

Paying attention to inequality: the development of the positive equality duties

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Introduction

1. Many criticisms may be levelled at the present government, but it cannot be said that it has been unwilling to think creatively the reach and breadth of equality law. Besides extending individual rights in employment, services and education, it has also sought to 'constitutionalize' anti-discriminatory practice.¹ For example, subject to exemptions (some of which are very significant) '*public functions*' must now be discharged to avoid not only human rights breaches but also the forms of individual discrimination prohibited by the Race Relations Act 1976 (RRA), Disability Discrimination Act 1995 (DDA) and Sex Discrimination Act 1975 (SDA). The Equality Act 2010, assuming it is fully brought into force, holds out the tantalising prospect of further advances.
2. To date though, perhaps the most unexpected development in this trend has been the willingness of the Courts to develop and rigorously enforce the three positive equality duties brought into force between April 2001 and 2007. Both discrimination and administrative lawyers were initially sceptical about the duties' potential to make a difference for their clients, but the Courts have taken a principled and purposive approach in many of the cases decided so far. Notably all but one of them² have been brought by individuals or non-governmental organisations rather than the Equality and Human Rights Commission or its predecessors, though the new Commission has made actively intervening in such cases a key priority in its litigation strategy.
3. These developments are discussed below. First, it is helpful to give a sense of what the duties require, their origins and which public authority activities are caught.

¹ See further '*Equality: The Neglected Virtue*' Rabinder Singh QC [2004] EHRLR 141.

² *R (Equality and Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147 (Admin).

Form and origin of the duties

4. In their current form the duties concern race, disability and gender equality. Each takes a broadly similar form: an overarching requirement to have '*due regard*' to a series of identified needs (referred to below as statutory imperatives) coupled with a regulation making power to secure its better performance.
5. The earliest to come into force, s71(1) of RRA as amended provides:

Every body or other person specified [in the Schedules to the Amendment Act], shall in carrying out its functions, have due regard to the need-

- (a) *to eliminate unlawful racial discrimination; and*
- (b) *to promote equality of opportunity and good relations between persons of different racial groups.*

6. S49A(1) of the DDA says this about disability equality:

Every public authority shall in carrying out its functions have due regard to –

- (a) *the need to eliminate discrimination that is unlawful under this Act;*
- (b) *the need to eliminate harassment of disabled persons that is related to their disabilities;*
- (c) *the need to promote equality of opportunity between disabled persons and other persons;*
- (d) *the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;*
- (e) *the need to promote positive attitudes towards disabled persons; and*
- (f) *the need to encourage participation by disabled persons in public life?*

7. The most recent of the duties, s76A(1) of the SDA provides:

A public authority shall in carrying out its functions have due regard to the need –

- (a) *to eliminate unlawful discrimination and harassment, and*
- (b) *to promote equality of opportunity between men and women.*

8. Duties of this kind do not require policy or decision makers to bring about a particular substantive outcome. They are also primarily concerned with processes, rather than the legality of particular acts of discrimination which impact on individual 'victims'. Nothing explicit is said about remedies or enforcement (though decisions made by reference to them or failures to discharge them can be challenged in judicial review proceedings). Importantly all concern more than the simple avoidance of discrimination, which would be unlawful under the RRA, DDA or SDA. As Munby J observed in *R (E) v JFS* [2008] EWHC 1535/1536 (Admin) at [213]:

Proper compliance with section 71 requires that appropriate consideration has been given to the need to achieve statutory goals whose achievement will almost inevitably, given the use of the words 'eliminate' and 'promote', involve the taking of active steps.

9. Similarly Dyson LJ noted in *R (Baker) v Secretary of State for the Environment* [2008] EWCA (Civ) 141 at [30]:

... promotion of equality of opportunity ... will be assisted by, but is not the same thing as the elimination of racial discrimination ... the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination...

