Neutral Citation Number: [2025] EAT 197

Case Nos: EA-2024-001559-BA (L v MoD) &
EA-2024-000995-DXA (Dunn v MoD)

IN THE EMPLOYMENT APPEAL TRIBUNAL
ON APPEAL FROM
THE NEWCASTLE EMPLOYMENT TRIBUNAL
AND THE WATFORD EMPLOYMENT TRIBUNAL

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/12/2025

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

(1) MR L

(2) PAUL DUNN

Appellants

- and –

MINISTRY OF DEFENCE

Respondent

- -
- -

Nicola Braganza KC and Maya Thomas Davis (instructed by **Wace Morgan Solicitors**) for the **First Appellant**
Keir Hirst (solicitor, **Wace Morgan Solicitors**) for the **Second Appellant**
Julian Allsop and Anna Williams (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 21 & 22 October 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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circulated to the parties on 17 December 2025

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MR JUSTICE LINDEN :

Introduction

1. These appeals arise out of claims brought by two former members of the armed forces who allege that they were subjected to disability discrimination by the Ministry of Defence ("MOD"), contrary to the Equality Act 2010. In the first claim, Mr L was discharged for reasons connected with the fact that he had been diagnosed with human immunodeficiency virus ("HIV"). He alleges that his treatment was contrary to Part 5 of the 2010 Act. In the second case, having been discharged from the armed forces on the basis of 'premature voluntary release', Mr Dunn sought a retrospective redesignation of the basis on which he had left service to 'discharge on medical grounds'. This was refused. He alleges breach of section 108 of the 2010 Act, read with Part 5.

2. The position of the MOD is that both claims are barred by paragraph 4(3) of Schedule 9 to the Equality Act 2010 which provides that *"so far as relating to age or disability…[Part 5] does not apply to service in the armed forces"*. However, Mr L and Mr Dunn contend that it is contrary to Article 14 of the European Convention on Human Rights ("ECHR"), read with Articles 6 and/or 8, for them to be unable to claim disability discrimination related to such service. They also argue that paragraph 4(3) of Schedule 9 and section 108 of the 2010 Act can be read compatibly with the ECHR, pursuant to the interpretive obligation under section 3(1) of the Human Rights Act 1998, so as to enable them to bring their claims.

3. Employment Judge TR Smith sitting in the Newcastle Employment Tribunal, in the case of Mr L, and Employment Judge Poynton sitting in the Watford Employment Tribunal in the case of Mr Dunn, considered the arguments under the Human Rights Act 1998 as preliminary issues. Both held that the claims were barred. In both cases, the Judges first considered whether the relevant provisions of the 2010 Act could be interpreted so as to give effect to the ECHR *assuming* that Article 14 required that the claimant before them was able to bring his disability discrimination claim ("the section 3 question"). And in both cases they held that the 2010 Act could not be interpreted so as to achieve this result. The claims would therefore be struck out. That being so, neither Judge went on to reach a final conclusion on whether paragraph 4(3) of Schedule 9, and/or section 108 of the 2010 Act, read literally, are in fact incompatible with the ECHR ("the ECHR compatibility question"), although both expressed views on aspects of this question.

4. Against these decisions the appellants now appeal. Both contend that the relevant provisions of the Equality Act 2010 can be interpreted in such a way as to enable them to bring their claims assuming that this is what Article 14 ECHR requires. In Mr L's case he also challenges other aspects of the Judge's decision including a finding that the matter does not fall within the ambit of Article 6 ECHR for the purposes of Article 14, and the MOD cross appeals against the Judge's finding that the matter fell within the ambit of Article 8 ECHR.

The statutory framework

The Equality Act 2010

5. Part 5 of the Equality Act 2010 – *'Work'* – includes section 39.

   i) Sections 39(1)(a)-(c) protect applicants for employment from discrimination by prospective employers in the arrangements for deciding who should be offered employment, in the terms offered to a given applicant or by not offering employment to them.

   ii) Under sections 39(2) and (5), which are relied on by both Mr L and Mr Dunn:

   > "(2) An employer (A) must not discriminate against an employee of A's (B)—
   >
   > (a) as to B's terms of employment;
   >
   > (b) in the way A affords B access, or by not affording B access, to opportunities for …receiving any other benefit, facility or service;
   >
   > (c) by dismissing B;
   >
   > (d) by subjecting B to any other detriment.
   >
   > …..
   >
   > (5) A duty to make reasonable adjustments applies to an employer"

6. So far as material to Mr Dunn's case, section 108 of the 2010 Act provides, as part of Part 8 – *'Prohibited conduct: ancillary'* – as follows:

   > "**Relationships that have ended**
   >
   > (1) A person (A) must not discriminate against another (B) if—
   >
   > (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
   >
   > (b) *conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act*." (emphasis added)

7. Section 108(2) prohibits harassment in the same circumstances and subject to the same conditions.

8. Section 108 then provides, so far as material, that:

   > "(4) A duty to make reasonable adjustments applies to A if B is placed at a substantial disadvantage as mentioned in section 20.
   >
   > (5) For the purposes of subsection (4), sections 20, 21 and 22 and the applicable Schedules are to be construed as if the relationship had not ended.

> *(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended…….*" (emphasis added)

9. In the present case, the relevant relationships for the purposes of Part 5 and section 108 are identified in section 83 of the 2010 Act. Section 83(2) of the defines *'employment'* as employment under a contract of employment, Crown employment and employment as a relevant member of House of Commons or House of Lords staff. Section 83(3) then provides that Part 5 applies to members of the armed forces in the following terms, so far as material:

> "(3) This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—
>
> (a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;….."

10. This provision reflects the fact that members of the armed forces do not fall within any of the categories of employment identified in section 83(2). They are appointed by the Crown under the royal prerogative and serve at the Crown's pleasure. There is no intention to create legal relations for the purposes of the law of contract, and they therefore do not serve under contracts of employment: see e.g. *Quinn v Ministry of Defence* [1998] PIQR 387 at 396, and the discussion in *Broni v Ministry of Defence* [2015] EWHC 66 (QB) at [17] and [19]. Their terms of service are governed by a discrete regulatory regime laid down pursuant to prerogative powers and the Armed Forces Act 2006 including, in the case of the Army, the Army Terms of Service Regulations 2007. The approach under the Equality Act 2010, i.e. to confer specified generally applicable statutory employment rights on armed forces personnel, is mirrored across the employment protection legislation: see, for example, sections 191 and 192 of the Employment Rights Act 1996.

11. Importantly, however, section 83(11) of the 2010 Act then provides as follows:

> "(11) Schedule 9 (exceptions) has effect."

12. Schedule 9, is entitled '*Work: exceptions'*. Part 1 of the Schedule sets out a series of general exceptions relating to *'Occupational requirements'* which are applicable to Part 5 cases, and therefore also applicable to service in the armed forces as a result of such service being treated as employment for the purposes of Part 5.

13. However, paragraph 4 of Schedule 9 relates specifically to the *'Armed Forces'*. Paragraph 4(1) and (2), reflecting the ruling of the European Court of Justice in *Sirdar v Army Board* C-273/97 [1999] ECR I-7403, [1999] 3 CMLR 559, provides as follows:

> "(1) A person does not contravene section 39(1)(a) or (c) or (2)(b)…by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces.
>
> (2) A relevant requirement is—
>
> (a) a requirement to be a man;

(b) a requirement not to be a transsexual person."

14. Paragraph 4(3) provides as follows:

> *"(3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces."*

15. It was agreed that "This Part of this Act" refers to Part 5. Section 55 of the 2010 Act enacts duties on employment service providers not to discriminate in relation to those to whom they offer or provide services.

16. Under Part 9 of the 2010 Act – *'Enforcement'* - section 120 provides, so far as material:

> "**Jurisdiction**
>
> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
>
> (a) a contravention of Part 5 (work);
>
> (b) a contravention of section 108…*that relates to Part 5*. (emphasis added)

17. Section 121 provides, so far as material:

> "**Armed forces cases**
>
> (1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless—
>
> (a) the complainant has made a service complaint about the matter, and
>
> (b) the complaint has not been withdrawn.

18. A service complaint is a complaint made pursuant to the Armed Forces (Service Complaints) Regulations 2015, which were made by the Defence Council pursuant to powers conferred by section 340B(1) of the Armed Forces Act 2006. The policy reflected in this provision is that internal service redress procedures should be pursued first (although they need not have been completed before a claim can be presented to the Employment Tribunal) and, accordingly, the limitation period for bringing a claim in the Employment Tribunal is extended by three months: see section 123(2). Again, this provision reflects the special position of the armed forces so far as employment protection is concerned.

The Framework Directive

19. Paragraph 4(3) of Schedule 9 to the 2010 Act and its predecessor provisions were enacted pursuant to a derogation permitted by Council of the European Union Directive 2000/78/EC ("the Framework Directive"). Article 1 of this Directive provided that its purpose was "to lay down a general framework for combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation". Having stated, at Recital (1), that the European Union

"respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.." and, at Recital (4), that equality before the law and protection against discrimination constituted a universal right which was recognised by ECHR to which all Member States are signatories, the Framework Directive went on to say, at Recital 19:

> "(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation."

20. Article 3.4 then provided, under the heading '*Scope*', that:

> "4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces."

21. Although Recital 19 identified combat effectiveness as the rationale for the derogation which was made available under Article 3.4, the Article itself is unqualified. In *R (Child Soldiers International) v Secretary of State for Defence* [2015] EWHC 2183 (Admin) Kenneth Parker J held that Article 3.4 conferred on Member States an unqualified and unrestricted power to derogate, in relation to the armed forces, from the general prohibition on discrimination by reason of age under the Framework Directive. That power had been exercised by paragraph 4(3) of Schedule 9 to the Equality Act 2010. It followed that there was no proportionality limitation to be applied by the national court in the context of a claim for judicial review of secondary legislation (the Army Terms of Service Regulations 2007) which included age related provisions governing recruitment to, and leaving, the Army.

