



# The myth of associative discrimination and the Court of Justice’s great vanishing act: part 2\*

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## ABSTRACT

This article complements an article (part 1) recently published in this journal (72(1) NILQ 29–60) contending that the notion of associative discrimination as a term of art renders it so vulnerable to manipulation that it can be used to narrow the scope of the legislation. That argument was rooted in the UK Supreme Court’s reasoning in *Lee v Ashers Bakery* [2018] UKSC 49. Part 2 continues the theme, but this time to show that the vulnerability can work the other way, producing, first, an ‘extended’ notion of associative discrimination and, second, radically broad notions of direct and indirect discrimination. This limb of the thesis also argues that a case heralded as one of associative discrimination, *CHEZ* [2016] CMLR 14, was no such thing. It concludes that the ambitious approach of the European Court of Justice and its Advocates General will blur the traditional form-based distinction between direct and indirect discrimination.

**Keywords:** extended direct and indirect associative discrimination; *CHEZ*.

## INTRODUCTION

This article complements an article previously published in this journal contending that the notion of associative discrimination as a term of art renders it so vulnerable to manipulation that it can be used to narrow the scope of the legislation.<sup>1</sup> That argument was rooted in the United Kingdom (UK) Supreme Court’s reasoning in *Lee v Ashers Bakery*.<sup>2</sup> The theme continues here, but this time to show that the vulnerability can work the other way, producing, first, an ‘extended’ notion of associative discrimination and, second, radically broad notions of direct and indirect discrimination. This limb of the thesis also argues that a case heralded as one of associative discrimination

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1 M Connolly ‘The “associative” discrimination fiction: part 1’ (2021) 72(1) Northern Ireland Legal Quarterly 29–60.

2 [2018] UKSC 49.

was no such thing. All three propositions are rooted in the reasoning of the European Court of Justice (ECJ) in the case of *CHEZ*.<sup>3</sup>

The starting point is a rehearsal of two 'simple' examples. A white worker is dismissed from her job because she married a black man,<sup>4</sup> or a bar denies service to a white woman because she is accompanied by a black man.<sup>5</sup> Although atypical, these scenarios represent what has become known as associative discrimination. In such circumstances, the white person can sue for direct racial discrimination. This potential applies to all three of the principal discrimination Directives of the European Union (EU), covering race,<sup>6</sup> sex and gender reassignment,<sup>7</sup> disability, age, religion or belief, and sexual orientation.<sup>8</sup> Nevertheless, the reason that the white woman can sue is not her association with a black person, but more simply that the treatment was because of race. So, where, for instance, a white manager is dismissed for defying an order to bar black youngsters, he is dismissed because of race. No 'association' is required for liability.<sup>9</sup> To hold otherwise is to assert a myth. The myth is better appreciated when the associative notion is presented with more complex scenarios, such as the one arising in *CHEZ*:

In a predominantly Roma district, an electricity supplier hostile to Roma people moved meters so high that they could not be read, inconveniencing both Roma and non-Roma residents.

This scenario is far removed from the 'simple' examples, as here a non-Roma victim is 'associated' by the happenstance of the protected characteristic of her neighbours. This state of affairs was characterised neatly by Advocate General Kokott as a matter of 'collateral damage'.<sup>10</sup> As such, she advised that the non-Roma could sue for associative *indirect* (racial) discrimination. The subsequent ECJ decision added that the treatment could amount to *direct* discrimination against the non-Roma, without a mention of it being 'associative'. Whatever the

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3 Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] CMLR 14.

4 See eg Lord Simon, *obiter*, *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289–290 (on the premise that foster parents discriminated against a local authority for refusing to foster children of colour).

5 See the suggestion by James Comyn QC, approved by Lord Denning MR: *Applin v Race Relations Board* [1973] QB 815 (CA) 828, and 831 (Stephenson LJ), affirmed [1975] 2 AC 259 (HL).

6 Race Directive 2000/43/EC.

7 'Recast' Directive 2006/54/EC.

8 'Framework' Directive 2000/78/EC.

9 *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT). See below, text to n 102.

10 Case C-83/14 *CHEZ* [2016] CMLR 14, Opinion of AG Kokott, para AG58.

differences of language and reasoning deployed, the case has been heralded erroneously as an example of associative discrimination.<sup>11</sup>

As with *Lee v Ashers*, an analysis of *CHEZ* shows that recourse to the legislative provisions would have produced simpler questions to ask. In *Lee v Ashers* (where a bakery refused to ice a cake with the message 'support gay marriage'), it would have been whether the refusal was less favourable treatment because of sexual orientation. Instead, the Supreme Court confined its thinking to 'associative discrimination'<sup>12</sup> and thus devised a convoluted and vague associative 'closeness' test. This resulted in a finding of no discrimination because any 'association' with homosexual persons was not 'close enough' to those supporters of same-sex marriage, such as 'parents, the families and friends of gay people' generally.<sup>13</sup> In *CHEZ*, the question should have been the *locus standi* (standing to sue) of the non-Roma victim, a matter for the legislative enforcement provisions, rather than one of substantive law. Instead, the Advocate General produced an extended notion of 'indirect associative discrimination'. As with the Supreme Court, the core error was treating the notion of associative discrimination as a term of art, around which a novel (but broader) version of discrimination was devised. The ECJ did not deploy this terminology, instead producing overbroad, incomplete, and unbounded models of direct and indirect discrimination. Under these, any notion of associative discrimination, along with the conventional boundaries of the direct/indirect framework, disappeared in a great vanishing act. Accordingly, in continuing the contention that associative discrimination is not a term of art, this article highlights the likely missteps when treated as such, and the myth that *CHEZ* was in fact such a case.

Ahead is an appreciation of the governing legislative regime in the context of notions of associative discrimination. This helps inform the subsequent missteps. The substance of the discussion concerns the

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11 *Hainsworth v Ministry of Defence* (Leave to Appeal refused, with details) UKSC 2014/0164 (Lord Wilson, Lady Hale, Lord Clarke, Lord Hughes, Lord Hodge) [7]–[9], see also [Permission to Appeal results December 2015](#); *Chief Constable of Norfolk Constabulary v Coffey* [2018] ICR 812 (EAT) [49] (Judge David Richardson). For commentary, see eg *Harvey on Industrial Relations*, Part L, Equal Opportunities, 3(2)(f) [284.01] and (more cautiously for indirect discrimination) 3(3)(a) [291.01]; M Malone, 'The concept of indirect discrimination by association: too late for the UK?' (2017) *Industrial Law Journal* 46(1) 144; D Mitchell, 'Collateral damage' (2016) 166 (7686) *New Law Journal* 8–9; M Rubenstein, 'Highlights' 2015 (Sep) [2015] *IRLR* 746; Á Oliveira, Sarah-Jane King, 'A good chess opening: Luxembourg's first Roma case consolidates its role as a fundamental rights court' (2016) 41(6) *European Law Review* 865.

12 [2018] UKSC 49 (Lady Hale) [34]: 'This was a case of associative discrimination or it was nothing.'

13 *Ibid* [33].

Advocate General's Opinion and the court's judgment in *CHEZ*. This begins with the Advocate General's models of associative direct and indirect discrimination, and continues with the court's radical new discrimination models. Within this, there is the court's unorthodox comparison, an ambiguous 'grounds of' approach (ranging from 'related to' to 'hostile intent'), the erosion of form-based indirect discrimination, and a radical extended model of indirect discrimination. There is also a consideration of the edict from *Coleman v Attridge Law*,<sup>14</sup> adopted by the court, and its relationship with the UK harassment case *English v Sanderson Blinds*.<sup>15</sup> Finally, the article identifies the missteps in *CHEZ* and why the case is wrongly regarded as one of associative discrimination (the 'associative myth').

A note of caution. The case of *CHEZ* contains many unconnected strands and incomplete notions, so it is not the easiest to digest. This might be down to the Reference, posing for the court 'no less than ten extremely detailed' questions.<sup>16</sup> These included the meanings of 'comparable situation' and 'apparently neutral practice'.<sup>17</sup> Thus, the court was charged not only with providing general principles of direct and indirect discrimination, but fleshing them out in some detail. Accordingly, some of the analysis on these questions is respectively similarly doctrinal.

## ASSOCIATIVE DIRECT DISCRIMINATION AND THE LEGISLATION

Hitherto, associative discrimination has only been considered in the context of *direct* discrimination. Various theories have been advanced in support of making associative discrimination unlawful. Some focus on the third party, or 'associated', member of a suspect class, with a concern over the harm<sup>18</sup> or indignity<sup>19</sup> they suffer via the treatment of someone with whom they are associated. Thus, the black husband of the white worker suffers harm or indignity when his wife is dismissed because of *his* colour. It will become apparent that the legislation suggests a reach further than this.

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14 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27.

15 [2009] ICR 543 (CA) [39] (Sedley LJ). See further Connolly (n 1 above) text to n 26.

16 Case C-83/14 *CHEZ*, Opinion of AG Kokott, para 30 (see also para 37 of the judgment).

17 *Ibid*, respectively, Questions 2, 6.

18 See eg V Schwartz, 'Title VII: a shift from sex to relationships' (2012) 35 Harvard Journal of Law and Gender 209. Discussed in Connolly (n 1 above) 30–38.

19 *Ibid*. See also, Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, Opinion of AG Maduro, para AG11.

