35. New documents rightly produced by the Home Office during the hearing of the appeal are revealing. One extract is sufficient to show what immigration officers must have understood their functions at Prague Airport to involve: 'The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination – without reference to additional statistical or intelligence information – if an immigration officer considers such discrimination is warranted.'

The immigration officers would have read this document in the light of a formal authorisation by the Secretary of State under section 19D of the Race Relations Act 1976. That authorisation purported to confer on immigration officers the express power to discriminate by reason of a person's ethnic origin against Roma. It is true that the Secretary of State does not rely on the authorisation. But it would have been known to immigration officers sent to Prague. Counsel for the Secretary of State argued that the authorisation was not in law an instruction. I would accept that. But the documents nevertheless reveal how immigration officers would have understood their principal task.

36. Following the principles affirmed by the House of Lords in *Nagarajan* v. *London Regional Transport* [2000] 1 AC 501, there is in law a single issue: why did the immigration officers treat Roma less favourably than non-Roma? In my view the only realistic answer is that they did so because the persons concerned were Roma. They discriminated on the grounds of race. The motive for such discrimination is irrelevant: *Nagarajan* v. *London Regional Transport*, *supra*.

37. The reasoning of the majority of the Court of Appeal in this case had at first glance the attractiveness of appearing to be in accord with common sense: *R. (European Roma Rights Centre)* v. *Immigration Officer at Prague Airport* [2004] QB 811. Simon Brown LJ said (para 86, 840): 'because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration office that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?'

Mantell LJ agreed with this analysis. Laws LJ dissented. In 'Equality: The Neglected Virtue' [2004] EHRLR 142, Mr Rabinder Singh QC convincingly exposed the flaw in the reasoning of the majority. He stated (at p 154): 'It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility – as it has done in the context of allegations of indirect discrimination – and has chosen not to do so. In so far as the fields of immigration and nationality may be thought to require special treatment, permitting discrimination on certain grounds (ethnic or national origins) but not others (such as colour), again Parliament has catered for that possibility in enabling a minister to give an authorisation. The Government did not want to rely on the

authorisation in the Roma case: that was a matter for its tactical choice but the courts should not bend over backwards to save the executive from what may have been its own folly. Their duty, as Laws LJ said, is to apply the will of Parliament as enacted in its laws. Moreover, the danger in the majority's reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown LJ expressly gives an example from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the Roma case itself.'

I am in respectful agreement with this analysis. In my view the majority was wrong. Laws LJ was right.

38. I agree with the conclusion of Baroness Hale of Richmond that the system operated by immigration officers at Prague Airport was inherently and systemically discriminatory on racial grounds against Roma, contrary to section 1(1)(a) of the Race Relations Act.

Baroness Hale of Richmond

72. [The] issue is whether the operation at Prague Airport was carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were treated less favourably than non-Roma were. In particular, it is alleged that they were subjected to longer and more intrusive questioning, they were required to provide proof of matters which were taken on trust from non-Roma, and far more of them were refused leave to enter than were non-Roma. The appellants seek a declaration to that effect.

73. Since 1968, it has been unlawful for providers of employment, education, housing, goods and other services to discriminate against individuals on racial grounds. The current law is contained in the Race Relations Act 1976, which in most respects is parallel to the Sex Discrimination Act 1975. The principles are well known and simple enough to state although they may be difficult to apply in practice. The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds: see *Glasgow City Council* v. *Zafar* [1997] 1 WLR 1659, approving *King* v. *Great Britain-China Centre* [1992] ICR 516. If the difference is on racial grounds, the reasons or motive behind it are irrelevant: see, for example, *Nagarajan* v. *London Regional Transport* [2000] 1 AC 501.

74. If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require

suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.

75. The complaint in this case is of direct discrimination against the Roma. Indirect discrimination arises where an employer or supplier treats everyone in the same way, but he applies to them all a requirement or condition which members of one sex or racial group are much less likely to be able to meet than members of another: for example, a test of heavy lifting which men would be much more likely to pass than women. This is only unlawful if the requirement is one which cannot be justified independently of the sex or race of those involved; in the example given, this would depend upon whether the job did or did not require heavy lifting. But it is the requirement or condition that may be justified, not the discrimination. This sort of justification should not be confused with the possibility that there may be an objective justification for discriminatory treatment which would otherwise fall foul of article 14 of the European Convention on Human Rights.

76. Discrimination law has always applied to public authority providers of employment, education and housing, and other services, as long as these services are of a similar kind to those which may be supplied by private persons. But a majority of this House held, in *R* v. *Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818, that it did not apply to acts done on behalf of the Crown which were of an entirely different kind from any act that would ever be done by a private person, in that case to the application of immigration controls. This is still the case for sex discrimination, but the race discrimination law was changed in response to the Macpherson Report into the Stephen Lawrence case. It is now unlawful for a public authority to discriminate on racial grounds in carrying out any of its functions. There are, however, a few exceptions and qualifications, one of which [insofar as it relates to the carrying out of immigration and nationality functions] is relevant to this case ...

78. The effect [of the said exception] is to exempt an immigration officer from the requirement not to discriminate if he was acting under a relevant authorisation, that is a requirement or express authorisation given by a Minister of the Crown acting personally (or by the law itself, but that does not arise here). Shortly before the Prague operation began on 18 July 2001, the Minister had made the Race Relations (Immigration and Asylum) (No 2) Authorisation 2001, which came into force in April 2001, at the same time as the 2000 Act amendments. [This Authorisation allowed for the screening of people of Roma origin.] ...

80. When these proceedings were begun on 18 October 2001, the claimants assumed that the immigration officers in Prague were operating under this Authorisation. The claim form therefore attacked the validity of the Authorisation. However, it is and has always been the respondents' case that the Authorisation did not apply to the Prague operation. Their case is not that the officers were discriminating lawfully but that they were not discriminating at all. Burton J accepted that they were not. Some individual differences in treatment were explicable, not by ethnic difference, but by more suspicious behaviour. There were too few instances of inexplicable differences in treatment to justify a general conclusion. The difference between the proportion

of Roma and non-Roma refused entry was explicable by reference to the proportions of Roma and non-Roma who were likely to seek asylum.

81. The Court of Appeal accepted that the judge was entitled to find that the immigration officers tried to give both Roma and non-Roma a fair and equal opportunity to satisfy them that they were coming to the United Kingdom for a permitted purpose and not to claim asylum once here. But they considered it 'wholly inevitable' that, being aware that Roma have a much greater incentive to claim asylum and that the vast majority, if not all, of those seeking asylum from the Czech Republic are Roma, immigration officers will treat their answers with greater scepticism, will be less easily persuaded that they are coming for a permitted purpose, and that 'generally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma' (Simon Brown LJ, paras 66–67). Laws LJ referred to the last of these propositions as 'plainly true on the facts of this case' (para 102). Simon Brown LJ, with whom Mantell LJ agreed, held that nevertheless this was not less favourable treatment, or if it was, it was not on racial grounds. The Roma were not being treated differently qua Roma but qua potential asylum-seekers. Laws LJ considered it 'inescapable' that this was less favourable treatment (para 102). He also concluded (para 109) that this was discrimination:

'One asks Lord Steyn's question [in *Nagarajan* v. *London Regional Transport* [2000] 1 A.C. 501, 521–2]: why did he treat the Roma less favourably? It may be said that there are two possible answers: (1) because he is Roma; (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably because Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the Rules, manifestly including covert asylum-seekers, and his knowledge that the Roma is more likely to be a covert asylum-seeker. But that is irrelevant to the claim under s 1(1)(a) of the 1976 Act.'

82. On the factual premises adopted by the Court of Appeal, this conclusion must be correct as a matter of law. The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officers know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant: see Lord Nicholls of Birkenhead in *Nagarajan* at p 511. The law reports are full of examples of obviously discriminatory treatment which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control: the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action (*R* v. *Commission for Racial Equality, Ex p Westminster City Council* [1985] ICR 827); the council which for historical reasons provided fewer selective school places for girls than for boys (*R* v. *Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155). But it goes further than this. The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But 'what may be true of a group may not be true of a significant number of individuals within that group' (see Hartmann J in *Equal Opportunities Commission* v. *Director of Education* [2001] 2 HKLRD 690, para 86, High

Court of Hong Kong). The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. As Laws LJ observed, at para 108: 'The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is untrue. But that cannot be right. If it were, it would imply that direct discrimination can be justified …'

83. As we have seen, the legislation draws a clear distinction between direct and indirect discrimination and makes no reference at all to justification in relation to direct discrimination. Nor, strictly, does it allow indirect discrimination to be justified. It accepts that a requirement or condition may be justified independently of its discriminatory effect.

84. The question for us, therefore, is whether the factual premise is made out. The appellants mount essentially the same argument before us as they did before both Burton J and the Court of Appeal. But, greatly to their credit, the respondents have made a further search and produced further evidence which casts a rather different light upon the case than was cast by their evidence in the courts below.

85. The appellants' case is, first, that the Prague operation carried with it a very high risk of racial discrimination. Its avowed object was to prevent people travelling from the Czech Republic to this country in order to seek asylum or otherwise overstay the limits of their leave to be here. The vast majority of those who have done this in the past are Roma. Many Roma have good reason to want to leave. For some, this may amount to persecution within the meaning of the Refugee Convention. The operation was targeting all potential asylum seekers, with or without a good claim. The object was not only to prevent the would-be travellers at the airport. It was also to deter others from even getting that far. Given the high degree of congruence between the object of the exercise and a particular ethnic group, which was recognised in public statements by the Czech Prime Minister and his deputy, the risk that the operation would be carried out in a racially discriminatory manner was very high.

86. That risk was exacerbated by the very existence of the Authorisation. This sanctioned discriminatory treatment of the very ethnic group to which the vast majority of the people against whom the Prague operation was targeted belonged. The evidence is that the immigration authorities responsible for the operation did not intend the officers in Prague to act on the Authorisation: its main object was to speed up processing at ports of entry to the United Kingdom when particular problems arose. So there was no instruction to the Prague officers to implement it. Nor do the records of individual cases give any indication that the officers thought that they were operating it. But the Authorisation was annexed to the Immigration Directorate's Instructions, chapter 1, section 11 of which is headed 'Race Relations (General)'. This seeks to explain the effect of this Authorisation, dealing with discrimination on grounds of ethnic or national origin, and an earlier one, which authorised discrimination on grounds of nationality if there was statistical or intelligence information of breach of immigration laws by persons of that nationality. Having set out the various ways in which officers might discriminate under either Authorisation, it contains the following passage about the later one with which we are concerned: 'The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination – without reference to additional statistical or intelligence information – if an immigration officer considers such discrimination is warranted.'

87. This is under the heading of 'Examination of passengers', which relates to people arriving at UK ports of entry; but under the heading 'Persons wishing to travel to the UK' the following

passage appears: 'From May 2001, immigration officers may also discriminate in similar ways in relation to persons wishing to travel to the UK on the grounds of ethnic or national origin but only in relation to the groups listed ... Additional statistical or intelligence evidence is not required as Ministers authorised the discrimination in respect of the listed groups.'

88. Also available now are the slides and accompanying briefing for the training which all staff received on the 2000 Act and the Ministerial Authorisations under it. These stress the importance of the Authorisations to the work of the Department, point out that discrimination against the listed groups is permissible without statistical or intelligence information, and advise of the need to be familiar with the list, to be able to identify passengers belonging to those groups, and to use their experience, knowledge of groups and local intelligence to assist in identification. They do point out that 'discrimination is likely to be exercised primarily in relation to specific port exercises', but do not suggest that these are the only circumstances in which it can be done. The briefing stresses that 'personnel need to be alert to the ways in which the integrity of the control function might be detrimentally affected if staff chose to disengage by not subjecting certain people/groups to extra scrutiny where appropriate.'

89. The combination of the objective of the whole Prague operation and a very recent ministerial authorisation of discrimination against Roma was, it is suggested, to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. Officers should have been told that the Directorate did not regard the operation as one which was covered by the Authorisation. They should therefore have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone.