10. Parliament's aim in extending anti-discrimination law in this way is the elimination of institutional discrimination. S71 was the legislative response to a recommendation of Sir William Macpherson's Inquiry into the ineffectual police investigation of the racist murder of Stephen Lawrence. In paragraph 46.27 of its report, the Inquiry stated:

We all agree that institutional racism affects the Metropolitan Police Service, and Police Services elsewhere. Furthermore our conclusions as to Police Services should not lead to complacency in other institutions and organisations. Collective failure is apparent in many of them, including the Criminal Justice system. It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.

11. Explaining Government thinking in imposing a statutory duty to counter such complacency, the sponsoring Minister, Mike O'Brien commented:

The Government sees this new duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities but in the delivery of services to ethnic minorities... In considering any new element of Government policy, a Minister must consider the implications for ethnic minorities and race equality generally... The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services – it should be part of the mainstream of policy consideration.³

12. The clearest and most principled statement of the legislative intent comes from the first case in which s71 was litigated, *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, [2006] IRLR 934⁴. This was the third challenge to the eligibility criteria of *ex gratia* government compensation arrangements intended to discharge the 'debt of honour' owed to British prisoners of war and civilian internees imprisoned in the Far East by Japanese forces during World War II. That debt was said to be owed because of the horrendous suffering endured at the hands of the Japanese. Yet eligibility was limited to British civilians who had either a grandparent or parent who were born in the UK, or were born here themselves. Tellingly, this restriction was called the 'bloodlink'. Deliberately excluded from the compensation arrangements were those British subjects who were imprisoned by the Japanese on account of their British nationality, but who lacked a connection by birth or ancestry to this country. Between 1700 and 2500 people were refused on this basis in June 2001, just a few months after s71 had come into force. One was Diana Elias, an 81 year old pensioner. She realised long before seeking legal advice that the bloodlink criterion was, in the words of a letter she wrote to the Prime Minister, '*prejudicial and biased*'. In her eyes, it artificially created '*two classes of British subjects*' yet the Japanese had drawn no such distinction in their dealings with internees.

13. The CA held that the criteria were indirectly discriminatory on grounds of national origins and that this could not be justified. They also commented extensively on the undisturbed first instance ruling that there had been a breach of s71. This was highly significant to issues of justification, as discussed below. But the opportunity was also taken to highlight the significance of the duty for both policy makers and the Courts. As Arden LJ explained at [274]:

Anti-discrimination legislation has implications for the administration of justice..., judges have a role to play in the process of transforming

³Speech of Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department, HC Standing Committee D, 2 May 2000.

⁴ See further John Halford, *Statutory Equality Duties and the Public Law Courts* [2007] JR 89

society from one in which inappropriate distinctions have in some cases been drawn between individuals based purely on their race, gender or other grounds to a society in which, through the integration of laws prohibiting discrimination in specified ways, each individual is valued and treated equally....

But legal proceedings are not the only way of policing anti-discrimination legislation. Monitoring and self-assessment by public bodies in their decision making can also further the aims of such legislation, and this is the role of section 71 of the 1976 Act...

It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

14. How can s71 and its sister duties in the DDA and SDA achieve these aims? There are three answers. The first is through the specific '*better performance*' duties imposed by regulation. Second, the Courts have required '*due regard*' to be had to the statutory imperatives conscientiously, at critical times and in a transparent way. Last, and most importantly, it has become clear that the duties can be enforced with real and meaningful consequences as against the public authorities to which they apply, notwithstanding the focus being on regard to the need to take steps rather than the actual taking of them: see *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at [81] and [84]. Before discussing each of these practical issues in detail, it is worth identifying the kind of decisions to which the duties apply.

Scope of the duties

Public authorities and functions

15. A subtly different approach is taken depending on which equality duty is engaged.
16. For s71, there are set lists scheduled to the RRA and implementing regulations identifying which public bodies are caught by the overarching duty and subsets of them to which the '*better performance*' regulations apply. Almost all obvious public bodies are caught: government departments, local authorities, the police and health services. There are some interesting and significant others: schools are subject to the overarching duty and some of the better performance duties, including, for example, a specific obligation to produce an

equal opportunities policy. The overarching duty applies to all the functions of the Arts Council, the Tate Gallery and the British Museum. A number of the Royal Colleges of medicine are subject to it, though only in respect of their public functions.