Direct discrimination across the EU equality Directives employs a common formula. For example, the Race Directive provides,

[D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin ...<sup>20</sup>

This does *not* state 'on grounds of *his* (or *her*) racial or ethnic origin'. The omission of a possessive adjective is key here. Rather than identifying the targeted victim with *a* protected characteristic, the conduct need only be because of a protected characteristic (or suspect class or suspect ground), a somewhat more abstract term. This is in contrast to the United States (US) Civil Rights Act 1964, whose employment discrimination provisions express that the protected characteristic belongs to the victim-claimant.<sup>21</sup>

The Directive's formula requires treatment 'on grounds of' the protected characteristic in question. The 'less favourable' element involves a comparison of how a person would be treated in a comparable situation. The usual approach here is to deduct just the racial (or other suspect ground) element from the comparable situation. Note that the phrase 'or would be treated' allows for a hypothetical comparison. In the simple examples (outlined above), the conduct was on the ground of the race of the third party, or perhaps, the interracial relationship. Either way, if the claimant-victim would not have been rejected in a comparable situation (where the husband or companion were white), the treatment was less favourable.

Thus, the key to the Directives' formulas encompassing associative discrimination is the absence of any requirement that the victim-claimant holds the relevant protected characteristic. Under the US model, even a liberal or purposive interpretation must ultimately refer to the plaintiff's protected characteristic. For instance, in *Tetro v Elliot Popham Pontiac*,<sup>22</sup> a Court of Appeals found that it was discriminatory to dismiss a white worker because his child was mixed race. But the reasoning came back to the statutory formula: '[A] white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child.'<sup>23</sup>

20 Race Directive 2000/43/EC, art 2(2)(a). The UK legislation is similarly formulated: eg EA 2010, s 13(1); Fair Employment and Treatment (Northern Ireland) Order (FETO(NI)) 1998, SR 1998/3162, Art 3(2A).

21 Civil Rights Act 1964, Title VII, s 706 (42 USC s 2000e-2): 'It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin ...'.

22 173 F 3d 988 (6th Cir 1999).

23 Ibid 994.

The Directive's formula has potential to go much further than necessary for this or the 'simple' examples of associative discrimination, which *could* be explained by the targeted victim's own race (a *white* person being associated with a black husband or companion). For instance, a white employee may be less favourably treated by being ordered to bar black guests, or to make the premises more attractive to heterosexuals.<sup>24</sup> This broader legislative intent is confirmed by the inclusion of exceptions expressly confined to the targeted victim's *own* protected characteristic.<sup>25</sup>

However, ECJ authority prior to *CHEZ* seems to extend the Directive's formula even further. In *Coleman v Attridge Law* (where a worker was treated less favourably because of her child's disability), Advocate General Maduro wrote,

The distinguishing feature of direct discrimination and harassment is that they bear a necessary relationship to a particular suspect classification. The discriminator relies on a suspect classification in order to act in a certain way. ... An employer's reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer's reasoning may be based.<sup>26</sup>

The court endorsed this sentiment with a pithy edict: 'The principle of equal treatment enshrined in the Directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Art.1.'<sup>27</sup> This characterisation of direct discrimination shifts the focus away from the identity of the victim, let alone *anyone* with whom they may be associated. Indeed, whether anyone in the scenario has a protected characteristic seems barely relevant. The 'evil which must be eradicated' is conduct informed by a protected

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24 Respectively, Race Directive 2000/43/EC, art 2(2) and (in the UK, *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT) (see, text to n 102); *Lisboa v Realpubs* [2011] Eq LR 267 (EAT).

25 Eg pregnancy and maternity (Recast 2006/54/EC, art 2(2)(c), referring to 92/85/EEC, art 2). Religious organisations can recruit according to the *victim-claimant's* religion (Framework 2000/78/EC, art 4(2). For the UK, see eg pregnancy and maternity (EA 2010, ss 17, 18), being married or in a civil partnership (s 13(4)). Religious organisations can discriminate because of the victim-claimant's sexual orientation or religion, in the fields of services, public functions, associations, and premises (sch 23, para 2). For the extensive employment exceptions, see sch 9, and for services, sch 3.

26 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, Opinion of AG Maduro, para AG19.

27 *Ibid*, para 38 (and 50). The 'grounds' alluded to were sexual orientation, religion or belief, disability and age ('Framework' Directive 2000/78/EC, art 1). The principle was applied to the Race Directive 2000/43/EC in Case C-83/14 *CHEZ* [2016] CMLR 14, para 56.

characteristic (race, sex, disability, sexual orientation, etc) rather than any harm or indignity caused to persons belonging to a suspect class. All that is required is conduct of a discriminatory nature and a victim. As such, this *Coleman* edict could be labelled 'discriminatory conduct *per se*', or 'discrimination *per se*', or just the '*per se* edict'.

Thus, in arguing that associative discrimination is not a term of art, the starting point is that the legislative text does nothing to encourage it. A good reason for this is the risk of missteps. Those made by the UK Supreme Court have been highlighted elsewhere.<sup>28</sup> Those made in the other leading case on the matter, *CHEZ*, are considered next.

### **'EXTENDED' ASSOCIATIVE DISCRIMINATION AND THE COLEMAN EDICT: THE CASE OF *CHEZ***<sup>29</sup>

As noted above, in this case, the Bulgarian electricity supplier raised its (outdoor) meters in a predominantly Roma district to at least six metres. This was to prevent tampering.<sup>30</sup> A non-Roma resident, suffering a similar inconvenience, offence and stigma<sup>31</sup> as her Roma neighbours, brought a claim of direct and indirect racial discrimination. This case resembles the 'associative' examples discussed so far, in that the victim-claimant did not belong to the relevant suspect class and (it was assumed) that the treatment was informed by the protected characteristic (race) of others. It differs because these others, the 'third parties', were likewise targeted.

#### **Advocate General's Opinion**

In her Opinion for the court, Advocate General Kokott considered that a 'personal link' was not the only conceivable requirement for associative discrimination.<sup>32</sup> She applied her associative theory to direct *and* indirect discrimination.<sup>33</sup>

For direct discrimination, AG Kokott advised that it extended beyond *Coleman* (and the personal link between mother and baby). She gave an example of a group of people refused a table in a restaurant because one of them was black. Here, each of the rejected group's white guests could sue for direct associative discrimination. It made no difference that there may not have been a personal link with the black

28 See Connolly (n 1 above) 30–38, discussing *Lee v Ashers Bakery* [2018] UKSC 49.

29 Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] CMLR 14.

30 Ibid para 106.

31 Ibid para 87.

32 Ibid Opinion of AG Kokott, para AG58.

33 Ibid paras AG103–AG109.

guest, say, if they were meeting for the first time.<sup>34</sup> Hence, associative discrimination may,

be inherent in the measure itself, in particular where that measure is liable, because of its wholesale and collective character, to affect not only the person possessing one of the [protected] characteristics ... but also—as a kind of ‘collateral damage’—includes other persons.<sup>35</sup>

From this, it would seem that AG Kokott’s theory applies to anyone suffering ‘collateral damage’ from a discriminatory act, and that these persons have suffered direct associative discrimination. This is not as far-reaching as it may first appear. In applying an orthodox comparison, the Advocate General found that, as the Roma and non-Roma residents had been treated equally (badly), any discrimination could not be direct.<sup>36</sup>

According to the Advocate General, if the ‘collective’ treatment is facially neutral, then it cannot be direct discrimination, associative or otherwise. This raises the question of how far this theory actually extends the notion of direct associative discrimination. AG Kokott’s restaurant example shows that where the treatment is facially discriminatory, then there is a case even without a ‘personal link’. This may extend beyond the close personal relationship in *Coleman*, but not beyond long-established simple examples. It is no different from the example of the white woman refused admission because she is accompanied by a black man. Whether they had a personal relationship is irrelevant. (They may have been meeting on a blind date.) This example, from the English Court of Appeal, dates to 1973.<sup>37</sup> The Advocate General gave no examples beyond this. As such, it is difficult to conclude that she intended to create a far-reaching theory of direct associative discrimination. On that basis, AG Kokott’s theory could be said to require facially discriminatory treatment, applied ‘collectively’ to a mixed group causing harm to both those with, and those without, the relevant protected characteristic. As such, this theory adds nothing new to the UK legal lexicon and merely confirms that *Coleman* is not confined to ‘close personal relationships’. Hemmed in by the orthodox comparison, the theory could not apply to the unusual facts of the case in hand.

Unaware of, or undaunted by, such niceties, from her finding of facially neutral treatment, AG Kokott’s analysis defaulted to that of indirect discrimination.<sup>38</sup> Here, her theory came to life. For her, the

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34 Ibid para AG 59.

35 Ibid.

36 Ibid paras AG85–AG87.

37 See n 5 above.

38 Cf *Lee v Ashers*, ceasing further analysis upon such a finding. See [2018] UKSC 49 [21] and for comment Connolly (n 1 above) 56, “Treatment “applying to all””.



facts of *CHEZ* presented a *prima facie* case of associative *indirect* discrimination (with a heavy hint that it could not be objectively justified<sup>39</sup>). In support of her theory here, the Advocate General deployed an example of an employer providing nursery care for children of its full-time employees only. Assuming that the full-timers were predominantly male and part-timers predominantly female, this raised a case of *indirect* sex discrimination. Her associative theory extended the employer's liability towards the part-timers' children, who had likewise suffered.<sup>40</sup> Note here, despite her observation elsewhere in her Opinion that the victims in *CHEZ* had been affected in the same way,<sup>41</sup> this was not laid down as a boundary for her associative theory. Accordingly, it did not matter that the children would not have been affected in the same way as their mothers. This suggests it is not necessary for victims of collateral damage to have suffered the *same* harm as the primary victims. Given this example, her Opinion on the case, and the absence of any boundaries, this associative theory, when applied to *indirect* discrimination, has exceptional potential. In *CHEZ*, there was an association merely by the happenstance of the protected characteristic of the claimant's neighbours. But the principle espoused here applies to anyone with the misfortune to have been harmed by a practice adversely affecting a suspect class. These victims need not be neighbours in the geographical, or any, sense, save for being harmed by the same practice. AG Kokott's associative theory is more about associated *harm* than anything else, suggesting that *anyone* harmed by a discriminatory act has suffered discrimination. (The ramifications are considered, further below, in the discussion on the court's finding on indirect discrimination.)<sup>42</sup>

For AG Kokott's associative theories, everything turns on the comparison. It would seem to have much more potential for indirect discrimination than for direct discrimination. However, her efforts failed to influence the court, as her associative theories vanished as the court delivered its own radical models of discrimination.