90. It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001, when the operation with which we are concerned began, the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than quarter of a century.

91. It is against this background that such evidence as there is of what happened on the ground at Prague Airport needs to be assessed. The officers did not make any record of the ethnic origin of the people they interviewed. The respondents cannot therefore provide us with figures of how many from each group were interviewed, for how long, and with what result. This, they suggest, makes it clear that the officers were not relying on the Authorisation: if they had been, they would only have had to record their view of the passenger's ethnicity. If correct, that would have been enough to justify refusal of leave. But what it also shows is that no formal steps were being taken to gather the information which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner. It also means that the only information available is that supplied by the claimants, and in particular the ERRC which was

attempting to monitor the operation. The respondents can cast doubt on the reliability of this, but they cannot contradict it or provide more reliable information themselves. Indeed the figures gathered were used by both sides before Burton J as a 'useful working basis' (Judgment, para 27).

92. Mr Vasil, a Czech Roma working for the ERRC, observed most flights leaving for the UK on 11 days in January, 13 days in February, 14 days in March and 13 days in April 2002. He was able to identify the Roma travellers by their physical appearance, manner of dress and other details which were recognisable to him as a Roma himself. His observations showed that 68 out of 78 Roma were turned away whereas only 14 out of 6170 non-Roma were rejected. Thus any individual Roma was 400 times more likely to be rejected than any individual non-Roma. The great majority of Roma were rejected. And only a tiny minority of non-Roma were rejected. It is, of course, entirely unsurprising that a far higher proportion of Roma were turned away. But if the officers began their work with a genuinely open mind, it is more surprising that so many of the Roma were refused. If all or almost all asylum seekers are Roma, it does not follow that all or almost all Roma are asylum seekers. It is even more surprising that so few of the non-Roma were refused. One might have expected that there would be more among them whose reasons for wanting to travel to the UK were also worthy of suspicion. The apparent ease with which non-Roma were accepted is quite consistent with the emphasis given in the Instructions and training materials to the sensible targeting of resources at busy times. The respondents have not put forward any positive explanation for the discrepancy.

93. Mr Vasil also observed that questioning of Roma travellers went on longer than that of non-Roma and that 80% of Roma were taken back to a secondary interview area compared with less than 1% of non-Roma. The observations of Ms Muhic-Dizdarevic, who was monitoring the operation on behalf of the Czech Helsinki Committee, were to much the same effect. She also points out that 'It was very obvious from their appearance which travellers were Roma and which were not. Firstly, at least 80% of the Roma could be readily identified by their darker skin and hair …' Aspects of her evidence have been attacked but not this.

94. These general observations are borne out by the experience of the individuals whose stories were before the court. The ERRC conducted an experiment in which three people tried to travel to the UK for a short visit. Two were young women with similar incomes, intentions and amounts of money with them, one non-Roma, Ms Dedikova, and one Roma, Ms Grundzova; the third, Ms Polakova, was a mature professional married Roma woman working in the media. Ms Dedikova was allowed through after only five minutes' questioning, none of which she thought intrusive or irrelevant. Her story that she was going to visit a woman friend who was also a student was accepted without further probing. Ms Grundzova was refused leave after longer questioning which she found intrusive and requests for confirmation of matters which had been taken on trust from Ms Dedikova. Ms Polakova was questioned for what seemed to her like half an hour, was then told to wait in a separate room, and was eventually given leave to enter. She felt that the interview process was very different from that undergone by the non-Roma passengers travelling at the same time as her and that the only reason she was allowed to travel was that she had told them that she was a journalist interested in the rights of the Roma people. All three of these people were to some extent acting a part, in that their trips had been provoked and financed by the ERRC, but they were genuinely intending to pay a short visit to a friend or relatives living here. Czech television also conducted a similar experiment with a Roma man and a non-Roma woman wishing to pay a short visit to the UK. The non-Roma was given leave while

the Roma was refused after a much longer interview. Unlike the ERRC test, we have a transcript from which one can see what it was about the Roma's answers which might have made the official suspicious even if he had not been a Roma. But the question still remains whether a non-Roma who gave similar answers would have been treated the same. The tiny numbers of non-Roma refused may suggest otherwise.

95. Then there are the claimants in the case. Three of them made no secret of their intention to seek asylum on arrival in the UK. They do not therefore complain of discrimination, because their less favourable treatment was on grounds other than their ethnic origin. Two of the claimants also intended to claim asylum but pretended that they did not. It is difficult therefore for them to complain of more intensive questioning which revealed their true intentions. The last claimant, HM, was refused entry in circumstances which again invite the question whether a non-Roma in similar circumstances would have been refused. She was of obviously Roma appearance, aged 61 at the time, living with her husband and children, but travelling alone. Her husband was recovering from a heart attack and she was awaiting spinal surgery. Both were unemployed and living on social security because of ill health, which might not be thought surprising given their age. She planned to visit her grandson-in-law in England, and was carrying a sponsorship letter from him, together with a return ticket and £100 cash. These facts do not suggest someone who is planning to abandon her husband and five children and move to England. On the other hand, the file note records that the grandson-in-law states that he has been awarded refugee status but provides no evidence of this, is currently living on benefits though seeking employment, and makes no mention of the grand-daughter to whom he was presumably married.

96. These are judicial review proceedings, not a discrimination claim in the county court. No oral evidence has been heard or findings of fact in the individual cases made. The question is not whether HM was indeed intending to claim asylum on arrival, although it seems somewhat unlikely in the circumstances. The question is whether a non-Roma grandmother would have been treated in the same way. Again, the ERRC figures and the outcome of their test are some evidence that she would not.

97. It is not the object of these proceedings to make a finding of discrimination in any individual case. The object, as Burton J pointed out (Judgment, para 53(iv)), is to establish a case that the Prague operation was carried out in a discriminatory fashion. All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed, the Court of Appeal considered it 'wholly inevitable'. This may be going too far. But setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.

98. In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction

of any kind such as race, colour, sex and the like: see, for example, the Universal Declaration of Human Rights 1948, article 2; the International Covenant on Civil and Political Rights 1966, article 2; the European Convention on Human Rights, article 14; and the Refugee Convention itself in article 3 provides: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

99. But the ICCPR goes further, in article 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

100. The International Convention on the Elimination of all Forms of Racial Discrimination 1966 provides in article 2: '(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.'

101. Racial discrimination is defined in article 1 in terms of distinctions which have the 'purpose or effect of nullifying or impairing the recognition, or enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' Article 1(2) states that the Convention does not apply to distinctions, exclusions, restrictions or preference made between citizens and non-citizens, but this certainly does not mean that States Parties can discriminate between non-citizens on racial grounds.

102. It was the existence of these and other instruments, some only in draft at the time, together with the principle of equality enshrined in the Charter of the United Nations and emphasised in numerous resolutions of the General Assembly, which led Judge Tanaka and the dissenting minority of the International Court of Justice in the South West Africa Cases (*Ethiopia* v. *South Africa*) (*Liberia* v. *South Africa*) (second phase) [1966] ICJ Rep 6, 293 to conclude that 'we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law ...'

103. The General Assembly has 'urged all States to review and where necessary revise their immigration laws, policies and practices so that they are free of racial discrimination and compatible with their obligations under international human rights instruments' (UNGA Resolution 57/195, para I.6, adopted 18 December 2002; see also UNGA Resolution 58/160 adopted on 22 December 2003). The UN Committee on the Elimination of Racial Discrimination has expressed its concern at the application of section 19D, which it considers 'incompatible with the very principle of non-discrimination' (UN doc CERD/C/63/CO/11, para 16, 10 December 2003). A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination.

104. As to remedy, the conclusion is that discrimination is inherent in the operation of the scheme itself. It is therefore more appropriate to make a general declaration, rather than the more specific one sought by appellants. The refusal of leave to enter to far more Roma than non-Roma is only objectionable if some Roma were wrongly refused or some non-Roma were wrongly

given leave. That we do not know. But the differential is further evidence of a general difference in approach between the two groups, which may have had other aspects than those to which our attention has specifically been drawn. Hence the following declaration meets the case: 'United Kingdom Immigration Officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the United Kingdom by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom, contrary to section 1(1)(a) of the Race Relations Act 1976.'

105. I would therefore allow the appeal on this ground and make the above declaration.

Box 7.2.

The question of 'ethnic profiling'

The 'Prague Airport' case presented above constitutes a clear example of 'ethnic profiling', i.e. the use of ethnic or religious background as a determining criterion for law-enforcement decisions (on the use of ethnic profiling in counter-terrorism, see Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 29 January 2007, A/HRC/4/26; see also more generally the General Policy Recommendation No. 11 on combating racism and racial discrimination in policing adopted on 29 June 2007 by the Council of Europe's European Commission against Racism and Intolerance (ECRI), which defines 'racial profiling' as 'the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities', and recommends that States define and explicitly prohibit racial profiling by law). Other well-known examples include the *Williams* case presented to the Human Rights Committee, the *Timishev* case presented to the European Court of Human Rights, or the *Rasterfahndung* data-mining operation led by the German authorities following the September 11, 2001, terrorist attacks on New York and Washington:

- In December 1992, Rosalind Williams, who was travelling with her husband and son, was stopped by a police officer on the platform of a train station in Valladolid, Spain, and told to produce her identity documents. When asked why she was the only person stopped, the police officer told her 'It's because you're black.' She filed a complaint against this treatment. This finally reached the Spanish Constitutional Court, which adopted a decision on 29 January 2001 rejecting the complaint: according to the Court, 'the police action used the racial criterion as merely indicative of a greater probability that the interested party was not Spanish. None of the circumstances that occurred in said intervention indicates that the conduct of the acting National Police officer was guided by racial prejudice or special bias against the members of a specific ethnic group, as alleged in the complaint. Thus, the police action took place in a place of travellers' transit, a railway station, in which, on the one hand, it is not illogical to think that there is a greater probability than in other places that persons who are selectively asked for identification may be foreigners; moreover, the inconveniences that any request for identification generates are minor and also reasonably assumable as

burdens inherent to social life.' The Human Rights Committee disagreed. It concluded on 30 June 2009 that Ms Williams had been a victim of discrimination prohibited under the ICCPR: while finding that 'it is generally legitimate to carry out identity checks for the purposes of protecting public safety and crime prevention or to control illegal immigration', the Committee noted that 'when the authorities carry out these checks, the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination' (*Rosalind Williams* v. *Spain* (Communication No. 1493/2006), UN doc. CCPR/C/96/D/1493/2006 (17 August 2009)).

- In 1999, Mr Timishev, a Chechen lawyer living in Nalchik in the Kabardino-Balkaria Republic of the Russian Federation, travelled by car from the Ingushetia Republic to Nalchik. When reaching the administrative border of the Kabardino-Balkaria Republic, his car was stopped at a checkpoint and entry was refused to him: traffic police officers had received an oral instruction from the Ministry of the Interior of Kabardino-Balkaria Republic not to admit persons of Chechen ethnic origin. The Nalchik Town Court dismissed Mr Timishev's complaint that this was discriminatory: in its view, the order was aimed at preventing persons with terrorist or antisocial aspirations from penetrating towns and villages. Five years after Mr Timishev filed an application against Russia, the European Court of Human Rights found that Russian officers had violated the non-discrimination provision of Article 14 ECHR in combination with the freedom of movement guaranteed in Article 2 of Protocol No. 4. The order, which barred passage to any person of Chechen ethnicity or perceived as such, 'represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin'. (Eur. Ct. H.R. (2nd section), *Timishev* v. *Russia* (Appl. Nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), §54).
- In the wake of September 11, 2001 terrorist attacks against New York and Washington, the German authorities, in an attempt to identify 'sleepers' of terrorist organizations, decided to resort to the so-called *Rasterfahndung* method, i.e. the screening by the police of personal data banks of public or private bodies in order to track individuals with suspects' characteristics. The criteria established at the national level for this operation included being male, Muslim, national of or born in one of twenty-six listed countries with predominantly Muslim population, current or former student, and legal resident in Germany. Numerous institutions, including universities, employers, health and social insurance agencies, were required to provide the police with the personal records of all individuals corresponding to the defined profile. Yet the operation did not result in any arrest or criminal charge for terrorism-related offences (D. Moeckli, 'Discrimination Profiles: Law Enforcement After 9/11 and 7/7', *European Human Rights Law Review*, 5 (2005), 517). On 4 April 2006, the Federal Constitutional Court ruled that the *Rasterfahndung* was in breach of the individual's fundamental right of self-determination over personal information (Arts. 2(1) and 1 of the German

Constitution *(Grundgesetz)*) and therefore was unconstitutional (Decision of 4 April 2006 (1 BvR 518/02) (2006) 59 *Neue Juristische Wochenschrift* 1939).

