



## ARTICLES

# PEERING INSIDE THE PRELIMINARY REFERENCE BOX: *COLEMAN V ATTRIDGE LAW*

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ABSTRACT: The importance of the preliminary reference procedure for the production of EU case-law is widely recognized in EU legal scholarship, but uncovering the motivations and strategies of the individuals that are involved in the preliminary reference procedure is difficult. The conditions that have the potential to influence whether a national judge poses a preliminary reference to the Court of Justice are so varied and complex that generalizations are difficult to discern. In a recent article, Virginia Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. This *Article* tests Passalacqua's theory by applying it to a new area of law. Although Passalacqua derived her theory from an intimate knowledge of EU migration law, her theory "travels well" when it is extended to a new domain, namely, EU disability rights litigation.

KEYWORDS: preliminary reference procedure – legal mobilization – disability rights – EU law – cause lawyering – legal opportunity structure.

## I. INTRODUCTION

It is difficult to overstate the importance of the preliminary reference procedure to the development of European Union law. In a document addressed to national judges in 2002, the Court of Justice of the European Union (CJEU) called it "a fundamental mechanism [...] aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union". Roughly two-thirds of the Court's docket is comprised of preliminary reference proceedings.<sup>1</sup> Nearly

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<sup>1</sup> Court of Justice of the European Union, *Annual Report 2020: Judicial Activity* curia.europa.eu 213.



“all of the significant rulings concerning EU law [...] have come via the preliminary reference procedure”.<sup>2</sup>

The outcome of a careful compromise between Member State preferences in the 1950s that ranged from the creation of a full-blown constitutional court to a technocratic non-permanent court of arbitration,<sup>3</sup> art. 177 of the Treaty of Rome (now art. 267 TFEU) provides that Member State national judges may – and in some cases must – pose questions to the Court to provide them with guidance in how to properly interpret EU law. The CJEU has the power to issue judgements, but it relies heavily on national courts to supply it with legal questions.

While there is no serious disagreement about the importance of the preliminary reference procedure for the production of EU case-law, uncovering the motivations and strategies of the individuals involved in the preliminary reference procedure is difficult. The conditions that have the potential to influence whether a national judge poses a preliminary reference to the CJEU are so varied and complex that generalizations are difficult to discern. The vast majority of research in this field has focused on the behaviour of national judges. A number of studies have employed a large-*n* empirical research design to study whether lower courts or higher courts are most likely to refer cases.<sup>4</sup> Several works have noted that the number of preliminary references vary significantly on a per capita basis, and have sought to explain how national judicial traditions and other contextual variables may help to explain dissimilar use of the procedure.<sup>5</sup> Another strand of literature has explored indicators, such as familiarity with EU law, that may predict a judge's willingness to engage in

<sup>2</sup> D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2014).

<sup>3</sup> A Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome' (2012) *Contemporary European History* 339 and 349.

<sup>4</sup> J Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) *Comparative Political Studies* 510; K Alter, 'The European Court's Political Power' (1996) *West European Politics* 458; AS Sweet and T Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95' (1998) *Journal of European Public Policy* 66. For a revision of this thesis based on new empirical research, see A Dyevre, M Glavina, and A Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' (2019) *Journal of European Public Policy* 1; RD Kelemen and T Pavone, 'Mapping European Law' (2016) *Journal of European Public Policy* 1118; T Pavone and RD Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) *ELJ* 352.

<sup>5</sup> Studies that examine national judicial context and traditions include M Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) *JComMarSt* 1039; M Wind, DS Martinsen and G P Rotger, 'The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe' (2009) *European Union Politics* 63; A Wallerman, 'Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example' in M Derlen and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing 2018) 153; J Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice' (1996) *West European Politics* 360; M Galvina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge

the process.<sup>6</sup> A notably smaller body of research has placed the motivations of *litigants and lawyers*, rather than national judges, at the centre of their analyses.<sup>7</sup>

In a recent article, Virginia Passalacqua provides an intriguing new contribution from the lesser-trodden – and potentially more revealing – perspective of the Euro-lawyer.<sup>8</sup> Briefly stated, Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. In the discussion below, I test Passalacqua's theory by applying it to a new area of law. Although Passalacqua derived her theory from an intimate knowledge of EU migration law, her theory "travels well" when it is extended to a new domain, namely, EU disability rights litigation.

This *Article* contains four main sections. Section II summarises Passalacqua's theory of preliminary reference legal mobilization and places her contribution in the broader academic discourse on legal mobilization. Sections III and IV analyse the preliminary reference in *Coleman v Attridge Law*. Section V concludes with an examination of the extent to which the *Coleman* litigation is compatible with Passalacqua's theory and proposes some potential avenues for future investigation.

The plaintiff in this case, a legal secretary, sued her former employer for abuses she allegedly suffered in the workplace after she gave birth to a child with a disability. *Coleman* is important to the development of both EU and UK law. The judicial opinions that it produced expanded the scope of coverage of national and European anti-discrimination laws. Because of its considerable significance for caregivers' rights, the case was followed closely in the UK national press.<sup>9</sup> The *Coleman* litigation is an especially good candidate for an in-depth case study because it produced a large number of lengthy domestic court

to EU Law: A Case Study on Slovenia and Croatia' in Rauegger and Wallerman (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Hart Publishing 2019) 191.

<sup>6</sup> U Jaremba and J Mayoral, 'The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms' (2018) *Journal of European Public Policy* 1.

<sup>7</sup> Examples include K Alter and J Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) *Comparative Political Studies* 452; C Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in S Sciarra (ed.), *Labour Law in the Courts: National Judges and the ECJ* (Hart Publishing 2001) 31; E Muir, C Kilpatrick, J Miller and B De Witte, 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum' (EUI Working Papers 17-2017); J Hoevenaars, 'Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References' (2020) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 777.

<sup>8</sup> V Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) *CMLRev* 751. For an earlier example of research on EU legal mobilization, see L Conant, A Hofmann, D Soennecken and L Vanhala, 'Mobilizing European law' (2018) *Journal of European Public Policy* 1376.

<sup>9</sup> See e.g., A Hirsch, 'Woman Forced to Quit Job Wins New Rights for Carers' (28 November 2008) *The Guardian* [www.theguardian.com](http://www.theguardian.com); BBC, 'Legal Ruling Win for Care Mother' (18 July 2008) [news.bbc.co.uk](http://news.bbc.co.uk); Daily Mail, 'Carers to be given same rights as disabled people in the workplace after landmark ruling' (30 Oct. 2009) [www.dailymail.co.uk](http://www.dailymail.co.uk).

decisions, both before and after the reference to the CJEU. These domestic court decisions provide us with an usually rich body of information which can be used to obtain a clearer picture of the context in which the litigation took place. The present author supplemented his analysis of the public record with a series of semi-structured interviews with the *Coleman* legal team in 2016.