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39 Case C-83/14 *CHEZ*, Opinion of AG Kokott, AG106-AG109 and (for justification) para AG139.

40 *Ibid* para AG107.

41 Elsewhere in her Opinion, she said that Roma and non-Roma were affected in the same way, but this was not laid down as a boundary for her theory on direct associative discrimination: para AG98.

42 See 25–27.

## The judgment

### *Direct discrimination*

For all the talk of associative discrimination by its Advocate General, the court's judgment did not mention it when holding that the claimant could sue for *direct* discrimination, or in the alternative, for indirect discrimination.<sup>43</sup> After iterating that the equality legislation should not be given a restrictive interpretation,<sup>44</sup> the court repeated the edict from *Coleman*, that the legislation is to combat discrimination *per se* and 'not to a particular category of person'.<sup>45</sup> From there, the court produced a judgment even more radical than its Advocate General's Opinion. It came to these findings via an unorthodox approach to the 'less favourable' element, an ambiguous presentation of the 'grounds of' question, and indications that a case could turn on motive rather than form, which returns the matter to the *Coleman* edict. These features are discussed next, in turn.

### *The comparison for the less favourable element*

AG Kokott's contrary Opinion relied on an orthodox comparison, incorporating all relevant facts save for the protected characteristic in question. For the court, however, rather than comparing the treatment of different racial groups, the comparison was between those whose meters had been raised, and those for whom they had not.<sup>46</sup> This departure from orthodoxy had more to do with meters and place of residence than with ethnicity. It merely compared those who had been mistreated with those who had not. Such a question will return the same answer every time. It proves no more than that the defendant treated one *district* (rather than ethnic group) less favourably than it did another; if the protected characteristic in question were race, this is an 'apparently neutral practice', and so apt for an indirect discrimination analysis.<sup>47</sup>

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43 Case C-83/14 *CHEZ*, para 50.

44 *Ibid* para 42, citing Case C-391/09 *Runevic-Vardyn v Vilniaus Miesto Savivaldybes Administracija* [2011] 3 CMLR 13, para 43.

45 *Ibid* para 56. In Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, para 38 (and 50); at para 64(1) the court ruled simply that the legislation was 'not limited only to people who are themselves disabled'. The Opinion advocating an 'associative' theory was written by AG Maduro [2008] 3 CMLR. 27, paras AG9–AG14 and AG19. See further Connolly (n 1 above) 32–36.

46 *Ibid* para 90.

47 The Bulgarian court had held that this was direct discrimination on the ground of 'personal situation', a protected characteristic under Bulgarian law: *ibid* paras 13 and 26.

EU legislation requires a comparison for direct discrimination as a matter of substantive law, although it is arguable that it affords some discretion in fashioning a 'comparable situation'. Less discretion is afforded by the UK legislation, requiring 'no material difference between the circumstances relating to each case'.<sup>48</sup> Again, this is an element of the direct discrimination formula. That said, UK case law has shown a willingness to dispense with the comparison, but only where a comparison would prove problematic and the 'reason why' was established.<sup>49</sup> Otherwise, the comparison is 'compulsory'.<sup>50</sup> Of course, making an orthodox comparison in *CHEZ* was quite unproblematic, as the Advocate General demonstrated.

When employed, orthodox comparisons help distinguish the protected characteristic in question, and thus isolate direct discrimination from merely unfair, or equally bad, treatment (the latter suggesting an indirect discrimination analysis is due, as the Advocate General deduced). The *CHEZ* comparison could not do this. The court did not explain this departure from orthodoxy or from its Advocate General's Opinion. Given that the Reference expressly requested clarity on the meaning of the comparison,<sup>51</sup> this unorthodoxy is all the more puzzling. Two explanations are ventured here.

First, although not expressed as such, the court may have been led into this by some notion of associative discrimination. The comparison made in *CHEZ* distinguished the treatment of one group (targeted Roma and non-Roma who were associated by neighbourhood) from that of another (those not targeted and associated by neighbourhood). Second, a more likely, or perhaps complementary, explanation rests in the *Coleman per se* edict, which, unlike AG Kokott's associative theory, was cited. With its focus on the defendant's conduct (and presumably consequent harm), rather than the protected characteristic of the victim-claimant, this edict absorbs the non-Roma as 'primary victims'. This explanation is also supported by the subsequent reasoning, which duly focused on the defendant's stereotyping of the Roma, which could be interpreted as the critical factor in the finding of direct discrimination.

A relaxed comparison facilitates this approach, which in effect has the potential to convert form-based indirect discrimination into direct discrimination. Indeed, given the novel consequence, and that an apparently neutral practice can be converted into direct discrimination

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48 EA 2010, s 23; FETO(NI), art 3(3).

49 *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (HL) [11] (Lord Nicholls), applied, *Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061 [76]. See further below, 'The *Coleman* edict and *Sanderson*-type Cases', 18.

50 *Glasgow CC v Zafar* [1998] ICR 120 (HL).

51 Case C-83/14 *CHEZ*, Question 2: para 37; Opinion of AG Kokott, para 30.

upon the 'grounds of' element, then the precise meaning of that element needs to be defined. This is especially so because the Reference expressly required a precise definition of direct discrimination.<sup>52</sup> The judgment fell short here.

***'Grounds of' – reasons relating to, or motivated by, discrimination?***

It was clear that the judgment considered that a defendant's discriminatory reasoning was relevant to the 'grounds of' question, but it clarified neither its precise meaning nor role. It appeared to pitch two models either side of the conventional 'grounds of' approach.

The court committed considerable attention to evidence implicating the supplier as acting on Roma stereotyping or prejudice. This, aided by the relaxed comparison, presented a presumption of direct discrimination (for the defendant to rebut 'exclusively on objective factors unrelated to any discrimination on the grounds of racial or ethnic origin').<sup>53</sup> Later in the same section of the judgment, the court wrote that there is direct discrimination where the conduct was 'introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned ...'<sup>54</sup> A reader predisposed to the conventional approach to the 'grounds of' question, might benignly suppose that this section is following that conventional approach, despite the imprecise language employed. After all, nothing in this section of the judgment expressly declared a major change of direction. However, the danger with such imprecision is that it opens the judgment to different interpretations, especially given the element's pivotal role in the novel suggestion that an apparently neutral practice can amount to direct discrimination. A less forgiving reader of this section could detect two alternative thresholds for the 'grounds of' question: either 'reasons relating to' race, or (racial) 'stereotyping or prejudice'.

A rubric, 'reasons relating to' race, is broader than 'on grounds of' race (although not as broad as the harassment provisions requiring only 'conduct relating to' a suspect class).<sup>55</sup> But it is broad enough, especially given the relaxed comparison, to encompass many cases of facially neutral treatment, ordinarily treated as indirect discrimination. This could prove critical. A natural application of the phrase would

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52 Ibid, Questions 2, 3, 4: para 37; Opinion of AG Kokott, para 30.

53 Ibid paras 81–84.

54 Case C-83/14 *CHEZ*, para 91.

55 Race Directive 200/43/EC, art 2(3); Recast 2006/54/EC, art 2(1)(c); Framework 2000/78/EC, art 2(3).

capture the likes of *Bressol*,<sup>56</sup> for example, where the ECJ accepted that restrictions amounted only to *indirect* discrimination, despite being drafted in barely disguised discriminatory terms (a residence requirement is typical), with the intention to restrict other EU nationals from utilising the host nation's education benefits. These restrictions were imposed for reasons 'relating to' nationality. It was unlikely that stereotyping or prejudice could convert them into direct discrimination, but the 'relating to' rubric surely could. In the UK, in *Orphanos v Queen Mary College*,<sup>57</sup> to avoid (higher) overseas fees, a requirement was imposed on students to be ordinarily resident within the European Community (EC) for three years. It was imposed knowingly against non-EC nationals with the immediate goal of curtailing public expenditure on education. The House of Lords treated the requirement as indirect discrimination, with the consequence that the claimant was awarded no compensation.<sup>58</sup> Yet, the requirement clearly was imposed for a reason relating to nationality, as the House of Lords found when rejecting the college's justification defence.<sup>59</sup> It would seem that a post-*CHEZ* claimant could have been awarded compensation for direct discrimination. This approach could also deprive many defendants of a good defence. In *Greater Glasgow Health Board v Carey*,<sup>60</sup> for example, the employer justified a denial to a health visitor's request to move to part-time work because patients required regular daily personal contact. Given that any employer (especially one with a significant Human Resources Department) is likely to be aware of the impact on women, this refusal, although not on 'grounds of' sex, could

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56 Case C-73/08 *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559. See also Case C-209/03 *R (Bidar) v Ealing LBC* [2005] ECR I-2119; followed by the UK Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11. 'Nationality' discrimination is unlawful by Treaty on the Functioning of the European Union, art 18 (ex art 12 Treaty establishing the European Community). For a summary of the political background, see, S Garben, 'Case Comment on *Bressol*' (2010) 47(5) *Common Market Law Review* 1493, 1496–1498.