As this last example illustrates, data protection legislation (and particularly, the restrictions imposed on the processing of 'sensitive' personal data relating, *inter alia*, to race or ethnicity, national origin or religion) may protect from ethnic profiling, when it is formalized and takes the form of the processing of data. Yet, if interpreted too broadly, data protection legislation may also create an obstacle to the identification of ethnic profiling: where it is practised informally, ethnic profiling can only be documented by monitoring the impact on certain groups of the practices of law enforcement officers, which requires some form of processing of data relating to the victims of such practices in order to assign them to specific groups. Thus, if it is to be effectively consistent with combating discrimination in the form of ethnic profiling, data protection legislation should focus, not only on the more or less sensitive nature of the data which are processed, but also and perhaps primarily on the objective of the processing of personal data and the proportionality of the means of processing. For a discussion of these issues, see O. De Schutter and J. Ringelheim, 'Ethnic Profiling: a Rising Challenge for European Human Rights Law', *Modern Law Review*, 71 (2008), 358–84.

7.3. Question for discussion: different faces of ethnic profiling

Which similarities and differences are relevant between the four cases referred to above – the *'Prague Airport'* case presented to the House of Lords, the *Williams* case presented to the Human Rights Committee, the *Timishev* case before the European Court of Human Rights, and the *Rasterfahndung* operation practised by the German authorities after 9/11? From the point of view of the search for solutions to combat ethnic profiling, does it matter whether these different forms of ethnic profiling are either formalized or informal? Whether they proceed by automated means or not?

2.2 Equal protection of the law

The second norm contained in Article 26 ICCPR requires that the law does not create any discrimination, either by making distinctions which cannot be reasonably and objectively justified (direct discrimination), or by treating equally situations which require a differentiated treatment (indirect discrimination). This norm is addressed, not at law enforcement authorities, but at the lawmaker. It is clearly a norm distinct from the one examined in the previous section. This is made clear by the rejection, in the preparatory works of the Covenant, of an amendment proposed by Brazil inserting the expression 'therefore' between the two guarantees stipulated in the first sentence of Article 26, which would have resulted in a formulation ('All persons are equal before the law and are *therefore* entitled without any discrimination to the equal protection of the law') negating this distinction (for the discussion before

the third committee of the UN General Assembly in 1961, see A/C.3/L.945; and for further developments, M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, cited above, at 606–7). The following cases offer illustrations of the obligation to provide for the equal protection of the law. They relate respectively to discrimination on grounds of sex, religious or philosophical conviction, sexual orientation and nationality.

(a) Sex

Human Rights Committee, *M. A. Müller and I. Engelhard* v. *Namibia*, Communication No. 919/2000 (CCPR/C/74/D/919/2000 (2002)), final views of 26 March 2002:

[Mr Müller, a German citizen, married Ms Engelhard, a Namibian citizen, on 25 October 1996. The couple wished to adopt Ms Engelhard's surname. However, under the applicable Namibian legislation, whereas a wife could assume her husband's surname without any formalities, a husband had to apply to change his surname: section 9, para. 1 of the Aliens Act No. 1 of 1937 as amended states that it is an offence to change one's surname without authorization following a certain procedure, unless one of the listed exceptions apply; among the listed exceptions in the Aliens Act is when a woman on her marriage assumes the surname of her husband (section 9, para. 1(a)). Mr Müller claims that he is the victim of a violation of Article 26 of the [ICCPR], as the Aliens Act section 9, para. 1(a) prevents Mr Müller from assuming his wife's surname without following a described procedure of application to a government service, whereas women wanting to assume their husbands' surname may do so without following this procedure. Likewise, Ms Engelhard claims that her surname may not be used as the family surname without complying with these same procedures, in violation of Article 26. They submit that this section of the law clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of their husbands on marriage, whereas men have to go through specified procedures of application.]

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 [see views adopted in *Danning* v. *Netherlands*, Communication No. 180/1984]. A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security.

The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

(b) Religious or philosophical conviction

Human Rights Committee, *F. Foin* v. *France*, Communication No. 666/1995 (CCPR/C/67/D/666/1995), final views of 9 November 1999:

[The author, a recognized conscientious objector to military service, was assigned to civilian service duty in the national nature reserve of Camargue in December 1988. On 23 December 1989, after exactly one year of civilian service, he left his duty station; he invoked the allegedly discriminatory character of Article 116, para. 6, of the National Service Code (*Code du service national*), pursuant to which recognized conscientious objectors were required to perform civilian national service duties for a period of two years, whereas military service did not exceed one year. As a result of his action, Mr Foin was charged with desertion in peacetime, and was given a six-month suspended prison sentence.]

10.2 The Committee has noted the State party's argument that the author is not a victim of any violation, because he was not convicted for his personal beliefs, but for deserting the service freely chosen by him. The Committee notes, however, that during the proceedings before the courts, the author raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying his desertion and that the courts' decisions refer to such claim. It also notes that the author contends that, as a conscientious objector to military service, he had no free choice in the service that he had to perform. The Committee therefore considers that the author qualifies as a victim for purposes of the Optional Protocol.

10.3 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the author constitute a violation of the Covenant.

The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The author has claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience.

Separate, dissenting, opinion of members Nisuke Ando, Eckart Klein and David Kretzmer

1. We agree with the Committee's approach that article 26 of the Covenant does not prohibit all differences in treatment, but that any differentiation must be based on reasonable and objective criteria. (See, also, the Committee's General Comment No. 18.) However, we are unable to agree with the Committee's view that the differentiation in treatment in the present case between the author and those who were conscripted for military service was not based on such criteria.

2. Article 8 of the Covenant, that prohibits forced and compulsory labour, provides that the prohibition does not include 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'. It is implicit in this provision that a State party may restrict the exemption from compulsory military service to conscientious objectors. It may refuse to grant such an exemption to all other categories of persons who would prefer not to do military service, whether the reasons are personal, economic or political.

3. As the exemption from military service may be restricted to conscientious objectors, it would also seem obvious that a State party may adopt reasonable mechanisms for distinguishing between those who wish to avoid military service on grounds of conscience, and those who wish to do so for other, unacceptable, reasons. One such mechanism may be establishment of a decision-making body, which examines applications for exemption from military service and decides whether the application for exemption on grounds of conscience is genuine. Such decision-making bodies are highly problematical, as they may involve intrusion into matters of privacy and conscience. It would therefore seem perfectly reasonable

for a State party to adopt an alternative mechanism, such as demanding somewhat longer service from those who apply for exemption (see the Committee's Views in Communication No. 295/1988, *Järvinen* v. *Finland*). The object of such an approach is to reduce the chance that the conscientious objection exemption will be exploited for reasons of convenience. However, even if such an approach is adopted the extra service demanded of conscientious objectors should not be punitive. It should not create a situation in which a real conscientious objector may be forced to forego his or her objection.

4. In the present case the military service was 12 months, while the service demanded of conscientious objectors was 24 months. Had the only reason advanced by the State party for the extra service been the selection mechanism, we would have tended to hold that the extra time was excessive and could be regarded as punitive. However, in order to assess whether the differentiation in treatment between the author and those who served in the military was based on reasonable and objective criteria all the relevant facts have to be taken into account. The Committee has neglected to do this.

5. The State party has argued that the conditions of alternative service differ from the conditions of military service ... While soldiers were assigned to positions without any choice, the conscientious objectors had a wide choice of posts. They could propose their own employers and could do service within their own professional fields. Furthermore, they received higher remuneration than people servicing in the armed forces. To this should be added that military service, by its very essence, carries with it burdens that are not imposed on those doing alternative service, such as military discipline, day and night, and the risks of being injured or even killed during military manoeuvers or military action. The author has not refuted the arguments relating to the differences between military service and alternative service, but has simply argued that people doing other civil service also enjoyed special conditions. This argument is not relevant in the present case, as the author's service was carried out before the system of civil service was instituted.

6. In light of all the circumstances of this case, the argument that the difference of twelve months between military service and the service required of conscientious objectors amounts to discrimination is unconvincing. The differentiation between those serving in the military and conscientious objectors was based on reasonable and objective criteria and does not amount to discrimination. We were therefore unable to join the Committee in finding a violation of article 26 of the Covenant in the present case.

At the time it was adopted, this decision constituted a clear overruling from the previous case law of the Committee (see Communication No. 295/1988, *Järvinen* v. *Finland*, final views of 25 July 1990, CCPR/C/39/D/295/1988 (1990)). Since then, however, it has been reaffirmed on a number of occasions, over the consistent dissents of certain individual members of the Committee (see Communication No. 689/1996, *Maille* v. *France*, final views of 10 July 2000, CCPR/C/69/D/689/1996 (2000) (with a joint individual opinion (dissenting) of members Ando, Klein, Kretzmer et Zakhia); Communication No. 690 and 691/1996, *Venier and Nicolas* v. *France*, final views of 10 July 2000, CCPR/C/69/D/690/1996 (2000) (same)); in the Concluding Observations the Human Rights Committee adopted concerning Finland on 2 December 2004 (CCPR/CO/82/FIN), the

Committee 'regrets that the right to conscientious objection is acknowledged only in peacetime, and that the civilian alternative to military service is punitively long' (para. 14, referring to Articles 18 (freedom of religion) and 26 of the Covenant).

(c) Sexual orientation

Human Rights Committee, *X.* v. *Colombia*, Communication No. 1361/2005 (CCPR/C/89/D/1361/2005), final views of 30 March 2007:

[On 27 July 1993, the author's life partner Mr Y died after a relationship of twenty-two years, during which they lived together for seven years. The author, who was economically dependent on his late partner, lodged an application with the Social Welfare Fund of the Colombian Congress, Division of Economic Benefits (the Fund), seeking a pension transfer. The request was rejected, however, on the grounds that the law did not permit the transfer of a pension to a person of the same sex. Although, according to Regulatory Decree No. 1160 of 1989, 'for the purposes of pension transfers, the person who shared married life with the deceased during the year immediately preceding the death of the deceased or during the period stipulated in the special arrangements shall be recognized as the permanent partner of the deceased', this provision is not considered to apply to same-sex partners, since Act No. 54 of 1990 provides that 'for all civil law purposes, the man and the woman who form part of the de facto marital union shall be termed permanent partners'.]

7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual de facto marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation [Communication No. 941/2000, *Young* v. *Australia*, Views of 6 August 2003, para. 10.4.]. It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences [Communication Nos. 180/1984, *Danning* v. *Netherlands*, Views of 9 April 1987, para. 14, and 976/2001, *Derksen and Bakker* v. *Netherlands*, Views of 1 April 2004, para. 9.2.]. The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward

no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.

[It would seem that the Constitutional Court brought Colombian law into compliance with the ICCPR even before the Human Rights Committee's decision. See *Sentencia* (Judgment) C-075/07, 7 February 2007.]

Separate opinion by Mr Abdelfattah Amor and Mr Ahmed Tawfik Khalil (dissenting)
Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of 'discrimination on grounds of sex or sexual orientation' cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that 'the family is the natural and fundamental group unit of society' and that 'the right of men and women of marriageable age to marry and found a family shall be recognized'. That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful – absent arbitrary decisions or manifest errors of assessment – and situations that depart from the norm must be shown to be lawful by those who so claim ...

