

Equality Act: Al Hijrah and ors

Fiona Scolding QC
Landmark Chambers

Introduction



- Discussion of Al Hijrah
- Impact upon this and other schools
- Other Equality Act issues of concern /competing rights.

Background to growth in litigation



- Significant and rapid growth (since 1998) of a much broader variety of faith schools within both the state and independent sector – viz Buddhist, Hindu, Muslim, Jewish, evangelical Christian. Government policy encouraged greater diversity within the sector.
 - Materially assisted by the Academies programme /free schools.
 - Schools also subject to the fundamental British values duties (introduced 2015).
 - The domestication of the ECHR by way of the HRA 1998.
-

Background to growth in litigation



- Before 2002 relatively “light touch” regulation of the independent sector with some exceptions (see eg Summerhill Case).
 - 2002 raft of regulations introduced to this sector.
 - Amended in 2014/15 – Independent School Regulations.
 - Increased number of equality duties in schools: either by way of enforcement of those which already existed (sex, race) and also enshrinement of other duties in domestic legislation – religious belief, sexual orientation, gender etc.
 - More muscular approach by both DFE and OFSTED/ISI around religious extremism after *Trojan Horse*.
-

Facts of Al Hijrah



- School is a voluntary aided school for both sexes.
 - Operates a segregation policy of those sexes from Year 5.
 - Always done so and said so explicitly in literature provided by the school.
 - Prior to June 2016, no comment by OFSTED about this practice.
-

Facts of Al Hijrah



- Similar to other schools of the Abrahamic faith and an orthodox/conservative/evangelical nature .
 - The school had been placed in special measures in 2013 (for different reasons).
 - At an inspection in June 2016 (not a routine inspection, but a specific inspection of OFSTED in response to concerns about segregation) , two girls indicated unhappiness with segregation.
 - Ofsted had concerns about equality of opportunity and how ready they were for participation in modern British life.
 - The school also failed its inspection for (a) having books which were derogatory of women and (b) inadequate safeguarding re forced marriage and "sexting"
-

Complaints of the school



- The school complained that it was being criticized for something which it had not previously been criticized for.
 - That the EHRC Guidance seemed to suggest that segregation was permissible and this was something the court had to have regard to.
 - That the position of DFE, OFSTED and Commission is inconsistent given its acceptance of segregation in the past .
-

Court proceedings in Al Hijrah



- Jay J found that the segregation was not sex discrimination. This was because:
 - (1) Both sexes were treated equally in respect of segregation and so there was no less favourable treatment, by examining each sex as a group (para 127 of first instance judgment).
 - (2) The loss of opportunity to mix with the opposite sex was not a particular detriment on girls, because women had the minority of power (para 133)
 - (3) The very fact of sex segregation being an expression of patriarchy and thus less favourable treatment in the absence of evidence that the reason for segregation was due to a view as to female inferiority (paras 140 – 146)
-

Is segregation sex discrimination?



- Yes as the reason for the segregation is on the grounds of sex. A boy cannot mix with girls: and vice versa. This is detrimental because the individual is precluded from doing so, and that this is a detriment in principle on the basis that the denial of the choice to seek the society of, and interaction with the opposite sex is capable of amounting to the denial of a benefit. This is direct discrimination (under s13).
- There was direct evidence from pupils that they found it detrimental and that this was reasonable (reasonableness of perception being accepted as a detriment in this context) .

Sex Discrimination (2)



- Judge had erred by finding that there is no such thing as group discrimination: s13 specifies discrimination by reference to a person. Each boy and girl pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective.
- E.g. people should be treated as individual, and not be seen to be like members of the group.
- Separate but equal treatment is discriminatory if there is a detriment -based on Smith v Croft Inns [1996] IRLR 84 (dismissal of RC barman in Protestant area of Belfast because he was RC)and Gill v El Vino (not being allowed to stand at the bar was sex discrimination) and by examining the services section of the EQA 2010 – see Part 7 of Schedule 3 of the EA 2010.



Sex Discrimination (3)

- Separate but equal treatment is prima facie discriminatory unless the Act expressly permits it.
- R(Coll) v SSJ [2017] UKSC 40 – Baroness Hale explored the concept that separate but equal treatment could be discriminatory, and that the part of the Act which permits such (Schedule 3 dealing with public services) shows that, subject to the exceptions specified, such treatment is unlawful discrimination.
- Underscored by the Act which identifies that for public services, single sex only services can be provided only if specified conditions are satisfied and it is a proportionate means of meeting a legitimate aim.



Sex Discrimination (4)

- Court also relied upon the fact that the Act does not permit gender segregation in co-educational facilities as it is not dealt with in the exceptions which are permitted for single sex education (Schedule 11 of the EA 2010).
- Whilst Schedule 11 of the Act permits a single sex school which admits students of the opposite sex for some courses to confine them to such, it says no such thing about mixed sex education.
- Majority of the Court rejected OFSTED's arguments that sex segregation in this context had a greater level of harm on girls and that it caused "symbolic or expressive harm" by its existence.

Gloster LJ dissent – practical harm



- Lady Justice Gloster in a powerful dissent agreed with OFSTED that the very notion of sex segregation can cause expressive harm – so that separate but equal in fact supports and reinforces the gender power imbalance within societies.
 - The actual practical impact of the segregation regime was, on the evidence, shown to cause harm – including derogatory comments about the role and place of women and highly stereotyped views about the role and place of women in society. Girls also had to wait longer for their break. It led to a greater risk of extreme and intolerant views and is likely to create misogynist attitudes.
-

Gloster LJ dissent – practical harm



- Once it is accepted that men exercise more influence in society than women and this plays into the employment market, evidence is not required to establish that a system of strict sex segregation is

“bound to endorse traditional gender stereotypes that preserve male power, influence and economic dominance....One does not need to have been educated at a women’s college at a co-educational university, at a time when women were still prohibited from being members of all male colleges, to take judicial notice of the career opportunities which women even today are denied, simply because they are prevented from participating in hierarchical male networking groups, whether in the social, educational or employment sphere..”