57 [1985] AC 761 (HL).

58 *Ibid* respectively 772–773 and 774–775. Although the fee was not justified, the Pyrrhic victory was because, at the time, for indirect discrimination only, compensation could only be awarded if the requirement was intended to discriminate: Sex Discrimination Act 1975, s 66(3); Race Relations Act 1976, s 57(3). This has since been ameliorated. See *JH Walker v Hussain* [1996] ICR 291 (EAT), at 299–300; *London Underground v Edwards* [1995] ICR 574 (EAT), where an 'awareness' of the discriminatory impact was enough for compensation to be payable. See now EA 2010, ss 119(6), 124(5); FETO(NI), art 39(3).

59 *Ibid* 773.

60 [1987] IRLR 484 (EAT). The employer justified the refusal by offering five half-days per week, instead of the requested three whole days.

be said to have been made for a reason 'relating to' sex, and as such, under *CHEZ*, the defence would be lost.<sup>61</sup>

These examples merely illustrate how the 'relating to' phrase, once combined with the relaxed comparison, could change the outcome of cases ordinarily treated as indirect discrimination. Of course, such a low threshold for direct discrimination liability does not accord with the legislative phrase 'grounds of' nor the legislative scheme, which expressly provides an objective justification defence only for indirect discrimination, which is expressed as form-based, requiring only *apparently* neutral practices that put suspect classes at a particular disadvantage.<sup>62</sup>

At the other extreme, the court's extensive detailing of the supplier's prejudice and stereotyping suggests that a discriminatory motive is required for direct discrimination liability. This at least could put a check on an otherwise extraordinary reach of this relaxed version of direct discrimination. There is further evidence supporting this interpretation in the subsequent case of *Achbita*,<sup>63</sup> where the court found that an employer's blanket ban on visible signs of religious, philosophical, or political beliefs amounted to indirect discrimination. This was despite the ban obviously 'relating to' religion, notably that of the headscarf-wearing Muslim worker who was dismissed for defying the order. Accordingly, in *Achbita*, AG Kokott distinguished *CHEZ* as turning on the supplier's motive,

As is clear from the judgment in *CHEZ* ... [82], the Court considers a measure taken on the basis of stereotypes and prejudices in relation to a particular group of individuals to be an indication of direct discrimination (based on ethnic origin).<sup>64</sup>

Even with these indications that the court looks for a discriminatory motive, the next question is what quite this means. Within the notion of motive, there is a range of states of mind that might be required for liability. These could range from malice, hostility, prejudice, stereotyping, or just foresight or even constructive knowledge of the impact of the conduct, such as having ought to have been aware that the district targeted for raised meters was predominantly Roma.

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61 It could not be argued as genuine occupational requirement (GOR), as there was no requirement for a man to do the job. For GORs see, EA 2010, sch 9, part 1, para 1; Sex Discrimination (NI) Order 1976, SR 1976/1042, art 10; 'Recast' Directive 2006/54/EC 14(2).

62 Race Directive 2000/43/EC, art 2(2)(b); Recast 2006/54/EC, art 2(1)(b); Framework 2000/78/EC, art 2(2)(b). Emphasis supplied.

63 C-157/15 *Achbita v G4S Secure Solutions NV* [2017] 3 CMLR 21.

64 *Ibid* para AG55, n 30.

Whatever the level of motive envisaged, importing notions of discriminatory intent into direct discrimination without qualification brings with it issues. Many claims would be more difficult to bring, especially if claimants were unduly burdened with proving requirements from higher in the range, such as a malicious intent.<sup>65</sup> It also risks, or encourages, the recognition of 'benign motive' defences, whereby even though there is a discriminatory reason for the treatment, the defendant demonstrates a benign motive, such as customer preference, chivalry, or protection from harassment or even violence.<sup>66</sup> One must presume that this would be against policy<sup>67</sup> or any purpose that could be attributed to equality legislation, but it might reignite long-standing arguments and divisions on the matter.<sup>68</sup>

A shift of emphasis towards a discriminatory motive brings to mind the US jurisprudence. Instead of a form-based approach, the US counterparts to direct and indirect discrimination are known respectively as intentional and non-intentional discrimination.<sup>69</sup> The US courts tend to utilise a comparison as an evidential tool in proving

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65 S Fredman, *Discrimination Law* 2nd edn (OUP 2011) 203–214.

66 Respectively, *Diaz v Pan Am* 442 F 2d 385 (US, 5th Cir 1971), *certiorari* denied, 404 US 950 (1971) (preference for female cabin crew); *Segor v Goodrich Actuation Systems Ltd* (2012) UKEAT/0145/11/DM (US arms contract stipulated 'no French nationals'); *Hafeez v Richmond School* (Industrial Tribunal, 27 February 1981) (parents' preference for pupils to be taught by 'English teachers'). *Ministry of Defence v Jeremiah* [1980] QB 87 (CA) (women not required to work in dirty part of factory); *Grieg v Community Industry* [1979] ICR 356 (EAT) (woman denied work with all-male decorating team); *Amnesty International v Ahmed* [2009] ICR 1450 (EAT) (Sudanese national rejected as reporter because of risk of violence).

67 In Case C-188/15 *Bouagnaoui v Micropole SA* [2017] 3 CMLR 22, para 40, it was held that a customer preference for workers not to wear a headscarf could not amount to a GOR defence. This was because these were 'subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer' (at [40]).

68 In the UK, on no less than eight occasions, the House of Lords/Supreme Court has entertained the issue and often divided on it: *R v Birmingham CC ex p EOC* [1989] 1 AC 1156; *James v Eastleigh BC* [1990] 2 AC 751; *Nagarajan v LRT* [2000] 1 AC 501; *Chief Constable of West Yorkshire v Khan* [2001] UKHL 48; *Shamoon v Chief Constable of the RUC* [2003] ICR 337; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 (HL); *St Helens MBC v Derbyshire* [2007] ICR 841; *R (E) v Governing Body of JFS* [2010] 2 AC 278 (SC). In addition, the issues of knowledge of the protected characteristic, and (for two Law Lords) discriminatory intent, arose in *Lewisham LBC v Malcolm* [2008] 1 AC 1399 (HL).

69 For discussions on the precise meaning of intent in the US, see M Selmi, 'Proving intentional discrimination: the reality of Supreme Court rhetoric' (1997) 86 *Georgetown Law Journal* 279; E Schnapper, 'Two categories of discriminatory intent' (1982) 17 *Harvard Civil Rights–Civil Liberties Law Rev* 31.

the discriminatory, or 'hostile', intention, rather than as a necessary element.<sup>70</sup> The difference is that the US model exists within the framework of developed jurisprudence, notably its 'pretext' doctrine (discussed below).

This is not to say that stereotyping cannot be evidence that a reason for the treatment is a protected characteristic,<sup>71</sup> notably where the grounds for the treatment are 'not obvious':<sup>72</sup> for example, where a bartender says to a homeless black man dressed in rags, 'I do not serve people like you.'<sup>73</sup> Hitherto, direct discrimination requires no motive, only a discriminatory ground, or cause, for the treatment. The distinction was set out by Lord Nicholls in *Nagarajan*,

The crucial ['grounds of'] question ... is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred.<sup>74</sup>

It might be that the *CHEZ* judgment cited stereotyping and prejudice merely as evidence of something else. The difficulty is that the 'something else' was not made clear. The reference to the reason being 'related to' ethnicity suggests such a low threshold, that the evidence of stereotyping or prejudice was unnecessary. All that could be required under this standard would be foresight that the practice would harm those in a predominantly Roma district. Instead of pitching two models either side of the conventional 'grounds of' approach, the matter would have been clearer if it had deployed this legislative format and explained the threshold it applied. The obligation upon the court was all the more so given the request for clarity on the meaning of direct discrimination expressed in the Reference.<sup>75</sup>

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70 See eg Civil Rights Act 1964, Title VII (employment), s 703 (42 USC s 2000e-2(m)). For the evidential role of the comparison, plaintiffs use a 'similarly situated' rubric. See *International Brotherhood of Teamster v US* (1977, Sup Ct) 431 US 324, n 15: 'Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.' Cited by the [Equal Employment Opportunity Commission Compliance Manual](#), 604.1(a).

71 See eg *Alexander v Home Office* [1988] 2 All ER 118 (CA) 120h: 'He displays the usual traits associated with people of his ethnic background being arrogant, suspicious of staff, anti-authority, devious and possessing a very large chip on his shoulder ... that seems too common in most coloured inmates.' This was evidence that a refusal of (preferable) kitchen work for a prisoner was directly discriminatory.

72 *Nagarajan v LRT* [2000] 1 AC 501 (HL) 511.

73 See also *R (E) v Governing Body of JFS* [2010] 2 AC 278 (SC) [21] (Lord Philips).

74 *Nagarajan v LRT* [2000] 1 AC 501 (HL) 511.

75 Case C-83/14 *CHEZ*, Questions 2, 3, 4: para 37; Opinion of AG Kokott, para 30.



*Form, motive, pretext and the relationship with  
indirect discrimination*

It was suggested above that the relaxed comparison permitted a conventional case of indirect discrimination to be analysed as direct discrimination. This appeared to turn on the 'grounds of' element, requiring a reason 'related to' race or based on racial 'stereotyping or prejudice'. In addition to providing no precision as to the meaning of this element, the *CHEZ* judgment changed this element's relationship with indirect discrimination.

