Consultation – the impact of section 149 EA 2010

Section 149 in outline

1. When carrying out their functions, public authorities must have *due regard* to the *need* to:

> *(a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;*
>
> *(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.*

2. Each 'need' represents a particular goal, which if achieved, would further the overall goal of the equality legislation. But the authority is not under a duty to achieve those goals (ie to eliminate discrimination, advance equality of opportunity, foster good relations etc). It is under a duty to have due regard to the need to achieve those goals.

3. 'Due regard' is the regard that is appropriate in all the circumstances: *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809, [31].

4. Paying due regard is an essential preliminary to any decision: *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [3].

5. While the circumstances may point strongly in favour of undertaking a formal equality impact assessment, that is not a statutory requirement: *R (Brown) v Work and Pensions Secretary* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, [89]. In that case the Court identified a number of helpful principles that demonstrate how a public authority should fulfil its due regard duty: [90]-[96]. These included that the due regard duty must be fulfilled before and at the time that a particular policy which might affect relevant persons is being considered; the duty has to be integrated within the discharge of the public functions of the authority; and the duty is a continuing one.

6. The court should ask whether, as a matter of substance, there has been compliance; it is not a tick box exercise: *R (on the application of Greenwich Community Law Centre) v Greenwich London Borough Council* [2012] EWCA 496.

7. It is only if a characteristic or combination of characteristics is likely to arise in the exercise of the public function that they need be taken into consideration: *R (Bailey) v Brent London Borough Council* [2011] EWCA Civ 1586 at [83].

8. However, there may be cases where the possibility exists that a protected characteristic might be engaged, in which case there may be a need for further investigation before that characteristic can be ignored: see *R (on the application of Greenwich Community Law Centre) v Greenwich London Borough Council* [2012] EWCA 496 at [30]. So whilst an authority has to have due regard to all aspects of the duty, some of them may immediately be rejected as plainly irrelevant to the exercise of the function under consideration - often subliminally and without being consciously addressed.

9. The duty applies not only to the formulation of policies, but also to the application of those policies in individual cases: *Pieretti v Enfield LBC* [2011] HLR 3.

10. The duty impacts upon authorities' obligations in terms of the level of consultation that needs to be undertaken. There may be no *express* statutory requirement for the authority to consult on a particular issue, but the obligation may be an *implied* one as a result of section 149.

11. This is because the duty requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required: *R (on the application of Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin) at [89].

12. The public authority concerned will have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account (for example) disabled persons' disabilities in the context of the particular function under consideration: *Brown* at [85].

Consultation issues and the PSED in practice

13. How do the courts treat these consultation issues in practice? We can see from a consideration of some of the recent cases dealing with cuts to public expenditure, in which breach of the PSED was contended. In *R (on the application of JM and NT) v Isle of Wight Council* [2011] EWHC 2911 (Admin) you will recall that the council decided to change its eligibility criteria for community care services, and the claimants were both severely disabled persons who stood to receive significantly less in the way of services under the revised criteria. There had been an attempt to consult with persons who would be affected by the change, but the court held that it was not adequate because:

    a. It provided insufficient information to enable those consulted "to give intelligent consideration and an intelligent response", applying the *Gunning* criteria.
    b. Although it described the proposals in outline it did not provide any detail about the numbers of users whose support would be reduced
    c. It did not give any detail about the costs and potential savings.
    d. It did not explain what types of services would or would not be included under the revised criteria.
    e. Consultees were left uncertain as to what impact the revised criteria would have on the assistance they received from the Council.

14. Putting that inadequate consultation in terms of the PSED it was held at [119] that:

> *"Lack of adequate consultation was not pleaded as a freestanding ground for judicial review in this case. Consultation only fell to be considered as part of the discharge of the s.49A DDA 1995 duty. Looked at from this perspective, the flaw was that the consultation responses did not, and could not, fully reflect the experiences and views of users and their carers, because they were not provided with the information they required to make an informed response. Council Members were therefore deprived of important information as to the potential impact of the proposed changes, which meant that they had insufficient information when they were discharging their s.49A DDA 1995 duties."*

15. However although there may therefore be an implicit requirement to gather evidence relevant to the PSED prior to exercising a particular function, that will not be necessary if the authority properly considers that it can exercise its duty with the material it has. So in *Hurley and Moore* (which was a challenge brought by two students to the decision to allow universities to increase fees up to £9000 per year) it was said that

> *"...it seems to me misleading to say that there was no consultation or inquiry in this case. There was very extensive consultation by the Browne panel and this engaged closely with the position of the poorer students, many of whom will be from ethnic minorities and disabled students. This was not legislation passed in a vacuum with no appreciation of the likely effects on protected groups. If the question were whether there had been adequate consultation about the effects of the proposals on the lower socio-economic groups, the only conceivable answer in my view would be that there had been."*

16. In R (on the application of Williams) v Surrey County Council [2012] EWHC 867 (QB) (03 April 2012) the claimants contended that section 149 had been breached by the council when it had decided to change the way it provided its library services. In short, it had decided to make a much greater use of volunteers to staff and run its libraries (as opposed to the largely professional council employees who had hitherto run them. It was a costs cutting exercise. One of the main criticisms was that although there had been some consultation with users of the libraries (particularly disabled users) the results thereof was not taken proper account of when the decision to change the method of running the libraries.

> *"The November 2010 EIA explicitly warned that residents and equality adviser groups had not yet been consulted and that such consultation would be important to inform the proposals, and to develop mitigating actions against negative impacts. It also stated that no final decision would be taken by cabinet until that consultation had been completed and the results analyzed."* [119]

17. It was accordingly held that section 149 had been breached because the council did not consider a relevant matter, namely the nature and extent of the equality training needs of volunteers which had emerged from the consultations with the various community groups, and the way in which the council officers envisaged that such training needs might be met.

Impact on the public authority of a decision being quashed by the court

18. In *Hurley and Moore* the court considered that there had been a breach of the PSED by the Secretary of State, because there had not been a proper consideration of all aspects of the duty. The concentration had been on the manner in which the increased fees might impact on poorer students; there had been no view taken (for instance) of aspects of the duty such as whether there might be harassment of disabled persons as a result of the proposed changes. The court held that it could not discount the possibility that a more precise focus on the specific statutory duties might have led to the conclusion

that some other requirements were potentially engaged and merited consideration. So there had not been compliance with the duty and a declaration was made to that effect.

19. But the Regulations under scrutiny were not quashed. The Court was satisfied that the Secretary of State did give proper consideration to those particular aspects of the duty which related to the principle of levying fees and the amounts of those fees. It held there had been very substantial compliance with the duty.

20. So it was held that

> *"I do not consider that it would be a proportionate remedy to quash the regulations themselves. Whilst I have come to the conclusion that the Secretary of State did not give the rigorous attention required to the package of measures overall, and to that extent the breach is not simply technical, I am satisfied that the particular decision to fix the fees at the level reflected in the regulations was the subject of an appropriate analysis. Moreover, all the parties affected by these decisions – Government, universities and students – have been making plans on the assumption that the fees would be charged. It would cause administrative chaos, and would inevitably have significant economic implications, if the regulations were now to be quashed. I emphasise that those considerations would not of themselves begin to justify a refusal to quash the orders if the breach was sufficiently significant. It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to a quashing of the relevant decision, however inconvenient that might be. But in circumstances where, for reasons I have given, there has been very substantial compliance in fact, and an adequate analysis of implications on protected groups of the fee structure itself, these considerations reinforce my very clear conclusion that quashing the orders would not be appropriate."*

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