

In Practice

The Admissions Arrangements of Faith Schools and the Equality Act 2010

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Introduction

Faith schools have an unusual place in society in that they benefit in the context of admissions from an exemption from anti-discrimination legislation otherwise of general application. Inspired by a recent case in which the authors were involved, this note seeks to draw attention to the potential for admissions criteria of faith schools to discriminate unlawfully contrary to the protections of the Equality Act 2010 (EqA 2010) notwithstanding this special exemption. After introducing the exemption, this article considers a number of scenarios where faith-based admission arrangements may fall foul of the EqA 2010, and the available remedies.

The Unique Right of Faith Schools to Discriminate and Its Limits

It is open to faith schools to discriminate in their admissions criteria on grounds of religion and belief pursuant to the exemption in schedule 11 para 5 of the EqA 2010. This disapplies the general prohibition on discrimination in s 85 of the EqA 2010 in respect of this protected characteristic for certain categories of school, including maintained schools designated as having a religious character by the Secretary of State. The exemption is on its face unrestricted and appears to allow any form of faith-based preference, including both membership and observance-based criteria.¹ Maintained schools

are, however, only allowed to allocate places on faith-based criteria where they are oversubscribed.² The new model funding agreement for Academies and Free Schools further restricts the entitlement of these schools to allocating 50% of places on the basis of faith-based criteria.³ Admissions authorities for faith-based schools are required to have regard to guidance from, and to consult, the official religious body of the denomination in question in setting their criteria.⁴

Some faith schools take advantage of this exemption; others do not. Moreover, faith-based admissions criteria vary greatly both in their terms and their underlying aim. However, it remains unlawful under the EqA 2010 for any school's admission arrangements to discriminate in respect of applicable protected characteristics other than religion and belief.⁵ Admission arrangements

institution must give preference to persons of a particular religion or belief (a) to preserve the institution's religious ethos, and (b) the course must not be a course of vocational training. Precondition (a) would appear to limit preferential treatment to practicing members of a religion or belief.

² See Schools Admissions Code 2012, paras 1.36 and 2.8.

³ This limitation is not incorporated into the terms of the funding agreement for voluntary aided faith schools converting to Academy/Free School status.

⁴ Schools Admissions Code 2012, para 1.38.

⁵ Section 85 prohibits the responsible body of a school from discriminating on the grounds of protected characteristics in respect of a range of matters, including admissions arrangements. Section 84 excludes from the scope of the prohibition discrimination on the grounds of the protected characteristics of age and marriage/civil partnership. The identity of the responsible body differs depending on the type of school, and is specified in s 85(9).

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¹ The unconditional exemption for faith schools can be contrasted with the exemption for further and higher education institutions in Schedule 12, para 5, which sets a number of preconditions: The responsible body of the

regarding state schools must moreover be compatible with the prohibition on discrimination under Art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (in particular in conjunction with Art 2 of Protocol 1 – the right to education) pursuant to the Human Rights Act 1998.⁶ It is the potential for faith-based admission arrangements to contravene the residual protection from discrimination under the EqA 2010 that is the subject of this note.

There is a persistent equality-related criticism regarding admission criteria of certain faith schools, and in particular the arrangements of certain popular, urban, oversubscribed church schools. This is that the criteria operate as a proxy for admitting a skewed socio-economic intake (a disproportionate number of better off children, from two-parent families) so as to perpetuate broader inequalities in society. The general public sector socio-economic equality duty in s 1 of the EqA 2010 (requiring public authorities to have due regard to the need to reduce inequalities of

outcome which result from socio-economic disadvantage) has not been brought into force. As such, the operation of admissions criteria in this way does not directly give rise to any issues under the EqA 2010 and therefore falls outside the scope of the present discussion.

Discrimination Arising From Disability: A Recent Case Study

This discussion stems from a case with striking facts. The authors represented a severely disabled widower, from a previously church-going family, who wished his daughter to attend the local (over-subscribed) Church of England secondary school. As a result of his disability, he had been either bedridden or in hospital for the majority of the 5-year period before the date his daughter applied for secondary school transfer. As would be common in such circumstances, his children had acted as his carers when not at school, including at weekends.

The local school in question had detailed oversubscription criteria under which points were accrued for the pupil and their parents' church attendance, and involvement in church life (readings, singing in the choir, organising events, bell-ringing and so forth), over the previous 5 years. There were bonus points for attendance being at a Church of England church, and also for the parish the applicant lived in. In our client's case, teachers at the daughter's school had written to the school drawing attention to the difficulty our client and his daughter would face in accruing the number of points required to gain admission under the school's oversubscription criteria in their circumstances.

