Discrimination Law Association

JOINT COMMITTEE ON HUMAN RIGHTS

IMPLICATIONS FOR ACCESS TO JUSTICE OF THE GOVERNMENT'S PROPOSED JUDICIAL REVIEW REFORMS

SUBMISSION OF THE DISCRIMINATION LAW ASSOCIATION

1. The Discrimination Law Association (DLA), a registered charity, is a national organisation that seeks to secure improvements in discrimination law and practice in the UK, Europe and at an international level.

2. It achieves this by, among other things, the promoting and disseminating advice and information, arranging seminars and conferences and training, making representations to government and bodies concerned with legal practice and the administration of justice, and the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally.

3. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others, and of the necessity for a complainant-centred approach to anti-discrimination law and practice. The DLA has a wide and diverse membership. Our some 300 members include practising lawyers, law firms, academic lawyers, trade unionists, legal or advice workers and other substantially engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

4. The DLA is pleased to submit for consideration by the Joint Committee on Human Rights our concerns regarding the Government's proposals for reform of judicial review. We focus on two of the four proposals in relation to which the Committee has invited evidence.

Standing and third party interventions

5. The Government's proposals to introduce restrictions relating to standing and third party interventions, especially when combined with its proposed restrictions on legal aid in judicial review cases, would indeed achieve its stated aim of reducing the number of such cases; however, in our view, the costs would be unacceptably high, since the inevitable result of such measures would be that a greater number of instances of abuse of state power or illegality by public authorities would go unchallenged.

Standing

6. The DLA is unaware of any evidence to support the Government's contention that the test of standing - "sufficient interest" - which was established by the Common Law, implemented by the Senior Courts Act 1981 and construed by judicial interpretation thereafter, has been inappropriately applied. In our view, it would neither be in the public interest nor in the interest of the rule of law to seek to restrict access to judicial review to those legal or natural persons able to show that they are *directly* affected by the matter which is the subject of proceedings. We consider that technical rules should not be used to insulate public authorities from accountability.

7. Further, as the Committee will be aware, there are times when persons *directly* affected by a decision or action of a public authority are unable to bring a challenge in the court, for example when the policy at issue has not yet been implemented or when those directly affected have been deported. Without the applications by relevant NGOs and interest groups some unlawful acts by public authorities would remain immune from challenge.

Third party interventions

8. The DLA wholly rejects the assertion by the Government in the consultation document "Further Reform of Judicial Review" that judicial review is being used "as a campaigning tool". Such an assertion does a disservice to the judges of the High Court who strictly regulate the applications which are permitted to be brought.

9. No evidence has been put forward in particular to support the suggestion that, in some, unexplained, way the current rules on interveners contributes to this (illusory) "problem". As the Committee will know, the court permits a party to intervene only when the court accepts that they will have something to add to the arguments already made by the named parties to the proceedings. Case law, for example *E (A Child) v Chief Constable of the Royal Ulster Constabulary]*[1]*,* makes clear that unless interventions make a material additional point in the case they should not be made.

10. Especially following enactment of legislation in an area where there are few legal precedents, a third party may be able to assist the court in its interpretation of the new statute to ensure its correct implementation by all persons to whom it may apply. We submit that, over the past seven or eight years, interveners have greatly assisted the courts to develop coherent interpretation of the statutory equality duties as they apply to a wide range of public functions by various public authorities: the previous duties under s.71, Race Relations Act 1976, s.49A

[1] [2009] 1 A.C. at [2] – [3]

Disability Discrimination Act 1995 and s. 76A Sex Discrimination Act 1975 and more recently the public sector equality duty under s.149 Equality Act 2010.

The Public Sector Equality Duty

11. The DLA submits that it is essential for individuals and groups to continue to be able to apply for judicial review to challenge breach of the public sector equality duty (PSED) by public authorities and other bodies in the exercise of public functions.

12. The fact that any person who can show 'sufficient interest' may apply for judicial review to challenge failure by a public authority to comply with the PSED gives effect to the broad purpose of the PSED, namely to make every public authority better aware of and more responsive to the particular needs of the users of its services and its employees. Access to judicial review for this purpose should not be restricted in any way, and no additional tests should be introduced to make it more difficult for judicial review to be used to challenge breach of the PSED.

13. The DLA is, of course, aware that in a number of instances an application for judicial review on grounds of breach of the PSED, may also rely on grounds of breach of the Human Rights Act and/or procedural unfairness. This should not be surprising to anyone. Public authorities have to address requirements related to human rights, equality and administrative law within a single decision-making process, and so it is right for there to be a single judicial review process for assessing compliance. Non-compliance with the PSED often involves procedural failures. A failure by a public authority to have due regard to the need to eliminate discrimination and to advance equality of opportunity may also involve failure by that authority to meet its obligations under the Human Rights Act.