Gloster LJ dissent – expressive harm



- One cannot shut one's eyes to the objective reality that, whatever the good intentions of the government, stereotypical attitudes towards women remains current .
- Given this, segregation by sex on a mixed sex campus endorses and perpetuates , or at the very least risks such, stereotypes that are still pervasive in society and which are widely recognised as detrimental .
- The fact that race segregation is more obviously harmful is no reason to reject the argument raised by OFSTED on the grounds of sex.
- This is particularly important for schools which are to educate the young as to the diversity of the country and of equal freedom.

Gloster LJ – gender segregation in a Muslim school is not gender neutral



- Gloster LJ accepted the view taken by Dame Louise Casey to investigate integration in isolated communities that Islamic organisations can have regressive and misogynistic views of women cloaked as cultural or religious values.
- Also accepted the submissions of Southall Black Sisters that it does not have a gender neutral impact upon the sexes, but perpetuates discrimination .
- Such segregation reinforces cultural norms that women are not be part of public space , and their exclusion from public life.



Overlap with religious discrimination

- The school did not rely upon the exemptions permitted under the EA 2010 for reasons of religion.
- These exemptions (Schedule 11 of the EA 2010, paragraphs 5-7) permit a school to discriminate “so far as relating to religion and belief” if the school has a particular religious character ethos (registered or recognised by the DFE as such).
- Also permits anything done in connection with an act of worship or other religious observance organised by or on behalf of a school – whether or not forming part of the curriculum.
- These exceptions can be varied.



Religious discrimination (2)

- The Court accepted that the school was doing what it considered to be conscientious adherence to the tenets of Islam.
- And that parents wanted this for their children.
- But these cannot negate the statutory right of a child to be educated in a non discriminatory manner.
- The SC in the *JFS case* identified similar difficulties: however distasteful or offensive it may be to some , it is an issue in an area regulated by Parliament that must be faced up to.

Time for implementation



“We considered, nevertheless, that there is a strong argument for the Secretary of State and OFSTED to recognise that, given the history of the matter, their failure....to identify the problem and the fact that they have de facto sanctioned and accepted a state of affairs which is unlawful, the schools affected should be given time to put their houses in order in the light of our conclusion that this is unlawful sex discrimination.....”

Limits on expression of religious belief?



- If freedom of religion caused physical or psychological harm and/or was conduct contrary to the EA 2010, then the courts should not, in effect, give in to it, and should act in accordance with EA 2010 and the ECHR rights (Re M [2017] EWCA Civ 2164)
-

Where does this leave schools?



- Timescales for the phasing out of segregation
- Challenges based upon Article 9/religion and belief under EA 2010
- Alteration of other aspects of some schools policies and provisions e.g. not doing music/dancing.
- School uniform policies?
- Use by OFSTED of EA duties – greater focus on their inspection generally so also race, disability, gender etc.

School uniform



- Indirect race and religious discrimination not to permit a Sikh girl to wear a “Kara” (R(Watkins Singh v Aberdare [2008] EWHC 1865)
- No breach of Article 9 to prevent the wearing of Jilbab which then lead to a girl being excluded and thus alleged a denial of the right to education (R(Begum) v Denbigh [2006] UKHL 15).
- No breach of Article 9 in refusing to allow a girl to wear a “purity ring” (R(Playfoot v Millais [2007] EWHC 1698).
- Indirect race discrimination not to permit cornrows on the basis of longstanding tradition (G v St. Gregory’s Science College [2011] EWHC 1452).
- Same findings after Eweida [2013] IRLR 231



School uniform

- School to ask itself:
 - (a) Is this policy potentially discriminatory ?
 - (b) If so, is there a legitimate aim and is the decision on policy proportionate.
 - (c) If there are concerns about community cohesion, british values, gender oppression , how have they been evidenced and analysed.



School transport

- Not discriminatory on the grounds of religion not to permit transport to specialist Orthodox Jewish School (R v Leeds [2005] EWHC 2495.
- But was indirectly discriminatory to cut school transport so that those who wished to attend faith schools would find it more difficult to do so and this indirectly discriminated against those who were black or form ethnic minorities (R(Diocese of Menevia) v Swansea CC [2015] EWHC 1436).

Religious discrimination/sexual orientation



- Seen more in the context of the provision of services – Hall v Bull [2013] UKSC 73
 - Case going to the Supreme Court in April – Lee v McArthur [2016] NICA 39: deals in particular with Northern Irish situation where the rules around religious discrimination are different given the Northern Ireland Act 1998.
 - Not unlawful to expel social work student for expressing homophobic thoughts (R(Ngole) v University of Sheffield [2017] EWHC 2669) on the basis of fitness to practice.
 - At present, the courts see that the refusal to provide same sex services on the basis of religious belief is not something which can be justified or excused under Article 9.
 - The limitation on the Article 9 rights pursues a legitimate aim.
-

Transgender discrimination



- Schools are under a duty not to discriminate on account of someone's gender assignment.
 - Indirect discrimination in many contexts – question whether or not can be justified by way of legitimate aim
 - (a) Uniform
 - (b) Provision of facilities
 - (c) Name.
-



Other claims

- Provision of different subjects for different genders?
 - Indirect difference in take up of certain subjects?
 - Teaching of homophobia?
-



Other issues

- Home based education – time for registration (see Wales where this was tried and then abandoned)?
 - Supervision of nature and content of curriculum required for home based education – greater use of enforcement powers for school attendance/imposition of a school attendance order.
-