**IN THE MATTER OF WHEELCHAIR ATHLETES**

**AND THE UKA RULES FOR COMPETITION 2020-22**

**ADVICE**

**INTRODUCTION**

1. We are asked to advise Ms Esther Leighton, a disabled person and enthusiastic participant in grassroots-level racing, on the potentially discriminatory nature of the UK Athletics Rules for Competition 2020-22 (‘The Rules’), in particular Rule T55. Our advice has been sought for the purpose of more fully understanding and exploring the potentially discriminatory effect of the Rule, and is not intended to anticipate litigation.
2. Ms Leighton uses a powerchair for day-to-day mobility, and a running frame to compete in races. Running frames (previously known as RaceRunners) are three-wheeled devices which are propelled by the body without a chain or motor.
3. Rule T55, supplementary rule 6, provides:

(1) The pushing of persons in any device is not permitted in any race held under UKA Rules of Competition (including but not limited to wheelchair, buggy, pushchair, stroller or similar).

(2) The participation of wheelchair athletes on road courses open to traffic is not permitted in any UKA Licensed Race.

(3) The participation of wheelchair athletes on road courses closed to traffic is permitted in UKA Licensed Races subject to Risk Assessment (see Risk Assessment Appendix).

1. The above division between ‘wheelchair athletes’ and pushed devices, including but not limited to pushed wheelchairs, is consistent with the rest of the Rules.[[1]](#footnote-1) Thus, it is clear that a ‘wheelchair athlete’ is someone who is not pushed. However, there is no further definition of a ‘wheelchair athlete’ within the Rules: in particular, it is not clear that frame runners ought to be included in this category.
2. There is a single reference to RaceRunners in the Rules, at Rule T19 s2: ‘*The judging and timing or RaceRunning events shall be conducted in the same manner as applied to Wheelchair Races and defined in Rules 19.3 and 20.3 of the World Para Athletics Rules and Regulations.’* The WPA rules cited apply particular rules in relation to judgment and timing to *‘wheelchair and RaceRunning races’.* However, no attempt is made in the UKA Rules to expressly distinguish or collate together the two, outside of these specific judgment and timing issues. No one category of ‘wheelchair races’ is envisaged under the UKA Rules, nor is there a separate category of RaceRunning races.
3. We understand that at least one event organiser has denied frame runners the opportunity to participate in road races, instead redirecting them towards separate wheelchair races.
4. In our view, however, frame runners are not ‘wheelchair athletes’ based on a proper construction of the Rules. A running frame is not within the ordinary understanding of what a ‘wheelchair’ is, and so if it is to be caught by the definition, this should be clearly expressed. If we are right on this, Ms Leighton (and we understand other frame running athletes) are being wrongly excluded from road races due to the lack of clarity in the Rules.
5. We suggest that the Rules could be amended to expressly provide for the participation of athletes using mobility aids to assist with leg propelled movement, including running frames (RaceRunners).
6. In the current context of uncertainty, the remainder of our advice applies to whichever disabled athletes fall within the definition of ‘wheelchair athlete’ for the purposes of the Rules.

**SUMMARY OF ADVICE**

1. In our view, there is an arguable primary case of direct discrimination here, with good cases of indirect discrimination and/or discrimination arising from disability in the alternative. It would be legally significant to advance the former case, and would have the advantage that UKA would have no defence of justification: however, the jurisprudence is deeply uncertain, and previous cases have not to our knowledge considered the relationship between direct discrimination and the related ground of ‘discrimination arising from disability’.
2. As such and in the alternative, we consider that there is a strong case that sub-rule (2) in particular is unjustifiable, whether this question arises in the context of discrimination arising from disability or indirect discrimination.
3. Further, in our view there is a good case that there has been a failure to make reasonable adjustments in relation to sub-rule (1). We are particularly conscious that UKA is likely to have relatively substantial resources by reference to the range of bodies which owe the reasonable adjustment duties, meaning that the class of adjustments which it is reasonable for UKA to make will be relatively ample.
4. We are less clear that sub-rule (3) represents a failure to make reasonable adjustments, similarly that sub-rule (2) would do so if amended to mirror (3) in relation to open road races. That is because in our view any health and safety risks considered by UKA are likely to be a factor in determining the reasonableness of adjusting these rules to remove any requirement for risk assessment altogether.
5. Nonetheless, given that UKA guidance suggests that risk assessments ought to be carried out on an event-by-event basis in any event, and suggests a standard template for use across all disciplines[[2]](#footnote-2), the justification for introducing additional administrative barriers to the participation of wheelchair athletes is not clear.[[3]](#footnote-3) For example, the participation of any runner in a fell running event is arguably inherently more dangerous than the participation of a wheelchair athlete in a road race, yet the Rules do not specify additional risk assessment requirements for such events. In our view, disabled people should be equally able to take on risk, and ought not to be viewed as representing an inherently greater risk to others, or themselves, than non-disabled people. In our view, assimilating wheelchair-specific risk concerns into the standard risk assessment already suggested, and removing additional wheelchair-specific barriers to participation, would be a more inclusive and appropriate approach.
6. While the responsibility for remedying any unlawful discrimination inherent in Rule T55 rests with UKA, we would suggest that the following amendments could be considered:
	1. Sub-rule (1) could be adjusted to allow for the pushing of wheelchair users;
	2. Sub-rule (2) ought in our view to be simply removed;
	3. Sub-rule (3) also ought to be fully removed, and risk assessment concerns assimilated into UKA’s standard risk assessment guidance.
7. In our view, if any additional reference to risk assessment is to survive in the Rules, it ought to make reference to a presumption in favour of inclusion and/or take a contextual approach to risk. For example, an amended rule could read as follows:

‘The participation of -

1. Wheelchair athletes, and
2. Athletes using other mobility aids to assist with leg propelled movements, including running frames (RaceRunners),

 is welcomed on road courses open to traffic, unless a risk assessment has shown that the specific race or course is unacceptably dangerous to them, beyond the risks that it is reasonable for an individual participating in a race to accept, and that no adjustment is possible to reduce this risk to acceptable limits.’

