EQUALITY DUTY CASES[1]:

EXTRACTS & SUMMARIES FOR PLP CONFERENCE WORKSHOP

[1] **Elias v The Secretary of State for Defence** [2005] EWHC 1435 (Admin):

"In principle it is necessary for the [decision maker] to pay attention not only to what might be termed the negative aspect of eliminating unlawful discrimination in sub-section (a), but also the positive obligations under the section found in sub-section (b), namely, to promote equality of opportunity and good relations between persons of different racial groups." [underlining added]

[2006] EWCA Civ 1293:

"The judge set out the requirements for the content of a Race Equality Scheme in para 92 of his judgment, and these show that the body making the scheme must therefore set out its arrangements for assessing and consulting on the likely impact of its proposed policies on the promotion of race equality.

The judge went on to make a declaration that, in the present case, the Secretary of State had not complied with his obligations…

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…." [underlining added]

[2] **BAPIO v Secretary of State for the Home Department** [2007] EWCA Civ 1139:

"…the importance of compliance with section 71 not as a rear guard action following a concluded decision, but as an essential preliminary to any such decision. In-attention to it is both unlawful and bad government…" [underlining added]

[3] **Baker v Secretary of State for Community and Local Government** [2008] EWCA Civ 141:

"Promotion of equality of opportunity (and indeed good relations) will be assisted by, but it is not the same thing as, the elimination of race 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

[1] PLP acted for the claimants in cases 5, 6, 8 and 9.

been a breach of a principle of non-discrimination… The duty is to have due regard to the need to promote equality of opportunity (and good relations) between the racial groups….” [underlining added]

“I do not accept that the failure of an inspector to make explicit reference to section 71(12) is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form. … The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed.” [underlining added]

[4] **C v SS for Justice** [2008] EWCA Civ 882

The failure to produce a race equality impact assessment prior to laying the Secure Training Centre (Amendment) Rules 2007 before Parliament was a defect in the procedure that was of substantial, and not merely technical, importance and the rule of law and the proper administration of race relations law required the Rules to be quashed. It sent out the wrong message to public bodies with responsibilities under s.71 of the 1976 Act to allow that deficit to be cured by a review only undertaken eight months after the amendments had been laid. Although one could not doubt the good faith of a civil servant, who had produced an impact assessment that showed that physical control in care had not been applied in a discriminatory manner, as a matter of principle it could not be right that a survey that should have been produced to inform the mind of the government before it took the decision to introduce the amendments was only produced in order to attempt to validate the decision that had already been taken. The failure to produce the assessment was a defect in the procedure that was of very great substantial, and not merely technical, importance. In the circumstances, the reasons given by the judge for not quashing the amendments were mistaken and the rule of law and the proper administration of race relations required the amendments to be quashed.

[5] **Chavda v Harrow LBC** [2007] EWHC Admin 3064, 11 CCLR 187

A report published after an equalities impact assessment of a proposal that a local authority restrict its adult care service to people with critical needs had failed to inform the authority’s decision makers of the disability equality duty owed by the authority under the Disability Discrimination Act 1995 s.49A, and that failure rendered the decision of the authority to adopt the proposal unlawful, as the decision makers had not had proper regard to the duty owed.

[6] **Kaur v Ealing** [2008] EWHC 2062 (Admin)

Quashing Ealing's decision to stop providing funding to the Southall Black Sisters, Emphasising: (1) the need for assessment of impact before a policy is adopted, (2) the need for the process of assessment to be recorded, and (3) the need for rigour in the assessment.

[7] **Brown v Secretary of State for Work and Pensions** [2008] EWHC 3158 (Admin)

"89. Accordingly, we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At 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. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death,* the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.

90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A(1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context ***R(Watkins – Singh) v Governing Body of Aberdare Girls' High School*** ***[2008] EWHC 1865*** at paragraph 114 per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in ***R (Kaur and Shah) v London Borough of Ealing*** ***[2008] EWHC 2062 (Admin)*** at paragraph 45.

91. Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: ***R(Elias) v Secretary of State for Defence*** ***[2006] 1 WLR 3213*** at paragraph 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in ***R(C) v Secretary of State for Justice*** ***[2008] EWCA Civ 882*** at paragraph 49.

92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes". Compare, in a race relations case the

remarks of Moses LJ in ***R(Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin)*** at paragraphs 24 - 25.

93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in ***Baker*** at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. "In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced": ***Baker*** at paragraph 38.

94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. Compare the remarks of Dobbs J in ***R (Eisai Limited) v National Instituted for Health and Clinical Excellence [2007] EWHC 1941 (Admin)*** at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in ***R(Bapio Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin)*** at paragraph 69, those of Dobbs J in ***R(Eisai Ltd) v NICE*** (supra) at 92 and 94, and those of Moses LJ in ***Kaur and Shah*** (supra) at paragraph 25."