On the other hand, there is no doubt that article 17, which prohibits interference with privacy, is violated by discrimination on grounds of sexual orientation. The Committee, both in its final comments on States parties' reports and in its Views on individual communications, has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults. Article 26, in conjunction with article 17, is fully applicable here because the aim in this case is precisely to combat discrimination, not to create new rights; but the same article cannot normally be applied in matters relating to benefits such as a survivor's pension for someone who has lost their same-sex partner. The situation of a homosexual couple in respect of survivor's pension, unless the problem is viewed from a cultural standpoint – and cultures are diverse and even, as regards certain social issues, opposed – is neither the same as nor similar to the situation of a heterosexual couple.

European Court of Human Rights (1st sect.), *Karner* v. *Austria* (Appl. No. 40016/98), judgment of 24 July 2003:

[The applicant lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which W. had rented a year earlier. They shared the expenses on the flat. In 1994 Mr W. died after designating the applicant as his heir. After the landlord of the flat brought proceedings against the applicant for termination of the tenancy, the lower courts dismissed the action, taking the view that section 14(3) of the Rent Act (*Mietrechtsgesetz*), which provided that family members (including 'life companions') had a right to succeed to a tenancy, was intended to protect persons who had lived together for a long time without being married against sudden homelessness, and thus applied to homosexuals as well as to persons of opposite sex. On 5 December 1996 the Supreme Court (*Oberster Gerichtshof*) adopted the opposite view. It granted the landlord's appeal and terminated the lease, finding that the notion of 'life companion' (*Lebensgefährte*) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex.]

37. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Burghartz* v. *Switzerland*, judgment of 22 February 1994, Series A No. 280–B, p. 29, §27; *Karlheinz Schmidt* v. *Germany*, judgment of 18 July 1994, Series A No. 291–B, pp. 32–33, §24; *Salgueiro da Silva Mouta* v. *Portugal*, No. 33290/96, §29, ECHR 1999IX; Smith and Grady v. United Kingdom, nos. 33985/96 and 33986/96, §94, ECHR 1999–VI; *Fretté* v. *France*, No. 36515/97, §§34 and 40, ECHR 2002-I; and *S.L.* v. *Austria*, No. 45330/99, §36, ECHR 2003–I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, §90, and *S.L.* v. *Austria*, cited above, §37).

38. In the present case, after Mr W.'s death, the applicant sought to avail himself of the right under section 14(3) of the Rent Act, which he asserted entitled him as a surviving partner to succeed to the tenancy. The court of first instance dismissed an action by the landlord for termination of the tenancy and the Vienna Regional Court dismissed the appeal. It found that the provision in issue protected persons who had been living together for a long time without being married against sudden homelessness and applied to homosexuals as well as to heterosexuals.

39. The Supreme Court, which ultimately granted the landlord's action for termination of the tenancy, did not argue that there were important reasons for restricting the right to succeed to a tenancy to heterosexual couples. It stated instead that it had not been the intention of the legislature when enacting section 14(3) of the Rent Act in 1974 to include protection for couples of the same sex. The Government now submit that the aim of the provision in issue was the protection of the traditional family unit.

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Mata Estevez* v. *Spain* (dec.), No. 56501/00, ECHR 2001–VI, with further references). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

As illustrated by the two decisions above, the existing international law of human rights views differences in treatment between heterosexual couples (whether married or forming a '*de facto* marital union') and same-sex couples as a direct discrimination on grounds of sexual orientation. At the same time, the failure to extend to same-sex couples advantages recognized to married heterosexual couples where the institution of marriage is reserved to the latter is sometimes not considered to constitute a form of prohibited discrimination (Eur. Ct. H.R. (4th sect.), *Mata Estevez* v. *Spain* (Appl. No. 56501/00), decision (inadmissibility) of 10 May 2001, Rep. 2001–VI). This view is increasingly challenged, however. The two decisions reproduced above illustrate a tendency in the case law of human rights expert bodies to acknowledge that the sexual orientation of a person should not result in an impossibility for that person to live with another individual, in conditions which ensure that both will benefit from a certain level of security against the risks entailed by the illness or death of one partner, or by the separation of the couple when one of the partners is economically dependent on the other. Indeed, the Parliamentary Assembly of the Council of Europe requested Member States to introduce registered partnerships in their national laws, precisely in order to achieve this objective (Recommendation 1474 (2000) of 26 September 2000, para. 11 (iii), (i)).

In the case of *Joslin* v. *New Zealand* presented to the United Nations Human Rights Committee, the Committee refused in its final views adopted on 30 July 2002 to interpret Article 23(2) of the International Covenant on Civil and Political Rights as imposing on the States parties an obligation to recognize the right to marry to same-sex partners (Communication No. 902/1999, CCPR/C/75/D/902/1999). However, two members of the Committee, Messrs Lallah and Scheinin, underlined in their concurring opinion that this conclusion 'should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the

Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination ... [When] the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences (*Danning* v. *Netherlands*, Communication No. 180/1984). No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.' Whether this trend in the international case law will be developed in the future remains to be seen.

(d) Nationality

The Universal Declaration on Human Rights prohibits any discrimination on grounds 'such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In contrast to these classical grounds of prohibited discrimination, sexual orientation or disability have emerged more recently as 'suspect' in international human rights law, thus exhibiting a shift in social expectations about the kind of treatment of certain groups that is acceptable. The case of nationality is slightly different. While discrimination on grounds of 'national origin' has traditionally been prohibited, it is only recently that the use of the criterion of nationality (or citizenship) in the allocation of social goods has been seen with suspicion, as a result of developments in the case law of human rights bodies. In its General Recommendation 30 on 'Discrimination against Non-citizens', the UN Committee on the Elimination of Racial Discrimination recalls that, although some fundamental rights such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, 'human rights are, in principle, to be enjoyed by all persons'. States parties to the International Convention on the Elimination of All Forms of Racial Discrimination therefore 'are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law' (General Recommendation 30 adopted at the sixty-fourth session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3) (1 October 2004), para. 5). In the view of the Committee, differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. The prohibition of such discrimination extends to indirect discrimination on grounds of nationality, for instance when regulations are directed to newly established residents in a country even without explicitly targeting foreigners. In its 2006 Concluding Observations

relating to Denmark, the Committee thus expressed its concern that under Act No. 361 of June 2002, social benefits for persons newly arrived in Denmark are reduced in order to entice them to seek employment, a policy which 'has reportedly created social marginalization, poverty and greater dependence on the social welfare system for those who have not become self-sufficient'. The Committee acknowledged that the new regulation applies to both citizens and non-citizens, yet it noted 'with concern that it is foreign nationals who are mainly affected by this policy' (Committee on the Elimination of Racial Discrimination, Concluding Observations: Denmark, UN Doc. CERD/C/DEN/CO/17, 19 October 2006, para. 18).

The Human Rights Committee adopts a similar view under the ICCPR. In its General Comment No. 15, *The Position of Aliens under the Covenant*, which it adopted in 1986, the Committee notes that 'in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike.' While Article 2 of the Covenant only prohibits discrimination in the enjoyment of other substantive rights of freedoms guaranteed by this instrument, Article 26 prohibits discrimination in all fields, whether or not covered by other substantive Covenant provisions. This also applies to discrimination on grounds of nationality. In the case of *Ibrahima Gueye and others* v. *France* (Communication No. 196/1985 (CCPR/C/35/D/196/1985 (1989))), the Human Rights Committee was asked to find whether France had violated its obligations under the Covenant after retired soldiers of Senegalese nationality who served in the French Army prior to Senegal's independence in 1960 were denied the pension rights which French nationals in the same situation were benefiting from, in accordance with a law enacted in December 1974 introducing a distinction between the retired members of the French Army on grounds of nationality. The Committee considered that differences of treatment on grounds of nationality could, in principle, be prohibited by Article 26 of the Covenant, since this provision prohibits differences in treatment on any grounds '*such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' (emphasis added). The Committee concluded that the difference in treatment of the authors of the communication is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant, since 'it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese' (para. 9.5). Since this decision the French administrative courts have aligned themselves with the position of the Human Rights Committee (see *Conseil d'Etat*, 30 November 2002, Nos. 212179 and 212211, Diop).

The Human Rights Committee adopted further decisions finding discrimination on grounds of nationality or on grounds of the status of permanent resident (see, e.g. Communication No. 516/1992, *Simunek* v. *Czech Republic*, final views of 19 July 1995, CCPR/C/54/D/516/1992; Communication No. 586/1994, *Adam* v. *Czech Republic*, final views of 23 July 1996, CCPR/C/57/D/586/1994). In the case of *Karakurt* v. *Austria* (Communication No. 965/2000, final views of 4 April 2002, CCPR/C/74/D/965/2000), the author of the communication complained that, because of his Turkish nationality, he could not stand for election to work-councils in Austria, since section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) limited the entitlement to be eligible for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). The Committee concluded that this difference in treatment between, on the one hand, Austrians and nationals of EU Member States or EEA Member States, and nationals of other countries on the other hand, constituted a discrimination prohibited under Article 26 of the International Covenant on Civil and Political Rights: 'the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone ... With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e. to promote staff interests and to supervise compliance with work conditions ... In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality' (para. 8.4.).

Of course, the difference in treatment which Mr Karakurt complained of had its source in the obligation imposed on Austria by EC law and by the Agreement on the European Economic Area not to establish any discrimination on grounds of nationality between Austrian nationals, on the one hand, and nationals of other EU Member States or EEA Member States, on the other hand. But this, in the view of the Committee, did not preclude it from finding discrimination. Although its earlier case law seemed to suggest that the existence of an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation (see Communication No. 658/1995, *Jacob and Jantina Hendrika van Oord* v. *Netherlands*, final views of 23 July 1997 (CCPR/C/60/D/658/1995)), it stated in *Karakurt* that 'there is no general rule to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts.' It follows that differences in treatment between nationals of EU Member States, on the one hand, and third country nationals, on the other hand, may be considered discriminatory, despite the fact that they are the result of the establishment of a new legal order by the EU treaties and that they take the form of the creation of a citizenship of the Union.

A similar evolution took place before regional courts. Since the 1990s, differences in treatment on grounds of nationality have been increasingly treated as suspect in the case law of the European Court of Human Rights. In the case of *Gaygusuz* v. *Austria* (Appl. No. 17371/90, judgment of 16 September 1996, Reports 1996–IV), the applicant, a Turkish national who had worked in Austria, with certain interruptions, from 1973 until October 1984, was denied an advance on his pension in the form of emergency assistance after his entitlement to unemployment benefits expired in 1987. He complained before the European Court of Human Rights of the Austrian authorities' refusal to grant him emergency assistance on the ground that he did not have Austrian nationality, which was one of the conditions laid down in section 33(2)(a) of the 1977 Unemployment Insurance Act for entitlement to an allowance of that type. He claimed to be a victim of discrimination based on national origin, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 to the Convention, which guarantees the right to property ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions').

The Court agreed. It noted in the first place that 'Mr Gaygusuz was legally resident in Austria and worked there at certain times ... paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.' It observed therefore that the Austrian authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33(2)(a) of the 1977 Unemployment Insurance Act, since 'it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.' The Court concluded that 'the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification"', and that it is therefore discriminatory (paras. 46–51).

In *Gaygusuz*, the Court had formulated its doctrine thus: 'a difference of treatment is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention' (para. 42). In other terms, like birth out of wedlock (Eur. Ct. H.R., *Inze* v. *Austria*, judgment of 28 October 1987, Series A No. 126, §41; Eur. Ct. H.R. (3rd sect.), *Mazurek* v. *France* (Appl. No. 34406/97), judgment of 1 February 2000, §49; Eur. Ct H.R. (GC), *Sommerfeld* v. *Germany* (Appl. No. 31871/96), judgment of 8 July 2003, §93), sex (Eur. Ct. H.R., *Burghartz* v. *Switzerland*, judgment of 22 February 1994, Series A No. 280–B, p. 29, §27; *Karlheinz Schmidt* v. *Germany*, judgment of 18 July 1994, Series A No. 291–B, pp. 32–3, §24; *Petrovic* v.

