriminator. This would extend to cases where those committing discriminatory acts did so for reasons of race, and would therefore have race discrimination claims themselves if they were to be punished for it. The Court of Appeal clearly felt that the purposes of the legislation had to be borne in mind, and these are to prevent racial discrimination, not to protect those who have racist views.

One consequence of the decision in *Redfearn* is that discrimination by association under the RRA 1976 has been recognised no longer only in cases where there has been an instruction to discriminate given by the employer. It may seem somewhat curious that it was only in that type of case that discrimination by association arose in that there are separate provisions in the legislation concerning instructions, and pressure, to discriminate. (See RRA 1976, ss 30, 31.) However, these are reserved for the Commission for Equality and Human Rights and cannot be relied upon by individual claimants.

Indirect Discrimination

So far it has been assumed that incidences of discrimination by association will occur as a result of direct discrimination. However, this is not necessarily the case. It is quite possible for it to result

from an act of indirect discrimination, although this may of course be much more difficult to recognise. Say, for example, that employer A requires all employees (including B) to work full-time. B is a carer for C, who is disabled. This is clearly an instance of indirect discrimination against B, the requirement being one that he or she is able to comply with but which is more difficult for B (and others in a similar position) to comply with, compared with other employees, as a consequence of C's disability. (The legislation, depending on context, as well as requirements also covers conditions, provisions, criteria and practices. For ease of explanation here it will be assumed that a requirement is in issue.)

Having said this, although much discriminatory treatment on grounds of disability may result from such indirect discrimination, it is much more difficult to identify credible examples from other areas of discrimination. (It is therefore somewhat ironic that the DDA 1995 does not cover indirect discrimination as a separate head of claim.) The difficulty arises, perhaps, because the demands made on a person, leading to an inability to comply with requirements of an employer, are less likely to arise because of (for example) the sexual orientation, sex, or religious belief *of another*. So, for example, if A discriminates against B because of the sexual orientation of C, it is only likely to impact on B if he or she is the partner of C, and therefore involves direct discrimination against B also.

What these examples also show is that there need not be discrimination on a ground with which the protected group cannot comply in order for it to amount to indirect discrimination by association. So, in the example just given, C might easily be able to comply with the requirement to be full-time even though B cannot. The inability to comply with the requirement would not have arisen but for the disability of the person being cared for, and this is the correct focus, not whether the disabled person could comply with it or not. The difficulty here, however, is that indirect discrimination in its statutory guise is somewhat narrower than this in that the requirement needs to be one that a smaller proportion of the protected category can comply with compared to those not in the protected category. The result would seem to be that, even in cases where the legislation has been held to cover discrimination by association, and also covers indirect discrimination, many instances of indirect discrimination by association will fall foul of the statutory language and its victims unprotected. To provide such protection legislation would need to extend to those who are disproportionately affected by being associated with someone in a protected category, and not depend upon those in the protected category themselves suffering a disproportionate impact.

Grounds for Including Discrimination by Association

There are several grounds why in principle discrimination legislation should cover discrimination by association. There are also some arguments for not doing so. Each will now be considered in turn.

Social Policy

The argument from social policy turns on the idea that all discrimination legislation exists to effect social change. Its aims are to protect those in society from detrimental treatment on grounds that are unjustified in moral principle. It is also functional in the sense that it seeks to bring about change in social attitudes by making such grounds recognised by the public at large as being morally unacceptable as grounds of action or decision. This being the case, it does not matter (the argument might run) in what manner or by what route anyone is detrimentally treated on such grounds. If they are, that is enough to make such treatment unlawful.

There is clearly much force in this argument in that it reflects the public perception of discrimination legislation. It would also seem to have much weight in morality, and is almost self-evidently justifiable. A difficulty with the argument, however, as a tool for the construction of existing legislation, is that the historical basis for much discrimination legislation does not lie in moral considerations, but in economic and political ones. Furthermore, the law itself does not fully support such a view of its foundation as is shown, for example, by the inability to bring class actions.

