**THE EQUALITY ACT IN JUDICIAL REVIEW PROCEEDINGS**

**KATHERINE APPS[[1]](#footnote-1)**

**39 Essex Chambers**

# Introduction

1. The premise of this paper will be that the Equality Act 2010, although “*popular*” in judicial review proceedings, is still somewhat underutilised. It can be extremely powerful when used in a suitable context.
2. In an unscientific survey carried out on 14 June 2019 with the new Westlaw Onepass. In the last 12 months in the Administrative Court there were:
   1. 23 results with “*discrimination*” in the key words/descriptors (16 of which were public sector equality duty cases).
   2. 100 results for “*human rights*” in the key words/ descriptors.
3. The 23 judgments ranged across many areas of the Administrative Court’s case load, from education to benefits, planning, cuts, immigration, local authorities, housing and healthcare. While this does not, of course, mean that there are more EA 2010 challenges that should be brought, or that those that were brought are ones which should have been, but suggests that the substantive provisions of the EA 2010 may be less in pleaders’ minds than the PSED and human rights issues.
4. This paper explains some practical and tactical considerations which might make substantive EA 2010 grounds more attractive to consider.

# Using the EA 2010 in Judicial Review Proceedings

5. There are two principal ways in which the Equality Act 2010 can be used in judicial review proceedings:

1. Firstly, as a form of “*illegality*” where a public authority is either carrying out public functions or providing a service and has breached section 29 EA 2010 (for example:
   1. *R(Coll) v Secretary of State for Justice* [2017] 1 WLR 2093; ii. *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London*

[2018] EWHC 969 (Admin); iii. *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57; iv. *R (Hall) v Secretary of State for Justice* [2018] EWHC 1905 (Admin).

1. Secondly, where the public authority has failed to comply with the public sector equality duty under section 149 EA 2010 to have “*due regard*” to the need to:

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

* + 1. *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
    2. *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

For example:

* 1. *Plan B Earth v Secretary of State for Business Energy and Industrial Strategy* [2018] EWHC 1892 (Admin).
  2. *R(KE) v Bristol City Council* [2018] EWHC 2103 (Admin). iii. *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. iv. *Hotak v Southwark LBC* [2016] AC 811.

# Forum

1. The question of forum can sometimes be perceived as a difficult issue for Claimants and a potential jurisdictional defence for Respondents because s 114 EA 2010 provides that, for breaches of section 29 the County Court has jurisdiction to hear the claim.

Under s 118 there is a limitation period of 6 months, less one day (unlike in the Administrative Court where the period is 3 months, without the subtraction of the additional day) and the County Court may well sit with lay assessors, in a similar way to the Employment Tribunal sitting with wing members.

1. However, there is no jurisdictional bar. The issue of forum need not be a deterrent to judicial review proceedings because:
   1. S 113(2) provides: “*Subsection (1) does not prevent – (a) a claim for judicial review*”.
   2. The case of *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) helpfully sets out the analysis which arises on a judicial review substantive claim for reasonable adjustments and how, under the Disability Discrimination Act 1995 a right to bring judicial review proceedings was preserved. This analysis applies under the EA 2010 *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin) at [136]-[143].
2. Section 113(2) does not preserve a right to raise the EA 2010 in a statutory review, however, (*Hamnett v Essex County Council* [2017] EWCA Civ 6).
3. Therefore, while it is useful to consider the appropriate forum, the existence of the County Court’s jurisdiction does not act as a jurisdictional bar to a claim for judicial review being brought in the Administrative Court, or being transferred in an appropriate case to the Upper Tribunal.

# Public Sector Equality Duty (PSED)

10. PSED claims have generally been more popular in the Administrative Court than substantive equality grounds. Key points to note are that:

1. Such claims cannot give rise to private law rights: 156 EA 2010.
2. Litigating often involves following the paper trial. The duty is a substantive one rather than a procedural one because the decision maker must apply a “*conscious approach*” “*in substance with rigour and with an open mind*” (*Bracking* at [59]-[60]).

