‘A recommitment to the idea of substantive equality’ (or not)? S. 15(1) of the Charter of Rights after Kapp: Harris v Canada (Human Resources and Skills Development)

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‘A recommitment to the idea of substantive equality’ (or not)? S. 15(1) of the Charter of Rights after Kapp: Harris v Canada (Human Resources and Skills Development)\(^1\)

This note looks at the decision of the Federal Court of Appeal in Harris – a case which raised important equality issues about the operation of the ‘drop out’ provisions in the Canadian Pension Plan. The case is interesting both for the issue itself but also because it is one of the first judgments to consider the impact of the Supreme Court’s restatement in Kapp of its approach to s. 15.\(^2\) However, the court of appeal was split with all three judges giving a different analysis of the issues (albeit that the claim was rejected on a split decision). Part I outlines the background to the claim and the discussion of s.15 by the Supreme Court in Kapp. Part II looks at the different approaches adopted by the members of the court of appeal in Harris and Part III discusses the issues arising.

1. **Context**

*Disability pension and the ‘recency’ requirement*

Ms. Harris submitted a claim for a disability pension under the Canada Pension Plan. In order to qualify she had to have contributions to the Plan in at least four of the last six years

\(^1\) 2009 FCA 22. The case involved a judicial review of a decision of a Pension Appeals Board (PAB) in Minister of Human Resources and Skills Development v C.H. CP24279, 17 November 2007 available at www.pab-cap.gc.ca. The quotation is from the dissenting judgment of Linden J.A. Harris (CA) at para 27.

(the ‘recency’ requirement).³ Ms. Harris’s children were born in 1989 and 1991. Following the birth of the second child, she and her husband decided that she would stay at home full-time to care for the children until they reached school age. However, in 1996, the older child Bradley suffered a number of strokes. Between 1996 and 1998, he was severely disabled, and had to re-learn basic activities such as walking and using his hands and arms. Ms. Harris cared for her son full-time during this period. The evidence was that he could not then attend school full-time but by late 1998, Bradley had largely recovered and was able to begin attending school full-time, albeit with his mother attending with him at least three times per week. Ms. Harris returned to the paid workforce in 2001 but was diagnosed with multiple sclerosis in 2002.⁴ She had to cease work and claimed disability pension. As she only had contributions in 2001 and 2002 Ms. Harris did not satisfy the ‘recency’ requirement simpliciter.

However, the Canada Pension Plan contains a number of provisions which enable persons to ‘drop out’ various years for the purposes of the recency requirement. Of particular relevance to Ms. Harris is that a parent who remains out of the paid workforce, and in the home, to care for a child under the age of seven, is entitled to drop the years she does so from her contributory period.⁵ Ms. Harris was able to avail of this provision to a certain extent but this still meant that she had only three relevant years of contributions (rather than the required four). The key point was that if 1998, a year in which Ms. Harris was

³ Subsection 44(2) of the Canada Pension Plan, R.S.C. 1985, c. 8.

⁴ It is, unfortunately, not clear from the judgements as to why there was a gap between 1998 and 2001 and whether Ms. Harris sought employment in this period.

⁵ As summarised by Linden J.A. Harris (CA) at para 9. The legal provisions are discussed at paras. 5-9.
engaged in providing care for her disabled son, was also dropped from the contributory period, she would have qualified for a disability pension. However, as Bradley was over 7 by 198, she was not entitled to drop-out this year. Ms. Harris argued that the cut-off at age 7 was discriminatory because it was ‘rooted in norms about able bodied children and when they are able to begin attending school, and fail[ed] to take into account the circumstances faced by her as a parent and caregiver to a severely disabled child’. 6

**S. 15 and Kapp**

Section 15 of the *Charter* provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As readers will be aware, the Supreme Court has, over the years, established a specific approach to the analysis of discrimination claims under s. 15. In particular, in *Law* the Court set out a three stage test:

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6 As summarised by Linden J.A. at para 18.
First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?\(^7\)

In the third stage of the Law test, the Court had put particular emphasis on whether the treatment resulted in a breach of the person’s ‘human dignity’.\(^8\) The approach of the Court had been rather heavily criticised\(^9\) and in the Kapp judgement the Court responded to that criticism.

\(^7\) Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, at para. 39.

\(^8\) Having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group’s reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected, Law at paras. 62-75.