Consistency in Principle

This argument takes the approach that there is a virtue in principle for legislation, the justification of which exists in the pursuit of a single principled aim, to achieve that with the maximum amount of consistency. For different pieces of discrimination legislation to have unnecessary differences clearly tends against that. This is not only undesirable but also is irrational, and it is undoubtedly a fundamental feature of good law that it does not display irrationality. In the absence of a Single Equality Act covering all grounds of discrimination within one provision, it can only be hoped that this broad principle can be recognised as a legitimate canon of construction. The genesis of a Single Equality Act could only involve identical treatment between the various areas of coverage of the legislation. It would surely be unthinkable that these inconsistencies could survive the introduction of such an Act.

Such is the view. However, it is also arguable that the heads of discrimination recognised by law do not belong to any identifiable genus, other than that they concern areas of social life where discrimination has been such a problem that it has been deemed

necessary for the law to intervene. Unless there were to be general discrimination legislation, in the sense of law that made unlawful all differential treatment between persons on irrelevant criteria, it will be the case that this will be the factor that groups the grounds of discrimination recognised by law. As such, the argument for identical treatment for all such grounds is weaker than it appears at first glance.

The Framework Directive

Closely linked to the idea considered in the previous paragraph, being its practical flip-side, is the EU Framework Directive which provides an overarching justification for all discrimination legislation. As we have seen, it clearly provides for the inclusion of discrimination by association within its definition of discrimination. Article 2.1 states that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever 'on any of the grounds' referred to in Article 1, namely religion or belief, disability, age or sexual orientation regarding 'employment and occupation'. It is therefore arguable that any failure to include discrimination by association within domestic legislation will involve a breach of the Directive.

Avoidance Techniques

A further practical consideration is that not to include discrimination by association within the definition of discrimination leaves open the door to forms of direct discrimination failing to be covered by the legislation. In other words, some unlawful discrimination could be avoided by diverting or directing the discriminatory act to a person not within a designated protected category. This form would appear to include unintentional as well as intentional discrimination. Even if this were to have an indirect detrimental impact on the person within that category that is not something that comes under the statutory definitions of indirect discrimination, as we have seen. This is because such discrimination requires, for example, a requirement or condition to be applied to the person in the protected category. By definition, this is not the case with discrimination by association.

Association is Two-Way

A final argument is that discrimination by association is a two-way concept. If one thinks of it as transferred discrimination, this idea is a little clearer. If A treats B less favourably than he treats, or would treat, C on a ground that pertains not to B but to D, then it can be seen that, whilst A (in principle if not in law) discriminates against B, he may also be discriminating against D. This is, of course, contingent rather than necessary in practical terms, but in psychological, social and moral terms it may be seen to be much

stronger than that. There is something that is (perhaps necessarily) diminishing to D if, because of a feature or characteristic that pertains to him or her that is a protected ground if applied D directly, B thereby suffers a detriment. D has become the instrument of detrimental treatment to B for reasons that, in other circumstances, are considered sufficient to ground legal protection.

Grounds for Excluding Discrimination by Association

However, there are some arguments for excluding discrimination by association from the definition of discrimination by association.

Confusion with Other Legislation

One possibility for the different treatment of discrimination by association in legislation is that it has been the effect of an oversight, resulting in wording that has been construed in a way that was not originally intended. However, discrimination by association has been in the legal consciousness for quite some time now, as we have seen, and there has not been a conspicuous attempt to make corrections. In any event, there is evidence that shows that the issue has been considered in relation to discrimination legislation, but consciously not followed up. So, for example, in the recent Notes by the Department of Trade and Industry on the new age discrimination legislation (see <http://www.dti.gov.uk/files/file27136.pdf>) it is clear that it was considered to be a viable option to include discrimination by association. However, the reason for not doing so is curious, namely that it would create confusion with 'family friendly' legislation (para.9) This is thought to necessitate the specific provision for perception in regulation 3 and the provision for instructions to discriminate in regulation 5. It is hard to see the specific connection between discrimination by association (or discrimination on the grounds of association as it is there referred to) and the areas covered by 'family friendly' legislation. Perhaps one example might be where one requires time off work or flexible working hours to look after an elderly parent or young child. In any event, such rights extend only so far as to make a request, and do not give an entitlement to the treatment itself. (See Employment Rights Act 1996 s 80F as amended by the Work and Families Act 2006 s 12.) It is interesting that this reason does not appear in the DTI's Explanatory Memorandum on the regulations laid before Parliament (see SI 2006 No. 1031.)