22. There was no disagreement before me that the same reasoning is applicable in relation to disability discrimination. It is, perhaps, worth noting that the position under Article 3.4 was apparently considered by the Council of Europe to be consistent with the ECHR (see Recitals (1) and (4)). However, no point was taken on this by the MOD.

<u>The Human Rights Act 1998 and the relevant provisions of the ECHR</u>

23. Section 3 of the Human Rights Act 1998 provides, so far as material, that:

> "**Interpretation of legislation**.
>
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation…" (emphasis added)

24. It was common ground before me that the Employment Appeal Tribunal is not a 'court' for the purposes of section 4 of the 1998 Act and therefore does not have the power to make a declaration of incompatibility: see *Whittaker v PD Watson (t/a P&M Haulage)* [2002] ICR 1244 EAT.

25. As to the relevant provisions of the ECHR, Article 6 provides, so far as material, as follows:

> "**Right to a fair trial**
>
> "1 *In the determination of his civil rights and obligations*….everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly….". (emphasis added)

26. Article 8 ECHR provides, so far as material:

> "**Right to respect for private and family life**
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence…."

27. Article 14 provides:

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

28. In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] AC 51 at [8] Lady Black JSC identified the following four matters which must be established if a difference in treatment is to amount to a violation of Article 14:

> "First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking."

The proceedings below

Mr L's case

29. Mr L was medically discharged from the armed forces with effect from 3 October 2022 having served as a soldier in the British Army for a little over 5 years. He had been diagnosed with HIV in 2019 which, the parties agree, meant that he had a 'disability' within the meaning of section 6 of the Equality Act 2010: see paragraph 6 of Schedule 1 to the 2010 Act.

30. Mr L brought a service complaint and then issued proceedings in the Employment Tribunal on 17 February 2023 alleging breaches of section 13 of the 2010 Act (direct disability discrimination), section 15 (unfavourable treatment for a reason arising out of his disability), section 19 (indirect disability discrimination) and sections 20 and 21 (failure to make reasonable adjustments). On 24 April 2023, the MOD applied to strike these claims out on the grounds that paragraph 4(3) of Schedule 9 applied and the Employment Tribunal therefore did not have "jurisdiction".

31. The arguments as to whether Mr L's claims were barred by paragraph 4(3) were heard by Employment Judge TR Smith on 19 and 20 September 2024. Although the issue was whether the claim should be struck out pursuant to rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") – i.e. on the grounds that it had no reasonable prospect of success – the parties agreed before me that the Judge was asked to make a final determination of whether the claim was barred, based on the evidence which he received. In other words, this was the trial of a preliminary issue rather than the Judge being asked to decide whether it was or was not *arguable* that paragraph 4(3) applied.

32. The Judge did not receive any oral evidence but there was a good deal of documentary evidence put before him. Mr L was represented by Ms Nicola Braganza KC, and the MOD was represented by Mr Niazi Fetto KC. Both submitted skeleton arguments. Ms Braganza's skeleton dealt with the section 3 question first and then the ECHR compatibility question, both of which were in issue, whereas Mr Fetto dealt with the compatibility question first and submitted in the alternative that a compatible interpretation was not 'possible' in any event. I understand, from [60]-[63] of the Judge's Reasons and what I was told at the hearing of the appeal, that the Judge asked Counsel whether they agreed that it was permissible to "put the cart before the horse", and decide the section 3 question first on the assumption that the literal reading of paragraph 4(3) was incompatible with Article 14 ECHR. They agreed that this approach could be taken, but they urged the Judge, even if he found for the MOD on the section 3 question, to set out his conclusions on the ECHR compatibility question given the possibility of an appeal.

33. In a Reserved Judgment which was sent to the parties on 21 October 2024, the Judge struck Mr L's claim out. He concluded that it was not possible to interpret paragraph 4(3) so as to enable Mr L to bring his claim and noted that, accordingly, it was not strictly necessary to address the ECHR compatibility question. However, he went on to find that although the circumstances of the case did not fall within the ambit of Article 6 ECHR for the purposes of Article 14, they did fall within the ambit of Article 8. He found that the 'ground' for the treatment complained of for purposes of Article 14 was "disability". The comparison for the purposes of deciding whether Mr L had been treated differently to persons who were in an analogous situation had to be with a member of the armed forces who sought to bring a claim which alleged discrimination related to a protected characteristic other than age or disability e.g. race. Such a person would have a claim. The Judge held that there had therefore been a relevant difference in treatment.

34. The Judge went on to consider whether the difference in treatment was objectively justified. He noted that it was not in dispute that the operational effectiveness of the armed forces is a legitimate aim. The issue was as to proportionality, and he discussed

the approach to this question in law and the arguments of the parties. But ultimately he declined to decide the issue, saying:

> "164. It was not for the tribunal then to go on to see to make findings on the issues of proportionality for two reasons.
>
> 164.1. Firstly, the fact that article 8 was within the ambit of article 14 was irrelevant given the tribunal's primary finding of fact that he lacked jurisdiction
>
> 164.2. Secondly, it considered it would need to hear evidence on the issue."

Mr Dunn's case

35. Mr Dunn served as a soldier from 12 September 1988 until 15 February 2001, when he was discharged under the premature voluntary release provisions. In or around May 2023 he requested that his mode of exit be changed to 'medical discharge, which was relevant to his pension entitlement. But on 23 May 2023 this was refused on the grounds that retrospective requests of this nature were required to be brought within 12 months of discharge. His request was therefore more than 20 years out of time.

36. On 31 July 2023, Mr Dunn brought proceedings in the Employment Tribunal alleging breach of the duty to make reasonable adjustments. His case is that the 12 month rule ought to have been varied by the MOD to allow his request to be considered, and his mode of exit should have been amended accordingly. There was an application by the MOD to strike out this claim, alternatively for a deposit order pursuant to Rules 37, alternatively 39, of the ET Rules, on the grounds that it had no/little reasonable prospect of success on the merits, regardless of the arguments in relation to paragraph 4(3). However, ultimately this application was not adjudicated by the Employment Judge and the merits of Mr Dunn's proposed claim are therefore not before me.

37. The hearing of the arguments as to whether Mr Dunn's claim was barred by paragraph 4(3) took place by CVP on 12 June 2024, before Employment Judge Poynton. Mr Dunn was represented by Mr Keir Hirst, and the MOD was represented by Mr Julian Allsop. Again, the issue was as to whether the claim should be struck out for want of "jurisdiction" pursuant to Rule 37(1) of the ET Rules but, again, the parties invited the Judge to make a final determination of the paragraph 4(3) issue. The Judge did not hear any evidence. Mr Hirst relied on Article 14 ECHR, read with Article 8, but did not pursue an argument that the subject matter fell within the ambit of Article 6 which had been raised in his skeleton argument. The MOD, having previously indicated that it would adopt a neutral stance, argued at the hearing that the matter did not fall within the ambit of Article 8 and that, in any event, it was not possible to interpret section 108 of the Equality Act 2010 so as to enable Mr Dunn to bring his claim.

38. In a Reserved Judgment which was sent to the parties on 16 July 2024, Employment Judge Poynton ruled in favour of the MOD in relation to the section 3 question. In so doing he disagreed with the decision of Employment Judge Stout (as she then was) to contrary effect in *T v Ministry of Defence* (Case No 3309378/2023). He went on to discuss the arguments in relation to the issue of compatibility with Article 14 ECHR and expressed doubts as to whether the matter fell within the ambit of Article 8 given that what was in issue was essentially the extent of Mr Dunn's pension rights, as opposed to his ability to continue to serve in the armed forces. However, ultimately the

Judge did not decide this question given that it was not necessary for him to do so, and nor did he decide whether the literal reading of paragraph 4(3) was incompatible with Article 14.

The appeals

Mr L's case

39. There are four pleaded grounds of appeal in Mr L's case, namely that:

    i) The Employment Tribunal erred in law in ruling against Mr L on the section 3 question ("Ground 1"). As a matter of law it was and is possible to read paragraph 4(3) of Schedule 9 to the Equality Act 2010 in such a way as to enable Mr L to bring his claim.

    ii) Given that this was an application to strike out, "The [Employment Tribunal] erred in failing to take the Appellant's case at its highest and in misapplying the facts." ("Ground 2"). This referred to a finding of fact which the Employment Judge made as to the reason for Mr L being discharged.

    iii) "The [Employment Tribunal] erred in finding that the circumstances did not fall within the ambit of Article 6 [ECHR]" ("Ground 3").

    iv) "The [Employment Tribunal] erred in refusing to address whether the difference in treatment was justified" ("Ground 4").

40. As noted above, the MOD cross appeals against the Employment Judge's finding that the subject matter of this case falls within the ambit of Article 8 ECHR for the purposes of determining the compatibility of paragraph 4(3) with Article 14.

41. As for disposal in the event that Mr L's appeal succeeds, the Notice of Appeal invited the Employment Appeal Tribunal "to set aside the ET's judgment and substitute its decision to read paragraph 4(3) Schedule 9 compatibly with Articles 6 and 8 taken with Article 14, and/or Article 6 so that the Appellant is permitted to have his claim of disability discrimination adjudicated upon.". Ms Braganza's skeleton argument invited the Tribunal to "substitute its decision to read paragraph 4(3) Schedule 9…compatibly with Articles 6 and 8 alone or taken with Article 14". However, she confirmed at the hearing that her case was based solely on alleged incompatibility with Article 14 ECHR, read with Article 6 and/or 8, which was the issue which the Employment Judge recorded had been agreed (see [2] of his Reasons) and had proceeded to consider.

Mr Dunn's case

42. The sole ground of appeal in Mr Dunn's case is that the Judge erred in law in holding that section 108 of the Equality Act 2010 could not be interpreted so as to enable him to bring his claim if Article 14 ECHR required it. The Respondent's Answer simply defended the reasoning and conclusion of the Employment Judge on the section 3 issue.

43. Neither party therefore raised the ECHR compatibility question or any aspect of it. As I understood his position, Mr Hirst seeks an order or declaration that section 108 of the 2010 Act can in principle be read in a way which permits Mr Dunn to bring his claim.