The duty is non delegable (*Bracking* at [25]).Evidence to demonstrate the correct material was before the decision maker is key. Where this is not established on the documents witness evidence would be needed (see *R(Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin) (which was *Bracking* the 2nd time around).

1. Misdirection as to the substantive law can amount to a failure to have due regard (*R(WX) v Northamptonshire CC* [2018] EWHC 2178 (Admin)).
2. A claim can be a useful way to rely on unincorporated Treaty rights. (UNCRDP in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 *R (Davey) v Oxfordshire County Council* [2017] EWCA Civ 1308). The UNCRDP is incorporated into English law in the field of application of EU law. How that will work post Brexit could be complicated.
3. If a public authority has failed to comply with the PSED it might be more difficult for them to establish objective justification (*R (Coll) v Secretary of State for*

*Justice* [2017] UKSC 40 [2017] 1 W.L.R. 2093 at [42] per Lady Hale)

1. BUT it is possible to comply with the PSED and make a discriminatory decision contrary to other provisions of the EA 2010.

**5 reasons why substantive equality claims may be more attractive than first thought**

# Reason 1: they targets the merits directly

1. Firstly, instead of focussing on the paper trail, substantive claims get to the heart of the merits of the decision itself. If successful, relief can be more far reaching. The decision is less likely to be remade in the same way second time around.
2. A recent example of this in practice is was *R (Adath Yisroel Burial Society) v HM Senior*

*Coroner for Inner North London* [2018] EWHC 969 (Admin),[[2]](#footnote-2) in which a coroner had adopted a policy that “*no death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner's officers or coroners.*” This was indirectly discriminatory contrary to s 29 (6) and 19 EA 2010 to those of the Jewish and Muslim faiths and could not be objectively justified. The policy was unlawful.

1. Another is *R(Coll) v Secretary of State for Justice* [2017] 1 WLR 2093. The distribution of approved premises for women (formally women’s bail hostels) across the UK was directly discriminatory on grounds of sex and could not be objectively justified. The distribution was unlawful.

# Reason 2: penetration of indirect discrimination

1. Secondly, is the potential penetration of indirect discrimination. Under s 29(6) a public authority in the exercise of public functions has a statutory duty not to discriminate. This includes the prohibition on indirect discrimination. S19 EA 2010 sets out the test for indirect discrimination:
   * 1. *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
     2. *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—* 
        1. *A applies, or would apply, it to persons with whom B does not share the characteristic,*
        2. *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it*
        3. *it puts, or would put, B at that disadvantage, and*
        4. *A cannot show it to be a proportionate means of achieving a legitimate aim.*”
2. As the Supreme Court confirmed in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27 [2017] I.C.R. 640) there is no need for a causal link between the particular disadvantage and the protected characteristic (see [25]). There was no need for a Claimant to show why a larger proportion of BAME officials failed the relevant Home

Office test or show that this was connected with their race. The fact that this was so

was sufficient to shift the burden of proof onto the Home Office to show that this disparity could be objectively justified. As Lady Hale in *Essop* stated at [25]:

*“Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.”*

1. At [26]:

*“The reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem.”*

1. In the employment field, indirect discrimination has historically been used to great effect, to challenge “*facially neutral*” barriers to women in the workplace, for example prohibitions or less favourable treatment of part time working (e.g. *Falkirk Council v Whyte* [1997] I.R.L.R. 560; C 170/84 *Bilka Kaufhaus GmbHv Karin Weber von Hartz* [1987] ICR 110).
2. Its potential scope in the public law arena is wide ranging.
   1. It was not the primary basis for the Supreme Court’s judgment in Unison v Lord Chancellor [2017] UKSC 51,[2017] 3 W.L.R. 409 but it is clear that Lady Hale considered it to be an additional ground on which it was unlawful (see [128]-

[134].[[3]](#footnote-3)