Our client's daughter was refused a place by the school on the grounds of not having accrued sufficient points, and the appeal panel rejected his appeal. This was in circumstances where it was clearly arguable that, but for our client's disability, he and his daughter would otherwise have accrued sufficient points, and certainly in circumstances where his disability had the effect of making it much harder (or even impossible) for him and his daughter to accrue sufficient points to achieve admission given the level of demand for places at the school.

⁶ In the *JFS* case (see n 7 below), discussed below, the British Humanist Association (intervening) (BHA) contended that oversubscription criteria based solely on membership of a faith group (as opposed to criteria related to actual observance) per se violated Art 14, in conjunction with Art 2 of Protocol 1 (relying on the reference to 'religious and philosophical convictions' (emphasis added) in the right to education in Art 2 of Protocol 1, and the decision of *Hoffmann v Austria* (1993) 17 EHRR 293, where the European Court held that an Austrian court's decision to award parental rights on grounds relating to the parents' respective religions was in breach of Art 14 ECHR in conjunction with Art 8 ECHR). The Supreme Court did not ultimately engage with this submission in its decision. The contrary view to that taken in the BHA submission would be that admission criteria based on religious membership fall to be considered, and can be justified, in precisely the same way as observance-based criteria under Art 14, because they are no less founded on a genuinely held religious conviction. However, in any event, neither membership nor observance-based admissions criteria are likely to be afforded significant (or possibly any) weight in the proportionality assessment under Art 14 where they offend fundamental Convention values, such as tolerance and pluralism. Both membership and observance-based criteria may do so.

We pointed out (in a judicial review pre-action letter challenging the appeal panel's decision) that applying the oversubscription criteria rigidly in the case of a parent who is too disabled to attend church or to participate in church activities (and where the disability impacted on the applicant child's ability to attend and participate) was unlawful. We argued that it constituted indirect discrimination on grounds of disability and/or discrimination arising from disability, contrary to ss 15 and 19 of the EqA 2010. Moreover, we argued that there was a duty on the admission authority for the school to make reasonable adjustments to the admissions arrangements under s 20 of the EqA 2010 in order to avoid the substantial disadvantage caused to him by the criteria in comparison with a non-disabled person in relation to his daughter's ability to be admitted to the secondary school of their choice. We also noted that the school was subject to the public sector equality duty in s 149 of the EqA 2010, which required it to have due regard to the need to eliminate discrimination and promote equality of opportunity in its admission arrangements between persons with protected characteristics and those not sharing them, and there was no evidence of such due regard at either the initial or appeal stage.

The points were accepted by the school and a fresh appeal was constituted. This appeal was successful (albeit ultimately not on a direct application of the requirements of the EqA 2010, but on the basis of the prejudice to our client's daughter if she were not admitted, given her own and her father's particular compassionate circumstances, which were found by the panel to outweigh any prejudice to the school).

While there are positive things to say about the school's response to the equality points raised by us (and its handling of the second appeal), what was noteworthy was the initial complete failure to identify the potentially discriminatory impact of a rigid application of its faith-based oversubscription criteria, notwithstanding the stark facts which had been drawn to its attention. It seems likely to us that this was due to a lack of familiarity on the part of the school with its duties under the EqA 2010. We consider that this is likely to be representative

of the admission authorities for many faith schools, especially where they are applying longstanding criteria or uncritically adopting guidance from their denominational leadership.

We would suggest that what, in general terms, is required in a case of this nature is that the admissions authority must proactively consider the need to depart from faith-based criteria that operate as an impediment to admission for individuals with a disability, or their children. The requirement on the admissions authority extends to ensuring both that standard application forms allow for relevant information to be gathered so as to ensure equality issues are properly identified, and that subsequent decision-making processes properly take the issues into account and are reflected in admission decisions.

Ultimately, this flexibility ought not – in many and perhaps most cases – to prevent faith schools fully implementing the underlying objective of observance-based admissions criteria, namely, preferring pupils demonstrating a commitment to the relevant faith system and seeking to maintain a particular ethos and values at the school. But it does require admission authorities to be open to allowing applicants to demonstrate this in a more flexible and creative manner which makes appropriate allowance for the way that disability may prevent applicants or their parents from satisfying particular observance-based religious tests.

