

Chapter 3: Human rights law

1. What effect does the law have in each of the situations set out in the bullet points.

The Jones family comprises Mr Jones, who is Welsh; Mrs Jones who is English, but of African racial background. They have adopted Gemma, who was born in China. They have two children, Matthew, age 12, who has attention deficit hyperactivity disorder, and Christine, age 6, who is confined to a wheelchair. Mr Jones has HIV. Mrs Jones has a severe facial disfigurement following a road accident.

Before turning to the problems set out in the bullet points, it helps when reading this type of case study to try and anticipate what the problem is going to be about. Can we first identify from the facts given to us what is likely to be relevant? A quick glance shows that the problems below will relate to the operation of the Equality Act 2010.

Mr Jones: Does Mr Jones have characteristics protected by the Act. Two attributes of Mr Jones have been identified in the question.

National origins: his origins are Welsh. Is Welsh a national origin? The courts of England and Wales have ruled that Scottish is not a nationality within the RRA: *Boyce v British Airways* (1997); the Scottish courts have, by contrast, ruled that English is a nationality: *BBC Scotland v Souster* (2001). The courts of England and Wales are bound to follow English/Welsh precedents, unless the facts can be distinguished from the facts of that precedent, or a higher court overrules the precedent set by a lower court. So we can predict that discrimination based on Welsh origins is unlikely to fall foul of the Equality Act.

Disability: Mr Jones has HIV. You're disabled under the [Equality Act 2010](#) if you have a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do normal daily activities. The legislation provides that you automatically meet the disability definition under the [Equality Act 2010](#) from the day you're diagnosed with HIV infection, cancer or multiple sclerosis.

Mrs Jones: She too has been identified as having two relevant attributes

Racial origin: she is of African 'racial origin'. Under the Equality Act it is unlawful to discriminate on racial grounds, which are defined as being grounds of colour, race, nationality, national or ethnic origins: her 'African origins' may touch on all of these.

Disfigurement: under Schedule 1 to the Equality Act facial disfigurement can amount to a disability (see para 3(1): 'an impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the abilities of the person concerned to carry out normal day-to-day activities.')

Gemma: Her national and ethnic origins are Chinese.

Matthew: He suffers from a disability under the Equality Act if his hyperactive attention deficit disorder has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities. Although each case is decided on its facts as found from the evidence presented to a court or tribunal, there is little doubt that this condition can satisfy one or more of these requirements, and the tribunal would have to decide whether or not on the medical and other evidence, it does so in fact. The Act does not distinguish between physical and mental disability. It is the effect of the impairment and not its cause which is significant.

Christine: Will her inability to walk normally also fall within the above Equality Act definition? Yes, impaired mobility is one of the areas of day to day activities which is recognised. Assuming that the inability to walk is proved as a fact in any tribunal (students should note that we are given this as a fact and do not need to question it further) then s.1DDA is satisfied.

- **Mrs Jones, who has a science doctorate and a high profile research and publication record, is refused several posts for which she met all of the essential criteria. The University of Anytown told her they might have trouble with the Home Office getting her a work permit. Science Labs plc told her that with her family problems she was unlikely to be committed to the work. Newtown College said the students would find her disfigurement difficult to handle.**

The question makes it clear that, on the face of it, Mrs Jones is well qualified to be considered for the level of work described. This aspect of the question requires no further analysis. We have been explicitly told there are other reasons she has not been selected. Your answer should therefore concentrate on whether the discrimination is unlawful.

University of Anytown: the employer is making assumptions about Mrs Jones' availability for work. If she had restricted immigration status it is possible that she would not be permitted to work in the UK. However we have not been told that this is the case; indeed the facts given state clearly that she is English. Why would the University think, therefore, that this applicant as opposed to any other applicant will have problems with the Home Office? To act to a person's detriment on assumptions, which derive, or cannot be proved not to be derived, from a person's membership of a particular racial, national or ethnic group is to discriminate. There is at the least ground for suspicion that the decision is based on her race, national origins, colour or ethnic origins, and that they would not have raised this objection in the case of a person of a different background. If she challenges their refusal to consider her, the employment tribunal would require the employer to demonstrate its reasons for excluding her; evidence could be sought as to the background of the people they did in fact select for interview or for the post, on this and on previous occasions. If the evidenced suggests that the reasons are based on her colour or national/ethnic origins – this would be for the tribunal to decide as a matter of fact – the discrimination would be unlawful under the Equality Act.