* 1. To date, challenges to the “*hostile environment*” have been made under the HRA and PSED, not as substantive discrimination claims (save for an unsuccessful attempt to use direct, but not indirect, discrimination under the EU Treaty in R(*Patmalneice) Secretary of State for Work and Pensions [2011] UKSC 11 [2011] 1 W.L.R. 783*) and under the Human Rights Act in (*R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452).
  2. To date EA 2010 indirect discrimination has not often been used in “*cuts*” cases. It has been used less frequently in disability cases, due in part to difficulties in establishing group disadvantage (although properly constructed indirect discrimination PCP can work wonders in disability cases, as the issue is often the presence of physical or organisational barriers to progression).
  3. It can be factually tidier to establish on the evidence. There is no need for every member of the group which has protective characteristic to be put to a substantial disadvantage. Statistical evidence demonstrating the difference in constitution of the populations affected by the PCP and not affected by the PCP will be sufficient (See *Essop* at [28]).
  4. These are not necessarily easy cases for a defendant to show objective justification - see reason 3 below).

1. Clearly much will turn on the precise definition of the PCP or PCPs.

# Reason 3: no / limited margin

1. It is often assumed in public law cases that the objective justification test under the EA 2010 is the same as under the ECHR (see *Adath Israel* at [143] where this had been accepted by all parties).
2. It may have the same result on a particular case, but the test is not identical. The test under the EA 2010 is as set out in *Bilka Kaufhaus* at [36]:
   1. What is the legitimate aim (or “real need”)?
   2. Do the measures chosen correspond with that “real need”?
   3. Are they appropriate and necessary to achieve that aim?[[4]](#footnote-4)
3. As Pill LJ held in *Hardy & Hansons Plc v Lax* [2005] ICR 1565 at [32], the judgment is one for the Court to make for itself. That case established the general principle that there is generally no margin under objective justification in domestic discrimination law.
4. Domestically there is recognition that there might be more than one proportionate option in in challenges to legislation (and quite possibly SIs, maybe even public law decisions), as explained by Lord Nicholls in *R v Secretary of State for Employment ex parte Seymour-Smith* [2000] 1 WLR 435:

*"… The burden placed on the government in this type of case is not as heavy as previously thought. Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors. The Court of Justice has recognised these practical considerations. If their aim is legitimate, governments have a discretion when choosing the methods to achieve their aim. National courts, acting with hindsight, are not to impose an impracticable burden on governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation, are not good enough. But governments are to be afforded a broad measure of discretion. The onus is on the member state to show (1) that the allegedly discriminatory rule reflects a legitimate aim of its social policy, (2) that this aim is unrelated to any discrimination based on sex, and (3) that the member state could reasonably consider that the means chosen were suitable for attaining that aim."*

1. Some EU authorities in the context of age discrimination recognise a wide discretion in relation to both aims and means (e.g. *Palacios de la Villa v Cortefiel Servicios S.A.* case C411/05 [2008] 1 C.M.L.R. 16 at [68], *Fuchs v Land Hessen* C-159/10 [2012] ICR 93 *Specht v Land Berlin* C-541/12; [2014] ICR 966 and *Unland v Land Berlin* C-20/13; [2015] ICR 1225 para 57), although this line of case law has not been held to apply to grounds other than age.
2. The Court of Appeal in *McCloud v Ministry of Justice* [2018] EWCA Civ 2844 at [85] held that where a margin under this age case law or under *Seymour Smith* applies, the Court still steps into the shoes of the decision maker. They held that the degree of margin (if any applies) is a matter left to the fact finding tribunal/ first instance court (at [87]) and is not a matter for appeal. Permission to appeal to the Supreme Court on this issue was refused on 27 June 2019.
3. Under the EA 2010, cost saving, and cost saving alone, cannot amount to a legitimate aim (*Cross v British Airways Plc* [2005] IRLR 423, and *Redcar and Cleveland BC v Bainbridge* [2008] I.C.R. 249, *Woodcock v Cumbria Primary Care Trust* [2012] I.C.R. 1126). It has long been established that something more than cost saving alone must be identified as a legitimate aim. This can be challenging in cuts cases where a public authority is facing a huge reduction in their budget. It is still not uncommon to see cost saving referred to in an EIA as a potentially legitimate aim.
4. Therefore, it is clear that a public authority has less of a margin of discretion than they would if a claim were to have been brought under the HRA. The focus is also fundamentally different from that under the PSED. The Court stands in the shoes of the decision maker (albeit may have some “*measure*” rather than “*margin*” of discretion if the case is a *Seymour Smith* case).