[8] **Meany v Harlow** [2009] EWHC 559 (Admin)

"72. First, the statutes require that the public body has "due regard" to the specified matters; and what is "due" depends on what is proper and appropriate to the circumstances of the case. Therefore, if a challenge is made, the question of due regard requires a review by the court....It is true that, as *Baker* and *Brown* make clear, how much weight is to be given to the countervailing factors is a matter for the

decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination."

84. …general regard to issues of equality is not the same as having specific regard, by way of conscious approach, to the statutory criteria."

[9] **Domb v Hammersmith & Fulham** [2008] EWHC 3277 (Admin):

"83….[one] criticism in this case is the failure of the Council to put the PEIA before the Cabinet. Whilst there is not a duty on the Council to do so, if it does not do so it must then make sure that the key aspects of the PAIA are included in the report to Cabinet."

[2009] EWCA (Civ) 941:

"52….there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is "the regard that is appropriate in all the circumstances"; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty." [underlining added]

"62….necessary for a local authority to be able to demonstrate, as a matter of its duty to have due regard to the need to promote disability equality that it had considered, in substance and with the necessary vigour, whether it could be any means avoid a decision which was plainly going to have a negative impact on the users of existing services."

"79. Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them….

80. But these lose significance against the backdrop of predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court."

[10] **Isaacs v Secretary of State for Communities (etc)** [2009] EWHC (Admin) 557

"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 judgment, in general automatically achieved by the application or implementation of the very policies which are adopted to achieve that purpose.

54. Of course, there may in some cases be additional problems over and above those which the policy is directed to ameliorate, and which will need specific consideration….But that is not this case. In my judgment the inspector was having regard to the requirements of Section 71 by seeking properly to apply the policies which had those very considerations in mind." [underlining added]

[11] **Harris v Haringey** [2009] EWHC (Admin) 2329

"125. A decision-maker – and this includes a preliminary decision-maker - - can achieve what is required even if not conscious of its duties under section 71."

"130…. [Applying Isaacs] This too is a case in which 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, including the development plan, and in accordance with the plan unless material considerations indicate otherwise." [underlining added]

[12] **Lunt & Allied Vehicles Ltd v Liverpool City Council** [2009] EWHC 2356 (Admin)

"43. I accept Ms Rose's primary submission that this decision is liable to be quashed because the judgment of the Committee was based on the fundamental misunderstanding as to the true factual position. In my judgment, that true factual position was a mandatory relevant consideration, both under section 49A of the DDA and at common law, applying the approach in E v the Home Secretary (already cited).

44. A lawful exercise of discretion could not have been performed unless the Committee properly understood the problem, its degree and extent. The margin of discretion as to fact and policy that the common law affords to decision-makers under the test in the Wednesbury Corporation case only applies to decision-makers who have acted fairly and directed themselves accurately on the relevant considerations to be weighed in making a matter of judgment or exercise of discretion. However, whether the failures came about as a result of the deficiencies in Mr Edwards' report, or a failure by the Committee to take into consideration and understand the factual position emerging from the documentary submissions and annexes in the second claimant's written submissions, the result is the same."

[13] **Equality & Human Rights Commission v Secretary of State for Justice** [2010] EWHC 147 (Admin)

"49. In my judgment, on balance of probabilities, NOMS did not have due regard to the duties under section 71 of the 1976 Act and section 49A of 2005 Act prior to the adoption and implementation of the SLA...no document has been disclosed....matters which were important to the duty under section 71 were not considered...the evidence demonstrates that no consultation was undertaken..."

"65. I remind myself that there is no duty to undertake an impact assessment let alone undertake it in a particular way. The obligation of the Defendant is to have due regard to the relevant statutory duties. It must be for the Defendant to assess the weight to be given to the many factors which are necessarily to be considered.

66. I am not persuaded that the Defendant, even now, has failed to have due regard to its statutory duties."

[14] **AC v Berkshire West Primary Care Trust** [2010] EWHC 1162 (Admin)

"47. I am satisfied that the Defendants had due regard to the need to eliminate discrimination against transsexuals and to the need to promote equality of opportunity between transsexuals and non-transsexuals. Their gender dysphoria policy was drafted with great care and after extensive consultation."

"53. ...Indeed Ms Mounfield QC accepted in oral argument that the duty was not to have conducted a formal EIA of every policy on the commencement date, but was, she submitted, to have given consideration to which policies needed most urgent review by that date, and to review them when the need arose. Even if that is correct, it would not affect the outcome of the Claimant's case."