FRA

Thematic Legal Study on assessment of Access to Justice in Civil Cases in European Union -

The United Kingdom

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Contents

Executive summary

[1.] For the most part, the United Kingdom system appears to satisfy the requirements of access to justice in relation to free movement of persons in the context of immigration. In particular, appeals may be addressed to an administrative tribunal in the first instance, there is legal aid for those lacking means, decisions are taken in a relatively timely manner, and there is the eventual possibility of review by the ordinary civil courts.

[2.] Criticisms of the present system operating in relation to free movement of persons may nevertheless be made from the perspective of 'access to justice':

- There is no simple remedy in cases of delay.
- There is no right of appeal where an individual lacks proof of status at the relevant time.
- It may be difficult for applicants outside the United Kingdom to bring an appeal, unless the primary European Economic Area national[1] is in the United Kingdom.
- The Special Immigration Appeals Commission, which hears appeals from the Asylum and Immigration Tribunal, is open to criticism for the use of closed evidence, the possible limits to written determinations, and the fact that one of its members may lack independence.
- Legal aid is not available to all who may realistically benefit from it.

[3.] Regarding non-discrimination, claims of non-discrimination in employment and of unequal pay under the equality Directives must be pursued in an employment tribunal. Therefore, the quality of 'access to justice' in the United Kingdom with regard to these Directives depends on the good functioning of the employment tribunal system. The following main points can be made.

- The rules of the employment tribunal system promote effective access to justice in a variety of ways. The claimant is entitled to represent him or herself or be represented by anyone he or she chooses, such as a friend. Tribunals are required to take into account the need for the parties to be on an equal footing in proceedings and employment judges normally assist

[1] In United Kingdom immigration law the term 'European Economic Area national' refers to nationals of the other 26 European Union states, Iceland, Liechtenstein, Norway and Switzerland.

unrepresented litigants to some extent in putting their cases as well as possible. Claimants are entitled to cross-examine witnesses for the other side and to examine and challenge evidence. They can receive written reasons for the tribunal's judgment and are entitled to appeal where an error of law has been made (although they may not challenge the first instance tribunal's determination of the facts).

- The study found no evidence that, in general, employment tribunal proceedings were taking an excessively long time to complete, having regard to the standards set by the European Court of Human Rights. Furthermore, the level of compensation awarded in the cases examined did not suggest that there was any concern over the effectiveness of the remedy available.
- Certain factors that may be viewed as restricting access to justice do not, on examination, seem to pose significant obstacles. Although no legal aid is available for claims in the employment tribunal, a representative acting on behalf of the claimant does not need to be a fully qualified solicitor or barrister, as is required in other courts. The claimant is therefore entitled to be represented by an experienced but unqualified adviser. The relatively short time limit of three months for bringing a discrimination claim (compared to six years for personal injury claims, for example) must be weighed against the more informal regime that prevails in employment tribunals, compared to other courts.
- More generally, other measures of law and good practice that promote effective access to justice are:
  - the questionnaire procedure, under which prospective claimants have a simple means of eliciting details about the likely prospect of success of a claim
  - restrictions on individuals' freedom to waive their non-discrimination rights unless they have received advice from an impartial adviser
  - the Equality and Human Rights Commission's role in improving awareness of rights, publishing codes of practice and, exceptionally, assisting in discrimination claims.

- Nevertheless, some concerns have been highlighted over the effectiveness of the system in providing a timely resolution. Evidence exists to show that awards often go unenforced for a long time after judgment is given. Enforcing such awards is then a matter for the ordinary civil courts, in which different, more formal procedural rules apply, which may pose problems for an unrepresented claimant. There is also some concern over the length of time equal pay proceedings take to complete. This is usually due to the greater complexity of equal pay claims and, often to the large numbers of litigants involved.

- With regard to non-employment discrimination claims, which must be brought in the mainstream civil courts, the dearth of reported decisions on this subject means that access to justice in this area cannot be effectively analysed. Although no specific enquiry was made of Her Majesty's Court Service (HMCS) for the purpose of this report, the central register of county court judgments[2] to which HMCS refers on its online information pages[3] holds only limited details (such as the names of claimant and defendant, date of judgment and amount of award) and does not allow for analysis of claims brought by reference to particular jurisdictions. Furthermore, while the British and Irish Legal Information Institute (BAILII)[4] offers a well-resourced and searchable database of judgments from the High Court and appellate courts it does not include county court decisions. As explained elsewhere in this report, appeals in non-discrimination cases originating in the county court go to the Court of Appeal. However, a search of the extensive Court of Appeal database on BAILII yielded no appeals in non-employment sex or race discrimination cases for the relevant period (compared to several hundred employment cases). The fact that so few cases are apparently brought may be put down to low awareness of rights, the lack of detailed and readily available guidance for would-be claimants, and the lack of a specialist but informal tribunal system, like the employment tribunals. These very factors suggest that access to justice in this area may be in danger of being hindered, at least by comparison with employment discrimination cases.

1. Overview

1.1. Free movement of persons

[4.] In light of the typology, with respect to the free movement of persons:

- Overall, national standards and practice are effective in providing for 'access to justice' with regard to the free movement of persons.

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2 Available at http://www.trustonline.org.uk (24.01.2010)

3 http://www.hmcourts-service.gov.uk/cms/judgments.htm (24.01.2010)

4 http://www.bailii.org (24.01.2010)

- Neither national law nor practice contains a single, accepted definition of 'access to justice'. Further, there is no known discussion of the concept of 'access to justice' within UK case law on the free movement of persons.
- Official discourse is instead focussed on ensuring 'speedy' and 'fair' decisions. This may be seen, for example, from the last major consultation in the area.[5]

1.2. Non-discrimination

[5.] In light of the typology, with respect to non-discrimination:

- National standards and practice are effective in providing for 'access to justice' with regard to non-discrimination. The employment tribunal system has many features designed to encourage litigants in person and promote informality, while remedies for breach of the non-discrimination principles are broadly equivalent to those available in respect of other civil rights.
- Neither national law nor practice contains a single, accepted definition of 'access to justice'.
- However national case law in the area of non-discrimination has clarified some of the key concepts involved in access to justice. The courts have determined that access to justice includes the right to have a claim determined by a tribunal free from both actual and apparent bias; the right to full reasons in judgment; and the right to a hearing and judgment without undue delay.

1.3. Landmark cases

[6.] For landmark cases relating to access to justice at the national level and at the European Court of Human Rights level, see Annex 2.

[5] See Home Office UK Border Agency, 'Consultation: Immigration Appeals – Fair Decisions; Faster Justice, 21 August 2008, e.g. at pages 1 and 3, available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigrationappealsconsultation?view=Binary (06.10.2009).

1.4. The national judicial system

[7.] United Kingdom court system

There are three separate court systems in the United Kingdom, for England and Wales, for Scotland and for Northern Ireland. Exceptions that are relevant to the present study are that the Asylum and Immigration Tribunal has jurisdiction over the whole of the United Kingdom and there is a common system of employment tribunals for England and Wales and Scotland. The Supreme Court of the United Kingdom is the highest court of appeal from all three sets of courts, except for some kinds of cases in which the Scottish courts have final jurisdiction.

The court systems for England and Wales, Scotland and Northern Ireland are considered separately in the following paragraphs. A diagrammatic representation of the court structure in England and Wales is inserted below.

England and Wales[6]

[8.] Magistrates' Courts

The principle function of the Magistrate's Court is to exercise criminal jurisdiction over summary offences (i.e. relatively minor criminal offences). Virtually all criminal cases begin in the Magistrate's Courts, and over 90% also end there. Where the magistrates do not dispose of the case entirely, they will commit the defendant to the Crown Court for either trial or sentence.

Magistrates' Courts also have jurisdiction to deal with a range of civil matters including liquor licensing and matters related to children and violence. Most magistrates (or justices of the peace) are lay, i.e., they have no formal legal qualifications. Magistrates are not salaried. The remainder are District Judges who are legally qualified, work on a salaried basis and have at least seven years experience as a legal practitioner.

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6 See further F. Cownie, A. Bradney and M. Burton (2007*) English Legal System in Context* (4th edn, London, Butterworths/Lexis Nexis), chapters 2 and 3; J. Holland and J. Webb (2006) *Learning Legal Rules* (6th edn, Oxford, Oxford University Press) chapter 1; R. Ward and A. Akhtar (2008) *Walker and Walker's English Legal System* (10th edn, Oxford, Oxford University Press) chapters 1 and 7; and M. Zander (2007) *Cases and Materials on the English Legal System* (10th edn, Cambridge, Cambridge University Press) chapter 1.

Magistrates' Courts are usually made up of three lay magistrates, who are advised by a legally qualified Justices' clerk. District Judges hear cases on their own.

[9.] The Crown Court

The Crown Court deals with almost exclusively with criminal trials and appeals. Cases in the Crown Court are presided over by a High Court Judge (mainly from the Queen's Bench Division), a Circuit Court judge or a recorder (i.e. part-time judge). Additionally, in trials there will be a jury.

[10.] The County Court

The County Court deals exclusively with civil matters, and hears the bulk of civil disputes such as tort, contract, property, insolvency and bankruptcy, with the High Court reserved for a few special cases. County Courts include five specialist mercantile courts and a Patents County Court.

The jurisdiction of the County Court largely corresponds to the civil jurisdiction of the High Court (see below), although the County Court is local in nature. Historically, the jurisdiction of the High Court and the County Court has been separated largely by the value of the matter in dispute.

Two types of judges sit in the County Court: circuit judges (more senior) and district judges. Circuit judges can hear all sorts of civil cases, including those where claims are over £15,000; district judges preside over the Small Claims Court where the limit is £5,000.

[11.] The High Court

The High Court is both an intermediate appellate court (hears appeals from lower courts) and a court of first instance (i.e. hears trials of the issues). It is split into three divisions: the Chancery Division, the Family Division and the Queen's Bench Division. Each Division has jurisdiction to hear cases at first instance. The Family and Chancery Divisions also have a Divisional Court. The Divisional Court constitutes the appellate 'part' of the High Court.

The main work of the High Court is civil, but it does possess an important criminal law function.

The Queen's Bench Division deals mainly with civil matters such as tort and contract. The Administrative Court in the Queen's Bench Division deals with a variety of judicial review issues. Judicial review allows for the supervision of public bodies. For example, it may be alleged that there has been a breach of proper procedure or an incorrect interpretation of the law on the part of a public

body, a government minister, or someone who is carrying out public acts or duties. Judicial review allows the court to examine this. If the court subsequently finds that the individual or body was not acting within the constraints of the law, then it will declare the decision or action to be unlawful. The relevant individual must then go back and reconsider the issue. In its appellate capacity, the Queen's Bench Division hears appeals on a point of law from Magistrates' Courts, tribunals and the Crown Court.

The Chancery Division deals exclusively with civil cases. The Division's work deals particularly with matters relating to property law, disputes involving trust property and disputes arising from wills and the administration of the estates of those who have died. It also deals with bankruptcy and insolvency, as well as general company law matters. In the form of Divisional Court, the Chancery also has jurisdiction certain appeals from county Courts (including cases of bankruptcy and land registration).

The Family Division shares jurisdiction with the Magistrates' and County Courts over family and matrimonial law. It hears appeals from the Magistrates' Court and the County Courts on a wide variety of matters, and deals with judicial review of family matters.

[12.] The Court of Appeal

The Court of Appeal is divided into two divisions: criminal and civil. The Civil Division of the Court of Appeal mainly hears appeals from the decisions of the High Court, as well as the County Courts and certain tribunals such as the Employment Appeal Tribunal and the Immigration Appeal Tribunal. Three judges usually hear appeals.

[13.] The Supreme Court

The Constitutional Reform Act 2005 established a new Supreme Court of the United Kingdom to replace the Appellate Committee of the House of Lords. The new Supreme Court has been established to create a separation of powers by removing the judges presiding in the United Kingdom's final court of appeal from the House of Lords, which is a parliamentary body. On 1 October 2009 the new Supreme Court took over jurisdiction as the highest domestic court. It is the final court of appeal on all but European Community matters.

The Supreme Court has almost exclusively appellate jurisdiction, and hears appeals from the Court of Appeal and, in civil cases (subject to statutory restrictions), direct from a decision of the High Court (this is known as the

'leapfrog' procedure, because it bypasses the Court of Appeal, but is rarely used). The Supreme Court also hears appeals from the Court of Session in Scotland and from civil and criminal cases from the Court of Appeal in Northern Ireland. The sole ground for obtaining leave to appeal to the new Supreme Court is when the case raises a point of law of general public importance.

[14.] Court of Justice of the European Communities

The Court of Justice is responsible for the consistent interpretation of European Union law across Member States.

[15.] Tribunals

England and Wales, like Scotland and Northern Ireland, has a system of administrative tribunals. As noted above, some tribunals are common to Great Britain or the whole of the United Kingdom. Tribunals were originally established to provide a quicker and cheaper route to justice. The aim was that individuals could represent themselves without the needing to go to the expense of obtaining legal representation. Tribunals are staffed by experts in the particular field, and can therefore usually reach a judgment more quickly than the normal court system.

Scotland

[16.] Sheriff Courts

These hear civil cases and have mostly co-extensive jurisdiction with the Court of Session. The pursuer, or plaintiff, may choose to have the case heard by either court, although the more complicated cases or those involving the most money are normally heard by the Court of Session. Appeals are to the Sheriff Principal or the Court of Session.

[17.] Court of Session

This is the highest civil court in Scotland. It may hear civil cases at first instance (Outer House) or on appeal (Inner House).

[18.] District Courts and Justice of the Peace Courts

District courts, staffed by lay Justices of the Peace, are local courts that hear less serious criminal offences in summary proceedings. There are gradually being replaced by Justice of the Peace Courts, which have more extensive jurisdiction.

[19.] High Court of Justiciary

This is the highest criminal court, with jurisdiction to hear criminal cases at first instance and on appeal. There is no appeal to the Supreme Court of the United Kingdom in criminal cases.

Northern Ireland

[20.] County Courts

These hear the lesser civil cases, with appeals to the Court of Appeal.

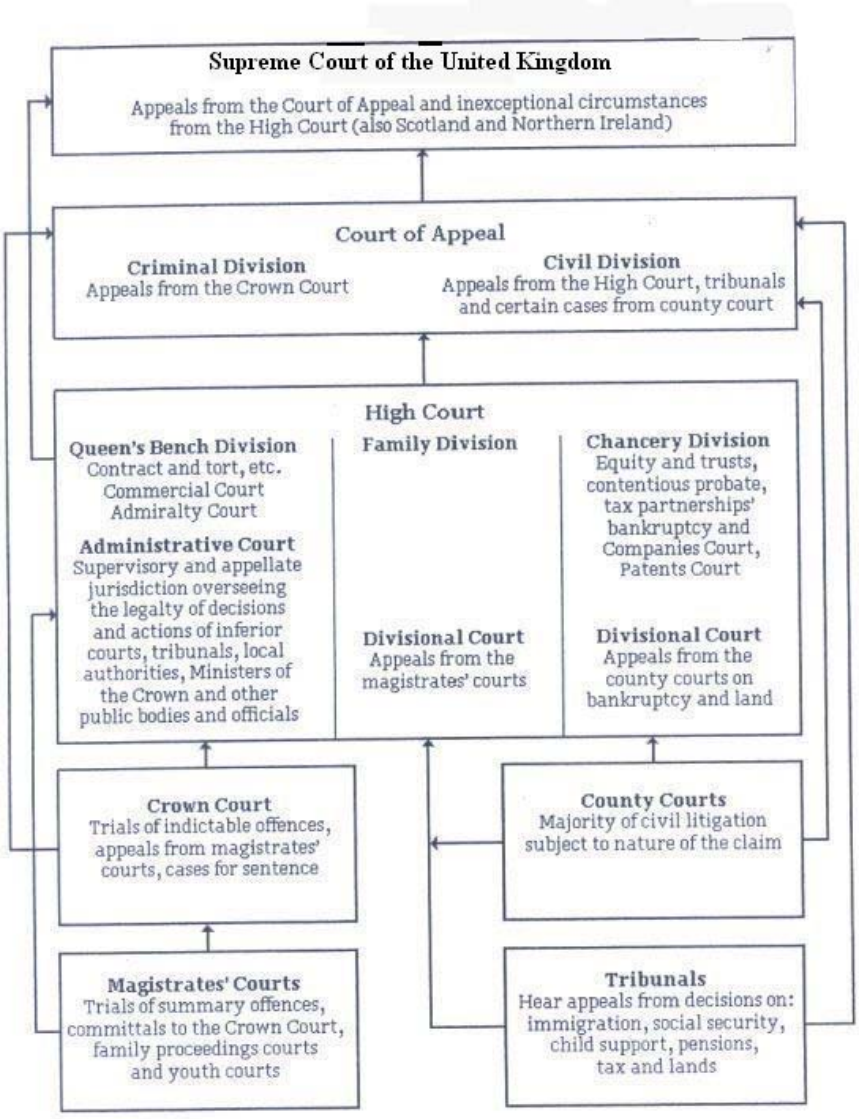
[21.] Magistrates Courts and Crown Courts

These hear the less and more serious criminal cases respectively, with appeals to the Court of Appeal.

