Trinity Term
[2023] UKSC 23
On appeal from: [2021] EWCA Civ 348

JUDGMENT

R (on the application of Marouf) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
28 June 2023

Heard on 9 March 2023

Appellant
Ben Jaffey KC
Emma Dixon
Blinne Ní Ghrálaigh
Julianne Kerr Morrison
(Instructed by Leigh Day (London))

Respondent
Sir James Eadie KC
David Blundell KC
Jason Pobjoy
(Instructed by Government Legal Department)

LADY ROSE (with whom Lord Reed, Lord Hodge, Lord Burrows and Lord Richards agree):

1. This appeal raises the issue whether the public sector equality duty ("PSED") imposed by section 149 of the Equality Act 2010 requires public bodies to have due regard to the need to promote the goals listed in that section when exercising their functions in so far as that exercise affects the lives of people living outside the United Kingdom. The Appellant is a woman currently living in Lebanon who wishes to be brought to settle in the United Kingdom. She is a refugee from the conflict in Syria and asserts that she should be treated as eligible to come to the UK under the Vulnerable Persons Resettlement Scheme ("the Resettlement Scheme") instituted by the Government in 2014. It is accepted by the Secretary of State that she meets the vulnerability criteria for resettlement in the United Kingdom.

2. The Resettlement Scheme is currently implemented by the Secretary of State relying on the United Nations High Commissioner for Refugees ("UNHCR") to identify and recommend refugees within their remit to be resettled in the UK. The Appellant is not within the remit of the UNHCR because she is a Palestinian refugee. Palestinian refugees in Lebanon, Jordan, Syria, the West Bank and Gaza fall within the remit of a different United Nations organisation, the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"). UNRWA was established in 1949, before the UNHCR. Whereas UNHCR has a specific mandate to assist refugees by local integration in the country where they are living, or by resettlement in a third country, UNRWA has no such mandate. Palestinian refugees are the subject of the exclusive mandate of UNRWA and are therefore outside the remit of UNHCR. It follows that in practice, they cannot take part in the Resettlement Scheme.

3. The Appellant brought judicial review proceedings challenging the lawfulness of the Secretary of State's adoption and operation of the Resettlement Scheme on the grounds that:

(i) the operation of the Resettlement Scheme amounted to unlawful discrimination contrary to section 29(6) of the Equality Act 2010 ("EqA 2010") and was irrational as a matter of common law;

(ii) the Secretary of State had failed to comply with the PSED because she did not have due regard to the equality needs set out in that section. The Appellant relies particularly on section 149(1)(b) of the EqA 2010 which requires public bodies including the Secretary of State to have due regard to the need to advance equality of opportunity for persons who share a relevant protected

characteristic (in this case being a Palestinian refugee) as compared with persons who do not share it (in this case, other refugees).

4. Elisabeth Laing J ("the Judge") at first instance held that the claim for unlawful discrimination under section 29(6) EqA 2010 failed because the section did not have the extraterritorial effect on which the Appellant relied. In any event, the discrimination was justified. As to the second ground of challenge, the Judge considered that she was bound by previous authority to hold that the PSED in section 149 did have extraterritorial effect. She held further on the facts that the Secretary of State had not had due regard to that duty to advance equality of opportunity for Palestinian refugees, and so had been in breach of section 149(1)(b).

5. The Appellant appealed against the Judge's decision that there had been no indirect discrimination in breach of section 29(6) and the Secretary of State cross-appealed against the finding that there had been a breach of the PSED. By the time of the hearing before the Court of Appeal, a further Policy Equality Statement had been published so the issue of whether there had been a breach of the PSED on the facts had become academic. The Secretary of State, however, pursued the appeal on the issue of whether the PSED has extraterritorial effect. The Court of Appeal dismissed the Appellant's appeal and allowed the cross-appeal. The Appellant has been granted permission to appeal to this court only on the question of the extraterritorial effect of section 149. Permission was refused for any challenge to the finding that there has been no substantive unlawful discrimination against the Appellant.

The Resettlement Scheme

6. The Resettlement Scheme is an *ex gratia* scheme which was launched in January 2014 by a statement in Parliament by the then Home Secretary. The nature of the Scheme is described by the Judge in paras 8 to 12 and 23 to 27 of her judgment. It was designed to provide emergency sanctuary in the UK, outside the Immigration Rules, for displaced refugees who were particularly vulnerable. Priority would be given to survivors of torture and violence, and to women and children at risk or in need of medical care. The Resettlement Scheme provided refugees with a direct and safe route to the UK rather than them having to make the hazardous journey to Europe. Those admitted under the original Resettlement Scheme were granted five years' humanitarian protection. The Resettlement Scheme was operated by relying on the UNHCR to identify and recommend refugees who met the criteria for relocation. The Minister described the "deep and strong working relationship" between the UK and UNHCR built up over many years. That would, she said, allow the best use to be made of the UK's capability to help these refugees.

7. In its original form, the scheme was open to Syrian nationals only. It was broadened to include non-Syrian nationals in July 2017 and the status conferred on those settled here was changed to refugee status. That status attracted more rights and benefits than humanitarian protection, including easier access to higher education. The Secretary of State announced that up to the end of March 2017, 7,307 Syrians had been resettled in the UK, half of whom were children. The commitment was to resettle 20,000 refugees by 2020.