In addition to the unorthodox comparison, this reasoning appears to depart from the conventional form-based approach, which in this case would be the apparently neutral conduct based on a place of residence. Under a form-based approach, a facially neutral practice cannot be converted into direct discrimination by the reason for the treatment. For indirect discrimination, the reasons for the treatment belong to the objective justification defence, which of course would be greatly undermined by evidence of stereotyping or prejudice.<sup>76</sup> Hence, the dominating 'grounds' feature is at odds with previous ECJ practice, notably in cases of intentional discrimination against non-nationals wanting to exploit a host nation's advantageous benefits,<sup>77</sup> using the simple expedient of drafting 'their way out of direct into indirect discrimination'.<sup>78</sup>

The form-based approach is supported by the Directive (and the UK legislation). The Directive's definition of indirect discrimination, requiring an 'apparently neutral provision, criterion or practice',<sup>79</sup> suggests that even a deceitful neutral practice should be analysed only as *indirect* discrimination.<sup>80</sup> This accords with previous ECJ practice,

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76 See eg Case 96/80 *Jenkins v Kingsgate* [1981] ICR 592 [11]: '[The defence should] in no way related to any discrimination based on sex.'; *R v Secretary of State for Employment, ex p EOC* [1995] 1 AC 1 (HL) 30 (Lord Keith): '[A] gross breach of the principle of equal pay ... could not be possibly regarded as a suitable means of achieving a [legitimate aim]'. See also, *Orphanos v QMC* [1985] AC 761 (HL) 772–773, and *R (Elias) v Secretary of State for Defence* [1985] AC 761 (HL) [161]–[162].

77 Case C-73/08 *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559. See n 56 above and accompanying text.

78 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11[73] (Lord Walker).

79 Race Directive 2000/43/EC, art 2(2)(b); Recast 2006/54/EC, art 2(1)(b); Framework 2000/78/EC, art 2(2)(b). Emphasis supplied.

80 The phrase has been criticised for allowing (deceitfully) disguised bigotry to go unchecked as direct discrimination. See Frej Klem Thomsen, 'Stealing bread and sleeping beneath bridges — indirect discrimination as disadvantageous equal treatment' (2015) 2(2) *Moral Philosophy and Politics* 299, 300; S Atrey, 'Redefining frontiers of EU discrimination law' [2017] *Public Law* 185, 189–190.

but undermines *CHEZ*. Again, this was not addressed by the *CHEZ* court, but given that its decision seems at odds with this legislative definition, and that this was a specific question in the Reference,<sup>81</sup> a clarification as to its meaning and relevance surely was required.

The reasoning presents a particular challenge to the UK legislation, which assumes, in its remedies provisions, that indirect discrimination can be intentional or unintentional.<sup>82</sup> On this basis, a UK tribunal or court must decide if indirect discrimination is intentional or not. If it were to hold instead that a discriminatory motive converted apparently facially neutral treatment into direct discrimination, it would render the provision redundant.<sup>83</sup>

As noted above, allowing the reason for the conduct to dictate the 'direct or indirect' question chimes with the US approach, which demarcates over intent, rather than form. This exists within a developed jurisprudence, notably its 'pretext' doctrine, where, following the defendant's rebuttal showing a non-discriminatory reason for the treatment, a plaintiff may submit evidence of a discriminatory motive behind this apparently neutral reason, thus exposing it as a pretext for intentional discrimination.<sup>84</sup> The *CHEZ* judgment evokes a US-style model, but without a 'pretext' framework of shifting burdens or a body of jurisprudence.<sup>85</sup>

### The Coleman edict and Sanderson-type cases

*CHEZ* has implications also for scenarios where nobody's protected characteristic is involved. The most obvious source of legal principle for the decision in *CHEZ* is the *Coleman per se* edict, where all that is required for direct discrimination is conduct of a discriminatory

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81 Question 6: Case C-83/14 *CHEZ*, para 37; Opinion of AG Kokott, para 30.

82 See now EA 2010, s 119(6), 124(5); FETO(NI), art 39(3); Sex Discrimination (Northern Ireland) Order 1976 SR, 1976/1042, art 65(1B); Race Relations (Northern Ireland) Order 1997, SR 1997/869, art 54(3); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (SORs), SR 2003/497, reg 36(2); Employment Equality (Age) Regulations (Northern Ireland) 2006, SR 2006/261, reg 43(2); Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SORs), SR 2006/439, reg 36(3). Indirect discrimination is not specified in the Disability Discrimination Act 1995 applying to Northern Ireland.

83 This would breach a 'cardinal rule' of statutory interpretation: *Re Florence Land Co* (1878) 10 Ch D 530 (CA) 544 (James LJ); *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 (HL) 546–547 (Lord Simon).

84 See eg *Domingo v New England Fish Company* 727 F 2d 1429 at 1435–1436 (9th Cir 1984): where an employer ought to be aware that its word-of-mouth recruitment policy (the 'neutral' practice) had a discriminatory effect, it will be liable for intentional direct discrimination, the word-of-mouth recruitment being a mere pretext.

85 The equality Directives allocate just one shift from the claimant's *prima facie* case to the defendant's rebuttal'. See eg Race Directive 2000/43/EC, art 8.

nature and a victim. This principle is wider than necessary even for this radical decision. The conduct in *CHEZ*, even if taken as facially neutral, was related to ethnicity, as both the claimant and the Roma were collectively targeted and harmed. Unlike the *CHEZ* scenario, the edict encompasses the situation where *no one* with a protected characteristic is related to the treatment.

This brings to mind another case of extended liability, *English v Sanderson Blinds*,<sup>86</sup> decided by the English Court of Appeal. Here, it may be recalled, the victim was harassed by colleagues using homophobic sexual innuendo in circumstances where the tormentors knew the victim was not gay. (The victim was aware of his tormentors' knowledge.) A majority held that there could be liability here for harassment 'on the grounds of' sexual orientation.<sup>87</sup> This statutory definition was broad enough to encompass this conduct, but a policy concern regarding privacy was evident in the decision. It meant that, in order to complain, anyone harmed by discriminatory harassment was not obliged to reveal whether or not they belonged to the relevant suspect class.<sup>88</sup> Although the decision exploits the potential of the statutory definition (not limited with a possessive adjective, his/her), it does not go beyond it and accords with an important policy consideration of persons being able to combat harassment without having their privacy violated.

A subsequent question hanging over this case is whether it would apply to direct discrimination. After citing the case and some of its majority and dissenting reasoning, the Supreme Court in *Lee v Ashers* offered no opinion on this question.<sup>89</sup>

The rather obvious barrier to the '*Sanderson* principle' migrating to direct discrimination is that, unlike harassment, discrimination requires *less* favourable treatment and the consequent comparison. Where the victim has no relevant protected characteristic, it is not possible to envisage a comparator without the victim's protected characteristic, as a conventional comparison requires. A similar problem arises with direct *perceived* discrimination, where again, victims have no relevant protected characteristic, but this time defendants wrongly think that they do. When presented with this scenario, in *Chief Constable of Norfolk Constabulary v Coffey*, Judge Richardson, sitting in the Employment Appeal Tribunal (EAT), simply asked: how would the defendant have treated a person he did not

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86 [2009] ICR 543 (CA). See further Connolly (n 1 above) text to n 26.

87 Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1660, reg 5. See now EA 2010, s 26, which replaced the term 'grounds of' with 'related to'.

88 [2009] ICR 543 (CA) [37]–[39] (Sedley LJ).

89 [2018] UKSC 49 [30]–[31].

perceive to have the protected characteristic in question?<sup>90</sup> That is linguistically neat, but it cannot disguise that it changes nothing bar the *defendant's* perception. Direct discrimination requires a comparison of how the defendant treated (or would have treated) *others*,<sup>91</sup> not how a different defendant would have treated the same victim. This approach was argued out in a conventional direct discrimination case, *Grieg v Community Industry*.<sup>92</sup> An employer maintained that its refusal to employ a woman on an all-male decorating team should be compared with a refusal to employ a man on an all-female team. The EAT rejected such a comparison because it involved changing the *defendant's* circumstances. The proper comparison should be how the same employer would have treated a different applicant, here a man, applying for the *same* job.<sup>93</sup>

In some cases, it would be possible to change an *attribute* of the comparator. This is where the misperception was triggered by an attribute of the claimant, say, a crucifix, a headscarf, a turban, or less tangible features, such as an effeminate mannerism or an African-sounding name. Here, the comparison could be with how a person without the relevant attribute would have been treated. But, such a list will tail off into such intangible or unspecifiable matters that no defendant could express *why* he or she was mistaken. It might also be that the defendant, for reasons of embarrassment, say, would not admit to what triggered the mistake. Thus, it cannot be said that a meaningful comparison is always possible for perceived discrimination.

The approach in *Coffey* implemented an express legislative policy commitment that perceived discrimination should be actionable.<sup>94</sup> Indeed, the Court of Appeal, while approving of Judge Richardson's test, nevertheless abandoned the comparison altogether, on the basis it was unnecessary where the 'grounds', or 'reason why', question had been answered.<sup>95</sup>

Whatever the merits of distorting the comparison for perceived discrimination, the matter is yet to be addressed with a *Sanderson* situation. One would expect at least a policy imperative in support of this, either legislative, or inferred, as in *Sanderson*. This suggests that

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90 [2018] ICR 812 (EAT) [62].

91 A point made with apparent approval, by counsel in the context of the political opinion claim and the (disapproved) notion that the discrimination could be on the ground of the *defendant's* religious/political belief: *Lee v Ashers Bakery* [2018] UKSC 49 [44]–[45].

92 [1979] ICR 356 (EAT).

93 *Ibid* 360–361.

