

Welcome to Landmark Chambers'

'Indirect Discrimination – A powerful, effective but under-used tool in tackling discrimination in the UK' webinar

The recording may be accessed [here](#).

Your speakers today are...



David Lock QC

Topic:
What is indirect discrimination and how to identify the right comparator



Fiona Scolding QC (Chair)

Topic:
What needs to be shown to prove or disprove a justification defence



Alex Goodman

Topic:
How this all works in practice – a worked example: how and why the “No resource to public funds” rule adds up to unlawful racial discrimination

Indirect Discrimination – An introduction



David Lock QC

The Protected Characteristics

There are 9 in number and (in alphabetical order) are:

- age,
- disability,
- gender reassignment,
- marriage and civil partnership,
- pregnancy and maternity,
- race,
- religion or belief,
- sex and
- sexual orientation.

History of Indirect Discrimination

- Sex Discrimination Act 1975
- Race Relations Act 1976
- Council Directive 97/80/EC of 15 December 1997
- Equality Act 2010

The elements of indirect discrimination under s19 EA

- Need for a “provision, criterion or practice”
 - Overlapping concepts, widely interpreted
 - For a practice see *Ishola v Transport for London* [2020] EWCA Civ 112
- First element: S19(2)(a):
 “A [*the alleged discriminator*] applies, or would apply, it to persons with whom B [*the alleged victim*] does not share the characteristic”

Elements of Indirect Discrimination (2)

- Second element: section 19(2)(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”

- Note need for no material difference under s 23(1) EA
- Learning from *Essop v The Home Office* (Supreme Court in 2017)
- Third element – S19(2)(c) : B suffered the disadvantage

Examples

How does this work in practice:

- 2015 public sector pension changes and age discrimination
- Mr Brotton and his regulation 12 award.

Justification of indirect discrimination



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Introduction

- What is justification of indirect discrimination?
- When can it be used?
- How does it work in practice?

S21 of the Equality Act 2010

- An essential ingredient of any claim for indirect discrimination is that the person who is discriminating CANNOT show that the discrimination can be justified.
- S19(2)(d) of the EQA 2010 says:
 - *"A cannot show it to be a proportionate means of achieving a legitimate aim"*

Practical issues

- Need evidence of the reason justifying discrimination
- Must be specific
- Must append relevant policy papers/discussions/written ministerial submissions
- Must have the EIA (as it has to be assumed that for the policy such is/should/would have been done in many cases)
- Must show that there is no practicable alternative.
- (In cases of disability discrimination must show have made reasonable adjustments).

Ingredients for justification

- Burden of proof is upon those who have the policy and practice to show that it can be justified.
- The service provider/public body/employer cannot rely upon generalizations as any defence is examined with anxious/rigorous scrutiny.
- The aim must be legitimate
- Must also be proportionate –a concept which has its origins in the ECHR, and in particular cases brought under Article 14 of the ECHR (i.e. claims of discriminatory differential treatment) alleging breaches of other substantive articles of the ECHR need to be examined when looking at claims under the EQA 2010 as the same approach has to be taken.

What is a legitimate aim?

- Unlike in ECHR case law where legitimate aims are broadly identified (eg the protection of others, the protection of public health), there is nothing to identify what a legitimate aim is or could be under the EQA 2010.
- The aim cannot be discriminatory and must be a "real" and "objective" consideration. Cost alone cannot be a reason for a discriminatory act, but if placed with other justifications, is permitted to be a factor (*Cross v BA* [2005] IRLR 423).
- One cannot justify something which is racially discriminatory but stating that such discrimination was not explicitly set out in the legislation, if the import of the legislation was such that this was how it was applied (*ER v Immigration Centre at Prague* [2005] 1 All ER 527).

Legitimate aim – social or economic policy

- If the policy is which involves balancing macro economic or macro social policy objectives against each other, then the court will give the policy maker a degree of discretion – sometimes called the margin of discretion/margin of appreciation (see *Clarkson , Wright and Jakes* [2012] UKSC [2012] ICR 716 at 50 -62and *LC v McCloud* [2018] EWCA Civ 2844 at 60 – 87).

Margin of appreciation /legitimate aim?

- As assessed in *McCloud* (at paragraph 85 – 87):
- The state or government must be accorded some margin of appreciation in respect of aims or means (but note that margin of appreciation is probably less when issues of race, sex, religious belief or disability are concerned than age as under ECHR jurisprudence these are seen as "core" concerns and so discrimination has to be very carefully justified – see *R(Carson) v DWP* [2005] UKHL 37: *R(Bibi) v SSHD* [2016] 2 All ER 193).
- It is for the court to determine what the appropriate margin is and the aim must be carefully scrutinised.
- But establishing an aim is capable of being legitimate is only the start of the story – it is then to decide it is legitimate on the facts of the case: and such aim must be rational.