17. S49A of the DDA and s76A(1) of the SDA take a wholly different approach echoing that of the Human Rights Act 1998. They provide that the overarching duties apply to *'any person certain of whose functions are functions of a public nature'* but not where such bodies are specifically excluded by regulation. Controversially, regulations were made to absolve the Post Office of its s49A duties shortly before implementation of a closure programme. When challenged in *Brown* the Divisional Court accepted that the decision to do so itself engaged s49A but found this had been discharged in substance.
18. S49A also provides *'In relation to a particular act, a person is not a public authority by virtue only of subsection (1)(a) if the nature of the act is private.* Thus for DDA purposes, there will be 'pure' public authorities to whose actions the overarching equality duty will always apply and 'hybrid' ones which will be immune when acting in an insufficiently 'public' way. S76A(1) SDA carries a further similar caveat: the *'functions'* to which it applies must be *'functions of a public nature'*.
19. All of this begs the first of a series of important questions the Courts have yet to grapple with: do public functions for s49A and s76A(1) purposes embrace employment decisions and if so, which ones? The instinctive administrative lawyer's response is to say that employment decisions (to dismiss or amend contractual terms, for example) are made outside the reach of public law altogether. Similarly, a hybrid authority cannot be challenged under the Human Right Act 1998 for the way it makes employment decisions.
20. This distinction may not be so clear cut when it comes to the positive equality duties. For one thing, if s76A(1) was not intended to apply to employment practices or policies, there would be no obligation to have due regard to the need to avoid some of the most prevalent forms of unlawful discrimination against women. It might also be said that while individual employment decisions remain sufficiently private in nature to fall outside its reach, the same cannot be said when it comes to policy making, especially in organisations such as the NHS.

No 'contracting out'

21. The Courts have made it clear that, when an institution is seized of one of the duties, it and it alone will be responsible for having due regard. *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC (Admin) 1941 concerned the terms of NHS guidance on identifying the

class of patients who would most benefit from (and so normally receive) Alzheimer's disease inhibitor drugs. In the guidance as framed, these would be identified exclusively by means of a Mini Mental State Examination (MMSE), a language and cognition test which the defendant, NICE, accepted had discriminatory effects on persons of non-UK national origins and those with certain disabilities. The argument that doctors could use their 'common sense' to mitigate the effects of the guidance being applied strictly was held to be misconceived by Dobbs J at [92]-[96]:

Instead of looking at how NICE as a public body could itself promote equal opportunity, having accepted that the Guidance could have a discriminatory effect ... the approach taken was to leave it to others to sort out in the hope and expectation that they would. That, in my judgment is not good enough ...

Staged decision making

22. Turning to the structural question, the Courts have also indicated that discharging the duty falls to the decision maker primarily responsible for the function on which it bites. A local authority committee, for example, will need to be made aware whenever one of the duties is engaged and, at a minimum, of the key points and conclusions of any assessment of impact: see *R (Domb and others) v London Borough of Hammersmith and Fulham* [2008] EWCA 3277 (Admin). It cannot simply be assured that an officer has carried out such an assessment as happened in *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin). At [40] Wilkie J held:

There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to 'potential conflict with the DDA' - this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act...

23. In some situations those who frame policies will be different from the decision makers who implement them. A positive equality duty may well apply to both. For example, in *R (Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWCA 1865 (Admin) Silber J criticised not only the failure of the school to frame its equal opportunities policy by reference to s71, but also the failure of its head and appeal panel to have regard to the section when considering a Sikh girl's application for an exemption from the uniform policy so that she could wear her kara. In *R (Baker and others) v Secretary of State for Local Government and others* [2008] EWCA Civ 141 the duty was held to apply

to an inspector's decision on an individual planning application and in *O'Brien and others v South Cambridgeshire District Council* [2008] EWCA Civ 1159 when a planning authority is considering whether to seek an injunction to restrain a breach of planning control. Although in *R (FB) v Director of Public Prosecutions and Another* [2009] EWHC 106 (Admin) the Divisional Court considered that s49A added nothing to normal public law constraints on decisions about proceeding with prosecutions, at [62] they suggested that it could have a bearing at the investigatory stage, for example, in considering special arrangements for disabled witnesses.

