Compensating discriminatory acts: public law claims under the Equality Act 2010 and Article 14 ECHR

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Introduction

1. This paper addresses the role of discrimination claims in judicial review addressing the inter-relationship between the public sector equality duty (PSED) in s 149 of the Equality Act 2010 (EA 2010) and the substantive duties in EA 2010. The focus is upon two cases: the judgement of the Supreme Court in ***Coll v Secretary of State for Justice*** **[2017] UKSC 40, [2017] 1 WLR 2093, 2108C–D** and its application in a judicial review challenging the discriminatory impact of a lock in regime and conditions in an immigration removal centre (Brook House IRC) on religious observance for muslim detainees: ***R (Hussein and Rahman) v SSHD*** **[2018] EWHC 213 (Admin).** Consideration is also given to the advantages or otherwise of running Human Rights Act (HRA) claims alongside or instead of claims under the EA 2010.

S149 EA 2010 and the PSED

2. The duty in s 149(1) 2010 is a "due regard" duty aimed at both non-discrimination (s 149(109a); equality of opportunity (s149(1)(b) and fostering good relations (s 149(1)(c).

3. Discrimination" for the purposes of s149(1), EA 2010 includes "indirect discrimination" (s.19, EA 2010) and "a failure to make reasonable adjustments" (ss. 20 and 21, EA 2010). Such discrimination is prohibited, *inter alia*, in the exercising of public functions (s.29(6)), unless explicitly excluded by exceptions in Schedule 18. It applies to both public authorities and those exercising public function e.g. private contractors running prisons/IRCs for example (s149(2)). Schedule 18(2) and (3) excludes some public authorities including exercise of judicial functions (paar 2) , parliaments, security services and GCHQ (para 3).

4. The Schedule 18 exceptions include age in a number of specified contexts (para 1). In the immigration context it excludes s149(1)(b) equality of opportunity in respect of age, race, religion or belief, race is however limited to nationality, ethnic or national origins (para 2).

5. The "relevant protected characteristics" for the purposes of s. 149(1), EA 2010 are exhaustive age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation. (s. 149(7) read with section s.4, EA 2010. Race is broadly defined in s 9(1) EA 2010 as nationality, ethnic or national origin.

6. The PSED applies to the exercising of all public functions, both in formulating policy of wide application and in making decisions in individual cases[1]. This includes operational management of custodial facilities and in undertaking any review of its operation and/or in making changes to it and/or in subjecting individual detainees to it, the D was bound to have "due regard" to the non-discrimination and equality obligations under s.149(1), EA 2010.

7. "Due regard" means "proportionate regard", or that which is appropriate in all the circumstances[2]. The extent of the duty will vary according to the nature of the function being exercised. Where a decision affects "a large number of vulnerable people, many of whom fall within on or more of the protected groups…the due regard necessary is very high": *R (Harjrual) v London Councils* [2009] EWHC 3261 [63].[3]

8. The principles are now well-established and were summarised by the Court of Appeal in *R (Bracking) v SSWP* [2013] EWCA Civ 1345, [26] and [60-61], approved by the Supreme Court in R *(Hotak) v London Borough of Southwark* [2015] UKSC 30; [2016] AC 811 at [73] as follows:

   8.1. The PSED is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation[4].

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[1] *Pieretti v. Enfield LBC* [2010] EWCA Civ 1104; [2011] PTSR 565
[2] *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2008] LGR 239, [31], per Dyson LJ; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158, [2009] PTSR 1506, [82]
[3] See also *R (HA) Nigeria v. Secretary of State for the Home Department* [2012] EWHC 979 [199]
[4] Section 149 EA 2010 is intended to be proactive not restitutionary

8.2. An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.

8.3. The relevant duty is upon the Minister or other decision maker personally. It is a non-delegable duty.[5]

8.4. The decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rear-guard action", following a concluded decision.

8.5. The public authority decision maker must have a focused awareness of each of the section 149 duties and their potential impact on the relevant group[6].

8.6. The duty must be fulfilled before and at the time when a particular policy or decision making is being considered and not as a "rear guard action" following a concluded decision.[7]

8.7. The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes". It involves a duty of enquiry. The PSED requires a public authority to be properly informed before taking a decision, and if relevant material is not available, there is a duty to acquire it.[8]

8.8. The duty is a continuing one.[9]

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[5] *Brown (supra)* [94] and *R (Domb) v London Borough of Hammersmith and Fulham* [2009] LGR 843 [52].
[6] *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 1550 [68].
[7] *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23-24] and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) ; [2009] PTSR 1506 [91] and R (C) v Secretary of State for Justice [2008] EWCA 882; [2009] QB 657 [49]
[8] *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201[89-90]
[9] Brown *(supra)* [95]

8.9. General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria applied to the particular circumstances under consideration.