**A THE RULES**

1. The Rules are framed to incorporate the World Athletics Rules for Competition (‘WAR’).[[4]](#footnote-4) In addition however, the Rules incorporate *’Specific UKA Domestic Rules’*, which are displayed in purple following the relevant WAR (p7).
2. The Rules go on to provide for participation in races where the race track is open or closed to traffic. A note under Rule 1 in green text, signalling that it provides interpretation to the Rules and practical guidance on their implementation, states that:

Race organisers are advised to emphasise in the information provided to all participants the rules and procedures that will apply to the various categories, especially in relation to safety considerations, particularly when all or part of the race is not closed to traffic. This may for example allow athletes (other than those competing in the elite or other categories to whom Rule 6.3 of the Technical Rules would apply) to use head or earphones when they are running on a closed course but prohibit their use (or at least recommend against it) for the slower runners when the course is open to traffic.

1. Participation in races which are not closed to traffic is provided for in Rule 55 (Road Races). The relevant WAR, at p313, provides for the distance and course type of road races. The WAR makes no provision for rules of participation where the route is open as opposed to closed to traffic: these flow rather from the UKA supplementary rules.
2. Thus, rule s1 of the UKA Supplement: Course (p315), provides materially that:

(1) The responsibility for providing a suitable course rests with the Competition Provider […]

(7) Where any part of a road used for a race is open to traffic at the same time as the competition is in progress, a runner must remain on the left hand side of the road (unless directed otherwise by the Police or a race official or other authorised persons).

1. As will be seen from the following rules, para (7) must be referring to an ambulant runner, referred to in this advice as distinct from wheelchair and frame runners.
2. Rule s5 UKA Supplement: Headphones, prescribes that the wearing of headphones, or similar devices, (other than those medically prescribed), is not permitted in races on any single carriageway road that is not wholly closed to traffic.
3. Rule s6 UKA Supplement: Wheelchairs and Buggies, provides that:

(1) The pushing of persons in any device is not permitted in any race held under UKA Rules of Competition (including but not limited to wheelchair, buggy, pushchair, stroller or similar).

(2) The participation of wheelchair athletes on road courses open to traffic is not permitted in any UKA Licensed Race.

(3) The participation of wheelchair athletes on road courses closed to traffic is permitted in UKA Licensed Races subject to Risk Assessment (see Risk Assessment Appendix).

(4) The carrying of a child by any participant is not permitted in any race held under UKA Rules of Competition.

Notes:

(i) Guidance on these issues can be found in Appendix 4: Endurance Running.

(ii) For the avoidance of doubt participation using hand-cranked or electric chairs is not permitted in any UKA Licensed Race held under UKA Rules of Competition.

(iii) A Competition Provider may, after due consideration within the Risk Assessment process, determine that a pushed wheelchair may be accommodated toward the rear of the event, on condition that the event is held on roads closed to traffic, meets runbritain Licence Standards and the participant is not attempting to compete against others.

1. Appendix 4 (pp369-377), so far as material, defines open and closed road; gives guidance for the participation of pushed wheelchairs; stipulates considerations when undertaking a risk assessment for wheelchair athletes and pushed wheelchairs; and lists circumstances where an athlete given permission to compete using a wheelchair may still be refused entry upon arrival at the event.
2. For a route to be closed, all roads on which participants are running must be closed to all traffic, although a road with more than one lane, where the running route is segregated by cones/barriers is still closed. A road will be open if a section of the road is closed, but other sections are shared with live traffic.
3. Appendix 4 provides that competition providers must undertake a Risk Assessment to determine whether their event is suitable for wheelchair and / or pushed wheelchair participation.
4. Event day circumstances in which a permitted wheelchair athlete may be refused entry include that a wheelchair and / or the athlete by using it represent a health and safety risk based on unforeseen circumstances on the day, i.e. weather conditions.
5. The operation of Rule 55 and Appendix 4 means that wheelchair athletes cannot participate in road races, unless they are ones where the entire road is closed. Ms Leighton’s concern is that, in effect, this excludes wheelchair athletes from virtually all events other than those reserved for elite athletes, meaning they are effectively unable to participate in road races at a grassroots level.

**B DISCRIMINATION LAW**

*Source of UKA’s Obligations*

1. In our view, UKA has obligations not to discriminate against persons subject to its rules of competition, whether in its capacity as a service provider or a person exercising public functions under Part 3 EA, or alternatively as an association under Part 7 EA.
2. The ECHR has issued a statutory Code of Practice on Services, Functions and Associations (‘the Code’) under s14(1) Equality Act 2006. The Code gives important guidance on the interpretation of, and potential for overlap between, Parts 3 and 7 EA. Pursuant to s15(4)(b) Equality Act 2006, courts and tribunals are obliged to take these codes into account when considering claims under the EA.
3. Part 3 EA (ss28-31) deals with services and public functions. Pursuant to s29 EA:

(1) A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

 […]

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

1. Pursuant to s31(7) EA:

(7) A reference to a service-provider not providing a person with a service includes a reference to—

(a) the service-provider not providing the person with a service of the quality that the service-provider usually provides to the public (or the section of it which includes the person), or

(b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).

1. The class of service providers is broad, and encompasses sports clubs[[5]](#footnote-5) which are not associations.
2. An example of discrimination in the terms of service could be imposing extra conditions for using a facility or service (11.21 of the Code).
3. On the interpretation of s29(2) EA, the Code outlines that even if a service provider thinks that they are acting in the best interests of a service user, their action may still create a detriment for that person. For example, a small shop which refused to serve a disabled person on the grounds that a nearby, larger shop appeared more accessible, would still be unlawfully creating a detriment (11.23 of the Code).
4. Part 7 EA (ss100-107) sets out the equalities obligations on associations. By virtue of s101(2)(a) EA, if the discrimination is already prohibited under Part 3, that part will take precedence. Part 7 will thus operate where an association discriminates towards its members, associates or guests, other than when providing a service to a section of the public.
5. An association is defined in s107(2) as an association of persons—

(a)which has at least 25 members, and

(b)admission to membership of which is regulated by the association's rules and involves a process of selection.

1. Pursuant to s101(2) EA, an association (A) must not discriminate against a member (B)—

(a)in the way A affords B access, or by not affording B access, to a benefit, facility or service;

(b)by depriving B of membership;

(c)by varying B's terms of membership;

(d)by subjecting B to any other detriment.