The present *Article* has two objectives. First, it aims to contribute, in a modest way, to a growing body of EU legal research that exploits an interdisciplinary approach to unearth insights that cannot be reached through pure doctrinal analysis.<sup>10</sup> The legal-historical contributions of new EU legal historians,<sup>11</sup> recent research grounded in the newly opened archive of the Court of Justice of the European Union,<sup>12</sup> and mixed-method socio-legal research on contemporary EU law cases<sup>13</sup> have greatly expanded our understanding of – and at times challenged conventional thinking about – how the EU legal system operates. Second, and more specifically, this *Article* provides an extension of Passalacqua's theory of EU legal mobilization to a new area of legal contestation.

Of course, a single case study cannot prove or disprove a general theory, but on the basis of the evidence marshalled in this *Article*, Passalacqua's arguments regarding the factors that contribute to preliminary reference legal mobilization appear to open a promising line of research that deserves further exploration. Passalacqua's theory provides a welcome shift from judge-centric analyses of the preliminary reference procedure to a more holistic approach that includes a stronger focus on lawyers and litigants and the environments in which they operate.

## II. PASSALACQUA'S THEORY OF EU LEGAL MOBILIZATION

Passalacqua's contribution builds on an extensive body of research on political and legal mobilization that now dates back several decades. It has its origins in the work of political sociologists who sought to identify the factors that encouraged or impeded collective actors from engaging in political mobilization in national and local political systems.<sup>14</sup> An early example is Eisinger's 1973 study, which attempted to explain why some American cities

<sup>10</sup> See F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 29, observing that "scholarship on EU law has moved beyond simple doctrinal analyses, relevant only for practitioners and judges, to a more nuanced retelling of the cases that have shaped this system within their contextual framework".

<sup>11</sup> *Ibid.*; M Rasmussen, 'Towards a Legal History of European Law' (2021) *European Papers* www.europeanpapers.eu 923.

<sup>12</sup> See the contributions included in M Cremona, C Kilpatrick and J Scott, *Using the Historical Archives of the EU to Study Cases of CJEU* (2021) www.europeanpapers.eu 527.

<sup>13</sup> T Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa' (2019) *Law & Society Review* 851; J Miller 'Explaining Paradigm Shifts in Danish Anti-Discrimination Law' (2019) *Maastricht Journal of European and Comparative Law* 540.

<sup>14</sup> DS Meyer and DC Minkoff, 'Conceptualizing Political Opportunity' (2004) *Social Forces* 1457-1458.

experienced widespread protests in the 1960s while others did not.<sup>15</sup> In aggregate, the factors that appeared to encourage or discourage political mobilization were referred to as the Political Opportunity Structure (POS). POS inspired an offshoot, known as Legal Opportunity Structures (LOS), which places a heavier emphasis on the factors that increase or decrease the likelihood that a group will pursue a *legal* strategy to achieve its objectives.<sup>16</sup>

Passalacqua's insight is essentially a modification of the LOS framework to reflect the unique circumstances that art. 267 TFEU poses for litigants. The theory stresses three factors that are particularly important in this context: the first is "altruism". The *Oxford English Dictionary* defines altruism as "Devotion to the welfare of others, regard for others, as a principle of action; opposed to egoism or selfishness". Placed in the context of legal mobilization, this means that the Euro-lawyer need not belong to, or strongly identify with, the complainant's group, but must nevertheless be motivated to assist the group. Stated more concretely, many of the actors that Passalacqua encountered in her research were not migrants themselves, but were determined to remedy the injustice that migrants had suffered.<sup>17</sup>

Passalacqua's second factor is "Euro-expertise". By using this term, Passalacqua emphasises that legal mobilization does not occur automatically because actors have the right to bring their grievances before the Court.<sup>18</sup> Meritorious claims will not be pursued unless they are matched with actors that have sufficient financial resources and legal "know-how" to competently pursue the litigation.<sup>19</sup> Passalacqua notes that none of the litigants in her study had sufficient economic resources to pursue litigation on their own. Had the litigants been unable to find free legal representation, it is highly unlikely that their cases would have found their way to Luxembourg. Equally important, the litigants secured not only free legal representation, but legal representation with expertise in EU law. Indeed, Passalacqua found that Euro-expertise was "the single most important, albeit scarce resource". The EU experts in her study had the capacity to identify the opportunities that EU law offered and could translate their knowledge into effective legal strategies.

Passalacqua's third and final factor is an "open EU legal opportunity structure".<sup>20</sup> Passalacqua focuses on two facets. First, in the eyes of the Euro-lawyer, does EU law provide an advantage over national law? In effect, Passalacqua found that Euro-lawyers are forum

<sup>15</sup> P Eisinger, 'The Conditions of Protest Behavior in American Cities' (1973) *AmPolSciRev* 11-28.

<sup>16</sup> LOS research (much like the work on POS that predates it) examines a somewhat eclectic range of questions. For instance, Hilson examines the trade-offs that collective actor face when choose between lobbying, litigation and protest. See C Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) *Journal of European Public Policy* 238-255. Another strand of research asks a more focused question: namely, why do groups litigate? See e.g., G De Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States' (2012) *International Journal of Comparative Sociology* 3-22.

<sup>17</sup> V Passalacqua, 'Legal Mobilization via Preliminary Reference' cit. 764-766.

<sup>18</sup> *Ibid.* 756.

<sup>19</sup> *Ibid.* 766-770.

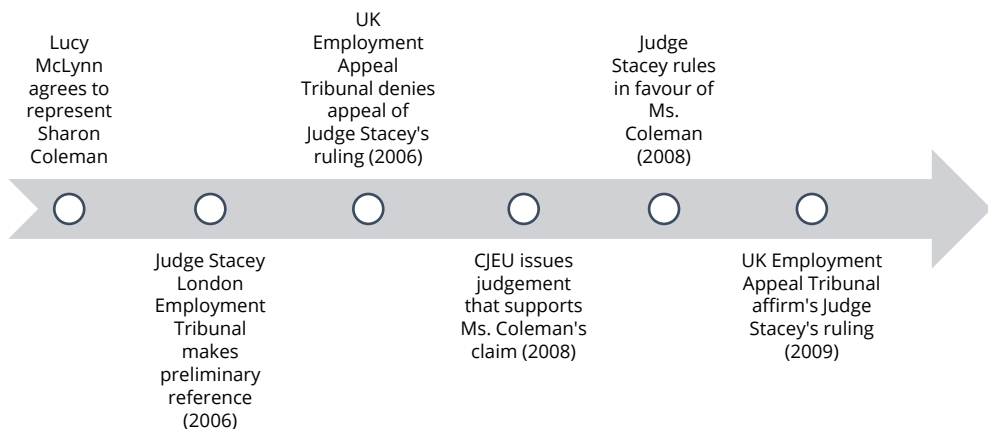
<sup>20</sup> *Ibid.* 770.

shoppers. If EU law does not provide a more attractive forum to litigate the case, the case will remain in the national court system and the preliminary reference procedure is unlikely to be activated. The second key facet of the legal opportunity structure concerns the receptivity of national judges to making preliminary references to the CJEU. Jurisdictions in which judges are willing to entertain requests for preliminary references have an “open” legal opportunity structures. In a “closed” legal opportunity structure, we would expect to find less EU legal mobilization, since the hurdles that the actors must traverse to reach a successful outcome are more substantial.<sup>21</sup>

With Passalacqua’s theory in mind, we now turn to section III, which provides a detailed examination of the preliminary reference in *Coleman v Attridge Law*.