8. The Judge also described the Policy Equalities Statement produced by the Secretary of State on 29 June 2017. The Judge assumed this had been prepared as part of the Ministerial submission about the widening of the Resettlement Scheme. She noted that the evidence before the court on behalf of the Secretary of State said that there had been no formal PSED consideration at the time the Resettlement Scheme was introduced because of the speed at which the scheme had to be developed and then rolled out: para 66.

The provisions of The Equality Act 2010

9. The Appellant put her case on the extraterritorial effect of the PSED in two ways. First, she argues that the whole of section 149 has extraterritorial effect. In this case she relies particularly on section 149(1)(b). Alternatively, she argues that it has extraterritorial effect co-extensively with the extraterritorial effect of the substantive provisions of the EqA 2010. Although the appeal before this court is limited to the extraterritorial effect of the PSED, the substantive provisions relating to unlawful discrimination are relevant for this alternative case. The Appellant relies on the Court of Appeal's decision that section 29(6) had extraterritorial effect to a limited extent to bring the Appellant's claim within its scope although that claim was then dismissed on the facts. The Secretary of State maintains that, even if that is correct, it does not follow from that that the PSED has any extraterritorial effect.

10. Section 29 of the EqA 2010 provides so far as relevant:

> "**29 Provision of services etc**
>
> (1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service. …

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

(9) In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.

(10) Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland."

11. Section 31(4) of the EqA 2010 explains that a "public function" for the purposes of section 29(6) is "a function that is a function of a public nature for the purposes of the Human Rights Act 1998".

12. Schedule 3 to the EqA 2010, given effect by section 31(10), sets out exceptions from the prohibition on discrimination in section 29. Paragraph 17 of Schedule 3 provides that section 29 does not apply to anything done by a Minister of the Crown acting personally, or by a person acting in accordance with Ministerial authorisation in the exercise of a function under the Immigration Acts. The exception applies only to the application of section 29 in relation to race discrimination so far as relating to nationality, or ethnic or national origins. As Simler LJ noted at para 32 of her judgment in the Court of Appeal in this case, paragraph 17 is the source of the power to make ministerial and class authorisations, the effect of which can be to exempt immigration officers from the requirement not to discriminate on race grounds when they are exercising functions under the Immigration Act 1971 to grant or refuse entry clearance.

13. Section 149 provides:

"**149 Public sector equality duty**

(1) A public authority must, in the exercise of its functions, have due regard to the need to-

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are - age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to -

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect."

14. The nature of the duty under section 149 was considered by the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60 and in *R (Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 ("*Bridges*"). In the latter case, the court emphasised the following principles: (para 175)

"(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.

(2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.

(3) The duty is non-delegable.

(4) The duty is a continuing one.

(5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

(6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."

15. The Court of Appeal in *Bridges* accepted (para 176) that the PSED is "a duty of process and not outcome" but said that that did not diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public.

The decisions in the courts below

16. The first issue addressed by the Judge at first instance was whether the prohibition in section 29(6) applied extraterritorially to the operation of the Resettlement Scheme in Lebanon. This turned on the application of section 29(9). She held that section 29(9) provided a modest exception to the normal presumption that Acts of Parliament are not intended to extend to things which happen outside the United Kingdom. Section 29(10) demonstrated that Parliament did not intend that modest, express exception to undermine the normal presumption about extraterritorial effect, other than to the extent expressly stated. She held that section 29(9) applies only to the specific act of granting entry clearance and not to the exercise

of common law powers to implement the *ex gratia* Resettlement Scheme for resettlement of foreign refugees.

17. If that was wrong, the Judge held that the Resettlement Scheme was justified. She also rejected the common law irrationality challenge on the grounds that it was rational for the Secretary of State to rely on UNHCR to select refugees for resettlement, even though it had the effect of excluding Palestinian refugees like the Appellant.

18. Turning to the extraterritorial effect of the PSED in section 149, she held that she was bound by the decisions of the Divisional Court in *R (Hottak) v Secretary of State for the Home Department* [2015] EWHC 1953 (Admin), [2015] IRLR 827 ("*Hottak*") and *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin), [2019] 1 WLR 4105 ("*Hoareau*") to hold that the PSED did have extraterritorial effect. Section 149(1)(b) therefore required the Secretary of State to confront the way in which the Scheme would not increase equality of opportunity for Palestinian refugees. There was no evidence that the Secretary of State had thought about the fact that relying on recommendations from UNHCR would effectively exclude them:

> "132. In that situation, in my judgment, the Secretary of State has not had due regard to the equality need listed in section 149(1)(b). The question is not whether the Scheme in its current form is justified. The questions, rather, are whether it ever occurred to the Secretary of State that the widening of the Scheme, as respects PRS *[Palestinian refugees from Syria]*, was theoretical rather than real, and whether it crossed his mind that he should consider whether or not to widen the equality of opportunity for PRS by changing the Scheme so as to enable another gatekeeper to refer their cases to him, and whether he faced up to the fact that if he did widen the Scheme in the way which he did, PRS would be excluded, or virtually excluded from it."