The specific better performance duties

24. The first way in which a relevant due regard duty must be discharged is when particular steps are prescribed for its better performance under the associated regulations. Not all public bodies are subject to these additional duties and there is some variation as to what is required. For example, Article 2 of the Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458) requires certain public authorities to periodically publish, assess and monitor a Race Equality Scheme which identifies those of its functions an authority considers caught by the overarching duty. An equality scheme is not determinative of those functions; the compensation arrangements at issue in *Elias* had never been thought to have race equality implications so the Ministry of Defence's Scheme was silent about them. Similarly in *Eisai* it emerged that the original equality scheme operated by NICE had conspicuously failed to identify the equality implications of its primary function. Notwithstanding this, any equality scheme will always be worth looking at when contemplating litigation to enforce an overarching positive equality duty.
25. The absence of a scheme, or of a lawful one, can now only be challenged by the Equality and Human Rights Commission. However, when a scheme is in place, and the decision making process it proscribes is not followed (including any impact assessment), the failure to do so without good reason will be a free standing legal error: see *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 at [27]. This is particularly significant in the disability context because, where disability equality schemes are required, disabled people must be involved in their development: see regulation 2 of the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2005/2966). Again, the implications of this requirement have yet to be clarified.

What is meant by 'due regard'?

26. Although the legacy equality commissions each produced helpful Codes and guidance, the responsibility of developing the concept of 'due regard' has been left to the Courts. Seven principles have emerged from *Elias* and subsequent cases.

Proper awareness of the statutory imperatives

27. It might be thought uncontroversial that those responsible for having due regard must be aware of that duty. This was the first principle enunciated by the Divisional Court in *Brown* at [90] and [91] picking up on *Chavda* at [40]. A similar point was made by Davis J in *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) at [74]:

After all, whatever the general culture, there must, as the authorities show, in any individual case be the conscious directing of the mind to the obligations under the discrimination legislation before a relevant decision is made.

28. The *Meany* decision was cited with approval, in *R (Boyejo and others) v Barnet London Borough Council* [2009] EWHC 3261 (Admin), which held (at [57]) that the *Wednesbury* test applied to the consideration of countervailing factors, but 'not to the question of whether the necessary due regard has been had'. HHJ Milwyn Jarman QC concluded that although the relevant decision-makers had some awareness of the equality considerations, it was not such as to enable them to take a 'substantial, rigorous and open-minded approach' to them ([58] and [59]).
29. This line of authority is, however, not easy to square with Dyson LJ's comment in *Baker* at [40] that it was 'immaterial' whether the Planning Inspector whose decision had been challenged was aware of the existence of the duty. Further doubts are raised by the decision of Kenneth Lindholm QC sitting as a Deputy High Court Judge in *R (Harris) v London Borough of Haringey* [2009] EWHC 2329 (Admin). Here at [130] the Judge considered no 'conscious' due regard was required at all because:

...the considerations arising under section 71 effectively merge with the matters to which the Council had to have regard by virtue of its fundamental duties under the planning legislation to make decisions on applications for planning permission having regard to all material considerations...

30. An appeal is due to be heard on this point in early May.

Due regard must be take place on a proper, informed footing

31. Although an impact assessment may not be necessary, there can be no due regard at all if the decision maker or those advising it make a fundamental error of fact in the sense discussed in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49. So held Blake J in *R (Lunt and another) v Liverpool City Council and Equalities and Human Rights Commission (Intervener)* [2009] EWHC 2356 (Admin).
32. Here the Defendant had argued that it was entitled to conclude that its city's hackney taxi fleet was accessible to '*wheelchair-users as a class*' and so the duty to make adjustments in accordance with s21E DDA was not triggered. The judge found that the evidence before the licensing committee showed serious difficulties for some wheelchair users, of whom some, like the claimant Mrs Lunt, could not access a safe and secure position in order the taxis that formed the current fleet at all. It was not necessary to show that there was a denial of access to a benefit for '*wheelchair users as a whole...undifferentiated as to the size of the chair or the particular disability that may distinguish one group of wheelchair users from another*'. The factual error was also fatal under s49A DDA, since the true factual position was a mandatory relevant consideration under s49A DDA and at common law: the licensing committee therefore could not lawfully exercise its discretion if it did not properly understand the problem, its degree and extent.