Race Discrimination

Direct race discrimination is of course unlawful and cannot be justified under the EqA 2010 (see s 13 of the EqA 2010). Therefore where a faith group directly corresponds to a racial group (including, a national group or a group defined by ethnic and national origin), admissions criteria on these lines cannot be applied even where the criteria are in fact motivated by benign religious precepts. So in the case of *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others; R (E) v The Office of the Schools Adjudicator*⁷ (the *JFS* case) preference for applicants satisfying the

⁷ [2009] UKSC 15, [2010] ELR 26.

matrilineal test of membership of the Jewish faith within the oversubscription criteria of this popular Jewish school was found by a majority of the Supreme Court to be a test of ethnic origin and therefore unlawful.

However, even where direct race discrimination does not arise, faith based admissions criteria may place individuals from a racial group at a particular disadvantage compared to persons without this protected characteristic. Unless this indirect discrimination can be justified as a proportionate means of achieving a legitimate aim, such arrangements will also be unlawful pursuant to s 19 of the EqA 2010.

It is worth recalling that England and Wales' school system developed on an ad hoc basis, with provision historically being made by the Church as opposed to the State. At the time of the enactment of the Education Act 1944 – which afforded free access to secondary education for all – the education sector still principally comprised Church schools. Because the country was still substantially ethnically and religiously (if not denominationally) homogenous, this may have raised few issues. However, fast forward 70 years and modern diverse multi-cultural, multi-faith England and Wales (particularly its towns and cities) is a very different place, and raises challenging questions regarding the potential indirect disadvantage arising from allocating limited places at oversubscribed schools on the basis of faith-based criteria.

Examples of indirect racial disadvantage are not difficult to envisage. An oversubscribed Christian school in an ethnically diverse urban area (as in certain areas of London or Birmingham with large populations of, for example, Bangladeshi or Pakistani heritage), may well have admissions criteria (eg church attendance or a requirement of baptism as a Catholic) that have the de facto effect of controlling admission to the school on substantially racial lines because membership of the Bangladeshi or Pakistani-origin populations correlates closely to membership of the Muslim faith. Indeed, it may be such admissions criteria that explain in part why it is not uncommon to see popular schools in urban areas that bear little resemblance to the ethnic demographic of the area from which they draw their pupils.

A further example would be where a Church school prioritises regular attendance at a *particular* parish church or denomination of church and where this is not the preferred church or denomination of a particular ethnic group. This is often done by giving extra points for attendance at a particular parish church or membership of a particular denomination, so that it in effect becomes a tie-breaker. Indirect discrimination may be particularly likely to arise (and potentially difficult to justify), in urban areas with immigrant populations who are likely to attend a church, or be associated with a denomination, other than the particular traditional church or denomination linked to the oversubscribed schools in the area, or alternatively where first generation immigrants will not have attended the particular parish church or been a member of the particular denomination for any prescribed period due to recent immigration.

What then is required before such indirect impact renders faith-based admission criteria unlawful? It must be first emphasised that there can be no backdoor challenge to the legitimacy of preferring applicants on faith-based criteria *per se* through the vehicle of indirect race discrimination given the current specific statutory sanction for such faith-based preference. Any challenge must be clearly focused on the particular disadvantage arising from membership of a racial group as a result of particular faith-based criteria of a particular school, together with the absence of a legitimate aim for the *particular* criteria and/or the disproportionality of the criteria as a means to achieve this aim. This enquiry will be driven by the underlying aims of the measure identified by the admission authority, which may vary considerably for different faith-based criteria. The underlying aim of membership criteria, especially where divorced from any observance requirements, may be particularly unclear and raise challenging issues, especially if reliance is placed on the benefit of education with other members of the group and the group is substantially coextensive with a racial group.

It must be noted that the exercise of adjudicating an indirect race discrimination challenge to faith-based criteria is likely to raise questions which

are far from the sort of hard-edged question that the courts generally feel most institutionally well-equipped to address. The questions arising may be intertwined with questions of religious doctrine, as is underscored by the prescribed involvement of denominational bodies in setting the criteria. The court may even find certain questions to be non-justiciable.⁸ Together with the more general sensitivity of the role of the courts in adjudicating faith-related discrimination issues (as seen most recently by the passage of the *Eweida*, *Chaplin*, *Ladele*, and *McFarlane* cases through the domestic courts and to the European Court of Human Rights),⁹ this may serve to give an uphill slant to many such challenges.