### III. THE *COLEMAN V ATTRIDGE* LITIGATION

The *Coleman* litigation spanned several years. For ease of reference, the graphic below sets out the key events in chronological order.



#### III.1. ALTRUISM

The first factor in Passalacqua’s theory of EU preliminary reference legal mobilization is altruism. The lawyer does not need to belong to the group that is affected by the outcome of the litigation, but must be sufficiently motivated to remedy an injustice. As will be shown below, altruism was clearly a driving factor in the *Coleman* litigation.

<sup>21</sup> *Ibid.* 770-775.

Sharon Coleman worked as a legal secretary in the London law firm, Attridge Law. In 2002, she gave birth to a son who experienced apnoeic attacks and congenital laryngomalacia and bronchomalacia. His condition required specialized care and Ms. Coleman was her son's primary caregiver.<sup>22</sup> Ms. Coleman alleged that when she returned from maternity leave, her employer gave her a different job, described her as "lazy" when she requested time off to care for her son, and that she suffered "abusive and insulting comments [...] about both her and her child".<sup>23</sup> After months of frustration with her working conditions, Ms. Coleman resigned. She was outraged at the way she had been treated and wanted to take legal action.

In a critical first step, Ms. Coleman obtained pro bono legal counsel: Lucy McLynn, a solicitor and partner at Bates, Wells & Braithwaite who frequently litigated cases before UK employment and appeal tribunals.<sup>24</sup> In an interview with the present author,<sup>25</sup> McLynn explained that she met Ms. Coleman through a former client who had suffered discrimination in the workplace. McLynn initially agreed to meet with Ms. Coleman for the limited purpose of advising her about her rights, since Ms. Coleman could not afford legal representation. Ms. Coleman recounted what McLynn described as "an absolutely terrible situation", but felt obliged to deliver the bad news that UK law probably did not cover people in her situation. The issue, in a nutshell, was this: Ms. Coleman did not claim that she had a disability. Rather, she alleged that she suffered discrimination because of her association with her disabled son. UK courts had never ruled that a non-disabled person had the right to bring a discrimination lawsuit solely on the basis of her *association* with a disabled person.

At the time, the UK's anti-discrimination legislation had evolved into a complex patchwork of laws that provided a variety of approaches to discrimination on the basis of association: the Equal Pay Act 1970; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995 (DDA); the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; and the Equality Act (Sexual Orientation) Regulations 2007.<sup>26</sup> None of the legislation specifically identified discrimination by association as a head of claim.<sup>27</sup> The only existing UK case-law on discrimination by as-

<sup>22</sup> Case C-303/06 *Coleman* ECLI:EU:C:2008:415 paras 19-20.

<sup>23</sup> *Ibid.* para. 26.

<sup>24</sup> A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association: A Case of the Double Yes?' (2011) *Social & Legal Studies* 173 and 178.

<sup>25</sup> Case C-303-06 *Coleman* ECLI:EU:C:2008:415. It was a telephone interview with Lucy McLynn, Counsel for Coleman, in *Coleman* on 7 February 2017.

<sup>26</sup> UK Government document, Department of Levelling Up, Housing and Communities, Green Paper, 'A Framework for Fairness: Proposals for Single Equality Bill for Great Britain' (Communities and Local Government Publications 2007) *Discrimination Law Review* [webarchive.nationalarchives.gov.uk](http://webarchive.nationalarchives.gov.uk) 31.

<sup>27</sup> S Honeyball, 'Discrimination by Association' (2007) *Web Journal of Current Legal Issues* [www.bailii.org](http://www.bailii.org).

sociation involved claims of race-based discrimination. The Race Relations Act 1976 section 1(1)(a) prohibited less favourable treatment “on racial grounds”, which did not – on a strict statutory interpretation – confine the scope of the law exclusively to the applicant. And, in fact, UK courts consistently held that association with an individual who belonged to a protected racial group was sufficient to invoke the statute if the claim asserted direct discrimination and/or instructions to discriminate.<sup>28</sup>

The same “on the ground of” formulation in the Race Relations Act 1976 was reproduced in the corresponding legislation on sexual orientation and religion or belief. That is, the Employment Equality (Religion or Belief) Regulations 2003 section 3(1)(a) prohibited discrimination “on grounds of religion or belief” and the Employment Equality (Sexual Orientation) Regulations 2003 section 3(1)(a) prohibited discrimination on “grounds of sexual orientation”. The DDA, by contrast, did not use the term “on grounds of disability”, but rather stated that it was “unlawful for an employer to discriminate against a disabled person”. Ms. Coleman’s legal team understood and did not deny that the Race Relations Act 1976 and the DDA used different words to explain what kinds of acts were prohibited, and that a literal reading of the DDA suggested that the law protected the person with a disability *only* and not somebody associated with a disabled person.

Indeed, there is a clear record of UK governments carefully considering – and rejecting – recommendations to extend the DDA to cover associational discrimination on the basis of disability. The exclusion of associational disability discrimination from the DDA was not an oversight; it was a deliberate government policy – a policy UK governments defended for many years. When the UK government created a Joint Parliamentary Committee to study a draft bill which eventually became the DDA 2005, it included a discussion of whether the Act should be amended to protect persons associated with persons with disabilities. The Joint Committee’s analysis of the issue notes that there was a difference of opinion between the UK Disability Rights Commission (DRC) and the Government on this matter. The DRC, along with the Discrimination Law Association, the Royal College of Nurses, the Equality Commission for Northern Ireland, the Commission for Racial Equality, and the National Aids Trust, argued in favour of an explicit ban on associational disability discrimination. The Joint Committee recommended that the DDA should be amended to prohibit associational disability discrimination,<sup>29</sup> but the UK Government rejected it:

<sup>28</sup> UK House of Lords judgment of 27 March 1974 *Applin v Race Relations Board* [UKHL] 3; UK Employment Appeal Tribunal judgment of 28 October 1983 UKEAT/29/83/2810 *Showboat Entertainment Centre Ltd v Owens*; England and Wales Court of Appeal (Civil Division) judgment of 10 December 1998 *Weathersfield Ltd v Sargent* [ICR] 425; UK Employment Appeal Tribunal judgment of 21 June 2004 UKEAT/0907/03/2106 *Carter v Ahsan*; England and Wales Court of Appeal (Civil Division) judgment of 25 May 2006 *Serco Ltd v Redfearn* [IRLR] 623.

<sup>29</sup> House of Lords and House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill, Twenty-Sixth Report of Session 2008-09* (12 November 2009) publications.parliament.uk para. 86.