[22.] Court of Appeal

This is the highest court in Northern Ireland. It hears appeals from lower civil and criminal courts. Appeal lies to the Supreme Court of the United Kingdom.

Diagram of the Court Structure for England and Wales


Supreme Court of the United Kingdom
Appeals from the Court of Appeal and inexceptional circumstances from the High Court (also Scotland and Northern Ireland)
Court of Appeal
Criminal Division
Appeals from the Crown Court
Civil Division
Appeals from the High Court, tribunals and certain cases from county court
High Court
Queen's Bench Division
Contract and tort, etc.
Commercial Court
Admiralty Court
Administrative Court
Supervisory and appellate jurisdiction overseeing the legalty of decisions and actions of inferior courts, tribunals, local authorities, Ministers of the Crown and other public bodies and officials
Family Division
Divisional Court
Appeals from the magistrates' courts
Chancery Division
Equity and trusts, contentious probate, tax partnerships' bankruptcy and Companies Court, Patents Court
Divisional Court
Appeals from the county courts on bankruptcy and land
Crown Court
Trials of indictable offences, appeals from magistrates' courts, cases for sentence
County Courts
Majority of civil litigation subject to nature of the claim
Magistrates' Courts
Trials of summary offences, committals to the Crown Court, family proceedings courts and youth courts
Tribunals
Hear appeals from decisions on: immigration, social security, child support, pensions, tax and lands

1.5. Legal training

[23.] Legal practitioners in England and Wales are either solicitors or barristers. Judges are drawn from the ranks of legal practitioners (usually having practised as barristers). Before commencing training as either a barrister or solicitor (the vocational stage of training), a Qualifying Law Degree or the Common Professional Examination or Approved Graduate Diploma in Law must be completed (the academic stage of training). Law of the European Union is one of the seven compulsory subjects that must be passed in these courses. Human Rights Law is a compulsory part of the compulsory subject Public Law and, as the European Convention on Human Rights is incorporated into United Kingdom domestic law, therefore European Human Rights Law does form a compulsory part of training in order to become a practising lawyer; a judge or court legal adviser and any official deciding claims in non-judicial dispute mechanisms if that official is legally trained.7

[24.] Training to become a barrister

- Up to the academic year 2009-2010, studying to become a barrister is through the Bar Vocational Course (BVC), which is regulated by the Bar Standards Board. The BVC Course Specification states: 'The Human Rights Act and its implication should be included within the delivery of the knowledge areas'.[8]
- The knowledge areas are civil and criminal procedure, sentencing and evidence. In fact, the Human Rights Act 1998 (which incorporates the European Convention on Human Rights into United Kingdom domestic law) and the European Convention on Human Rights are integrated throughout the BVC, and European Human Rights law not limited to the compulsory subject areas. European Union law is also integrated within the BVC wherever it arises. The principles and procedures governing the Court

[7] See Joint Statement issued in 1999 by the Law Society and the General Council of the Bar on the completion of the initial or academic stage of training by obtaining an undergraduate degree and the Supplement to the Statement – mixed degrees, conversions courses and senior status courses, 1999, available at: http://www.sra.org.uk/documents/students/academic-stage/academicjointstate.pdf (02.10.2009).

[8] Bar Standards Board, Bar Vocational Course – Course Specifications and Guidance, September 2008, at para. 74, available at: http://barstandardsboard.org.uk/assets/documents%20course%20specification%202008.pdf (02.10/2009).

of Justice of the European Communities are part of the civil litigation syllabus.

- As from the academic year 2010-11, the BVC is replaced by the Bar Professional Training Course (BPTC). The first objective of the BPTC is to 'provide a sound understanding of … *the impact of the Human Rights Act on civil claims*….'[9] [emphasis added]. Regarding European Union law, Intended Learning Outcome 18 is that students have a sound understanding 'of the principles and procedures governing…the…making of references to the ECJ',[10] which also features in para. 26 of the syllabus.

[25.] Training to become a solicitor

- The Solicitors Regulation Authority regulates the vocational stage of training for solicitors. For the 2009-2010 year approximately half the Legal Practice Course Providers are running the vocational course for solicitors according to the Legal Practice Course Written Standards set by the Solicitors' Regulation Authority. European Union law, specifically EC competition law, the free movement of goods and workers and equal treatment for men and women, is included in the compulsory 'Business Law and Practice' subject. European Human Rights Law is included in the compulsory subjects 'Civil Litigation' and 'Criminal Procedure'. Human rights under the European Convention on Human Rights is specifically covered as a pervasive subject in the LPC2 course.[11]

- From 2010 European Union law and European Human Rights Law will not be taught as compulsory areas. The Information for Providers of Legal Practice Courses 2009 gives the following reason for the removal of these subjects on the compulsory curriculum: 'Specific requirements in relation to EU Law, [and] human rights…have been removed. While these are important areas that providers will wish to continue to cover in the relevant contexts as part of the LPC, it is anomalous to refer to them in the outcomes

[9] See Bar Standards Board, Bar Professional Training Course Handbook 2010, July 2009, at para. 2.2.2 (b), available at: http://www.barstandardsboard.org.uk/assets/documents/BPTC.pdf (02.10.2009).

[10] Ibid. at para. 2.2.2 (c).

[11] See Solicitors Regulation Authority, Legal Practice Course – Written Standards, 25 November 2004, available at: http://www.sra.org.uk/documents/students/lpc/standards.pdf (02.10.2009).

and not also to refer to other areas of law referred to in the Joint Announcement'.[12]

2. Application of the typology of access to justice to national standards and practices applicable in selected areas of the acquis communautaire

2.1. Free movement of persons

[26.] The immigration aspects of Directive 2004/ 38 are given effect through the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003) (2006 Regulations). **As the immigration aspects of Directive 2004/ 38 are its core, they are the focus of this report.** It should be noted that, under the 2006 Regulations, UK law gives the full immigration benefits of the Directive not only to nationals of EU member states, but also to citizens of Iceland, Liechtenstein and Norway (EEA states) and Switzerland (which has an agreement on the free movement of persons with the EU).

[27.] The rights of access to employment in Article 1 of Regulation 1612/68 and Article 23 of Directive 2004/ 38 are reflected for example in the Immigration (Restrictions on Employment) Order 2007 (SI 2007 No 3290), Schedule, List A, paras 2-4. A failure on the part of an employer to give equal treatment in hiring, or in the terms and conditions of employment, would give rise to a potential claim under the Race Relations Act 1976. (Further information may be found in the discrimination part of this report.)

[28.] The rights of equal treatment in social provision in Article 7(2) of Regulation 1612/68 and Article 24 of Directive 2004/ 38 are reflected in particular in the concept of 'person from abroad' in the following: Council Tax Benefit Regulations 2006 (SI 2006 No 215), Reg 7; Housing Benefit

[12] SRA, Information Pack for Providers of LP Courses, May 2009, at para. 3.21, available at: http://www.sra.org.uk/documents/lpc/info-pack.pdf (02/10/2009).

Regulations 2006 (SI 2006 No 213), Reg 10; Income Support (General) Regulations 1987 (SI 1987 No 1967), Reg 21AA; Jobseeker's Allowance Regulations 1996 (SI 1996 No 207), Reg 85A. A claim that an individual has been denied social benefits to which they are entitled gives rise to a right of appeal, under the Social Security Act 1998, section 12. Since 3 November 2008, this right of appeal has been to the Social Entitlement Chamber of the First-Tier Tribunal, which is the lower level of a general administrative tribunal structure. Subject to permission being granted, further appeals on points of law are possible to the Upper Tribunal - which is the higher level of the new tribunal structure - the Court of Appeal and the Supreme Court. These mechanisms are not analysed in detail here. The main points to note are these: the role of the First-Tier Tribunal is to determine eligibility to benefits, not compensation; legal aid is not available in social entitlement cases at the First-Tier Tribunal, but is available at the Upper Tribunal and other levels; and, there is no power to award costs within the First-Tier Tribunal or Upper Tribunal.

2.1.1. The right of effective access to a dispute resolution body

[29.] **i. Is there a general right of access to a judicial body in order to resolve legal disputes relating to breach of a right derived from Community law?**

[30.] **Decision taken by immigration decision-maker.** There is generally a right of access to a judicial body when a decision has in fact been taken by the immigration authorities. Regulation 26 of the 2006 Regulations grants EEA nationals and their qualifying family members a right of appeal to the Asylum and Immigration Tribunal (AIT).[13] This right may be exercised against an 'EEA decision', which is defined in Regulation 2 of the 2006 Regulations as:

> 'a decision under these Regulations that concerns a person's—(a) entitlement to be admitted to the United Kingdom; (b) entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card; or (c) removal from the United Kingdom.'

[31.] The grounds of appeal are based upon those set out in section 84 of the Nationality, Immigration and Asylum Act 2002. These include:

[13] Note that the AIT is scheduled to be replaced in 2010 by asylum and immigration chambers within athe First Tier Tribunal and Upper Tribunal. It has not been possible to anticipate the precise arrangements applicable to EEA appeals under the future system.

> '(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom.'

[32.] **Delay.** The position is more complex where there is delay either in taking a decision on eligibility or in issuing status documents.

[33.] Delay is itself addressed by four provisions of Directive 2004/38 concerning the timeliness of the issuing of status documents. Article 8 provides that a registration certificate - which is issued to EU nationals when they qualify for residence – 'shall be issued immediately'. Article 10 provides that the right of residence of non-EU qualifying family members of an EU citizen 'shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application.' To cover the interim period, Article 10 states that a 'certificate of application' for the residence card 'shall be issued immediately.' EU citizens acquire the status of permanent resident after five years' residence. Article 19 provides that, upon application, a "document certifying permanent residence shall be issued as soon as possible". Non-EU family members also acquire the status of permanent resident after five years' residence. In their case, Article 20 of the Directive provides that 'Member States shall issue… a permanent residence card within six months of the submission of the application.'

[34.] Each of these four provisions is reflected in the UK implementing legislation: see Regulations 16, 17(3), 18(1) and 18(2) respectively.

[35.] There is extensive experience of decisions concerning EU family members being taken outside of these requirements. There is a particular issue with Article 10, as it concerns evidence of the initial right of residence of non-EU family members. In a response on 2 June 2009 to a freedom of information request by the Immigration Law Practitioners' Association, the UK Border Agency confirmed that it has not been compliant with Article 10. It reported that only 38% of decisions under Article 10 in the previous 12 months had been decided within 6 months, and that the average time in these cases was 7 months. It accepted 'that such timings are in breach of the… Directive' and indicated an intention to comply with the time limits by December 2009. (The response is on file with Immigration Law Practitioners' Association)

[36.] In cases of delay, in order to obtain a decision, an application for judicial review to the High Court would appear to be necessary. This is an unattractive option, however, because of the potential costs associated with such a claim. Compensation is also a possibility, and is considered in sub-section D, below.

[37.] **ii. What restrictions exist regarding access and do these undermine the right of access?**

[38.] **No right of appeal where lack of proof of status.** Regulation 26 of the 2006 Regulations excludes an appeal in two cases where the individual cannot prove their status. The first is that a person who claims to be an EEA national may not appeal unless they produce 'a valid national identity card or passport issued by an EEA State.' The second is that a person may not appeal as the 'family member or relative' of an EEA national unless they produce an EEA family permit (a form of entry clearance) or 'other proof' that they are related as claimed. (Note however that the reference here to 'family member or relative' does not apply to those whose claim to stay is based on a 'durable relationship' with an EEA national: see *Abdullah* [2009] EWHC 1771 (Admin), in which this interpretation was agreed by both parties, and implicitly approved by Blair J.

[39.] These preconditions may amount to a denial of access to justice if they prevent a claim being brought which would otherwise succeed, because proof of status could only be provided at a later date.

[40.] **Cases where there is no in-country (suspensive) right of appeal.** The 2006 Regulations deny the right to conduct an appeal while within the United Kingdom in the following six cases:

[41.] (1) The individual has been refused admission to the United Kingdom (Regulation 27(1)(a)). This provision is subject to three exceptions:

- on arrival in the United Kingdom, the person held a document giving evidence of an EEA right of entry or residence or can 'otherwise prove' that they are resident in the United Kingdom";
- on arrival in the United Kingdom, the individual was detained or admitted temporarily to the United Kingdom, while their position was considered, and the subsequent decision to refuse admission was notified more than 3 months after their arrival;
- a ground of appeal is that the decision is contrary to the ECHR or the Geneva Convention on the Status of Refugees. In this last case, the Home Secretary may certify that such a ground of appeal is 'clearly unfounded', but that certification may itself be challenged in-country by way of judicial review.

[42.] It should be noted that in any event these exemptions cannot benefit someone who is refused admission to the United Kingdom by an immigration officer while outside the United Kingdom. A decision of this kind by an immigration officer is authorised by Article 7 of the Immigration (Leave to Enter and Remain) Order 2000 (SI 2000 No 1161). In practice, it will occur at one of Britain's 'juxtaposed controls', which are at Eurostar terminals in France

or Belgium, at the Channel Tunnel entrance in France or at a ferry port in France. A person refused admission in these places has not 'arrived' in the United Kingdom for the purpose of the first and second exceptions, above, and will not be in the process of 'removal from the United Kingdom' for the purposes of the third exemption.

[43.] (2) An exclusion order has been made against the individual (Regulation 27(1)(aa)). An 'exclusion order' is made under Regulation 19 of the 2006 Regulations, and bars a named individual from entering the United Kingdom on the grounds of "public policy, public security or public health." This provision is subject to the three exceptions listed under the previous item.

[44.] (3) An application to revoke a deportation order or an exclusion order made against the individual has been refused (Regulation 27(1)(b)). The concept of an 'exclusion order' was explained in the previous paragraph. A 'deportation order' is an order expelling someone who is already in the United Kingdom, on the grounds that their 'removal is justified on grounds of public policy, public security or public health.' The decision to make a deportation order itself attracts an in-country right of appeal.

[45.] (4) An EEA family permit has been refused the individual (Regulation 27(1)(c)). An 'EEA family permit' is a form of entry clearance, issued abroad to enable a family member to enter the United Kingdom. Note that it may be possible for a family member to gain admission without a family permit, if they can otherwise prove their status: see Regulation 11(4) of the 2006 Regulations.

[46.] (5). The individual has been ordered removed from the United Kingdom, having entered it in breach of a deportation order or an exclusion order (Regulation 27(1)(e)). This provision does not apply where a ground of appeal is that the decision is contrary to the ECHR or the Geneva Convention on the Status of Refugees. As noted above, the Home Secretary may certify that such a ground of appeal is "clearly unfounded", but this certification is itself open to challenge.

[47.] (6). An individual is subject to removal, and appeals against the refusal of an EEA document (Regulation 29). Regulation 29 suspends a possible removal in the event of an EEA appeal if the appeal is against either (i) a refusal to admit the person to the United Kingdom, or (ii) a decision to remove the person made under the EEA Regulations. It is however possible for an individual to be removed if their appeal is against the non-issue of a document, and is under general immigration law – e.g. because the individual does not have permission to be in the United Kingdom. An individual cannot protect themselves against removal by making an EEA application or bringing an EEA appeal: see for example *Abdullah* [2009] EWHC 1771.

[48.] It is self-evidently a constraint on 'access to justice' for an individual to have to conduct an appeal from outside the United Kingdom. It will be more difficult for the individual to obtain effective legal advice and to communicate with a legal advisor. In addition, the advantage of appearing in person at the tribunal hearing will be unavailable to them.

[49.] This is not to say however that it is impossible for a claim to be brought from outside the United Kingdom. A realistic prospect to do so will arise in particular in a family case where the primary EEA national is in the United Kingdom. Examples of reported AIT determinations in such cases are *KA Sudan* [2008] UKAIT 00052 and *CO Nigeria* [2007] UKAIT 00070.

[50.] Conversely, it will be more difficult to conduct such a claim in cases where the primary EEA national is outside the United Kingdom.

[51.] **Public interest cases.** Under Regulation 28 of the 2006 Regulations, an EEA appeal may be removed from the AIT on public interest grounds. This occurs when the Secretary of State certifies one of two things: (i) the grounds for the decision were wholly or partly that the individual's exclusion or removal from the United Kingdom would be in the interests of 'national security' or of 'the relationship between the United Kingdom and another country'; (ii) the decision was taken wholly or partly in reliance on information which should not be made public for those reasons.