1. There are similar provisions relating to associates and guests.
2. Paras 12.5-6 of the Code set out the requirements for associations to have rules regulating admission to membership, outlining that where these selection processes are absent, the body will be involved in the provision of services.
3. ‘Benefit, facility or service’ describes the wide range of material and non-material advantages enjoyed by members of an association and can include invitation or admission to meetings or events, use of equipment or facilities (12.27 of the Code).
4. Even if an association considers that they are acting in the best interests of a person they may be subjecting that person to a detriment: for example, where a breastfeeding member is advised that she not attend the AGM because members would not be comfortable watching her breastfeed (12.30 of the Code).
5. Service providers, persons exercising public functions and associations are subject to a duty to make reasonable adjustments under the EA (s29(7) and Schedule 2; s103(1) and Schedule 15 respectively). Schedule 2 provides additional guidance for persons exercising public functions:

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—

(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or

(b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment

[….]

(8) If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take.

*Lack of Exemptions*

1. The EA provides for two general exceptions to its overall scheme in relation to competitive sports: these relate to the protected characteristics of sex or gender reassignment, and nationality. There is no equivalent general exception for disability. Nor are there any relevant specific exceptions in Schedule 2 (exceptions for service providers) or Schedule 16 (exceptions for associations).

*Conclusion on Obligations*

1. As a result of the above, whether as a service provider, a body exercising public functions or an association, UKA is obliged not to engage in any of the following relevant forms of prohibited conduct under the EA:
	1. Direct discrimination (s13 EA);
	2. Indirect discrimination (s19 EA);
	3. Discrimination arising from disability (s15 EA); and
	4. Failure to make reasonable adjustments (ss20-21 EA).

**Direct Discrimination**

1. Pursuant to section 13 Equality Act 2010:
2. A person (A) discriminates against another (B) if, **because of a protected characteristic,** A treats B **less favourably** than A treats or would treat others.

[…]

1. If the protected characteristic is disability, and B is not a disabled person, A **does not discriminate** against B only because A treats or would treat disabled persons **more favourably** than A treats B (*emphasis added*).
2. Unlike in relation to other forms of discrimination under the EA, there is no provision for ‘justification’ under section 13. In other words, it is not possible for a service provider/association to argue that any direct discrimination is justified (and therefore lawful) as a proportionate means of achieving a legitimate aim.
3. As a result, where a service provider/association i) treats a person less favourably than they treat others, and ii) the less favourable treatment is because of a protected characteristic, the treatment will constitute direct discrimination, and will be unlawful.
4. As to what constitutes ‘less favourable’ treatment, the Code states:

4.5 To decide whether a service provider has treated a service user ‘less favourably’, a **comparison must be made with how they have treated other service users or would have treated them in similar circumstances**. If the service provider’s treatment of the service user puts the service user at a clear disadvantage compared with other service users, then it is more likely that the treatment will be less favourable: for example, where a customer is refused service or a person’s membership of a club is terminated. **Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity**. If the quality of the service being offered or the manner in which it is offered is comparatively poor, this could also amount to less favourable treatment

4.6 The service user **does not have to experience actual disadvantage (economic or otherwise)** for the treatment to be less favourable. It is enough that the service user can reasonably say that they would have preferred not to be treated differently from the way the service provider treated- or would have treated- another person.

4.7 Under the Act it is not possible for the service provider to balance or

eliminate less favourable treatment by offsetting it against more favourable treatment – for example, by offering an alternative service at a discount (*emphasis added*).

1. The second requirement is that the less favourable treatment is ‘because of’ a protected characteristic, such as disability. The Code provides that the characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause (4.12). The Code further suggests that the answer to this question can be deduced by asking: ‘But for the relevant protected characteristic, would the claimant have been treated in that way?’ (4.28). As we will show below however, the ‘but for’ test is one of a number of formulations adopted in the case law.
2. Further, the Code provides at 4.15 that:

Direct discrimination is unlawful, **no matter what the service provider’s motive or intention**, and regardless of whether the less favourable treatment of the service user is conscious or unconscious. Service providers may have prejudices that they do not even admit to themselves **or may act out of good intentions** – or simply be unaware that they are treating the service user differently because of a protected characteristic (*emphasis added*).

Example: An amateur dramatics association that organises theatre trips for its members turns down an application for membership from a woman with a hearing impairment as they believe she would not get the same benefits as other members. Although the association may be well-intentioned in rejecting her membership application, this is likely to amount to direct disability discrimination.

1. Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate (4.16). For example, it being a general stereotype that women are less interested in sport than men, if a bank offers male customers only the chance to win a ticket to sporting events, this is likely to be less favourable treatment because of sex.
2. Finally, the Code expressly states that a service provider cannot base its treatment on a decision to follow a discriminatory external rule (4.17).

*Analysis*

1. In our view, there is a good arguable case that Rule 55 is directly discriminatory on the ground of disability, based on the interplay between the wording of the rule and the case law analysed below.
2. As outlined above, the Rules permit ambulant runners to participate in road races which are open to traffic, on the condition that they remain on the left hand side of the road unless directed otherwise (Rule 55 s1(7)). In contrast, the participation of wheelchair athletes on road courses open to traffic is not permitted in any UKA Licensed Race (Rule 55 s6(3)). Indeed, wheelchair athletes are only permitted to participate in races *closed* to traffic subject to the appended risk assessment (Rule 55 s6(4)).
3. The Rules themselves therefore allow a clear comparison to be made with how wheelchair athletes are treated as compared to ambulant athletes, in the same circumstances (road races). Wheelchair athletes are flatly excluded from the opportunity to participate in open races (and their participation in closed races is circumscribed).
4. Under s23(1) EA, on a comparison of cases for the purposes of section 13, 14, or 19, there must be no material difference between the circumstances relating to each case. It is crucial in any case to identify which circumstances are relevant to constructing a comparator in accordance with s23(1) EA.
5. A circumstance will only be material if it was relevant to the decision to treat the person less favourably (*Shamoon v Chief Constable of the Ulster Constabulary* [2003] UKHL 11 at [9]). The majority of the jurisprudence demonstrates that any discriminatory circumstance cannot form part of the relevant circumstances, and so must be stripped out for comparator purposes (see Monaghan, *Equality Law,* 2nd edn. (2013), 6.60-75). This jurisprudence flows from *James v Eastleigh BC* [1990] 2 AC 751, discussed below, and recognises that where the reason for the difference in treatment is inherently discriminatory, this is not a relevant circumstance (for a recent example, see *Hartlepool BC v Llewellyn [*2009] ICR 1426 (EAT) at [53]).
6. In disability cases, the Act further provides that the comparator must be someone with materially equivalent abilities, but who is not disabled (s23(2) EA). For example (p63 of the Code):

A disabled man with a chronic heart condition is a member of a golf club. He asks whether he can join the club’s tournament team, but is told his game is not good enough. Another club member with the same golf handicap as him, who doesn’t have this disability, is selected for the team. This new team member could be a comparator to the man with a disability.