Remedies

9. Non-compliance with the PSED is a serious matter.[10] The starting point is that the PSED should ordinarily result in an order quashing the relevant decision although there is a discretion not to so do and relief may be limited to declaratory relief.[11]

10. No compensatory damages are available for a breach of the duty under s 149 EA 2010 including in an individual case.

Substantive Equality Duties under s 19 Equality Act 2010

11. A breach of the PSED is, however, highly relevant to substantive discrimination claims under the EA 2010 and directly impacts upon the ability of the public authority to establish either a lawful justification for, or demonstrate the proportionality of the measures under challenge generally and in individual claims.

12. Direct discrimination is defined by section 13 of the Equality Act 2010. (The definition excludes discrimination on the grounds of age, if it is a proportionate means of achieving a legitimate aim). Indirect discrimination is defined by section 19. Indirect discrimination may be justified if it is a proportionate means of achieving a legitimate aim. Service providers, and persons exercising public functions are prohibited from discriminating, whether directly or indirectly: section 29 EA 2010.

[10] R(C) *(supra*) and *R (HA)* (supra) [199]
[11] See for example *Secretary of State for Communities and Local Government v (1) West Berkshire Council and another* [2016];[2016] 1 WLR 393 at [87]; *Hottack* (supra) at [62] (adverse impact on third parties) ; *Hurley (supra)* at [99] *(detriment to good administration); HA* (supra) undertaking to carry out an EIA and BAPIO (supra at[64-70] (substantive and unchallenged compliance with the duty) .

13. It is the discrimination that must be justified rather than the measures themselves.[12] In the absence of compliance with the PSED, the public authority is in no position or in real difficulty in doing so.[13]

14. The case of *Coll v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093, 2108C–D concerned, a woman serving a sentence of life imprisonment, who complained that the relative paucity of approved premises for women relative to men had the sex discriminatory effect that she could not, unlike a man, be placed in approved premises near to her home in preparation for her release into the community. The Supreme Court held this to be direct discrimination but the Court had to decide on the applicability of an exemption from the prohibition on direct discrimination on the ground of sex in the EA, if (a) a joint service for persons of both sexes would be less effective, and (b) the limited provision is a proportionate means of achieving a legitimate aim.

15. The judge at first instance (Cranstan J) had already found and declared that the Secretary of State had failed to discharge the public sector equality duty, and that finding had not been the subject of challenge in the subsequent appeals. In paragraphs 34 to 42 of her judgment, Baroness Hale described the arguments that had been advanced in relation to justification; but at paragraph 41 she said:

> "41. Despite her criticisms of the aims identified by the Secretary of State and the courts below, [leading counsel for the claimant] accepts that in principle the different provision made for men and women might be justified. Her complaint is that the Ministry of Justice has never properly addressed its collective mind to the problem of providing sufficient and suitable places in APs for women which achieve, so far as practicable, the policy of placing them as close to home as possible. There are other options which could have been considered… "

At paragraph 42 Baroness Hale continued:

> "42. Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and

[12] *AL (Serbia) (supra)* at [38] and *A (No 1) v Secretary of State for the Home Department* [2005] AC 68 at [54].

[13] *Coll v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093, 2108C–D

> for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the Secretary of State to show that the discrimination is justified. Given that the ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."

The granted by the Supreme Court in paragraph 45 of *Coll* was to make a declaration that there was:

> " ... direct discrimination against women ... which is unlawful unless justified ... No such justification has yet been shown by the Secretary of State."

16. The decision of the Supreme Court in ***Coll*** therefore makes clear that in the absence of any lawful discharge of the duty under s 149 of the EA 2010 the D is in no position to establish a lawful and sufficient justification for that discriminatory impact which must be justified, as distinct from the general measures themselves.[14]

17. It is also to be noted that whilst costs and budgetary consideration may justify the measure alone they cannot justify discrimination.[15]

R (Rahman and Hussein)

> Both Claimants were adult men of the Muslim faith who were detained at Brook House IRC. Both claimed that the conditions and regime at Brook House interfered with their required religious observance as, devout Muslims, and that the conditions and regime had a differential and discriminatory impact upon them as Muslims, not experienced by those of other faiths or of no faith at all. This followed from a combination of the hours of a "lock-in" when detainees cannot leave their cells; the required times of Muslim prayer; cell sharing; the presence

[14] *AL (Serbia)* (supra), [38] and *A (No1) v SSHD* [2005] AC 68, [54].
[15] *Department for Constitutional Affairs v O Brien* [2013] 1 WLR 522 at [69].

within the room of a lavatory cubicle without a door and the insanitary conditions of the cell.

