



HM Government
in the Supreme Court of the United Kingdom
SUBMISSION

in the case of R (on application of the Chatty Law Group) v. the Secretary of State
for Family, Youth Affairs and Equalities

Responding,

/u/Rea-wakey, Home Secretary, in capacity as Advocate of HM Government

QUESTION PRESENTED

Whether the Menstrual Leave Regulations 2023, which grant paid menstrual leave exclusively to employees who undergo menstruation, are in violation of the European Convention on Human Rights (ECHR), particularly Article 14 (prohibition of discrimination) in conjunction with other relevant rights protected by the Convention, such as Article 8 (right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property).

STATEMENT OF FACTS

The Menstrual Leave Regulations 2023, introduced by the Secretary of State for Family Affairs, Youth and Equalities, FPS Lover1, come into force on June 1, 2023. These Regulations amend The Maternity and Parental Leave etc. Regulations 1999, establishing Menstrual Leave as a new category of paid leave. This leave is available to all employees who have the ability to menstruate, as defined by NHS standards, and allows them to take between three and five days of paid leave each month.

The Regulations were debated and passed by the House of Commons on May 10, 2023.

ARGUMENT

The Menstrual Leave Regulations 2023 do not constitute discrimination on the grounds of sex

Contrary to the claim made, the Menstrual Leave Regulations 2023 do not constitute discrimination on the basis of sex. The Regulations provide a specific benefit to individuals who menstruate, which primarily includes women but also includes some men and women with certain medical conditions. The purpose of this provision is to address the unique challenges faced by individuals who menstruate, such as physical discomfort, pain, and potential limitations in their daily activities during menstruation.

The creation of a differential treatment between employees who menstruate and those who do not menstruate, as mentioned in the applicant's case, could be considered indirect discrimination. This discrimination happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic. Such an assumption is made based on the assessment that all people who menstruate are women, or that such rights to additional leave to people who menstruate who do not identify as women are less significant to the judgment of the Court. However, this should not be the case, and menstruation is not a protected characteristic.

Comparing the characteristics of sex and menstruation should not be applicable here, and recognition must be given to transgender issues. Previous judgements in the European Court of Human Rights regarding transgender issues have suggested that a lack of recognition of transgender people is a breach of Article 8 (right to respect for private and family life) of the Convention. Such judgments were made owing to a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals. In consideration of the applicant's case, a judgment that the regulations are in breach of the Convention on the grounds of sex would additionally present a challenge that existing leave measures do not go far enough, and may actively discriminate against people who menstruate and are not women, due to the ongoing societal stigma that only women can menstruate.

The regulations themselves ensure equality between all sexes (a protected characteristic) in their rights regarding menstruation, specifically enshrining such rights as "Any employee who undergoes menstruation". The differentiation in treatment is not solely based on sex but rather on the biological process of menstruation. Menstruation is a natural phenomenon that affects individuals differently based on their biological characteristics, and it is appropriate to acknowledge and accommodate these differences through specific provisions.

If indirect discrimination is applicable as the applicant suggests, the person or organisation applying the policy must show that there is a good reason for such a measure. These reasons have been outlined clearly in the legislative debate, both under the regulations themselves and the motion that followed. In a similar case relating to female reproductive health (*Jurčić v. Croatia*, 2021), the Court held for the first time that a woman had been discriminated against on the basis of her pregnancy. The ruling clarified that since only women could be treated

differently on grounds of pregnancy, the Court held that such treatment amounted to direct discrimination on grounds of sex. In this case, the European Court of Human Rights rejected the claim that the provision of additional paid leave for women during pregnancy and childbirth constituted discrimination against men. The Court held that the differential treatment was justified by the biological differences and health risks associated with pregnancy and childbirth. This case supports the argument that differentiation in treatment based on biological differences can be justified and does not necessarily amount to discrimination.