19. The Court of Appeal agreed that the language of section 29(9) "demonstrates an express intention by Parliament to extend the territorial effect of section 29 to things done outside the United Kingdom, but only in specified, limited circumstances": para 58. Simler LJ agreed with the Judge's conclusion that the making of the Resettlement Scheme was not itself the grant of entry clearance under section 29(9) but was the exercise of prerogative powers to make a policy about how such statutory immigration powers would be exercised: para 62.

20. But the Court of Appeal arrived at a different conclusion from the Judge on the limited point as to whether or not the application of the Resettlement Scheme in individual cases amounted to "the granting of entry clearance" and so fell within section 29(9). The Secretary of State had argued before the Court of Appeal that neither the decision by UNHCR nor a decision by UNRWA not to refer an individual for resettlement could reasonably be described as a refusal of entry clearance. At no point did the individual apply for entry clearance but entry clearance would be granted, if at all, by an officer in Amman in Jordan under section 3 of the Immigration Act 1971. Simler LJ held that it was artificial on the facts to separate the decision-making into different stages, thereby divorcing the earliest stage from the final entry clearance decision:

> "66. It is accepted that section 29(9) of the EA 2010 cannot be read literally and extends to refusals as well as grants, and must cover the substance of the decision and not merely the formal decision itself. Accordingly, it must also extend to matters that are integral to the grant (or refusal) decision. …
>
> 67. The whole purpose of the Scheme is to resettle vulnerable refugees fleeing the Syrian conflict in the United Kingdom, by granting them entry clearance. The Scheme sets out special entry control rules outside the immigration rules for a class of vulnerable refugees. Whether or not a particular vulnerable refugee can come into the United Kingdom is determined by the rules set by the Scheme. The impugned rule applied to the appellants is the requirement of a referral by UNHCR for resettlement. Although this is not the grant of entry clearance itself, it is an absolute pre-condition to obtaining a grant of entry clearance under this special route."

21. She held that the prohibition on unlawful discrimination in section 29(6) of the EqA 2010 applied to the inability of the Appellant to meet the absolute precondition to obtaining the grant of entry clearance, namely a referral from UNHCR, notwithstanding that this took place outside the United Kingdom. Underhill LJ accepted Simler LJ's reasoning on this point, albeit with some hesitation: para 109. Warby LJ agreed with both judgments.

22. Turning to the extraterritorial effect of section 149, Simler LJ rejected the Appellant's reliance on section 149(1)(a) and 149(1)(c). As regards the duty in subsection (1)(a) she explained that her conclusion on extraterritorial effect was limited to the application of the Resettlement Scheme rules in the Appellant's

individual case and did not extend to the making of the Scheme. Simler LJ also agreed with the Judge that section 149(1)(c) was not engaged on the facts of the case. That left the Appellant's reliance on section 149(1)(b) (obligation to have due regard for the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it).

23. She said that the starting point must be a presumption that Parliament legislated for territorial effect only, unless Parliament can reasonably be taken to have intended to legislate for extraterritorial effect: para 101. Having considered the judgments of the Divisional Court in *Hottak* and *Hoareau* and the criticisms of them made by the Judge in the present case, Simler LJ formulated the question before the court as "whether the duty extends to having due regard for promoting equality (or fostering good relations) in respect of persons or matters outside the United Kingdom when formulating that policy.": para 100. She considered that a duty to have due regard to the need to enhance equality for anyone anywhere in the world, regardless of the public authority's actual capacity to advance that, would be a meaningless duty and there was nothing to suggest that that had been Parliament's intention.

24. Underhill LJ agreed, adding that that conclusion was entirely consistent with the view that section 29(6) has extraterritorial scope in the circumstances of this case: "The duty under section 149(1)(b) is entirely different in character from the substantive duty not to discriminate provided for by Parts 3-7 of the Act" (para 112).

The presumption against the extraterritorial effect of legislation

25. Mr Jaffey KC, appearing for the Appellant, criticised the Court of Appeal's reliance on a presumption that Parliament legislated for territorial effect only. He submitted that Simler LJ had given undue weight to that presumption in the circumstances of this legislation. He argued that the existence of a presumption and the weight to be given to it depended on the type and nature of the extraterritoriality involved. The presumption arose only if giving extraterritorial effect to legislation would jeopardise comity between nations or would interfere with the sovereign right of another state to regulate activities in its own territory. In other cases, the question whether the legislation has extraterritorial effect is an open one.

26. He relied for this proposition on *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 ("*Bilta*") and *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519. These cases, he argued, showed that the presumption was now merely a question of construction and there was no particularly high hurdle for the Appellant to overcome to establish that the PSED required public bodies to pursue the

equality needs listed there when exercising their functions. Those goals of eliminating discrimination and protecting the rights of those with protected characteristics were generally recognised as desirable by the international community. He referred to the UK's treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities in support of that proposition. There was no reason to restrict the public bodies' duty to have due regard to the equality needs when exercising their functions in the UK.