18. The Cs case was that although neutral in form and applied generally, the operation of the lock-in regime and the conditions of detention, differentially disadvantaged Muslim detainees. Accordingly was indirectly discriminatory and it is submitted violates s.19 EA 2010 and/or Article 14 ECHR read together with Article 9 ECHR.

The Defendant admitted in the proceedings that there had been a failure to discharge the duty under section 149 of the EA 2010 to have due regard to whether these circumstances have a discriminatory impact but opposed any relief being granted.

EA 2010

19. Section 19(3) lists the relevant characteristics for the purpose of that section as including "religion or belief". Sections 19(1) and (2) provide as follows:

"19. Indirect discrimination

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

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

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

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

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

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

20. The Judge concluded at [28-29] that the right to religious observance was both engaged and had been interfered with and at [38] found that :

> " Patently the SSHD applies a provision, criterion or practice which puts persons who share the protected characteristic of being practising adherents of the Muslim faith at a particular disadvantage when compared with persons who do not share that characteristic. There is thus a burden on the SSHD under section 19(2)(d) to show that the relevant provision, criterion or practice is a proportionate means of achieving a legitimate aim. It thus follows that both under the Convention and under section 19 of the domestic Equality Act 2010 there is a burden upon the SSHD to justify, if she can, the discrimination in point.

21. At [43] the Judge addressed the failure to comply with 149 EA 2010 as follows

> "Where a minister has failed for an appreciable period of time to discharge that duty, it is not, in my view, sufficient for a court merely to so state in judgment, even after a concession has been made. A minister who has failed to discharge that heavy duty cannot avoid censure by a concession made in the course of the proceedings themselves. I will accordingly make a declaration substantially in the terms of paragraph (viii) of the relief sought in the respective amended grounds for judicial review; namely to the effect that in continuing to authorise and/or permit the maintenance of the lock-in (or night state) regime at Brook House and/or the conditions of the detention generally and/or in the claimants' cases, the SSHD failed to have any regard to the public sector equality duty under section 149 of the Equality Act 2010."

22. Having made those findings the Judge applied the judgment in Col rejecting the submission of the Defendant that the ruling was confined to direct discrimination could not be read over to indirect discrimination claims and was not relevant to the HRA claim as follows at [57-58]:

> " Paragraph 42 of *Coll* is not laying down (nor am I being invited by Ms Harrison to apply) a rule of law. It merely indicates an approach which may, on the facts and in the circumstances of a given case, be adopted. I cannot see that the approach is confined to cases of direct discrimination, nor why it may not be equally in point in cases of indirect discrimination.

> Either way, the point is the same. The minister has failed to address his mind to the problem and how it may be mitigated or avoided. Whilst the question of justification may not "logically depend on whether the [minister] thought about this at the time", a minister who did not think about it is likely to be disadvantaged or disabled in demonstrating justification unless and until he has properly thought about it. "

23. The Judge held at [65] follows:

> "The blunt truth and reality is that the SSHD has never previously thought about the differential discriminatory effect upon practising Muslims of the combination of their required times of prayer, the night state, the unclosed lavatories and the shared rooms. It may in the end be justifiable, but, as already indicated, there may be a range of steps which the SSHD may be able to take to mitigate or avoid it. Unless and until she, who is the policymaker, has fully and conscientiously considered those steps (and others) and thought this whole problem through, I am quite unable to hold, meantime, that it is justified. "

24. In **R (Ward and Others) and (Gullu) v London Borough of Hillingdon** [2019] EWCA Civ 692(indirectly discriminatory impact on grounds of race (national origins) of housing allocation policy requiring 10 years continuous residence on Irish traveller and Refugees). The Court at [74] upheld the finding that there was a breach of the PSED once the position of the non UK national and refugees had been identified through the challenge:

> "But by the time of the 2016 assessment Mr Gullu had made his challenge in court. In the light of that challenge, I consider that Hillingdon ought at least to have considered the position of non-UK nationals. But they did not. I would therefore hold that Mr Gullu has established a breach of the PSED".