However, it remains the case that once particular disadvantage has been established the burden falls on the admissions authority to justify the criteria, and this burden has to be taken seriously by the courts. The *JFS* case presents the leading guidance on the approach to assessing such a challenge. Notwithstanding that the majority of the Supreme Court determined that the impugned criteria gave rise to direct race discrimination, a number of judges (both in the majority and minority) went on to consider indirect discrimination (as had the Court of Appeal, albeit very briefly, *Munby J* at first instance, and the Schools Adjudicator before that). Perhaps the primary point that emerges from the *JFS* case is the absence of any uniform approach. For example, a range of approaches to the identification and legitimacy of the aim behind the impugned criterion is apparent.¹⁰ There is also a discernible spectrum of views as to the intensity of review – certain judges appeared to contemplate a robust,

objective and evidence-led proportionality assessment notwithstanding the subject-matter,¹¹ whilst others more readily accepted the determinative force of the religiously motivated justification for the criteria (at least in the case of the religious membership criterion).¹² Finally, it is clear from the *JFS* case that admissions authorities may be in some difficulty if they have failed to properly consider the equality issues arising (including compliance with the public sector equality duty, on which see below) at the time of adopting the criteria and are therefore left having to undertake a post-hoc justification before the court, potentially without having gathered evidence to support their contentions regarding the benefits of the aim and the extent of disadvantage arising.¹³

The jury is out as to whether admissions authorities will have taken heed of the Supreme Court's reasoning on indirect racial discrimination and undertaken the required assessments of longstanding criteria.

Indirect Discrimination on Grounds of Sexual Orientation

A further example of potential indirect discrimination would be where a school applies a 'church attendance' or similar criteria, but the approach taken by the church in question is not tolerant to homosexuality. In our view, it would be difficult for a school to justify retaining any strict attendance criteria (eg 'regular attendance at X church') in its oversubscription criteria, if X church adopted a discriminatory approach to homosexuality, since this would effectively exclude pupils from schools based on their parents' sexual orientation.

Public Sector Equality Duty

A more subtle ground of challenge relevant to the admissions criteria of public sector schools, and a

⁸ See eg *Khaira v Shergill* [2012] EWCA Civ 983 at paras [14]–[24] for a discussion of the non-justiciability of religious matters.

⁹ *Eweida and Ors v United Kingdom* (Application Nos 48420/10, 59842/10, 51671/10 and 36516/10) (unreported) 15 January 2013.

¹⁰ Lord Brown regarded the aim and legitimacy of the aim of the criteria as being obvious (para [252]), the Court of Appeal regarded it as per se illegitimate – being too closely related to the discrimination it was seeking to justify – and other members of the Supreme Court regarded it as requiring some elucidation – eg Lord Mance at para [96].

¹¹ Eg Lord Mance at paras [97]–[103] and Lord Hope at paras [211]–[214].

¹² Eg Lord Brown at paras [255]–[258] agreeing with the reasoning of *Munby J* at first instance.

¹³ See in particular Lord Mance at paras [100]–[102], though again contrast the approach of Lord Brown at para [256] in view of his conclusion on the legitimate aim.

ground which the courts may be more comfortable bringing to bear in this sensitive area, is the public sector equality duty in s 149 of the EqA 2010. Section 149 seeks to institutionalise equality considerations¹⁴ in public sector decision-making by mandating due regard to the need to achieve the prescribed equality enhancing objectives. Failure to comply with the duty, where it is engaged by a particular decision, will render the decision unlawful and subject to a public law challenge, though the appropriate relief will be likely limited to declaratory relief if the court considers that compliance would invariably not have led to a different conclusion.¹⁵

The public sector equality duty is engaged by both macro policy decisions and individual determination of entitlements.¹⁶ In our view the public sector equality duty will be clearly engaged in many cases both (a) by the formation and review of faith-based admission criteria (as illustrated by some of the above examples), and (b) in many individual decisions (as in our recent case), and in respect of a number of protected characteristics. Thus the admissions authorities of faith schools will need to identify and rigorously consider the equality implications of their policies and individual decisions and consider how to respond to equality issues arising. As our recent case study shows, appropriate due regard may well suggest substantial reconsideration of established procedural and

substantive admissions arrangements to avoid the possibility of unlawful discrimination.