The matter would then need to be remitted to the Employment Tribunal to determine the issue of compatibility with Article 14 ECHR.

My approach to the appeals

44. As will therefore be apparent, the section 3 issue is decisive in both appeals if the Employment Judges' decisions on this issue are upheld. If Mr Dunn's appeal succeeds, Mr Hirst positively advocated remitting the ECHR compatibility question to the Employment Tribunal.

45. In the case of Mr L, the ECHR compatibility question would also be potentially decisive if I were to hold that the subject matter of this case is not within the ambit of Articles 6 or 8 ECHR for the purposes of Article 14. However, if it is within the ambit of either of these provisions, the other elements of the Article 14 analysis would become relevant. As to this, the grounds of appeal in both cases before me did not raise any issue as to whether paragraph 4(3) results in different treatment of analogous cases on the grounds of status i.e. the second and third questions identified by Lady Black in *Stott* (see [28], above). Nor did the MOD in its pleadings. This meant that although Ms Braganza touched on these issues in her skeleton argument, they were not addressed by any of the other parties. Although I queried the Judge's analysis in Mr L's case, nor were they the subject of detailed oral submissions at the hearing before me.

46. For reasons which I explain below, I considered that there was a question mark as to the precise analysis on the second and third *Stott* questions in Mr L's case and that this potentially mattered on the fourth: the issue of objective justification. And if the appeal succeeded on the section 3 issue, it seemed likely that it would be necessary to remit the issue of objective justification in any event. This is because the Employment Judge did not decide this issue, and Ground 4 of the appeal, at least as pleaded in the grounds of appeal and responded to by the MOD, is that he should have. The grounds of appeal did not contend that Employment Judge TR Smith erred in law in failing to conclude that paragraph 4(3) was disproportionate – that this was the only conclusion open to him, or that it was the correct position as a matter of law – although, as I have noted, the relief sought invited the Appeal Tribunal to determine this issue for itself.

47. Ms Braganza's skeleton argued, at least in outline, that if the Judge was wrong to decline to decide the justification issue, I should decide it myself. She wrote that there was nothing to stop the Employment Appeal Tribunal from making a finding that paragraph 4(3) of Schedule 9 breaches Mr L's Convention rights, and she referred to [192]-[195] of the judgment of the Employment Appeal Tribunal in *Steer v Stormsure Ltd* [2021] ICR 807 EAT (Cavanagh J). However, that was a case in which no justification for the difference of treatment was put forward by the (private sector) employer, and the Government did not intervene in the proceedings until they reached the Court of Appeal (see [2021] EWCA Civ 887, [2021] ICR 1671). As the burden of proof in relation to this issue was on the party seeking to justify the difference in treatment, the incompatibility with Article 14 was established. In the present case, the MOD put forward a defence of justification in the Employment Tribunal and sought to support it by legal argument and on the basis of documentary evidence. The problem on appeal is that the Employment Judge did not reach a conclusion on the issue.

48. At the hearing before me, Ms Braganza appeared to recognise that it would be necessary for the question of justification to be remitted if the appeal succeeded on Ground 1.

This was realistic on her part given that the MOD did not agree that I should decide the issue myself, given that this would require me to evaluate the evidence and given that the Appeal Tribunal is not a fact finding tribunal in the context of this type of appeal. Moreover, with respect, and no doubt because he did not intend to reach a final conclusion on the question, the Employment Judge did not set out his legal analysis and make findings in the sort of clear and comprehensive way which would have been necessary for me to reach a firm view based on his Reasons. In the light of *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920 at [21] and [47] in particular, I concluded that there would be no option other than to remit this issue for determination in the event that it remained "live".

49. These considerations led me to conclude, somewhat against my instincts, that I would take the same approach as had been taken by the Employment Judges below and by the parties, at least in their pleaded cases and written arguments for the appeal, and determine the section 3 question in both cases first and on the same hypothetical basis. Furthermore, although the parties' submissions attacked and defended, respectively, aspects of the Judges' reasoning on this section 3 question, at the hearing before me they also appeared to agree that it is a pure question of law and that the appeal would therefore turn on my decision as to the right answer rather than the identification or otherwise of flaws in the reasoning which led to the answers given at first instance. Without intending any disrespect to Employment Judges TR Smith and Poynton, I therefore do not intend to summarise their Reasons in a separate section of this judgment.

The arguments of the parties on the section 3 question

Mr L's case on Ground 1

50. Ms Braganza's position was that paragraph 4(3) of schedule 9 to the Equality Act 2010 should be read as if it says:

> "(3) This Part of this Act, so far as relating to age or disability **other than HIV**, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces"

51. As part of the context for her arguments, Ms Braganza developed two main themes. Firstly, she sought to emphasise the merits of Mr L's claim. She accepted that for the purposes of the issues before the Employment Judge there had been agreed facts about Mr L's service which amounted to no more than the dates on which he began his service, was diagnosed with HIV and was discharged, and an agreement that he was discharged as a result of his HIV and that he had a 'disability' for the purposes of the 2010 Act. The merits of Mr L's claim were contested and were not before the Judge, albeit the nature of his case was relevant to the issue as to the ambit of Article 8 ECHR. However, Ms Braganza set out further detail by way of background and context, emphasising evidence that Mr L was not considered to pose any risk to his colleagues and of strong support from senior officers for his desire to stay in the Army. She also emphasised Mr L's wish to serve until retirement and the difficulty which he has experienced in finding alternative employment and his difficult personal circumstances. Ms Braganza asked me to read various documents from the bundle which was before the Employment Judge and which related to the circumstances of his discharge.

52. I have considered this evidence and these materials but they were not the subject of detailed findings by the Employment Judge. The merits of Mr L's claim did not have a direct bearing on the section 3 question and they were not the subject of live evidence from the MOD or the focus of its submissions. The outcome on the section 3 question cannot turn on whether Mr L would or would not succeed in his proposed claim for disability discrimination as the issue is one of principle, although I accept that consideration of the nature of his case is relevant.

53. Secondly, Ms Braganza relied on press releases by the MOD, on 1 December 2021 and 21 June 2022, which heralded a change of policy in relation to HIV infection and the armed forces. The latter included the following passage:

> "From today, serving personnel who are taking suppressive treatment for HIV and whose blood tests show no detectable virus will now be recognised as fully fit for all service. The policy change also applies to anyone wishing to join the military, meaning living with HIV is no longer a barrier for those wishing to serve"

54. She said that the change of policy had taken place on the instruction of government, for reasons that relate to combat effectiveness, and she referred to a MOD slide presentation in March 2022 which stated: "KEY POINT: No10 directed and maintain that HIV will not be a barrier to military employment".

55. The Judge did make findings about the press releases at [20]-[41] of his Reasons given the weight which Ms Braganza gave to the policy of the MOD in her arguments. These findings included that the changes came into effect after the decision to discharge Mr L had been made but before his actual discharge date. He also made findings about the terms of the actual policy which was set out in the Joint Service Manual of Medical Fitness. The change of policy was indeed that a diagnosis of HIV did not automatically operate as a bar to service in the armed forces or lead to the person being discharged. But this was subject to specified conditions. One such condition related to the person's CD 4 lymphocyte count, which is a measure of a type of white blood cell in order to assess the extent of the damage to the immune system caused by the virus, and therefore the risk of opportunistic infections.

56. At all material times, the MOD's policy required a CD4 count of over 200 cells per mm3 for a period of at least six months if a person was to remain in service, whereas it was common ground that at all material times Mr L's CD4 count was below this figure. At [90] the Judge found that:

> "He was not fit [to serve] because his CD4 count was below 200 cells mm3 and that was the criteria (sic) which he was judged against and which in turn led to his discharge."

57. This is the finding which is challenged under Ground 2 of Ms Braganza's Notice of Appeal.

58. In relation to Ground 1, Ms Braganza's essential submission was that the Judge erred in finding that reading the words "other than HIV" into paragraph 4(3) in the way highlighted in bold at [50] above would *"go against the grain of the [Equality Act 2010] because the legislation expressly prohibited such a claim"* ([91] of his Reasons). Ms Braganza submitted that, on the contrary, the addition of these words would go *with* the

grain of the Equality Act 2010: "the fundamental, underlying feature of the [Act], its entire purpose and intention, is to provide protection and redress for those discriminated against in relation to their protected characteristic/s.". Inserting the words "other than HIV" would protect Mr L from discrimination on the ground of his disability and avoid violation of his Convention rights. It would also be consistent with the Framework Directive and various other international instruments designed to protect those with disabilities from discrimination in the workplace, including the UN Convention on the Rights of Persons with Disabilities, the EU Charter of Fundamental Rights and the prohibition of discrimination and the Universal Declaration of Human Rights.

59. Second, contrary to the view of the Employment Judge, nor would reading in these words risk, in the words of Cavanagh J in *Steer v Stormsure Ltd* (supra) at [149], *"affecting the overall balance struck by the legislature whilst lacking Parliament' panoramic vision across the whole of the landscape"* ([92] of the Employment Judge's Reasons). On the contrary, the effect would be to extend protection to a highly limited cohort of service personnel. This would be in line with the MOD's stated policy position and consistent with its public sector equality duty under section 149 of the 2010 Act. In this regard, Ms Braganza relied on the statement of then Employment Judge Stout in *T v Ministry of Defence* (supra) at [75] (albeit in the context of arguments about section 108 of the 2010 Act) that:

> "this is nothing like the situation that was being considered by Cavanagh J in *Steer v Stormsure*…[that case was] quite different to the possibility arising in this case of making a very modest adjustment to the scope of the exemption for the armed forces for disability discrimination to ensure that it does not apply to discrimination against a small category of claimants"

60. This, said Ms Braganza, was particularly so where the MOD's change in policy undermines the exemption enacted by paragraph 4(3).

61. Third, the Judge had erred in saying that his interpretation was consistent with the will of Parliament in that the 2010 Act sets out the will of Parliament ([95] of his Reasons). In taking this approach he overlooked the point that the Human Rights Act 1998 also reflects the intention of Parliament and it requires that legislation should be interpreted in a way which is compatible with the ECHR if possible, and that declarations of incompatibility should be the exception.