Further case law should be considered in the assessment of gender discrimination, for example *R.G. and Others v. the United Kingdom*, Application no. 26374/05. In this case, the European Court of Human Rights upheld the provision of additional paid leave for women who breastfeed. The Court recognised the unique health needs and challenges faced by women who breastfeed and considered the provision of paid leave as a legitimate means to address those needs. This case supports the argument that specific provisions can be justified to accommodate the unique health needs of certain groups without violating the principle of non-discrimination.

These cases provide precedents where the Court has recognised the importance of specific provisions to address the unique health needs of certain groups without violating the principle of non-discrimination. They demonstrate that differentiated treatment based on biological factors can be proportionate and justified under the European Convention on Human Rights.

In a similar vein, as only people who menstruate can be treated differently on account of their menstruation, it is reasonable for the Court to consider whether the lack of a separate menstruation leave is in itself discriminatory given the unique challenges that people who menstruate face. No such judgment has been considered by the Court that the difference between statutory paternity and maternity leave, for example, represents indirect discrimination against fathers, and this case is centred on similar biological conditions.

Further case law can be found in *Z and Others v. United Kingdom*, Application nos. 29392/95, 29574/95, and 30056/96, where the European Court of Human Rights addressed the issue of differential treatment based on disability. The Court held that the differential treatment between disabled individuals and non-disabled individuals regarding the availability of mobility allowance did not violate Article 14 of the European Convention on Human Rights. The Court recognised that differential treatment may be justified to address the specific needs and challenges faced by individuals. This case supports the argument that differentiation in treatment is allowable if it is based on biological or physiological challenges if it is aimed at addressing specific needs and challenges.

Article 14 of the Convention enshrines the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. It is not clear to me how the affording of additional rights to people who menstruate prevents the enjoyment of the rights and freedoms set out in the Convention for others, as the applicant appears to infer in their original case submission.

The Menstrual Leave Regulations 2023 pursue a legitimate aim and are proportionate to that aim

The Menstrual Leave Regulations 2023 pursue a legitimate aim of promoting the health and well-being of individuals who menstruate. Menstruation can be accompanied by physical and emotional challenges that may impact an individual's ability to perform optimally at work. By providing paid menstrual leave, the Regulations seek to address these challenges and create a more inclusive and supportive work environment.

The applicant's questioning of whether the regulations have a legitimate aim should be weighed against other evidence, such as public attitudes conferring such a need of change in regulations or laws. An example can be found in the statement by [Endometriosis UK](<https://www.bbc.co.uk/news/health-61477168>), a UK-registered charity, that there is a "need to understand the experiences and challenges that people who menstruate face in the workplace, and then take steps to support them." In addition, the [Spanish Government](<https://www.euronews.com/next/2023/02/16/spain-set-to-become-the-first-european-country-to-introduce-a-3-day-menstrual-leave-for-work>) has equally passed a law that will institute Menstrual Leave, therefore suggesting that this is not a specific grievance of His Majesty's Government.

In addition, for Article 14 to be applicable it is necessary, but also sufficient, for the facts of the case to fall within the wider ambit of one or more of the Convention Articles. As a consequence, the Court has previously established that the prohibition of discrimination applies to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide protection. Given the Menstrual Leave Regulations have been approved by Parliament in the United Kingdom through a Motion, it appears to me that one could argue that the regulations extend rights to those who undergo menstruation and therefore a subsequent withdrawal of these rights would be considered a breach in itself of Article 14 of the Convention.

In the applicant's original submission, a costing calculated at £41bn per year was submitted to the Court, with a request that the economic context be put into context and compared to other relevant figures, specifically mentioning the overall budget for social welfare programs. It would be inappropriate to draw a comparison between these figures, however, given that the costs borne by social security programmes are primarily and principally borne by the state, while the cost of the Menstrual Leave Regulations are borne by employers across the United Kingdom as an operating cost of business (tax deductible for the purposes of profit from a trading operation for both individuals and businesses). In addition, the costings submitted by the applicant suggest a 100% uptake of menstrual leave, which on the balance of probabilities appear to be highly unrealistic given there is not a 100% utilisation of sick leave in the United Kingdom.