\(^9\) See the literature cited in Kapp at para 22.
First, the Court reiterated the approach set out in *Andrews*\(^\text{10}\) that s. 15 involved a ‘commitment to substantive equality’.\(^\text{11}\) Substantive equality – the Court repeated - is grounded in the idea that:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.\(^\text{12}\)

Second, the Court stated that its case law had ‘established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The Court acknowledged that these tests were divided, in *Law*, into three steps, but stated that in its view the test ‘is, in substance, the same’.\(^\text{13}\)

Third, the Court turned to the emphasis on ‘human dignity’ as a key indicator of discrimination. The Court recalled that in *Andrews* McIntyre J. had viewed discriminatory impact as: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics. It acknowledged that its subsequent decision in *Law* had placed the emphasis on ‘human


\(^{11}\) *Kapp* at para 14.

\(^{12}\) Citing *Andrews* at p.

\(^{13}\) At para 17.
dignity’ and argued that ‘[t]he achievement of Law was its success in unifying what had become, since Andrews, a division in this Court’s approach to s. 15.’\textsuperscript{14} It argued that Law had reiterated and confirmed Andrews’ interpretation of s. 15 as a guarantee of substantive, and not just formal, equality and had ‘made an important contribution to our understanding of the conceptual underpinnings of substantive equality’. However, it accepted that difficulties had arisen from the attempt ‘to employ human dignity as a legal test.’\textsuperscript{15} The Court, referring to the academic criticism of its approach, accepted that ‘human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply’.\textsuperscript{16} In addition, it had ‘also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be’. Finally the Court referred to the criticism that Law had ‘allowed the formalism of some of the Court’s post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike’.

In response to these criticisms, the Court stated that analysis of discrimination in a particular case ‘more usefully focuses on the factors that identify impact amounting to discrimination’.\textsuperscript{17} The Court argued that the four factors cited in Law are based on and relate to the identification in Andrews of ‘perpetuation of disadvantage and stereotyping as

\textsuperscript{14} At para 20.

\textsuperscript{15} At para 21 (emphasis in the original).

\textsuperscript{16} At para 22 (as are subsequent quotations in this paragraph).

\textsuperscript{17} At para 23.
the primary indicators of discrimination’. 18 The Court argued that viewed in this way, Law did not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in Andrews — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping. 19

Finally, the Court went on to analyse the role of s. 15(2). Here the Court rejected the view of s. 15(2) as an interpretive aid to s. 15(1) 20 and instead saw the focus of s. 15(2) as being on enabling governments to pro-actively combat discrimination. 21 Thus ‘if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all’. 22 S. 15(2) was not considered in Harris and this aspect of the Kapp decision will not be considered in detail here (for the possible

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18 The Court stated that pre-existing disadvantage and the nature of the interest affected (factors one and four in Law) go to perpetuation of disadvantage and prejudice, while the second factor (correspondence) deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in Law) goes to whether the purpose is remedial within the meaning of s. 15(2). It suggested, without deciding, that the third Law factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.

19 At para 24.


21 Kapp at para 37.

22 At para 37.
implications in this case, see below Part III). However, given the Court’s stated intention of reinforcing its commitment to substantive equality, it is arguably hugely problematic to have erected s. 15(2) as a specific exclusion (rather than an interpretative guide) to s. 15(1). One can imagine that much ingenuity will now be displayed in seeking to argue that challenged provisions are, in fact, ameliorative within the meaning of s. 15(2), and, therefore, not subject to review under s. 15(1).

One can only welcome the fact that a Supreme Court should so clearly respond to criticism of its approach. However, the s. 15(1) analysis set out in Kapp is somewhat problematic. First, it is very brief being set out in only 12 paragraphs (of the 66 paragraph majority judgement). Second, and more importantly, notwithstanding the fact that the Court arguably had to consider the overall function of s. 15 in order to interpret the specific role of s. 15(2), Kapp was a somewhat strange case in which to set out a ‘new’ approach to s. 15(1). Given that the majority approach focussed almost entirely on s. 15(2), the Court had no opportunity to give substance to its comments on s. 15(1) by showing how they would apply in a concrete case. Given this, it is interesting to turn to the Harris decision to see how the Federal Court of Appeal applied s. 15(1) post-Kapp.