Austria, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998–II, p. 587, §37), or sexual orientation (Eur. Ct. H.R., *Smith and Grady* v. *United Kingdom*, cited above; *Lustig-Prean and Beckett* v. *United Kingdom* (Appl. Nos. 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. H.R. (3rd sect.), *A.D.T.* v. *United Kingdom* (Appl. No. 35765/97), judgment of 31 July 2000, E.C.H.R. 2000–IX, §37; Eur. Ct. H.R. (1st sect.), *L. and V.* v. *Austria* (Appl. Nos. 39392/98 and 39829/98), judgment of 9 January 2003, §45; Eur. Ct. H.R., *S.L.* v. *Austria* (Appl. No. 45330/99), judgment of 9 January 2003, §36; Eur. Ct. H.R. (1st sect.), *Karner* v. *Austria* (Appl. No. 40016/98), judgment of 24 July 2003, §37), nationality is considered to constitute a 'suspect' ground, requiring that any difference of treatment grounded on nationality be justified by particularly strong reasons and that it be strictly necessary to achieve the objectives pursued.

This was confirmed in the case of *Koua Poirrez* v. *France* (Eur. Ct. H.R. (3rd sect.), *Koua Poirrez* v. *France* (Appl. No. 40892/98), judgment of 30 September 2003). The applicant, a national of the Ivory Coast who had failed to obtain French nationality because he had applied after his eighteenth birthday, had been physically disabled since the age of seven. He had been adopted by Mr Bernard Poirrez, a French national. In May 1990 he applied for an 'allowance for disabled adults' (*allocation aux adultes handicapés* – AAH), stating in support of his application that he was a French resident of Ivory Coast nationality and the adopted son of a French national residing and working in France. His application was rejected on the ground that, as he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France in respect of the AAH, he did not satisfy the relevant conditions laid down in Article L. 821–1 of the Social Security Code. The Court found this to constitute discrimination on grounds of nationality. It reiterated that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention' (para. 46).

In *Andrejeva* v. *Latvia* (Eur. Ct. H.R. (GC), *Andrejeva* v. *Latvia* (Appl. No. 55707/00), judgment of 18 February 2009), the Court found Latvia to have committed a discrimination against Ms Natālija Andrejeva, a 'permanently resident non-citizen' of Latvia who was previously a national of the former USSR. Because she did not have Latvian citizenship, Ms Andrejeva was denied pension rights since, in her case, the fact she had worked for an entity established outside Latvia despite having been physically in Latvian territory did not constitute 'employment within the territory of Latvia' within the meaning of the State Pensions Act. In finding that a discimination had occured, the Court dismissed the argument of the Latvian Government that the applicant could have applied to become a Latvian citizen by a naturalization process, in order to avoid being treated differently as a 'non-citizen permanent resident' in Latvia and to receive the full amount of the pension claimed. The Court said: 'The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination

by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance' (para. 91).

In the case of *The Girls Yean and Bosico* v. *Dominican Republic*, the Inter-American Court of Human Rights was required to determine whether rules applicable to late registrations of birth resulted in a discrimination on grounds of foreign descent.

Inter-American Court of Human Rights, case of *The Girls Yean and Bosico* v. *Dominican Republic*, judgment of September 8, 2005 [preliminary objections, merits, reparations and costs], Series C No. 130:

[The Girls, Dilcia Yean and Violeta Bosico, Haitian descendants born in the Dominican Republic, were denied birth registration by public authorities on the ground that they failed to comply with certain legal requirements. Under Dominican Law, the age of the person requesting birth registration was the only criterion to define the requirements and procedure to be followed. The requirements imposed on the petitioners were far more demanding than those applied to other children under the age of thirteen. The denial of a birth certificate entailed the denial of the Dominican nationality and rendered the petitioners stateless.]

171. Considering that it is the State's obligation to grant nationality to those born on its territory [under the *jus soli* principle embodied in the Dominican Constitution], the Dominican Republic must adopt all necessary positive measures to guarantee that Dilcia Yean and Violeta Bosico, as Dominican children of Haitian origin, can access the late registration procedure in conditions of equality and nondiscrimination and fully exercise and enjoy their right to Dominican nationality. The requirements needed to prove birth on Dominican territory should be reasonable and not represent an obstacle for acceding to the right to nationality.

172. The Court finds that, owing to the discriminatory treatment applied to the children, the State denied their nationality and left them stateless, which, in turn, placed them in a situation of continuing vulnerability that lasted until September 25, 2001; in other words, after the date on which the Dominican Republic accepted the Court's contentious jurisdiction.

173. The Court considers that the Dominican Republic failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation), but also that it must adopt all appropriate measures to guarantee them (positive obligation), owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children, because it denied them their right to nationality for discriminatory reasons, and placed them in the impossibility of receiving protection from the State and having access to the benefits due to them, and since they lived in fear of being expelled by the State of which they were nationals and separated from their families owing to the absence of a birth certificate.

174. The Court finds that for discriminatory reasons, and contrary to the pertinent domestic norms, the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality, and left them stateless for more than four years and four months, in violation of Articles 20 and 24 of the American Convention [respectively guaranteeing a right to a nationality and stipulating a principle of equality], in relation to Article 19 thereof [on the rights of the child], and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico ...

178. A stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality.

179. The Court considers that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.

180. In this specific case, the State maintained the Yean and Bosico children in a legal limbo in which, even though the children existed and were inserted into a particular social context, their existence was not recognized juridically; in other words they did not have juridical personality ...

190. In this regard, the Court considers that the domestic norms establishing the requirements for late birth registration must be coherent with the right to nationality in the Dominican Republic and with the terms of the American Convention and other international instruments; namely, they must accredit that the person was born on the State's territory.

191. In accordance with the obligation arising from Article 2 of the American Convention, the Court considers that the requirements for obtaining nationality must be clearly and objectively established previously by the competent authority. Likewise, the law should not provide the State officials applying it with broad discretionary powers, because this creates opportunities for discriminatory acts.

192. The requirements for late declaration of birth cannot be an obstacle for enjoying the right to nationality, particularly for Dominicans of Haitian origin, who belong to a vulnerable sector of the population in the Dominican Republic.

7.4. Question for discussion: the hierarchy of grounds in anti-discrimination law

Applying the Equal Protection Clause of the Bill of Rights appended to the United States Constitution (Fourteenth Amendment), the US Supreme Court applies a three-tiered approach when asked to decide whether the clause has been violated. Most classifications adopted by the legislator are subjected to a mere rationality review, requiring only that the classification be rationally related to a legitimate end. Other classifications are subjected to an intermediate form of scrutiny, requiring that the challenged classification serves an important State interest and that the classification is at least substantially related to serving that interest. Classifications on the basis of gender fall under this category (see *Craig* v. *Boren*, 429 U.S. 190 (1976), although more recent cases, beginning with *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), added the requirement that, to be valid, a sex-based classification requires an 'exceedingly persuasive justification', bringing the test applied for sex-based classifications closer to strict scrutiny: see *United States* v. *Virginia*, 518 U.S. 515 (1996) and *J.E.B.* v. *Alabama*, 511 U.S. 127 (1994)); so do classifications on grounds of illegitimacy (*Caban* v. *Mohammed*, 441 U.S. 380 (1979)). Finally, some classifications, whether they relate to a 'suspect' ground such as race, national origin (see *Korematsu* v. *United States*, 323 U.S. 214 (1944)), religion (see *Sherbert* v. *Verner*, 374 U.S. 398 (1963)) or, arguably, alienage (*Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)), or whether they burden fundamental rights (including

denial or dilution of vote, interstate migration, or access to the courts), are subjected to the strictest form of scrutiny: the Government must show that the challenged classification serves a compelling state interest and that the classification is necessary to serve that interest.

It has sometimes been suggested that this approach, based on more clearly delineated variations in the strictness of scrutiny, should also be adopted by international or regional human rights bodies (see for instance, in the context of the European Convention on Human Rights, where the case law seems to be moving in such a direction, O. M. Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, International Studies in Human Rights No. 74 (The Hague: Martinus Nijhoff, 2003); and J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', *Netherlands International Law Review* (2004), 135–83). Do you agree? What are the arguments for and against the establishment of such a 'hierarchy of grounds'? On the basis of which considerations should such a hierarchy be developed?

2.3 The legal prohibition of discrimination

The second sentence of Article 26 ICCPR (see box 7.1.) stipulates that the law should prohibit discrimination. This imposes a positive obligation on the legislator: whether they are committed by State agents or by private actors, discriminatory acts should be prohibited and subject to effective legal sanctions. As regards racial discrimination, this obligation already follows from Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination, which provides that the States parties 'shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'. The Convention on the Elimination of All Forms of Discrimination against Women also imposes an obligation on States to 'adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women'; to 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'; and to 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise' (Art. 2(b), (c) and (e)). Under the ICCPR itself, Articles 2(1) and 3, which prohibit any discrimination in the enjoyment of the rights of the Covenant and guarantee the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, have been interpreted to require that the States parties 'take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights' (Human Rights Committee, General Comment No. 28, *Equality of Rights between Men and Women* (Art. 3) (29 March 2000) (CCPR/C/21/Rev.1/Add. 10), para. 4). In addition, the Human Rights Committee notes that:

Human Rights Committee, General Comment No. 28, *Equality of Rights between Men and Women* (Art. 3) (29 March 2000) (CCPR/C/21/Rev.1/Add. 10), para. 31:

The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields. Discrimination against women in areas such as social security laws (Communications Nos. 172/84, *Broeks* v. *Netherlands*, Views of 9 April 1987; 182/84, *Zwaan de Vries* v. *Netherlands*, Views of 9 April 1987; 218/1986, *Vos* v. *Netherlands*, Views of 29 March 1989) as well as in the area of citizenship or rights of non-citizens in a country (Communication No. 035/1978, *Aumeeruddy-Cziffra et al.* v. *Mauritius*, Views adopted 9 April 1981) violates article 26. The commission of so-called 'honour crimes' which remain unpunished constitutes a serious violation of the Covenant and in particular of articles 6, 14 and 26. Laws which impose more severe penalties on women than on men for adultery or other offences also violate the requirement of equal treatment. The Committee has also often observed in reviewing States parties reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value. States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.

The main difficulty which may arise in the implementation of this norm concerns the scope of the positive obligation it imposes. Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination defines the term 'racial discrimination' as meaning 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms *in the political, economic, social, cultural or any other field of public life*' (emphasis added), thus apparently not extending the obligation to prohibit discrimination to private life narrowly understood as the sphere of family or intimate relationships.

A similar question of interpretation arose when Protocol No. 12 to the European Convention on Human Rights was adopted in 2000 (see above, section 1.2.). Article 1 of Protocol No. 12 imposes direct obligations only on public authorities (whether they belong to the executive, the legislative or the judicial branches). However, the States may have to adopt measures in order to prohibit discrimination by private parties, in situations where the failure to adopt such measures would be clearly unreasonable and result in depriving persons from the enjoyment of rights set forth by law. The Explanatory Report to Protocol No. 12 mentions that 'a failure to provide protection from discrimination in [relations between private persons] might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of

the Protocol could come into play' (Explanatory Report to Protocol No. 12, para. 26). Although certain positive obligations may thus be imposed on States to protect from discrimination in the relationships between private parties, States parties may not, under the pretext of protecting from discrimination, commit disproportionate interferences with the right to respect for private or family life, as guaranteed by Article 8 ECHR.

Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), para. 28:

[A]ny positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention.

Therefore, a tripartite division is required, between three kinds of legal relations: in the interactions between the public authorities and private individuals, the former are prohibited from discriminating against the latter; in the interactions between private individuals occurring in the context of market relationships (in spheres such as employment, education, housing, or services accessible to the public), the State authorities may be under an obligation to intervene in order to prevent the most flagrant cases of discrimination and offer remedies to the victims thereof; finally, in the interactions between private individuals which concern the private sphere, in the original meaning of private and family life which restricts this notion to the sphere of intimacy, the public authorities shall be prohibited from intervening, even if their objective in doing so is to better protect from discriminatory acts. It is in the intermediate or semi-public sphere where the obligations of the State are the least clearly defined: there, discriminatory behaviour may be regulated in order to outlaw discrimination, but whether or not this is an obligation under Article 1 of Protocol No. 12 ECHR may in certain cases be debated.