27. The case of *Bilta* concerned the extraterritorial effect of section 213 of the Insolvency Act 1986. That empowered the court, in the course of winding up a company, to direct any persons who were knowingly parties to the fraudulent business of that company to contribute to the company's assets. It was argued that the "persons" who could be so directed to contribute were only persons in the UK. This court rejected that limitation. Lord Toulson and Lord Hodge JJSC, giving a joint judgment, said at para 212:

> "In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary: *Ex p Blain; In re Sawers* (1879) 12 Ch D 522, 526, James LJ. That principle has evolved into a question of interpreting the particular statute: *Clark v Oceanic [Contractors] Inc* [1983] 2 AC 130, Lord Scarman, at p 145, Lord Wilberforce, at p 152; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, Lord Mance, at para 10; and *Cox v Ergo Versicherung AG* [2014] AC 1379, Lord Sumption JSC, at paras 27-29. In *Cox* Lord Sumption JSC suggested that an intention to give a statute extraterritorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para 29."

28. They held that the section did have extraterritorial effect. The ease of modern travel meant that people who have committed a fraud in this country through the medium of a company could abscond abroad. It would seriously handicap the efficient winding up of a British company if the power did not apply to people overseas (para 213). Lord Neuberger of Abbotsbury, Lord Clarke and Lord Carnwath JJSC agreed with this reasoning: see para 10.

29. I do not agree that Lord Toulson and Lord Hodge's comment that the presumption had "evolved into a question of interpreting the particular statute" was intended to move away from the presumption against extraterritoriality or to suggest that it applied only in certain circumstances. Lord Scarman said no such thing in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 at the passage cited. At p 144-145 of that case, Lord Scarman set out two passages from *Ex p Blain; In re Sawers* (1879) 12 Ch D 522 and then said:

> "Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction."

30. Lord Scarman said that the principle was a "rule of construction only" but he indicated that it certainly applied to the fiscal legislation the House was concerned with in that case. Lord Wilberforce in his speech in *Clark v Oceanic Contractors* also quoted from the judgment of James LJ in *Ex p Blain*. In a passage often cited in later cases, Lord Wilberforce said: p 152C

> "That principle, which is really a rule of construction of statutes expressed in general terms,…. requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating".

31. *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90 ("*Masri*") concerned the scope of the power conferred by section 1 of the Civil Procedure Act 1997 to enable rules to be made relating to the examination of an officer abroad of a company against which judgment had been given within the jurisdiction. At para 10, Lord Mance JSC described the principle relied on as "one of construction, underpinned by considerations of international comity and law". He described that principle, using the formulation from *Bennion on Statutory Interpretation* 4th ed (2002), p 282, section 106 as being that unless the contrary intention appears, an enactment applies to all persons and matters within the territory to which it extends but not to any other persons and matters. Again, I do not agree with Mr Jaffey that Lord Mance was diluting the presumption as it had been previously understood or that he was saying that it only applied where international comity is jeopardised.

32. The third case referred to in the passage quoted from *Bilta* is *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014[AC 1379 ("*Cox*") concerning the application of the Fatal Accidents Act 1976 to accidents occurring abroad with no connection to England or English law. It is true that Lord Sumption (with whom the majority agreed) said at para 27 of his judgment that the presumption against extraterritorial application "is more or less strong depending on the subject matter". But he went on immediately to cite with approval what Lord Scarman had said in *Clark v Oceanic Contractors* at p 145. When considering the extraterritorial application of the 1976 Act, Lord Sumption in *Cox* said that implied extraterritorial effect "is certainly possible":

> "29 … But, in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply."

33. I do not therefore see any support in those cases cited by Lord Toulson and Lord Hodge in *Bilta* for the proposition relied on by Mr Jaffey.

34. The parties also referred to *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519 ("*KBR*"), Mr Jaffey relies on para 24 of the judgment of Lord Lloyd-Jones JSC describing the reasons for the presumption. The presumption, Lord Lloyd-Jones said, reflects in part the requirements of international law that one state should not by the claim or exercise of jurisdiction infringe the sovereignty of another state in breach of rules of international law. It was also rooted in the concept of comity which was something less than a rule of international law. He then said:

> "25. The lack of precisely defined rules in international law as to the limits of legislative jurisdiction makes resort to the principle of comity as a basis of the presumption applied by courts in this jurisdiction all the more important. As a result, the presumption in domestic law is more extensive and reflects the usages of states acting out of mutual respect and, no doubt, the expectation of reciprocal advantage. Accordingly, it is not necessary, in invoking the presumption, to demonstrate that the extra-territorial application of the legislation in issue would infringe the sovereignty of another state in violation of international law."

35. In *KBR* it was the Government arguing that the power to serve a notice to produce documents could be exercised in respect of a company which had never carried on business in the UK nor had a registered office or any other presence here. Lord Lloyd-Jones rejected that submission. The other Justices agreed with his judgment.