14. That a case may include grounds additional to breach of the PSED does not support relegation of only the PSED challenge to a different forum. To do so would not reflect the way decisions are actually made and would make both judicial review decisions and decisions by the different forum less useful as guidance for public bodies; there would be no benefit to duplicate in this alternative forum the work which would remain with the Administrative Court. Further and more worrying, to require transfer of PSED challenges to a different forum (a non-judicial forum?) would send a message that failure to comply with the PSED was of lesser significance than failure to comply with the Human Rights Act or to comply with other public law obligations. The DLA can see no gain and considerable loss to effective public services and to the public generally to adopt any measures that could convey such a message.

15. From July 2005 to mid-October 2013 the High Court has heard 95 PSED judicial review applications; of these 27 were successful or partially successful, six others succeeded on appeal. However these figures grossly under-estimate the impact

that the remedy of judicial review has had on securing compliance with the PSED. DLA members advise that for every case in which permission is granted at least four other cases are resolved without the need for litigation. A letter before claim, advising a public authority of their breach of the PSED and an intention to seek judicial review, may make the authority aware of the PSED implications of a decision or policy which it had not considered and, without more, to avoid the costs/delay/reputational damage of a judicial review, the authority will agree to take the steps necessary for compliance.

16. The qualitative research by NatCen[2] commissioned as part of the review of the PSED indicated that public authorities are gradually making the PSED part of their 'business as usual', incorporating relevant and proportionate consideration of equality issues across their functions, and by doing so are improving the quality of their policies and practice.

17. Arguably, the increasing rate of compliance, as the still new PSED becomes better understood, has been influenced by the rulings in judicial review applications. And improved compliance is reflected in the changes that have occurred in PSED judicial review cases over recent months. In the early cases the basic issue was whether the authority had had any regard to the equality impact of its proposal or policy; now, with the benefit of decisions which have clarified what is required to demonstrate 'due regard', a public authority is more likely to be challenged on whether, for the particular decision or policy, the ways in which it has taken equality matters into account are sufficient.

18. The DLA is not suggesting that judicial review should be the sole means by which compliance with the PSED can be enforced, but it should remain one of the available means for enforcement. As the PSED Review Steering Group stated in its report "There was general agreement that …formal enforcement and sanctioning mechanism**s** [plural] are important in ensuring compliance."

19. The DLA, in its submission to the PSED Review, recommended that the statutory inspectorates, auditors and regulators should be expected to take on a far greater role in ensuring compliance with the PSED by the public bodies within their mandate. While some inspectorates already refer to the PSED in their inspection frameworks, there is less evidence that levels or standards of compliance with the PSED are currently given much weight in their scrutiny, assessment and rating processes. If the aim is for the PSED to be fully integrated into the functions of public authorities, then, in our view, it is essential that the bodies appointed to oversee the functioning of public authorities must fully incorporate PSED compliance into their regulatory role. The impact on a public authority of sanctions in the form of a negative report and poor rating by an inspectorate,

[2] Views and Experiences of the Public Sector Equality Duty https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237200/PSED_Revised_Report_Final_030913_-_FINAL.PDF

auditor or other regulator should not be underestimated. An increased role for relevant regulators would not be an alternative to judicial review; both mechanisms for enforcement are needed; they perform different and mutually reinforcing roles.

20. The Equality Act 2006, s.32, gives the EHRC unique powers to enforce compliance with the PSED, including both the 'general' duty now in s.149 Equality Act 2010 and the specific duties imposed by secondary legislation. This involves the service of a notice by the EHRC requiring compliance and provision of information regarding compliance, which ultimately can be enforced by the courts. Since its establishment to date the EHRC has issued a total of six compliance notices (3 under the Race Equality Duty and 3 under the Gender Equality Duty). Before a notice can be served regarding non-compliance with the 'general duty' the EHRC must carry out a formal assessment of compliance by the authority (s.31, Equality Act 2006). To date the EHRC has conducted three assessments, none of which has been followed by a compliance notice.

21. The DLA recognises that with its substantially reduced resources it is unrealistic to expect huge expansion of EHRC enforcement of PSED compliance. We agree with the recommendation by the PSED Review Steering Group that collaboration between the EHRC and the regulators should result in better performance of the PSED, and we would hope this will take place as soon as possible. On past form it is most likely that the EHRC will be engaged in enforcement through its ability to bring and, more especially, to intervene in applications for judicial review. It is our view that in very many cases the added contribution by the EHRC as intervener has been invaluable in the courts' full appreciation of the content and implications of the PSED, and the DLA would not want to see this role diminished in any way.

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