This position is not unique to Protocol No. 12 ECHR. Thus for instance, within the EU, the European Court of Justice has concluded (albeit without making any reference to the ICCPR or, indeed, to international human rights law generally) that the United Kingdom could legitimately exclude from the prohibition of discrimination on grounds of sex (as imposed under European Union Law) employment in a private household: it took the view that this exception, provided in section 6(3) of the UK Sex Discrimination Act 1975, 'is intended ... to reconcile the principle of equality of treatment with the principle of respect for private life, which is also fundamental' (Case

165/82, *Commission* v. *United Kingdom* [1983] E.C.R. 3431 (judgment of 8 November 1983), para. 13).

Indeed, the right to respect for private or family life may not be the sole relevant consideration where the legal prohibition of discrimination is extended to private relationships: other competing rights, such as the freedom of association of certain groups seeking to exclude individuals on the basis of criteria discriminatory on their face, may also come into play. This question was presented to the United States Supreme Court in the following case.

United States Supreme Court, *Boy Scouts of America et al.* v. *Dale*, 530 U.S. 640 (2000):

[The Boy Scouts of America (BSA) revoked assistant scoutmaster James Dale's membership when, following an interview with Dale published in a local newspaper, the officials of the organization discovered that he was a homosexual and a gay rights activist. In 1992, Dale filed suit against BSA, alleging that they had violated the New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. The BSA, a private, not-for-profit organization, asserted that homosexual conduct was inconsistent with the values it was attempting to instil in young people. The New Jersey Superior Court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation. The Court also concluded that the Boy Scouts' First Amendment freedom of expressive association prevented the Government from forcing the Boy Scouts to accept Dale as an adult leader. On appeal however, the Court's Appellate Division held that New Jersey's public accommodations law applied to the Boy Scouts because of its broad-based membership solicitation and its connections with various public entities, and that the Boy Scouts violated it by revoking Dale's membership based on his homosexuality; it also rejected the Boy Scouts' federal constitutional claims. The New Jersey Supreme Court affirmed. The Court held that application of New Jersey's public accommodations law did not violate the Boy Scouts' First Amendment right of expressive association because Dale's inclusion would not significantly affect members' abilities to carry out their purpose: the Court said it was 'not persuaded ... that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral' (160 N. J. 562 at 613 (1999)). With respect to the right to intimate association, the court concluded that the Boy Scouts' 'large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not "sufficiently personal or private to warrant constitutional protection" under the freedom of intimate association.' (160 N. J. 562 at 608–9 (1999))]

Opinion of the Court by Chief Justice Rehnquist:

In *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that 'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends'. This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. See *ibid.* (stating that

protection of the right to expressive association is 'especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority'). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire'. *Id.*, at 623. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association ... plainly presupposes a freedom not to associate'. Ibid.

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc.* v. *City of New York*, 487 U.S. 1, 13 (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'. *Roberts*, *supra*, at 623.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association'. The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

[Having found that the general mission of the BSA is to 'instill values into young people', the Court concludes that they do engage in expressive activity, and that they have always in the past sought to convey the message that homosexual conduct was not consistent with those values. It further notes that 'the presence of Dale as an assistant scoutmaster would ... interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs'.]

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation – like inns and trains ... Over time, the public accommodations laws have expanded to cover more places. New Jersey's statutory definition of '"[a] place of public accommodation"' is extremely broad. The term is said to 'include, but not be limited to', a list of over 50 types of places. N. J. Stat. Ann. §10:5 – 5(l) (West Supp. 2000) ... Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location. As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts*, we said '[i]ndeed, the Jaycees has failed to demonstrate ... any serious burden on the male members' freedom of expressive association' 468 U.S., at 626. In [*Board of Directors of Rotary Inter'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987)], we said: '[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.' 481 U.S., at 548 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In [*Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)], we said that public accommodations laws 'are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments'. 515 U.S., at 572. But we went on to note that in that case 'the Massachusetts [public accommodations] law has been applied in a peculiar way' because 'any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wish to join in with some expressive demonstration of their own'. *Id.*, at 572–573. And in the associational freedom cases such as *Roberts*, *Duarte*, and [*New York State Club Assn., Inc.* v. *City of New York*, 487 U.S. 1 (1988)], after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States* v. *O'Brien*, 391 U.S. 367 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech – in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations

law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law ...

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. 'While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.' *Hurley*, 515 U.S., at 579.

This position may be contrasted with the judgment adopted on 18 August 2008 by the California Supreme Court in a case involving a lesbian woman, Ms Benitez, who sought to become pregnant but was confronted with the refusal of the qualified physicians to treat her on the basis of religious objection.

California Supreme Court, *North Coast Women's Care Medical Care Group, Inc., et al.* v. *San Diego County Superior Court (Guadalupe T. Benitez)*, Case S142892, judgment of 18 August 2008:

Do the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, exempt a medical clinic's physicians from complying with the California Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation? Our answer is no.

... Plaintiff Guadalupe T. Benitez is a lesbian who lives with her partner, Joanne Clark, in San Diego County. They wanted Benitez to become pregnant ... In August 1999, Benitez and Clark first met with defendant Christine Brody, an obstetrician and gynecologist employed by defendant North Coast. Benitez mentioned that she was a lesbian. Dr. Brody explained that at some point intrauterine insemination (IUI) might have to be considered ... Dr. Brody said that if IUI became necessary, her religious beliefs would preclude her from performing the procedure for Benitez ... [Similarly, Dr Fenton, another North Coast physician,] refused to prepare donated fresh sperm for Benitez because of his religious objection. Two of his colleagues, Drs. Charles Stoopack and Ross Langley, had no such religious objection, but unlike Dr. Fenton, they were not licensed to prepare fresh sperm. Dr. Fenton then referred Benitez to a physician outside North Coast's medical practice, Dr. Michael Kettle [who ultimately performed in vitro fertilization, making Ms Benitez pregnant].

In August 2001, Benitez sued North Coast and its physicians, Brody and Fenton, seeking damages and injunctive relief on several theories, notably sexual orientation discrimination in violation of California's Unruh Civil Rights Act. [The Defendants argued that their] 'alleged misconduct, if any' was protected by the rights of free speech and freedom of religion set forth in the federal and state Constitutions ...

[Part III of the opinion, which discusses the reliance of the defendants on the First Amendment to the Federal Constitution, is reproduced in full below. Parts IV and V, which discuss the Californian Constitution and procedural issues, are not reproduced here.]

The First Amendment to the federal Constitution states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...' (US Const., 1st Amend.) This provision applies not only to Congress but also to the states because of its incorporation into the Fourteenth Amendment. (See *Employment Div., Ore. Dept. of Human Resources* v. *Smith* (1990) 494 U.S. 872, 876–877 (*Smith*).) With respect to the free exercise of religion, the First Amendment 'first and foremost' protects 'the right to believe and profess whatever religious doctrine one desires'. (*Smith*, *supra*, at p. 877.) Thus, it 'obviously excludes all "government regulation of religious beliefs as such".' (*Ibid.*) Below, we discuss pertinent decisions of the high court construing the First Amendment's guarantee of the free exercise of religion.

Sherbert v. *Verner* (1963) 374 U.S. 398 (*Sherbert*) involved South Carolina's denial of unemployment benefits to a Seventh-day Adventist who refused on religious grounds to work on Saturdays. The high court held that restricting unemployment benefit eligibility to those who could work on Saturdays was a 'substantial infringement' of the claimant's First Amendment rights, and it declared the state law unconstitutional because it lacked a 'compelling [governmental] interest'. (*Id.* at pp. 406–407.)

Nine years later, the United States Supreme Court reiterated that test in *Wisconsin* v. *Yoder* (1972) 406 U.S. 205 (*Yoder*). At issue there was a Wisconsin law that required all children ages seven to 16 to attend school. Members of the Old Order Amish religion and the Conservative Amish Mennonite Church, however, kept their children out of school once they completed the eighth grade. (*Id.* at pp. 208–209.) Yoder held that under the First Amendment's clause guaranteeing the free exercise of religion, the Amish were exempt from obeying the state law in question because their 'objection to formal education beyond the eighth grade [was] firmly grounded' in their religious beliefs, and the State of Wisconsin lacked a compelling interest in applying the compulsory education law to Amish children. (*Id.* at p. 210; see *id.* at pp. 214, 219, 234.)

But then in 1990, in *Smith*, *supra*, 494 U.S 872, the high court repudiated the compelling state interest test it had used in *Sherbert*, *supra*, 374 U.S. 398, and in *Yoder*, *supra*, 406 U.S. 205. Instead, it announced that the First Amendment's right to the free exercise of religion 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)".' (*Smith*, *supra*, at p. 879.) Three years later, the court reiterated that holding in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah* (1993) 508 U.S. 520, 531 (*Lukumi*), stating that 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice'.

Thus, under the United States Supreme Court's most recent holdings, a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs.

Just four years ago, in *Catholic Charities of Sacramento, Inc.* v. *Superior Court* (2004) 32 Cal.4th 527 (*Catholic Charities*), we considered the claim of a nonprofit entity affiliated

with the Roman Catholic Church (Catholic Charities) that the First Amendment's guarantee of free exercise of religion exempted it from complying with a California law, the Women's Contraception Equity Act (WCEA), which required employers that provide prescription drug insurance coverage for their employees to include coverage for prescription contraceptives.

In rejecting that claim, we applied the test the United States Supreme Court had adopted in its 1990 decision in *Smith*, *supra*, 494 U.S. 872. We explained: 'The WCEA's requirements apply neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute's strict requirements for exemption on religious grounds. The act also addresses a matter the state is free to regulate; it regulates the content of insurance policies for the purpose of eliminating a form of gender discrimination in health benefits. The act conflicts with Catholic Charities' religious beliefs only incidentally, because those beliefs happen to make prescription contraceptives sinful.' (*Catholic Charities*, *supra*, at p. 549.)

In this case, too, with respect to defendants' reliance on the First Amendment, we apply the high court's *Smith* test. California's Unruh Civil Rights Act, from which defendant physicians seek religious exemption, is 'a valid and neutral law of general applicability' (*Smith*, *supra*, 494 U.S. at p. 879). As relevant in this case, it requires business establishments to provide 'full and equal accommodations, advantages, facilities, privileges, or services' to all persons notwithstanding their sexual orientation. (Civ. Code, §51, subds. (a) & (b).) Accordingly, the First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs. (*Lukumi*, *supra*, 508 U.S. at p. 531; *Smith*, supra, at p. 879.)

Defendant physicians, however, insist that the high court's decision in *Smith*, *supra*, 494 U.S. 872, has language on 'hybrid rights' that lends support to their argument that under the First Amendment they are exempt from complying with the antidiscrimination provisions of California's Unruh Civil Rights Act. The pertinent passage in *Smith* states: 'The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections ...' (*Smith*, at p. 881.) But the facts in *Smith*, the court explained, did 'not present such a hybrid situation'. (*Id.* at p. 882.) Defendants here contend that they do have a hybrid claim, because compliance on their part with the state's Act interferes with a combination of their First Amendment rights to free speech and to freely exercise their religion. We rejected a similar hybrid claim in *Catholic Charities*, *supra*, 32 Cal.4th 527.

