

## Public

# Promoting equality

**Ulele Burnham** examines how courts interpret positive equality obligations in public law

### IN BRIEF

- *R (Kaur and Shah)* represents a reiteration of a reasonably new anticipatory approach to equality protection and is an important judicial recognition that substantive equality is not to be confused with shallow symmetry or parity of treatment.
- In fact it goes further: it concludes on its facts that the pursuit of a public policy which privileges equivalent treatment irrespective of the particular circumstances is destructive of equality; it says, in effect, that in equality law, nuance is all.

In *R (Kaur and Shah) v LB Ealing* [2008] EWHC 2062 (Admin) Judicial Review proceedings were brought by two clients of Southall Black Sisters (SBS), a well-established specialist service directed at providing support and assistance for victims of domestic violence from predominantly black and asian minority communities, against Ealing Borough Council (Ealing).

#### Funding

The Ealing decision subject to challenge was a decision to withdraw funding from SBS on the grounds that SBS's focus on black and minority women was at odds with its perceived obligation to sponsor a borough wide service for all irrespective of race.

complained that Ealing had failed, in breach of its race equality duty contained in s 71 of the Race Relations Act 1976 (RRA 1976), to conduct a proper race equality impact assessment before deciding to withdraw funding from an agency, upon which many women from minority communities relied.

#### The judgment

Although Ealing conceded the claim in the course of the hearing, Mr Justice Moses gave a short but instructive judgment in which he made the following points:

- RRA 1976, s 71, the accompanying 2001 Statutory Duties Order, the Code of Practice and Guide on the s 71 race equality duty promulgated



proposed policy changes are adopted or implemented.

- An assessment should be undertaken with substance and with rigour and should be recorded; it should not be a mere formulaic exercise used to justify an already concluded decision.
- Departure from the Code and Guide by a public authority could only be justified by clear and cogent reasons.
- Ealing had failed unlawfully throughout the process leading to its decision to assess the impact on black and ethnic minority women. In particular it failed to take proper account of SBS's clear contention that the targeting of services to particular minority women by them encouraged such women to access services which they probably would not otherwise.
- Ealing had seriously misinterpreted the effect of RRA 1976, s 35 (the provision of the RRA 1976 which permits acts intended to provide a particular racial group access to facilities or services to meet the special needs of the group in respect of education, training, welfare or ancillary benefits) in

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Ealing relied in particular on the notion that a borough wide service which did not target or cater to specific sectors/groups was an important building block in community “cohesion”. The claimants

by the Commission for Racial Equality, and the decided cases express the vital principle that any adverse impact in terms of race equality ought to be assessed before



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reaching a conclusion (i) that it was a derogation from the principle of non-discriminatory treatment; and (ii) that it precluded the provision of services directed at minority women rather than the public at large.

### Comment

This decision is a welcome addition to the emerging jurisprudence (*Elias*, *BAPIO*, *Baker*, *Eisai*, *C* and *Chavda*) which has begun to treat compliance with equality duties as a critical component of lawful public law decision-making. However, of greater significance is Moses J's lucid interpretation of the aims and effect of RRA 1976, s 35.

Ealing sought to argue that s 35 would make it impermissible for the authority to permit a service provider such as SBS to

discourage users from a particular racial group from using its services by its choice of language. Ealing attempted to rely on *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (Case C-54/07) [2008] All ER (D) 139 (Jul) (a case in which the ECJ concluded that recruitment advertisements which

## “There is no dichotomy between the promotion of equality and the provision of specialist services to an ethnic minority”

included the phrase “no Moroccans” were directly discriminatory) to support the proposition that the name “Southall Black Sisters” had the effect of discouraging users who were not black. On this analysis, Ealing claimed, sponsorship of SBS would, in effect, amount to facilitating direct discrimination.

### Misinterpretation

Moses J rejected both Ealing's misinterpretation of RRA 1976, s 35 and its misdescription of the rationale in *Centrum*. He identified Ealing's insistence that “cohesion” could not be achieved unless there was a single service provider as a fatal error in its thinking.

His comments on the proper interpretation of s 35 are of great value, not least because RRA 1976, s 35 has been under-interpreted and under-litigated.

In quashing Ealing's decision not to fund SBS he said: “The importance of section 35 is that it recognises that the elimination of discrimination and the promotion of equality requires indirect discrimination to be eliminated and equality for those who are the victims of indirect discrimination may require their special needs to be met. That those twin objectives may require positive action is acknowledged in s 37 and s 38 of the 1976 Act. Section 35 is not an exception to the 1976 Act. It does not derogate from it in any way. It is a manifestation of the important principle of anti discrimination and equality measures that not only must

like cases be treated alike but that unlike cases but must be treated differently.

“Cohesion is achieved by overcoming barriers. That may require the needs of ethnic minorities to be met in a particular and focussed way. The Southall Black Sisters illustrate that principle. In the second statement from the chairperson she

identifies the experience of the Southall Black Sisters in demonstrating how social services may be provided to those where a single service provider may be reluctant to intervene in the cultural and religious affairs of a minority for fear of causing offence. Specialist services such as those provided by the Southall Black Sisters avoid those traps and help women to leave a violent relationship by using what she describes as ‘these very concepts of their culture such as honour and shame to support them in escaping violence and rebuilding their lives’.

“She continued: ‘Specialist services are more effective in empowering minority women so that they can take their place in the wider society’.

“There is no dichotomy between the promotion of equality and cohesion and the provision of specialist services to an ethnic minority. Barriers cannot be broken down unless the victims themselves recognise that the source of help is coming from the same community and background as they do...That is the importance of the name of the Southall Black Sisters. Its very name evokes home and family.”

Thankfully Moses J lent his voice in support of that cardinal, if oft under-appreciated, principle of anti-discrimination law: shallow equivalence does not equality make!

NLJ

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