62. Fourth, the Employment Judge was wrong to reason from the fact of the unqualified permission to derogate under Article 3.4 of the Framework Directive that he was being asked to depart from a fundamental feature of the legislation ([93] and [94] of his Reasons). The fact that Parliament had chosen to derogate did not make paragraph 4(3) a fundamental feature or part of the underlying thrust of the legislation. Nor does the decision in *R (Child Soldiers International) v Secretary of State for Defence* (supra) give support for any such proposition, as the Employment Judge appeared to think.

63. Fifth, contrary to the Judge's view, the reading in of the words proposed by Ms Braganza would not undermine combat effectiveness, which was the rationale for Article 3.4 of the Framework Directive as identified in Recital 19. This is the MOD's own view, as reflected in its policy statements referred to above. There is no correlation between combat effectiveness and excluding Mr L from service in the armed forces. He had no detectable virus and was assessed to pose no risk to others by medical specialists.

Many soldiers remain in service with limited ability to deploy, particularly if there is a good chance of improvement, as there was in Mr L's cases. Moreover, the MOD's disclosure shows that, far from equal treatment threatening combat effectiveness, the stigmatising of HIV is likely to deter service personnel from seeking diagnosis and treatment and thereby increase risk. These considerations had driven the MOD's change in policy in relation to HIV.

64. Ms Braganza supported these submissions by reference to various passages from *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 which included the following points. Section 3(1) of the 1998 Act may require the court to depart from the intention of the Parliament which enacted the legislation under consideration (per Lord Nicholls at [30]); a court can modify the meaning and hence the effect of primary legislation (per Lord Nicholls at [32]); interpretation under section 3(1) is the primary remedy where issues of incompatibility arise, and resort to a declaration of incompatibility under section 4 of the 1998 Act must always be the exceptional course (per Lord Steyn at [50]). She pointed out that the only limits on the interpretive obligation are that the meaning derived by the court must not be "inconsistent with a fundamental feature of the legislation". It "must be compatible with the underlying thrust of the legislation being construed" and must "go with the grain of the legislation" (see Lord Nicholls at [33]).

65. As for the "grain" of the Equality Act 2010, Ms Braganza relied on the preamble to the Act which states that it is:

> "An Act to ……to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics…to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; ….to increase equality of opportunity; ..and for connected purposes."

66. She also relied on the following passage from the judgment of Eady P in *British Airways Plc v Rollett* [2024] EAT 131, [2025] ICR 242 at [53]:

> "53. The " grain " of the EqA is clear: it seeks to harmonise discrimination law and to strengthen the law to support progress on equality (Explanatory Notes, para 10); although it did not itself implement the EU Equality Directives for the first time, it replaced earlier legislation that had done so (Explanatory Notes, para 21). Specifically, section 19 of the EqA was intended to apply the EU definition of indirect discrimination, "to ensure uniformity of protection across all the protected characteristics in all areas where it applies" (Explanatory Notes, para 81)."

67. *Rollett* was a case in which the issue was whether section 19 of the 2010 Act could be interpreted so as to permit an indirect discrimination claim to be brought by a person who did not share the protected characteristic of the group which was disadvantaged by the indirectly discriminatory policy, criterion or practice but who was also disadvantaged by it (e.g. whether a man who was also disadvantaged could bring a claim in respect of a practice which disadvantaged women as a group). In *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (Case C-83/14) [2015] All ER (EC) 1083, the European Court of Justice had held that this was permitted under EU law. Eady P said:

> "52. Although it is not disputed that this construction would provide for the form of indirect discrimination allowed in *CHEZ* , the question raised by the appeal is whether this falls on the wrong side of the boundary between interpretation and amendment: whether it goes with the "grain of the legislation" or whether it is inconsistent with "a fundamental or cardinal feature" of that legislation (*Vodafone 2*, para 38(a)), or whether it effectively involves "turning the scheme inside out" (*Ghaidan* , para 110)."

68. She went on to hold that a conforming interpretation of the 2010 Act was possible in that case, and she explained why in a detailed consideration of the legislative history and the caselaw. But, essentially, allowing such a claim to be brought was consistent with the aims of the 2010 Act and it involved an incremental expansion in the direction in which European and domestic equality law had been developing through legislation and caselaw.

69. Ms Braganza's overall submission was that to expand the scope of the Equality Act 2010 so that it applied to service personnel with HIV would be consistent with the aims of the Act, and would amount to a very limited incremental increase in its reach. She said that it was estimated that this would benefit around 100 service personnel although, of course, it would benefit those who might wish to enlist as well and, on Mr Dunn's argument, former service personnel. There was therefore nothing in any floodgates argument which might be put forward by the MOD.

Mr Dunn's case

70. Mr Hirst's submission was section 108 of the 2010 Act can and should be read as if it is worded as follows:

> (1) A person (A) must not discriminate against another (B) if—
>
> (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
>
> (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act. **(or would do were the Act not dis-applied by paragraph 4(3) of Schedule 9)**"

71. This was the conclusion which then Employment Judge Stout reached in *T v Ministry of Defence* (supra), which Mr Hirst submitted was correctly decided in relation to the section 3 question. He also noted that the decision in *T* had not been appealed by the MOD.

72. Mr Hirst adopted Ms Braganza's arguments as to the requirements of section 3(1) of the Human Rights Act 1998 and as to the grain of the 2010 Act, and I therefore need not repeat these aspects of his helpful submissions. He also relied on and adopted the reasoning of Employment Judge Stout, and he drew particular attention to the following passages from her judgment:

i) [71] and [72] where she said:

> "71….Although paragraph 4(3) is framed in terms of *(current)* 'service in the armed forces', by virtue of s 108(1)(b) of the EA 2010 the *exemption* also applies

where the service relationship has ended….. *By this indirect means*, *the exemption for the armed forces for disability is extended to apply where the individual has left the armed forces* in the same way as it applies while they are serving members. (emphasis added)

72. On the face of the Act, accordingly, the armed forces are free to discriminate against disabled ex-servicemen and women. That is a surprising position because, despite Kenneth Parker J's decision in the Child Soldiers' case as to the width of the derogation provided by the Framework Directive, the purpose of the derogation is (as Recital (19), and commonsense, make clear) to protect the combat effectiveness of the armed forces. However, there can be no possible link between combat effectiveness of the armed forces and the way that the armed forces is permitted to treat disabled ex-servicemen and women. I cannot see why the same obligation not to discriminate against members of the public on grounds of disability, which applies to the armed forces as to other public authorities by virtue of s 29(6) of the EA 2010, should not also apply to ex-servicemen and women. However, by dint of s 28(2) of the EA 2010 it does not. By virtue of their former employment status, ex-servicemen and women must bring their claims under Part 5, and thus are barred by the combination of paragraph 4(3) of Schedule 9 and section 108(1)(b) from bringing disability discrimination claims….".

ii) [75] where she said:

"…..In my judgment a revision to the EA 2010 *so as to provide that the exemption enjoyed by the armed forces* in relation to disability discrimination *does not apply* to claims brought by ex-servicemen and women by virtue of s 108 of the EA 2010 would not alter a fundamental feature of the legislation. Indeed, since it is not possible to think why the armed forces should be permitted to discriminate against disabled ex-servicemen and women, *the overwhelming impression is that no consideration was given to the interaction between paragraph 4(3) of Schedule 9 and s 108(1)(b) when it was enacted*…. paragraph 4(3) itself is not mentioned in the Explanatory notes, only paragraphs 4(1) and (2))…." (emphasis added)

73. Judge Stout went on to say that this would be *"a very modest adjustment to the scope of the exemption"* and that it would only benefit a small category of claimants as noted in the passage relied on by Ms Braganza (see [59] above). The Judge added that *"there is nothing to suggest that the exemption was ever intended to apply to [ex-service personnel] in any event."*.

74. Mr Hirst went on to argue that Employment Judge Poynton had been wrong to conclude that paragraph 4(3) was a fundamental feature of the legislation. He emphasised that the reason for the permission to derogate under the Framework Directive was to safeguard the combat effectiveness of the armed forces, which was irrelevant in the case of ex-service personnel. He also argued that paragraph 4(3) related to "active service" and that the position under section 108 of the Equality Act 2010 was likely the result of an oversight given that ex-service personnel are more likely than ex-employees to have disabilities. It was inconceivable that Parliament intended to enable disability discrimination against them. There would be no plausible policy reason to exclude armed forces veterans from the 2010 Act. Given that the aim of the Equality Act 2010 was to promote equality and to eliminate discrimination, Parliament would have

enacted a much clearer exception if it had intended this result. It would be very unfortunate indeed if section 108 were to be applied literally and to have results which were not spotted or considered by Parliament. Moreover, as the MOD is subject to the public sector equality duty under section 149 "this is not a rubicon crossing issue".

The applicable principles

75. In *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, [2010] Ch 77 the Court of Appeal considered a number of authorities on the principles to be observed in deciding whether an interpretation which conforms with European Union law or the ECHR, including *Pickstone v Freemans plc* [1988] UKHL 2, [1989] AC 66, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135; *Litster v Forth Dry Dock & Engineering Co Ltd* [1988] UKHL 10, [1990] 1 AC 546 and *Ghaidan v Godin-Mendoza* (supra). Having done so, at [37] and [38], the Court of Appeal approved the following summary which was relied on, inter alia, by the Court of Appeal in *Rowstock Ltd v Jessemey* [2014] EWCA Civ 185, [2014] 1 WLR 3615 and *Blackwood v Birmingham and Solihull Mental Health NHS Foundation* [2016] EWCA Civ 607, [2016] ICR 903 at [48], and which I gratefully adopt.

> "37…..In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction….; (b) it does not require ambiguity in the legislative language…; (c) it is not an exercise in semantics or linguistics..; (d) it permits departure from the strict and literal application of the words which the legislature has elected to use..(e) it permits the implication of words necessary to comply with Community law obligations…..; and (f) the precise form of the words to be implied does not matter,,,,.
>
> "38….The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'…An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment…; and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate…."