94 EA 2010, Explanatory Note 63.

95 [2019] UKCA 1061 [76]–[77] (Underhill LJ), citing *obiter dictum* from *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (HL) [11] (Lord Nicholls).

either a relaxed comparison (as in *CHEZ*) or none at all (the *per se* edict) would be required for direct discrimination. Thus, for UK courts, it may take a discrimination case raising a similar policy issue for the question to be faced. It should be noted here that, where the facts satisfy both the definitions of direct discrimination and harassment, the complaint *must* be treated as one of harassment.<sup>96</sup> So, it would take a rare discrimination case to raise a privacy issue. It might be that this arises where the harassment provisions are not available. The EA 2010 and its Northern Ireland counterparts exclude harassment related to religion or belief, or sexual orientation, from the provision of services.<sup>97</sup> Thus, a *Sanderson*-type case on these excluded areas might force the issue. For example, under a new regime wanting to encourage more heterosexual custom,<sup>98</sup> a bar manager may abuse a customer for his effeminate appearance, despite knowing that the customer is not actually homosexual. In *Sanderson*, the treatment was because of some attributes that the tormentor associated with sexual orientation. These were the claimant's attendance at boarding school and place of residence (a well-known centre of gay society). In this scenario, the attribute is the customer's appearance. A comparator without this effeminate appearance may be considered efficacious. But where the manager could not specify or articulate *why* he thought the customer's appearance was effeminate, the only comparator is a different manager. Thus, as a matter of principle, this issue remains to be addressed.

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96 EA 2010, s 212(1): “detriment” does not ... include conduct which amounts to harassment’. Thus, if the conduct amounts to harassment, s 212 dictates that there is no ‘detriment’ for the provisions on employment discrimination (eg EA 2010, s 39). For a similar proviso in Northern Ireland, see FETO(NI) 1998, art 2(2); SORs, reg 2(4); Disability Discrimination Act 1995, s 18D(2); Sex Discrimination (Northern Ireland) Order 1976, SR 1976/1042, art 2(2); Employment Equality (Age) Regulations (Northern Ireland) 2006, SR 2006/261, reg 2(3). The Race Relations (Northern Ireland) Order 1997, SR 1997/869, has no such proviso. Where harassment is excluded, EA 2010, s 212(5) (but not the SORs or FETO) lifts the proviso, allowing ‘harassment’ claims where the facts satisfy the definition of direct discrimination.

97 EA 2010, s 29(8), or premises s 34(4); exercise of public functions (ss 28(8), 33(6), 34(4), 35(4)); associations (members or guests s 103(2)); school education (s 85(1), which also excludes harassment related to gender reassignment). See FETO(NI); Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, SR 2006/439 (the harassment provision in reg 3 was quashed under judicial review because of an ‘absence of proper consultation’: *The Christian Institute v The Office of the First Minister and Deputy First Minister* [2007] NIQB 66; [2008] ELR 146 [34] and [43]).

98 See *Lisboa v Realpubs* [2011] Eq LR 267 (EAT), where a new regime ordered to make the premises more attractive to heterosexuals and correspondingly less so to its traditional homosexual customers.

In *Lee v Ashers*, the Supreme Court avoided the matter by confining its thinking to associative discrimination.<sup>99</sup> As such, the bar's customer would be well-advised not to compress a claim into a notion of associative discrimination and its accompanying rule that the association must be 'close enough'. At EU level, the *Coleman* edict, if taken literally, would readily embrace *Sanderson*-type cases, as no comparison seems to be required and, as *CHEZ*, demonstrates, the ECJ will not be confined by any restrictive notion of associative discrimination. There are no similar exclusions of harassment in the equality Directives, but given the referral system, which is less adversarial, should a *Sanderson*-type case arise, a ruling of both discrimination and harassment by the ECJ would be welcome, not least to clarify the reach of the *Coleman* edict, notably with the role and status of both the comparison and 'grounds of' elements.

*A further danger of the Coleman edict – 'anti-purpose' claims*

The edict given in *Coleman* was unnecessarily wide for the facts of that case. The existence of a third party with a relevant protected characteristic made it unnecessary to isolate the reasoning to the employer's conduct. (The treatment alluded to the victim's disabled child.) This over-breadth in itself was not unusual. As any student of ECJ jurisprudence will know, unlike the common law's preoccupation with *rationes decidendi*, the court is comfortable producing broad principles under which many a case can be solved. This edict is no different, but without boundaries, it carries a danger that became apparent in a series of English cases, none of which were cited in the ECJ.<sup>100</sup>

Working within that edict, the *CHEZ* court found that evidence of the 'relating to' question was the supplier's stereotyping of Roma people, which effectively drew on the supplier's discriminatory motive. As noted above, the court gave no precise meaning here. The edict could be confined narrowly only to where the conduct has a *hostile* motive (such as the supplier's stereotyping of Roma). At the other end of the scale, it could require no more than an awareness of the discriminatory effect of the conduct. It is at this end of the scale that the danger lurks, where the conduct is merely 'relating to' the suspect class.

The danger is this. While it is convenient to fall back on a common edict such as this to explain and embrace notions of perceived, associated, and third-party discrimination, as well as, perhaps, the

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99 See Connolly (n 1 above) 36,39,47 and 57.

100 The cases are: *Showboat v Owens* [1984] ICR 65 (EAT); *Wheeler v Leicester Council* [1985] AC 1054 (CA and HL); and *Redfearn v Serco (t/a West Yorkshire Transport Service)* [2006] EWCA 659). Westlaw and Eur-Lex.Europa searches (25 November 2020) revealed that the ECJ has never cited any of these cases.

'Sanderson principle',<sup>101</sup> and even *CHEZ*, its rather universal nature could encompass 'anti-purpose' claims. These can arise where a party is sued because of its *anti*-discrimination conduct, it being conduct 'relating to' a protected characteristic. Note here that such conduct could be characterised as being 'on grounds of' a protected characteristic, and so the legislative formulas are susceptible to these anti-purpose claims, as the examples below will demonstrate.

A good starting point for the English series of cases is *Showboat v Owens*,<sup>102</sup> where, it will be recalled, a white manager was dismissed for defying an order to bar black youths. In holding that this amounted to direct discrimination, Browne-Wilkinson J offered an opinion wider than necessary for this decision:

[T]here seems to be no stopping point short of holding that any discriminatory treatment caused by racial considerations is capable of falling within section 1 of the [Race Relations] Act of 1976.<sup>103</sup>

The substance of this statement is strikingly similar to the *Coleman* edict. As a reminder, the court in *Coleman* ruled, 'The principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Art.1.'<sup>104</sup> The potential is that either statement is so open that it could entertain claims quite the reverse of any purpose that could be ascribed to anti-discrimination legislation. It encompasses persons treated less favourably because of the defendant's *anti*-discrimination conduct. This negative potential was exhibited in two English Court of Appeal cases.

In *Wheeler v Leicester City Council*,<sup>105</sup> a local authority council issued a 12-month bar on a rugby club using the council's recreation ground. This was because three of the club's players participated in a rebel tour of apartheid South Africa, something to which the council objected. The club argued *inter alia* that as the council's conduct was based on 'racial considerations' (opposing apartheid), the *council* was liable for direct racial discrimination. In other words, under Browne-Wilkinson J's wide statement, it no longer mattered if the defendant's conduct was pro- or anti-discriminatory. It was no surprise that the argument was rejected by the Court of Appeal, but only after a renouncement by the statement's author. Browne-Wilkinson LJ, now

101 *English v Sanderson Blinds* [2009] ICR 543 (CA). See above, text to n 86, and further Connolly (n 1 above) text to n 26.

102 *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT), discussed further in relation to *Lee v Ashers* in Connolly (n 1 above) text to nn 19 and 65.

103 *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT) 73.

104 Case C-303/06 *Coleman*, para 38 (and 50). The 'grounds' alluded to were sexual orientation, religion or belief, disability, and age ('Framework' Directive 2000/78/EC, art 1).

105 [1985] AC 1054 (CA and HL).

sitting in the Court of Appeal, conceded that this literal interpretation of his statement was 'too wide'.<sup>106</sup> Ackner LJ held it could not be used to 'produce consequences totally repugnant to the very purpose of the legislation'.<sup>107</sup>

This did not deter a more radical argument, launched with some chutzpah, in *Redfearn v Serco*.<sup>108</sup> Here, a bus driver, whose passengers numbered mainly Asian, relied on Browne-Wilkinson J's *dictum* to claim that his dismissal for membership of a racist political party was in fact discriminatory. After all, this was 'discriminatory treatment caused by racial considerations'. In other words, a racist was calling in aid of anti-racist legislation *because* he was a racist. The EAT found the logic inescapable, and held that the bus driver was a victim of direct (racial) discrimination.<sup>109</sup> The Court of Appeal reversed, holding that Browne-Wilkinson J's *dictum*, 'does not apply so as to make the employer ... who is pursuing a policy of anti-race discrimination, liable for race discrimination'.<sup>110</sup> In both *Wheeler* and *Redfearn*, the Court of Appeal could not formulate a principle to distinguish such claims, rejecting them only on policy grounds.<sup>111</sup>

Had the *Coleman* and *CHEZ* judgments and Opinions considered this English case-law narrative, the court might have been more guarded when promoting the *per se* edict. While it is likely that the ECJ would reject any such dissonant claims under its teleological approach to interpretation,<sup>112</sup> until someone goes to the trouble, time, and expense of arguing a case all the way to Luxembourg, doubts will linger, as the English narrative demonstrated, notably with Mr Redfearn's victory in the EAT.

This is not to say that a 'discrimination *per se*' approach is wholly unwelcome. It has potential to simplify the law and broaden its reach to

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106 Ibid 1061.