“The DDA is unique because it does not generally prohibit discrimination against non-disabled people. Indeed, it actively requires positive action to be taken to ensure a disabled person has equality of access or outcome. This contrasts with the approach taken in other anti-discrimination legislation [...] extending the Act to cover people who associate with disabled people or people who are perceived to be disabled would fundamentally alter the approach taken in the DDA”.<sup>30</sup>

A UK government Green Paper published while Ms. Coleman’s case was pending before the CJEU in June 2007 included a section on “Where perception and association should be protected”,<sup>31</sup> which provided the government’s position on associational discrimination for every ground enumerated in Directive 2000/78, and expressed a preference for, essentially, the *status quo*. In the areas of race, religion or sexual orientation, the government acknowledged that UK legislation covered associational discrimination, and took the position that this should not change. In the area of disability discrimination, however,

“the current British legislation takes a narrower approach, limiting protection against discrimination to the actual person who is disabled. Extending protection to people who are perceived to be disabled, but are not disabled, or who associate with disabled people, would potentially extend coverage of the disability legislation to several million extra people who are not themselves disabled. This in turn would significantly extend the responsibilities of those with duties under the legislation. We are not persuaded that this is a proportionate approach, and do not currently propose a change in the law”.<sup>32</sup>

The paper trail does not leave much room for speculation. The UK government clearly understood that some anti-discrimination laws recognized associational discrimination while others did not, and it articulated reasons why this should be so. To put it bluntly, the UK government was concerned that extending the law to include associational discrimination in areas such as disability and age had the potential to be extremely expensive for employers.

As luck would have it, Ms. Coleman’s solicitor, Lucy McLynn was intimately familiar with the discrepancy between the scope of coverage under the DDA compared to other UK anti-discrimination statutes. She had attended a conference earlier that year where a member of the UK Disability Rights Commission (DRC) had given a lecture on precisely this issue. The DRC explained that it wanted to find a test case that could be used to

<sup>30</sup> Cited in K Monaghan, *Equality Law* (Oxford University Press 2007) 66.

<sup>31</sup> Green Paper, *A Framework for Fairness* cit. 38.

<sup>32</sup> *Ibid.* 38-39. The UK government’s opposition to extending the law to include associational discrimination was not limited to disability. With regard to sex discrimination, the Green Paper states: “We cannot see any practical benefit in extending the law” to include associational discrimination. Regarding age discrimination, the Green Paper concludes: “Extending the definition to include association could potentially bring in parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope. We therefore do not propose any extension to association”.

clarify the law and potentially expand the scope of the DDA's protections. McLynn remembered the lecture well and had been thinking about the issue of associative discrimination for several months before Ms. Coleman walked through her door. Once Ms. Coleman began to explain her situation, McLynn identified the legal issue immediately. She explained: "Literally from the first meeting, I was thinking, this could be a test case".<sup>33</sup>

McLynn investigated Ms. Coleman's case a bit further, and then wrote to the DRC, informing it that she had come across what she believed to be a good test case to challenge the status of associative discrimination under the DDA. About 10 days before the statute of limitations was set to toll, the DRC responded, thanking McLynn for her referral, but declining to take Ms. Coleman's case. After she recovered from her disappointment, McLynn resolved to represent Ms. Coleman *pro bono*. With just over a week to spare, McLynn started to work on Ms. Coleman's claim to the employment tribunal – the document which sets forth the alleged facts and formally initiates legal proceedings. As McLynn was well aware, she was in the unusual position of alleging a legal violation (associational discrimination) that UK courts had never recognized as a cognizable claim under the DDA – and she had to draft the document under strict time constraints. Around the same time, a team of barristers from the London-based "Cloisters" chambers joined Ms. Coleman's legal team on a *pro bono* basis.

In short, in line with Passalacqua's theory, altruism was indeed a defining feature of the *Coleman* litigation. In the course of the authors' interviews, there was no suggestion that McLynn or her associates identified personally with Ms. Coleman's circumstance as a parent of a child with special needs, but they clearly felt that she has been mistreated and were determined to assist her. As alluded to above and described in more detail below, Ms. Coleman not only secured altruistic legal representation, she also obtained free services from a team of EU law experts.

### III.2. EURO-EXPERTISE

The second factor in Passalacqua's EU legal mobilization theory is "Euro-expertise". Even claims that have a high probability of success before the CJEU will not materialise if the plaintiff's lawyers do not possess the legal "know-how" to competently pursue the litigation. Ms. Coleman's legal team was remarkably well versed in both UK and EU Law. In addition to McLynn's substantial expertise, Ms. Coleman's legal team included several barristers with substantial knowledge of EU law. Robin Allen QC<sup>34</sup> had already argued before the CJEU in *Kaba* and *Cadman*. After the *Coleman* litigation, he would go on to ap-

<sup>33</sup> Interview with Lucy McLynn cited above.

<sup>34</sup> Robin Allen had already appeared as counsel in the following cases: case C-388/07 *Age Concern England* ECLI:EU:C:2009:128; case C-432/17 *O'Brien* ECLI:EU:C:2018:879; case C-17/05 *Cadman* ECLI:EU:C:2006:633; case C-466/00 *Kaba* ECLI:EU:C:2003:127.

pear before the Court in *Age Concern England* and *O'Brien*. Declan O'Dempsey, who represented Ms. Coleman during the early stages of the litigation, would later appear before the CJEU in *Age Concern England* and represent the plaintiff in *Sobhi v Met Police*, a domestic UK case that used EU law and the UN Convention on the Rights of Persons with Disabilities (UNCPRD) to extend the scope of the concept of disability in UK equality law.<sup>35</sup> Paul Michell, another member of the *Coleman* team, later appeared (along with Robin Allen QC and Declan O'Dempsey) in a domestic UK case about volunteer workers that focused heavily on the scope of EU anti-discrimination law.<sup>36</sup> The legal team developed a sophisticated strategy that demonstrated a deep understanding of the interrelationship between UK and EU law.

On 7 November 2005, the parties held a case management discussion. They agreed to list the case for a pre-hearing review, in the presiding judge's words: "to consider the question whether the Claimant is entitled to bring a claim of unlawful disability discrimination against the Respondents based on the concept of associated discrimination on account of the alleged disability of the Claimant's son".<sup>37</sup>

On 17 February 2006, Ms. Coleman's case came before Mary Stacey, who was serving at that time as a judge for the London (South) Employment Tribunal, for a pre-hearing review. Ms. Coleman's legal team asked Chairman Stacey to rule that the DDA be re-written to imply the words "all persons associated with a disabled person" at the relevant points in the disability statute in recognition that Ms. Coleman had a cognizable claim against her former employer. Alternatively, if Judge Stacey "considered that to be too bold a step to take unaided", the team requested that the Tribunal refer the question to the CJEU for a preliminary ruling.<sup>38</sup>

Counsel for Attridge Law countered that the DDA was perfectly clear on this point of law. It did not recognize disability-based associative discrimination as a cause of action. Furthermore, even if the Tribunal assumed that the EU Directive 2000/78 covered associative discrimination, it was "simply not possible to interpret the DDA consistently with the Directive", in which case, the appropriate remedy would be a lawsuit against the UK Government for improperly transposing Directive 2000/78 – what is known as a *Franovich* claim – rather than a request for a preliminary ruling from the CJEU.<sup>39</sup>

Judge Stacey reframed the question as:

"whether the relevant provisions of the DDA are *acte claire* and their meaning beyond any doubt, and capable of no other reading but that protection from the forms of disability

<sup>35</sup> Case C-388/07 *Age Concern England* ECLI:EU:C:2009:128.