1. Rule 55 makes no distinction based on levels of experience: the difference in treatment is solely based on whether the participant is using a wheelchair. In our view, therefore, this is plainly less favourable treatment than a relevant comparator group.
2. It is further clear from rule 55 s1(7) that but for the fact of using a wheelchair, disabled athletes would not be excluded from the opportunity to participate in open races. The question is however whether wheelchair athletes can participate but for their *disability –* or strictly speaking whether the discrimination is ‘because of’ the protected characteristic of disability. The case law in this area draws on both the ‘but for’ and ‘because of’ formulations, in addition to asking whether the overt criterion (being a wheelchair athlete) is ‘indissociable’ from, or a proxy for, the protected characteristic (disability).

*Is ‘Wheelchair Athlete’ a Proxy for Disabled Athletes?*

1. In the foundational case of *James v Eastleigh BC* [1990] 2 AC 751, the House of Lords considered whether a council’s policy of only providing free admittance to a leisure centre to those ‘who had reached pensionable age’, where there were different state pension ages for men and women, was neutral between sexes or inherently sex biased. The court held by a majority that *‘such a formula was inherently discriminatory’* (per Lord Ackner at 769).
2. The council in *James* had argued that their reason or motive for giving free access to those of pensionable age was that their resources were likely to have been reduced by retirement. The Court of Appeal’s treatment of this subjective motive as the relevant ‘ground’ for the discrimination was overturned by the majority opinion in the House of Lords, where Lord Ackner outlined the irrelevance of even benign motives in cases where the criterion is inherently discriminatory.
3. Although controversial and decided by a bare majority, *James* has been ‘applied time and time again’.[[6]](#footnote-6) First, the House of Lords in *Nagarajan v London Regional Transport* [2000] 1 AC 501 confirmed the irrelevance of reasons where the criterion is inherently discriminatory. This position was in contrast to situations where the factual criteria influencing the decision were not plain, in that case an employer’s subconscious intention to treat an interviewee less favourably on grounds of race.
4. *James* was subsequently upheld in the two further bare-majority Supreme Court authorities of *R (E) v Governing Body of JFS and another* [2009] UKSC 15 and *Hall v Bull* [2013] UKSC 73*.* In our view, *JFS* is the key authority for the purposes of this claim. In particular, it is significant for the different formulations of the threshold for finding an overt criterion to be inherently discriminatory, and for the approaches of the majority to the distinction between the alleged discriminator’s subjective motive, and the objective grounds for the discrimination.
5. Importantly, whereas some dicta in the other key authorities suggests that the connection between the overt criterion and the protected characteristic needs to be necessarily and logically inherent, such that it will apply in each and every case without fail (see *Amnesty International v Ahmed* [2009] 8 WLUK 142 (EAT) [31]-[40]*[[7]](#footnote-7); Bull;* and *Owen*), in our view the majority approach in *JFS* examined the basis of the overt criterion as a matter of fact and evidence, pronounced on the functioning of the criterion in practice, and via this route reached the conclusion that the criterion was inherently discriminatory. This becomes important given the approach of the court in *Owen* to a direct discrimination claim.
6. *JFS* concerned a school admissions policy giving preference to children whose Jewish status had been recognised by an orthodox Rabbinical body which required the child’s mother to be Jewish by matrilineal descent or orthodox conversion - or that the child had converted [24]. The majority found that this policy was inherently racial and therefore directly discriminatory.
7. While the ‘but for’ test from *James* was cited several times in *JFS,* there is little in the judgment to suggest that it was expressly adopted, and was disapproved by Lord Phillips at [16]. The majority leaned much more heavily on the formulations ‘on grounds of’[[8]](#footnote-8) and ‘because of’[[9]](#footnote-9) the protected characteristic. Lords Mance and Clarke were the only two Lords to cleave to the *James* formulation of ‘inherently’ discriminatory.
8. Lady Hale’s reasoning was based on the ‘because of’ formulation. It was only having thus concluded at [71] that this was a ‘clear case of direct discrimination on grounds of ethnic origin’, that she went on to suggest that the case ill-fitted an indirect discrimination challenge, since:

[…] There is no question of those who are not being at a “particular disadvantage when compared with others persons” in the sense that more of the others can comply than they can. None of the non-halachically Jewish can comply, while all of the halachically Jewish can do so. There is an exact correspondence between compliance and the criterion, just as there was in the *Birmingham* and *James* cases. This too suggests, although it does not prove, that the criterion is itself ethnically based. If not, I would agree with Lord Mance on this issue.

1. Thus, Lady Hale’s first introduction of the ‘exact correspondence’ formulation was *obiter.*
2. In further contrast to the ‘logically inherent’ approach, per Lord Phillips, although descent *simpliciter* was not a ground of racial discrimination, it would be where the descent in question in fact traced racial or ethnic origin, see [33]. At [39]-[43] in particular, Lord Phillips gave a rich analysis of the relationship between the ethnic and religious elements of Jewish identity, concluding based on the evidence that in the matrilineal descent test the two are ‘inextricably intertwined.’
3. In holding the policy unlawful, the majority disregarded the hypothetical possibilities that a child could gain admission through their own conversion, or that a child could be adopted (Per Lord Phillips at [24]; Lord Clarke at [126]). Per Lord Mance at [89]:

The reason for M's ineligibility can be said to be that his mother converted to Judaism under a procedure and principles other than those accepted by Orthodox Jews. However, **M remains at a disadvantage because of his descent**, and, **speaking generally, the test for admission of any child to JFS is for practical purposes one of descent**. The **possibility** of a child applying to JFS being him - or herself a convert, or even in the course of converting, appears **negligible**. JFS in its answers dated 17 December 2007 believed there **never to have been any such child in the three years preceding** the answers (*emphasis added*).

