Getting the most out of the Equality Act 2010

Discrimination Law Association

The Public Sector Equality Duty

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Introduction

> "The challenge we face is that of rooting out anything and everything that distorts and devalues human relations."
>
> Jimmy Reid, trade union activist, speech on inauguration as Rector of Glasgow University in 1972

The 2010 Equality Act ('EA'), passed in the final days of the last government, contains a significant legacy – the consolidation and broadening of the positive equality duties previously found in sections 71 RRA, 49 DDA and 76A(1) SDA to embrace 'due regard' in the contexts of age, disability, gender reassignment, (explicitly) pregnancy and maternity, religion or belief and sexual orientation. These provisions, set out for the most part in section 149 EA, are intended to come into effect in April 2011. The EHRC has yet to consult on a draft statutory Code or detailed guidance. The Government Equalities Office is presently consulting on regulations to impose further requirements on some of the public bodies caught by the section 149 duties. Their proposed focus is very different from the better performance duties imposed by the RRA, DDA and SDA, as discussed below.

There are some significant gaps in this broadened scope, most troublingly around the provision of public services to children and immigration control functions. One of the significant elements of section 49A DDA – *'the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favorably than other persons'* – has been removed, although the government has said this is implicit in section 149(4). The protected characteristics of marriage and civil partnership have no linked positive equality duty.

More positively, however:

- Far more proposals and decisions will be subject to the duties - bodies that are not explicitly identified as subject to the section 149 duties in the lists scheduled to the EA will nevertheless be caught, provided that the functions

in question are 'public' ones (a definition that is intended to catch all functions of 'hybrid' authorities which are subject to the Human Rights Act 1998);

- Due regard must now be had to the need to 'advance' equality of opportunity between those sharing a protected characteristic and those who do not, rather than the merely the need to 'promote' it;

- There is no requirement for those with a protected characteristic to be one of a 'group' for due regard to be called for, either in relation to equality of opportunity or the fostering of good relations, only that they 'share' that characteristic with others;

- Having due regard to the need to 'advance equality of opportunity' involves 'in particular' due regard 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.'*

  These provisions chime with observations of the Courts on the different purposes of section 71(1) (a) and (b) RRA.[1]

- 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.*

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

> '*…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…'*

This specificity is very welcome, given the limited case law on the concept of 'good relations'.

- It is explicitly recognized that compliance with the duties may involve treating some persons more favourably than others (provided that doing so does not breach the EA in other respects)

- Judicial review remains available to enforce failures to comply with the duties (at one point it was proposed that the EHRC – which as to date brought one claim - should exclusively enjoy the right to do so but that was abandoned).

This talk focuses on the pract6iclaities around enforcement of the new duty, something the government's consultation says will now be achieved 'democratically' rather than 'bureaucratically' – which it considers was the case with the RRA, DDA and SDA duties.

Enforcement – the story so far

The RRA, DDA and SDA provided the legacy Commissions and, through amendments, the EHCR, with an arsenal of special regulatory powers to enforce the positive equality duties. But perhaps more importantly, the Courts have taken a principled and purposive approach in many of the cases decided so far, allowing individuals and NGOs to seek judicial review of decisions made without adequate due regard and, in many cases, quashing them thereby returning the decision making process to an early stage and preserving the status quo in the meantime. The range of decisions successfully challenged in this way (including by favorable settlements) is remarkable. They include decisions to:

- award compensation to British civilians interned by the Japanese during World War II but only if they could establish a 'blood link' to UK soil by their own or an ancestor's birth here (*Secretary of State for Defence v Elias* [2006] EWCA Civ 1293);

- instruct doctors to prescribe Alzheimer's' medicines on the basis of a language test that took no account of cognitive impairments or having English as a second language (*R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC 1941 (Admin));

- cut the funding of the UK's leading black theatre company, Talawa, taking no account of the lack of any other organization's ability to develop ethnic minority actors or cater to the audiences it does (*R(Talawa) Arts Council of England* CO/7705/2005);

- cut the funding of voluntary organizations in Harrow (*R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin));

- cut the funding of Southall Black Sisters (*R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC 2026 (Admin));

- refuse permission to a Sikh girl to wear a kara through the inflexible application of a school uniform policy (*R (Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWCA 1865 (Admin));

- amend the rules on what forms of forceful restraint of children are permitted in secure training centres (*R (C) v Secretary of State for Justice* [2008] EWCA Civ 882);

- refuse to license a particular model of taxi for use as a hackney cab despite disabled groups making representations that this meant many wheelchair users could not travel safely *(R (Lunt and another) v Liverpool City Council* [2009] EWHC 2356 (Admin));

- approve planning permission for a development of chain stores and luxury flats on a site overwhelmingly occupied by BME businesses and tenants (*R(Harris) v London Borough of Haringey* [2010] EWCA Civ 703); and

- drastically truncate the period of notice given to unsuccessful asylum seekers of the intention to remove them from the UK (*R(Medical Justice) v Secretary of State for the Home Department* [2010] EWCA Admin 1925).

