The PSED and Homelessness

The Equality Act 2010

The Equality Act 2010 combined, for the first time, equality legislation formerly split into various statutory codes covering different protected groups. It also significantly strengthened their legal rights. One of the key elements of the 2010 Act is the PSED.

The relevant protected characteristics for the purposes of the PSED are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Hereafter the groups of people sharing these protected characteristics will be referred to as "the Protected Groups". Schedule 18 provides for exceptions.

It is well-established that Parliament's intention was that equality of opportunity for the Protected Groups should be placed at the centre of policy formulation by public authorities. The legislative technique used was to require public authorities to have "due regard" to the three equality needs or aims set out in section 149(1) when exercising their functions.

The PSED

The PSED is "only" a process duty. In other words, all that it requires is that "due regard" is given to the three equality needs in section 149(1). It does not dictate any particular outcome, but requires public authorities to think hard about the equality implications of their decisions. "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker": *R(Hurley & Moore) v SSBIS* [2012] HRLR 13, at para 78.

Nevertheless, it has been said that the PSED imposes a heavy burden on public authorities, both in terms of discharging this procedural duty and in ensuring that there is sufficient evidence available when challenged to prove that the duty has been discharged: see *R(Bracking) v SSWP* [2013] EWCA Civ 1345; [2014] EqLR 60, at para 59.

The detailed requirements of the PSED have been exhaustively discussed in the case law (see e.g. *Bracking* at para 27). A sufficient summary for present purposes is that the decision-maker must: (i) have adequate, relevant information, (ii) focus on the statutory equality aims, (iii) face up to the realities of any adverse impacts on members of the Protected Groups and (iv) consider possible mitigating measures.

Policy decisions and individual cases

The above all makes sense in the context of legislation designed to push equality of opportunity up the policy agenda for central and local government. Undoubtedly, the PSED will apply to policy decisions affecting the homeless, such as locational placement policies, criteria for use of PRSOs and housing allocations policies.

Less clear, perhaps, is how the PSED impacts on decision-making in individual cases, in particular decisions made under Part 7 of the Housing Act 1996,. The homelessness legislation is itself designed to assist vulnerable sections of society and contains its own set of procedural and substantive rules. Does the PSED trump the specific legislation? Or, to put the contrary position, does it add nothing?

It is clear from authorities under predecessor equality legislation that the PSED is capable of applying to decisions, not only at the policy level, but also in individual cases. See, for example *R(Harris) v Haringey LBC* [2011] PTSR 931, in which the Court of Appeal quashed a planning permission for the redevelopment of the Wards Corner market in Tottenham that would have been likely to lead to the loss of Latino traders serving the local community. It was held that section 71(1)(b) of the Race Relations Act 1976 required the decision maker to apply the statutory criteria to the specific facts of the case.

The duty of inquiry

It is also clear that the mere fact that an individual decision is made under legislation which has its own particular rules does not oust the operation of the PSED. Thus, in *Pieretti v Enfield LBC* [2011] PTSR 565 - a homelessness case - it was held that section 49A(1) of the Disability Discrimination Act 1995 fortified the duty of inquiry into a homelessness application, in a case where the applicant's disability or claimed disability was relevant. The decision that the applicant became homeless intentionally was quashed because the local authority had not taken "due steps to take account of" the applicant's mental disability.

At para 28 of the judgment in *Pieretti* Wilson LJ stated that the duty "to take steps to take account of" disability complements the duty in section 184(1) of the 1996 Act to make necessary inquiries into a homelessness application. The potentially narrow point of difference between the two duties of inquiry was held to be that, whereas the court could only intervene in relation to section 184(1) if the local authority had failed to make an obvious inquiry, under what is now section 149(4) of the Equality Act 2010 the court could intervene if it had failed to make all appropriate inquiries: see at paras 31-35.

The duty to give reasons

Beyond fortifying the duty of inquiry in cases involving disability, does the PSED make any other difference to homelessness cases in practice?

In *R(McDonald) v Kensington & Chelsea RLBC* [2011] PTSR 1266, the local authority had conducted a very thorough assessment under community care legislation into the applicant's community care needs. The argument that the assessment had failed to give due regard to the equality aims in relation to disabled people was given short shrift by Lord Scott at para 24, as follows:

> "Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section."

A similar argument could be advanced in relation to homelessness decisions about priority need, intentionality and suitability: provided that the assessment leading to the decision is thorough, the Equality Act adds nothing of substance ("the McDonald argument").

The leading case on the interaction of the two statutory schemes is currently *Hotak v Southwark LBC* [2015] 2 WLR 1341. In *Hotak* the Equality Act was relied on to challenge the substance of vulnerability decisions in relation to applicants who were disabled. At para 78 Lord Neuberger PSC described the PSED as complementary to the duties under the 1996 Act. Helpfully, he went on to explain what this meant in practice, namely that it:

> "require[s] the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'."

In relation to the McDonald argument, he said this at para 79:

> "I quite accept that, in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty."

So, what difference does the PSED actually make? Lord Neuberger went on to state:

> "In the *Holmes-Moorhouse case* [2009] 1 WLR 413 , paras 47–52, I said that a 'benevolent' and 'not too technical' approach to section 202 review letters was appropriate, that one should not 'search for inconsistencies', and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but they now have to be read in the light of the contents of para 78 above in a case where the equality duty is engaged."

In summary, therefore, when a homeless applicant or a member of his household belongs to a Protected Group, and this is relevant to the question that the local authority has to decide, the court will expect a higher standard of reasoning to justify an adverse decision. Such reasoning will have to show a "sharp focus" on the relevant protected characteristic and its potential impact on the decision in question.

Watch this space: Poshteh

The potential impact of an applicant's mental health on the suitability of accommodation came to prominence in *R v Brent LBC, ex p. Omar* (1991) 23 HLR 446, the well known case in which the accommodation offered reminded the applicant of his former prison cell and caused him to have a panic attack at the viewing.

In a case highly reminiscent of *Omar*, *Poshteh v Kensington & Chelsea RLBC* [2015] HLR 36, the Court of Appeal rejected the applicant's challenge to the suitability of accommodation offered to her, based on its "cell windows". By a majority the Court of Appeal held that the PSED had been properly discharged. McCombe LJ stated at para 41:

> "…the reviewing officer clearly recognised Ms Poshteh's disability. He conscientiously recognised the public sector equality duty in that respect and was at pains to acquire all information that appeared to

him to be necessary for that purpose. In particular, he considered the important question of the likely effect of Ms Poshteh's particular disability on whether it was reasonable for her to accept this offer of accommodation that had been made."

However, the Supreme Court has granted permission to appeal. It is likely that its judgment will have more to say about the degree of scrutiny which the courts should apply to homelessness decision making, and in particular in the context of the Equality Act 2010.

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