76. Obviously, this approach is consistent with Parliamentary sovereignty given that Parliament placed the general interpretive obligation on the courts via section 2 of the European Community Act 1972 in the case of EU law, and under section 3(1) of the Human Rights Act 1998 in the case of the ECHR. Moreover, the requirement is that the court interprets the specific provision which is under consideration in a way which goes with the grain of the legislation of which it forms part and is therefore consistent with what Parliament can be taken to intend in the circumstances which have arisen, even if that was not its intention at the time when the provision was enacted.

77. However, this approach has also meant that the courts have repeatedly declined to read in words which reverse or directly contradict a specific statutory provision. Thus, for

example, in *Mercer v Alternative Future Group Ltd* [2024] UKSC 12, [2024] ICR 814 Lady Simler JSC said of section 3(1) of the 1998 Act that:

> "While this section gives the court a powerful tool with which to interpret legislation, it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite;…."

78. In the *Rollett* case (supra), on which Ms Braganza relied, Eady P said this at [31]:

> "Where, however, legislation specifically provides for an exception to rights that would otherwise ensure protections consistent with those provided under a relevant Directive, an attempt to interpret the provision in question so as to avoid that exception would cross the line, notwithstanding a more general legislative intent to achieve harmony with the Directive: see *Walker v Wallem Shipmanagement Ltd* [2020] ICR 1103 .

79. See also Lord Rodger in *Ghaidan* (supra) at [116] and [117], and Stacey J in *Ministry of Defence v Rubery* [2025] ICR 521 at [97]-[105].

80. At the heart of the principles summarised in *Vodafone 2* is the point that the words '*so far as it is possible to do so'* in section 3(1) and the provision for declarations of incompatibility under section 4 show that the 1998 Act contemplates that there will be cases, albeit this will be the exception rather than the rule, where the task of addressing an incompatibility between legislation and the ECHR is a matter for Parliament. A court which is asked to reach a conforming interpretation is permitted and, indeed, required to *interpret* the legislation in question but it is not permitted to *amend* it as this would usurp the role of Parliament. As Lord Nicholls put it in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] AC 291 at [39]:

> "The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

81. The distinction between interpretation and amendment is not always easy to apply given that the general interpretive obligation permits the reading in of words which change the meaning of a specific statutory provision. However, the decision as to whether a proposed reading in of words is or is not on the right side of the line is also informed by, amongst other things, the constitutional roles of the courts on the one hand, and Parliament as the democratically elected legislature which decides issues of policy on the other, as well as the differences in their areas of expertise. This is the point which Cavanagh J no doubt had in mind in *Steer v Stormsure* (supra) when he referred to the risk that the interpretation contended for in that case would affect the overall balance struck by the legislature, whilst the Appeal Tribunal lacked Parliament's panoramic vision across the whole of the landscape ([149]), and would have *"major policy and practical consequences, the effects of which the Employment Appeal Tribunal is not equipped to evaluate"* ([150]).

82. It is also the point which Lord Nicholls expressed as follows at [33] of *Ghaidan v Godin- Mendoza* [2004] UKHL 30, [2004] 2 AC 557:

> "33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". *Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.*" (emphasis added)

Discussion of the section 3 question

The nature of the problem for Mr L and Mr Dunn

83. In the light of Ms Braganza's approach, I will need to say something about the Article 14 analysis, albeit without finally deciding the issue of the compatibility of paragraph 4(3) with Article 14 ECHR for the reasons which I have indicated. But before analysing the application of the *Stott* questions in the present context, it is important to identify what, precisely, the problem is for Mr L and for Mr Dunn in relation to the Equality Act 2010.

84. As is well known, the 2010 Act does not protect all personal characteristics which may lead to a person being treated adversely, or ban all forms of discrimination in all spheres of economic activity, society or life. Part 2 of the 2010 Act defines the key concepts for the purposes of the legislation: the particular characteristics which are protected by the Act (sex, age, disability etc), and the types of discrimination (direct, indirect, failure to make reasonable adjustments, etc). The Act goes on, at Parts 3-7, to identify the sectors ('the provision of services and public functions'; 'premises'; 'work'; 'education'; and 'associations'), and the specific decisions and actions within those sectors (such as those identified in section 39(1) and (2), quoted at [5] above), in respect of which discrimination is unlawful e.g. in deciding who should be offered employment or in terminating a person's employment.

85. In the present case, subject to various conditions and qualifications, by section 39 of the Equality Act 2010 Parliament has conferred a right on employees (as defined by section 83(2)) and applicants for employment not to be subjected to discrimination by their employers which relates to any of the protected characteristics identified in Part 2. By sections 83(3), 83(11), paragraph 4(3) of Schedule 9 and section 108, Parliament has also conferred a right not to be subjected to discrimination in the context of work and occupation on a cohort who are not employees or applicants for employment but who wish to serve, serve or have served in the armed forces. However, that right is limited to protection from discrimination in relation to the Part 2 protected characteristics other that disability and age.

86. In form, this position is referred to in the 2010 Act as an exception and, as part of Mr Dunn's case, and in *T v Ministry of Defence*, as "an exemption" enjoyed by the armed forces. However, in substance – particularly when the legislative history is considered - the position is that Parliament has not bestowed protection from disability or age

discrimination on anyone in relation to service in the armed forces. Such discrimination has never been prohibited by legislation, and that remains the case under the 2010 Act.

87. The question in the present case is therefore one of rights rather than the 'jurisdiction' of the Employment Tribunal in the sense of the power to determine the claim. The Employment Tribunal has the power to determine both of the present cases (see section 120(1) of the 2010 Act, albeit subject to section 121), but the issue whether either claimant has a cause of action in law.

Outline of the Article 14 analysis

Within the ambit of Article 6?

88. It follows from this that the present case does not fall within the ambit of Article 6 ECHR for the purposes of the Article 14 analysis. As noted above, this was the conclusion which the Employment Judge TR Smith reached in Mr L's case and it is challenged under Ground 3. Mr Hirst, for Mr Dunn, appears to have come to the same conclusion in not pursuing the Article 14 argument on this particular basis. The, with respect, obvious flaw in Ms Braganza's argument under Ground 3 is that Article 6 presupposes the existence of a civil right and then requires that it be determined at a fair and public hearing etc. It is directed at procedural rules or practices which prevent this from occurring. In the present case, the problem is that Parliament has not conferred a civil right on Mr L not to be subjected to disability discrimination, rather than that Mr L enjoys such a right but has been denied a fair and public hearing of the question whether it has been breached.

89. In *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 778, to which Ms Braganza referred, Lord Sumption JSC said the following at [15] and [16]:

> "15. One of the perennial problems posed by the right to a court is that article 6 is concerned with the judicial processes of Convention states, and not with the content of their substantive law……
>
> 16. The dichotomy between procedural and substantive rules is not always as straightforward as it sounds, partly because the categories are not wholly distinct and partly because they do not exhaust the field…… *What the Strasbourg court means by a procedural rule is a rule which, whether technically procedural or substantive in character, has the effect of barring a claim for reasons which do not go to its legal merits; that is to say, rules which do not define the existence or extent of any legal obligation*." (emphasis added)

90. The present case is plainly concerned with provisions of the Equality Act 2010 which define the existence or extent of a legal obligation on the part of employers (in the broad sense) not to discriminate against those who work or provide service. It is therefore outwith the ambit of Article 6 for the purposes of Article 14 ECHR: see, further, *Roche v United Kingdom* (Application no 32555/96) [2006] 42 EHRR 30 at [133].

Within the ambit of Article 8?

91. For the purposes of the question whether the impugned conduct or measure falls within the ambit of Article 8 ECHR, it seems to me that it is also important to focus on the point that the substance of the complaint in this case is that the right to protection from disability discrimination in the context of work or occupation has been conferred on certain categories of person identified in Part 5 of the 2010 Act (employees, etc) but not on those who serve in the armed forces. The question is therefore whether the conferring by the State of protection from disability discrimination in the context of work or occupation is within the ambit of Article 8 ECHR.

92. As noted above, the MOD argues in the context of the cross appeal that the answer to this question is "no". The conferring of protection from disability discrimination by the Equality Act 2010 is not one of the ways in which the State gives effect to Article 8 (see e.g. *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 at [16], and nor is there a sufficient link between the subject matter of Mr L's complaint and the exercise of Article 8 rights ([14]). The Employment Tribunal was right to apply the consequence or effects based approach in *Denisov v Ukraine* (Application 76639/11) at [107]-[109] but it erroneously looked at the particular facts of Mr L's case, including his discharge and the effect which it had on him, rather than looking at the consequences of the impugned measure i.e. of people in the armed forces having no cause of action in disability discrimination. Had the Judge taken the right approach he would have found that the consequences of paragraph 4(3) were not sufficiently linked to Article 8 to bring the case within the ambit of that article.

93. Ms Braganza argued the contrary. The underlying reason for the treatment of Mr L – his diagnosis of HIV - was part of, or was linked to, his private life. In terms of the consequences based approach under *Denisov*, the loss of his occupation had severe consequences. Serving in the armed forces involves a substantial overlap between private life and working life given that members of the armed forces tend to have closer working and social relationships than civilians. They form more of a community, the nature of their working life creates stronger personal bonds and they live and socialise together. Mr L's discharge disrupted his inner circle, he suffered financial consequences and there was an impact on his psychological and moral integrity, dignity and social activity.

94. I tend to agree that Ms Braganza's approach and the approach of the Employment Judge was overly focussed on the particular circumstances of Mr L, the reasons for his discharge and the consequences for him in particular. The focus should be on the effect of denying protection from disability discrimination to members of the armed forces in general. However, the issue is in this case is as to protection against exclusion or other detrimental treatment related to a personal characteristic – disability. In *Glor v Switzerland* (Application no 13444/04) at [52] the European Court of Human Rights reiterated that "the concept of 'private life' is a broad term not susceptible to exhaustive definition" and that it covers the physical integrity of the person. A tax which had its origin in unfitness to serve in the army for health reasons therefore "clearly" fell within the scope of Article 8. At [95] of *Denisov* the Court said that Article 8 also covers the psychological integrity of a person. "It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.".