36. There is nothing in Lord Lloyd-Jones' judgment to suggest a revision of the well-established presumption. On the contrary, he said at para 21 that the starting point for a consideration of the scope of the enactment was the presumption in domestic law that legislation is generally not intended to have extraterritorial effect. As to the content of that presumption, Lord Lloyd-Jones quoted from the (dissenting) speech of Lord Bingham of Cornhill in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153, ("*Al-Skeini*") para 11. That passage in turn cites cases from *Ex p Blain case* onwards from which the presumption derives. Lord Bingham refers to the observation of Lord Walker of Gestingthorpe in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 13, a Privy Council case, that there is now greater hesitation on the part of the courts to assume that legislation enacted by the Westminster Parliament was intended to apply throughout the Empire. Lord Walker said that one of the reasons for this greater restraint was:

> "… the courts' long-standing practice, in construing statutes of the Westminster Parliament, of presuming that their intended territorial extent is limited to the United Kingdom, unless it is clear that a wider extent is intended: see for instance the observations of Lord Russell of Killowen CJ in *R v Jameson* [1896] 2 QB 425, 430. This presumption is of long standing but (with increasingly precise drafting techniques) it appears to have become stronger over the years, and it has become common for an Act of the Westminster Parliament to contain power for all or part of its provisions to be extended to British territories by Order in Council."

37. Although the present case is not concerned with the application of English law in former colonies, this observation does not support the Appellant's argument and one would expect, if the House of Lords or this court were to depart from the presumption, that intention would be clearly stated. I do not read the speech of Lord Rodger of Earlsferry in *Al-Skeini* as watering down the presumption even though he held that it was rebutted in that case for the reasons he set out in paras 53 to 60.

38. The current edition of Bennion, Bailey and Norbury on *Statutory Interpretation*, 8th ed (2020) states the principle in the following terms at section 6.10:

> "Unless the contrary intention appears, an enactment is taken not to apply to people and matters outside the territory to which it extends."

39. The authors cite *KBR* as authority for the proposition that the starting point is the presumption in domestic law that legislation is not generally intended to have extraterritorial effect. They cite *Masri* as an example of the presumption being applied.

40. I do not therefore accept Mr Jaffey's submission that the presumption against extraterritorial effect only arises where that jurisdiction risks generating real problems by interfering with foreign states. The policy reasons behind the rule of construction were discussed by Lord Rodger in *Al-Skeini* at para 45 onwards. The different policies described there underlie the principle of construction, but they do not determine the application of the principle.

41. It is a well-established principle that has been applied for very many years to very many enactments. In the absence of express words, the extraterritorial application of legislation may be implied but it is high threshold that needs to be overcome. I agree with the authors of *Bennion* that Lord Sumption's comments in *Cox* should not be read as requiring all cases of implied extraterritorial effect to meet one or both of the conditions he refers to. That would be to put an unnecessary gloss on an approach which has stood the test of time. But the starting point is indeed, as Simler LJ stated, that there is a presumption which it falls to the Appellant to rebut.

The extraterritorial effect of section 149 as a whole

42. Mr Jaffey's primary submission is that the whole of section 149 has extraterritorial effect. He recognises the point made by Simler LJ that that effect would in most cases be nugatory because the functions exercised by public bodies usually have no effect on people outside the UK. Even where a decision or policy does have such an effect, there may be nothing that the public body can do to foster good relations or eliminate victimisation in the overseas territory concerned. Mr Jaffey seeks to turn that to a point in his favour by arguing that the concept of "due regard" is a flexible one. If there is nothing that can realistically be done to eliminate, advance, foster or encourage the good things listed in subsections (1) and (3), then the regard which is "due" to the PSED will be minimal and the duty will easily be complied with. The extraterritorial effect does not therefore place an impossible or impracticable burden on the public bodies on which the PSED duty is imposed.

43. The meaning of the term "due regard" in the PSED was considered in *Bridges*. The Court of Appeal said at para 181:

> "We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex."

44. The court nevertheless found that there had been a breach by the failure of the police to consider whether the advanced facial recognition software which they had used to match the faces of members of the public with those on a 'wanted' list had a bias on racial or gender grounds. It had been suggested by an expert on behalf of the claimants that there was a higher rate of positive matches for female faces and for black and minority ethnic faces.

45. It is clear that the concept of "due regard" is a flexible one. In *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457, [2022] PTSR 1315, the Court of Appeal said (para 56):

> "The authorities show that the concept of 'due regard' is highly sensitive to facts and context. How intense the 'regard' must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in which the duty is engaged. What is 'due regard' in one case will not necessarily be 'due regard' in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as 'due regard' is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental, and is itself conducive to a more robust assessment of equality impacts later in the process."

46. Despite that flexibility, I reject, as a matter of principle, the argument that one can rebut the presumption against extraterritorial effect by construing the legislation as having very limited effect when it is applied extraterritorially. If there is likely to be no useful purpose served in most cases by imposing the duty with extraterritorial effect, it is less, rather than more, likely that Parliament intended to extend the scope of the duty beyond this jurisdiction. It is the opposite of the first set of circumstances to which Lord Sumption referred in *Cox*. This is very far from a case where the PSED cannot effectually be applied or its purpose achieved unless it has extraterritorial effect. *Bridges* stressed that the PSED is not to be reduced to a "tick box" exercise but Mr Jaffey seems to be suggesting that in most cases it would be just that.