And, at the time of writing, challenges are underway or contemplated to:

- the failure to undertake equality impact assessments before the budget was set (*R(Fawcett Society v HM Treasury*);

- the quality of the LSC's impact assessments in respect of its decisions to award Legal Aid family contracts to only 60% of the solicitors and NGOs that have them at present (*R(Law Society) v Legal Services Commission*); and

- the government's decision to undertake a public inquiry into the circumstances in which 24 villagers were massacred by British troops in Colonial Malaya in 1948.

All but one (*R (Equality and Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147 (Admin)) of the judicial review cases to date have been brought by individuals or non-governmental organizations rather than the Equality and Human Rights Commission or its predecessors, though the new Commission has made actively intervening in such cases a priority in its litigation strategy.

The Courts have also applied the standing test for judicial review claims fairly and – to the writer's knowledge – have yet to exercise discretion to refuse permission or relief on this basis. NGOs have therefore actively litigated in circumstances where neither they nor individuals would have had a realistic basis for a claim that the substantive anti-discrimination provisions of the RRA, DDA or SDA were breached (e.g. *Eisai*). Cases have also been won by campaigners who would not feel the greatest impact of the measure challenged (e.g. *Harris*) and by those who would no longer be affected by the measure challenged *(*e.g. *C).*

What principles emerge from the decided cases and what difference will the EA make?

As noted above, the most significant changes the EA will make are to the scope of the duties and the bodies to which they apply. The basic structure of the positive equality duties remains the same as those under the RRA, DDA and SDA. It follows that:

- the duties remain triggered by the exercise of functions (*'A public authority must, in the exercise of its functions….'*);
- 'regard' must still be had to particular identified statutory imperatives when those functions are exercised;
- the amount of regard required remains that which is 'due' in the circumstances;
- the duties do not require a particular outcome - what the body chooses to do once it has had the required regard is for it to decide subject – importantly - to ordinary constraints of public and discrimination law: see *R (Brown) v*

Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) at [82]; and

- the general duties are supported by specific ones, directed at particular bodies.

Given this, the following key principles that have been developed by the Courts will apply in the section 149 context.

The duties are triggered whenever 'an issue arises'

There will be some (though probably not many) decisions made by public authorities which do not have equality implications for section 149 purposes. 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 *R (Baker) v Secretary of State for the Environment* [2008] EWCA (Civ) 141 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].

Further, it may be obvious that issues arise in relation to section 149 in the particular circumstances of the particular proposal or decision contemplates. In some cases third parties may draw the matter to the decision maker's attention. However, the responsibility to identify whether there is an issue and, discharge the duty when there is, remains that of the decision maker: see *Eisai* at [92]-[96].

The duties arise before a decision is made or a proposal is adopted, and are ongoing

When will the section 149 duties arise? There have been two complementary answers from the Courts as regard the existing duties.

First, in *Elias* both the first instance Court and the Court of Appeal stressed:

> *'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…'*

Compliance should therefore never be treated as a '*rearguard action following a concluded decision'* but exists as an *'essential preliminary'*, 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.

However, the duty to have due regard is ongoing, see *Brown* at [95], and in some situations those who frame policies will be different from the decision makers who implement them. Both may well be caught. For example, in *Watkins-Singh* 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 the pupil's application for an exemption from the uniform policy to be made. In *Baker* 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 decision maker must be aware of the section 149 needs

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.'*

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]).

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.

This conflict was resolved in *Harris*. Here the Council accepted section 71 was engaged in the planning decision under challenge but contended it had been discharged through a process of 'mainstreaming' whereby all Council policies were said to have been audited for equality purposes with the result that any decision made consistently with them would 'automatically' discharge the duty. The Court of Appeal rejected this argument and in doing so explained what was different about the Planning Inspector's decision in *Baker* and the other gypsy and traveler cases that took a similar approach.

> *'The case is distinguishable from Baker and Isaacs where policies had been adopted in a Circular whose very purpose was to address the issues addressed in section 71(1). It cannot be said that the policies cited in this case were focused on specific considerations raised by section 71. The council policies to which reference has been made may be admirable in terms of proposing assistance for ethnic minority communities, and it can be assumed that they are, but they do not address specifically the requirements imposed upon the council by section 71(1).'*

It follows that the only circumstances where a decision maker's lack of awareness of section 149 to the decision they are making will be excusable is whether a policy has been devised to ensure each of the needs identified is taken into account, wherever relevant, and that policy is applied in the individual circumstances of the proposal or decision.

The amount of regard needed depends on likely impact

The amount of regard that is "due" (that is, the degree of attention to the needs set out in section 149 that is called for) will depend on the circumstances of the case. However, the regard to be had must be commensurate with the impact of the proposal or decision on the needs specified. Due regard should always involve

more than a tick box exercise, however. As the Court of Appeal 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.