<sup>36</sup> UK Supreme Court judgment of 12 December 2012 *X v Mid Sussex Citizens Advice Bureau and another* [UKSC] 59.

<sup>37</sup> UK Employment Tribunal judgment of 17 February 2006 2303745/05 *Coleman v Attridge Law* para. 4.

<sup>38</sup> *Ibid.* para. 18.

<sup>39</sup> *Ibid.* para. 19.

discrimination relied on extend only to disabled persons, and not to the wider category of carers of disabled people to cover discrimination by association, or if there is doubt and ambiguity in the matter such as to require a reference to the European Court of Justice for guidance as to how to interpret the statute by reference to the parent directive the DDA purportedly implements".<sup>40</sup>

Citing EU case law, Judge Stacey affirmed that when national courts apply the provisions of a national law that are intended to implement an EU directive, they are required to interpret the national provisions, as far as possible, in a manner that achieves an outcome consistent with the directive's purpose. In order to achieve this objective, "words cannot be deleted [from a national statute], but words can be implied to ensure compliance".<sup>41</sup>

Ultimately, Chairman Stacey concluded that a reference to the CJEU was the appropriate course of action.

"It is quite clear to me that on a literal interpretation, associative discrimination is not covered by the DDA. However, nor do I consider it to be totally *acte claire* that on a purposive construction with appropriate interpolations, sections 3A, 3B and 4 of the DDA are incapable of sustaining such an interpretation. It would be possible to imply words to achieve the purpose of the Directive contended by [counsel for Ms. Coleman] as they have indeed shown in their suggested interpolations. It would be too bold a move for me to do so, without the guidance of the Court of Justice of the European Union, but it is just such a matter that is apt for a reference. This is so most especially given the importance of the issue and the extent of the legal and academic debate on the subject".<sup>42</sup>

Judge Stacey's decision to refer the case for a preliminary ruling has been described in the academic literature as "a bold act for an employment tribunal".<sup>43</sup> While there is no question that UK Employment Tribunals have the power to make a reference to the CJEU, the power is discretionary, and at least one UK Employment Appeal Tribunal judge has gone on record as observing that the power is "sparingly used at that level; normally it is left to the higher Courts for a reference to be made".<sup>44</sup> In an interview with the author, McLynn confessed that she too was surprised at the outcome: "I didn't think they were going to secure a reference at that point".

Judge Stacey's uncommon ruling resulted in some unusual responses. The defendant, Attridge Law, appealed Judge Stacey's decision to refer the case to the CJEU for a preliminary ruling to the UK Employment Appeal Tribunal (EAT). For the first time in the

<sup>40</sup> *Ibid.* para. 6.

<sup>41</sup> *Ibid.* para. 18.

<sup>42</sup> *Ibid.* para. 29.

<sup>43</sup> A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association' cit. 173 and 178.

<sup>44</sup> UK Employment Appeal Tribunal judgment of 29 December 2006 UKEAT/0417/06/DM *Attridge Law v Coleman*.

history of UK employment law, a party appealed a decision of a chairman of an employment tribunal to refer a question to the CJEU.<sup>45</sup> It is also noteworthy that the UK government department responsible for implementing the DDA, the Department for Work and Pensions, made a last-minute – and ultimately unsuccessful – effort to intervene in the case. EAT Judge Peter Clark, who presided over the appeal, reported in his judgment that counsel for Attridge Law broadly agreed with the UK Department's position, but counsel for Ms. Coleman objected to the UK Department's submission on procedural grounds because the Department had failed to make an application to be joined as a party to the case. Judge Clark found in favour of Ms. Coleman on this point and did not consider the UK Department's submission.<sup>46</sup>

In his decision, EAT Judge Peter Clark framed the question that he was bound to answer as: "whether in referring the question identified in this case [Judge Stacey] has failed to exercise her discretion judicially or has erred in principle".<sup>47</sup> Covering much of the same ground that Judge Stacey had already traversed, Judge Clark decided that there were two separate questions at issue: *i*) whether Directive 2000/78 was *acte claire*, such that no referral to the CJEU was necessary and *ii*) assuming that it was not *acte claire*, whether the DDA could be read purposively in a way that accorded with EU law.<sup>48</sup> He concluded that Judge Stacey had not erred in finding that the Directive was not *acte claire* and that words could be interpolated into the DDA to cover associative discrimination. Rejecting Attridge Law's argument that there was simply no way to interpolate words into the DDA without violating basic principles of legal construction, Judge Clark found that "ultimately the precise form of words [that could be interpolated] will depend upon the proper interpretation of the Directive. That is the very question which the Chairman has referred to Europe".<sup>49</sup>

In the concluding paragraphs of his judgment, Judge Clark addressed a procedural issue that, while seemingly technical, had great strategic significance in the eyes of the parties. Judge Stacey had not only made the unusual step of referring the case to the CJEU for a preliminary ruling, she had also asked the CJEU to assume that all of the facts that Ms. Coleman alleged in her complaint were true. This turned the preliminary reference into something akin to a "strike-out case",<sup>50</sup> a procedure whereby the defence argues that the even if all of the facts alleged in the complaint are coherent and true, the case fails because the facts "do not disclose any legally recognisable claim against the defendant".<sup>51</sup> Counsel

<sup>45</sup> *Ibid.* para. 1.

<sup>46</sup> *Ibid.* para. 10.

<sup>47</sup> *Ibid.* para. 11.

<sup>48</sup> *Ibid.* para. 16.

<sup>49</sup> *Ibid.* para. 19.

<sup>50</sup> *Ibid.* para. 24.

<sup>51</sup> UK Ministry of Justice practice direction 3A of 30 January 2017, *Striking Out a Statement of Case* available at [www.justice.gov.uk](http://www.justice.gov.uk).

for *Attridge Law* requested that the Tribunal defer the decision whether to make a reference to the CJEU until the domestic court had made its own determination regarding the true facts of the case. Judge Clark concluded “whilst normally it is preferable that a case is referred after all of the facts have been found by the domestic Court, I see no bar [...] for the matter to be referred on assumed facts”.<sup>52</sup> It was within Chairman Stacey’s sound discretion to conclude that in this matter, it was necessary first to obtain the opinion of the CJEU on the issue of associative discrimination before she could proceed further.<sup>53</sup>

How did Ms. Coleman’s legal team succeed in obtaining a preliminary reference? Several factors that are rarely discussed in standard texts on preliminary rulings appear to have been relevant. Counsel for Ms. Coleman were intimately familiar with the relevant national law (DDA), EU law (Directive 2000/78), and the ambiguous state of UK law on associational discrimination. Ms. Coleman’s legal team was able to spot the unresolved legal question at the crux of Ms. Coleman’s case early on, and quickly developed a strategy to use the Employment Tribunal pre-hearing review procedure to press for a preliminary ruling as early as possible. The team’s early assessment of the strengths and weaknesses of Ms. Coleman’s case led to careful planning and a legal strategy that resulted in several tactical advantages.