II. Applying Kapp?

As noted above, the three judges of the court took three entirely different approaches to the analysis of the issues (with two rejecting the claim albeit for different reasons). Thus there is no real ratio for the decision.
Linden J.A. set out the main (but dissenting) judgement and addressed *Kapp* in some detail.\(^{23}\) Linden J.A. took the view that the Supreme Court had called for ‘a recommitment to the ideal of substantive equality’.\(^{24}\) Applying the two-stage framework discussed by the Supreme Court in *Kapp*, Linden J.A. considered first whether the challenged provision created a distinction based on an enumerated or analogous ground and took the view that it did. The Supreme Court had previously emphasised the importance of choosing the correct comparator group.\(^{25}\) However, Linden J.A. suggested that the *Kapp* court may have signalled a rethink of the comparator group-based analysis. If so, he was satisfied that this was a case where discrimination was ‘apparent on the basis of the disproportionate and prejudicial economic impact of the legislation on an already-disadvantaged group, the caregivers of disabled children’.\(^{26}\) If comparator groups are still relevant, Linden J.A. took the view that it is essential to define the comparator group in a way that reflects the claimant’s perspective and rejected the Pension Appeals Board’s choice of parents of non-disabled children seven and older who stay out of the workforce to care for their children. He felt that, given that the purpose of the provision was to avoid penalizing parents for the lack of labour market flexibility imposed by child-rearing responsibilities the appropriate group was that proposed by Ms. Harris: the parents of all non-disabled children six years and under, and the parents of children seven and older, whose disabilities are not severe enough that they are

\(^{23}\) In fact neither Evans J.A. nor Ryer J.A. specifically mentioned *Kapp*.

\(^{24}\) *Harris* at para 27.


\(^{26}\) At para 36.
prevented from attending school full-time.\textsuperscript{27} He was satisfied that the cut-off (at age 7) did impose different treatment as while parents in the comparator group were entitled to the benefit of the drop-out for the full period when their access to the labour market was restricted by having to care for children at home full-time, Ms. Harris was only protected for part of that time (i.e. until the child reached the age of 7). In fact, Linden J.A. would also have found differential treatment even accepting the PAB’s comparator group.\textsuperscript{28}

Linden J.A. also found that the treatment was on an enumerated ground, i.e. disability. It had been argued that a parent could not claim discrimination on the basis of her child’s disability. However, following \textit{Benner v. Canada (Secretary of State)},\textsuperscript{29} Linden J.A. held that the relationship between a parent and child was of a ‘particularly unique and intimate nature’ and that, in the circumstances, ‘because of the special care disabled children require, even over and above the dependent relationship all children have with their parents, the child’s disability affects the parent in a way that is profound and unchangeable’.\textsuperscript{30} Therefore, the differential treatment was on an enumerated ground.\textsuperscript{31}

Turning to the second part of the \textit{Kapp} test, i.e. whether the distinction was discriminatory within the meaning of s. 15, Linden J.A. stated that the cut-off age was seven was ‘based on

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\textsuperscript{27} At para 37-40.

\textsuperscript{28} Ata para 41-2.

\textsuperscript{29} [1997] 1 SCR 358.

\textsuperscript{30} \textit{Harris} at para 46. The PAB had come to the opposite conclusion on this point. Linden J.A. pointed out that this did not involve a broad doctrine of ‘discrimination by association’ which had been reserved by the Supreme Court in \textit{Brenner}.

\textsuperscript{31} A view Evans J.A. was prepared to accept for the purposes of the application (para 92).
a presumed characteristic, that children seven years of age and older are capable of attending school full-time'.

This, in his view, laid bare the discriminatory nature of the cut-off, which reflects assumptions based on the capabilities of non-disabled children, without any regard for the different circumstances of disabled children who are not able to attend school full-time and continue to require ongoing fulltime home care.

Therefore, Linden J.A. concluded that the distinction both reflects prejudicial attitudes and perpetuates economic disadvantage, which demeaned the human dignity of these disabled individuals and was therefore discriminatory within the meaning of section 15(1) of the Charter.

He further concluded that this breach of s. 15 was not saved by s.1. He was satisfied that the objective of the drop-out (i.e. to protect the eligibility for Plan benefits earned by contributors who leave or reduce their participation in the workforce to care for young children) was both pressing and substantial and provision was rationally connected to that objective. However, he took the view that it did not minimally impair Ms. Harris’ rights, noting that the Minister has not tried to justify it on cost grounds and that the cost of extending the drop-out ‘would not have a serious impact on the financial liability of the Plan’. As extending the drop-out to Ms. Harris would, In Linden’s J.A. view represent ‘an

32 At para 57.
33 At para 63
34 At paras 65-66.
35 At paras 67-70.
improper intrusion ... into Parliament’s role’ he would have declared the offending paragraphs invalid.