A properly informed, rational view must be taken on the extent of likely impact

The Courts have stopped short of holding formal equality impact assessments are necessary. In *Brown* it was said to be a *'wealth of evidence'* demonstrating due regard, but no formal assessment had been carried out. The Divisional Court noted that the absence of one did not make the decision unlawful. Assessments were not explicitly required by s49A nor under 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.'*

Of course, where the body has given a commitment to undertake such an assessment and / or to consult in connection with it (for example through a policy or in an equality scheme) it will be unlawful not to honour it unless there are compelling reasons not to do so: see *Kaur and Shah* at [27].

More importantly, however, there can be no due regard at all if the decision maker or those advising it make a fundamental error of fact as a result of failing to properly inform themselves about the impact of a particular decision. This was one of the flaws of the taxi licensing decision in *Lunt*. Here the Council 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 error was also fatal under section 49A DDA, since the true factual position was a mandatory relevant consideration under section

49A 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'.*

It follows that regardless of whether there is an impact assessment, due regard will require collection and consideration of data and information and data in relation to the people directly and indirectly affected by decision in play sufficient to enable the body in question to assess whether the decision might amount to unlawful discrimination and/or might impact on the promotion of equality of opportunity and/or might impact on the promotion of good relations, and if so the extent and nature and duration of those impacts.

Responsibility for discharging the duties cannot be delegated or sub-contracted

Although that process of assessment need not be undertaken personally by the person or people actually taking the decision in question and can thus be undertaken by officers or others, the decision-maker must be sufficiently aware of the outcome of the assessment properly to discharge the section 149 duties.

Where negative effects are identified, potential mitigation must be considered

Where a proposal under consideration would have potentially negative effects (in that it may lead to unlawful discrimination, undermine equality of opportunity or good relations between person of different racial groups) "due regard" as required by section 149 would entail evaluating the extent of such effects on affected persons and considering whether there are any means (in the proposal itself or available to the authority itself as part of its functions) by which they may be mitigated.

Thus in Elias (first instance) at [97] it was noted that:

> *'"It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact. I accept that even after considering these matters the minister may have adopted precisely the same scheme, but he would then have done so after having due regard to the obligations under the section.'*

In *Eisai* at [92] Dobbs J observed:

> *'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'.*

And in *Kaur ad Shah* at [43] the Court noted that 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.'*

The process of having due regard should be documented and transparent

These issues were first 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.'*

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.'*

Potential problems with enforcing section 149

Section 149 presents a number of new challenges for public authorities and equality lawyers.

No equality schemes

First, at present, the government has decided against better performance duties of the kind imposed under the existing positive equality duties. For example, Article 2 of the Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458) required 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. This focused the minds of at least some public authorities on the functions caught by section 71. Many schemes were constructively produced in consultation with affected groups. Now the requirement (thought to be too administratively burdensome and costly) is gone, there will be a temptation for public bodies to be far less proactive, identifying only the most obvious functions as ones calling for rigorous decision making.

Further, when schemes identified functions as being caught by one of the existing duties, this would eliminate any dispute about whether they in fact were, narrowing the argument to the question of whether due regard had been had in the particular circumstances.

No emphasis on impact assessment

According to the current consultation, there will also be a shift away from process and towards substantive 'outcomes'. This is difficult to understand in the context of a process based set of duties, especially as the monitoring obligations proposed are so limited. There are also no plans for any specific duty requiring impact assessments. Subject to what is said in the EHRC's statutory Code, at best impact assessments will be a non-mandatory means to help discharge the duty which the more conscientious bodies continue to use.

This is especially unhelpful given the expansion in the scope of the existing duties to cover new strands of discrimination. Significantly more is expected of public authorities (and rightly so) but there is no linked structure to ensure proposals are considered and decisions made lawfully.

The Courts?

The Courts have been generally supportive of the duties to date save in the gypsy and traveler context. It should not be forgotten, however, that the some of early

cases (*Elias, BAPIO* and *Eisai*) demonstrated that, even where a breach of a duty was established, the policy or decision might be allowed to stand, especially if an ex post facto impact assessment had taken place. This trend was reversed by *C where the Court of Appeal Held 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 restraint rules be quashed ([54-55)]. *Harris* illustrates this principle in play: permission for a multi million pound development was quashed despite the openly expressed reluctance of the Court.

However, there is likely to be an increase in litigation once the new duties are in force, particularly around cuts to public services. It remains to be seen how much additional leeway the Courts will allow decision makers when making decisions of this kind.

Towards the constitutionalization of equality?

Perhaps the most interesting issue yet to be resolved by the Courts is the precise relationship between discharge of a positive equality duty and prima facie discriminatory decisions which call for justification if they are to be lawful. They are clearly alive to the issue. In *Brown* at [82] the Divisional Court observed:

> *'What is meant by "due regard"? Dyson LJ stated, in the same paragraph in Baker, that "due regard" in the Race Relations Act provision meant the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. The same principle applies here. There must, therefore, be a proper regard for all the goals that are set out in section 49A(1) paragraphs (a) to (f), in the context of the function that is being exercised at the time by the public authority. 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.'*

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.'*

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.'*

That balancing exercise had to be informed by section 71. 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.*

Lord Hope disagreed with the majority on indirect discrimination but at [212] agreed with Lord Manse'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 … 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.'*

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.

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