107 Ibid 1060. The matter was not discussed in the House of Lords, who found for the club on an alternative claim that the council had acted *ultra vires*.

108 *Redfearn v Serco (t/a West Yorkshire Transport Service)* [2006] EWCA 659.

109 [2005] IRLR 744 (EAT) especially [30]–[42].

110 [2006] EWCA 659 [43] (Mummery LJ). This goes too far the other way. It does not account for positive action which is unlawful direct discrimination unless sanctioned by the relatively narrow boundaries set by the EA 2010, eg ss 158 and 159. A more generously worded formula regarding Protestant and Roman Catholic employment in Northern Ireland is provided by FETO(NI), art 4. Note that Redfearn won a human rights claim based on political opinion under European Convention on Human Rights, art 11 (Freedom of Association): *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR).

111 It could have been resolved under the statutory construction rule under *Re Sigsworth* [1935] Ch 89 (Ch) 92 (Clauson J), as something 'obnoxious to the principle'.

112 See eg *R v Henn and Darby* [1981] 1 AC 850 (HL).



encompass unforeseen meritorious claims. But it is a radical departure from orthodoxy which does not appear to have been thought through. Of course, it would prove challenging to draft the edict with precise boundaries, not least because cases such as *Redfearn* and *Wheeler* need to be distinguished from unsanctioned positive action<sup>113</sup> and other benignly motivated discrimination<sup>114</sup> which, policy dictates, *should* attract liability. Thus, the court ought to have provided some policy guidance as to where its boundaries lie, if only to signal that 'anti-purpose' cases will not succeed under its *per se* edict.

While in pockets of Europe, the likes of Mr Redfearn may be encouraged by the *Coleman* edict, back in the UK, a new raft of far-reaching 'associative' claims may emerge, arguing that the *Lee v Ashers'* close-enough rubric no longer applies, or distinguishing it as just one evidential path to a 'per se' discrimination claim.

### **'Extended' indirect discrimination**

Although the court's deployment of the *Coleman* edict encroached upon the notion of indirect discrimination, it did not entirely erase it from the court's jurisprudence. The judgment confirmed this by producing an alternative finding of indirect discrimination (advising that the practice seemed not to be objectively justified<sup>115</sup>). This was based on the hypothesis that the reason for the 'ostensibly neutral' treatment was not 'based on' ethnicity.<sup>116</sup> Beyond this, no analysis was given, nor theory advanced, in support of this finding (of the practice causing the particular disadvantage). There was no reference to AG Kokott's associative theory.

The particular novel finding was a break with the Directive's conventional definition by including as victims persons not of the relevant ethnic origin. The Directive provides,

[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage *compared with* other persons ...<sup>117</sup>

Even though the court stated the conventional view that this meant 'it is particularly persons of a given ethnic origin who are at a disadvantage

113 See eg Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] IRLR 732 (mandatory preference for female candidates).

114 See eg *James v Eastleigh* BC [1990] 2 AC 751 (HL) (free swimming for pensioners discriminated against men, who retired later); *R (A) v Governing Body of JFS* [2009] UKSC 15 (racial preference based on religious doctrine); *Amnesty International v Ahmed* [2009] IRLR 884 (EAT) (protection from violence).

115 Case C-83/14 *CHEZ*, para 127.

116 *Ibid* paras 50, 106 and 92–96.

117 Race Directive 2000/43/EC, art 2(2)(b). Emphasis supplied.

because of the measure at issue',<sup>118</sup> its *decision*, classing Roma and non-Roma as one, holds that both groups had suffered a 'particular disadvantage'. Further, there was no indication that both Roma and non-Roma suffered the *same* disadvantage.<sup>119</sup> Indeed, it is reasonable to assume that the offence and stigma suffered by the non-Roma was different in character from that suffered by the Roma, given their history of persecution combined with the stereotyping behind this policy. Such a question was not discussed in the judgment. A clarification would have been welcome. AG Kokott's unacknowledged extended associative theory (illustrated with her nursery scenario<sup>120</sup>) provided a slightly more coherent solution. Her associative theory piggybacked the legislative formula seemingly leaving it intact. However, in substance, either approach challenges the conventional definition of indirect discrimination by including non-members of a suspect class as primary victims with the consequential right to sue. In addition, the *decision* leaves open the possibility that the non-members need not have suffered the *same* disadvantage. The UK legislation more cogently holds to the conventional view on same-group *and* same-harm liability,<sup>121</sup> presenting a potential conflict with Retained EU Law.<sup>122</sup>

As with its approach to direct discrimination, the ramifications of the judgment could be surprising and unwieldy. For instance, in *Hussein v Saints Complete House Furnishers*,<sup>123</sup> a retail furniture store refused to hire youths from the city centre because in the past they attracted unemployed friends who loitered in front of the shop. Compared to other districts in the city, the centre was disproportionately populated with black and Asian residents, one of whom won a claim of indirect discrimination after the store refused to consider him for

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118 Case C-83/14 *CHEZ*, para 100.

119 AG Kokott observed that Roma and non-Roma were affected in the same way (Case C-83/14 *CHEZ*, AG98), but drew no rule or boundary from this.

120 See above, text to n 40.

121 Required under EA 2010, s 19(2)(b) and (c) (stating that the claimant must have been put at *that* particular disadvantage suffered by the group); FETO(NI), art 3(2A)(b)(i) and (ii); Sex Discrimination (Northern Ireland) Order 1976, SR 1976/1042, art 3A2(2)(b) and (c); Race Relations (Northern Ireland) Order 1997 SR 1997/869, art 3(1A)(a) and (b).

122 EU employment rights existing before 1 January 2021 were converted into domestic law: EU (Withdrawal) Act 2018, s 7. Under the Trade and Cooperation Agreement 2020, Northern Ireland is bound to follow subsequent EU employment law, while any divergence in the rest of the UK can be redressed with 'rebalancing measures'. See the [Trade and Cooperation Agreement](#), a [Summary](#) (UK Government); [Explanatory Brochure](#) (EU Commission). More generally, see Malone (n 11 above) parts 10 and 12 respectively.

123 [1979] IRLR 337 (IT).

employment.<sup>124</sup> Upon the *CHEZ* judgment, any white person from that district could sue for indirect discrimination. (If the embargo were motivated by race, under *CHEZ*, the discrimination against the white resident would be *direct*.) The harm could range from being rejected, to being deterred from applying, or just the resultant stigma as a resident. One could conjure up all manner of similarly far-reaching scenarios.<sup>125</sup> In AG Kokott's nursery scenario, for example, in addition to the children deprived of nursery places, the *male* part-time parents, having suffered the same harm as their female colleagues, could sue, even if the females chose not to.<sup>126</sup> This judgment challenges the same-group and same-harm liability principles set out in both the EU and UK legislation. Being insufficiently reasoned and bounded, it could produce unintended consequences.

### **Collateral damage and standing**

The decision favouring the non-Roma claimant may be welcomed by many, but it will sit uncomfortably with those wanting a somewhat tidier underpinning. The fundamental problem common to both the Opinion and judgment is that they are trying to absorb the 'collateral damage' question into a model of substantive law, when it ought to be dealt with as a procedural matter of standing to sue. Instead, it would have been logical (and tidier) to engage the procedural provisions of the Directive, which state that enforcement must be 'available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them'.<sup>127</sup> This approach is all the more curious because when faced with cases with only hypothetical victims, the court has readily approached the matter via the procedural provisions. Thus, where businesses announced they would never employ immigrants, or homosexuals, the court, after finding that the conduct could amount to direct discrimination (potential applicants

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124 See also in the US, where employers advertise in, say, a predominantly white district: eg *USA v City of Warren*, Michigan 138 F 3d 1083 (6th Cir 1998).

125 For this variation, and others, on *Hussein*, see Malone (n 11 above) 152 and (equal pay) 158–161.

126 If the employer had responded to a mother's sex discrimination claim by providing nursery places for the part-time women, the part-time men, now the only ones deprived of nursery care, could 'level up' with a straightforward claim of *direct* sex discrimination. See eg the equal pay case *Hartlepool BC v Llewellyn* [2009] ICR 1426 (EAT) where, following a successful equal pay claim by women in a predominantly female occupation, the men in that occupation were entitled to the same pay as the women.

127 Race Directive 2000/43/EC, art 7(1), located under 'Chapter II Remedies and Enforcement'. For the UK, see nn 132 and 133 below.

could be deterred), considered the standing of an (unharmed) public interest body to bring an action.<sup>128</sup>

The procedural route to providing remedies to those harmed by 'collateral damage' is well established in the US, where the federal equality legislation similarly provides a 'person aggrieved' with the right to sue.<sup>129</sup> For example, two residents (one white, one black) were given standing by the Supreme Court to sue their landlord for its (anti-black) racist policies, causing them a loss of the social and professional benefits of living in an integrated community, as well as the stigma of living in a 'white ghetto'.<sup>130</sup> It is notable here that these plaintiffs did not suffer the same harm as the primary victims and, it is conceivable, not as each other.

Given the far-reaching ramifications, the EU (and UK) courts would be wise to observe this US practice and its limitations.<sup>131</sup> It can resolve other doubts about the *CHEZ* case. First of all, neither the Opinion nor the judgment make clear whether the victim-claimant has to suffer the *same* harm as the principal victims. Short of class actions, this should not be an issue when considering standing. Second, as noted above, *CHEZ* challenges the orthodox approach to direct discrimination as well as the more detailed legislative formula for indirect discrimination. Treating collateral damage claims as a matter of standing may well provide British courts with a means to avoid the complexities of compatibility and interpretive issues post-Brexit. The EA 2010's enforcement provisions are expressed quite passively, providing jurisdiction to courts and tribunals to determine complaints

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128 Respectively, Case C-54/07 *Feryn* [2008] ECR I-05187 (ECJ); C-81/12 *Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminariilor* [2013] ICR 938 and C-507/18 *NH v Associazione Avvocatura per I diritti LGBTI – Rete Lenford* [2020] 3 CMLR 33.