It would also be an argument that would not be significant in other contexts. For example, there would seem to be no difference in principle between race (and other forms of discrimination) and sex discrimination in this regard. The White Paper preceding the RRA 1976 made it clear that that Act and the SDA 1975 were intended to be the same. It stated that

"[e]xcept for good reason, the two statutes and the procedures for their administration and enforcement will be framed in similar terms. It is hoped in this way to ensure wider public understanding of the meaning and effect of the legislation in both fields." (*Racial Discrimination* 1975 Cmnd 6234 at para.50)

In any event, that there might be overlap does not entail confusion. That a person might have a choice of remedy does not entail that they are confused as to what remedies they may have. If the real argument is that such persons should not have both remedies, then that could be easily dealt with in the same way that such overlaps occur in other areas of law, such as between claims in contract and tort.

Policy

Another argument is that, far from advancing the moral purpose of anti-discrimination legislation, to include discrimination by association would allow discrimination of the very type the legislation seeks to allow. One only needs to be reminded of *Redfearn* (considered above) to understand the possibilities here. It is a dangerous strategy to rely on the courts to give effect to the policy of the legislation when the wording of the text seems to go against it. The difficulty here is that it is problematic to arrive at a definition of discrimination that includes discrimination by association that does not allow people like Mr Redfearn to succeed. It would be necessary to include within the definition (or adjunct to it) a restriction on the field of application of the definition determined by particular policy considerations. That is not the normal approach of drafters of legislation in this country and would be extremely difficult to achieve.

A second possible policy consideration is that to include discrimination by association would not necessarily protect the intended group or category. It is not immediately obvious why someone who does not belong to such a category should be protected as if they were members of it. Whilst initially attractive, this argument does seem to fall to two ripostes. The first is that, insofar as the legislation is at all created in order to eradicate discrimination driven by certain attitudes and beliefs, the mechanism required to give effect to that is irrelevant. It is a consideration quite distinct from directly protecting members of those particular groups. The second is that discrimination often occurs in situations where a person is being used merely as the agency by which discrimination against someone in a protected group is sought to be brought about. This is most obvious in those cases involving instructions to discriminate. Whilst it might be possible for those in the protected categories to bring claims in such circumstances, this is an additional means of protection.

Literal Approaches

Finally, an argument against inclusion of discrimination by association might be based upon the desirability of following literal approaches to the interpretation of legislation as far as possible. It is an argument that clearly was felt to have a great deal of force in the EAT's decision in *Redfearn*. Whilst there is clearly merit in the idea, it would be difficult to claim any superior status for this over and above the other arguments of principle, policy and pragmatism considered above.

Conclusion

It is perhaps surprising that it has taken as long as it has for the idea of discrimination by association to take hold, even if it has yet to be recognised as a discrete form of discrimination with its own label in either legislation or case-law. Perhaps part, at least, of the reason for this, is that it has been recognised until very recently only within a very narrow scope, namely instructions to discriminate in race discrimination claims. However, although *Redfearn* temporarily gave the impression that this was unlikely to be extended, even in race discrimination cases, this will surely not survive a decision by the ECJ in *Coleman* that it is covered by the Framework Directive. Although instructions to discriminate are of course serious, the effect of the discrimination suffered by Mrs Coleman would appear to be of an entirely different order. If the decision goes in her favour, and it is recognised that discrimination by association should be covered by all forms of discrimination legislation, we can expect that the idea will be come of very major importance indeed.

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