How much regard is called for will vary depending on the context

33. There will be some (though probably not many) decisions made by public authorities which do not have equality implications. In these circumstances the amount of regard needed will inevitably be negligible. To hold that any decision impacting upon one or the groups with which the duties are concerned can be made only after a proper assessment would, in the view of the Court of Appeal, '*promote form over substance*': see *Baker* at [64]. That said, the threshold for one or more of the duties to be triggered is a low one. In *Elias* at first instance [2005] EWHC 1435 (Admin) it was said to have been crossed because there was an '*issue which needed at least to be addressed*': see [98]. Once that threshold is crossed, the amount of regard called for (that is, 'due') will be that appropriate in all the circumstances including the extent of the inequality experienced by the protected group: see *Baker* at [31].
34. Due regard does, however, not involve treating the statutory imperatives as cards that trump all other relevant considerations. As the Divisional Court observed in *Brown* at [82], when adverse impact is identified and given proper weight, it will then be a factor that joins others in the balance:

At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational: see Dyson LJ's judgment in Baker at paragraph 34.

35. See also *R (Equality & Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147 (Admin) at [65] per Wyn Williams J 'it must be for the Defendant to assess the weight to be given to the many factors which are necessarily to be considered.'

Timing

36. Due regard must be exercised proactively whenever a function is caught by one of the duties, whether that be policy making or making decisions based on a policy. In *Elias* at first instance, in response to an submission that s71 could be discharged by ventilating concerns about discrimination in the course of litigation, Mr Justice Elias responded at [99]:

[T]he purpose of this section is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised - and not when it has become the subject of challenge. Moreover... there will be in many cases a tendency. to make the assessment whether discrimination might arise with an eye on the outcome of the litigation. That will not produce the same unbiased analysis as might occur if consideration is given to the section 71 factors at the proper time.

37. This was underscored by Arden LJ on appeal at [274]:

It is the clear purpose of section 71 to require public bodies ... to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them...

38. Compliance should therefore never be treated as a 'rearguard action following a concluded decision' but exists as an 'essential preliminary' to any such decision, inattention to which 'is both unlawful and bad government': see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ at [3]. This point was echoed by Moses LJ in *Kaur* at [24]. In *Brown* at [91]-[92], adopting the submissions of Helen Mountfield for the intervener, the Divisional Court emphasised the need for conscientiousness, rigour and an open

mind when due regard is had. Its contribution to decision making will therefore have much in common with a proper consultation process. The significance of late compliance in terms of remedies is discussed below.

Structured due regard

39. Due regard involves more than a tick box exercise. As the CA stressed in *Baker* at [27], mere recitation of a mantra will not by itself show a positive equality duty has been discharged, but the '*substance and reasoning*' of the decision must be examined. On the other hand, emphasised the Court at [36], failure to make explicit reference to the relevant positive equality duty will not, of itself, be fatal to a decision, a point reiterated in *Brown* at [93].
40. Where a policy which is drafted with the specific aim of ensuring due regard is had and it is followed with appropriate rigour this will be highly material to the question of whether the relevant positive equality duty has been discharged: see *Baker* at [40]. This approach was followed in *R (Isaacs) v Secretary of State for Communities and Local Government* [2009] EWHC 557 (Admin) where Elias J commented at [53]:

The classic situation where the Section 71 obligation bites is where some policy is in the course of being considered. The duty, to put it loosely, to have regard to race relations implications is very important. But where a policy has been adopted whose very purpose is designed to address these problems, compliance with Section 71 is, in my judgement, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose.

