

R (on the application of Rahman) v Birmingham City Council [2011] EWHC 944 (Admin)

Keywords: *Judicial Review – Public Sector Equality Duty – Defective Equality Impact Assessment*

The Cs were users of a service (LEAS) which provided free advice on various matters to the local community. D made a decision which interrupted the funding of the scheme and Cs applied for a judicial review of the decision.

FACTS

Cs were comprised of members of the local community that were using the services of the LEAS. Some of the Cs had difficulty communicating in English because it was not their native tongue and others suffered from various physical or mental impairments. D made a decision to terminate the funding of those organizations providing legal entitlement advice before any funding for an alternative scheme was in place. This meant that there would be a gap in service when no free advice would be available. Although D had prepared an Equality Impact Assessment (EIA) the EIA was not referred to in the documents or the report which was used by the Counselors taking the decision. After Cs' challenge had been lodged D made a fresh decision in which they considered the EIA but reached the same conclusion. Cs argued that the 1st decision was unlawful because: (1) it was taken without consultation with the LEAS or their users; (2) it was taken in breach of the Public Sector Equality Duty (PSED); (3) it was irrational because it failed to consider relevant facts and/or took into account irrelevant facts. The Cs argued that the 2nd decision was unlawful because it: (1) was not based upon a consultation with the affected users; (2) was inherently flawed; (3) failed to have regard to the PSED.

HELD

Mr Justice Blake held that D's most significant failure was its failure to have "due regard" to the PSED. He suggested that 6 general principles could be derived from the authorities: (1) those in the public authority who make a decision must be made aware of their duty to have due regard to the goals of the PSED; (2) the duty to have "due regard" must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered; (3) the duty must be exercised in substance, with rigour, and with an open mind and must be integrated within the discharge of the public function as opposed to merely ticking boxes; (4) the duty is not delegable and remains on the public authority charged with it; (5) the duty is a continuing one; (6) it is good practice for the public authority to keep notes recording its consideration of the PSED.

Mr Justice Blake held that what was "due" depended on what was proper and appropriate in the circumstances and that it was insufficient for the decision makers to be aware of the PSED. They had to apply it. The 1st decision was defective because it did not have regard to the PSED. The 2nd decision was defective because the public authority had regard to the defective EIA and not the PSED. The EIA was defective because it did not focus on the disadvantage that would be caused to users by the termination of the funding arrangements and was not based upon a proper consultation with affected users. Mr Justice Blake made a declaration that the decisions were unlawful because they were made without due regard to the PSED.

COMMENT

The two judicial review cases summarised this quarter illustrate the breadth of the challenges that can be made to a public authority which is making a decision that has an adverse impact on disabled persons. Cs are not required to show that the authority has not had "due regard" to the PSED in a *Wednesbury* unreasonableness sense. The Court is able to conduct a broader examination of whether the PSED has been satisfied (see para. 56 in which Mr Justice Blake relying on *R (Meany & Others) v Harlow District Council* [2009] EWHC 559 (Admin)).