In its first tactical move, the legal team accurately anticipated that Ms. Coleman’s case against *Attridge Law* would be in serious jeopardy if Chairman Stacey determined that it was impossible to interpret the DDA in a manner that achieved Directive 2000/78’s purpose. Although the legal team conceded that a literal interpretation of the DDA did not cover associative discrimination, it also provided Chairman Stacey with concrete, specific suggestions about how the national court could purposively construct the statute to comply with the directive – suggestions that Chairman Stacey evidently found convincing. Had Chairman Stacey found otherwise, Ms. Coleman’s only form of recourse would have been a *Francovich* claim – a slower and more expensive judicial process that the legal team wanted to avoid at all costs.<sup>54</sup>

Second, the legal team deliberately and explicitly narrowed the scope of the legal question it sought to resolve. It did not make the argument that the duty of reasonable adjustments should be extended to individuals who are not disabled. It did not, for example, allege that Ms. Coleman has been unlawfully discriminated against because it failed to provide her with more flexible working hours to care for her son. Instead, the legal team limited its argument to direct discrimination in the form of harassment. Art. 5 of Directive 2000/78, which covers the concept of reasonable accommodation, was drafted in such a way that it would be more difficult to argue that it applied to individuals other than the disabled person. Art. 1 prohibits discrimination “on the grounds of” disability, but art. 5 explicitly refers to reasonable accommodation as an obligation to “enable

<sup>52</sup> *Attridge Law v Coleman* cit. para. 24.

<sup>53</sup> *Ibid.*

<sup>54</sup> Telephone interview with Paul Michell, Counsel for Coleman, in *Coleman* cit. on 30 November 2016.

*a person with a disability* to have access to, participate in, or advance in employment’ (emphasis added). Furthermore, the legal team anticipated that opponents to their argument would complain that associative discrimination would be too expensive to implement. By deliberately excluding the argument that associative discrimination included a duty to make a reasonable accommodation, Ms. Coleman’s legal team took the wind out of their opponents’ sails. Indeed, this tactic proved highly relevant. Much of Attridge Law’s attempt to convince the Tribunal that Directive 2000/78 did not include an associative discrimination mandate relied mainly on the reasonable adjustment duties described in arts 5 and (2)(2)(b) and preamble recitals 8, 16, and 20 of the Directive. Since Ms. Coleman’s legal team made no claim about reasonable adjustments, the Tribunal dismissed Attridge Law’s argument as completely irrelevant.<sup>55</sup>

Third, the legal team planned for – and succeeded in – its efforts to convince the Tribunal to make a preliminary reference before Ms. Coleman’s case had been heard on the merits. This resulted in several advantages for Ms. Coleman. The facts alleged by Ms. Coleman, if true, pointed to genuinely outrageous conduct by Attridge Law. It certainly did no harm to Ms. Coleman’s chances of success that the preliminary reference explicitly asked that the CJEU reach a decision based on the assumption that all of Ms. Coleman’s allegations were true. Had the case gone forward on the merits, there was always the risk that the finder of fact would determine that Ms. Coleman had failed to meet her burden of proof. For instance, if Ms. Coleman failed to show that she had been harassed by her former employer, her case could have been dismissed on those grounds alone, rendering a preliminary reference to the CJEU unnecessary.

Finally, it appears that the UK Government had difficulties keeping up with the pace of litigation and lost control of the process. It tried – and failed – to intervene in the appeal before Judge Clark and had to resort to opposing Ms. Coleman before the CJEU.

In sum, as Passalacqua’s theory would anticipate, the Coleman litigation featured not only altruistic behaviour, but also actors with a strong command of the relevant laws. The Coleman legal team was not only motivated to right an injustice; it had the legal skills required to steer the litigation around the myriad pitfalls that this approach entailed. Also as Passalacqua’s theory would anticipate, the legal team offered its services free of charge to an individual who otherwise would not have been able to pursue her claim.

### III.3. AN OPEN EU LEGAL OPPORTUNITY STRUCTURE

According to Passalacqua’s theory, the final factor that supports EU legal mobilization is the existence of an open EU legal opportunity structure. An open EU legal opportunity structure has two main attributes. First, legal actors recognize that EU law has a comparative advantage over national law. For example, the EU Treaties or secondary legislation

<sup>55</sup> *Attridge Law v Coleman* cit. para. 24.

may be expressed in terms that are more favourable to their client's position than national law. Second, national judges are willing to engage with the EU legal system. For better or worse, national judges are the gatekeepers of the preliminary reference procedure. Its functioning depends on Member State cooperation. As Passalacqua notes, "access to court crucially depends on judicial receptivity".<sup>56</sup>

With regard to the comparative advantage of EU law over national law, multiple actors recognized that Ms. Coleman's case might get a more favourable hearing before the Court of Justice than in the national court system. McLynn assembled a legal team that was acutely aware that Ms. Coleman would need a ruling from the CJEU to encourage a new interpretation of UK law.

On the second point, domestic judicial receptiveness, although it has been argued that UK judges are not – on the whole – eager to make preliminary references,<sup>57</sup> in the case of *Coleman*, the legal team was pitching its argument to a bone fide disability law expert. Prior to being called to the bench, Chairman Stacey was a senior employment law partner at Thompsons, where she co-authored a nuts and bolts primer on disability discrimination law titled *Challenging Disability Discrimination at Work*. In the words of the authors: "The aim of this publication is to explain the scope of the employment provisions of the DDA in light of the developing case law". The purpose of the book, the authors explained, was to "analyse how the law can be used by union officials and activists in the workplace to protect their disabled members and, if necessary, through Tribunal proceedings" because "the Act is under-utilised by applicants and their representatives and only partially understood and adhered to by employers".<sup>58</sup> The book was published by the Institute for Employment Rights – an organization that self-identifies on its website as "A think tank for the labour movement". *Challenging Disability Discrimination at Work* does not directly address the issue of associational discrimination, but it consistently argues that the DDA's definition of disability should be expanded to cover more employment situations, that the burden of proof for plaintiffs should be relaxed, and that the UK Government should introduce "a positive duty to promote equalization of opportunities for disabled people in employment, at least in the public sector, both as employer and by using its purchasing power to promote compliance with equality legislation among contractors and supplies to the public sector".<sup>59</sup>

One should not read too much between the lines. As Paul Michell, one of the barristers on the Coleman legal team was quick to point out, Judge Stacey ruled *against* expanding the scope of Directive 2000/78 and *against* a referral to the CJEU on a different occasion, namely, *X v Mid Sussex CAB*.<sup>60</sup> What seems fair to conclude based on her background is that

<sup>56</sup> V Passalacqua, 'Legal Mobilization via Preliminary Reference' cit. 770.

<sup>57</sup> J Golub, 'The Politics of Judicial Discretion' cit. 360.

<sup>58</sup> M Stacey and A Short, *Challenging Disability Discrimination at Work* (Institute of Employment Rights 2000) 3-4.