# Reason 4: an EU angle

1. **Fourthly**, is (for the time being) an advantage if there is an EU base to the prohibition on discrimination. EU law can require the disapplication of primary legislation (and not just secondary legislation or administrative decisions).
2. This EU law source of non-discrimination rights was used to this effect in *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1995] 1 AC 1 and *R v Secretary of State for Employment ex p Seymour Smith (No 1*). While Directive 2000/78 (the Equality Framework Directive) and the Directives establishing the prohibition on sex discrimination generally apply in the employment field, it is worth noting that:
   1. Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin applies to education, social protection including social security and healthcare, social advantages and supply of goods and services (whether within the field of application of EU law or otherwise).
   2. Article 18 TFEU (ex Art 12 TEC) prohibits nationality discrimination “*within the*

*scope of application of the Treaties*.”

1. No EU line of argument appears to have been taken in:
   1. *Joint Council for the Welfare of Immigrants v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), (instead a declaration of incompatibility was granted under the HRA rather than disapplication of the statutory scheme).
   2. *R(Z) v Hackney London Borough Council and Agudas Isreal Housing Association* [2019] EWHC 139 (Admin) concerning a Housing Association’s policy of supplying housing only to orthodox Jewish people (although it was in the Court of Appeal, [2019] EWCA Civ 1099.[[5]](#footnote-5)

(a) is under appeal. It is not known if (b) is (judgment was handed down on 27 June 2019).

## Reason 5: funding

1. The EHRC has powers under section 28 of the Equality Act 2006 (not 2010; “EA 2006”) to “*assist*” an individual who is bringing proceedings (including legal representation) if:

*a) the proceedings relate or may relate (wholly or partly) to a provision of the Equality Act 2010, and*

*(b) the individual alleges that he has been the victim of behaviour contrary to a provision of the that Act.*

(provided none of the very specific exceptions apply)

1. A claimant might, therefore, be eligible to have their legal costs paid by the EHRC if they bring a substantive EA 2010 claim as part of their judicial review claim.

Advantages include:

* 1. No statutory charge (contrast legal aid)
  2. No means test
  3. Adverse costs protection
  4. Assistance in dealing with publicity.

1. Section 28 EA 2006 does not apply to claims brought under the HRA or domestic public law grounds.

## Conclusion

1. Lady Hale in *DA v SSWP* [2019] UKSC 21 recently stated:

*“These are cases about equality and equality is the most complicated and difficult of all the fundamental rights*”

1. EA 2010 grounds can be complicated and difficult, but if deployed successfully have the potential to add value in judicial review grounds.

**KATHERINE APPS**

39 Essex Chambers 15 July 2019

1. Katherine Apps is a barrister member of 39 Essex Chambers. The views in this paper are her own and do not represent the views of all members of 39 Essex Chambers. Any errors are entirely her own. This paper is not intended as legal advice. [↑](#footnote-ref-1)
2. In fact the coroner lost to such an extent that the Court did not apply the general rule against ordering costs against judicial officers and ordered her to pay £68,000 of the Claimant’s costs [2018] EWHC 1286 (Admin) [↑](#footnote-ref-2)
3. While the premise of this paper is that the EA 2010 will often produce more favourable results for a Claimant than the HRA or purely domestic fundamental rights, this was a case where the domestic fundament rights and HRA grounds were argued first to great effect. [↑](#footnote-ref-3)
4. Some cases apply the proportionality test from EU free movement law as set out in *R(Lumsdon) v Legal Services Board* [2016] AC 697 see [33] [↑](#footnote-ref-4)
5. Although it was conceded that the discrimination (on grounds of not being orthodox Jewish) was not race discrimination, although the definition of race in the Directive includes “ethnic origin” and under the Race Relations Act 1976 has always been interpreted as including Jewish people. *R(E ) v JFS* [2010] 2 AC 728. [↑](#footnote-ref-5)