In that case, we explained that '[t]he high court has not, since the decision in *Smith*, *supra*, 494 U.S. 872, determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim.' (*Catholic Charities*, *supra*, 32 Cal.4th at p. 557.) We added, however, that Justice Souter's concurring opinion in *Lukumi*, *supra*, 508 U.S. 520, 567, was critical of the idea that hybrid rights would give rise to a stricter level of scrutiny: '"[I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule ..."' (*Catholic Charities*, *supra*, at pp. 557–558, quoting *Lukumi*, *supra*, at p. 567 (conc. opn. of Souter, J.).) We also noted that the federal Court of Appeals for the Sixth Circuit had rejected as '"completely illogical" the proposition that "the legal standard [of review] under the Free Exercise Clause depends on

whether a free exercise claim is coupled with other constitutional rights." (*Kissinger* v. *Board of Trustees* [(1993)] 5 F.3d 177, 180 & fn. 1.)' (*Catholic Charities*, *supra*, at p. 558.) Nonetheless, after assuming for argument's sake that 'the hybrid rights theory is not merely a misreading of *Smith*, *supra*, 494 U.S. 872', we concluded that *Catholic Charities* had 'not alleged a meritorious' claim under that theory. (*Ibid.*) We also rejected the contention by Catholic Charities that requiring it to provide prescription contraceptive coverage to its employees would violate its First Amendment right to free speech 'by requiring the organization to engage in symbolic speech it finds objectionable'. (*Ibid.*) As we explained, 'compliance with a law regulating health care benefits is not speech'. (*Ibid.*)

Here, defendant physicians contend that exposing them to liability for refusing to perform the IUI medical procedure for plaintiff infringes upon their First Amendment rights to free speech and free exercise of religion. Not so. As we noted earlier, California's Unruh Civil Rights Act imposes on business establishments certain antidiscrimination obligations, thus precluding any such establishment or its agents from telling patrons that it will not comply with the Act. Notwithstanding these statutory obligations, defendant physicians remain free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination. 'For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.' (*Catholic Charities*, *supra*, 32 Cal.4th at pp. 558–559.)

Defendant physicians also perceive a form of free speech infringement flowing from plaintiff's purported efforts 'to silence the doctors at trial'. But the First Amendment prohibits government abridgment of free speech. Here, plaintiff is a private citizen. Therefore, her conduct as complained of by defendants does not fall within the ambit of the First Amendment.

Plaintiff's motion in the trial court for summary adjudication of defendant physicians' affirmative defense claiming a religious exemption from liability under California's Unruh Civil Rights Act merely sought to preclude the presentation at trial of a defense lacking any constitutional basis. In ruling on the motion, the trial court granted summary adjudication of the defense only insofar as it applied to plaintiff's claim of sexual orientation discrimination as prohibited by the Act. (See p. 17, *post*.) Nothing in that ruling precludes defendants from later at trial offering evidence, if relevant, that their denial of the medical treatment at issue was prompted by their religious beliefs for reasons other than plaintiff's sexual orientation.

7.5. Question for discussion: conflicts between equality requirements and other human rights

How far should anti-discrimination legislation reach, when it conflicts with other rights such as the right to respect for private or family life, freedom of religion, or freedom of association? Is this kind of conflict specific, or is it simply one example of conflicting fundamental rights? Should it matter which forms of discrimination are at stake, in particular on which grounds the disputed classification is made?

The requirement of a legal prohibition of discrimination requires more than simply that a law exists to impose such a prohibition. Effective enforcement is also required. In the case of *Simone André Diniz* v. *Brazil*, the Inter-American Commission on Human Rights dealt with the issue of the lack of an effective prohibition of racial discrimination, and in particular the State's failure to establish appropriate judicial remedies:

Inter-American Commission on Human Rights, *Simone André Diniz* v. *Brazil*, Case 12.001, Decision on the merits of 21 October 2006, Report No. 66/06:

[In the present case, an employer published an advertisement in a regional newspaper offering domestic employment, with preference to white persons. An Afro-Brazilian job-seeker, after calling the employer and being turned down for her colour, brought charges of racism against the employer. After a brief investigation, the public prosecutor decided not to press charges alleging that the impugned behaviour – publication of an advertisement expressing racial preferences – did not constitute the crime of racism. The decision to classify was upheld by the judge. After acknowledging the important progress made by Brazil in establishing a legal framework – including criminal law provisions – for the punishment of racism, the Inter-American Commission noted that these norms remained largely ineffective. It then suggested three causes for the law's inefficiency: the difficulty of satisfying the procedural requirement to prove racial hatred or the intent to discriminate; the existence of institutional racism; and the non-existence of a hate-speech crime, all cases being treated under general laws of slander. In its analysis of the specific circumstances of the petition, the Commission observed:]

97. The Commission already held that every victim of a human rights violation must be assured of a diligent and impartial investigation, and, if there are indicia as to who committed the crime, the pertinent action should be initiated so that a judge with jurisdiction, in the context of a fair trial, can determine whether the crime occurred, as with every crime brought to the attention of the authorities.

98. As this has not happened with the complaints of racial discrimination lodged by Afrodescendants in Brazil, the Brazilian State has flagrantly violated the principle of equality enshrined in the American Declaration and the American Convention, which it undertook to respect, and which dictates that all persons are equal before the law and have the right to equal protection of the law, without discrimination.

99. First, the Commission understands that excluding a person from access to the labor market on grounds of race is an act of racial discrimination ...

100. The IACHR understands that Article 24 of the American Convention is violated, in conjunction with Article 1(1), if the State allows such conduct to remain in impunity, validating it implicitly or giving its acquiescence. Equal protection before the law requires that any expression of racist practices be dealt with diligently by the judicial authorities.

101. In the specific case of Simone André Diniz, there was an ad that excluded her, based on her racial status, from a job. When she lodged a complaint with the judicial authorities they proceeded to archive the case, even though the perpetrator herself verified that she had the ad published.

102. The archiving of the case was not an isolated event in the Brazilian justice system; rather, the Commission has shown that it reflects a purposeful and explicit pattern of conduct on the part of the Brazilian authorities, when they receive a complaint of racism.

103. In addition, the automatic archiving of racism complaints keeps the judiciary from considering whether there was malicious or deceitful intent (*dolo*). As shown above, the absence of racial motivation has led to the non-enforcement of Law 7716/89, either by the automatic archiving of complaints in the inquiry phase or by judgments of acquittal. In the instant case it was by archiving the police inquiry. The fact that Gisela Silva had told the police inquiry that she had no intent to discriminate racially, or that she had reasons for preferring a white domestic employee, did not justify archiving; the defense of no racial motivation should have been argued before and analyzed by the judge, in the context of a regular criminal proceeding ...

107. The Commission emphasizes to the Brazilian government that the failure of the public authorities to go forward diligently and adequately with the criminal prosecution of the perpetrators of racial discrimination and racism creates the risk of producing not only institutional racism, in which the judiciary is seen by the Afrodescendant community as a racist branch of government, but is also grave because of the impact on society, insofar as impunity encourages racist practices.

108. The Commission would like to conclude saying that it is of fundamental importance to foster a legal awareness capable of making the effort to combat racial discrimination and racism effectively, for the judiciary should respond effectively insofar as it's an essential tool for controlling and fighting racial discrimination and racism.

109. In view of the unequal treatment the Brazilian authorities accorded the complaint of racism and racial discrimination lodged by Simone André Diniz, which reveals a widespread discriminatory practice in the analysis of these crimes, the Commission concludes that the Brazilian State violated Article 24 of the American Convention in respect of Simone André Diniz.

2.4 The guarantee of an effective protection against discrimination

According to the fourth norm contained in Article 26 ICCPR (see box 7.1.), States parties must 'guarantee to all persons *equal and effective protection against discrimination* on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (emphasis added). This positive obligation goes beyond the mere legal prohibition of individual acts of discrimination. It requires that States effectively combat instances of structural or systemic discrimination, by the adoption of positive measures ensuring that no group is permanently disadvantaged or excluded from the community. The Human Rights Committee requests that States parties include in their reports information about 'any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies', and wishes to be informed about 'legal provisions and administrative measures directed at diminishing or eliminating such discrimination'. The Committee also notes that positive action may in certain cases be required.

Human Rights Committee, General Comment No. 18, *Non-discrimination* (1989) (HRI/GEN/1/Rev.7, at 146), paras. 9–10:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

We return to the question of positive action measures hereunder (section 3.3.). We may note here, however, that similar positive duties have also been identified under the American Convention on Human Rights. In the above-mentioned *Simone André Diniz* v. *Brazil* case (section 2.3.), the Commission established that institutional racism and structural and historical causes were responsible for the inefficiency of the anti-discrimination legal framework, which led the Commission to recommend that Brazil 'adopt and implement measures to educate court and police officials to avoid actions that involve discrimination in investigations, proceedings or in civil or criminal conviction for complaints of racial discrimination and racism'. Furthermore, in the *Yean and Bosico* case, which concerned discrimination on grounds of foreign descent (section 2.2.), the Inter-American Court of Human Rights took the view that there was a positive obligation to adopt legislative, administrative and other measures in order to remedy structural discrimination. This is expressed even more clearly in the following advisory opinion, requested by Mexico:

Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States on the *Juridical Condition and Rights of the Undocumented Migrants*, paras. 112–19:

112. Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.

113. Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity ...

118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and nondiscrimination, because,

as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.

119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.

3 THE NOTION OF DISCRIMINATION

Discrimination is a multi-pronged notion. The vocabulary used refers to notions such as *de facto* discrimination, institutional discrimination, real or substantive equality, positive or affirmative action. The precise meaning of these concepts may differ between treaties and jurisdictions. In this section, the different dimensions of the non-discrimination requirement are explored and illustrated through representative cases. We examine the notions of direct and indirect discrimination (section 3.1.); of reasonable accommodation (section 3.2.); and of positive action (section 3.3.). Finally, these different understandings of the requirement of non-discrimination are related to the four rules explained in section 2 above: together, these two dimensions provide a full matrix of the implications of the principle of equal treatment.

3.1 Direct and indirect discrimination

Cases such as *Müller and Engelhard* v. *Namibia* or *Foin* v. *France*, both discussed above, present us with relatively easy situations where the impugned difference in treatment was practised openly – and indeed, was written into the legislation whose compatibility with the requirements of non-discrimination was challenged before the Human Rights Committee. In certain cases, practices too will openly differentiate on the basis of a ground which may lack a reasonable and objective justification. However, discrimination may also result from the use of apparently neutral criteria, procedures, or practices, the effect of which will be similar to that of direct discrimination: it is then referred to as indirect discrimination. Such criteria, procedures or practices, which result in *de facto* discrimination, may be calculated in order to exclude the members of a certain category. Alternatively, even in the absence of any intention to discriminate, they may have a

discriminatory impact because they are the result of established and unchecked routines, and fail to take into account the specific situation of certain groups. The notion of indirect discrimination serves, thus, two distinct ends: first, to unmask instances of conscious discrimination which hide behind the use of apparently neutral criteria, in order to arrive at the same result as would follow from the explicit use of prohibited differentiation criteria; second, to challenge certain rules or practices which, although not calculated to produce such effect, impose a specific disadvantage on certain groups, or have a disproportionate impact on such groups, without there being a justification for such disadvantage or such an impact. In this second conception, indirect discrimination may be completely detached from any kind of intention to discriminate, and it is best seen as a tool to revise permanently institutionalized habits and procedures, in order to make them more hospitable to difference. This is made possible by the use of statistical data, in order to measure the 'disparate (or disproportionate) impact' of apparently neutral measures on certain groups. There are advantages associated to this understanding of indirect discrimination, but also potential difficulties (see box 7.3.).