<sup>59</sup> *Ibid.* 67-69.

<sup>60</sup> Telephone interview with Paul Michell cited above.



Judge Stacey was unusually well qualified to evaluate *Coleman's* claim and that, despite her relatively junior position within the UK court hierarchy at that time, she was willing to entertain an early referral to the CJEU. And as we have seen *supra*, EAT Judge Peter Clark was willing to back Judge Stacey when her decision to refer was appealed.

When the preliminary reference finally reached Luxembourg, AG Maduro framed the London Employment Tribunal's preliminary reference as a request to clarify whether an employee who is treated less favourably, not because she is disabled, but because she has an association with an individual with a disability, is covered under the Directive.<sup>61</sup> AG Maduro advised the Court that, in his opinion, it did. He stressed that the stated purpose of art. 1 of Directive 2000/78 was to lay down a general framework to combat discrimination *on the grounds of* religion or belief, age, disability, or sexual orientation,<sup>62</sup> which effectively perform an exclusionary function. It prohibits employers from relying on enumerated "suspect classifications" to treat one employee less favourably than another.<sup>63</sup> For AG Maduro, it was not necessary for Ms. Coleman to show that she had been treated less favourably because of her disability. It was sufficient to show that she had been mistreated *because of* "disability":<sup>64</sup> "what is important is that that [sic] disability – in this case the disability of Ms. Coleman's son – was used as a reason to treat her less well".<sup>65</sup>

The CJEU adopted a similar logic and reached a similar conclusion. Referring, as AG Maduro did, to the fact that art. 1 of Directive 2000/78 uses the language *on the grounds of*, the Court concluded that the principle of equal treatment applied not to particular category of person, but to the specifically enumerated 'grounds' provided in art. 1.<sup>66</sup> The Court therefore held that: "Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee."<sup>67</sup>

#### IV. *COLEMAN* CONTRIBUTES TO A NEW INTERPRETATION OF NATIONAL LAW

On 30 September 2008, the case returned to Judge Stacey for a crucial aspect of Ms. Coleman's case. In a judgement issued on 26 November 2008, Judge Stacey concluded that her task was to interpret the DDA in a way that conformed with the effect of Directive

<sup>61</sup> Case C-303/06 *Coleman* ECLI:EU:C:2008:61, opinion of AG Maduro, para. 1.

<sup>62</sup> *Ibid.* para. 15 (emphasis in original).

<sup>63</sup> *Ibid.* paras 7 and 18.

<sup>64</sup> *Ibid.* para. 23.

<sup>65</sup> *Ibid.* para. 23.

<sup>66</sup> *Coleman* cit. paras 38 and 51.

<sup>67</sup> *Ibid.* para. 51.

2000/78, as elaborated upon by the CJEU, by inserting words if necessary, unless the domestic statute contained “an express and unambiguous indication to the contrary.”<sup>68</sup> Judge Stacey held that the DDA *could* be interpreted in such a way as to include associative discrimination as a matter of domestic law, and therefore, concluded that the Employment Tribunal had jurisdiction to hear Ms. Coleman’s case.<sup>69</sup> This decision was appealed to the UK Employment Appeal Tribunal, overseen by Justice Underhill, who handed down his judgment on 30 October 2009.

This is a rather complex question of law, which may be more accessible if we begin with an analysis of the objections that the defendant raised in its appeal to Judge Stacey’s ruling. First, the defendant argued that it was not possible to extend the DDA to achieve conformity with EU law because it “would involve a departure from a fundamental feature of the legislation”. The obvious conclusion from a plain reading of the DDA was that it covered only individuals with disabilities, and not individuals associated with them. Not only is the language “unlawful for an employer to discriminate against *a disabled person*” clearly intended to limit the scope of the Act only to individuals with disabilities, the “whole Act is [...] drafted on that basis”.<sup>70</sup> Second, the defendant referred the court to the Report of the Joint Committee, which was essentially the legislative history of the bill that would become the Disability Discrimination Act of 2005. The Committee had explicitly considered whether associative discrimination was covered under EU law, and the Minister for Disabled People had informed the Disability Rights Commission that he did not believe that associative discrimination came within the ambit of Directive 2000/78. The defendant argued that this supported the view that the legislator did not intend the DDA to be extended to include associative discrimination.<sup>71</sup> Third, the defendant submitted that Judge Stacey’s decision was inconsistent with decisions of the Court of Appeal in *English v Thomas Sanderson Blinds Ltd*.<sup>72</sup> In both cases, the court decided that it was impossible to read the UK legislation that it was interpreting – respectively, the Sex Discrimination Act 1975 and Employment Equality (Sexual Orientation) Regulation 2003 – in such a way that they would conform with EU law.<sup>73</sup> In short, the defendant argued that the

<sup>68</sup> UK Employment Appeal Tribunal judgment of 30 October 2009 UKEAT/0071/09/JOJ *Attridge Law v Coleman* para. 8 (quotation marks in original).

<sup>69</sup> *Ibid.* paras 1-2.

<sup>70</sup> *Ibid.* para. 18.

<sup>71</sup> *Ibid.* para. 19.

<sup>72</sup> *English v Thomas Sanderson Blinds Ltd* [2009] IRIL 206 and *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRIL 327.

<sup>73</sup> *Ibid.* para. 11 (internal quotation marks in original). The defendant raised a fourth point questioning whether Directive 2000/78 had direct effect at the time that Ms. Coleman brought her lawsuit. For reasons that need not concern us here, the Employment Appeal Tribunal rejected this contention outright. See *Ibid.* para. 20.

Tribunal had “distorted and rewritten” the DDA to expand its coverage to include associative discrimination.<sup>74</sup> These were formidable hurdles to overcome.

Justice Underhill began his analysis by stating that it was a principle of EU law that “courts and tribunals of member states should ‘so far as possible’ interpret domestic legislation in order to give effect to the state’s obligations under EU law”.<sup>75</sup> Furthermore, citing to *House of Lords in Pickerstone v Forth Dry Dock & Engineering Co.*,<sup>76</sup> he concluded that it was now settled law in the UK that a court or tribunal may “go beyond the strict limitations of statutory construction and can read words into a statute in order to give effect to EU legislation which the statute is intended to implement”.<sup>77</sup> But UK law also made clear that the phrase “so far as possible” meant that “it is not legitimate in every case” to employ this technique.<sup>78</sup> In sum: “The difficulty is to define the touchstone for distinguishing between the two types of cases, or – to put it another way – the limits of what is ‘possible’”.<sup>79</sup>

For guidance, Justice Underhill looked primarily to the decision of the *House of Lords in Ghaidan v Godin-Mendoza*,<sup>80</sup> which concerned the UK’s obligations with respect to section 3(1) of the Human Rights Act 1998 and the implementation of the European Convention on Human Rights. After engaging in a detailed analysis of the reasoning presented in *Ghaidan*, Justice Underhill reached the following conclusion, which is quoted at length because it provides a relatively succinct summary of *Ghaidan*’s intricate holding:<sup>81</sup>

“I agree with the Judge [Stacey], and with Judge Clark when the matter was first before this Tribunal, that there is nothing ‘impossible’ about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in *Ghaidan* make clear, that is not in itself impermissible. The real question is whether it would do so in a manner which is not ‘compatible with the underlying thrust of the legislation’ or which is ‘inconsistent with the scheme of the legislation or its general principles’. In *Ghaidan* the majority were prepared to interpret the words ‘wife or husband’ in Schedule 1 of the Rent Act 1977 as extending to same-sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went ‘with the grain of the legislation’. In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an

<sup>74</sup> *Ibid.* para. 10(A) (quotation marks in the original).