1. On one analysis, the criterion of childhood conversion is severable from the criterion of matrilineal descent which was under analysis. However, arguably the above *dicta* support the view that the question of whether a formula is inherently discriminatory cannot be wholly divorced from its real-world operation – a view which seems to be supported by Lord Philipps’ extensive enquiry into the actual interplay of religious and ethnic elements in the test. In our view therefore, consideration must be given to how the test operates for practical purposes, and a negligible possibility of a different set of circumstances arising is not sufficient to negate the directly discriminatory nature of the ground.
2. The majority followed the twofold classification from *Nagarajan*,and reasoned that on these facts, the factual criterion being applied was plainly recognisable, and therefore that it was unnecessary to inquire into the policy-maker’s subjective intention (see [21]-[23] per Lord Phillips; [61]-[65] per Lady Hale; [78], [89] per Lord Mance; [114]-[120] Lord Kerr; [138]-[146] Lord Clarke). In our view, the facts of the instant claim also fall into this category – the factual criterion being applied is apparent from the face of the rule.
3. Finally, while the majority all agreed that subjective intention was irrelevant to the question of whether the criterion actually discriminated on the basis of ethnicity, Lord Clarke diverged from Lady Hale [62] and Lord Kerr [116]-[17] where they separated the subjective motive of religion from the true ground or basis of ethnicity. Rather, Lord Clarke suggested that ethnicity and religion were both in truth ‘grounds’ of the decision, the one ground being an ‘essential feature’ of the other [130]. In our view, a potential defence from UKA that the legitimate ‘ground’ of the decision was health and safety would fail on either approach. Lord Clarke further outlined that if, contrary to his expressed view, subjective intention were relevant, he would have decided the case the same way [151].
4. In *Hall v Bull* [2013] UKSC 73, Christian hoteliers had refused to check in two gay civil partners, since they had a policy of only renting double rooms to ‘heterosexual married couples’. They argued that the reason for the discrimination was not sexual orientation, but marital status, since they had applied the same policy to unmarried opposite-sex couples [17]. This argument failed: Lady Hale held at [29] that *‘I have the greatest difficulty in seeing how discriminating between a married and a civilly partnered person can be anything other than direct discrimination on grounds of sexual orientation…I would therefore regard the criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it.’* It was relevant however that at that time, there was an exact correspondence between the sexual orientation of a person and whether they were married or in a civil partnership.
5. Lady Hale’s application of *James* here leaned more heavily on this test of ‘exact correspondence’, equivalated to ECJ jurisprudence referring to disadvantages which *‘coincide exactly’* with a relevant category of person, or which have an *‘indissociable’* connection to that category [18]-[29]. Advocate General Jacobs had held in a recent case that *‘The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected’* ([19] of Hall).
6. Finally, in *Essop v Home Office* [2017] UKSC 27, Lady Hale expressed the threshold test in slightly different terms again:

17. […] *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it.

1. In that case, a test in which BME candidates performed statistically worse was indirectly discriminatory – interestingly however, Lady Hale suggested *obiter* that had all BME candidates failed the test, it would be *‘closer to a case of direct discrimination (because the test requirement would be a proxy for race or age)’* [27].
2. Thus, the *James* test of whether a formula is ‘inherently’ discriminatory has in recent Supreme Court jurisprudence been equivalated with tests of whether the *prima facie* requirement in the formula under challenge discriminates ‘because of’ a protected characteristic (PC), is ‘indissociable’ from a PC, and/or is a ‘proxy’ for a PC.

*Inherent Characteristics in the Comparative Analysis*

1. Per *Monaghan* at 6.74, the case law demonstrates that when undertaking the comparative exercise, both the fact of the protected characteristic and the conduct ‘indissociable’ from it, or which is a ‘necessary facet’ of it, should be ignored. Monaghan cites Lady Hale in *AL (Serbia) v SSHD* [2008] 1 WLR 1437 at [27]:

There are…dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situations are not analogous.

1. Following the general approach that inherently discriminatory circumstances should be stripped out of the comparator analysis under s23(1) EA, in this case, the fact of being a wheelchair athlete would not be a relevant circumstance. The appropriate comparator would not be some hypothetical person who is not disabled but is a wheelchair athlete: rather, applying s23(1) and (2) in light of the case law, it would be a non-disabled ‘ambulant’ athlete with an equivalent racing ability.
2. *Monaghan* does note, however, that the case law has taken differing approaches when it comes to protecting conduct which is a *manifestation* of a protected characteristic: conduct manifesting sexual orientation has been held to be protected, while not all extreme conduct manifesting religious belief will be protected under direct discrimination, for policy reasons (6.74). In *Stockton-on-Tees v Aylott* [2010] EWCA Civ 910 at [47], the Court of Appeal held that behavioural and performance issues stemming from a disability were correctly excluded from the relevant circumstances for comparator purposes (and this ruling was undisturbed by the same court in *Aitken v Commissioner of Police for the Metropolis* [2011] EWCA Civ 582). *Aylott* was briefly considered in *Owen,* discussed below, but the court in *Owen* appeared to draw from it only the dicta that the fact of the claimant’s disability should be excluded from the comparison, rather than the issue of behaviour ‘manifesting’ the disability [64].

*Approach where the Protected Characteristic is Disability*

1. Most recently, in *Owen v Amec Foster Wheeler Energy Ltd* [2019] EWCA Civ 822 at [49]-[79], the court considered the authorities of *James, Amnesty,* and *Essop*. Under challenge was an employer’s decision to refuse the claimant, a disabled man with a long medical history, an overseas assignment on the ground that he was at high risk of needing medical assistance. The court here rejected the submission that there was an inherent or indissociable link between the ground given, and the claimant’s disability. At [78], the court doubted whether the concept of indissociability could readily be translated to the context of disability discrimination (from the ‘simple binary’ of racial or sex discrimination). *Owen* has not yet been considered in another reported case.
2. In response to *Owen*, we note firstly that *JFS* was not cited in the judgment, and would appear to rebut the notion that the law governing racial discrimination is a simple binary. Secondly, there was not a strong case of ‘indissociability’ on the facts of *Owen*, which may therefore be distinguishable.
3. In *Owen,* it was submitted that the overt criterion – the conclusions of a medical assessment – was indissociable from the Claimant’s disability, since ‘the reasons are part of the facts constituting his disability’ [46], [49]. However, it is immediately easy to imagine many engineers who were medically unfit for work in a remote location, absent a disability. In contrast, in our view, the connection between wheelchair athletes and athletes with a particular category of disabilities is much closer to being ‘indissociable’. Adopting Lord Mance’s analysis in *JFS*, while it is theoretically possible to conceive of a non-disabled athlete choosing to participate in a road race using a wheelchair, this possibility is negligible (indeed fanciful).
4. Thirdly, from the array of differently formulated tests found in the jurisprudence, the court in *Owen* interpreted the threshold at its highest. While clearly supportable by some of the case law dicta, this approach is not indisputable, for the following reasons:
	1. The court at [71] relied on Lady Hale’s earlier ‘exact correspondence’ formulation, going on to interpret the criterion in *James* as one which *‘necessarily and in all cases…distinguish[ed] between men and women’*. However, when Lady Hale first referred to an *‘exact correspondence’* in *JFS* at [71], it was as an *obiter* additional consideration, which was merely potentially relevant to her already drawn conclusion;
	2. In our view, Lady Hale’s most recent formulation of a ‘proxy’ could improve the prospects of this claim. As to the strictness of the ‘proxy’ test, it is notable that the court in *Owen* cited Lady Hale at [17] of *Essop*, but not her more generous (*obiter*) approach to a ‘proxy’ criterion suggested at [27] (*supra*).
5. In our view, it would be wrong for disabled people to be excluded from protection from direct discrimination because of an unduly restrictive interpretation of the jurisprudence*,* overriding the fundamental question in the legislation of whether the discrimination is objectively ‘because of’ disability. However, in disability claims in particular respondents and tribunals will have recourse to the alternative formulation of ‘something arising in consequence of’ disability, which we consider below. That may point to the Court taking a more restrictive approach to direct discrimination than we think, on a proper reading of the authorities, that it should.