[52.] In the event of such a certificate, the individual instead has a right of appeal to the Special Immigration Appeals Commission (SIAC). This body is equivalent to the High Court in its position within the legal hierarchy.

[53.] The key feature of the SIAC system is that some evidence may be 'closed', not seen or heard by the applicant or their representatives. In relation to the closed evidence, the interests of the applicant are in theory advanced by a 'special advocate'. The 'special advocate' is not however permitted to communicate with the applicant or their representatives once they have seen or heard the evidence.

[54.] There are two examples in recent years of SIAC cases concerning the free movement of persons: *BY* (Appeal SC/63/2007, judgment of 30 July 2008) and *ZZ* (Appeal SC/65/2007, judgment of 7 November 2008). In each case, closed evidence was decisive in SIAC's upholding a decision not to permit entry to the United Kingdom.

[55.] The compatibility of the closed evidence system with the ECHR in an immigration-type case (non-admission, deportation, etc) may be thought uncertain at the time of writing. SIAC has it origins in the judgment of the European Court of Human Rights (ECtHR) in *Chahal v. United Kingdom* (1996) 23 EHRR 413. This was a national security deportation case, and the

Court expressed approval in general for a similar Canadian system as a solution to the problem of balancing liberty and national interests under Article 5 ECHR. More recently, however, both the Grand Chamber of the ECtHR in *A v. United Kingdom* (judgment of 19 February 2009) and the House of Lords in *Secretary of State for the Home Department v. AF (No 3*) [2009] UKHL 28, have found that the SIAC system breaches the fair hearing requirement of Article 5(4), because of the applicant's lack of knowledge of the substance of the case against them. *A* and *AF* were each concerned with a prolonged denial of liberty, in circumstances where an expulsion was thought impossible. It does not necessarily follow from them that ECHR is breached by the current SIAC arrangements in an immigration-type case.

[56.] **iii. Is it possible to waive the right of access to a judicial body and does sufficient protection exist to prevent an individual undermining their right to redress?**

[57.] Immigration applications to the AIT or SIAC are a form of administrative law proceeding. The question of waiver does not generally arise.

[58.] An exception concerns a mechanism known as 'supervised departure', set out in the UK Border Agency's Immigration Directorate Instructions (Chapter 13, section 10). A person who has been given notice of a decision to make a deportation order against them may choose to leave the UK before the deportation order is actually made. It is necessary to obtain the permission of the immigration authorities, and is usually necessary to waive any appeal rights. The advantage to the individual is that, by leaving the UK in this manner, they prevent the deportation order being made, and so preserve the possibility of re-entry. They may still face an exclusion order, however.

[59.] **iv. Is there a possibility of access to non-judicial procedures in order to obtain redress? Is the procedure in front of non-judicial bodies exclusive or complementary to other legal remedies?**

[60.] There are no non-judicial alternatives to the applications to the AIT or SIAC.

2.1.2. The right to fair proceedings

[61.] **i. To what extent is the aggrieved individual able to meaningfully participate in legal proceedings?**

[62.] As explained in section 2.1.1 above some appellants have no right to stay in the United Kingdom, while applicants in public interest cases are unlikely to hear all of the evidence against them. In other circumstances, the applicant is generally permitted to attend the hearing, and to give oral evidence at it.

[63.] One special case is where an applicant has made an apparently late appeal, and is subject to imminent removal from the United Kingdom. (It is likely that the appellant will be in immigration detention.) In those circumstances, it is possible for the Tribunal to hear evidence from the applicant by telephone: see Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005 No. 230), Rules 10 and 11.

[64.] **ii. Do proceedings conform to the principle of the equality of arms?**

[65.] In general, proceedings respect the principle of equality of arms. In particular, para 6.5 of the AIT Practice Directions requires that the principal documents to be relied upon by each side be communicated to the other not later than five days before the hearing date.

[66.] **iii. Are proceedings adversarial in nature?** Yes.

[67.] **iv. What safeguards exist in order to ensure the reliability of evidence?**

[68.] There are a number of provisions of the Procedure Rules of relevance to the reliability of evidence. Witnesses may be summoned by the AIT, and required both to answer any questions and to produce documents which relate to the appeal (Rule 50). Witnesses may be required to give evidence under oath (Rule 51(3)). Where reliance is placed on a copy of a document, the tribunal may require the original document to be produced (Rules 51(5).

[69.] **v. Is legal representation available to individuals who have insufficient funds or, in the alternative, is legal aid available? Where this is available, what criteria (financial or otherwise) must be met in order to qualify?**

[70.] Appeals to the AIT are covered by the part of the legal aid scheme called 'Controlled Legal Representation' (CLR). Access to CLR is however subject to three significant restrictions. Firstly, the applicant must be financially eligible. This is defined to mean that their monthly disposable income does not exceed £672 and that their disposable income does not exceed £3,000 (Community Legal Service (Financial) Regulations 2000, SI 2000 No. 516, Regs 4 and 5). Secondly, there must be a significant prospect of success ('merits test'), and, thirdly, the benefits of the action justify its costs (Legal Services Commission Funding Code, paras 3A-075 and 3A-076). It follows that not all applicants who would benefit from CLR will be able to obtain it. In particular, the 'merits test' may lead to CLR being rejected in cases which in fact have a realistic prospect of success.

[71.] **vi. Will the parties receive a reasoned judgement?**

[72.] Rule 22 of the Procedure Rules requires the AIT to serve a reasoned written determination on both parties.

[73.] Consistently with its nature, a different approach applies to SIAC, under the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003 No 1034), Rule 47. A written determination is required to be served on both parties, but need only set out the reasons 'to the extent that it is possible to do so without disclosing information contrary to the public interest.'

[74.] **vii. Can the judicial body in question be considered independent?**

[75.] 'Independence' is not expressly stated in the legislation governing either the AIT or SIAC.

[76.] The independence of the AI is implicit in the requirement that, all members are required to take the judicial oath (Nationality Immigration and Asylum Act 2002, Schedule 4, para 14).

[77.] The full independence of SIAC is less certain, because of the make-up of its three-person panel. The legislation provides that at least one member of the panel must holds or have held high judicial office, and that at least one must be or have been a legally qualified member of the AIT (Special Immigration Appeals Commission Act 1997, Schedule 1, para 5). The third member need not have either of those qualities, however, and the SIAC website states that 'the third member will usually be someone who has experience of national security matters' (see http://www.siac.tribunals.gov.uk/aboutus.htm, last accessed 17 August 2009). It is also significant that, while the first two categories of SIAC member will have taken the judicial oath, there appears to be no requirement that other SIAC members do so.

2.1.3. The right to timely resolution of disputes

[78.] **i. Once commenced, how long do judicial proceedings take to conclude?**

[79.] It is not possible to give a general answer to this question for cases which originate in the AIT. This is partly because of the potential complexity of the legal procedures, and partly because of a lack of information.

[80.] As regards complexity, litigation begins when an individual brings an immigration appeal within a short time-limit: 5 days for a person in immigration detention; 10 days for other persons in the United Kingdom; 28 days for persons outside the United Kingdom (Rule 7 of the Procedure Rules). Late applications are also possible, if there are 'special circumstances' (Rule 10).

[81.] If the initial determination has been reached by a single member of the AIT (an 'immigration judge'), either party may request a 'reconsideration' be

ordered by a member of the AIT, on the grounds that the initial judge made an error of law. If reconsideration is not ordered by the AIT itself, the application for reconsideration may be renewed before the High Court. (On both forms of reconsideration, see Nationality, Immigration and Asylum Act 2002, section 103A, together with Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Sch 2, para 30). When ordered, a reconsideration will usually involve two or three immigration judges.

[82.] An initial determination by a three-member AIT, or a reconsideration determination, is subject of appeal on a point of law to the Court of Appeal. For this, permission to appeal is first required from either the AIT or the Court of Appeal. (Nationality, Immigration and Asylum Act 2002, sections 103B and 103E.)

[83.] Free movement cases can theoretically reach the House of Lords on appeal from the Court of Appeal (with the permission of either court). The only example of a 'free movement' case concerning immigration which has reached the House of Lords is that of *McCarthy v Secretary of State for the Home Department* (see Annex B below).

[84.] As regards the incompleteness of information, one difficulty is that the AIT database of unreported determinations includes initial determinations and reconsiderations.[14] This database only allows searches by date, so that it is extremely difficult to identify free movement cases.

[85.] The AIT reports certain of its determinations.[15] These are usually reconsideration cases, and it is possible to identify free movement cases among them. The difficulty here however is that the determinations often do not contain a full chronology of decision-making.

[86.] High Court decisions on applications for reconsideration are not generally published.

[87.] Judgments delivered by the Court of Appeal are generally published. However, a full chronology is not always provided.

[88.] The approach adopted here has been to consider the length of proceedings separately at different stages. The information here includes all of the determinations/judgments published by the AIT or Court of Appeal between

[14] See http://www.ait.gov.uk/Public/Searchunreported.aspx (02.10.2009).

[15] See http://www.ait.gov.uk/Public/SearchReported.aspx (02.10.2009).

January 2008 and August 2009 levels in which the required information is given.

[89.] ***Administrative decision - AIT determination***

Case name	**Case number**	**Administrative decision**	**AIT determination**	**Period elapsed**
McCarthy	[2008] EWCA Civ. 641	6 December 2004	17 October 2006	680 days
TR Sri Lanka	[2008] UKAIT 00004	3 July 2006	25 September 2006	84 days
MJ Nigeria	[2008] UKAIT 00034	5 November 2007	4 January 2008	60 days
PK Sri Lanka	[2008] UKAIT 00043	2 March 2007	15 June 2007	105 days
KA Sudan	[2008] UKAIT 00052	30 January 2007	4 September 2007	217 days
YB Ivory Coast	[2008] UKAIT 00062	9 October 2007	19 December 2007	71 days
HB Algeria	[2008] UKAIT 00069	9 March 2007	4 May 2007	56 days
JT Poland: Truchan proceedings	[2008] UKAIT 00077	19 July 2007	22 November 2007	126 days
JT Poland: Wojtielewicz	[2008]UKAIT 00077	6 February 2007	11 July 2007	155 days

proceedings				
JT Poland: Liber proceedings	[2008] UKAIT 00077	6 February 2007	11 July 2007	155 days
JT Poland: Nitecka proceedings	[2008] UKAIT 00077	12 March 2007	30 July 2007	140 days
WW Thailand	[2009] UKAIT 00014	3 September 2008	24 November 2008	82 days
SH Bulgaria	[2009] UKAIT 00020	10 July 2008	10 November 2008	123 days
LG Italy	[2009] UKAIT 00024	10 November 2005	20 December 2005	40 days

Among these 14 examples, the median length is 114 days (half way between 105 and 123).

[83]. AIT determination – Reconsideration order

Case name	**Case number**	**AIT determination**	**Order for reconsideration**	**Period elapsed**
TR Sri	[2008]UKAIT 00004	25 September 2006	9 February 2007 (AIT)	137 days
MJ Nigeria	[2008]UKAIT 00034	4 January 2008	18 January 2008 (AIT)	14 days
OP Colombia	[2008]UKAIT 00074	4 February 2008	22 February 2008 (AIT)	18 days
WW	[2009]UKAIT	24 November 2008	11December 2008 (AIT)	17 days

Thailand	00014			

Among these four examples the median is 17.5 days.

[90.] Reconsideration order – reconsideration determined

Case name	**Case number**	**Order for reconsideration**	**AIT reconsideration**	**Period elapsed**
TR Sri Lanka	[2008] UKAIT 00004	9 February 2007	9 October 2007	242 days
LK Kenya	[2008] UKAIT 00028	2 November 2007	3 March 2008	121 days
MJ Nigeria	[2008] UKAIT 00034	18 January 2008	21 April 2008	94 days
OP Colombia	[2008] UKAIT 00074	22 February 2008	15 September 2008	206 days
SM Sri Lanka	[2008] UKAIT 00075	10 August 2006	30 September 2008	782 days
NA Ghana	[2009] UKAIT 00009	14 May 2008	12 January 2009	182 days
WW Thailand	[2009] UKAIT 00014	11 December 2008	5 March 2009	84 days
CC Portugal	[2009] UKAIT 00024	4 February 2008	19 June 2009	501 days
JL Poland	[2009] UKAIT	21 August 2008	2 July 2009	315 days

	00030			

Among these nine examples, the median length of time is 206 days.

[91.] Reconsideration determination – Court of Appeal judgment

Case name	**Case number**	**AIT for reconsideration**	**CA judgment**	**Period elapsed**
LG Italy	[2008] EWCA Civ. 190	19 January 2007	18 March 2008	424 days
TC Kenya	[2008] EWCA Civ. 543	16 August 2007	17 April 2008	245 days
KG Sri Lanka	[2008] EWCA Civ 664	30 March 2007	21 May 2008	418 days
McCarthy	[2008] EWCA Civ 641	16 August 2007	11 June 2008	300 days
OO Netherland	[2008] EWCA Civ 1244	9 April 2008	16 October 2008	190 days
HR Portugal	[2009] EWCA Civ 371	3 July 2008	5 May 2009	306 days
CS Brazil	[2009] EWCA Civ 480	1 July 2008	31 March 2009	273 days
YK Bulgaria	[2009] EWCA Civ 530	11 December 2008	28 April 2009	138 days

Among these eight examples, the median length of time is 286.5 days (half way between 273 and 300).

[92.] **ii. Taken as a whole, do you consider that, in general, procedures are concluded within a reasonable time?**

[93.] The above information concerning median lengths of time may be summarised as follows:

Administrative decision - AIT determination: 114 days

AIT determination – Reconsideration order: 17.5 days

Reconsideration order – Reconsideration determination: 206 days

Reconsideration determination – Court of Appeal judgment: 286.5 days

[94.] These time periods appear generally reasonable. In particular, the three AIT stages considered in an average case are likely to take less than a year in total (114 + 17.5 + 206 = 337.5 days). Equally, a Court of Appeal resolution is likely to take less than a year in an average case in which judgment is delivered.

[95.] **iii. Does provision exist for speedy resolution of particular cases, e.g. on grounds of urgency or sensitivity? In practice do such 'expedited' procedures reduce the length of the legal process appropriately?**

[96.] There is provision for a 'fast-track' system of appeals in the UK. This is used for certain classes of asylum applicant, and does not appear to be of relevance to free movement cases.

[97.] In relation to EEA cases, a provision of possible significance is Rule 11 of the Procedure Rules. This applies where an applicant has made a late appeal, and the Secretary of State notifies the AIT that the individual is scheduled to be removed from the United Kingdom within five days. In such a case, the AIT is to decide on the admissibility of the application if possible before the date and time scheduled for the removal. This procedure will plainly reduce the length of the procedure. It has not been possible to identify examples of its use where a free movement application is at issue.

2.1.4. The right to adequate redress

[98.] **i. Is compensation available to a vindicated party? Are any other forms of 'satisfaction' available?**

[99.] Immigration litigation is essentially about the achievement or protection of a particular residence status. This will be achieved through an appropriate declaratory order of the AIT or courts. Compensation issues tend not to arise in EEA cases.Under section 87 of the Nationality Immigration and Asylum Act 2002, where the AIT allows an appeal, it may issue "directions for the purpose of giving effect to its decision." In practice, the AIT generally limits itself to allowing the appeal against the negative decision taken by the immigration authorities. Any attempt to go further and order the conferral of a particular immigration permission upon an applicant are generally viewed with disfavour, based on the theory that that is not necessary to give effect to the decision: see for example *EB (Ghana)* [2005] UKAIT 00131 (not an EEA case).

[100.] It is in theory possible to claim compensation for loss suffered (i) because of an incorrect adverse decision, or (ii) prior to a delayed decision. These are tort law claims, relying upon the EU law principle of state liability and/ or the domestic law of negligence. The AIT has no jurisdiction to award compensation. An action of that kind could instead be brought in the county court or the High Court. In cases where an action for judicial review is taken with respect to a failure to act, a claim of this kind may also be brought as part of that action. In a tort action in England and Wales, liability in damages (i.e. compensation) will extend to "any type of damage which should have been foreseen by a reasonable person as being something of which there was a real risk" (Halsbury's Laws of England vol 12 para 852, as at 6 December 2009).

[101.] **ii. Is compensation adequate?**

[102.] No examples of a compensation award in an EEA case have been identified. There is however no reason to doubt *a priori* the adequacy of the ordinary civil rules concerning the quantum of compensation in this context.