41. In circumstances where there is a significant equality issue, that reasoning will need to be clear and structured. In *Eisai the Alzheimer's Society* argued that due regard for s71 and s49A would normally involve completion of a formal equality impact assessment (analogous to the obligation to complete an Environmental Impact Assessment before certain planning decisions are made). Dobbs J's attention was drawn to the Statutory Codes and guidance about this issued by the CRE and DRC. She did not make a specific finding on this submission, but set out at [92] the minimum standards for due regard in the context of NICE's decision making:

There was a series of simple questions the Panel could have asked ... such as: i) has the Appraisal Committee taken into account any anti-discrimination legislation in coming to its decision? ii) in the light of NICE's anti-discrimination duties, given that it is accepted that the

use of the MMSE test as the benchmark for [Alzheimer's disease] severity discriminates against certain groups, and given the purpose of the Guidance, were/are the Appraisal Committee/Appeal Panel satisfied that the Guidance properly and clearly ensures, without the need for interpretation, that those atypical groups are put in the same position as those scoring 10-20 on the MMSE test for whom treatment was recommended? Rather than relying on what clinicians could do to eliminate the risk, and having regard to the need to eliminate discrimination, what could NICE itself do to reduce or eliminate any risk of disadvantage?

42. The Divisional Court returned to the question of impact assessments in *Brown*. Here there was said to be a 'wealth of evidence' demonstrating due regard, but no formal assessment had been carried out. The Court noted that impact assessments were not explicitly required by s49A nor the better performance regulations. In such circumstances, it noted at [89],

[a]t the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability.

43. When due regard is had, failure to comply with the statutory codes issues by the Equality and Human Rights Commission's predecessor bodies may well be significant, however. In *Kaur Moses* LJ considered there to be an unlawful breach of the CRE Code (to which the courts must give regard) because the failure to follow it was unexplained. Though illegality was found in *Brown*, the Divisional Court noted at [119]-[120] that ignoring, departing from, misconstruing, or misapplication of a Code could be 'a powerful factor that leads a court to conclude there was a breach of statutory duty'. Any departure would call for 'cogent and compelling' reasons.

Grappling with questions of justification

44. Sometimes the exercise of posing and addressing such questions or undertaking a formal assessment will show that there is a discriminatory effect which would amount to unlawful discrimination for DDA purposes, were there no justification (or indirect and thus potentially unlawful discrimination under the RRA or SDA). Faced with this very situation in *Eisai*, Dodds J commented at [93]:

With regard to the question of justification, the Appeal Panel needed to give close scrutiny to the reasons given for lack of specific provision in

relation to the atypical groups and properly test whether they were proportionate and pursued a legitimate aim. Whilst purporting to deal with proportionality in its decision, the Panel never in fact tested the main reason put forward for not including those with language difficulties and those with English as a second language as exceptions. This was an important omission, particularly in the light of the acceptance by NICE of the potentially discriminatory impact of the approach, and in the light of the concerns expressed by a number of parties.

45. To summarise Dobbs J's analysis, due regard involves:

- a. (at a general level) ensuring account is taken of equality legislation when a decision is made
- b. where there is a risk of discrimination, asking and addressing the question of what could be done to eliminate that risk
- c. where there are actual discriminatory effects, ensuring that thought has been given to the steps necessary to put those who would be adversely affected in the same position as those who would not (in other words, eliminate the discrimination)
- d. where identified discriminatory effects are indirect, and the public body nevertheless considers they may be justified and incapable of being eliminated entirely, it must properly test whether they pursue a legitimate aim and are proportionate.

46. This was echoed in *Kaur* at [43]. Once LB Ealing had:

identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution.

Transparency and documentation

47. These issues were considered in *R (BAPIO Action Ltd & Yousaf) v Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199. The Home Office asserted that it had turned its mind to s71 before drafting changes to immigration policy on foreign doctors but accepted that there was no formal record. Stanley Burnton J directed that any note or memorandum that existed to evidence this 'informal assessment' having taken place should be put in evidence. Nothing was produced, provoking this comment at [69]:

If there had been a significant examination of the race relations issues involved in the change to the Immigration Rules, there would have been a written record of it. In my judgement, the evidence before me does not establish that the duty imposed by section 71 was complied with.