95. I am therefore prepared to assume, without deciding, that the subject matter of Mr L's complaint falls within the ambit of Article 8. I note that the position is not necessarily the same in relation to Mr Dunn's case, as Employment Judge Poynton pointed out. He had not been in the armed forces for 20 years at the time of the alleged failure to make reasonable adjustments, and the issue of redesignating the basis on which he was discharged appears to have arisen principally because it affects his pension. His case is that a 12 month time limit for applying for redesignation is discriminatory and therefore ought to have been adjusted. It may well be the case that section 108 and/or paragraph 4(3), so far as they operate to bar complaints about post termination discrimination do not have a sufficiently strong link with Article 8. However, I reach no view on the matter as no issue was raised on it in the pleadings for the appeal, and it was not the subject of argument before me.

The ground for the differential treatment and the relevant comparison

96. Following through the analysis, I was not addressed on the second and third *Stott* questions in any detail as I have said. However, the heart of the Article 14 complaint of discrimination in this case is the fact that Mr L and Mr Dunn were not protected against disability discrimination at the material times. My provisional view, in respectful disagreement with Employment Judge TR Smith and Ms Braganza's analysis, is therefore that the correct comparison for the purposes of the different treatment question should be with those in analogous situations who <u>are</u> protected against disability discrimination in the context of work and occupation. I am prepared to assume, again without deciding, that those who are 'employees' for the purposes of the 2010 Act are in an analogous situation to those who serve in the armed forces: arguably this is implicitly recognised by the facts that both cohorts are dealt with by section 83, and that section 83(3) effectively requires members of the armed forces to be treated as employees for the purposes of the Part 5 rights which are conferred on them.

97. On this analysis, the relevant ground for differentiation for the purposes of the Article 14 analysis is that the service to which the discrimination relates is service in the armed forces. Again, I am prepared to assume that prospective, current or past membership of the armed forces comes within 'other status' for the purposes of Article 14: compare *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 5905 at [30].

98. It seems to me that an analysis which compares members of the armed forces who are protected against, for example, race discrimination with members of the armed forces who are not protected against disability discrimination, and concludes that the criterion for differentiation is "disability", overlooks the fact that the issue in this case is as to the rights or protections conferred on a person by Parliament, rather than as to whether that person is or is not a member of a particular racial group, or has or does not have a disability. Under the 2010 Act, it is the person's status as an employee or a member of the armed forces which determines what rights they have under Part 5. Moreover, all members of the armed forces enjoy the same rights under Part 5 and, indeed, section 108 of the Equality Act 2010. So, on the comparison advocated by Ms Braganza and accepted by the Employment Judge, there is no relevant difference in treatment.

99. My suggested approach is not an artificial one. A person of any racial group may be subjected to race discrimination on the grounds of membership or non-membership of a particular racial group. All members of the armed forces of whatever racial group are protected against discrimination on this ground, even if their racial group makes it

unlikely that they will ever be subjected to race discrimination in this context. A person may not have a disability when they started in a particular role, so that their right not to be subjected to disability discrimination has no particular value to them, but then develop a disability, as it appears Mr L did. It is not artificial to say that if he had been an employee he would have been protected against disability discrimination throughout his career in the Army even if this only became relevant to him when he was diagnosed with HIV. Similarly, there may be an issue as to whether a person does have a disability, or a person may have a disability but never need to assert their right not to be discriminated against on this ground. And, of course, a person of a particular racial group who is serving in the armed forces may also have a disability and therefore be protected in respect of the former characteristic but not the latter. In each case, what matters for present purposes is whether the relevant right or protection has been conferred on the person by Parliament, rather than the specifics of whether they have or have not been categorised as "disabled" or are a member of a particular racial group.

Justification

100. On this approach, what requires to be objectively justified under the fourth *Stott* question is the difference in treatment, under the Equality Act 2010, between those who serve in the armed forces and 'employees' as defined in section 83(2) on whom Part 5 confers protection from disability discrimination. That is the legislative choice which is really challenged by Mr L and Mr Dunn. This may or may not make a difference to the *outcome* on the justification question, as compared with the outcome if the comparison is between different members of the armed forces, and the ground for discrimination is 'disability'. For the reasons given above, it is not appropriate for me to decide this question. However, it may well make a difference to (at least) the strength of the reasons which are required by a court or tribunal to justify the difference in treatment, or the intensity of the review of the decision, given that 'disability' is arguably more central to a person's identity – closer to being a 'suspect' ground - than the fact that they are serving, or used to serve, in the armed forces: see e.g. *AL Serbia v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [29]-[31].

101. Moreover, even if the correct approach to the second and third *Stott* questions is as Employment Judge TR Smith found it to be, my provisional view is also that the Article 14 analysis requires recognition that the impugned provisions of the Equality Act 2010 are not solely or specifically concerned with armed forces personnel who have been diagnosed with HIV. The issue in the present case relates to the rights of prospective, current and past members of the armed forces generally or, on the Employment Judge's analysis, the rights of such people with disabilities generally. This point also potentially affects the issue of justification because the adverse effect of the measure is not limited to people with HIV and because it may be justified by reference to consideration of the implications if protection were available to members of the armed forces generally.

102. Overall, my doubts about Employment Judge TR Smith's analysis on the second and third *Stott* questions and Ms Braganza's approach to the issue of justification, as well as the fact that these issues were not fully argued before me, fortified me in the view that if the appellants succeeded on the section 3 question the justification issue would need to be remitted.

The application of section 3 of the Human Rights Act 1998 in this case

Overview

103. For the reasons stated below, I agree with the conclusions of the Employment Judges in both Mr L and Mr Dunns' cases that it is not *'possible'* to read and give effect to the Equality Act 2010 so that it gives each or either of them a right not to be subjected to disability discrimination at the time of the acts complained of or at all, and to bring a claim on this basis. Essentially this is because, as I will explain, the longstanding policy of Parliament has been that the relevant disability discrimination legislation does not apply to service in the armed forces. In my view, the 2010 Act cannot be read and given effect in a way which reverses this policy. Such a decision would be for Parliament rather than the courts and it would require a decision to amend the statute, whether to confer disability rights on people with HIV or more generally, and whether in relation to prospective, current or past members of the armed forces.

Legislative history

104. When the Disability Discrimination Act 1995 was originally enacted, following the basic approach and structure of the existing anti-discrimination legislation and, indeed, the structure of the Equality Act 2010 (summarised at [84] above), it outlawed specified forms of disability discrimination in particular sectors including, under Part II, '*employment'*. Part II covered disability discrimination in relation to employees and applicants for employment in essentially the same forms as under section 39 of the 2010 Act, against contract workers, by trade organisations and under occupational pension schemes and employment related insurance services. However, section 64(7) provided that:

> "It is hereby declared (for the avoidance of doubt) that Part II does not apply to service in any of the naval, military or air forces of the Crown".

105. The section was expressed as a declaration for the avoidance of doubt because service in the armed forces is not 'employment' as defined by section 68(1) of the 1995 Act. It therefore was not strictly necessary to say that Part II did not apply to it. Moreover, section 64(7) *confirmed that Part II of the 1995 Act did not apply*, rather than enacting an exception or exemption in respect of the armed forces.

106. The position under the 1995 Act was in contrast to, for example, the Sex Discrimination Act 1975, Part II of which applied to service in the armed forces with effect from 1 February 1995, albeit subject to a genuine occupational requirement exception for combat effectiveness (see the then section 85(4)). The position under the Race Relations Act 1976 at the time of the enactment of the 1995 Act was that section 75(2)(c) expressly provided that Parts II to IV applied to service in the armed forces. Part II conferred protection against race discrimination in the employment field.

107. Over a number of years, the scope of Part II of the Disability Discrimination Act 1995 was expanded by a series of amendments so that, by the time of the enactment of the Equality Act 2010, it was entitled *'the employment field and district councils and members of locally-electable authorities'* and it covered a significantly wider range of roles or occupations. However, the substance of section 64(7) had not changed, and the 1995 Act therefore continued to have no application to service in the armed forces.

108. A key event which had taken place in the intervening period was that, on 27 November 2000, the Council of the European Union enacted the Framework Directive, with a deadline for implementation by Member States of 2 December 2003. By way of implementation of the Framework Directive in relation to disability discrimination, the Disability Discrimination Act 1995 (Amendment) Regulations 2003 made substantial amendments to Part II of the 1995 Act.

109. The 2003 Regulations took into account recommendations made by the Disability Rights Task Force in its December 1999 Report - *"From Exclusion to Inclusion"* - which was responded to by the Government of the day in its March 2001 Report *"Towards Inclusion – Civil Rights for Disabled People"*. The Regulations expanded the reach of Part II of the 1995 Act in terms of the occupations to which it applied – for example firefighters, prison officers and partners in business partnerships were now specifically included. Also of significance in the present case, Regulation 25 inserted a new section 64A of the 1995 Act which provided that the holding of the office of constable (and appointment as a police cadet) was to be treated as 'employment' for the purposes of Part II of the Act. In *Quinn v Ministry of Defence* (supra) Swinton Thomas LJ accepted that a constable and a member of the armed forces are in comparable positions in terms of employment status.

110. Also of importance to Mr Dunn's case, Regulation 15 of the 2003 Regulations inserted a new section 16A into Part II of the 1995 Act which rendered discrimination after the end of a relevant relationship unlawful provided the discrimination arose out of, or was closely connected to, the relevant relationship. Under section 16A(2) a relevant relationship was one *"during the course of which an act of discrimination against, or harassment of, one party to the relationship by the other party to it is unlawful under any preceding provision of this Part"*. At the same time, equivalent provisions were inserted into the Sex Discrimination Act 1975 (see section 20A which was inserted by regulation 3 of the Sex Discrimination Act 1975 (Amendment) Regulations 2003; and section 27A of the Race Relations Act 1976 which was inserted by regulation 29 of the Race Relations Act 1976 (Amendment) Regulations 2003. Equivalent provision was also made under regulation 24 of the Employment Equality (Age) Regulations 2006 when they were subsequently enacted, here in the context of the 2006 Regulations being applicable to the police (regulation 13) but not service in the armed forces (regulation 44(4) which provided that *"These regulations do not apply to service in any of the naval military or air forces of the Crown"*).