[103.] **iii. What rules exist relating to the payment of legal costs?**

[104.] It is assumed here that this question refers to litigation concerning an individual's immigration position. There is no general provision for the payment of costs to the successful party before the AIT. In the higher courts, the award of costs is discretionary. According to Halsbury's Laws of England, in administrative law proceedings, the general rules are that orders for costs are not made where permission to proceed is refused; and that costs follow the outcome where a case reaches a substantive hearing (vol 1, para 178, as at 6 December 2009).

[105.] There are complex rules on the payment of legal aid funds. At the initial AIT appeal stage, legal aid is payable irrespective of outcome. If there is an application for reconsideration, however, legal aid funds are generally only paid if (i) the appeal eventually succeeds on reconsideration, or (ii) either

reconsideration is not ordered, or the appeal fails on reconsideration, but there was "significant prospect" of success. (See Nationality, Immigration and Asylum Act 2002, section 103D and Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 (SI 2005 No 966).

[106.] **iv. Are interim/emergency measures available?**

[107.] It is assumed here that this question refers to litigation concerning an individual's immigration position. The AIT does not have a power to take interim measures. Instead, there is a general principle (subject to exceptions discussed above at paras 40-50) that the effect of negative immigration decisions is suspended pending the outcome of an appeal.

[108.] **v. Is there any evidence to suggest that final judgements remain unexecuted?** No.

[109.] **vi. Is there any evidence that the principle of the finality of legal proceedings (res judicata) is not respected?** No.

[110.] **vii. Is there a right of appeal?**

[111.] As explained above (paras 81-82), an initial determination by the AIT may be the subject of an application for reconsideration to the AIT itself and, if unsuccessful, to the High Court. Certain AIT determinations may be appealed to the Court of Appeal.

[112.] **viii. Where non-judicial procedures are available apply above points and vii. What is the relationship between the non-judicial procedure and the available judicial procedures?**

[113.] There are no non-judicial means of obtaining redress.

2.1.5. The right to an equivalent and effective remedy

[114.] **In assessing access to justice in areas of the *acquis* has any evidence been found to suggest that procedures enabling redress for rights derived from Community law fail to comply with the principles of equivalence or effectiveness?**

[115.] The UK system appears adequate in this regard. In this context, the test of ***equivalence*** means that the procedures and remedies available to domestic immigration law claimants are also available to free movement claimants. This

requirement appears to be satisfied, in particular because of the possibility to take claims to the AIT.

[116.] Questions might be raised as to the ***effectiveness*** of the available procedures and remedies in cases where access to the AIT is unavailable (person unable to prove their status, and compensation claims). It is in principle possible to take such a claim to the ordinary courts, by way of judicial review (status) or an action for damages (compensation). These possibilities are probably sufficient to meet the minimum requirements of EU law. (Note however that this is a hypothetical discussion: there are no examples of either kind of case of which I am aware.)

2.2. Non-discrimination

[117.] In the area of non-discrimination, the implementing legislation[16] is as follows:

- UK/Race Relations Act 1976 c.74 (22.11.1976) implements the general prohibition on race discrimination in employment and in the provision of goods and services currently found in Council Directive 2000/43/EC (29.06.2000)
- UK/Equal Pay Act 1970 c.41 (29.05.1970) implements the prohibition on sex discrimination in contracts of employment (including matters relating to pay) currently found in Parliament and Council Directive 2006/54/EC (05.07.2006)
- UK/Sex Discrimination Act 1975 c.65 (12.11.1975) implements the general prohibition on sex and sex-related discrimination in employment currently found in Parliament and Council Directive 2006/54/EC (05.07.2006) and the general prohibition on sex discrimination in the provision of goods and services set out in Council Directive 2004/113/EC (21.12.2004)
- UK/Disability Discrimination Act 1995 c.50 (08.11.1995) implements the general prohibition on disability and disability-related discrimination in employment currently found in Council Directive 2000/78/EC (27.11.2000)
- UK/Employment Equality (Religion or Belief) Regulations SI 2003/1660 (26.06.2003) implement the general prohibition on religion or belief

[16] These Acts and Regulations extend generally to Great Britain namely England, Scotland and Wales. Separate provisions cover Northern Ireland, which are identical in all material respects of law.

discrimination in employment currently found in Council Directive 2000/78/EC (27.11.2000)

- UK/Employment Equality (Sexual Orientation) Regulations SI 2003/1661 (26.06.2003) implement the general prohibition on sexual orientation discrimination in employment currently found in Council Directive 2000/78/EC (27.11.2000)
- UK/Employment Equality (Age) Regulations SI 2006/1031 (03.04.2006) implement the general prohibition on age discrimination in employment currently found in Council Directive 2000/78/EC (27.11.2000).

2.2.1. The right of effective access to a dispute resolution body

2.2.1.1. Employment cases

[118.] All of the United Kingdom non-discrimination legislation relating to employment contains the same mechanism for enforcing individual rights, prescribing the employment tribunal as the forum in which such rights are to be enforced.

[119.] The structure of the sex discrimination legislation[17] can be taken as typical, being replicated in the other United Kingdom non-discrimination provisions. The legislation makes it unlawful to discriminate or to commit an act of harassment in relation to employment in Great Britain.[18] No complaint of unlawful discrimination or harassment may be brought other than as provided for by the sex discrimination legislation itself,[19] which provides that a complaint by any person that another person has committed an act of unlawful discrimination or harassment against him or her may be presented to an employment tribunal.[20] Thus, an individual who wishes to complain of discrimination or harassment in employment is entitled to bring such a complaint in an employment tribunal only. It is not open to him or her to bring

[17] UK/Sex Discrimination Act 1975 c.65 (12.11.1975)

[18] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 6

[19] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 62

[20] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 63

proceedings in the county court or the High Court, for example – no other court or tribunal has jurisdiction to hear the claim. It is only at the second stage of appeal (after appeal to the Employment Appeal Tribunal) that the claim would reach the mainstream civil courts (i.e. the Court of Appeal, followed by the Supreme Court).

[120.] The sex discrimination legislation goes on to provide for how such a complaint should be determined by that tribunal, having regard to the burden of proof placed on each party, [21] and sets out the remedies that an employment tribunal may award if it finds a complaint well-founded.[22] These provisions, too, are replicated in the non-discrimination legislation identified above.

[121.] There are two principal restrictions on access to justice: dispute resolution requirements and time limits.

[122.] On 1 October 2004, new procedural rules came into force, setting down a mandatory dispute resolution procedure to be observed before tribunal proceedings were instituted.[23] Among other things, the rules required individuals wishing to bring a complaint of discrimination in employment to first attempt to resolve their complaint with their employer by way of an internal grievance procedure. An individual would not be permitted to present a complaint to an employment tribunal unless he or she had first put that complaint in writing to his or her employer and waited 28 days.[24] If the individual attempted to present his or her claim to the employment tribunal before this requirement had been observed, the employment tribunal would be obliged to reject the claim for want of jurisdiction. Furthermore, if either party failed to observe any part of the minimum grievance procedure[25], the employment tribunal would be able to adjust any compensation award it made based on that complaint by between ten to 50 per cent.[26] So, for example, if an employee failed to avail him or herself of an appeal against an allegedly discriminatory decision made by the employer, and then went on to prove in an employment tribunal that the decision was discriminatory, the tribunal could

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[21] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 63A

[22] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 65

[23] UK/Employment Act 2002 c.22 (08.07.2002), available at: http://www.opsi.gov.uk/acts/acts2002/ukpga_20020022_en_1 (12 September 2009)

[24] UK/Employment Act 2002 c.22 (08.07.2002) Section 32

[25] UK/Employment Act 2002 c.22 (08.07.2002) Schedule 2

[26] UK/Employment Act 2002 c.22 (08.07.2002) Section 31

reduce compensation by an appropriate amount to reflect the employee's failure to seek redress from his or her employer before instituting proceedings.

[123.] The purpose of these dispute resolution rules was to encourage aggrieved individuals to attempt informal dispute resolution in the workplace instead of proceeding straight to litigation, with the ultimate goal of reducing pressure on an over-burdened employment tribunal system.[27] However, a government-commissioned review of the rules just over two years into their life showed that they were having the unintended consequence of formalising disputes early on and imposing an unnecessarily high administrative burden on both parties.[28] The rules were therefore repealed on 06.04.2009.[29] Thus, there is no longer an absolute barrier on access to tribunals for complainants who do not raise their grievance with their employer first. However, the replacement legislative regime puts in place a statutory Code of Practice on resolving grievances,[30] which employees and employers are expected to follow. Unreasonable failure to comply with any part of the Code may result in any award of compensation arising out of the complaint being adjusted by up to 25 per cent.[31] An individual seeking redress for discrimination is therefore still encouraged – but no longer strictly obliged – to first have recourse to a non-judicial dispute resolution procedure before presenting his or her claim to an employment tribunal.

[124.] All of the above-mentioned UK non-discrimination legislation sets down a time limit within which proceedings to enforce non-discrimination rights must be brought.

[125.] The sex discrimination legislation is typical of the non-discrimination legislation, in that it provides that an employment tribunal may not consider a complaint of discrimination unless proceedings are brought within three months of the date on which the act complained of was done.[32] Thus, there is an

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[27] UK/Department for Trade and Industry (2001) *Routes to Resolution: Improving dispute resolution in Great Britain*

[28] UK/Department for Trade and Industry (2007) *Better Dispute Resolution – A review of employment dispute resolution in Great Britain*, available at: http://www.berr.gov.uk/files/file38516.pdf (12.09.2009)

[29] UK/Employment Act 2008 c.24 (13.11.2008) available at: http://www.opsi.gov.uk/acts/acts2008/ukpga_20080024_en_1 (12.09.2009)

[30] UK/Advisory, Conciliation and Arbitration Service (2009) *Code of practice on Disciplinary and Grievance Procedures* available at: http://www.acas.org.uk/dgcode2009 (12.09.2009)

[31] UK/Employment Act 2008 c.24 (13.11.2008) Section 3

[32] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 76, and similar provision in the other non-discrimination legislation

absolute bar on complaints that do not comply with the time limit. However, a complaint brought 'out of time' may nonetheless be heard if the employment tribunal considers that it is just and equitable to hear it. Although the burden is on the claimant to show a good reason why time should be extended, employment tribunals have a wide discretion to hear out of time claims. It has been established that time may be extended where, for example, the delay is the fault of the claimant's legal representative[33] or where there has been a misunderstanding of the law.[34] There has been no legal challenge to these rules on the grounds of effectiveness or equivalence. It does not appear these rules unduly restrict access to justice – while three months is a much more restrictive time limit than applies in the ordinary civil courts, the less formal procedure in the employment tribunal (see below) must be weighed in the balance.

[126.] All the legislation outlawing discrimination in employment contains the same time limit provision except for the Equal Pay Act 1970,[35] which deals specifically with sex discrimination in contractual terms. In a 'standard' equal pay case, the claim must be brought within six months of the end of the employment to which the claim relates.[36] Special provision is made for cases where the employer has concealed the discrimination in question, where the employee has a disability, or where there was a 'stable employment relationship' covering two or more separate contracts of employment.[37] However, unlike the other discrimination legislation, there is no provision allowing an employment tribunal to hear an 'out of time' claim on the basis that it is just and equitable to do so – the six-month limit is absolute. It has been established by case law that these rules comply with the principles of effectiveness and equivalence.[38]

[127.] There are limited circumstances in which a victim of discrimination can waive his or her right to access to a judicial body. Each of the discrimination provisions prevents individuals 'contracting out' of their rights. The sex discrimination legislation is typical in that it provides that a contractual term

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33 *Virdi v Commissioner of Police of the Metropolis* UK/EAT/0363/06 (18.10.2006)

34 *British Coal Corporation v Keeble and ors* UK/EAT/496/97 (26.03.1997)

35 UK/Equal Pay Act 1970 c.41 (29.05.1970)

36 UK/Equal Pay Act 1970 c.41 (29.05.1970) Sections 2(4) and 2ZA

37 UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 2ZA

38 *Preston and ors v Wolverhampton Healthcare NHS Trust and ors (No.2)* UK/House of Lords/2001/UKHL/5 (08.02.2001)

that purports to exclude or limit any provision of the Act is unenforceable. [39] However, there are two exceptions[40] to this rule:

- Compromise agreements: these are contracts concluded between a complainant and a company or another individual, by which the complainant agrees not to bring or continue proceedings against the company or individual, usually in return for an agreed sum. The non-discrimination legislation sets out various conditions that must be met in order for such an agreement to be valid. These include that the complainant must have received advice from a relevant independent adviser – such as a qualified lawyer or a trade union official – who is covered by a professional indemnity or insurance scheme, and who is identified in the agreement. Only if these conditions are satisfied will the agreement be valid to prevent the complainant bringing the claim to which the agreement relates.
- Conciliated settlements: these are contracts similar to compromise agreements, except that they are concluded with the assistance of a 'conciliation officer'. A conciliation officer is an employee of the Advisory, Conciliation and Arbitration Service (Acas), a government-funded service providing advice and mediation services in employment disputes.

[128.] There are no non-judicial mechanisms for enforcing rights under the discrimination legislation. Individual non-discrimination rights may only be enforced by way of a complaint to the employment tribunal (or the county court – see below). Although the Equality and Human Rights Commission (EHRC) has power to investigate suspected acts of unlawful discrimination it is not competent to resolve complaints between private individuals.

2.2.1.2. Non-employment cases

[129.] With regard to non-employment discrimination proceedings, such as claims of sex or race discrimination in access to goods and services, such claims must be brought in the county court.[41] The time limit for bringing a goods and services claim is six months. Individuals bringing a county court claim under

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[39] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 76 and similar provision in the other non-discrimination legislation

[40] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 77 and similar provision in the other non-discrimination legislation

[41] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 66, and similar provision under the race discrimination legislation

the discrimination legislation are required to notify the Equality and Human Rights Commission (EHRC) when the claim is lodged.[42]

[130.] In some areas of civil litigation, such as defamation and professional negligence, 'pre-action protocols' impose certain procedural requirements on the parties to a dispute. No such requirements apply to non-employment discrimination claims. However, complainants are expected to make some effort at resolving the dispute – for example, by setting out the complaint in writing to the respondent – before commencing proceedings.[43] The court will generally expect parties to act reasonably in exchanging information and trying to avoid the need for litigation. This might involve recourse to the questionnaire procedure – see under 'Good practice' at 3.2, below.

[131.] It is notable that, while there is a wealth of free guidance, published by organisations such as the EHRC, the Advisory, Conciliation and Arbitration Service (Acas) and the Tribunals Service, on discrimination in employment and how to pursue a claim, there is hardly any such guidance aimed at would-be litigants in the county court. It is fair to assume that this leads to low awareness of non-discrimination rights outside the employment sphere and of enforcement mechanisms. This may, in itself, be viewed as a hindrance to effective access to justice.

2.2.2. The right to fair proceedings

2.2.2.1. Employment cases

[132.] An individual wishing to bring a complaint of discrimination is entitled to represent him or herself in the employment tribunal – Section 6 of the Employment Tribunals Act 1996.[44] While litigants in other civil proceedings (including in discrimination claims in the county court) are entitled to represent themselves, the employment tribunal system is intended to be less formal than ordinary civil courts and so has certain features designed to assist the litigant

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[42] Practice Direction on proceedings in the county court under enactments relating to discrimination, Ministry of Justice, available at: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/proceedings_under_enactments.htm (08.12.2009)

[43] Practice Direction on pre-action conduct, Ministry of Justice, available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm#IDAUJ5Q (08.12.2009)

[44] UK/Employment Tribunals Act 1996 c.17 (22.05.1996)

person. For example, the rules of procedure in the employment tribunal[45] expressly direct employment judges to seek to avoid formality in proceedings wherever possible. [46] The Tribunals Service, which provides administrative support to employment tribunals, publishes easy-to-understand guidance for those representing themselves.[47]

[133.] Assistance is available for complainants in the employment tribunal who might otherwise be disadvantaged. For example, the Tribunals Service meets the reasonable cost of interpreters for those who are deaf or hard of hearing.[48] Foreign language interpreters can also be paid for.[49] However, there are no specific procedures in place to help those with diminished intellectual capabilities – while procedures exist in the ordinary civil courts for investigating a claimant's mental capacity and appointing a 'litigation friend' where necessary, it has been established that there is no comparable procedure in the employment tribunals.[50]

[134.] Once before the tribunal, a complainant is entitled to give evidence, call and question witnesses, and address the tribunal.[51] Although the tribunal has a power to strike out a claim on grounds including that it has no reasonable

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45 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004). These rules cover Great Britain (England, Scotland and Wales) only and do not extend to Northern Ireland. Given the unavailability of data relating to proceedings in Northern Ireland, the study has confined its focus to the situation in Great Britain.