48. He went on to declare that s71 had been breached in these circumstances. Similarly, Moses LJ commented in *Kaur* at [25]:

The process of assessments should be recorded ... Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of his proposed policy, which section 71 requires. But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor.

Enforcing the duties

49. Remedies in judicial review are always a matter of discretion and, up until very recently, there was some concern that, although the Courts were willing to declare that positive equality duties had been breached, the consequences were insufficient to encourage future compliance. In *Elias* this made little difference to the outcome given the unlawful indirect discrimination finding. In *Eisai*, however, the defendant was encouraged by Dobbs J to resolve the discrimination inherent in the challenged guidelines before the final judgement was handed down. Special interest groups that might well have been consulted as part of a proper assessment process were deprived of an opportunity to comment. How did this approach to remedies sit with the obligation to have due regard at the time decisions were made? Public bodies might well take comfort in the fact that, however serious their failure to have due regard at the right time, it could always be remedied during the course of proceedings, as in *BAPIO*, or once they were concluded.
50. The Courts now appear willing to take a harder line on remedies than before. The normal course will be to quash a decision (including one to make a policy) or action which fails to have due regard when this is required unless having it would almost certainly make no real difference as Munby J had thought was the case in *JFS*). Quashing orders were made in *Watkins-Singh* and *Kaur* (effectively halting the funding cut under challenge). In *R (C) v Secretary of State for Justice*

[2008] EWCA Civ 882 the Court of Appeal explained their significance in this context. *C* concerned the legality of changes to the rules concerning forceful restraint of children in secure training centres. These had not been preceded by a race equality impact assessment because it was considered that they were not significant enough in policy terms to warrant one. The Divisional Court ruled that this was unlawful but went on to find that the defect was cured by a late review of the changes of the kind that occurred in *BAPIO*.

51. At [49] Buxton LJ held that this was not good enough:

[A]s a matter of principle it cannot be right that a survey that should have been produced to inform the mind of government before it took the decision to introduce the Amendment Rules was only produced in order to attempt to validate the decision that had already been taken.

52. The failure to produce an assessment at the proper time was ‘*a defect... that is of very great substantial, and not merely technical, importance*’ and the rule of law itself therefore required that the Rules be quashed ([54-55]).

The future

53. What does the future hold for the positive equality duties?

Legislative changes

54. The most immediate answers are found in s149 of the Equality Act 2010. When in force this will impose single ‘streamlined’ equality duty to replace the current free standing ones. Its scope will be extended to cover gender reassignment, age, sexual orientation and religion or belief. This, the government has said, will help public authorities to ‘*focus their efforts on outcomes, rather than on producing plans and documents*’.⁵ Earlier proposals limiting the right to challenge failure to discharge the positive equality duties to the Equality and Human Rights Commission were abandoned.

Further litigation

55. Perhaps the most interesting issue yet to be resolved by the Courts is the precise relationship between failure to discharge an equality duty and prima facie discriminatory decisions which call for justification if they are to be lawful.

⁵ See Framework for a Fairer Future – The Equality Bill Cmmd 7331

56. The failure to discharge a positive equality duty at the proper time will certainly make subsequent acts of individual discrimination that might otherwise be justifiable far harder to defend as in *Elias* where, noted Mummery LJ at [133], the Secretary of State responsible for the compensation scheme had:

to justify something which he did not even consider required any justification. In these circumstances the court should consider with great care the ex post facto justifications advanced at the hearing.

57. The point also arose in *JFS* at Supreme Court level [2009] UKSC 15. Here there was an unappealed finding of the first instance Judge that the school under challenge had failed to discharge s71 when formulating an admissions policy which barred children who, regardless of their faith or religious practise, were not considered Jewish by birth or conversion under the auspices of particular Orthodox Synagogues. Although the majority of the Court decided the case on the basis that there was direct discrimination, Lord Manse reviewed the indirect discrimination arguments in detail. He noted that it was:

for the school to show, in the circumstances, that its aim or objective corresponds to a real need and that the means used are appropriate and necessary to achieving that aim, and any decision on these points must 'weigh the need against the seriousness of the detriment to the disadvantaged group': Elias, para. 151 per Mummery LJ.