Margin of appreciation and state benefits

- In cases concerning state benefits /matters akin to state benefits, the government has a wide margin of appreciation and so the test is that of “manifestly without reasonable foundation” *DA v SSWP* [2016] UKSC 58.
- In *SC v SSWP* [2019] EWCA Civ 615 (case concerning whether the two child limit in respect of whom child tax credit/universal credit was payable), the courts held that this issue was one of significant political controversy, as the aims of the government were about reducing spending upon welfare benefits and of fairness between taxpayers were not suitable matters for the court, as there was no “process of legal reasoning which could justify one view in preference to the other” and where the matter had been subject to Parliamentary debate, the court would be “very slow” to displace the balance struck by Parliament.

Proportionality

- Even if the aim is legitimate, must be proportionate: the most adopted statement of assessing proportionality is currently Lord Reed in *Bank Mellat v HM Treasury* [2013] UKSC 39 at 69 – 76 which is :
- (a) Measures must be appropriate and necessary to achieve the objectives of the legislation.
- (b) Where there is a choice between several appropriate measures recourse must be had to the least onerous.
- © The disadvantages caused must not be disproportionate to the aims pursued
- (d) The intensity of the test – eg the margin of appreciation: depends upon the context: it is a search for fair balance between the rights of the community vs the rights of the individual.

Proportionality (2)

- The court should undertake a structure analysis (largely so that the court can be shown to have made its value judgements explicit) to do as follows:
- (a) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right:
- (b) Whether the measure is rationally connected to the objective
- (c) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective
- (d) Whether, balancing the severity of the measure's effects on the rights of the person to whom it applies against the importances of the objective, the former outweighs the latter.

But not a substitution of judgment

- Lord Reed again emphasises the need for the courts not to substitute its judgement for a legislative one so there is a margin of appreciation.
- However, as we are dealing with discriminatory treatment: which everyone agrees should be outlawed, then there should be a "robust" approach with a great deal of scrutiny of the issues involved (see *R(Elias) SOS for Defence* [2006] 1 WLR 3213).

Examples of proportionality in practice

- *R(E) v GB of JFS*: was a policy of matrilineal priority which disadvantaged those who had converted, or who were members of different traditions.
- SC found that this was direct discrimination on the grounds of ethnicity.
- But on indirect discrimination on the grounds of ethnicity and proportionality, each outcome on justification depended upon the individual's judges application of proportionality.
- Lord Mance (and others) looked broadly at whether the school had established that other less discriminatory alternatives were unsuitable to achieve the aim of having a school for Jewish children following Halachic law, but also considered the impact on society of maintaining this discriminatory policy : he found that the policy was not justified [at [97] – [100]

Proportionality in practice (2)

- Lord Rodger and Brown took a much narrower view, examining the needs of the school and the Jewish community and Jewish tradition, with much less emphasis upon the discriminatory impact, which led them to conclude that the policy was justifiable (at [233] and [255]).
- There is disquiet that religion is afforded less protection than other protected characteristics and may "rank" them (see for example *Ladele v Islington* in the domestic courts- [2008] UKEAT Dec 2008 where this was stated) .

Proportionality in practice

- *SG v SSWP* [2016] UKSC 16 (benefits cap): concerning discrimination on the grounds of sex.
- Justification put forward that this is one of economic and social policy.
- Majority found that it was proportionate because of macro social strategy and reasonable foundation.
- The fact that it affected women more than men was seen as being acceptable and objective, and no alternative had been suggested which would have avoided that differential impact without compromising the achievement of the legitimate aims of the government.

Proportionality in practice

- *R (Gullu) v Hillingdon Bc* [2018] EWHC 1937
- Was a policy of housing allocation requiring 10 years residence to obtain some degree of priority discriminatory against refugees?
- Judge found that the analogous person was a short term resident who was not a refugee: therefore it was not analogous
- However, it found that the policy could be justified on the basis that:
- (a) the allocation of housing stock is a matter of political and macro economic nature in the case of housing undersupply and so a generous margin of appreciation will be taken into account.
- (b) The objectives of the scheme were rational and a less intrusive measure to permit refugees to have a shorter waiting town would be "quite wrong" .

Proportionality in practice

- *Mayor of Bromley LBC v Persons Unknown* [2020] EWCA Civ 12
- Whether an injunction sought “borough wide” to prevent encampment by anyone was indirectly discriminatory against gypsies and travellers, particularly where other injunctions had been obtained so that they were squeezed out of being able to camp in large part of the UK
- Judge at first instance found it was disproportionate given :
 - (a) Very wide terms of the injunction
 - (b) Absence of any evidence of criminality
 - (c) No alternative lesser injunction sought.
 - (d) Cumulative impact of other injunctions.
 - (e) The rights of the gypsies to pursue a nomadic lifestyle
 - (f) No EIA assessment has been done.

How this all works in practice – a worked example: how and why the “No resource to public funds” rule adds up to unlawful racial discrimination



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Thank you for listening

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