46 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 14(2)

47 UK/Tribunals Service (2009) *Your claim – What next?*, available at: http://www.employmenttribunals.gov.uk/Documents/Publications/TheHearingClaim.pdf (12.09.2009)

48 UK/Tribunals Service (2004) *Guidance for tribunal users who are deaf or hard of hearing*, available at: http://www.employmenttribunals.gov.uk/Documents/Publications/GuideForDeafHardOfHearing.pdf (12.09.2009)

49 UK/Tribunals Service (2009) *Your claim – What next?*, available at: http://www.employmenttribunals.gov.uk/Documents/Publications/TheHearingClaim.pdf (12.09.2009)

50 *Johnson v Edwardian International Hotels Ltd* UK/EAT/0588/07 (02.05.2008)

51 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 27(2)

prospect of success,[52] case law has established that there is a strong presumption in favour of hearing discrimination cases in full.[53]

[135.] The requirement that claimants benefit from equality of arms is expressly recognised in the employment tribunal rules of procedure – employment judges are required, so far as is practicable, to ensure that the parties are on an 'equal footing'.[54] However, this requirement may have limited impact in practice. While an employment judge may be expected to take a more inquisitive role in proceedings in order to assist an unrepresented party, it remains the individual's responsibility or put his or her case and present the relevant evidence.[55] Furthermore, there is no right to funding for legal representation in the employment tribunal[56] and so complainants will generally be limited by their means.

[136.] Although an adversarial procedure is not expressly set out in the employment tribunal rules of procedure, this is how hearings are invariably conducted, with the party on whom the burden of proving his or her case lies going first.[57] Claimants in discrimination proceedings have the assistance of a 'reverse' or 'shifting' burden of proof. For example, the sex discrimination legislation, which is typical of the non-discrimination legislation, provides that where a complainant proves facts from which a tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination has been committed, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or is not to be treated as having committed, the act complained of.[58] Case law guidance on this mechanism has established that,

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52 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 18(7)

53 *Anyanwu and anor v South Bank Student Union and ors* UK/House of Lords/UKHL/2001/14 (22.03.2001)

54 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Regulation 3

55 *Mensah v East Hertfordshire NHS Trust* UK/Court of Appeal/EARTF 97/0610/B (10.06.1998)

56 Funding for advocacy is only available in courts and tribunals listed in UK/Access to Justice Act 1999 c.22 (27.07.1999), Schedule 2, Paragraph 2

57 IDS (2006) *Employment Tribunal Practice and Procedure*, London: Incomes Data Services Ltd

58 UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 63A and similar provision in the other non-discrimination legislation

in effect, that a complainant need only show a *prima facie* case of discrimination for the burden of proof to shift onto the respondent.[59] However, it has been established that the reverse burden of proof does not apply where the complaint is one of race victimisation, which means that there is a slight inconsistency in the level of discrimination protection.[60]

[137.] Claimants before the employment tribunal have a wider choice of representative than those bringing claim in the 'ordinary' civil courts. Rights of audience in the ordinary courts are generally restricted to qualified advocates. In the employment tribunal, by contrast, a complainant is entitled to be represented by an advocate, a solicitor, a trade union representative or any other person.[61] There is no requirement that the representative be legally qualified, or even educated in discrimination law, and it has been established that the tribunal has no power to remove a representative, even where the tribunal considers that representative's participation to be a hindrance to proceedings.[62] While this gives rise to a risk of amateurism in the employment tribunals, it also means that unrepresented litigants may be represented by unqualified but legally educated individuals (such as trainee lawyers), offering their services for free through organisations such as the Free Representation Unit.[63] Furthermore, while publicly funded representation is not available in the employment tribunal, it is available in the Employment Appeal Tribunal and higher courts.[64]

[138.] Proceedings in the employment tribunal are adversarial in nature. However, employment judges may take a more active role than would be permitted in an ordinary civil court. For example, employment judges are entitled to ask questions of the parties and witnesses in proceedings, and may conduct the hearing in the most appropriate manner to clarify any relevant matter and to ensure the just handling of proceedings.[65] Given that the employment judge is also required to ensure, so far as is practicable, that parties are on an equal

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59 *Igen Ltd and ors v Wong* UK/Court of Appeal/A2/2004/1141 (18.02.2005)

60 *Oyarce v Cheshire County Council* UK/Court of Appeal/A2/2007/1532 (02.05.2008)

61 UK/Employment Tribunals Act 1996 c.17 (22.05.1996) Section 6

62 *Bache v Essex County Council* UK/Court of Appeal/EATRF/98/1012/A1 (21.01.2000)

63 See http://www.freerepresentationunit.org.uk (15.09.2009)

64 UK/Access to Justice Act 1999 c.22 (27.07.1999), Schedule 2, Paragraph 2

65 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 14(3)

footing, the judge is therefore enable to ensure unrepresented litigants are not unduly disadvantaged.[66]

[139.] Employment judges are largely free to set their own rules as to the admissibility of evidence, as they are not bound by any enactment or rule of law in this respect.[67] So, for example, 'hearsay' evidence, which can only exceptionally be admitted in ordinary civil proceedings, may be taken into account in an employment tribunal.[68] However, case law has established that evidence must be relevant and potentially probative of the issues in a case if a party is to be entitled to introduce it.[69] In addition to the overriding objective placed on employment judges to deal with cases justly,[70] case law has recognised the right of litigants in employment tribunals to question witnesses for the opposing side.[71]

[140.] Parties are entitled to written reasons for a tribunal's judgment, which must include, among other things, relevant findings of fact and a concise statement of the applicable law and how the law has been applied.[72] Case law has established that reasons should be clear enough that the parties can know why they have won or lost and that the appellate court or tribunal can know whether there has been any mistake of law.[73] Failure to observe these requirements will be grounds for appeal.

[141.] Employment judges are appointed by the Judicial Appointments Commission, an independent body composed of members drawn from the judiciary, the legal profession, tribunals, the magistracy and the public.[74]

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66 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Regulation 3

67 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 14(2)

68 *Coral Squash Clubs Ltd v Matthews and anor* UK/EAT (23.03.1979)

69 *XXX v YYY and anor* UK/Court of Appeal/A1/2003/1811 (10.02.2004)

70 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Regulation 3

71 *Bache v Essex County Council* UK/Court of Appeal/EATRF/98/1012/A1 (21.01.2000)

72 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 30

73 *Meek v Birmingham City Council* UK/Court of Appeal (18.02.1987)

74 UK/Constitutional Reform Act 2005 c.4 (24.03.2005)

Employment tribunals are expressly made subject to the Article 6 ECHR standards for a fair trial by virtue of the Human Rights Act 1998.[75] The need for judges not only to be impartial but to maintain the appearance of impartiality has been recognised by case law. An employment judge will be obliged to stand down on the ground of apparent bias where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[76]

2.2.2.2. Non-employment cases

[142.] Non-employment discrimination cases are brought in the county court. Claims with a value of up to £5,000 are routinely allocated to the 'small claims' track in the county court.[77] The small claims track provides for a less formal procedure not dissimilar to that adopted in the employment tribunal. For instance, the strict rules of evidence do not apply, the court need not take evidence on oath, the court may limit cross-examination, and the court must give reasons for its decision.[78]

[143.] Small claims also attract a limit on the amount of costs that may be awarded. Whereas the usual rule in the civil courts is that costs follow judgment (i.e. the loser pays all the costs of the other side), this rule does not apply to small claims. Instead, the county court is expressly prohibited from awarding costs except for specified expenses, such as witnesses' travelling expenses and standard court fees.[79]

[144.] Legal aid is not available for representation in claims in the small claims track, although some assistance may be available for pre-claim preparation. However, as in employment tribunals, lay representatives (i.e. not legally qualified) are permitted in small claims. Small non-employment claims are therefore treated in much the same way as employment claims, in terms of the right to representation.

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75 UK/Human Rights Act 1998 c.42 (09.11.1998)

76 *Lodwick v Southwark London Borough Council* UK/Court of Appeal/A1/2003/1697 (18.03.2004)

77 UK/Civil Procedure Rules SI 1998/3132 (10.12.1998) Rule 26.6(3)

78 UK/Civil Procedure Rules SI 1998/3132 (10.12.1998) Rule 27.8

79 UK/Civil Procedure Rules SI 1998/3132 (10.12.1998) Rule 27.14

[145.] Aggrieved individuals are entitled to represent themselves and are implicitly encouraged to do so by the less formal small claims procedure. However, the lack of free, detailed guidance on the procedure and the preparation required in such claims undermines claimants' ability to do so.

[146.] Higher value claims (i.e. over £5,000) in the county court may qualify for publicly-funded legal representation. Whether legal aid will be granted depends on the claimant's means. The assessment will take account of the claimant's disposable income and capital, and also the merits of his or her claim.[80] However, lay representatives are not permitted in such claims (although the claimant is permitted to represent him or herself). Furthermore, such claims carry the risk of costs awards against the losing party.

2.2.3. The right to timely resolution of disputes

2.2.3.1. Employment cases

[147.] Claims identified in the table in Annex 3 took between five months and 75 months to complete. In general, all claims that did not involve an appeal were completed in 20 months or fewer. Cases that involved at least one level of appeal took a minimum of 11 months to complete, although most took over two years.

[148.] Employment tribunal proceedings in discrimination cases took between five months and two-and-a-half years to complete. As a broad generalisation it is possible to say that a claimant bringing discrimination proceedings in the employment tribunal can expect to have a judgment and a determination of remedy within a year to 18 months. It is not uncommon for straightforward cases to be resolved in a much shorter period. For example, one sex discrimination claim was decided, and remedy determined, within five months, and several were similarly concluded within a year. However, a large number of cases took between a year and two years to complete proceedings at first instance. Furthermore, particularly complex equal pay and race discrimination cases took 29 and 31 months to reach a final decision.

[149.] In most cases, liability and remedy were determined on the same day or within a few months of each other. However, where complicated assessments were involved – for example, calculating long-ranging loss of earnings – it

[80] Guidance from Community Legal Advice, available at http://www.communitylegaladvice.org.uk/en/legalaid/index.jsp (09.12.2009)

could take up to a further eight months after the liability judgment for the remedy to be decided.

[150.] Where claims have been subject to an appeal, there is also a wide range in the delay a claimant can expect until final judgment. Appeals to the Employment Appeal Tribunal (EAT) took between a further five months and two years to complete, although the majority involved delays of less than a year. The range for further appeals to the Court of Appeal was between four and 12 months following judgment of the EAT. In the one case where appeals went as far as the House of Lords, the final court of appeal in the UK, the case took over six years from start to finish, with the final stage between the Court of Appeal's judgment and that of the House of Lords taking nearly two years.

[151.] It can be observed that some of the longest-running cases noted in Annex 3 involve equal pay claims. This is the result of several factors. Equal pay claims tend to be more complex than other employment tribunal claims, given the variety of ways a claim may be brought – on the basis of like work, work rated as equivalent or work of equal value[81] and the abundance of case law on every aspect of the Equal Pay Act 1970. The potential for complainants to allege systemic discrimination in pay systems, such as has occurred in the mass litigation in the National Health Service[82], has also made for protracted and complex hearings.

[152.] The examination of employment tribunal cases does not give an indication of what delay can be expected between the date of judgment and execution of that judgment. It has been recognised by the UK Government that difficulties exist in enforcing employment tribunal awards. A survey of 1,002 claimants who had been awarded a monetary payment between January 2007 and April 2008 showed that at the time of interview (which in all cases was more than 42 days after the award was made) 39 per cent of successful claimants had not received their award at all.[83] Just over half (53 per cent) had been paid in full and a further 8 per cent had been paid in part.

[153.] Historically, employment tribunal judgments have been difficult to enforce as they the claimant is first required to register the unpaid award in the county court or the High Court before civil enforcement proceedings can be

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81 UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1(2)

82 See, for example, *Hartley and ors v Northumbria Healthcare NHS Foundation Trust and ors* UK/Employment Tribunal No.2507033/07 (06.04.2009)

83 UK/Ministry of Justice (2009) *Research into enforcement of employment tribunal awards in England and Wales*, available at: http://www.justice.gov.uk/publications/docs/employment-tribunal-awards.pdf (15.09.2009)

instituted.[84] The UK Government recognised this unsatisfactory state of affairs and changed the rule, as from April 2009, so that claimants will be able to go directly to the county court or High Court for enforcement.[85] Nonetheless, enforcement procedures still require to be pursued in the ordinary civil courts and instead of the less formal employment tribunal.

[154.] It cannot be said that, in general, the time taken to conclude judicial procedures for breach of the anti-discrimination legislation is not reasonable. Only exceptionally do cases – such as the one House of Lords appeal cited in the table in Annex 3 – approach what the European Court of Human Rights might consider unacceptable delay in judicial procedures.

[155.] No provision exists for expedited procedures in employment discrimination matters.

2.2.3.2. Non-employment cases

[156.] Given the paucity of reported decisions on non-employment discrimination cases it has not been possible to conduct analysis of the time such disputes usually take to resolve. While employment tribunal judgments are collated at a central office, no similar central database exists for county court judgments.

2.2.4. The right to adequate redress

[157.] A successful complainant in employment proceedings under the discrimination legislation is entitled to any of the following remedies that the employment tribunal considers 'just and equitable':

- a declaration that his or her rights have been breached
- an order of compensation
- a recommendation that the employer take, within a specified period, action that the tribunal considers to be practicable in order to obviate or reduce the adverse effect of the discrimination.

[158.] A declaration is usually included in the tribunal's judgment, being simply a statement that the employer has violated the employee's rights. Recommendations are fairly rare, and their effect is limited to the individual

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[84] UK/Employment Tribunals Act 1996 c.17 (22.05.1996) Section 15

[85] UK/Tribunals, Courts and Enforcement Act c.15 (19.07.2007)

bringing the complaint – a tribunal may not order that an employer's discriminatory practice must cease.[86]

[159.] Awards of compensation are made on the basis of the damages that could be awarded by a county court (or a Sheriff Court in Scotland) for a claim in tort or for breach of a statutory duty.[87] This rule allows for a wide range of loss to be compensated, including financial loss, psychiatric damage, injury to feelings and aggravated damages.[88] Although it is yet to be conclusively established, it is thought that tribunals may award exemplary or punitive damages if the compensation that would otherwise be awarded would be inadequate to punish the guilty party.[89] The basis on which damages are calculated is restitutionary, i.e. the aim is that, as best as money can do it, the claimant is put in the position he or she would have been in but for the unlawful conduct.[90] There is no limit on the amount of compensation that may be awarded, in contrast to certain other remedies available in an employment tribunal – for example, compensation for unfair dismissal is capped at £66,200.[91] Case law has, however, imposed binding guidance on the amount that may be awarded in respect of various degrees of injury to feelings, with an overall limit of £25,000.[92]

[160.] As noted above, compensation in respect of acts of unlawful discrimination is potentially unlimited. The cases set out in the table in Annex 3 indicate a range in the total compensation award of £635 to £90,000. (An award of £217,000 was the subject of a successful appeal and will have been reduced on remission to the tribunal.) The median award, based on the cases in which information on compensation was available, was around £4,500, with the interquartile range between £2,500 and £20,000. In the majority of cases, awards were made up of a mixture of economic and non-economic loss.

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86 *Ministry of Defence v Jeremiah UK* Court of Appeal (19.10.1979)

87 UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 65(1)(b), and similar provision in the other anti-discrimination legislation

88 *Sheriff v Klyne Tugs (Lowestoft) Ltd* UK Court of Appeal/CCRTI 98/1436/2 (24.06.1999)

89 IDS (2008) *Sex Discrimination,* London: Incomes Data Services Ltd

90 *Ministry of Defence v Cannock and ors* UK/EAT/110/94 and other appeals (29.07.1994)

91 UK/Employment Rights Act 1996 c.18 (22.05.1996) Section 123

92 *Vento v Chief Constable of West Yorkshire Police* UK/Court of Appeal/A1/2001/2866 (20.12.2002)

[161.] The range of awards indicated by the table in Annex 3 largely reflects the official statistics relating to tribunal awards. Official statistics for 2007-08[93] showing the range of total compensation awards for various categories of discrimination are set out in Annex 4.

[162.] Compensation for equal pay is subject to different rules to those that apply to compensation for other forms of discrimination. This is a consequence of the contractual basis of an equal pay claim.[94] An individual who succeeds in an equal pay claim can seek arrears of pay in respect of the difference between the rate he or she was paid and the non-discriminatory rate he or she should have been paid, by reference to a comparator of the opposite sex employed on equal work. Arrears are limited in time, in the standard case, to six years before the date the claim was brought.[95] Being a contractual claim, the successful claimant is also entitled to have the discriminatory term in his or her contract modified to be no less favourable than that of his or her chosen comparator.[96] So, the tribunal's determination will normally result in the claimant's pay being increased to the non-discriminatory rate.