*Conclusion on Direct Discrimination*

1. Direct discrimination is a deeply uncertain area of law, replete with Supreme Court decisions decided by bare majorities and propounding various tests. The uncertainty is even greater in the context of direct discrimination on grounds of disability. Some of the jurisprudence has attempted to interpret *James* narrowly, confining it to cases of logically necessary correspondence. Adopting that approach, the recent Court of Appeal case of *Owen* was unfriendly to claims relying on this jurisprudence in a disability discrimination context. For these reasons, we cannot be at all confident of success on this ground.
2. Nonetheless, in our view there is an arguable case that the Rule gives rise to direct discrimination on grounds of disability, based on a proper understanding of the above jurisprudence. In particular, in our view *JFS* (which was not considered in *Owen*)lends support to a more realist, factually sensitive approach to the ‘because of’ formulation. So too, potentially, does Lady Hale’s most recent ‘proxy’ formulation. Further or alternatively, it is easier on these facts to imagine an ‘exact correspondence’ between wheelchair athletes and a particular category of disabled athletes. Therefore, in our view, the facts of this case have the potential to develop the law by extending the scope of the jurisprudence to the protected characteristic of disability, at least in these particular circumstances. As discussed below, the unique cause of action of discrimination arising from disability functions in the alternative, subject to justification, and the jurisprudence we have seen does not discuss this relationship.
3. If the Rule *is* a proxy for a particular category of disability, it need not be the only cause of the unfavourable treatment to found a claim, so long as it is a substantial cause. In our view it would be no defence therefore if the treatment is also motivated by safety concerns, or the desire to protect UKA from liability: per the above jurisprudence, these subjective motivations do not necessarily negate a direct discrimination claim.
4. Per 4.15 of the Code, direct discrimination is unlawful regardless of the service provider’s motive or intention, even if their intentions are good. In our view, this means that even if wheelchair participation is not permitted due to genuine concerns for the safety of participants, this cannot render the Rule lawful.
5. Regarding the incorporation of external rules, it is clear from the structure of the Rules that the relevant provisions are not WAR rules, but have been supplemented by UKA. It may be that they incorporate IPC rules (as stated near the beginning of the Rules). No matter how authoritative or well-intentioned the IPC rules are, however, the Code expressly tells us that a decision to follow a discriminatory external rule cannot legitimise direct discrimination. That basis is therefore no defence.
6. In conclusion, for all the reasons given above, in our view Rule 55 is arguably directly discriminatory and unlawful.

**Indirect Discrimination**

1. If we are right in our primary position that the Rule is directly discriminatory, then the question of indirect discrimination does not arise: the two are mutually exclusive ([57] and [92] of *JFS*). There is however significant overlap in the principles governing indirect discrimination, discrimination arising from a disability, and the duty to make reasonable adjustments.
2. In the alternative to a direct discrimination argument, in our view there would be a good case that the Rule constitutes indirect discrimination. Per s19 EA on indirect discrimination:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

[…]

Disability.

1. Per Lady Hale in *Essop v Home Office* [2017] UKSC 27 at [25]:

Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

1. Lady Hale’s purposive comparison of the two forms of discrimination bolsters our view that this is more properly a direct discrimination claim. On her earlier analysis of the requisite causal link, however, we consider that an indirect discrimination claim in the alternative would be well founded.
2. The Rule plainly amounts to a provision, criteria or practice (‘PCP’). It applies to ‘wheelchair athletes’ – as set out above, in our view this is essentially a proxy for a certain category of persons with a disability, but if we are wrong on that, it would be the case that the PCP on its face applies to disabled and non-disabled athletes equally. The Rule would however put a certain category of disabled athletes[[10]](#footnote-10) at a particular disadvantage since they would be unable or less able to compete without the use of a wheelchair.
3. Per 5.10 of the Code, whilst disadvantage is not defined in the Act, it *‘could include denial of an opportunity or choice, deterrence, rejection or exclusion… A disadvantage does not have to be quantifiable and the service user does not have to experience actual loss (economic or otherwise). It is enough that the person can reasonably say that they would have preferred to be treated differently.’* Rule 55 plainly excludes a particular category of disabled athletes from the opportunity to participate in many road races.
4. Next, the Rule does in fact put Ms Leighton at that disadvantage: she has been refused entry to grassroots races on the basis of the Rule (even if this refusal may have been based on an incorrect understanding and / or application of the Rule). While Ms Leighton does participate in parasports events, this cannot be a substitute for equal participation in grassroots sport. Ms Leighton is clear that she would have preferred to be treated differently, and to be able to participate equally in the grassroots sport she loves.
5. The success of this ground would thus in our view hinge on whether UKA can show the rule to be a proportionate means of achieving a legitimate aim, and thereby establish the ‘justification’ defence. In our view, there is a good case that the rule is not justifiable, chiefly on proportionality grounds.
6. Based on the Rules overall, it seems likely that the legitimate aim raised by UKA would relate to health and safety, albeit that Appendix 4 does not fully set out this reasoning. While stated aims should never automatically be accepted as legitimate, and mere generalisations cannot be sufficient, nor is UKA required to have fully set out their justification in the Rules: respondents are able to set out their reasoning more fully in response to an issue being raised (5.26 of the Code). Further, health and safety is specifically listed as an example of a legitimate aim, albeit that the risks must be clearly specified (5.30 of the Code). Therefore, while we would certainly request UKA to set out any anticipated risks much more clearly and specifically, in our view this is likely a passable hurdle for UKA.
7. However, in our view there is a good case that Rule 55 s6 does not represent a proportionate means of achieving the above ‘legitimate aim’, particularly sub-rule (2), which represents a blanket ban. One aspect of proportionality is whether the rule is a reasonably necessary means of achieving the aim, not in the sense that it is the only possible route, but whether the same aim could have been achieved using less discriminatory means (*Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368 (ECJ)* and *Dansk Jurist- og Okonomforbund v Indenrigs- og Sundhedsministeriet [2013] EUECJ C-546/11*). In our view, the blanket nature of the ban imposed by sub-rule (2) therefore likely renders it disproportionate. For example, as Ms Leighton suggests, participation of wheelchair athletes in open traffic races could have been permitted subject to a risk assessment, as in sub-rule (3) for closed traffic races.
8. This view is corroborated by the example given at 5.33 of the Code:

Example: An outdoor centre provides a variety of activities from walks on gravelled areas to those involving strenuous physical effort. On safety grounds, it requires a medical certificate of good health for all participants in any activities. **Although ensuring health and safety is a legitimate aim, the blanket application of the policy is likely to be unjustified because customers with disabilities which restrict strenuous exercise could still be admitted to undertake parts of the course which do not create a safety risk**. Also some conditions which doctors may not classify as ‘good health’ do not, in practice, impede the ability to safely undertake strenuous exercise. *(emphasis added)*

1. The duty to make reasonable adjustments, considered below, is also relevant to proportionality analysis at the justification stage in a claim of indirect discrimination. Per 5.34 of the Code, *‘In a case involving disability if the service provider has not complied with its duty to make relevant reasonable adjustments, it will be difficult for the service provider to show that the treatment was proportionate.’*
2. Sub-rule (3) arguably discloses a reasonable adjustment, but sub-rule (2) in our view represents a failure to make reasonable adjustments. So too, potentially, does sub-rule (1), since permitting pushing in the case of wheelchair athletes would arguably represent a reasonable adjustment.[[11]](#footnote-11) These considerations bolster our strong view that sub-rule (2) is disproportionate, and also bolster our view that sub-rule (1) is arguably so. Alternatively, per 5.40 of the Code, in the case of any Rule which UKA *could* justify as proportionate, they would still be obliged to consider making reasonable adjustments.
3. For the reasons set out above, in our view there is a strong case that sub-rule (2) is disproportionate given the blanket nature of the ban, and an arguable case that sub-rules (1) and (3) are disproportionate.

**Discrimination Arising from Disability**

1. Pursuant to s15 EA: (1) a person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

1. This cause of action is unique to the particular characteristic of disability. It is necessary to compare the material wording of s13 EA – ‘because of’ B’s disability, with the wording of s15 – ‘because of something arising in consequence of’ B’s disability. In other words, is the discrimination on the grounds of disability *per se,* or because of mobility needs which arise in consequence of disability.
2. The Code gives examples in the employment context, including where an employee's visual impairment means that he cannot work as quickly as colleagues, and he is dismissed for low output, or if a woman is dismissed for disability-related sick leave (5.3 of the Code). The reason for discrimination would be the low output or sick leave. The Code also gives an example of a child with Hirschsprung’s disease, meaning that he does not have full bowel control, being refused entry to a nursery because he is not toilet trained.
3. From that example that s15 may give rise to a more straightforward challenge to Rule 55 than direct discrimination; the direct discrimination jurisprudence reveals the difficulties which the courts have experienced when grappling with the baldness of the ‘because of’ formulation, when they have not had recourse to this alternative (particularly in *JFS,* on the question of descent ‘*simpliciter’*). That is not to say however that the direct discrimination jurisprudence is necessarily inapplicable, the evident significance of that issue being that direct discrimination cannot be justified. Section 15 was not pleaded in *Owen,* and so the court did not analyse the Respondent’s submission that this was the more appropriate formulation [55].
4. If the criterion was not considered a ‘proxy’, in our view the fact of being a wheelchair user would for the vast majority of, if not all, wheelchair athletes be something arising in consequence of their disability. On the second element of s60(a) EA, it is clear that the treatment, which we have already established is unfavourable, is ‘because of’ that something (using a wheelchair).
5. Again, in our view there would be a good case that the treatment was not proportionate, for the reasons set out above under the indirect discrimination ground. Nor would UKA have a defence under s15(2), since it would not be credible for UKA to assert that they could not reasonably have been expected to know that a wheelchair athlete would have a disability.
6. Therefore, while the relationship between s13 and s15 raises important points of principle for disability discrimination claims in general, practically speaking, in this case there are good prospects of success under s15 in the alternative. We would therefore suggest that in any claim both sections 13 and 15 are pleaded.

**Failure to make reasonable adjustments**

1. If or to the extent that the rule is directly discriminatory, it is not possible for UKA to make reasonable adjustments to it. If, however, the rule is indirectly discriminatory, and/or represents discrimination arising from disability, the duty to make reasonable adjustments will be a relevant consideration in the proportionality analysis, as set out above. Failure to make reasonable adjustments is of course also a cause of action in its own right.
2. As set out at the beginning of the advice, UKA is subject to a duty to make reasonable adjustments, under Part 3 and/or Part 7 EA. The relevant component of the duty is that contained in s20(2)-(3) EA:

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

1. The duty is an anticipatory one; it goes beyond simply avoiding discrimination, requiring service providers to take positive steps; and it is not a minimalist policy, but one which aims, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public (7.3-4 of the Code). It is a duty owed to disabled people as a class, and so applies regardless of whether UKA knows that it currently has any disabled members (7.22 of the Code).
2. Again, Rule 55 is a PCP. Per s212(1) EA, a ‘substantial’ disadvantage is one which is ‘more than minor or trivial’: in our view, the disadvantage of not being permitted to participate in any open road races at all is a substantial disadvantage. We would further view the qualified rules of participation in relation to closed road races as more than minor or trivial; this is not a high threshold.
3. In our view, UKA ought reasonably to know that wheelchair athletes will be disabled and likely to be placed at a substantial disadvantage because of their disability.
4. As such, there is a duty in our view on UKA to make reasonable adjustments to Rule 55 which would avoid the disadvantage it causes to disabled people. The issue thus comes down to the reasonableness of any proposed amendments to the rule, which is a fact-specific question. In our view, the minimum reasonable adjustment would be to amend sub-rule (2) to enable participation in open road races subject to a risk assessment, although preferably sub-rules (2) and (3) would simply be removed.
5. A key relevant factor here is UKA’s size and resources. UKA is a national organisation, not a local club. We would anticipate that UKA have relatively substantial resources, which would expand the class of possible adjustments which it would be reasonable for them to make. We do note however that risk assessments would likely be carried out by individual race providers, and we do not have evidence on the resourcing arrangements in play here (7.29-32 of the Code). As outlined in the summary of our advice, we suggest that UKA could assimilate specific guidance on completing risk assessments in relation to wheelchair users, into its generic risk assessment guidance and template for event organisers.
6. A relevant factor tending in the opposite direction is the extent of any disruption which taking the steps would cause. In relation to sub-rule (1), in our view wheelchair pushing would be unlikely to be disruptive, although UKA may argue that fairness of competition is an element of reasonableness. In our view, risk assessment requirements are also not inherently disruptive. UKA may however argue that it would be potentially disruptive to fully allow wheelchair athlete participation in races which are open to traffic in particular, if not subject to a risk assessment, based on health and safety concerns.
7. In answer to that defence, we would repeat our concerns set out in the summary of this advice. First, risk assessment is a desirable, though not mandatory, facet of all UKA event organisation. There are real levels of risk inherent in, for example, fell running races, as well as all athletic competitions, in relation to all kinds of runner. Disabled people should be equally able to take on risk, and ought not to be viewed as representing an inherently greater risk to others, or themselves, than other groups. The justification for introducing additional administrative barriers to the participation of wheelchair athletes is therefore far from clear. In our view, assimilating wheelchair-specific risk concerns into the standard risk assessment already suggested, and removing additional wheelchair-specific barriers to participation, would be a more inclusive and appropriate approach, which UKA would be better able to justify.
8. Overall, in our view adjusting sub-rule (1) to allow for pushing in the specific case of wheelchair athletes arguably represents a reasonable adjustment. So too does amending sub-rule (2) to mirror sub-rule (3), if it is not removed altogether. In our view, it is easier to understand UKA’s potential defence in favour of sub-rule (3) (or an equivalently amended sub-rule (2)). However, our case is not that it would be reasonable to remove risk assessment requirements altogether, but rather that they be assimilated into the generic risk assessment guidance so as not to constitute an additional barrier to disabled participation in racing.
9. Finally, any proper assessment of the prospects of success of a reasonable adjustments challenge would need to be provided at the point in which UKA’s position is made clear. We would need to assess the reasons given for any refusal to make requested adjustments in the light of the relevant law and guidance before giving a view as to whether UKA would be likely to establish that it is not reasonable to take the requested step.

**CONCLUSION**

1. Overall, in our view there are good prospects of challenging Rule 55, and in particular sub-rule (2). In our view, it would be possible and potentially legally significant to bring a direct discrimination challenge, the further advantage being that UKA would have no defence of justification. However, in the alternative, in our view the Rule (in particular sub-rule (2)) is likely unjustifiable, since the blanket ban is clearly disproportionate. As such, in our view the Rule likely gives rise to discrimination arising from disability and / or indirect discrimination, both being forms of ‘prohibited conduct’ under the EA 2010 (sections 15 and 19 respectively, as set out above).
2. Further, in our view sub-rules (1) and (3), and a potentially amended variant of sub-rule (2), arguably represent failures to make reasonable adjustments, for the reasons set out above. We have proposed that it would be a more inclusive, fairer, and less potentially discriminatory approach to assimilate wheelchair-specific risk consideration into the generic risk assessment process, rather than stipulating an additional barrier to participation on the face of the Rules.
3. We hope this advice assists in seeking to persuade UKA to amend Rule 55. If we can be of any further assistance in this matter, please do not hesitate to contact us in chambers.

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12 June 2021

1. Per Note (iii) on Rule T55, s6, pushed wheelchairs may be accommodated within a closed road race, but only if not attempting to compete with others; per the section of Appendix 4 dealing with Risk Assessment, *‘the Competition Provider must undertake a Risk Assessment to determine whether their event is suitable for wheelchair and / or pushed wheelchair participation.’* The section later lists *‘Considerations when undertaking a risk assessment for wheelchair athletes and pushed wheelchairs’,* while the Fun Run Only sections provide for risk assessment in relation to any pushed device. [↑](#footnote-ref-1)
2. Pp384-391 of the Rules. [↑](#footnote-ref-2)
3. The Rules only additionally specify the need for risk assessments in the case of open roads (p315), and headphone usage by runners (p391). [↑](#footnote-ref-3)
4. <http://www.uka.org.uk/wp-content/uploads/2021/04/UKA-Rules-for-Competition-2020-2022-Incorporating-World-Athletics-Rules-Updated-April-2021.pdf>. [↑](#footnote-ref-4)
5. <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-law-gyms-health-clubs-and-sporting-activity-providers> [↑](#footnote-ref-5)
6. Per Lady Hale in *JFS*, below, at [61]. [↑](#footnote-ref-6)
7. In *Amnesty International,* decided slightly before *JFS,* Underhill J as he then was stated that the formula in James ‘necessarily’ discriminated against men. At [39], he endorsed an earlier High Court decision holding that although a criterion of national origin would ‘very likely’ have produced a similar outcome to what was in fact adopted, the reasoning in James required that they be inherently identical. Arguably, that reasoning has been overtaken by the higher court’s decision in *JFS*. [↑](#footnote-ref-7)
8. In the phraseology of the earlier discrimination legislation current at the relevant time. [↑](#footnote-ref-8)
9. from Birmingham City Council, as approved in *Nagarajan*. [↑](#footnote-ref-9)
10. Per 5.17 of the Code, clarity on the relevant protected characteristic is key, and ‘in the case of disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent visual impairment.’ [↑](#footnote-ref-10)
11. The Rule imposes a blanket exclusion on the *‘pushing of persons in any device….including but not limited to wheelchair, buggy, pushchair, stroller or similar.’* There is no suggestion that the Rule permits adjustment where the protected characteristic of disability is engaged. We understand that in addition to wheelchairs, buggies and strollers will sometimes (though not always) refer to wheelchairs for disabled children. In our view, UKA should consider reasonable adjustments in relation to any and all pushed devices insofar as the characteristic of disability is engaged. [↑](#footnote-ref-11)