



10 years of the Equality Act and housing: where next?

Indirect discrimination against tenants and potential tenants

Daniel Clarke

Introduction

- In the 10 years since the EA 2010 came into force, defences to possession claims based on disability discrimination under s15 EA 2010 have become well-established: see e.g. *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] AC 1399, *Birmingham CC v Stephenson* [2016] EWCA Civ 1029, [2016] HLR 44
- Similarly, arguments re PSED: see e.g. *Barnsley MBC v Norton* [2011] EWCA Civ 834, [2011] HLR 46; *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, [2020] 1 WLR 584; *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445, [2020] HLR 27
- Surprisingly limited authority on indirect discrimination in housing context

Section 19 EA 2010: Indirect discrimination

1. A applies a **provision, criterion or practice** (“PCP”) to B
 - Construed widely: “any formal or informal policies, rules, practices [etc]” (EHRC SPFA Code §5.6)
 - May include one-off, but not necessarily: must be way things would generally be done (*Ishola v TFL*)
2. A applies / would apply to persons without B’s PC
3. Puts / would put those who share B’s PC at **particular disadvantage** when **compared with those who do not share B’s PC**
 - Pool for comparison should generally cover all those affected by the PCP
 - Must be no material difference in circumstances of comparator (s23(1))
 - May be hypothetical (“would apply”; see also SPFA §§4.23-4.28 re direct discrimination)
 - Disadvantage *may* be obvious; statistics/ experts *may* help (SPFA §§5.12-5.15)
4. Puts / would put B at that disadvantage
5. A can’t show that **proportionate means of achieving a legitimate aim**
 - (1) Legitimate aim; (2) Rational connection; (3) Least drastic means; (4) Proportionate in all the circs.
 - Burden on A: even if could in theory be justified, A must have the evidence (*Coll, Ward*)
 - Q for court, and justification may be *ex post facto* (but less defence will be shown: *Brewster, Ward*)
 - Where LL is a public body, compliance with PSED is a “significant factor” (SPFA §5.36)

Part 4 EA 2010: Application to premises

- s32 (General application):
 - **Doesn't apply to age or marriage & civil partnership**
 - Nor to accommodation for short stays or only for purpose of public function / service to the public
- Must not discriminate:
 - s33(1) (**disposal**): (a) as to terms of disposal to B (b) by not disposing to B or (c) in treatment of B re persons seeking premises
 - s34(1) (**permission for disposal**): where permission required for disposal, by not giving permission to dispose of premises to B
 - s35(1) (**management**): (a) in the way in which A allows B to make use of benefit or facility, (b) by evicting B or taking steps to secure eviction, or (c) subjecting B to any other detriment
- Other matters, e.g. allocations policies, fall within Part 3 (Services and Public Functions)
- Sch 5 (Premises: Exceptions):
 - §1: Private disposal (w/o agent or advert) by owner-occupier (of whole): s33(1) only applies to race and s34(1) doesn't apply in relation to religion or belief or sexual orientation
 - §3: Small premises (2-3 households and up to 6 people) with shared facilities, part of which occupied by landlord or relative

Cases so far: allocations and letting agents (Part 3)

Allocations

- *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16
Application of residence condition to exclude women fleeing domestic violence was indirectly discriminatory on grounds of sex
- *R (C) v Islington LBC* [2017] EWHC 1288 (Admin), [2017] HLR 32
Effect on women fleeing domestic violence of local lettings policy was justified within scheme as a whole
- *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] PTSR 541
Effect on women, disabled and elderly people of reservation of stock for working households was justified
- *R (TW) v Hillingdon LBC* [2018] EWHC 1791 (Admin), [2018] PTSR 1678
- *R (Ward & Gullu) v Hillingdon LBC* [2019] EWCA Civ 692, [2019] PTSR 1738
Residence requirement (v1 and v2), indirectly discriminated against Travellers (and v2 non-UK nationals) on grounds of race
- *R (XC) v Southwark LBC* [2017] EWHC 736 (Admin), [2017] HLR 24
Effect on women and disabled people of additional priority for working households was justified