[163.] The costs regime in the employment tribunal is different to that which prevails in the ordinary civil courts. While in the ordinary courts costs tend to 'follow judgment', costs may only be awarded by an employment tribunal in limited circumstances. These are that a party has caused a hearing to be postponed or adjourned; has failed to comply with an order or a practice direction; has acted vexatious, abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings; or the bringing or conducting of proceedings has been misconceived.[97] There is a limit of £10,000 on the amount of costs that can be ordered, and the tribunal is entitled to take into account a party's ability to pay when making an award.[98] Under an innovation introduced in 2004, the tribunal may also make a 'preparation time

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93 UK/Tribunals Service (2008) *Employment Tribunal and EAT Statistics (GB) 1 April 2007 to 31 March 2008* available at: http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal_and_EAT_Statistics_v9.pdf (15.09.2009)

94 UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1

95 UK/Equal Pay Act 1970 c.41 (29.05.1970) Sections 2(5) and 2ZB

96 UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1

97 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 40

98 UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 41

order' in respect of the time spent by an unrepresented litigant in preparing for the hearing.[99]

[164.] As noted above, there is evidence that tribunal awards are going unpaid. A survey of 1,002 claimants who had been awarded a monetary payment between January 2007 and April 2008 showed that at the time of interview (which in all cases was more than 42 days after the award was made) 39 per cent of successful claimants had not received their award at all.[100]

[165.] Appeals from the employment tribunal lie to the Employment Appeal Tribunal (EAT) and from there to the Court of Appeal (the Court of Session in Scotland) and then to the Supreme Court (formerly known as the House of Lords). Non-employment discrimination cases in the county court go on appeal directly to the Court of Appeal. An appeal may only be made in respect of an error of law[101] – the appeal courts will not re-try issues of fact. There is therefore no danger that the principles of res judicata and the finality of legal proceedings will be compromised by re-litigating decided legal points in the appeal courts. However, where an employment tribunal's findings of fact involve a misdirection in law, or the tribunal has reached a conclusion that no reasonable tribunal could have come to, those errors amount to errors of law that the EAT has jurisdiction to hear on appeal.[102]

2.2.5. The right to an equivalent and effective remedy

[166.] With regard to non-discrimination law generally there is no evidence suggesting that procedures for redress do not comply with the principles of effectiveness or equivalence. Compensation is expressly stated to be available on the same basis as in the ordinary civil courts.[103] Furthermore, while the time limit for bringing discrimination claims is much shorter than the limit that applies to other civil proceedings, this may be thought to be balanced by rules

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[99] UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 42

[100] UK/Ministry of Justice (2009) *Research into enforcement of employment tribunal awards in England and Wales*, available at: http://www.justice.gov.uk/publications/docs/employment-tribunal-awards.pdf (15.09.2009)

[101] UK/Employment Tribunals Act 1996 c.17 (22.05.1996) Section 21

[102] *Martin v MBS Fastenings (Glynwed) Distribution Ltd UK* Court of Appeal (24.03.1983)

[103] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 65(1)(b), and similar provision in the other anti-discrimination legislation

on representation, evidence and costs, among other things, which are more favourable to the claimant in the employment tribunal.

[167.] With regard specifically to equal pay claims, the rules set out above limiting the arrears of remuneration that can be recovered were brought into force on 19 July 2003. Previously, arrears of remuneration were limited to the two-year period before the claim was presented, instead of the six-year period as is the case today. This provision was the subject of a reference to the European Court of Justice,[104] where the Court held that, although there is nothing in principle that prohibits the imposition of limits on arrears, such limits must meet the principle of equivalence and so must not be less favourable than those governing similar domestic actions. When the case returned to the Employment Appeal Tribunal, which had made the reference, it held[105] that comparable domestic claims included breach of contract, arrears of pay, unlawful deductions from wages or race or disability discrimination, in respect of which claimants can receive compensation covering losses dating back six years.[106] The two-year limit on back pay in equal pay claims was, therefore, less favourable, in breach of the equivalence rule. These decisions led to amending legislation,[107] which inserted the more favourable provisions listed above.

3. Good practice

3.1. Free movement of persons

[168.] The material presented in section 2 suggests that overall the United Kingdom satisfies the broad requirements of access to justice in relation to 'free movement' immigration cases.

[169.] In particular:

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[104] *Levez v TH Jennings (Harlow Pools) Ltd* ECJ/C-326/96 (01.12.1998)

[105] (1) *Levez v TH Jennings (Harlow Pools) Ltd (No.2)* (2) *Hicking v Basford Group Ltd (in receivership*) UK/EAT/812/84 and UK/EAT/311/99 (01.10.1999)

[106] UK/Limitation Act 1980 c.58 (13.11.1980)

[107] UK/Equal Pay Act 1970 (Amendment) Regulations SI 2003/1656 (26.06.2003)

- appeals may be addressed to an administrative tribunal in the first instance
- there is a system of legal aid for those lacking means
- decisions are taken in a relatively timely manner
- there is the possibility of scrutiny by the ordinary courts (through reconsideration applications and on appeal).

3.2. Non-discrimination

[170.] If 'good practice' is taken to refer to the ways in which UK measures for ensuring the right to non-discrimination is respected exceed the minimum standards required by Article 6 of the European Convention on Human Rights, there are three main aspects worth noting: the equal value procedure in equal pay claims; the questionnaire procedure in discrimination claims; and the provision of advice and support by the Equality and Human Rights Commission.

[171.] The particular complexities of equal pay claims based on 'equal value'[108] – i.e. where a complainant seeks the same pay as a comparator doing an two entirely different job, on the basis that the two jobs are nonetheless of equivalent value – have led to the introduction of special procedural rules. According to an assessment carried out in 2000, the average time taken by tribunals to hear equal value cases was just under 20 months; and large-scale equal value cases, involving numerous complainants and independent experts, have run for many years before reaching an outcome.[109] Specialised procedures for dealing with equal value claims where therefore added to the ordinary employment tribunal rules in 2004.[110] These rules provide, among other things, for the use of 'equal value hearings' to set parameters, agree timetables and deal with delays and disagreements, and for the effective use of independent experts to assist the tribunal in deciding whether a finding of equal value should be made. The rules also set down an indicative timetable. In the 'average straightforward case', the timetable envisages that claims not involving an independent expert should take no more than 25 weeks from presentation of the

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[108] UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1(2)

[109] IDS (2004) 'Equal value cases – streamlining of procedures' in: *IDS Employment Law Brief,* No. 767, p.15

[110] UK/ Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004) Schedule 6

claim to full hearing. Cases involving an independent expert are expected to take 37 weeks.

[172.] The questionnaire procedure for discrimination claims is aimed at helping complainants discover the reasons for the treatment they seek to complain of and assist them in establishing whether they have indeed been discriminated against. The same procedure exists in all the non-discrimination legislation and applies to both county court and employment tribunal proceedings. The aim is to give the would-be claimant a better idea of the merits of his or her claim. Under the procedure the complainant is allowed to ask questions of the respondent as to his or her reasons for doing any relevant act, or on any other matter which is or may be relevant.[111] The respondent's answers are then admissible in proceedings and a court or tribunal is entitled to draw an adverse inference from evasive answers or a failure to respond.[112] Standard questionnaire forms are prescribed by legislation, to assist complainants in framing their questions. However, these are not mandatory.

[173.] The Equality and Human Rights Commission (EHRC) came into being on 1 October 2007. It took over the role and functions of the three existing equality commissions – the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC) – with regard to sex, race and disability discrimination, and assumed responsibility in the areas of sexual orientation, religion or belief, and age discrimination, as well as for the promotion of human rights. It has a wide range of duties and powers relevant to the promotion of equality and the elimination of discrimination on the grounds covered by the Equality Directives. Among other things, the EHRC may investigate suspected unlawful acts under the discrimination legislation; seek an injunction to prevent a person or corporate body from discriminating; intervene in legal proceedings under the discrimination legislation; and assist complainants in legal proceedings under the discrimination legislation.[113]

[174.] Importantly, the EHRC may also issue statutory Codes of Practice in the areas of equal pay, sex, race, religion or belief, sexual orientation, disability and age discrimination.[114] Failure to comply with a provision of a Code will not itself give rise to legal proceedings but will be admissible in such proceedings

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[111] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 74(1), and similar provision in the other anti-discrimination legislation

[112] UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 74(2), and similar provision in the other anti-discrimination legislation

[113] UK/Equality Act 2006 c.3 (16.02.2006)

[114] UK/Equality Act 2006 c.3 (16.02.2006) Section 14

and must be taken into account by a court or tribunal if the court or tribunal considers it relevant. Codes of Practice already exist in relation to sex, disability and race and are available on the EHRC's website,[115] along with a wide range of advice and guidance on individuals' rights under discrimination law, including information on the questionnaire and equal value procedures noted above.

[175.] However, as noted under 'The right of effective access to a dispute resolution body' at 2.2.1.2 above, there is very little guidance from organisations such as the EHRC or Government departments on non-employment discrimination and how to pursue such claims. Available guidance on enforcing rights under non-discrimination legislation is heavily weighted towards employment cases.

4. Recommendations

4.1. Free movement of persons

[176.] Despite the conclusion in the previous section, a number of criticisms of the present system may be made from the perspective of 'access to justice'. These are indicated here, together with possible solutions.

[177.] There is no simple remedy in cases of delay (see paras 32-36). This could be addressed by giving the Asylum and Immigration Tribunal powers of determination in cases of inaction. It could also be given a power to order compensation in such cases.

[178.] There is no right of appeal where an individual lacks proof of status at the relevant time (paras 38-39). Consideration could be given to permitting some applications in such cases, e.g. where a reasonable explanation can be given for the lack of evidence.

[179.] It may be difficult for applicants outside the UK to bring an appeal, unless the primary EEA national is in the UK (paras 40-50). Consideration should be given to either a relaxation of these rules, or the provision of appropriate information to such persons with appeal rights outside the UK.

[115] See http://www.equalityhumanrights.com (15.09.2009)

[180.] SIAC is open to criticism for the use of closed evidence, the possible limits to written determinations, and the fact that one of its members may lack independence (paras 51-55, 73 and 77). It is not clear what solutions may be offered here, short of the removal of this special procedure.

[181.] Legal aid is not available to all who may realistically benefit from it (para 70) . This could be addressed by a more generous system.

4.2. Non-discrimination

[182.] The examination of UK laws and rules governing access to justice in the area of non-discrimination, set out in Section 2 above, does not give rise to any serious concerns that access to justice is being unduly restricted. However, two areas suggest that further investigation and action might be appropriate – enforcement of tribunal awards and the length of equal pay claims.

[183.] The statistics on the number of tribunal awards that go unpaid is a cause for concern. However, the Government has since announced new measures to improve the enforcement regime.[116] Among other things, High Court Enforcement Officers will take on recovery of awards made by employment tribunals, a public information drive will try to make the enforcement process clearer for claimants and a new extended telephone enquiries line will provide more comprehensive information on how and where people can enforce their awards. These measures are to be welcomed. However, their effectiveness should be reviewed within a few years to see if they lead to any significant reduction in the percentage of tribunal awards that go unpaid.

[184.] One particular problem with regard to equal pay is the current need for claims to be lodged individually, resulting in extra administration for the Tribunals Service and, in general, extra delay in deciding claims. Some claims involve several thousand individual claimants, all bringing claims based on the same pay system but all of whom must present an individual claim form.[117] These problems have led to calls for the introduction of representative or

[116] UK/Ministry of Justice (2009) *Court enforcement officers to help employees collect unpaid awards from tribunals* available at: http://www.justice.gov.uk/news/newsrelease190509a.htm (15.09.2009)

[117] See, for example, *Hartley and ors v Northumbria Healthcare NHS Foundation Trust and ors UK/Employment Tribunal* No.2507033/07 (06.04.2009)

collective actions for equal pay claims,[118] by which trade unions or the Equality and Human Rights Commission could bring a single claim on behalf of a large group of employees. So far, the Government has dismissed these calls. In a recent report, the Government has expressly rejected the suggestion of introducing a 'generic' right to collective action, applying across all jurisdictions, but has left open the possibility of the right being introduced in specific sectors.[119] The Equality Bill,[120] which is currently going through Parliament and is due to come into force next year, will consolidate UK discrimination law into one Act of Parliament. This would seem an appropriate place to consider the possibility of collective and/or representative actions. The Act could include a power for the responsible minister to consult on the possibility of introducing collective actions and, if required, make an order to amend the law.

[185.] As to non-employment cases, the lack of user-friendly guidance on enforcing non-discrimination rights outside employment is a potential hindrance on access to justice. Commentators have noted the dearth of reported case law under the non-employment provisions of the SDA and the RRA. This has been ascribed to two factors: (1) lack of awareness of non-discrimination rights outside the employment fields; and (2) the cost of litigating in the 'ordinary' civil courts compared to the employment tribunal.[121] With this in mind, the possibility of bringing all discrimination cases in the employment tribunal, or a similarly convened specialist tribunal, should be investigated. Furthermore, government or, more properly, the EHRC should do more to publicise such rights and produce free information for those who feel their rights have been infringed.

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[118] EHRC (2009) *Commission calls for radical equal pay reform and a new approach to closing the pay gap*, available at: http://www.equalityhumanrights.com/media-centre/-commission-calls-for-radical-equal-pay-reform-and-a-new-approach-to-closing-the-pay-gap/ (15.09.2009)

[119] UK/Ministry of Justice available at: http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf (15.09.2009)

[120] Available at: http://services.parliament.uk/bills/2008-09/equality.html (15.09.2009)

[121] See, for example, C. Palmer, B. Cohen, T. Gill, K. Monaghan, G. Moon & M. Stacey (2006) *Discrimination Law Handbook* (London, Legal Action Group), Chapter 18

5. Miscellaneous

5.1. Free movement of persons

[186.] **Where problems have been identified in relation to access to justice in the areas of the *acquis* examined please indicate whether these extend to other areas of the national legal system**.

[187.] Delay appears to be a particular problem within the EEA part of the immigration system, rather than a general problem with immigration decision-making or with public administration.

[188.] The second and third points referred to in section 4 are specific to the immigration law system: the requirement of proof of status, and the provision for non-suspensive appeals.

[189.] SIAC The system of closed evidence and special advocates first developed in SIAC also applies in the High Court to challenges to anti-terrorist control orders (Prevention of Terrorism Act 2005). The concerns as regards access to justice raisedposed by the system obviously apply equally in that context.

[190.] The limits to legal aid referred to here are applicable morein general in the civil matters for which legal aid is available. The civil law fields which are excluded are listed in the Access to Justice Act 1999, Sch 2, para 1. They include: allegations of causing personal injury and death (except clinical negligence); allegations of negligently caused damage to property; conveyancing, boundary disputes, the making of wills, trust law, defamation and malicious falsehood, and company and partnership law.

[191.] **Report on any other legal issues related to access to justice, which you consider important and relevant and which do not fit under the other headings.**

[192.] There is a difficulty in the United Kingdom system with access to preliminary rulings to the ECJ at the AIT stage. Under para 2.2 of the AIT practice directions, a preliminary ruling request may only be made by the AIT President or Deputy President, or by a panel of which one or other is a member. This appears contrary to the EU law principle that all judicial bodies should have the discretion to make references to the ECJ.

5.2. Non-discrimination

[193.] The concern identified in Section 4 above relating to the enforcement of tribunal awards is not particular to the area of non-discrimination. The survey on which the findings are based covered a variety of jurisdiction in employment tribunals, not just discrimination cases. Furthermore, awards of compensation in employment tribunals are treated like county court judgments when it comes to enforcement. Therefore, the procedural rules that a vindicated but unpaid complainant must follow are the same whether the claim was brought to enforce non-discrimination rights or any other civil rights.[122]

[194.] Although not identified as a particular concern, it has been noted in Section 2 that publicly funded legal representation is not available in the employment tribunal or the small claims track of the county court. As explained above, this potential weakness in the enforcement regime for non-discrimination rights is balanced out by the less restrictive rules on rights of audience in the tribunals, so that representation may be given by an experienced but not legally qualified voluntary representative. Legal aid is also unavailable for determining many other civil rights, the majority of which are determined in courts with more restrictive rights of audience than in employment tribunals or the small claims track in the county court. This include matters such as personal injury; negligently caused damage to property; conveyancing; boundary disputes; making a will; trust law; defamation or malicious falsehood; company or partnership law; matters arising out of carrying on a business; or attending an interview or an asylum claim.[123] Thus, the unavailability of legal aid is not a problem peculiar to discrimination cases.