47. In my judgment, the Court of Appeal in the present case was right to disagree with the reasoning of the Divisional Court in *Hottak* and *Hoareau*. *Hottak* arose out of the *ex gratia* arrangements put in place by the Government to benefit Afghan nationals who had served as interpreters for the British Forces in Afghanistan. The complaint was that the arrangements were less generous than a similar scheme for Iraqis assisting the British Forces in Iraq. No assessment had been made for the purposes of the PSED before the Afghan scheme was formulated and announced. The Divisional Court (Burnett LJ and Irwin J) rejected claims founded on section 29(6) of the EqA 2010 or on section 39(2) of that Act relating to employee benefits. They held that the territorial reach of those provisions did not include the claimants' circumstances. As to the PSED, Burnett LJ (with whom Irwin J agreed) said at para 60:

> "The scheme of section 149 is to apply the PSED by reference to the functions of the relevant body. In the formulation of policy it does not matter, in my view, that the policy may have an impact wholly or partly outside Great Britain. The territorial limitations implicit in section 149(1)(a) follow the application of the substantive parts of the Act but otherwise there are no territorial limitations. Although [*counsel for the Secretary of State's*] written material suggested otherwise, I did not understand him to press the point in his oral argument."

48. He held that there had been a failure to comply with the duty before the policy was put in place but further work done thereafter satisfied the duty. Relief was therefore limited to a declaration that there had been a failure to have due regard to the matters in section 149(1)(b) and (c). The judgment does not refer to the presumption against extraterritoriality or cite any of the cases I have discussed above. Although the case went on appeal, there was no cross appeal challenging the making

of that declaration and the Court of Appeal did not address the issue of the extraterritorial application of the PSED: [2016] EWCA Civ 438, [2016] 1 WLR 3791.

49. The Divisional Court in *Hoareau* (Singh LJ and Carr J) was considering the resettlement of the Chagossians from the British Indian Ocean Territory ("BIOT") between 1966 and 1972. A review of the policy in 2012 led to a decision that the Chagossians should not be resettled on BIOT but provided a support package of money. The Court recorded at para 153 that the Secretary of State conceded that the decision in respect of the support package fell within the scope of the section 149 duty: "This is because the decision was taken within the UK (although it affects territory and persons elsewhere in the world)". The court considered whether the duty applied to the resettlement decision. The court correctly stated that this issue was not determined by the geographic scope provision in section 217 EqA 2010 as that addressed a different question. There was no relevant exception in Schedule 18 to the Act. Referring to what the Divisional Court had said in *Hottak*, the court proceeded in *Hoareau* on the basis that the PSED did apply: para 164. They held, however, that it had not been breached. Again, there was no discussion of the presumption against extraterritorial effect and it appears from the law report that none of the cases considering that presumption was cited to the court.

50. In her judgment in the present case, the Judge respectfully disagreed with the reasoning in *Hottak* and *Hoareau* as regards the extraterritorial effect of section 149: see para 113 onwards of her judgment. In her view, all the reasons which showed that the substantive duties in Part 3 of the EqA 2010 did not have more than very exceptional extraterritorial effect applied with as much force to section 149: (para 114)

> "The approach of the Divisional Court means that even though a public authority cannot breach the substantive provisions of the 2010 Act in the exercise of a particular public function which has only extra-territorial effects, it is nonetheless required, when exercising it, to have due regard to the listed equality needs as respects people who are outside the jurisdiction and whose equality of opportunity, and whose good relations with others, it will, necessarily, have a limited, if any, scope, to influence. A legislative scheme with that effect is incoherent."

51. She was however bound to follow that approach. She went on to hold that section 149(1)(a) was not engaged; since section 29 did not have extraterritorial effect, there had been no conduct prohibited by the EqA 2010. The requirement to foster good relations under section 149(1)(c) was satisfied because the Policy Equalities

Statement showed that the Secretary of State had had due regard to this. But, as I have explained, she held section 149(1)(b) was engaged and had been breached.

52. The Court of Appeal agreed with the Judge's criticisms of *Hottak* and *Hoareau*. Having described the elaboration of the duty in section 149(3)(b) as tackling prejudice and promoting understanding, Simler LJ said: (para 102)

> "I find it difficult to see why or how Parliament could have expected public authorities to take these steps in relation to people outside the United Kingdom in a place where the authority is unlikely to have any real sphere of operation, or in a place or country where different views may be taken on questions of equality and non-discrimination as reflected in local laws, customs and traditions. Certain characteristics that are protected characteristics in Great Britain are far from protected elsewhere and there may be great sensitivity in this regard. It cannot be for a public authority in this country to determine how best to advance equality of opportunity between people subject to foreign law, traditions and customs. These points reinforce the force of the normal presumption in this case."

53. I agree with that analysis. The reasoning of the Divisional Court in *Hottak* was flawed because the fact that the decision challenged was taken in the UK does not mean that the PSED requires due regard to be had to all the effects of that decision on anyone wherever they are in the world. Mr Jaffey appeared to go further than the Divisional Court in *Hottak*, arguing that the Appellant's case does not depend on extraterritorial effect at all because those bound by the PSED are all UK public bodies. He argued that when the court engages on the inquiry indicated by Lord Wilberforce in *Clark*, the "persons" with respect to whom Parliament is presumed to be legislating here are the public bodies subject to the duty, not the myriad persons within and outside the UK whom a decision by the public body may affect. I reject that argument. The problems that can arise from giving the provision extraterritorial effect do not only arise when the decision making body is outside the UK. The issue of extraterritoriality that arises here was correctly identified by Simler LJ as being whether the duty extends to having due regard for promoting equality etc in respect of persons or matters outside the UK when exercising functions within the UK which affect those overseas. I agree with the Court of Appeal that it does not.