111. The amendments made by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 also included an amendment to section 64(7) of the 1995 Act, but this amendment did not materially alter its effect. Pursuant to Regulation 24(d), the first ten words of section 64(7) were deleted so that it now simply provided that:

> "Part II does not apply to service in any of the naval, military or air forces of the Crown".

112. As I have noted, Part 2 included new section 16A. In my view, this tends to reinforce the inference that Parliament therefore made a considered decision that protection against post termination disability discrimination would not apply to service in the armed forces.

113. It is also worth noting that, by way of implementation of the Framework Directive, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion and Belief) Regulations 2003 were enacted. These outlawed discrimination related to the specified grounds in the field of employment and vocational training. In both sets of regulations, regulation 36(2)(c) provided that they applied to service in the armed forces as they applied to employment by a private person etc. Both sets of regulations also prohibited post termination discrimination (regulation 21).

114. In my view it is therefore safe to infer that, at the time of the various sets of 2003 regulations, including the Disability Discrimination Act 1995 (Amendment) Regulations 2003, a considered decision was taken that the United Kingdom would avail itself of the derogation under Article 3.4 of the Framework Directive and would not alter its pre-existing position that Part II of the 1995 Act had no application to service in the armed forces. No protection from disability discrimination would be conferred in respect of such service. This would be the position whether at the application for enlistment stage, during service or after its termination. It is also worth noting that this position was taken after the Human Rights Act 1998 had come into force on 2 May 2000 and, it can be inferred, with awareness of the potential for human rights implications.

115. Thereafter, section 16A of the 1995 Act was not materially amended and section 64(7) was not amended at all. Up to the time of the enactment of the Equality Act 2010 the position therefore remained that the parts of the Disability Discrimination Act 1995 which outlawed disability discrimination in the field of employment and occupation had no application to service in the armed forces. This was despite various other amendments to the 1995 Act, including substantial further amendments made by the Disability Discrimination Act 2005. The Explanatory Notes state that 2005 Act took forward the Government's remaining proposals in "*Towards Inclusion – Civil Rights for Disabled People"*. A draft Bill was published in December 2003 and was considered by a Joint Committee of both Houses of Parliament, which reported its findings on 27 May 2004. The Government then published its response to the Joint Committee's report on 15 July 2004. Again I note that this consideration and amendment of the 1995 Act was undertaken long after the Human Rights Act 1998 had come into force.

116. As to the background to the Equality Act 2010, as is well known, the law against discrimination related to various protected characteristics was by now set out in a number of different pieces of primary and secondary legislation which are listed at [4] of the Explanatory Notes to the 2010 Act, a number of which I have mentioned above. [7] and [8] of the Explanatory Notes state that:

> "7. In February 2005, the Government set up the Discrimination Law Review to address long-term concerns about inconsistencies in the current discrimination law framework. The Review was tasked with considering the fundamental principles of discrimination legislation and its underlying concepts, and the opportunities for creating a clearer and more streamlined framework of equality legislation which produces better outcomes for those who experience disadvantage.
>
> 8. In June 2007 the Department for Communities and Local Government published a consultation paper, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. This was followed in June and July 2008 by two Command

> Papers published by the Government Equalities Office: Framework for a Fairer Future – the Equality Bill (Cm 7431); and The Equality Bill – Government Response to the Consultation (Cm 7454). In January 2009, the Government published the New Opportunities White Paper (Cm 7533) which, amongst other things, committed the Government to considering legislation to address disadvantage associated with socio-economic inequality."

117. [10] and [11] of the Explanatory Notes state that:

> "10. The Act has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.
>
> 11. The Act brings together and re-states all the enactments listed in paragraph 4 above and a number of other related provisions. It will harmonise existing provisions to give a single approach where appropriate. Most of the existing legislation will be repealed. The Equality Act 2006 will remain in force (as amended by the Act) so far as it relates to the constitution and operation of the Equality and Human Rights Commission; as will the Disability Discrimination Act 1995, so far as it relates to Northern Ireland."

118. [12] then lists a number of respects in which the 2010 Act strengthened equality law including by extending protection against discrimination, expanding the public sector equality duty to additional protected characteristics, authorising certain forms of positive action and broadening the power of employment tribunals to make recommendations. In *Steer v Stormsure Ltd* (supra) Cavanagh J said that the Government and Parliament had conducted a "wholesale review" of the law relating to discrimination and that it was safe to infer that a decision had been made not to add interim relief to the suite of available remedies: see [146]. The Court of Appeal agreed with him on this point: see [2021] ICR 1671 at [57].

119. As is quite apparent, another decision taken by Parliament after this review of equality law was that the Equality Act 2010 would retain existing protections against discrimination in relation to service in the armed forces (e.g. in respect of the protected characteristics of sex, race, sexual orientation, religion or belief etc). It would, however, continue with the existing derogations from the Framework Directive (to which the United Kingdom remained subject) under regulation 44(4) of the Employment Equality (Age) Regulations 2006 and section 64(7) of the Disability Discrimination Act 1995, albeit regulation 44(4) and section 64(7) would be reworded to the terms of paragraph 4(3) of Schedule 9 to the 2010 Act. Given that the approach to drafting under the 2010 Act was to bring all protected characteristics and forms of discrimination, as it were, under one legislative roof, and to set out generally applicable concepts and prohibitions, the fact that the rules against disability and age discrimination did not apply to service in the armed forces was structured and expressed as an exception. But the substance of the position remained as it had been under the predecessor legislation.

Paragraph 4(3) and Mr L's case

120. In the light of this legislative history, and the clear terms of paragraph 4(3), it seems to me to go against the grain of the legislation to hold that Part 5 of the 2010 Act, so far as relating to disability discrimination, does in fact apply to service in the armed forces, when paragraph 4(3) states that it does not. To reach such a conclusion would be to

read paragraph 4(3) as saying the opposite to what it says, but it would also be contrary to the long standing policy of Parliament which has been maintained at various points when the disability discrimination legislation was considered including, in 2003, when a specific decision whether to include service in the armed forces required to be taken; and in 2010 after a wholesale review of equality law. Moreover, throughout this period the Human Rights Act 1998 was in force.

121. Conferring protection from disability discrimination in relation to service in the armed forces would not merely entail a continuation in the direction of travel of the equality legislation. As the 2010 Act and other employment legislation reflect, service in the armed forces is a distinct area of work and occupation in respect of which distinct legal arrangements apply. Parliament has chosen to confer certain employment rights in respect of such service, and protection against certain forms of discrimination. But, for policy reasons related to the distinctive features of such service and the role of the armed forces, it has consistently chosen not to confer protection from disability discrimination.

122. It is for Parliament, rather than the courts, to decide whether that policy should be reversed or qualified. Moreover, this would not be an all or nothing issue. For example, there might need to be consideration of whether protection should be conferred in relation to some types of disability but not others, or some forms of discrimination but not others; or there might be certain roles or situations to which the disability discrimination provisions of the 2010 Act should or should not apply; or there might be distinctions drawn between complaints arising before, during or after the completion of service. Again, these would be questions of policy for Parliament rather than the courts.

123. I understand why, from a tactical point of view, Ms Braganza argues for a limited qualification to paragraph 4(3) – which extends protection to those with HIV alone - and says that this would only benefit a small number of personnel. However, I have doubts about whether this would be the logical consequence of a finding of incompatibility between paragraph 4(3) and Article 14 ECHR. Given that paragraph 4(3) applies generally, rather than specifically to HIV cases, and assuming that the justification issue therefore requires to be approached by reference to its overall advantages and disadvantages rather than solely by reference to its impact on people with HIV (see the discussion at [101] above), it would seem logical that the section 3 question would be whether it was possible to read paragraph 4(3) out of the 2010 Act, rather than whether it was possible to read it in such a way as to confer rights on service personnel with HIV alone.

124. But even assuming that these doubts are unfounded, I cannot accept that it would be consistent with the grain of the 2010 Act to read the words "other than HIV" into paragraph 4(3) as Ms Braganza argues. This would still contradict the clear and unqualified terms of paragraph 4(3) and go directly against the longstanding policy that the relevant prohibitions on disability discrimination do not apply to service in the armed forces. Moreover, whilst the question of the number of people who would benefit from a proposed modification of a statutory provision may be relevant to justification under Article 14, I do not think that it is a particularly relevant consideration when deciding whether that modification amounts to interpretation rather than amendment for the purposes of applying section 3(1) of the 1998 Act. In most cases, the section 3 issues of the degree of clarity of the specific statutory intention as expressed in the

language used by Parliament, identifying the grain or thrust of the legislation and deciding whether the proposed modification is or is not consistent with it, the constitutional roles of Parliament and the courts, and their respective areas of expertise, are unlikely to be affected by estimates of the numbers of people who will be impacted or will benefit.

125. Furthermore, the question whether there should be special treatment in respect of HIV infection is itself one of policy and would in my view require to be determined by Parliament. Contrary to Ms Braganza's argument, it would not follow from the fact that the policy of the MOD is that HIV infection does not automatically disqualify a person from service in the armed forces that therefore this group should also have the same rights as employees to claim disability discrimination in respect of such service or, indeed, any such rights. Parliament would need to look at the implications and consider whether such an approach was appropriate.

126. Moreover Parliament would be far better qualified than the courts to do so. The decision would entail, for example, an understanding of how many people would be likely to benefit (given that the exception would potentially apply to applicants, current and past personnel), of what the impact would be in the context of the particular circumstances of the armed forces, and of whether such an exception could or should be confined to people with HIV. Obviously, there are likely to be other disabilities which do not materially impact on the combat effectiveness of the individual and/or a number of disabilities which could be accommodated within the armed forces given the range of jobs that there are, and the range of circumstances in which personnel might be required to work.