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[122] UK/HM Court Service (2006) *I have a judgment but the defendant hasn't paid – what can I do?,* available at: http://www.hmcourts-service.gov.uk/courtfinder/forms/ex321_0406.pdf (15.09.2009)

[123] UK/Legal Services Commission (2008) *A Step-by-Step Guide to Legal Aid*, available at: http://www.legalservices.gov.uk/docs/cls_main/LSCG2_Dec08.pdf (15.09.2009)

Annexes

Annex 1 – Typology to be applied to acquis cases at national level

ATJ Typology Indicators	Cases re. Discrimination Acquis	Cases re. Free Movement Acquis
A. The right of effective access to a dispute resolution body		
i. Is there a general right of access to a judicial body in order to resolve legal disputes relating to breach of a right derived from Community law?	Yes. All of the UK non-discrimination legislation provides that complaint may be made to an employment tribunal in employment matters. Non-employment cases can be taken to a county court. A complainant is permitted to represent him or herself in such proceedings.	The answer is broadly 'yes'. Where a negative decision has been taken, there is ordinarily a right of appeal to the Asylum and Immigration Tribunal. Cases of delay are more problematic.
ii. What restrictions exist regarding access and do these undermine the right of access?	The discrimination legislation requires most employment complaints to be brought within three months of the date of the act complained of, although a tribunal has discretion to extend time where it is just and equitable to do so. Complaints of sex discrimination in contractual terms (equal pay claims) must be usually brought within six months of the end of the employment to which the complaint relates – there is no discretion to extend this time limit. Obligatory pre-litigation dispute resolution procedures have recently been abolished; however, complainants are encouraged to seek to resolve disputes with their employer first before instituting tribunal proceedings. Taken as a whole, it cannot be said that these rules undermine the right of access. Non-employment complaints must be brought within six months. Complainants must make some effort at resolving the dispute – for example, by setting out the complaint in writing to the respondent – before commencing proceedings.	(1) There is no right of appeal where the individual's status can be proven; (2) there are a number of exceptions to the right of bring an appeal while in the United Kingdom; (3) public interest cases may be transferred to the Special Immigration Appeals Commission. Each of these may entail a denial of access to justice.
iii. Is it possible to waive the right of access to a judicial body	Complainants may only 'contract out' of discrimination rights in limited	The question of waiver does not generally

and does sufficient protection exist to prevent an individual undermining their right to redress?	circumstances, namely where a discrimination complaint is settled with the assistance of an independent legal adviser or a Government-funded conciliation officer.	arise.
iv. Is there a possibility of access to non-judicial procedures in order to obtain redress? Is the procedure in front of non-judicial bodies exclusive or complementary to other legal remedies ?	No. Individual non-discrimination rights may only be enforced by way of a complaint to the employment tribunal or the county court. Although the Equality and Human Rights Commission has power to investigate suspected acts of unlawful discrimination it is not competent to resolve complaints between private individuals.	There are no non-judicial alternatives to the applications to the AIT or SIAC.
B. The right to fair proceedings		
i. To what extent is the aggrieved individual able to meaningfully participate in legal proceedings?	An aggrieved individual is entitled to represent him or herself in employment tribunal or county court proceedings. Employment tribunals encourage litigants in person through the Tribunal Rules' emphasis on informality and the requirement on employment judges to deal with cases justly. The 'small claims' procedure in the county court can similarly provide a less formal forum for hearing non-employment discrimination claims, although only those with a value up to £5,000,	An applicant who is in the United Kingdom is generally permitted to attend the hearing, and to give oral evidence at it.
ii. Do proceedings conform to the principle of the equality of arms?	Opposing parties have equal rights to present their case and challenge that of the other side. Employment tribunal judges are entitled to intervene in the proceedings to ask questions and elicit information to assist in the clarification of relevant issues and promote the just handling of the case.	Yes.
iii. Are proceedings adversarial in nature?	Yes – although not expressly set out in the rules of procedure, this is the practice in employment tribunals. Proceedings in the county court are by tradition adversarial.	Yes.
iv. What safeguards exist in order to ensure the reliability of evidence?	Rules of evidence in the employment tribunal are less restrictive than in other civil proceedings – hearsay, for example, is more readily admitted. However, both sides may cross-examine witnesses and employment judges can refuse to admit evidence that appears irrelevant or unlikely to be probative of the issues. In small claims (i.e. less than £5,000) in the	There are guarantees concerning both witnesses and documents.

	county court, the rules of evidence are similarly relaxed.	
v. Is legal representation available to individuals who have insufficient funds or, in the alternative, is legal aid available? Where this is available what criteria (financial or otherwise) must be met in order to qualify?	Legal aid is not available for representation in the employment tribunals. However, the less restrictive rules on rights of audience mean those complainants are more likely to find a free, legally educated (but not qualified) representative, which would not be permitted in ordinary civil proceedings. Legal aid for representation is available in limited circumstances in the county court, but not in small claims. Where it is available, entitlement to legal aid is based on means testing, which takes account of dispoable income and capital.	Legal aid is available, but is subject to restrictions as to financial eligibility, a merits test, and a cost-benefit test.
vi. Will the parties receive a reasoned judgement?	The employment tribunal rules of procedure state that parties are entitled to receive written reasons. The same rule applies to small claims hearings in the county court.	Yes, in the case of the AIT; with possible restrictions in the case of SIAC.
vii. Can the judicial body in question be considered impartial?	Employment judges are appointed by an independent appointments body made up of a mixture of judges, practising lawyers, legal experts and lay persons. The requirement for judges in employment tribunals and in ordinary civil courts to be free both of bias and of the appearance of bias is well recognised by case law.	Yes, in the case of the AIT; with qualification in the case of SIAC.
viii. Where non-judicial procedures are available apply points Bi.-vi.	Not applicable	Not applicable.
C. The Right to timely resolution of disputes		
i. Once commenced, how long do judicial proceedings take to conclude? Please distinguish between the different stages of the process: the time taken from the institution of proceedings by the individual until a decision is reached; the time taken by appeals or review by a higher tribunal (where applicable); the time taken to assess compensation or other reparation (where this is	Case examined took between five months and 75 months to complete. In general, all claims that did not involve an appeal were completed in no more than 20 months. Cases that involved at least one level of appeal took a minimum of 11 months to complete, although most took around two years or more. Where an appeal was involved, the delay at the first level of appeal was up to two years, plus up to another year for the second level of appeal. No information was available for county	For the cases reviewed, an indicative estimate is: Administrative decision - AIT determination: 114 days AIT determination – Reconsideration order: 17.5 days Reconsideration order – Reconsideration determination: 206 days

separate from the main proceedings); the time taken to execute the decision (where this information is available).	court cases.	Reconsideration determination – Court of Appeal judgment: 286.5 days
ii. Taken as a whole, do you consider that, in general, procedures are is concluded within a reasonable time?	Broadly speaking there did not appear to be excessive delays. The majority of cases examined concluded within two to two-and-a-half years which would seem reasonable according to the information provided in the memorandum to the Guidelines. No information was available for county court cases.	Yes.
iii. Does provision exist for speedy resolution of particular cases, e.g. on grounds of urgency or sensitivity? In practice do such 'expedited' procedures reduce the length of the legal process appropriately?	No.	Yes, in the case of persons subject to imminent removal.
iv. Where non-judicial procedures exist, apply points Ci-iii.	Not applicable	Not applicable
D. Right to adequate redress		
i. Is compensation available to a vindicated party? Are any other forms of 'satisfaction' available?	Compensation is available to a successful complainant in a discrimination case. Damages can include awards for injury to feelings, aggravated damages, psychiatric injury and loss of earnings. An employment tribunal may also make a recommendation that the offending party take action aimed at alleviating the effect of the discrimination complained of. A county court may make an injunction preventing a discriminatory act. Successful equal pay complainants are entitled to arrears of pay and to have their contracts of employment modified to remove the discriminatory effect.	It is theoretically possible to claim compensation for loss suffered (i) because of an incorrect adverse decision, or (ii) pending a delayed decision. No cases are known of.
ii. Is compensation adequate? In particular is the level of compensation set in consideration of the damage caused to the individual, and/or can compensation be set with a	There is no evidence to suggest that compensation is inadequate. Compensation is awarded on a restitutionary basis so that employment tribunals must aim to provide an adequate remedy for damage, in so far as money can do that. However, tribunals may only award exemplary or punitive damages if the compensation that would otherwise	Unable to answer.

deterrent or punitive effect?	be awarded would be inadequate to punish the guilty party.	
iii. What rules exist relating to the payment of legal costs?	Costs are only awarded in the employment tribunal in limited circumstances, such as where a party has behaved unreasonably in bringing or conducting the proceedings. There is no presumption that the losing party will pay the victor's costs. There is a presumption in normal county court proceedings that the loser pays the successful party's costs. However, this rule does not apply to small claims (those valued at £5,000 or less).	There is no provision for costs awards within the AIT
iv. Are interim/emergency measures available?	No.	Not generally available.
v. Is there any evidence to suggest that final judgements remain unexecuted?	The Ministry of Justice has produced statistics suggesting that tribunal awards regularly go unpaid. Amendments to national law have recently been made to make enforcement procedures simpler but these are unlikely to have a significant impact.	No.
vi. Is there any evidence that the principle of the finality of legal proceedings (res judicata) is not respected?	No.	No.
vii. Is there a right of appeal? If so, on what basis may an appeal be made, what are the powers of the appellate body, and through how many instances may appeals be heard?	Appeals from an employment tribunal on errors of law only may be made to the Employment Appeal Tribunal. There are two further levels of appeal – to the Court of Appeal and then to the Supreme Court (formerly the House of Lords) – at which point domestic remedies are exhausted. Appeals from the county court go to the Court of Appeal and from there to the Supreme Court.	Possibility to apply for reconsideration to the AIT itself and, if unsuccessful, to the High Court.
viii. Where non-judicial procedures are available apply points D.i-vii. What is the relationship between the non-judicial procedure and the available judicial procedures?	Not applicable.	There is no non-judicial means of obtaining compensation.

E. The right to an equivalent and effective remedy: *In assessing access to justice in areas of the* acquis *has any evidence been found to suggest that procedures enabling redress for rights derived from Community law fail to comply with the principles of equivalence or effectiveness?*	With regard to non-discrimination law generally there is no evidence suggesting that procedures for redress do not comply with the principles of effectiveness or equivalence. Compensation is available on the same basis as in the ordinary civil courts while rules on representation, evidence and costs are all more favourable. These factors arguably balance the more restrictive time limit that applies to discrimination claims. With regard to equal pay claims, a ruling of the Employment Appeal Tribunal held that the limit of two years on the amount of arrears that could be claimed breached the principle of equivalence. This breach has since been remedied by national law.	The UK system appears adequate in this regard.

Annex 2

Please use this table to:

- Detail up to five landmark cases relating to access to justice at the national level.
- Detail up to five landmark cases relating to your Member State emanating from the European Court of Human Rights relating to access to justice. Where a violation was found please note the response of the national authorities in remedying the particular case as well as broader systematic changes.

National cases

Case title	Preston and ors v Wolverhampton Healthcare NHS Trust and ors (No.2)	Kwamin v Abbey National plc and other cases	Oyarce v Cheshire County Council	Vento v Chief Constable of West Yorkshire Police	McCarthy v Secretary of State for the Home Department
Decision date	08.02.2001	02.03.2004	02.05.2008	20.12.2002	Administrative decision: 06.12.2004 Initial AIT determination: 17.10.2006 Reconsideration refused by AIT member, but ordered by High Court (Black J): dates unknown AIT determination on reconsideration:

					16.08.2007 Court of Appeal decision: 11.06.2008 Leave to appeal granted by House of Lords: 13.11.2008 House of Lords order of a preliminary ruling request to the ECJ: 05.05.2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	2001 UKHL 5 – House of Lords	0564/03, 0710-0711/03 & 0860/03 – Employment Appeal Tribunal	A2/2007/1532 – Court of Appeal	A1/2001/2866 – Court of Appeal	The only references available are: AIT reconsideration - IM 15510/2006 Court of Appeal – [2008] EWCA Civ. 641
Key facts of the case	The House of Lords had to decide, following the ECJ's judgment in the same case, whether	The EAT considered four separate complaints that a tribunal's delay in	The Equality Directives require that claims brought under national discrimination law be subject	The claimant was the victim of bullying, undue scrutiny, uncalled-for criticism and	The case concerns a dual Irish/ British national woman (McCarthy), married to a Jamaican

	the mechanism for enforcing the right of equal access to pension schemes under the Equal Pay Act 1970 (implementing the Equal Pay Directive (No. 75/117/EEC and Article 141 (formerly Article 119) EC Treaty) complied with the principle of equivalence. Their Lordships compared the enforcement of such a claim in an employment tribunal with an action for breach of contract in the civil courts.	handing down its decision after a hearing had rendered the decision unsafe. The EAT had to consider the extent to which (if at all) delays of up to 14 months between the last day of hearing and the judgment being sent out constituted grounds for appeal.	to a 'reverse' burden of proof, by which a court or tribunal is entitled to draw an inference of discrimination from prima facie evidence put forward by the claimant and look to the respondent for an adequate explanation. The Court of Appeal had to consider whether this mechanism applies in respect of victimisation claims brought under the Race Relations Act 1976.	sexual harassment. She brought a number of claims before the tribunal, including that her dismissal amounted to unlawful sex discrimination. She succeeded and was awarded £165,829 for future loss of earnings, £50,000 for injury to feelings, £15,000 for aggravated damages and £9,000 for personal injury. The employer appealed against this assessment, in particular the total award of £65,000 for injury to feelings and aggravated damages.	national man. She was born in the United Kingdom, and has lived there all her life. They wish to use EU law to ensure his right of admission to the United Kingdom. She is not economically active, and not self-sufficient, as she is dependent on public funds. Instead, she wishes to establish that she has the status of permanent resident, through five years' residence in the United Kingdom.
Main reasoning/argumentation (max. 500 chars)	A contract claimant has six years from the date the cause of action accrues to lodge the claim and can seek a remedy going back six years. While a pensions access claim must be brought within six months of the end of employment,	In the High Court and county courts, judgments are expected to be delivered within three months. The Charter Statement issued by the Employment Tribunals Service sets out a target	On a literal reading of the RRA, and contrary to the situation that prevails under all other discrimination legislation, the 'reverse' burden of proof provisions do not apply where the complaint is one of	The employer argued that the awards for non-economic loss were too high and did not reflect the loss suffered. The Court took into account, in particular, that awards for injury to feelings are designed to compensate	On the first question, the Court of Appeal concluded that a dual national who had never resided in the country of nationality could not rely upon EU law. This interpretation appears inconsistent with clear statements in

	the remedy can reach back to the later of the start of employment or 1976; the claimant loses nothing by waiting until employment ends in order to avoid friction with the employer; and the claimant benefits from greater informality and lower costs in the employment tribunal.	of four weeks in 85 per cent of cases. The EAT proceeded on the basis that a similar regime to that adopted in the High Court is expected in the EAT and the employment tribunals, but extra allowance is made to take account of the involvement of lay members.	victimisation. The Race Directive, which the RRA implements, deals with the burden of proof and victimisation in a section of the Directive entitled 'Remedies and Enforcement', suggesting that both are tools for enforcing the prohibition on discrimination but that the 'reverse' burden of proof need not necessarily apply to a complaint of victimisation.	the injured party fully but not to punish the guilty party; that awards should not be so low as to diminish respect for the policy of the anti-discrimination legislation, nor so high that they might be regarded as untaxed riches; and that awards should bear some broad general similarity to the range of awards in personal injury cases.	the ECJ decision of *Garcia Avello* (Case C-148/02, judgment of 2 October 2003). On the second issue, the UK's position is that residence in accordance with EU law is required: see Article 15 of the EEA Regulations. The alternative view is that any lawful residence is sufficient, as there is no other requirement in Article 16 of Directive 2004/ 38. The UK government view was approved by both the AIT and Court of Appeal.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The House of Lords sets out some of the factors that can be taken into account in determining whether the principle of equivalence is satisfied by a particular enforcement procedure. Their Lordships apply the ECJ's	The EAT considered the whole issue of delay: what constitutes delay in handing down a decision; the problems that delay may cause; and the law to be applied where delay	The Court rejected the argument that 'equivalence' required the same level of victimisation protection under the RRA as under the other discrimination legislation (e.g. the Sex Discrimination Act 1975).	The Court of Appeal gave guidance on appropriate injury to feelings compensation. A top band of £15,000-25,000 applies only to the most serious cases, such as where there has been a lengthy	The two central questions in the case are set out in the House of Lords preliminary ruling request, ordered on 5.05.2009: 1 'Is a person of dual Irish and United