54. There is nothing in the legislation from which one can infer that the presumption against extraterritoriality has been overridden. On the contrary, the

scope of the goals which the words in section 149 require the public authority to aspire to achieve suggest that there is no such intention. It is one thing to expect the wide range of bodies listed in Schedule 19 to the EqA 2010 to have due regard to the "need" set out in section 149 as regards the people within their remit but another to expect them to have due regard to the "need" to do so as regards people overseas. The PSED is intended to ensure that the specified public bodies have due regard to the need to adopt policies which help to bring about the societal change that would see the elimination of discrimination, equality of opportunity and good relations between different groups within the community. There is no general duty under section 149 on public bodies to attempt to bring about that kind of change in countries outside the United Kingdom and it is not open to a person with a protected characteristic but no connection to the United Kingdom to challenge a decision of a public body on the grounds that a policy adopted failed to have due regard to the need to improve their position within that overseas community.

55. It is no doubt the case that where decisions and policies are being discussed within a Government department, consideration will be given to whether the effects on people overseas are likely to be advantageous or disadvantageous from the point of view of the UK's overall interests. The wisdom of having such an internal discussion as part of policy making certainly does not mean that the PSED should apply. The Policy Equalities Statement is, and should be, a public document. The Court of Appeal in *Bridges* said that the purpose of the duty is not only to aid decision making. It "helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect.": para 176. It is part of the body's accountability to the public.

56. As Sir James Eadie KC appearing for the Secretary of State submitted, a public body considering whether to adopt a decision or policy which will affect people overseas, may very quickly be drawn into sensitive areas of the kind to which Simler LJ referred in para 102 cited earlier. Subsection (3) elaborates on what is included in the need to have due regard to advancing equality of opportunity in section 149(1)(b). It is not credible to suggest that Parliament expected the public body to publish a statement to show how it had addressed the need to encourage people of a particular race or religion to participate in public life in an overseas country where the decision or policy will be implemented. There is nothing to suggest that public bodies on whom the duty is imposed are intended to be accountable to people elsewhere in the world who have no particular connection with the UK or that such people are entitled to the reassurance to which reference was made in *Bridges*.

57. There may be circumstances where the kinds of factors listed in section 149 are so germane to the lawfulness of a decision or policy to be implemented overseas that

they become relevant factors that the public body must take into account in accordance with ordinary judicial review principles. Well known examples of where the courts have examined in detail the Government's assessment of the effect of decisions overseas are the quashing of the decision to use public money to finance the Pergau Dam in Malaysia (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386) or "the whole sad story" of the removal of the Chagossians from BIOT: see *per* Lord Hoffmann, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, para 9. If in respect of a particular decision, the Minister ought to have taken into account the need to minimise disadvantages suffered by persons who share a relevant protected characteristic in a foreign country where the decision will be implemented, then that decision is open to challenge for failure to take that into account. That is true regardless of the application or not of the PSED. As this appeal and the cases cited show, the adequacy of the statement published by the public body can give rise to a judicial review challenge separate from the substantive challenge to the decision. That, in my judgment, was not Parliament's purpose in enacting section 149.

Extraterritorial effect of section 149(1)(a) co-extensive with a breach of section 29(6)

58. Mr Jaffey's alternative case was that section 149 has a limited extraterritorial effect which is co-extensive with the extraterritorial effect of the substantive provisions. He submitted that, having found that the decisions applying the Resettlement Scheme in individual cases fell within section 29(6) because of section 29(9), the Court of Appeal should have held that section 149(1)(a) had extraterritorial effect at least to that extent.

59. Mr Jaffey argued that the Court of Appeal was wrong to hold that section 149(1)(a) could only apply to the individual application of the Resettlement Scheme. The PSED applies both at the level of policy making and at the level of individual decision making pursuant to a policy. To be effective, the territorial scope of section 149(1)(a) must be at least as wide as the relevant substantive provisions. Even if the Court of Appeal were right that the substantive provisions apply only to individual decisions and that the policy was justified overall, he submits that it was wrong to reject the extraterritorial application of section 149(1)(a) to that extent.

60. In addressing this point, it is important to understand the extent of the Court of Appeal's disagreement with the Judge. As I have explained, the Judge held that section 29(6) had no application because it did not, generally, have extraterritorial effect and because the circumstances of this case did not fall within the modest territorial extension provided in section 29(9). She did not consider that the application of the

policy to exclude the Appellant from the opportunity to benefit from the Resettlement Scheme was part of "granting entry clearance" within the meaning of section 29(9). That meant not only that the unlawful indirect discrimination claim failed but that section 149(1)(a) was not engaged because there was no conduct prohibited by the EqA 2010.

