

Equality law and the Planning Court



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Direct discrimination – s 13 of the Equality Act 2010

S 13(1): A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

“Protected characteristics” defined in s 4 as:

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

Indirect discrimination: s 19 of the Equality Act 2010

- A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s (S19(1)).
- S 19(2): a PCP is discriminatory if
 - (a) A applies, or would apply, the PCP to persons who do not share the characteristic;
 - (b) it puts, or would put, persons who share B’s 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.

Equality Act 2010 – burden of proof

- Section 136: Claimant needs to establish prima facie case that defendant has breached the EA 2010. Burden of proof then shifts to defendant to show that the Act was not breached:

136(2): If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened [the 2010 Act], the court must hold that the contravention occurred.

136:(3) subsection (2) does not apply if A shows that A did not contravene the provision.

Article 14 ECHR

- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground...”
- No claim under Art. 14 unless the facts "fall within the ambit" of another Convention right: *Petrovic v. Austria* (1998) 33 E.H.R.R, at [22].
- If the state creates a measure that affects the exercise of rights protected by the Convention, “*the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified*” (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 per Etherton MR at [55]).

Direct discrimination: *R. (on the application of Fraser) v Shropshire Council* [2021] EWHC 31 (Admin)

- Claimant argued that the Council had granted permission for residential development for older people with less open space than would be required for a conventional development and that older people were therefore treated less favourably.
- Officers' report concluded that, despite failing to provide the amount of open space required, the quality of the open space made it a better development proposal "irrespective of the intended residents of the development" (at [183]).
- Court found that no discrimination had occurred: permission would have been granted whether the intended residents were older people or not.

Direct discrimination: *Secretary of State for Communities and Local Government v Proudfoot Properties Limited* [2013] EWCA Civ 498

- Applicant sought permission to develop six houses with triple garages in an AONB. Applicant alleged:
 - 1. Refusal prevented the peaceful enjoyment of his possessions, contrary to Art. 1 of Protocol 1 ECHR (“A1P1”).
 - 2. planning permission had been granted to similar proposals in the area and that in refusing his application the Council had discriminated against him contrary to Art. 14.
- Court held: 1. refusal was a proportionate way of achieving legitimate aim of protecting AONB; and
- 2. No discrimination as comparator cases claimant relied upon presented different considerations, combined with pronounced harm to the area presented by his proposals – refusal therefore justified (see also *Holland* [2009] EWHC 2161 (Admin)).

Indirect discrimination: *Smith v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1650 (Admin)

- Smith claimed the definition of “Gypsies and Travellers” in 2015 *Planning Policy for Traveller Sites* as “nomadic” unlawfully discriminated against elderly and disabled Gypsies contrary to Art. 14 and s 19 of the EA 2010
- **Lost on both grounds:** court held that nothing “inherently objectionable” to different treatment of settled Gypsies and Travellers provided that the planning regime as a whole can accommodate the needs of settled Gypsies and Travellers – the 2015 Policy “is part of a patchwork of provisions” to address the needs of Gypsies and Travellers (at [80] per Pepperall J).

Moore v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin)

- *Planning policy for traveller sites* (2012): traveller sites in the green belt constituted inappropriate development.
- SoS stated in July 2013 that he would *consider* recovering appeals concerning the development of traveller sites on the green belt.
- However, SoS recovered *all* such appeals from September 2013 until September 2014
- Court found that although the policy for recovery was "not itself discriminatory", the application of the policy was discriminatory within the meaning of s 19: the appeals would take longer to determine than appeals made people other than travellers, and this approach was not a proportionate way of achieving the Secretary of State's aims (at [126]).

Connors v Secretary of State for Communities and Local Government [2017] EWCA Civ 1850

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Distinction between unlawfulness of the decision to recover the appeal and the decision itself:

- A decision to recover an appeal which may contravene equality law does not impugn the substantive decision itself “*unless that unlawfulness infected the decision-making process itself*” (at [34]).

Public Sector Equality Duty – s 149

- S 149(1) provides that, a public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the Equality Act 2010];
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Public Sector Equality Duty – s 149

- S 149(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Public sector equality duty

Discharging the duty:

- “the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty”:* (*R. (on the application of Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) per Lewis J at [113]).

PSED – failures to discharge duty

- **R. (on the application of Buckley) v Bath and North East Somerset Council [2018] EWHC 1551 (Admin)**: partial demolition and rebuild of estate: no regard was had to the impact on elderly residents of losing their homes and whether the impact was greater than those who did not share that protected characteristic. Outline planning permission quashed.
- **R. (on the application of Danning) v Sedgemoor DC [2021] EWHC 1649 (Admin)**: Error of law in failure to fulfil section 149 duty on basis of “a complete absence of evidence” in respect to Council’s consideration of the impact of proposed changed of use from pub to residential dwelling on persons with protected characteristics (at [56]).

PSED – failures to discharge duty

- **R. (on the application of Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin)**: Claimant successfully challenged decision to close leisure centre. Court held that the Council failed to have regard to impact of closure of the leisure centre on elderly and disabled persons.
- **LDRA Ltd v Secretary of State for Communities and Local Government [2016] EWHC 950 (Admin)**: Court not satisfied that Inspector had any had to the impact on disable people of loss of car park used to access the River Mersey. Planning permission quashed.

PSED – Decisions upheld

- In [*Gathercole v Suffolk CC \[2020\] EWCA Civ 1179*](#), the Court of Appeal held that when considering a planning application to build a new primary school the local planning authority had failed to have regard to the effect of aircraft noise on children with protected characteristics in breach of the public sector equality duty. The appeal was dismissed because applying [s.31\(2A\) of the Senior Courts Act 1981](#) it was highly likely that the same decision would have been made without the error.
- In [*R. \(Lakenheath Parish Council\) v Suffolk CC \[2019\] EWHC 978 \(Admin\)*](#) a decision to grant planning permission for a new primary school was upheld because the s.149 duty was discharged in substance even though the officer's report did not mention the PSED in terms.
- [*R. \(Coleman\) v Barnet LBC \[2013\] Eq. L.R. 223*](#): claim under s.149 dismissed on basis Council had done everything required of it under section 149 in weighing up the replacement of a garden centre used by elderly and disabled people with a school.

S.71 of the Race Relations Act 1976

- Section 71 now superseded by EA 2010.
- But Cases raising the duty under r [s.71\(1\)\(b\) of the Race Relations Act 1976](#) to “have due regard to the need ... to promote equality of opportunity and good relations between persons of different racial groups” remain relevant
- See e.g. [Baker v Secretary of State for Communities and Local Government \(Equality and Human Rights Commission intervening\) \[2009\] P.T.S.R. 809](#) and [R. \(Harris\) v Haringey London Borough Council \(Equality and Human Rights Commission intervening\) \[2011\] P.T.S.R. 931](#) and [Collins v Secretary of State for Communities and Local Government \[2013\] P.T.S.R. 1594](#)), in which the Court of Appeal held that for the purposes of race relations, gypsies were capable of being a separate racial group as defined by [s.3\(1\) of the 1976 Act](#).

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