Letting agent

- *A Tenant v A Letting Agency* (2020) September *Legal Action* 44 (order with reasons [here](#))
- *Tyler v Paul Carr Estate Agents Ltd* (2020) November *Legal Action* 40
“No DSS” policies — not to let to tenants in receipt of Housing Benefit — indirectly discriminated against women and disabled people

Cases so far: other (Part 4)

Adjustments

- *Plummer v Royal Herbert Freehold Ltd* (2018) September *Legal Action* 43:
Policy of never making adjustments to club premises that did not benefit all members indirectly discriminated against disabled member

Possession

- *Hertfordshire CC v Davies* [2017] EWHC 1488 (QB), [2017] HLR 33
Eviction of caretaker following end of employment did not constitute indirect discrimination on grounds of disability and in any event would have been justified
- *Turner v Enfield LBC* [2018] EWHC 1431 (QB)
Eviction of 73-year-old daughter of original tenants, with significant health problems but no right of succession and under-occupying, did not constitute unlawful discrimination (not appealed to High Court)
- *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, [2020] 1 WLR 584
Eviction of tenant for ASB did not constitute indirect discrimination on grounds of disability and in any event would have been justified (not appealed to High Court of Court of Appeal)

Where next: Disability

- Where eviction sought on ground arising in consequence of disability s15 will usually be best option
- However, where eviction sought on ground unrelated to disability, but eviction will have a particular impact because of disability, may be an argument for indirect discrimination (plus reasonable adjustments)
- e.g. successor to tenancy, under-occupying property (Ground 15A) but with significant mental health needs connected to occupation of the particular property — cf. cases (albeit under A8) where no right to tenancy and disability not relevant to *particular property* (*Turner, Holley v Hillingdon LBC* [2016] EWCA Civ 1052, [2017] HLR 3)
- Potentially in other cases where no right of occupation, unless alternative accommodation provided (see *Norton* §29 re PSED)

Where next: Benefits issues

- Women and disabled people more likely to be dependent on HB (see ONS)
- More specifically, benefit Cap disproportionately affects women: see *R (SG) v SSWP* [2015] UKSC 16, [2015] 1 WLR 1449 §61; *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289 §§22,45. Justified at a systemic level (under A14), in part because of availability of DHPs: see *DA* §153
- Similarly, the effects of the Bedroom Tax on e.g. disabled people under-occupying an adapted property justified in part on basis of DHPs (*R (Carmichael) v SSWP* [2016] UKSC 58, [2016] 1 WLR 4550)
- But that does not mean that it will be justified to seek possession on the basis of arrears arising as a result of the BC / BT in an individual case
- Especially where e.g. the landlord is the LA that has refused DHP and/or is accommodating under Part 7 HA 1996 and so is restricted to charging a “reasonable amount” (see *R (Yekini) v Southwark LBC* [2014] EWHC 2096 (Admin))
- Perhaps even arrears caused by chronic delays in benefit system (see PAP §2.6)

Where next: Domestic abuse

- Victims of domestic abuse are disproportionately female (and victims of male perpetrators): see e.g. Baroness Hale in *Carmichael*
- Therefore, may be prima facie indirect discrimination where e.g.:
 - landlord seeks to evict for criminal behaviour of coercive ex-partner
 - landlord seeks to evict for rent arrears as a result of financial abuse
 - landlord accepts surrender or short notice from abusive ex-partner
- Equally, where victim of domestic violence is male or LGBT, are the landlord's policies adequate in this regard, given the particular issues that might arise (see e.g. [CAB 2015 report](#))?

Article 14 ECHR

- Where EA 2010 can't help — e.g. discrimination is on grounds of age or marriage, or on the basis of a status which does not constitute a protected characteristic under the Act — concept of indirect discrimination is recognised under A14 ECHR (*DH v Czech Republic* (2008) 47 EHRR 3)
- Only available where:
 - Landlord is a public authority exercising public function under s6 HRA 1998 (*Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363)
 - Matter falls within the ambit of another ECHR right:
 - Unlikely to be an issue in relation to existing home, where A8 will be involved
 - But more difficult in relation to prospective tenants (see discussion at *R (JCWI) v SSHD* [2020] EWCA Civ 542, [2020] HLR 30 §§81-111)



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