<sup>75</sup> The leading case on the subject is case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* ECLI:EU:C:1990:395.

<sup>76</sup> *House of Lords in Pickerstone v Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 AC 546.

<sup>77</sup> *Attridge Law v Coleman* cit. para. 11.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* (internal quotation marks in original).

<sup>80</sup> UK House of Lords judgment of 21 June 2004 *Ghaidan v. Godin-Mendoza (FC)* 2004 [UKHL] 30.

<sup>81</sup> A Westlaw search of citations to *Coleman v Attridge* in the UK revealed that, by far, the case was most frequent cited for its analysis of *Ghaidan*. The subject matter, associative discrimination, was only relevant to the authors in a small minority of cases.

extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination 'on the ground of disability' still remains central".<sup>82</sup>

Once it had been firmly established that Ms. Coleman had the right to bring her suit against Attridge Law, the case was listed on the docket for an employment tribunal hearing. Shortly thereafter, Ms. Coleman and Attridge Law settled the case out of court, reportedly for 12000 pounds.<sup>83</sup>

The *Coleman* court saga was unfolding at the same time when the UK legislature was contemplating a complete structural revision of its anti-discrimination statutes – a process that resulted in the Equality Act 2010. The Act replaced nine anti-discrimination laws and was intended to implement fully four EU directives, including Directive 2000/78.<sup>84</sup> The Act has 218 sections and runs 239 pages.<sup>85</sup> Section 13 of the UK Equality Act prohibits less favourable treatment "because of a protected characteristic." According to at least one author, "this provides a clear basis for direct discrimination claims brought by people (such as carers or relatives) who are not themselves disabled but are treated less favourably because of their association with somebody who is".<sup>86</sup>

An explanatory note (note 63) on the definition of direct discrimination explains that it was drafted to eliminate the dissimilarities that were a feature of previous UK anti-discrimination legislation. To quote the note, it provides "a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation". Another explanatory note (note 59) on the definition of direct discrimination explains that it "occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief)".

One should resist the temptation to paint the holding in *Coleman* with an excessively broad brush. For sound reasons related to legal strategy, from beginning to end, *Coleman* was very consciously a case exclusively about associational discrimination in the field of

<sup>82</sup> *Attridge Law v Coleman* cit. 14 (internal citations omitted).

<sup>83</sup> A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association' cit. 173 and 184.

<sup>84</sup> B Hepple, 'The New Single Equality Act in Britain' (2010) *The Equal Rights Review* [www.equal-rightstrust.org](http://www.equal-rightstrust.org) 11 and 15.

<sup>85</sup> *Ibid.*

<sup>86</sup> A Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) *ILJ* 359 and 373.

*direct discrimination*. It says nothing, for instance, about whether associational discrimination on the basis of disability should be extended to include indirect discrimination or reasonable accommodation. In fact, the latter is the subject of a 2014 published opinion,<sup>87</sup> in which the Court of Appeal (Civil Division) rejected the invitation to extend *Coleman* to include a duty to reasonably accommodate the needs of a child of an employee.

Nevertheless, it is clear that *Coleman* has been an important catalyst for the expansion of rights under UK law. It was instrumental in the re-formulation of the definition of direct discrimination to include associational discrimination, not only in the UK, but across the European Union. By all accounts, it was an extremely successful and well-executed legal campaign. In light of the UK's recent departure from the European Union, which will invariably raise questions about the legitimacy and precedential value of CJEU judgements in the UK legal order, the fact *Coleman* has already been integrated into domestic statutory law is particularly significant.

## V. EU LEGAL MOBILIZATION IN THEORY AND PRACTICE

Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. There is overwhelming evidence of all of them in this story. McLynn and her co-counsel, who accepted the case on a pro bono basis, were highly motivated by a desire to correct an injustice, even if they did not personally identify with Ms. Coleman's struggle. Ms. Coleman's legal team had an abundance of expertise in European law. They were clearly at ease moving between the UK national courts, the CJEU, and then back to the UK national courts again. And finally, they operated in an environment that was conducive to EU legal mobilization. The legal team not only had the financial resources and legal expertise required to pursue the litigation, but also encountered a judiciary that was open to making a preliminary reference at the first possible moment and willing to defend its position, even when the UK government urged it to reconsider. Ms. Coleman's lawyers were arguably fortunate that their case was initially presented to a judge with a particularly strong background in disability rights law, but Judge Stacey's rulings were consistently upheld by other members of the UK judiciary. When her decision was appealed, EAT Judge Peter Clark affirmed Judge Stacey's decision to refer the *Coleman* case to the CJEU. After the CJEU handed down its judgment, Justice Underhill affirmed Judge Stacey's conclusion that it was possible to interpret the DDA in a way that conformed with Directive 2000/78. To put it briefly, the *Coleman* litigation did not hinge on the inclinations of a solitary judge. The UK legal system, as a collective unit, was receptive to engagement with the CJEU and willing to adjust its interpretation of domestic laws to accommodate the CJEU's new judgement.

<sup>87</sup> England and Wales Court of Appeal (Civil Division) judgment of 13 May 2014 *Hainsworth v Ministry of Defence* EWCA Civ 763.

Passalacqua's theory provides a solid foundation for further investigation. Three key unanswered questions stand out. First, this *Article* has extended Passalacqua's theory to a new legal domain, but one that shares many important characteristics. Migration law and disability rights law are both fields in which NGOs and cause lawyers are well established in the EU legal ecosystem. Is Passalacqua's theory of EU legal mobilization really a theory of EU anti-discrimination and social justice legal mobilization, or does it have more generalizable explanatory power? Second, research conducted thus far has only considered cases in which preliminary references to the CJEU were successful. A close examination of *failed* attempts to secure preliminary references may help to untangle whether the factors that Passalacqua identifies in her theory are sufficient for, necessary for, or merely conducive to EU legal mobilization.<sup>88</sup> Third, the *Coleman* litigation does not match the widely-held view that the UK judiciary is hostile to the use of the preliminary reference procedure. To the contrary, at several stages in the litigation, UK judges made rather bold pronouncements that kept Ms. Coleman's case alive. Perhaps Passalacqua's third factor, which focuses on "judicial receptivity", cannot be properly assessed at the national level. The national judge is the crucial gatekeeper, and future research may show that the attitudes of individual judges towards engagement with the CJEU matters more than the country where their courts are located.

<sup>88</sup> I thank an anonymous reviewer for bringing these two points to my attention.