One famous example of 'disparate impact' discrimination is the case of *Griggs* v. *Duke Power Co*, which the US Supreme Court decided in 1971. This is generally seen as the first 'disparate impact' decision adopted under the Employment Title (Title VII) of the Civil Rights Act 1964 (see D. A. Strauss, 'Discriminatory Intent and the Taming of Brown', *University of Chicago Law Review*, 56 (1989), 935; or T. Eisenberg, 'Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication', 52 *New York University Law Review*, vol. 36 (1977)). This class action, filed on behalf of the African-American employees of the Duke Power Company, challenged the defendant's 'inside' transfer policy, which required employees who wanted to work in all but the company's lowest paying Labour Department to register a minimum score on two separate aptitude tests in addition to having a high school education. The Court considered that this policy was in violation of the applicable provision of the Civil Rights Act. At the material time, section 703 of the Civil Rights Act 1964 provided that '(a) It shall be an unlawful employment practice for an employer ... (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex, or national origin ... (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, colour, religion, sex or national origin ...' (78 Stat. 255, 42 U.S.C. 2000e-2). There was evidence that, under this policy, far more whites would accede to the other departments than African-Americans: in North Carolina, 1960 census statistics showed that, while 34 per cent of white males had completed high school, only 12 per cent of African-American males had done so; and with respect to standardized tests, the Employment Equal Opportunities Commission (EEOC) had found that use of a battery of tests, including the Wonderlic and Bennett tests used by the company in the instant case,

Box 7.3. The promises and methodological difficulties associated with 'disparate impact' discrimination

The reach of 'disparate impact' discrimination is potentially much broader than indirect discrimination construed as discrimination resulting from the adoption of a measure which is 'suspect' on its face. Although they do not overtly rely on a classification on a suspect ground, suspect measures must appear as if calculated to exclude the members of a certain category. Disparate impact discrimination, on the other hand, may be identified even in measures whose content, as such, is not in any way suspect. Wherever a particular measure produces a disparate impact on the members of certain protected categories, it will have to be justified, even where that measure, apart from this statistically proven impact, would not appear to be potentially discriminatory. This advantage is clear especially in situations where the challenged practice is opaque or informal, thus making it difficult to anticipate its impact. In the 1989 case of *Danfoss* for instance, as an undertaking had a pay policy which was characterized by a total lack of transparency, the European Court of Justice considered that 'it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men' (Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark* v. *Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] E.C.R. 3199 (judgment of 17 October 1989), para. 16). A similar reasoning could be made where an employer bases a recruitment process on the use of criteria or procedures which either are opaque (for instance, psychotechnical tests or job interviews), or more generally, whose potentially discriminatory impact may only be identified by the use of statistics (for instance, where preference is given to candidates residing in a particular geographical area, where certain ethnic minorities are located primarily in other neighbourhoods and are thus disproportionately affected by the use of such a criterion).

The disadvantage of this method however, is that it requires reliance on a specific methodology, based on the collection and analysis of statistical data, which may be particularly burdensome or even unavailable to victims of discrimination. Disparate impact analysis requires a comparison between the representation of different categories of persons (say, women and men, or different ethnic groups) within a 'departure group' and their representation in the 'arrival group', after an apparently neutral measure has been applied: the existence of a discrimination shall be presumed where the impact of that measure appears 'disproportionate', that is, where the representation of one category (say, women, or persons of a certain ethnic origin) is significantly lower in the 'group of arrival' than in the 'departure group'. However, apart from the question of what constitutes a disproportionate impact for the purposes of this analysis, the implementation of such a methodology requires that we define with precision the boundaries of the 'departure group' on the basis of which the impact of the provision, criterion or practice may be calculated. In the context of employment, for instance, the delimitation of the 'departure group' raises the question which minimum level of qualifications may be required in order to delineate the 'pool' of candidates to a job between whom the selection is to be made. Thus for instance, it may not be justified to presume that a recruitment process is indirectly

discriminatory where, although only 10 per cent of workers are of a certain ethnic origin in a region where 25 per cent of the active population is of that ethnic group, only 5 per cent of those having completed their secondary education are members of that group. If we consider that having completed high school is an essential requirement for being employed in the undertaking concerned (more plausibly: within a particular occupation in that undertaking), the recruitment process is in fact favourable to persons of that ethnic group, although they still are under-represented in that undertaking in comparison to their representation in the overall active population of the area (see, e.g. for situations where the definition of the relevant 'pool' has been discussed within the case law of the US Supreme Court, in the context of Title VII of the Civil Rights Act 1964: *Johnson* v. *Transportation Agency, Santa Clara County, Calif., et al.*, 107 S. Ct. 1442 at 1452 (1987) ('When a job requires special training ... the comparison should be with those in the labour force *who possess the relevant qualifications*'); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 at 620 (1974) (noting that the Court is not dealing with a situation where 'it can be assumed that all citizens are *fungible* for purposes of determining whether members of a particular class have been unlawfully excluded'); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977) (in order to address the allegation that a procedure for the recruitment of schoolteachers is indirectly discriminatory on the basis of race, the percentage of black schoolteachers recruited in a particular county should be compared with 'the percentage of *qualified black teachers in the labour force*'); *City of Richmond* v. *J. A. Croson Co*, 488 U.S. 469 (1989) ('where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be *the number of minorities qualified to undertake the particular task*') (emphasis added)).

In the employment context, this first difficulty does not arise where the job offered requires no qualifications or only minimal qualifications, or may be acquired by the training which the employer will provide (see, e.g. *Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (stating that it should put an end to the affirmative action programme set up within the undertaking for access to training 'as soon as the percentage of black skilled craftworkers in the ... plant approximates *the percentage of blacks in the local labour force*') (emphasis added)). But there are other difficulties. For instance, which role could the 'preferences' expressed by potential applicants play? Should we allow such 'preferences' to be taken into account in determining the relevant 'pool', although such preferences are always suspect of being tainted by the existence of institutional discrimination or, indeed, by the very fact of under-representation of certain groups within certain sectors or at certain levels of the professional ladder? Moreover, the assessment of the impact of such measure requires that we define the representation of the different categories within both the 'departure group' and the 'arrival group' where, in many cases, such data may be inexistent or where there may even be legal obstacles to the collection of such data.

resulted in 58 per cent of whites passing the tests, as compared with only 6 per cent of the blacks. This prompted the following remarks by the Court:

United States Supreme Court, *Griggs* v. *Duke Power Co*, 401 U.S. 424 (1971), 429–36 (opinion for the Court by CJ Burger):

The objective of Congress in the enactment of Title VII [of the Civil Rights Act] was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

The [fact that 'whites register far better on the Company's alternative requirements' than members of the African-American community] would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted … without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related

future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees'. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by 703(h) of the Act. That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or used to discriminate because of race ...'

Section 703(h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination. Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong. Rec. 7247. Despite these assurances, Senator Tower of Texas introduced an amendment authorizing 'professionally developed ability tests'. Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute.' 110 Cong. Rec. 13504 (remarks of Sen. Case).

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of 703(h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: 'Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title.' 110 Cong. Rec. 13724. The amendment was

then adopted. From the sum of the legislative history relevant in this case, the conclusion is inescapable that the [reading of the Employment Equal Opportunities Commission, acccording to which] 703(h) [requires] that employment tests be job related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The point to be emphasized here is that, without data indicating the percentage of African-Americans and whites respectively having completed high school in North Carolina, and indicating the disproportionate impact of so-called 'aptitude tests' on African-American applicants, these practices would not have been considered suspect and presumptively discriminatory. In fact, without breaking down the workforce of the Duke Power Company into ethnic groups, those requirements would most probably have gone unnoticed: even though upon closer examination they may have been found to impose disproportionate requirements on applicants, they would not appear, on their face at least, to impose a particular disadvantage on the African-American workers. In contrast, in the decision below, the Human Rights Committee uses a very different understanding of 'indirect discrimination', one which is not dependent on the use of statistics and instead takes as its departure point that certain measures shall, by their very nature, affect certain groups defined, for instance, by the religious affiliation of their members:

Human Rights Committee, *Karnel Singh Bhinder* v. *Canada*, Communication No. 208/1986 (CCPR/C/37/D/208/1986), final views of 9 November 1989:

[The author of the communication, Mr Singh Bhinder, is a naturalized Canadian citizen who was born in India. A Sikh by religion, he wears a turban in his daily life and refuses to wear safety headgear during his work. This resulted in the termination of his employment contract. Mr Singh Bhinder claims to be a victim of a violation by Canada of Article 18 of the International Covenant on Civil and Political Rights (freedom of religion). The State party on the other side submits that the author was not discharged from his employment because of his religion as such but rather because of his refusal to wear a hard hat, and contends that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate Art. 18 ICCPR.]

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat

be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3 [according to which the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others]. If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

Human Rights Committee, *C. Derksen* v. *Netherlands*, Communication No. 976/2001 (CCPR/C/80/D/976/2001), final views of 1 March 2004:

[The author, Cecilia Derksen, shared a household with her partner Marcel Bakker from August 1991 to February 1995, when Mr Bakker died. In April 1995, Ms Derksen gave birth to a child, Kaya Marcelle Bakker, which Mr Bakker had recognized as his during the pregnancy. On 6 July 1995, Ms Derksen requested benefits under the General Widows and Orphans Law (AWW, *Algemene Weduwen en Wezen Wet*). Her request was rejected, however, because she had not been married to Mr Bakker and therefore could not be recognized as a widow under the AWW. On 1 July 1996, the Surviving Dependants Act (ANW, *Algemene Nabestaanden Wet*) replaced the AWW. Under the ANW, unmarried partners are also entitled to benefit. On 26 November 1996 Ms Derksen applied for benefit under the ANW. However, her application was rejected because the ANW was considered not to apply retrospectively, i.e. to those who became widows prior to 1 July 1996 and were not, at the time of the entry into effect of the ANW, covered by the AWW. In her communication to the Committee, Ms Derksen alleges that it constitutes a violation of Article 26 of the Covenant to distinguish between half-orphans whose parents were married and those whose parents were not married, since such a distinction cannot be justified on objective and reasonable grounds.]

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants'

benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 in regard of Kaya Marcelle Bakker in respect of whom half orphan's benefits through her mother was denied under the ANW ...

Individual opinion of Committee member, Mr Nisuke Ando (dissenting)

... It is unfortunate that the new law affects her as well as her daughter unfavourably in the present case. However, in interpreting and applying article 26, the Human Rights Committee must take into account the following three factors: First, the codification history of the Universal Declaration of Human Rights makes it clear that only those rights contained in the International Covenant on Civil and Political Rights are justiciable and the Optional Protocol is attached to that Covenant, while the rights contained in the International Covenant on Economic, Social and

Cultural Rights are not justiciable. Second, while the principle of non-discrimination enshrined in article 26 of the former Covenant may be applicable to any field regulated and protected by public authorities, the latter Covenant obligates its States parties to realize rights contained therein only progressively. Third, the right to social security, the very right at issue in the present case, is provided not in the former Covenant but in the latter Covenant and the latter Covenant has its own provision on non-discriminatory implementation of the rights it contains.

Consequently, the Human Rights Committee needs to be especially prudent in applying its article 26 to cases involving economic and social rights, which States parties to the International Covenant on Economic, Social and Cultural Rights are to realize without discrimination but step-by-step through available means. In my opinion, the State party in the present case is attempting to treat married couples and unmarried partners equally but progressively, thus making the application of ANW not retroactive. To tell the State party that it is violating article 26 unless it treats all married couples and unmarried partners exactly on the same footing at once sounds like telling the State party not to start putting water in an empty cup it if cannot fill the cup all at once!

Individual of Committee member, Sir Nigel Rodley (dissenting):
I do not consider that the Committee's finding of a violation in respect of Kaya Marcelle Bakker, the author's daughter (paragraph 9.3), withstands analysis. To comply with the Committee's interpretation of the Covenant, the State Party would have had to make the ANW retroactive. Indeed, it is the very absence of retroactivity that, according to the Committee, constitutes the violation. Since most legislation has the effect of varying people's rights as compared with the situation prior to the adoption of the legislation, the Committee's logic would imply that all legislation granting a new benefit must be retroactive if it is to avoid discriminating against those whose rights fall to be determined under the previous legislation ...

The notion of indirect discrimination was slow to emerge in the case law of the European Court of Human Rights. The first explicit acknowledgement of the notion by the Court occurred in the case of *Thlimmenos* v. *Greece*, decided in 2000. A Jehovah's Witness had been denied the right to register as a chartered accountant, due to his criminal record following a conviction for having refused to do his military service. The Court noted that the Greek authorities should have taken into account that the conviction was based on behaviour motivated by the religious beliefs of Mr Thlimmenos, rather than on behaviour raising doubts about his morality or trustworthiness, which would justify the rationale behind the rule excluding from the profession of chartered accountants all persons with a criminal record. In arriving at the conclusion that Article 14 ECHR had been violated, taken in combination with Article 9 ECHR (freedom of religion), the Court noted that 'the right under Article 14 [of the European Convention on Human Rights] not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification ... However, ... the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without