The two majority judgements can be outlined more briefly. Evans J.A. took a different view of the purpose of the drop-out provisions considering that the objective was to favour parents of young children (rather than all parents with caring responsibilities). Therefore confining the drop-out to children aged up to 7 did not involve different treatment and he took the view that whether the drop-out provisions should extend to parents who are at home looking after children with disabilities beyond the age of seven was a matter of social and economic policy and priorities to be decided in the political realm, not of constitutionally guaranteed human rights to be determined by the courts. Thus there was no breach of s. 15.

Ryer J.A. agreed with the conclusion but for different reasons. He took the view that the benefit provided by the legislation was the entitlement of a disability pension claimant to exclude from the determination of the claimant’s contributory period, for the purposes of the 4 of 6 contribution requirements, each month of at-home care for a child under the age of seven. Ryer J.A. pointed out that in her application for a pension Ms. Harris had in fact excluded the maximum number of months permitted by the provisions in attempting to demonstrate that she met the 4 of 6 contribution requirement. Unfortunately for her, this

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36 At para 79-81. Ryer J.A. concurred on this point (at para 101).

37 At para 86. Evans J.A. took the view (at para 91) that the judgement of the Supreme Court in Granovsky v. Canada (Minister of Citizenship and Immigration), [2000] 1 SCR 703, 2000 SCC 28 was ‘virtually dispositive’ on the claim – a view rightly rejected by Linden J.A. (at para 61) as the case involves a substantially different issue.
still meant that she did not satisfy the ‘recency’ requirement, notwithstanding that – in the view of Ryer J.A. - she claimed and received the maximum benefit that the impugned legislation provided.\(^{38}\) Ryer J.A. rejected the claim on the basis that she was not denied the benefit provided by the law. He agreed with Evans J.A. that whether the law should provide more extensive benefits was a matter for Parliament rather than the courts.\(^{39}\)

Unfortunately while the case is of considerable interest, none of the three judgements provide a fully convincing analysis of the issues. Linden J.A. provides the most detailed analysis and clearly seeks to apply the approach outlined in *Kapp*. However, for reasons which are nowhere discussed, he does not consider the standard ‘contextual factors’. While *Kapp* may involve a refocusing of these factors, it is nowhere suggested that they should no longer be applied to s. 15 analysis and – as noted above – the *Kapp* court specifically discussed each of the factors in its analysis. The approach advanced by Evans J.A. is really a policy argument that the courts should not consider cases of similar treatment of different groups under s. 15. However, the Supreme Court has consistently stated that such challenges are within the scope of s. 15 (even if one would be pressed to find cases where they have been successful).\(^{40}\) The approach of Ryer J.A. is simply wrong. The learned judge has recently, relying on *Auton*,\(^{41}\) rejected a claim for a medical tax credit on the basis that the claim was not for a benefit provided by the law.\(^{42}\) Here he seeks to take the argument even further. But the logic of the approach would be to reject any s. 15 claim since

\(^{38}\) At paras 103-106.

\(^{39}\) At para 108.

\(^{40}\) As to the intention see most recently *Kapp* at para 15.


\(^{42}\) *Ali v the Queen*, 2008 FCA 190.
inevitably applicants are not being provided with the benefit which they claim. Ryer’s J.A. approach represents a recommitment to *formal* equality and a clear rejection of the Supreme Court’s approach to substantive equality. Given the unsatisfactory nature of the judgements, let us look again at the issues.

*Differential treatment on an enumerated ground*

One of the problems with the *Kapp* judgement is that it is not clear where it leaves *Law* (as we have seen as to the contextual factors). This also arises with the *Kapp* court’s restatement of the s. 15 test in two (rather than three) steps. If the old *Law* test is ‘in substance, the same’ may courts continue to apply it? In this case, while seemingly following the new approach, Linden J.A. actually approached the question of different treatment and the ground thereof separately (à la *Law*). But this is not a case of different treatment of like groups but rather of similar treatment of unalike groups. Therefore, one can only adequately assess ‘different’ treatment by treating both issues as a ‘compendious question’ (à la *Kapp*). In other words, one cannot decide that a mother with a disabled child has been treated ‘differently’ from a mother with a young child without also finding that the ground involves disability. Viewed as a compendious question, it is submitted that it is clear that Ms. Harris was treated ‘differently’ on an enumerated ground.

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43 This point also applies to the Court’s case law on comparators.

