

The Public Sector Equality Duty: an Overview and Update

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- Policy and context of the PSED
- The settled principles arising from:
 - *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158; [2009] PTSR 1506
 - *R (Bracking) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345
 - *Hotak v. London Borough of Southwark* [2015] UKSC 30
- Recent developments:
 - UN Convention on the Rights of Persons with Disabilities
 - Territorial extent of the PSED
 - Interaction with s. 31(2A) of the Senior Courts Act 1981

What is the PSED for?



- To guard against the creation *or continuation* of policies and practices which, if their impact remains unexamined, may disadvantage particular sections of our communities, *Brown* [30]
- To 'avoid the inadvertent' creation of disadvantage, *Luton BC* [115]
- To require decision makers to recognise and address equality issues, *Bapio*

Who does the PSED apply to?



- All public authorities listed in Schedule 19 to the Act
and
- Anyone performing a public function, in the exercise of that function (s.149(2))
- The duty cannot be delegated: *Brown, Bracking, Hunt*

When must due regard be had (1) ?



- PSED applies, when a public authority is “exercising a function”:
 - statutory function
 - exercising a discretion
 - carrying out a common law obligation
- Application of policy to individuals, *Pieretti*
- To an existing policy having an adverse effect, *Bapio*

When must due regard be had (2) ?



- Before or at the time a particular policy is being considered; not as a rear-guard action, *Bracking*
- Relevance of bad faith to a post-hoc EIA, *West Berks*
- Duty is ongoing; may arise after a policy has been implemented, *BAPIO*

What does “due regard” mean(1)?



See *Brown*, *Bracking* and *Hotak*:

- Not a duty to achieve a result, but to have “due regard” to the need to achieve the goals in s.149(1)(a)-(c)
- “appropriate in all the circumstances” not helpful as a guide, *Hotak*
- Regard may be had to relevant countervailing factors

What does “due regard” mean(2)?



- “exercised in substance, with rigour, and with an open mind” , *Brown*
- General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria, *Meany*
- Distinction between “due regard” and “weight”, *Hurley and Moore*
- Requirement to obtain evidence where necessary, *Hurley and Moore*

Due regard to what?

- The impact of performance of function on all persons with the protected characteristic and also on any particular class of persons within a protected characteristic who might most obviously be adversely affected by the proposal, *Bracking* [40].
- “Due regard”: that which is appropriate in the circumstances. Not necessary to investigate every possible ramification: “councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum”, *Bailey* [102].

Confronting the adverse effects



- The adverse effect of the measure on any protected group must be identified, assessed and confronted.
- The perils of failing to do so:
 - “[m]embers are heavily reliant on officers in taking these decisions. That makes it doubly important for officers not to simply tell members what they want to hear but to be rigorous in both enquiring and reporting to them”, *R (Domb) v. LBHF* [2010] EWCA Civ 941: per Sedley LJ [79].
 - “what was put before the Minster did not give to her an adequate flavour of the responses received indicating that independent living might well be seriously put in peril for a large number of people”, *Bracking* [62].

- If a risk of an adverse impact is identified, consideration should be given to measures to avoid that impact:
 - *Rahman* [2011] EWHC 944 [35].
- Need for realism about any proposed mitigation
 - *Blake* [2014] EWHC 1027: successful challenge to a decision to terminate the licence of a soup kitchen. No consideration in the EIA of the possibility that the soup kitchen would not reopen.

Evidencing the decision



- Importance of evidence, *Bracking*
- No duty to carry out an EIA, *Brown*
- Failure to provide evidence of having “due regard” and/or no evidence that all relevant protected characteristics considered: *Cushnie, Moore, Winder, Fakh*
- Lack of judicial appetite to forensically analyse an EIA, *Unison*

UN Convention on the Rights of Persons with Disabilities



- *Aspinall*: UNCRPD does not affect the nature or extent of the PSED, still less the way in which the court will approach the question of whether the duty has been discharged
- This ignored the effect of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009

- *Hottak*: Afghan nationals working in Afghanistan
- Approach in *Lawson v. Serco* (in respect of unfair dismissal) applied to the 2010 Act
- If Parts 3 and 5 of the 2010 Act did not apply, section 149(1)(a) had no relevance
- But sections 149(1)(b) and (c) did apply (and, e.g. may apply to activities of FCO abroad, and to distribution of aid by DFID, even if policy has impact wholly or partly outside GB)

Section 31(2A) SCA 1981



- *Hawke & Hawke:*
 - relief in section 31(2A) must include a declaration
 - section 31(2A) does apply to the PSED
 - PSED is no more important than other statutory duties

- *Logan:*
 - section 31(2A) did not prevent Judge from giving a declaratory judgment

- Success in PSED claim only will usually lead to recovery of reasonable costs, *Hunt*

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