61. The Court of Appeal disagreed with the Judge's conclusion on section 29(6) but only to a limited extent. Simler LJ drew a distinction between the grant and refusal of entry clearance covered by section 29(9) on the one hand and the making of the Resettlement Scheme on the other. The application of the Resettlement Scheme at the stage when it prevented an individual Palestinian refugee from going forward to the next stage of being considered for resettlement under the Scheme was the exercise of a function under the Immigration Acts. That step in the process was, Simler LJ held, sufficiently close to the act of granting entry clearance to be part and parcel of it. The refusal to allow a particular refugee to go forward to the next stage of the entry clearance process did therefore fall within section 29(9). But she held that the making of the policy underlying the Resettlement Scheme was not itself part and parcel of the exercise of a function under the Immigration Acts. The policy had been adopted by the exercise of prerogative powers. Simler LJ recorded (at para 63) that before the Court of Appeal, Mr Jaffey had accepted that distinction and had accepted also that the making of the policy did not fall within section 29(9). He had argued, however, that the application of the policy in an individual case was within section 29(9) and that was the point with which Simler LJ agreed. To that extent, the prohibition on unlawful discrimination in section 29(6) applied to the exclusion of the Appellant from the Resettlement Scheme notwithstanding that she was outside the UK. She went on to uphold the Judge's finding that the policy discrimination was justified: see para 75.

62. When Simler LJ came to consider the application of section 149(1)(a), she still held that it was not engaged. This was because the Appellant's complaint was directed at the introduction and amendment of the policy that underlay the Resettlement Scheme and the failure to have due regard to the exclusion by the Scheme of refugees outside the remit of UNHCR. She had held that the adoption of the Scheme was not within section 29(9) and so not affected by the territorial extension in section 29(9). Section 149(1)(a) was still not engaged because the adoption of the Resettlement Scheme was not within the prohibition laid down by the substantive provisions of the Act. I respectfully agree with Simler LJ's analysis and the importance of the distinction between the exercise of the function of granting entry clearance and the adoption of the Resettlement Scheme. The PSED is primarily directed at policy decisions not at the application of policy to individual cases. The duty on an official not to discriminate unlawfully against a particular individual at all stages of the grant of entry clearance is imposed by the substantive obligations imposed by the EqA 2010, rather than by the PSED. There is no need to impose on that official in addition the duty under section

149(1)(a). In support of his submission that the extraterritorial effect of the PSED should be co-extensive with the substantive provisions, Mr Jaffey relies on *Al-Skeini* where the issues concerned the conduct of the British Armed Forces in Iraq. There, the House of Lords held that the Human Rights Act 1998 had extraterritorial effect to the same extent as the European Convention on Human Rights. In those circumstances, the House held (para 53) that "it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home". Lord Rodger (with whom Lady Hale (para 88) and Lord Carswell (para 97) agreed) went on:

> "54. The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United Kingdom public authority. Making such remedies available for acts of a United Kingdom authority on the territory of another state would not be offensive to the sovereignty of the other state. There is therefore nothing in the wider context of international law which points to the need to confine sections 6 and 7 of the 1998 Act to the territory of the United Kingdom."

63. Lord Rodger (para 55) then addressed the argument that such an extension of the Human Rights Act would "potentially at least, confer rights on people all over the world with little or no connexion with the United Kingdom". That danger was removed, he held, by the inbuilt limitations in the Human Rights Act, namely that the claimants had to be "victims" and also, importantly, had to be within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention as interpreted by the European Court of Human Rights in Strasbourg. Finally, at para 56, Lord Rodger turned to the "crucial argument" in favour of a wider interpretation of section 6, namely that the central policy of the Act was to enable claimants to obtain remedies in the UK courts rather than having to bring their claim in Strasbourg. It would be contrary to that policy to hold that the claimants in that case must resort to Strasbourg at the first instance.

64. It can readily be seen that none of the reasoning which led the majority of the House in *Al-Skeini* to hold that the Human Rights Act had extraterritorial effect co-extensive with the Convention applies to the Appellant's circumstances and the application of the PSED. We are not dealing with a limited potential extraterritorial effect bounded by inbuilt limitations within section 149 and justified by the central policy underlying the EqA 2010. The Appellant's argument would confer rights on people all over the world to challenge the decision-making process of a public body exercising its functions, if the exercise of the public body's functions affected them.

65. I do not consider therefore that *Al Skeini* assists the Appellant in establishing that the extraterritorial effect of section 149(1)(a) should be construed as co-extensive with that of section 29(6). There is no incoherence or illogicality in upholding the Court of Appeal's conclusion.

66. Further, looking at the matter as one of statutory construction, I accept Sir James' submission that the extraterritorial effect for which the Appellant contends is a subtle one – it applies to section 149(1)(a) but not to section 149(1)(b) or (c). If Parliament had wanted to achieve that result, it would have made this express in the legislation. Section 29(9) and (10) is not the only place in the EqA 2010 where extraterritoriality is carefully dealt with by the legislature. It is unlikely that Parliament would leave the courts to puzzle out this nuanced construction for themselves, given the very serious implications of that construction for the public bodies in Schedule 19.

Conclusion

67. I would therefore dismiss the appeal.