44 Linden J.A. was surely correct to accept that, in the circumstances, the fact that disability related to her child rather than herself did not bar the claim. One might note in passing that the European Court of Justice has
Discrimination

The key issue is whether this constitutes discrimination under the ‘new’ approach. If the test is to focus on a perpetuation of disadvantage and stereotyping, then arguably Linden J.A. is correct that the failure to provide for older children is in breach of s. 15. Clearly disabled children and their parents have been the object of disadvantage and stereotyping, the provision does not fully correspond to the needs of Ms. Harris, and there is no real suggestion that the purpose of the test was ameliorative (in the sense that it aimed to assist persons worse off than Ms. Harris). However, it must be acknowledged that such ‘unalike’ cases are not easy and that while the Canadian Supreme Court has expressly included such cases in those protected by s. 15, courts across the world have found it much easier to address cases of ‘like’ discrimination preferring to leave ‘unalike’ cases to parliaments.

recently upheld a broader discrimination ‘by association’ claim in somewhat similar circumstances: Case C-303/06, Coleman v Attridge Law [2008] ECR 000.

45 As the PAB was (then) arguably correct to hold that it was not a breach of ‘human dignity’ as interpreted by the courts.

46 Although one must acknowledge that she would have benefitted from the drop-out provisions to some extent (albeit insufficient to qualify for pension).

47 The fourth test as to the interest involved has not been interpreted in a manner such as to assist much in the analysis when social benefits are concerned. Clearly the ‘interest’ is mainly financial and it is not clear that any such cases have turned one way or the other on this point.

48 Evans J.A. voiced concerns (at para 85) that Ms. Harris’ argument would have the effect that s. 15 would prevent Parliament from designing a program for the benefit of the parents of preschool age children, without also extending it to those whose children, regardless of age, are unable to attend school by virtue of a disability. Obviously this is the rather traditional approach – used by the Supreme Court itself in Auton to great
S. 15(2)

It does not appear that s. 15(2) was raised in this case. However, in the light of *Kapp*, one might argue that the drop-out is a positive measure to protect parents (mainly women) of a young child and that it should, therefore, be protected from scrutiny under s. 15(1). In *Kapp* the Supreme Court set out the test for s. 15(2) as

A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

I do not argue for such a view but it is difficult to see how one could not advance such an argument in the light of the approach adopted by the Court in *Kapp* – even if such a finding would appear to run counter to the Court’s apparent intention in relation to s. 15(1) in that effect – of broadening the applicant’s claim so as to reject it. It is by no means clear that the same arguments would apply to other services to young children. Evans J.A. also questions whether if Ms Harris was right, why might a section 15 claim not also be made by a person who stayed at home to care for a child over the age of 18, a parent, or a sibling, who had a serious disability. This is a legitimate question but again not one before the court. One might speculate that the courts could treat both parenthood and the age of adulthood as a demarcation point holding that measures to support others being cared for were a matter for Parliament. Such a broader claim has been rejected by the Pension Appeals Board in *Taylor v Minister of Social Development* CP 22241, 18 August 2006.

49 See Linden J.A. at para 63.

50 *Kapp* at para 41.
case. I do, however, highlight this issue as one of the possible dangers of the ‘freestanding’ approach to s. 15(2) adopted by the Court.

The Supreme Court and equality

Finally, as a non-Canadian author - it is perhaps fair to conclude with a short comment on the Supreme Court’s overall record on equality. Notwithstanding the merits of many of the criticisms advanced, if one looks at the Canadian Supreme Court in comparison with other courts charged with applying constitutional equality clauses, such as, for example the US Supreme Court or the European Court of Human Rights, the Canadian Court stands out for its commitment to substantive equality and its closely reasoned judgements. If one looks at the US Supreme Court in recent years, the Court has shown very little concern for substantive equality and – given the (in)famous rational review test and the fact that cases of discrimination by effect must show that this is intentional - very few cases of direct or ‘indirect’ discrimination have any possibility of success before the Court. While the European Court of Human Rights does make a commitment to substantive equality, outside the field of nationality discrimination, its recent record on, for example, gender discrimination, is rather weak. And the Court’s ‘outcome oriented’ judgements could not be described as ‘closely reasoned’. Whatever its ‘failings’ (and these are arguably understandable given the complexity of the issues involved), the Canadian Supreme Court

51 I focus particularly on issues concerning social rights.

52 Outside those areas classified as suspect.

continues to provide a substantive commitment to equality and attempts to explain how and why it decides equality cases in accordance with that commitment. If this case is appealed it will be interesting to see how the Supreme Court will approach it.