	ruling in Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) that the court must take into account the role played by the procedure, its operation and any special features. Their Lordships' factors include time limits, the relative formality of proceedings and the costs involved.	occurs. It noted that the danger of delay is that is that the judge or tribunal chairman, in coming to write the decision, will not be able to take proper advantage of the fact that he or she has seen and heard the witnesses, and has formed impressions of them.	Given that such legislation also gives effect to EC rights the requisite comparison with an action of domestic law was missing. As to effectiveness, the absence of more favourable burden of proof provisions could not be said to render access to rights impossible or excessively difficult.	campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000. A middle band of £5,000-15,000 should be used for serious cases which do not merit an award in the highest band and awards of between £500-5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.	Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/3?' 2. 'Has such a person 'resided legally' within the host Member State for the purpose of Article 16 of the Directive in circumstances where she was unable to satisfy the requirements of Article 7 of Directive 2004/38EC?'
Results and key consequences or implications of the case (max. 500 chars)	Overall, the enforcement mechanism set down by the Equal Pay Act 1970 was no less favourable and so did not breach the principle of equivalence. This put to rest the argument that the Equal Pay Act 1970 might breach EC law.	Anything over three and a half months in the EAT would be considered 'culpable delay absent proper explanation' and all but the most complex and lengthy tribunal judgments ought to be sent out within three months or	The 'reversal of the burden of proof provided for by S.54A of the RRA does not apply to where the claim is one of victimisation. On a proper construction, S.54A applies only to claims of direct and indirect race discrimination or racial harassment. The result is that there is an	The instant case was held to fall within the top band and the claimant was awarded £18,000 for injury to feelings, £5,000 for aggravated damages and £9,000 for personal injury. The Court's three bands of injury to feelings compensation	The first question: if the Court of Appeal's view were approved, it would limit the possibility for dual nationals to rely upon EU law. This is a particular issue in the UK, because many UK born persons are Irish nationals (by descent, or through birth in Northern

		less. However, excessive delay won't automatically lead to a finding that a decision is unsafe. The complaining party must show a significant material error or omission, or a series of errors or omissions, which show a real risk that there has been a failure of recollection, and that delay was the likely cause of that failure.	inconsistency in UK discrimination legislation, where the more favourable burden of proof rules apply to every kind of discrimination complaint except race victimisation.	still bind employment tribunals. There is thus a cap of £25,000 on such awards, which are the most common form of award in discrimination cases. Tribunals are also obliged to heed the Court's direction that awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.	Ireland). The second question: this is of importance where individuals have five years' lawful residence, but not five years as a qualifying EU citizen. This will occur in particular where they have not been self-sufficient throughout the period, they are nationals of a new member state, or they have recently acquired an EU nationality.

European Court of Human Rights

Case title	Golder v United Kingdom	Ashingdane v United Kingdom	Fayed v United Kingdom	Al-Adsani v United Kingdom	Steel and Morris v United Kingdom

Decision date	21 February 1975	28 May 1985	21 September 1994	21 November 2001	15 February 2005
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Series A, No. 18; European Court of Human Rights; (1979-80) 1 EHRR 524	Series A, No. 93 European Court of Human Rights; (1985) 7 EHRR 528	Series A, No. 294-B European Court of Human Rights; (1994) 18 EHRR 393	Application No. 35763/97 European Court of Human Rights; (2002) 34 EHRR 11	Application No. 68416/01 European Court of Human Rights; (2005) 41 EHRR 22
Key facts of the case	There was a disturbance at the prison where the applicant was imprisoned. The applicant was mistakenly identified by a prison office as having participated in the incident and was placed in segregation with notice of disciplinary proceedings to be brought against him. The allegation was later dropped, and the charged were not proceeded with but the entry remained on his prison record. The applicant sought but was refused access to a solicitor to bring libel proceedings against the prison officer involved.	The applicant had been committed to a mental hospital after conviction for a number of offences. He was placed in a secure special hospital, and after an improvement in his condition, the Home Secretary authorised his return to his local psychiatric hospital. However, the health authority of the hospital refused to accept the applicant and the Secretary of State declined to order the transfer to proceed. The applicant remained in the secure	The three applicants were businessmen who acquired ownership of a company Fraser, after taking steps to promote their reputations in the press. The takeover was opposed by Lonrho PLC who pursued a media campaign against the applicants. The Government then appointed two inspectors to investigate the circumstances surrounding the acquisition. The Government published a report concluding that the applicants had misrepresented their origins, their wealth, their business interests, their resources, and used false documents. The applicants brought a tort	The applicant obtained video evidence of a member of the royal family in Kuwait engaging in sexual activities. The videos were leaked, and the applicant alleged he was abducted and tortured by the agents of the state. When he returned to England, he initiated civil proceedings, inter alia, against the state of Kuwait in respect of injury to his physical and mental health caused by the torture, but was prevented from pursuing his claim due to domestic legislation conferring state immunity..	The applicants were associated with London Greenpeace. They produced and distributed a leaflet called 'What's wrong with McDonald's?' McDonalds issued a writ against them for libel and the applicants contested the claim. They were refused legal aid, which was not available for defamation proceedings, and for the bulk of proceedings represented themselves. Damages were awarded against them, and, although these were reduced on appeal, they remained substantial when compared to

		hospital and started unsuccessful legal proceedings to challenge the legality of his continued detention there.	claim for defamation, but were successfully met by a defence of immunity that was available to the authors of the report.		their incomes and resources.
Main reasoning/argumentation (max. 500 chars)	The Convention's preamble included the 'rule of law' and in civil matters, the rule of law was not conceivable without the possibility of access to the courts. By forbidding Golder to make contact with a solicitor, the Home Secretary prevented him from commencing a legal proceeding at that time, in beach of the implied right of access to a court. In Article 6(1).	The legislative restrictions on recourse to the courts by mental patients in England, by which they could not succeed in the absence of bad faith or reasonable care, were intended to reduce the risk of unfair harassment of those responsible for their case. This was a legitimate aim and gave rise to a justifiable limitation upon the right of access to a court, which could have limitations that did not take away the essence of the right. The limitations in this case were	The Court drew a distinction between the situation where an applicant has no arguable claim under national law, in which case the right of access in Article 6 (1) does not apply, and the situation where there is such a claim but it is met by a procedural defence that defeats it. In the latter case, as was the situation on the facts of the present case, the defence is a permissible limitation on the right of access provided that it has a legitimate aim, and is not disproportionate.	The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right. The Court was satisfied that there existed a serious and genuine dispute over civil rights. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote good relations between States through the respect of another State's sovereignty.	It was central to the concept of a fair trial that a litigant should not be denied the opportunity to present his or her case effectively and should enjoy equality of arms with the opposing side. The institution of a legal aid scheme was one way of guaranteeing those rights. The applicants had not chosen to commence the action but had resisted the claim in order to protect their right to freedom of expression. The disparity between the levels of legal assistance enjoyed by the applicants and McDonald's had been so great that it

		acceptable on this basis..			must have given rise to unfairness. In these circumstances, the lack of availability of legal aid for indigent litigants was a violation of the right to effective access to a court.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Hindrance is capable of contravening the Convention just like a legal impediment. Article 6 (1) does not state a right to access to the courts or tribunals in express terms but embodies the 'right to a court'.	The right to access to a court is not absolute and may be subject to limitations at the discretion of the national authority provided these are not such as to impair the essence of the right, that they are for a legitimate aim and are reasonably proportionate to that aim.	The right of access may be limited, provided that these limitations are for a legitimate purpose , in this case to investigate fraud, and are not disproportionate, taking away the essence of the civil right in issue (in this case the right to a reputation). .	Article 6 cannot be interpreted in a vacuum, but in the light of public international law. .In particular ,recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court in civil cases as embodied in Article 6(1).	Whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the facts and circumstances of each case and would depend, *inter alia* , on the importance of what was at stake for the applicant, the complexity of the law and procedure, and the ability of the applicant to represent him or herself effectively. The State did not have to use public funds in order to ensure total equality of arms, as long as each side was afforded a

					reasonable opportunity to present its case under conditions which did not place it at a substantial disadvantage *vis-à-vis* the adversary.
Results and key consequences or implications of the case (max. 500 chars)	Refusing access to a solicitor was in breach of Article 6(1). The United Kingdom amended its prison rules on correspondence to take account of the judgment..	There was no violation of the right of access to a court in Article 6(1).	There was no violation of the right of access to a court in Article 6 (1).	No violation of Article 6(1) because upholding the public international law on state immunity in civil cases had a legitimate aim and was not disproportionate.	The denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively and contributed to an unacceptable inequality of arms with McDonald's. Accordingly, there had been a violation of Article. 6(1).

Annex 3 – Discrimination cases

Case name and reference[124]	**Claim**[125]	**Hearing length**[126]	**First instance judgment**[127]	**Remedy delay**[128]	**Remedy**	**Appeals**[129]	**Total length**
Carter v Penyards Country Properties Ltd – 3101889/07	Sex	3 days	11 months	7 months	£12,000 injury to feelings £5,000 aggravated damages £11,964 loss of earnings		18 months

[124] Unless otherwise noted, all case references are the original reference numbers in the employment tribunal

[125] The complaint for which a remedy is sought. Sex = sex discrimination; Rce = race discrimination; Dby = disability discrimination; Rbf = religion or belief discrimination; Sor = sexual orientation discrimination; Age = age discrimination; Epa = equal pay

[126] The number of days over which the hearing took place at first instance, including pre-hearing reviews

[127] The length of the period between the date the claim is presented to the tribunal and the date the claimant receives a final determination of liability

[128] The period between the date of first instance judgment and the date on which remedy is decided. If no figure is given then the remedy has been decided on (or at most within a week of) the date of the determination of liability

[129] Instances of appeal, if any. The length of time given for each stage is the delay between judgment in that appeal and judgment at the previous stage

1.1.1.2.

Reaney v Hereford Diocesan Board of Finance – 1602844/06	Sor	4 days	9 months	7 months	£13,000 injury to feelings £34,345 loss of earnings		16 months
Mamedu v Hatten Wyatt – 1103228/06	Rce	2 days	7 months	6 months	£6,000 injury to feelings £2,360 loss of earnings		13 months
Carey v IVP Ltd – 2301411/07	Sor	5 days	6 months		£10,000 injury to feelings £11,899 loss of earnings		6 months
Heinrich v Royal College of General Practitioners – 2201464/06	Epa	4 days	5 months		£4,450 loss of earnings		5 months
Clarke v Triton plc – 1306157/04	Epa	6 days	17 months	*Settled between*	*the parties*		17 months
Francis v London Underground Ltd – 3201872/04	Epa	3 days	18 months	2 months	£31,302 loss of earnings Salary increase ordered		20 months
Medley v ISS Facility Services Ltd – 2304226/04	Epa	3 days	12 months		£635 loss of earnings		12 months
Bodnar v Sodexo Ltd – 2801615/08	Sex	1 day	5 months		£1,500 injury to feelings		5 months

					£2,500 loss of earnings		
Theodossiou v Haringey Teaching PCT – 3201980/06	Dby	9 days	10 months	6 months	£3,500 injury to feelings		16 months
Gardner v BBT Thermotechnology UK Ltd – 1307647/07	Sex	7 days	12 months	1 month	£2,000 injury to feelings		13 months
Odimba v Cambridge Education Associates – 2200385/06	Rce	5 days	11 months	1 month	£3,500 injury to feelings		12 months
Carlucci v Oracle Coroporation UK Ltd – 2700870/03	Sex	3 days	12 months	8 months	£15,000 injury to feelings £5,000 aggravated damages £70,000 loss of earnings		20 months
Hampton v Lord Chancellor's Department – 2300835/07	Age	3 days	10 months	3 months	£16,000 loss of earnings		13 months
McIntosh v ESL Reading Ltd t/a ACS – 2700388/08	Age	1 day	8 months		£3,000 injury to feelings		8 months
Estorninho v Zorhan Jokic – 2301487/06	Rbf	2 days	4 months	2 months	£4,000 injury to feelings £770 loss of earnings		6 months

Edge v Visual Security Services – 1301635/06	Rbf	2 days	8 months		£1,000 injury to feelings		8 months
Begum v All Saints Haque Centre – 1302807/07	Rbf	9 days	10 months	4 months	£7,500 injury to feelings £2,500 aggravated damages £565 loss of earnings		14 months
Choudry v Meridian Personnel Ltd – 2401071/07	Rbf	2 days	14 months	*Settled between*	*the parties*		14 months
Symes v Eaton-Williams Group Ltd – 1100481/06	Dby	3 days	10 months	5 months	£20,000 injury to feelings		15 months
Wynn v Mulitpulse Electronics Ltd – 2301416/07	Dby	2 days	6 months		£7,500 injury to feelings £5,600 loss of earnings		6 months
Khawaja v Instant Muscle Ltd – EAT 0216/03	Dby	Not available	12 months		£6,000 injury to feelings	EAT – 12 months – remedy appeal succeeds, compensation reduced to £2,500	24 months
Singh v London Borough of	Rce	Not	31 months		£15,000 injury to feelings	EAT – 5 months – appeal	36 months

Camden and ors – EAT 0294/03		available			£5,000 aggravated damages £10,000 costs	dismissed	
Rihal v London Borough of Ealing – Court of Appeal A1/2003/2111 EATRF	Rce	6 days	9 months	1 month	£44,777	EAT – 26 months – appeal dismissed; Court of Appeal – 8 months – appeal dismissed	43 months
Emokpae v Chamberlin Solicitors and anor – 2201895/03	Sex	3 days	8 months	1 month	£4,500 injury to feelings.	EAT – 8 months – appeal dismissed	16 months
Greaves v Banner Business Supplies Ltd – 2401357/03	Sex	Not available	15 months		£1,500 injury to feelings	EAT – 8 months – appeal allowed, claim remitted – settled between parties	23 months
Adebayo v Dresdner Kleinwort Wasserstein – 2204280/03	Rce	5 days	9 months	*Settled between*	*the parties*	EAT – 10 months – appeal dismissed; Court of Appeal – 4 months – permission to	23 months

						appeal refused	
Silveira v Brocklebank and ors – 2601511/04	Sex	3 days	13 months		£1,066 injury to feelings	EAT – 6 months – appeal dismissed	19 months
Booth v Network Rail Infrastructure Ltd – 1801322/05	Sex	4 days	8 months	3 months	£217,960	EAT – 9 months –issue of remedy remitted	17 months
Nyateka v Queenscourt Ltd – 2800846/05	Rce	3 days	12 months	2 months	£1,500 injury to feelings £1,092 loss of earnings	EAT – 6 months – appeal dismissed – injury to feelings remedy reduced to £1,250	18 months
Loxley v BAE Systems – 1601458/07	Age	2 days	10 months (claim rejected)	*Settled between*	*the parties*	EAT – 6 months – appeal allowed	16 months
English v Thomas Sanderson Blinds – 3102989/05	Sor	3 days	22 months (claim rejected)	*Settled between*	*the parties*	EAT – 5 months – appeal dismissed; Court of Appeal – 8 months – appeal allowed	35 months

Dhaliwal v Richmond Pharmacology – 2312779/08	Rce	2 days	5 months		£1,000 injury to feelings	EAT – 6 months – appeal dismissed	11 months
Ahmed v Amnesty International – 2203206/07	Rce	6 days	10 months	2 months	£3,500 injury to feelings £9,500 loss of earnings	EAT – 10 months – appeal dismissed	20 months
Dolphin and ors v Hartlepool Borough Council – 2506112/03	Epa	8 days	29 months	*Settled between*	*the parties*	Employment tribunal review – 14 months – rejected; EAT – 10 months – appeal dismissed	53 months
Derbyshire and ors v St Helens Metropolitan Borough Council – 2100634/01	Epa	Not available	6 months (claim dismissed)			EAT – 16 months – appeal upheld; employment tribunal remission – 10 months – claim upheld; EAT – 10 months – appeal allowed; Court of Appeal – 12 months – appeal allowed; House of Lords – 21 months –	75 months

						appeal allowed	

Annex 4 – Compensation in employment discrimination cases in 2007-2008

Discrimination	**Median**	**Average**	**Maximum**
Race	£8,120	£14,566	£68,991
Sex	£5,200	£11,263	£131,466
Disability	£8,363	£19,523	£227,208
Religion or Belief	-	£3,203	£5,750
Sexual Orientation	£2,103	£7,579	£22,850
Age	£1,526	£3,334	£12,124

Source: UK/Tribunals Service (2008) Employment Tribunal and EAT Statistics (GB) 1 April 2007 to 31 March 2008 available at http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal_and_EAT_Statistics_v9.pdf