129 See eg Fair Housing Act 1968 (formally Civil Rights Act 1968), s 810(a) (codified as 42 USC s 3610(a)); Civil Rights Act 1964, Title VII (employment), s 706 (42 USC s 2000e-(5)(f)(1)), although courts often refer to 'associative theory' at the same time: see eg *Clayton v White Hall School* 778 F 2d 457 (8th Cir 1985) 459.

130 *Trafficante v Metropolitan Life Insurance Co* 409 US 205 (1972, US Sup Ct) 208. The notion has been applied to employment. In *Angelino v New York Times* 200 F 3d 73 (3rd Cir 2000), the employer stopped hiring when it reached the first woman's name on its priority list; as well as the women, the *men* below that name not hired had standing to sue for the sex discrimination against the women.

131 See eg *Thompson v North American Stainless* 131 S Ct 863 (2011, US Sup Ct) 868–870, limiting the reach of the 'person aggrieved' requirement; *Lyman v Nabil's* 903 F Supp 1443 (D Kan 1995) 1446, distinguishing *Trafficante* as not extending to sex discrimination; *Patee v Pacific Northwest Bell Tel Co* 803 F 2d 476 (9th Cir, 1986) 479 (men did not have standing to protest their depressed wages allegedly resulting from their employer's discrimination against women in the same job classification).

'relating to a contravention' of parts of the Act, covering employment, services and public functions, premises, education, associations, or other ancillary matters.<sup>132</sup> This is not so for Northern Ireland, where the enforcement provisions state that the complainant is the victim of the alleged discrimination.<sup>133</sup> Here then, 'collateral damage' victims must rely on the logic of *CHEZ*.

### **The missteps in *CHEZ***

One can assume that both the Advocate General and the court were driven by the policy concern of the wholesale treatment rooted in racial stereotyping, and that the only remedy was via a sole complainant who happened to be non-Roma. However, this result was achieved via many missteps in a patchwork of incomplete notions and unconnected strands. It is unsurprising then, that the case may produce some unintended consequences. The principal missteps were:

- 1 *'Extended' associative discrimination.* Advocate General Kokott's Opinion deployed models of discrimination as generally understood in EU and UK jurisprudence. The misstep was attaching (or 'piggybacking') her associative theory, which had more to do with associated harm than anything else. Applied to indirect discrimination, it had extraordinary potential. In this case, embracing non-members of a suspect class as primary victims, a matter for standing, not substantive law.
- 2 *Unorthodox comparison.* The court's finding of direct discrimination was facilitated by a comparison that could do no more than distinguish victims from non-victims, irrespective of ethnicity.
- 3 *A suggestion of an intentional/non-intentional model.* The court's apparent reliance on some unspecified level of motive departed from its conventional form-based model and encroached upon the conventional model of indirect discrimination set out in the legislation. Neither consequence was acknowledged in the judgment. If followed, this aligns EU law with the US 'intentional/non-intentional' model, but with no complementary framework regarding such matters as benign motives, the pretext doctrine, its shifting burdens, and the separate provisions on standing.
- 4 *Adoption of the Coleman edict.* The edict, a blank canvas, was speckled with varying notions including 'collateral victims', an orthodox comparison, and conduct ranging from that 'motivated by' ethnicity to that merely 'relating to' ethnicity. The edict has

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132 EA 2010, s 120 (employment tribunals) and s 114, respectively.

133 See eg FETO(NI), art 38; Race Relations (Northern Ireland) Order 1997, SR 1997/869, art 52.

extraordinary potential, notably for *Sanderson*-type cases. It was adopted without boundaries, leaving its potential unspecified and vague.

- 5 *Extending the reach of indirect discrimination.* This again was done in the face of the contrary legislative formula, with no reasons given. There was no acknowledgment of this, nor the resulting extraordinary potential.
- 6 *Absorbing procedural matters into substantive law.* In doing this, both the Advocate General and the court have distorted the established models of discrimination and have sown doubt into their exact meaning.

### **The associative myth of *CHEZ***

The case has been heralded as an example of associative discrimination.<sup>134</sup> This is an error. Even where this term was used, it was unsustainable. AG Kokott's theory for direct discrimination did no more than restate the simple examples, which are no more than treatment 'on grounds of' race (or other protected characteristic). Her 'restaurant' example was her most ambitious illustration, but goes no further than the *Lee v Ashers*' restrictive close-enough rubric. Labelling such cases as associative perpetuates the myth and risks narrowing the scope of the direct discrimination by restricting the reach of the 'grounds of' element.

By contrast, the Advocate General's application of her test for indirect discrimination was extraordinarily wide, equating her associative theory with 'collateral damage',<sup>135</sup> and thus encompassing anyone harmed by the discriminatory act. This permits, say, men affected by less favourable treatment of (predominantly female) part-time workers to claim that they have been discriminated against 'by association'. The myth of association is more readily understood with large-scale examples. Suppose a national rule disadvantaging part-time workers by requiring longer service to acquire unfair dismissal and redundancy rights.<sup>136</sup> This would obviously put women at a particular disadvantage. Under AG Kokott's associative theory, any affected man in the country could sue for 'associative' sex discrimination. It is somewhat creative to hold here even a non-personal 'link' or association of any meaning save for the shared or 'collateral' damage. In fact, the only explanation for liability under this theory is collateral damage, which is not a form

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134 See n 11 above.

135 Case C-83/14 *CHEZ*, para AG58, applied to indirect discrimination AG106–AG109.

136 *R v Secretary of State for Employment, ex p EOC* [1995] 1 AC 1 (HL).

of discrimination. As such, the reason for liability must be found elsewhere, with the likely route being procedural.

Meanwhile, the court's findings of direct and/or indirect discrimination required no supplementary theories piggybacking the conventional models of discrimination. Instead, the judgment ripped up the conventional form-based models. In doing so, it eradicated any notion that associative discrimination was a term of art in EU jurisprudence. Again, anyone harmed by the discriminatory conduct was included. No 'association' beyond this was required.

## CONCLUSION

Associative discrimination has two legislative origins in modern discrimination law. One, from the US, is a narrow but manageable reasoning ultimately dependent upon the targeted victim-claimant's protected characteristic. Its limited reach is down to the 'closed' (US federal) legislative formula. The other, stemming from the more open EU (and UK) formulas, has no such limitation. This was recognised in the 1970s by the English Court of Appeal, and subsequently, the House of Lords, both observing that associative scenarios fell within the language of the UK open formula, as well as its mischief, or purpose.<sup>137</sup> Its open formula meant that the claimant's protected characteristic need not have been a factor. In time, the English judiciary learnt that it had to impose some boundaries on this open formula, save it facilitate 'anti-purpose' cases.

The reasoning offered in *CHEZ* (and subsequently in *Lee v Ashers*) appeared to have no knowledge of either origin. The Advocate General produced an extended theory of associative discrimination, which was wrongly equated with 'collateral damage', confused with standing, and in any case vanished under the court's overbroad models of discrimination. The *Coleman* edict, on which it seemingly relied, is a single incomplete and unbounded model of direct discrimination. Without qualification, it can supplant the form-based conventional and established formulas, import procedural matters into substantive law, and even entertain 'anti-purpose' claims or benign motive defences. Without qualification, notably, a conventional comparison, it will produce more problems than it apparently solved. The case leaves open the *possibility*, but no more, that the *Sanderson* principle of extended liability for harassment could apply to direct discrimination.

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137 *Applin v Race Relations Board* [1973] QB 815 (CA) 828 and 831 (Stephenson LJ), affirmed [1975] 2 AC 259 (HL) 289–290 (Lord Simon), commenting on the similarly formulated version in the Race Relations Act 1968, s 1(1). See further Connolly (n 1 above), text to nn 1, 2 and 37.

The advice on indirect discrimination suggests that third parties, not belonging to a suspect class but suffering under the same facially neutral treatment, can claim that they suffered *discrimination*; this is irrespective of whether any primary victims complain. This presents a particular challenge to the UK statutory provisions, which express that only victims with the relevant protected characteristic can sue for indirect discrimination.

More generally, it is received wisdom in the UK by scholars and judges alike (including the Supreme Court), that *CHEZ* is a case of associative discrimination.<sup>138</sup> It is no such thing. This case – a patchwork of incomplete notions and unconnected strands – was *in fact* a straightforward example of indirect discrimination requiring resolution for the non-Roma claimant under the procedural provisions on standing. For the ECJ, it was a scenario falling within its *Coleman* edict and/or a US-style ‘intent’ model, *or* a redefined extended model of indirect discrimination. No association was required or mentioned. The one certainty about the radical judgment is that it did not endorse as a term of art the Advocate General’s extraordinary associative theory, nor indeed, *any* associative theory. This vanishing act was one of the few positives emerging from the judgment. It is unfortunate that this also erased many boundaries of the established principles of discrimination. As such, truly it was a *great* vanishing act.

What is required now is for the ECJ to reinstate the orthodox models of direct and indirect discrimination and impose some boundaries on the *Coleman* edict. If EU law is to adopt fully a US-style model and its complementary framework, it should not be done without extensive consideration. Whatever the outcome, any reform should continue to distinguish between substantive law and standing, announce the necessary policy boundaries, and, of course, not engage with notions of associative discrimination as terms of art.

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138 See n 11 above.