HAINSWORTH v MINISTRY OF DEFENCE **UKSC 2014/0164**

LORD WILSON (on behalf of the panel):

1. On 18 December 2014 the panel which was assigned to consider Dr Hainsworth's applications directed that there be an oral hearing of them, but limited to the issue of whether a reference should be made to the CJEU for a preliminary ruling under Article 267 of the TFEU.
2. On 14 July 2015 the hearing took place before an enlarged panel of five Justices, namely Lady Hale, Lord Clarke, Lord Wilson, Lord Hughes and Lord Hodge.
3. Had it decided to make a reference to the CJEU, the panel would probably have deferred determination of the application for permission to appeal.
4. In the event, however, the panel has decided not to make a reference and to refuse the application for permission to appeal.
5. The reasons for its decisions, put briefly, are as follows.
6. The applicant correctly submits that the CJEU is adopting an expansionist approach to the rights of disabled persons, and therefore indirectly of their families, and that its ruling in *Coleman* was a landmark down that path.
7. The ruling in *Coleman* was that, if an employer's less favourable treatment of an able-bodied employee was referable to the latter's care of a disabled child, it would directly discriminate against the employee on the ground of disability contrary to Article 2.2(a) of the Employment Directive (2000/78/EC). The Grand Chamber thereby gave birth to the notion of *direct associative* discrimination.

8. On 16 July 2015 in *CHEZ RB* the Grand Chamber, by reference to *Coleman*, developed the notion of *associative* discrimination, albeit in the context of the Race Directive (2000/43/EC). Its ruling was that, if an electricity supply company's decision to erect meters out of the normal reach of its consumers in a certain area was referable to the Roma ethnicity of most of the inhabitants of that area, it would directly discriminate against a non-Roma inhabitant of that area on the ground of ethnicity contrary to Article 2.2(a) of the Race Directive. Analogously to *Coleman*, that would be *direct associative* discrimination. The Grand Chamber proceeded, however, to make a further ruling on the hypothesis that the company had not been guilty of direct discrimination. Its further ruling was that, if the *effect* of its practice of erecting meters out of normal reach in certain areas was unjustifiably to put persons of Roma ethnicity at a particular disadvantage compared with others, the company would indirectly discriminate against a non-Roma inhabitant of that area on the ground of ethnicity contrary to Article 2.2(b) of the Race Directive. That, then, would be *indirect associative* discrimination.

9. The purpose of a reference to the CJEU in the present case would be to obtain a ruling whether the notion of *associative* discrimination extends to Article 5 of the Employment Directive. Does the employer's obligation to provide reasonable accommodation in relation to disabled persons extend beyond disabled employees to able-bodied employees associated with, and in particular caring for, disabled persons?

10. It is clear that the transposition of Article 5 into domestic law does not extend the duty beyond disabled employees: see sections 20 and 39(5) of, and para 5(1) of schedule 8 to, the Equality Act 2010. But has the transposition been too narrow?
11. Although, as in section 21(2) of the 2010 Act, a breach of it is regarded as a species of discrimination, the duty under Article 5 is fundamentally different from the duty not to discriminate directly or indirectly under Article 2. It is a positive duty cast on employers, namely to take certain steps to meet the needs of disabled persons, as opposed to a negative duty, namely not to treat persons unfavourably on any of the four prohibited grounds nor unjustifiably to adopt a practice disadvantageous to persons with any of those four characteristics. Article 5 is rightly to be regarded as a "concrete" and as a stand-alone provision.
12. The applicant stresses that the declared object of Article 5 is to secure equal treatment "in relation to persons with disabilities" rather than "for disabled employees". But the second sentence of the article, which is said to explain what the obligation "means", requires employers to take appropriate measures, where needed, to enable disabled persons to have access to, participate in or advance in, employment. This can sensibly refer only to disabled employees, whether prospective or actual.
13. That the obligation in Article 5 does not extend beyond disabled employees is confirmed by Recital 16 to the Directive, which refers to the accommodation of the needs of disabled people at the workplace, and by Recitals 17, 20 and 27.
14. Had there been no guidance from the CJEU upon the construction of Article 5, the panel would have declined to make a reference to it on the basis that its

limitation to disabled employees was "so obvious as to leave no scope for any reasonable doubt" within the meaning of para 16 of the ECJ's judgment in *C.I.L.F.I.T.* In other words the matter would have been *acte clair.*

15. In fact, however, the CJEU has already addressed the construction of Article 5, with the result that, irrespective of the nature of the case in which it did so and notwithstanding that the question there in issue was not identical, there is no obligation to refer the issue of its construction to the CJEU, as explained in para 14 of the ECJ's judgment in *C.I.L.F.I.T.* In other words the matter is *acte éclairé*.

16. The case in which the CJEU did so is the landmark case of *Coleman* itself. The Grand Chamber accepted at para 39 that the wording of Article 5 made it apparent that it was limited to disabled employees; and at para 42 that it was so limited because its provisions either required positive discrimination or would otherwise be rendered meaningless or disproportionate and because they were specifically designed to promote the integration of disabled people into the working environment. Nevertheless, as is already apparent, the ruling of the Grand Chamber was that the limited reach of Article 5 should not inhibit an expansionist, and in particular an associative, construction of Article 2.2(a).

17. The EHRC makes energetic submissions to the panel that the observations upon Article 5 made by the Grand Chamber in *Coleman* in 2008 may now need to be reconsidered in the light both of the attribution in 2009 of treaty status to the Charter of Fundamental Rights of the E.U. and of the E.U.'s ratification in 2010 of the U.N. Convention on the Rights of Persons with Disabilities. It relies in particular on Article 26 of the Charter and on Articles 4, 5 and 27 of the

Convention. None of these articles, however, can help to shift the limited construction of Article 5 which seemed as obvious to the Grand Chamber in 2008 as it seems to the panel today.

18. The panel wishes to compliment all the applicant's lawyers for their fine conduct of her applications to this court.

Sealed and issued to the parties with corresponding order 1 December 2015