





## White Paper Conferences: Judicial Review Law & Practice

The link between Public Sector Equality Duty compliance and the justification of substantive discrimination claims - the *Coll* line of case law. How potent is it?

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**Coll v Secretary of State for Justice [2017] UKSC 40, [2017] 1 WLR  
2093**

**R (Hussein and Rahman) v SSHD [2018] EWHC 213 (Admin) [2018] ACD  
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**R (Ward and Others ) and ( Gullu) v London Borough of Hillingdon  
[2019] EWCA Civ 692 [2019] HLR 30.**



## S 149 Equality Act 2010 - Public sector equality duty

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(1) 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 this 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) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).



## S 149 Equality Act 2010 - Public sector equality duty [cont]

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(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.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.



## S 149 Equality Act 2010 - Public sector equality duty [cont]

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(5) Having due regard to the need to foster good relations 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) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.



## *(Bracking) v SSWP* [2013] EWCA Civ 1345 at [26]

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1. The PSED is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
2. An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
3. The relevant duty is upon the Minister or other decision maker personally. It is a non-delegable duty.
4. The decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rear-guard action”, following a concluded decision.
5. The public authority decision-maker must have a focused awareness of each of the section 149 duties and their potential impact on the relevant group .



## ***(Bracking) v SSWP*** [2013] EWCA Civ 1345 at [26]

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6. The duty must be fulfilled before and at the time when a particular policy or decision-making is being considered and not as a “rear guard action” following a concluded decision.
7. The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”. It involves a duty of enquiry. The PSED requires a public authority to be properly informed before taking a decision, and if relevant material is not available, there is a duty to acquire it.
8. The duty is a continuing one.
9. General regard to issues of equality is not the same as having specific regard, by way of a conscious approach to the statutory criteria applied to the particular circumstances under consideration.
10. The proactive continuing duties under the PSED may also require a duty to monitor the operation of the implementation of the policy and practice requiring information on the impact of those with protected characteristics to be gathered and the ways in which this impact may be eliminated: *R (Nur) v Birmingham City Council* (No 2) [2022] HLR 41 at [28] and *R (DMA) v SSHD* [2020] 1 WLR 2374 at [309]-[325].



## *Coll v Secretary of State for Justice*

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- 42. “Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the Secretary of State to show that the discrimination is justified. Given that the ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim.”



## Declaration Granted:

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" ... direct discrimination against women ... which is unlawful unless justified ... No such justification has yet been shown by the Secretary of State."



## *R (Rahman and Hussein)*

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- [57] “Paragraph 42 of *Coll* is not laying down (nor am I being invited by Ms Harrison to apply) a rule of law. It merely indicates an approach which may, on the facts and in the circumstances of a given case, be adopted. I cannot see that the approach is confined to cases of direct discrimination, nor why it may not be equally in point in cases of indirect discrimination.
- [58] Either way, the point is the same. The minister has failed to address his mind to the problem and how it may be mitigated or avoided. Whilst the question of justification may not "logically depend on whether the [minister] thought about this at the time", a minister who did not think about it is likely to be disadvantaged or disabled in demonstrating justification unless and until he has properly thought about it.”



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[65] The blunt truth and reality is that the SSHD has never previously thought about the differential discriminatory effect upon practising Muslims of the combination of their required times of prayer, the night state, the unclosed lavatories and the shared rooms. It may in the end be justifiable, but, as already indicated, there may be a range of steps which the SSHD may be able to take to mitigate or avoid it. Unless and until she, who is the policymaker, has fully and conscientiously considered those steps (and others) and thought this whole problem through, I am quite unable to hold, meantime, that it is justified.”



## Declaration Granted:

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The “lock-in regime at Brook House, in conjunction with the presence of internal unclosed lavatories and shared rooms, (i) constitutes indirect discrimination contrary to Article 9 of the European Convention on Human Rights read with Article 14, which is unlawful unless justified; and (ii) unless justified, constitutes unlawful indirect discrimination contrary to section 19 of the Equality Act 2010. No such justification has yet been shown by the SSHD.”



## *R (Ward and Others) and (Gullu) v London Borough of Hillingdon*

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[76] “The burden lies on the policy maker to justify the impugned PCP. It is not a legal requirement of justification that the reasons put forward in defence of the PCP must have been present to the mind of the policymaker at the time when the PCP was introduced. It is open to a policy maker to advance an *ex post facto* justification: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at [129]; *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716 at [59] and [76]. However, in the case of an *ex post facto* justification, the court will not have had the benefit of the considered decision of the policy maker.”



## Declaration Granted:

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[111] “I would prefer to follow the form of declaration made by the Supreme Court in *R (Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 at [45]. That would result in a declaration that the impugned provisions of the policy constitute indirect discrimination against Irish Travellers and non-UK nationals which is unlawful unless justified; and that Hillingdon has not yet shown such justification.”



# Thank you

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