25. The Court did not treat the failure to comply with the PSED as fatal to the Defendants attempt to justify the discriminatory treatment. It recognised that it was in principle possible expost facto justify the discrimination at [76]:

> "The burden lies on the policy maker to justify the impugned PCP. It is not a legal requirement of justification that the reasons put forward in defence of the PCP must have been present to the mind of the policy maker at the time when the PCP was introduced. It is open to a policy maker to advance an ex post facto justification: R

(Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at [129]; Seldon v Clarkson Wright & Jakes [2012] UKSC 16, [2012] ICR 716 at [59] and [76]. However, in the case of an ex post facto justification, the court will not have had the benefit of the considered decision of the policy maker. ”

26. The Court applied Re Brewster [2017] UKSC 8, [2017] 1 WLR 519 at [52] of requiring “greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised” . At first instance it was the “paucity and inadequacy of their evidence” at [78]. In the Court of Appeal this was reformulated as a failure to address the relevant questions arising from the adverse impact of the measures which the Defendant had not addressed at [96]. The Court posited the possibility of making special exceptions for refugees or for those like traveller who have no fixed abode at [101].

Human Rights Act Claim

27. The Judge addressed the HRA claim in parallel with the EA 2010 claims finding at [28-35] the impugned treatment fell within the ambit of Article 9 and that the non-discrimination obligations in enjoyment of that fundamental right under Article 14 ECHR was engaged, there was discriminatory treatment which for the same reason could not be justified. He declared that the “ *lock-in regime at Brook House, in conjunction with the presence of internal unclosed lavatories and shared rooms, (i) constitutes indirect discrimination contrary to Article 9 of the European Convention on Human Rights read with Article 14, which is unlawful unless justified; and (ii) unless justified, constitutes unlawful indirect discrimination contrary to section 19 of the Equality Act 2010. No such justification has yet been shown by the SSHD*”.

28. The HRA claim did not add anything of substance to the remedy available under EA 2010 and plainly EA 2010 compensation is as of right and calculated by reference to established *Vento* brackets. The ECHR case law is, however, highly developed and adds to the EA arguments. In the context of *Rahman and Hussein* we could pray in aid that the |Convention places a high value on religious freedom which ranks high in the hierarchy of human

rights[16] Special recognition of the importance of this right is accorded by section 13 of the Human Rights Act 1998[17].Whilst manifestation of beliefs is qualified, " in the light of the importance of the rights enshrined in art 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment will only be compatible with the Convention if very weighty reasons exist": *Vojnity v Hungary* (Application no 29617/07) at [36]; discrimination based on religion requires "strict scrutiny" by the Court[18].

29. Likewise the Strasbourg case law Article 14 of the Convention is also helpful. In *Thlimmenos*[19] the applicant complained that the law made no distinction between persons convicted as a result of their religious beliefs and persons convicted on other grounds. The Strasbourg Court held that this was a failure to treat differently persons whose situations are significantly different and in the absence of objective and reasonable justification was in breach of Articles 9 and 14. The *Thlimmenos* principle, imposes a positive obligation on the state to make provision to cater for significant difference.[20] In *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634; [2009] UKHRR 1073, Elias LJ at [44-46] explained the difference between this and indirect discrimination as one where *" the compliant is not that the single rule adopted is inappropriate because discriminatory and unjustified; it is that the circumstances require that there should be more than one rule*" and "*that a different rule should be adopted for the Claimant and those in a similar situation, specifically ameliorating the effect resulting from their special features or characteristics*."

30. There is no strict need for comparators under Article 14 as required by s.10 and 19 EA 2010. In *Rahman and Hussein* the comparators were straight forward those with non-

[16] *R v Secretary of State for the Home Department exparte Williamson* [2005] UKHL 15 at [15-19] *Eweida v United Kingdom* [2013] 57 EHRR 8, [79] – [80].
[17] "13 Freedom of thought, conscience and religion"
(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.
(2) In this section "court" includes a tribunal.
[18] *Thlimmenos v Greece* (2000) 31 EHRR 411 at [44].
[19] *Thlimmenos v Greece* (2000) 31 EHRR 411 at [44].
[20] For a recent example *Tadducci and McCall v Italy* (App 51362/09), 30 June 2016 and in a domestic context, *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117 (CA), per Maurice Kay LJ, at [15].

Muslim religious beliefs or indeed those with no religious belief at all but this can present significant problems in other contexts.

31. More generally, the protected characteristics in the EA 2010 are limited and exhaustive. Article 14, although not unlimited, is very much wider and includes any other status. Distinctions within groups are not covered under EA 2010 for example prisoners under different sentencing regimes or by reference to immigration status.

Conclusion

32. The PSED is intended to have integrated into decision making of public authorities non-discrimination and equality standards. Whilst declarations and mandatory orders may follow from a breach it does not give rise to compensation in its own right. A breach of the PSED is, however, highly relevant and may be determinative in claims under both the EA 2010 and the HRA where justification is required for measures and decisions with a discriminatory adverse impact.

33. There is benefit in pursing both EA 2010 and HRA claims particularly in indirect discrimination claims even where they cover the same substantive ground.

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