58. That balancing exercise had to be informed by s71. Lord Manse considered it was 'impossible' to reach the same conclusion as Munby J had at first instance that discharging the duty would have made no difference to the admission policy. He noted at [100] and [103] that:

There is, as I have indicated, no information about the extent to which the school succeeds in its stated aim of inculcating Orthodox Judaism in the minds and habits not only of those who already practise it, but also of those pupils who gain admission as Orthodox Jews in the eyes of Orthodox Judaism. The latter may not on entry practise or have any interest in practising Orthodox Judaism. They or their parents may adhere in religious observance to a Jewish denomination other than the Orthodox Jewish and be concerned that their children receive a, rather than no, Jewish education; or they or their parents may be seeking entry for reasons associated with the school's acknowledged educational excellence, and may be themselves agnostic or atheist. The school's policy was formulated without considering the extent to which others professing the Jewish faith, but not in the Orthodox Jewish tradition, were separated by it from friends and from the general Jewish community by the school's admissions policy, or about the extent to

which this might cause grief and bitterness in inter- or intra-community relations – matters about which some evidence was tendered before the Court...

In my view and (I emphasise) on the material before the Court, JFS has not and could not have justified its admissions policy.

59. Lord Hope disagreed with the majority on indirect discrimination but at [212] agreed with Lord Mansfield's analysis of the consequences of proper engagement with the discriminatory consequences of the policy and the failure to consider less discriminatory alternatives:

there is no evidence that the governing body gave thought to the question whether less discriminatory means could be adopted which would not undermine the religious ethos of the school. Consideration might have been given, for example, to the possibility of admitting children recognised as Jewish by any of the branches of Judaism, including those who were Masorti, Reform or Liberal. Consideration might have been given to the relative balance in composition of the school's intake from time to time between those recognised as Jewish by the OCR who were committed to the Jewish religion and those who were not, and as to whether in the light of it there was room for the admission of a limited number of those committed to the Jewish religion who were recognised as Jewish by one of the other branches. Ms Rose said that the adverse impact would be much less if a different criterion were to be adopted. But the same might be true if the criterion were to be applied less rigidly. There may perhaps be reasons, as Lord Brown indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate.

60. This comes very close indeed to holding that a failure to discharge one of the positive equality duties in circumstances where there is indirect discrimination makes advancing a lawful justification not only difficult, as Mummery LJ had thought in *Elias*, but impossible in practical terms.
61. This may have ramifications for private law claims against public bodies, whether in the employment or service provision contexts. To the writer's knowledge, so far no such claims have turned on a clear and relevant failure to discharge a positive equality duty. This might be explained by the fact that an ET or County Court lacks the jurisdiction to hold that there has been such a failure. Sometimes though, the lack of an impact assessment will be readily accepted either in pre-action correspondence or the response to a questionnaire. This might well have a bearing on the justification offered for a sickness related dismissal or a redundancy when the public authority

employer's decision was made by reference to a policy that had never undergone an equality impact assessment.

62. Lastly, it should be kept in mind that the substantive individual anti-discrimination rights which the RRA, SDA and DDA create can potentially be enforced in the Administrative Court in litigation which also raises questions of positive equality duty compliance: *Elias*, *Eisai*, *Watkins-Singh* and *JFS* are all good examples. The Court cannot deal with damages, but parallel proceedings can be issued in the County Court or ET and stayed, if necessary. The cases discussed above suggest that the Administrative Court and CA are more engaged with issues of policy and context than the County Court might be.
63. As Arden LJ stressed in *Elias*, these duties are intended to continuously remind the state that its policies and decisions can help shape a future society in which human potential is not frustrated and all are treated and valued equally. The Courts have an important role in ensuring they are honoured. But it is also important that lawyers are ready to use the full range of tools Parliament and the Courts have supplied. Certainly there is certainly no shortage of courageous individuals like the Lawrence family, Mrs Elias or the claimants in *Kaur* (service users of Southall Black Sisters which faced a fatal funding cut) who are capable of identifying institutional discrimination and its impact on their lives.

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