127. I therefore reject Ms Braganza's arguments in Mr L's case.

Section 108 and Mr Dunn's case

128. Based on the analysis of the legislation and the caselaw on section 3(1) of the Human Rights Act 1998 set out above, and for the reasons given below, I have come to the same conclusion in Mr Dunn's case.

129. I accept the point that the issue of combat effectiveness is unlikely to arise in the same way in relation to acts of disability discrimination which occur after a person has left the armed forces. That may well make the task of justifying section 108 of the 2010 Act for Article 14 ECHR purposes more difficult although, as I have noted, the argument that post termination cases fall within the ambit of Article 8 may be weaker in any event. I express no final view on this.

130. But it is important not to lose sight of the point that the issue in relation to section 3(1) is whether it would simply be an act of interpretation, and consistent with the grain or thrust of the legislation, to confer disability discrimination rights on ex-service personnel. The fact that the policy reasons for not doing so appear less compelling than in the case of applicants to serve, or those who are serving, may lend support to an argument that therefore that cannot be what Parliament intended. But other evidence of Parliamentary intention requires to be considered. As to this, what Parliament said in the Equality Act 2010 and the predecessor enactments, referred to above, is important. In the light of this evidence, the reality of reading in the words contended for by Mr Hirst is that they directly contradict section 108.

131. This is not merely a linguistic point. Section 108 and its predecessor provisions grew out of the decision in *Coote v Granada Hospitality Ltd* (Case C-185/97) [1998] ECR 1-5199 that Council Directive 76/207/EEC on the implementation of equal treatment for men and women as regards access to employment etc required that protection from victimisation (i.e. retaliation for raising equality issues in the course of employment) continued after the end of an employment relationship. The history is helpfully traced by the Court of Appeal in *Rowstock Ltd v Jessemey* (supra). The premise for this principle was that there was a protected relationship (e.g. employment) so that the individual had rights which arose out of that relationship which then continued to protect them after its termination.

132. A fundamental feature of the 2010 Act and its predecessor enactments is that, as noted above, the equality legislation confers rights on individuals not to be discriminated against in the context of particular relationships (e.g. employment) rather than on people in general. Consistently with this, under section 108 and its predecessor provisions, where an individual enters into such a relationship and, as a result, has rights, after the end of the relationship they are protected in the same way against discrimination which arises out of, and is closely connected to, that relationship. Thus, the rights arise out of the protected relationship and continue thereafter. Moreover, the acts of discrimination must also arise out of or be closely connected to that protected relationship if they are to be unlawful, and enforcement of those rights is through the mechanism which is available to those who have rights before entering into, or during the currency of, the protected relationship – here the Employment Tribunal - see sections 108(6) and 121(1)(b) of the 2010 Act (at [16], above). This has been the approach to post termination discrimination in all of the predecessor equality legislation since this type of provision was first enacted.

133. The addition to section 108 of the words contended for by Mr Hirst involves a major departure from this principle or feature of the relevant equality legislation, and the creation of a special case for service in the armed forces. When a prospective service person applies to join and/or joins the armed forces they do not enter into a relationship which gives rise to rights not to be subjected to disability or age discrimination. Yet, on Mr Hirst's argument, unlike any other person, when the relationship ends they acquire rights which they did not have during the relationship, rather than there being no more (and no less) than a continuation of their existing protections. The requirement that there be a close connection between the acts of discrimination and the relevant relationship continues, but the fact that it was not a protected relationship in the relevant respects no longer matters. Although Mr Hirst did not address this point, presumably the terms of section 108(6) and 121(1(b) of the 2010 Act also have to be altered in much the same way so that the ex-service person can bring a claim in the Employment Tribunal when they would not otherwise be entitled to do so, and nor would any other person who was not protected for relevant purposes by Part 5.

134. The second feature of the legislation which Mr Hirst's argument contradicts is that, as illustrated above, the policy of the Discrimination Act 1995 was that Part II had no application to service in the armed forces. That meant applicants to enlist as well as those in service. When the Disability Discrimination Act 1995 (Amendment) Regulations 2003 introduced a right to claim in respect of post termination acts of discrimination, that was a right under Part II. The 2003 Regulations amended section 64(7) but, rather than confer post termination protection on service personnel, it

remained the position that Part II did not apply to service in the armed forces. It can therefore be inferred that there was a decision at this point that ex-service personnel would not be protected against disability discrimination.

135. As I have traced above, this approach continued through various amendments to the 1995 Act, under the Employment Equality (Age) Regulations 2006 and through into the Equality Act 2010. It reflected a clear and consistent policy that protection against disability and age discrimination did not apply to service in the armed forces, whether the discrimination took place before during or after the end of such service.

136. I was not taken to Hansard or any background material other than the Explanatory Notes in this connection. However, on the evidence I have seen, and particularly the changes to the 1995 Act made by the 2003 Regulations and the review which was carried out for the purposes of the 2010 Act, I do not accept that the position taken by Parliament in relation to post termination discrimination was the result of legislative oversight. Parliament did not overlook, or at least cannot be taken to have overlooked, the effect of section 108 and its predecessor provisions on ex service personnel and/or the fact that the issue of combat effectiveness did not arise in the same way. As a matter of principle, when interpreting legislation the courts should proceed on the basis that Parliament's intentions are reflected in the words which it used, read in their proper context, and be slow to conclude that there has been an error on the part of the legislature (compare *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 HL(E), albeit this deals with drafting errors). And, in any event, the legislative history shows that the disability discrimination legislation has been under detailed consideration on a number of occasions, and in depth.

137. I also have difficulty with the suggestion that paragraph 4(3) is referring to "active" or "current" service, and that section 108 therefore operates "indirectly", as a basis for reinforcing the idea that Mr Hirst's suggested reading does not go against the grain of the legislation and/or that there has been a legislative oversight or error. Reading paragraph 4(3) in the context of the legislative history and the 2010 Act as a whole, and bearing in mind the centrality of the requirement for there to be a protected relationship for the Act to apply at all, the reference to 'service in the armed forces' in paragraph 4(3) is intended to apply to all disability discrimination related to such service, whether it takes place before, during or after such service.

138. Similarly, in the light of the legislative history, nor do I accept that characterising paragraph 4(3) as an exemption of the armed forces, assists. As explained above, members of the armed forces are not in 'employment' for the purposes of the legislation. The default position was and is therefore that the relevant parts of the equality legislation did/do not apply to them. It has therefore always been necessary for Parliament to make a specific decision as to whether employment rights should nevertheless be conferred on them, and then positively to state that they are. It has never done so in relation to disability discrimination relating to service in the armed forces. The substance of the matter is therefore that there has never been a pre-existing set of disability discrimination rights under domestic legislation from which the armed forces were then exempted or excepted.

139. In my view the better way of looking at the matter is that the scheme of the legislation is that those who acquire rights through entering into a relevant relationship retain those rights thereafter. If they do not acquire those rights in the first place there are no rights

to retain. Section 108 reflects the scheme of the legislation, and the fact that ex service personnel do not have disability discrimination rights upon leaving service in the armed forces is entirely consistent with that scheme and with the policy of Parliament to which I haver referred. There was no particular issue in relation to the armed forces which was anomalous, given this approach, and required or merited special consideration or treatment.

140. Finally, I also consider that the question whether ex service personnel should be able to bring claims which alleged disability discrimination based on events after their discharge is one of policy and for Parliament rather than the courts. Certainly, given the way that the case has been argued before Employment Judge Poynton and before me – i.e. without consideration of evidence about implications and the ECHR compatibility question - I do not consider that I am sufficiently aware of the practical implications of such a change in the law. Bearing in mind the range of different disabilities which a person may have, the greater likelihood that some members of the armed forces will suffer life altering injuries (mental and physical) in the course of their work and the distinct terms under which they are engaged, this is a case in which the court does not have the ability to assess the potential consequences, or the advantages and disadvantages, which Parliament has.

141. I am conscious that I have reached a conclusion which differs from the decision of Employment Judge Stout in *T v Ministry of Defence* (supra) and I respectfully acknowledge that her judgment is careful, considered and compellingly expressed. It appears, however, that she did not have the advantage of the research into the legislative history which I have carried out.

Conclusion

142. For all of these reasons I dismiss Ground 1 of the appeal in Mr L's case and I dismiss Mr Dunn's appeal.

143. It therefore was not necessary for me to express a concluded view on the other Grounds in Mr L's appeal but, for completeness:

i) Ground 2 is a challenge to a finding of fact. The argument that the Employment Judge was obliged to take Mr L's case at its highest given that this was an application to strike out appears to overlook the fact that the Judge was being asked to reach a final determination on the preliminary issues on the basis of the evidence which was before him. Ms Braganza also appears to have been inviting the Judge to consider the circumstances of Mr L's particular case. The Judge's finding was based on the documentary evidence which was before him and was open to him. I therefore would not have allowed the appeal on this Ground.

ii) I reject Ground 3 for the reasons given at [88]-[90], above. The circumstances of this case were not within the ambit of Article 6 ECHR.

iii) As far as Ground 4 is concerned, the Employment Judge was entitled to decline to determine the issue of justification on the grounds that it was academic given his conclusion on the section 3 question. His view that he would need to hear evidence on the issue is, with respect, not easy to follow given that the parties had put the whole of their evidence for the purposes of the preliminary issues

before him. It is also arguably inconsistent with his making a finding about the reasons for the discharge of Mr L (the finding which is the subject of Ground 2). Ms Williams suggested that the Judge meant that he would need to hear evidence about the merits of Mr L's case but it is not clear that this is what he meant, or why he considered that he would need to do this. I therefore agree that his reasoning in this regard was flawed and, subject to reaching a final view on the ambit of Article 8 ECHR, would therefore have remitted the issue of justification had it been "live".

iv) As for the cross appeal in Mr L's case, I did not finally decide this issue as I did not need to but I am prepared to assume that his case fell within the ambit of Article 8 ECHR.