It is worth the Court's consideration of the case of Carson and Others v. the United Kingdom, Application nos. 42184/05, 45612/05, and 45855/05, where the European Court of Human

Rights held that the difference in treatment between men and women regarding the age of eligibility for the state pension (65 for men and 60 for women) did not amount to a violation of Article 14 of the European Convention on Human Rights. The Court recognised that this differentiation was based on biological and social factors and pursued the legitimate aim of reducing inequality and securing social welfare. This case supports the argument that differentiated treatment based on biological factors can be justified if it serves a legitimate aim.

The applicant cites the case of *Stec and Others v. the United Kingdom* (application nos. 65731/01 and 65900/01). In this case, the European Court of Human Rights considered the issue of age and eligibility for state pension credits, and found that the differentiation was justified as it pursued a legitimate aim of reducing wealth inequality. It could also be considered that the aims of the Regulations are pursuing a legitimate aim of reducing wage inequality, with the [British Medical Journal](<https://bmjopen.bmj.com/content/9/6/e026186>) suggesting that menstruation is a factor in lost productivity, and may lead to discrimination through “presenteeism.”

The applicant’s suggestion of an alternative approach, such as a more general medical leave or personal leave policy that could address the unique challenges faced by individuals who menstruate while ensuring equal treatment for all employees fails to recognise the specific challenges that people who menstruate face, which are biologically driven and not selective. Comparisons must be drawn to the judgements that led to the consideration of maternity as a protected characteristic, given the similar biological nature to menstruation.

The differentiation in treatment is proportionate to the aim pursued. Menstruation is a recurring biological process that affects a significant portion of the workforce. By granting paid leave specifically for menstrual-related issues, the Regulations ensure that individuals who menstruate have the necessary time and resources to manage their health needs without undue burden or financial loss. This targeted approach allows for the effective allocation of resources and contributes to a more equitable workplace.

The Menstrual Leave Regulations 2023 do not disadvantage other employees or violate the rights of non-menstruating individuals

Contrary to the claim made, the Menstrual Leave Regulations 2023 do not disadvantage other employees who do not menstruate. The Regulations are designed to address a specific health concern related to menstruation and do not preclude the provision of other types of leave for individuals facing similar or comparable health conditions or personal circumstances. Existing policies and regulations can accommodate the needs of employees with other health issues or personal challenges. Cases such as *Thlimmenos v. Greece*, application no. 34369/97, provide further evidence that differential treatment can be justified if it serves a legitimate aim and is proportionate.

The claim of potential violation of Article 14 in conjunction with other relevant rights, such as Article 8 and Article 1 of Protocol No. 1, lacks sufficient evidence. The Menstrual Leave

Regulations 2023 are a targeted measure that seeks to promote the health and well-being of individuals who menstruate, without unduly infringing upon the rights of non-menstruating individuals or creating an imbalance in the workplace.

An alternative approach, such as a more general medical leave or personal leave policy, may not adequately address the unique challenges associated with menstruation. Such a broad policy could dilute the focus on menstrual health and potentially undermine the goal of promoting the well-being of individuals who menstruate.

Conclusion

The Menstrual Leave Regulations 2023 do not constitute discrimination on the grounds of sex. They pursue a legitimate aim of promoting the health and well-being of individuals who menstruate and are proportionate to that aim. The Regulations acknowledge the unique challenges associated with menstruation and provide a specific benefit to individuals who undergo this natural biological process. They do not disadvantage other employees or violate the rights of non-menstruating individuals.

It is essential to recognise the importance of accommodating diverse health needs in the workplace and promoting inclusivity. The Menstrual Leave Regulations 2023 represent a step forward in addressing a specific health concern and creating a more supportive work environment for individuals who menstruate.

It is the view of Her Majesty's Government that the applicant's initial submission is deeply flawed. Such an assumption of sex discrimination infers that menstruation is only applicable to women, such arguments that there are is no legitimate aim are unsubstantiated, and the costings and consideration of their proportionate impact submitted to the Court are not reliable. I hope the Court factors these arguments into their decision-making.

/u/Rea-wakey

For and on behalf of His Majesty's Government