However, it will also require a wider consideration of how to enhance equality in admissions arrangements proactively in the ways identified in s 149(3). For example, the changing demographic make-up of an area may need to be proactively taken into account when reviewing admissions arrangements in order to establish whether particular ethnic groups are being disadvantaged by a parish residence criteria and consideration given as to how to respond to any such disadvantage. Similarly, the requirement to have due regard to the need to foster good relations between persons with and without protected characteristics may require proactive consideration of the role of admissions policies in advancing social cohesion in an ethnically diverse area.

Feeder Schools: Indirect Discrimination on Grounds of Religion or Belief by Schools Not Benefiting from the Exemption

A final scenario worth drawing attention to is where the admission arrangements of a secondary school, which is not designated as a faith school, identify a certain primary or middle school, which is a faith school, as a preferred 'feeder school' within its oversubscription criteria (as permitted under the Admissions Code¹⁷). In this situation, the admission arrangements of the non-faith designated secondary school do not benefit from the exemption from the prohibition on religious discrimination in its admission arrangements yet will very likely give rise to indirect discrimination on grounds of religion or belief so as to require justification under s 19 of the EqA 2010 in order to be lawful. The preference for the feeder school cannot be justified directly by reference to its faith orientation since this may constitute impermissible direct discrimination on grounds of religion or belief, and would in any event be unlikely to be accepted as a legitimate aim independent from the indirect discrimination that must be justified.¹⁸ Moreover, as

¹⁴ Namely (a) removing or minimising disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic, (b) taking 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, and (c) encouraging 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: see s 149(3)(a)–(c) EqA 2010.

¹⁵ See eg *JFS* case at first instance per Munby J [2008] EWHC 1535 (Admin), [2008] ELR 445 at para [214], though contrast the less pessimistic view of certain Supreme Court Justices on whether compliance would have made a difference: eg Lord Mance at para [102].

¹⁶ See eg *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104, [2011] PTSR 565.

¹⁷ Para 1.15.

¹⁸ Cf the decision of the Court of Appeal in the *JFS* case,

considered above, where a legitimate aim can be identified, the admission authority must further be able to demonstrate the proportionality of the particular disadvantage caused. Again, it may be likely that many admissions authorities will not have considered the equality implications of, particularly historic, feeder school arrangements and therefore may struggle to justify any associated indirect disadvantage if challenged.

Remedies

It is open to any body or person (provided that they give their name and address) to refer admissions arrangements which they believe to be unlawful to the Schools Adjudicator.¹⁹ They must do so by 30 June in respect of admissions arrangements governing entry to the school the following September (eg by 30 June 2013 in respect of admissions arrangements that will govern entry to the school for those starting in September 2014). The Adjudicator will then determine whether or not the criteria are lawful and need to be changed. The adjudicator's decision is final and must be implemented by the school. Decisions of the Schools Adjudicator may nevertheless be subject to judicial review.

above, at para [40] per Sedley LJ in respect of indirect race discrimination. (If, however, the aim itself is racially discriminatory, it is accepted by all parties that it cannot be legitimate.)

¹⁹ See s 88H of the School Standards and Frameworks Act 1998, and the subordinate provisions of the School Admissions (Admission Arrangements and Co-Ordination of Admissions Arrangements) Regulations 2012.

In an individual case parents would be well advised in the first instance to raise the issue with supporting evidence in their application. This should identify the equality issue (eg any difficulty satisfying the strict criteria as a result of disability), seek as best as possible to show compliance with the criteria and the underlying rationale of the criteria (eg prior and ongoing religious attendance, involvement and observance as identified in the particular admissions criteria) whilst explaining why fuller compliance is prevented or impeded by the protected characteristic. If legal advisors are engaged, they would be well advised to spell out pre-emptively what they understand the admission authority's obligations under the EqA 2010 to require in the particular case.

Breaches of the EqA 2010 by the admissions authority can be pursued on appeal before an appeal panel. The current Schools Admissions Appeal Code (2012) makes clear that the Panel must uphold an appeal where an admissions decision does not comply with a mandatory requirement of the Schools Admissions Code, or is not in accordance with admissions law; the current Schools Admissions Code (2012) in turn makes clear that all admissions decisions must comply with the EqA 2010, including the public sector equality duty,²⁰ which in any event forms part of binding admissions law.²¹

The remedy of last resort for breaches of the EqA 2010 is an application for judicial review.

²⁰ Paras 2–9.

²¹ Pursuant to s 85 of the EqA 2010.

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