Science Labs plc: this employer is making assumptions about Mrs Jones' likely

commitment to her job because of her family circumstances. A tribunal hearing this case would require the company to explain its recruitment practices, and whether it treated men with child care responsibilities in the same way (there is no legislation protecting parents from acts of discrimination, but male and female parents must be treated equally). A good case which the tribunal would almost certainly follow is *Horseley v Dyffed* (1982). Here the employer refused to provide training for a female social worker, since they felt she was bound to follow her husband, who had moved to another part of the country, after it was completed. Why did they assume she would follow him rather than the other way round? Because she was a woman. This was contrary to SDA sections 1 (definition of discrimination) and 6 (discrimination unlawful in employment) which was then current law. It would be difficult for Science Labs plc to persuade a tribunal that they were not making these assumptions about Mrs Jones because they assumed a woman would have the major role in looking after the family.

Could Mrs Jones argue that she has been discriminated against because of the disability of her children? Would the employer have excluded her from consideration if her children had not disabilities? Such indirect discrimination is unlawful under the Equality Act.

Newtown College refuse to consider Mrs Jones because of her facial disfigurement. This is expressly included as a disability under Schedule 1 to the Act. It is no excuse for the employer to hide behind the discriminatory attitudes of their other employees – the legislation provides no such excuse (and in fact was expressly designed to force employers to take measures to overcome such attitudes. Under the Act the employer must show that any discrimination is justified on grounds which are substantial. The prejudice of employees would not satisfy this test). Therefore they have unlawfully discriminated against her on grounds of her disability, and she can seek compensation from an employment tribunal.

- **Gemma needs special English language tuition but the school says they are not allowed to spend more money on her than other children.**

Gemma's needs arise because her first language is not English. Her parents are not seeking equal treatment – they want a form of positive action so that in due course her English will be good enough for her to be treated equally. The argument of the school is that special provision would be a form of positive discrimination which is unlawful. The victim of the discrimination would not in this case be Gemma but any other child of different national origins (brought up in an English speaking environment) who is not receiving the extra facilities. It is a far-fetched argument, because almost all children receive an education tailored to their individual needs, at least in the form of the attention provided by teachers during the day. But can they effectively single out Gemma for special provision for reasons connected to her national origins? Yes, the Act contains positive action provisions which allow (but do not require) schools to take proportionate action to address the disadvantage faced by particular groups of pupils. Such action could include targeted provision, resources or putting in place additional or bespoke provision to benefit a particular disadvantaged pupil group.

Positive action is intended to be a measure that will allow schools to provide additional benefits to some pupils to address disadvantage and is not the same as positive

discrimination. Positive discrimination would be providing preferential treatment for a particular disadvantaged pupil group that exceeded the positive action conditions.

Mr Jones is continuously taunted at work with offensive comments about his multiracial family. The employer treats this as a joke, and up to now Mr Jones has tried to pretend he does not mind.

Such behaviour would constitute harassment under the Equality Act and under s.40 of the Act the employer is liable for the harassing acts of his employees.

- **Mrs Jones takes Christine to the Gateside Cinema, which is situated in an old building recently modernized. They are refused admission because Christine's wheelchair 'will create a safety hazard for other customers'.**

It is unlawful to refuse access to public facilities on grounds of disability, and service providers must make reasonable adjustments to their premises. The fact that this is an old building would offer no excuse in law if reasonable adjustments could be made. This would include examination of the financial cost and resources of the service provider, but it would be their task to justify the reasonableness of a refusal to make adjustments.

- **Social Housing Ltd, the family's landlords, have written to say that Matthew's loud behaviour is anti-social and the family will have to leave.**

Social landlords have extensive powers to deal with anti-social behaviour which include demoting the tenancy from its secure status, and ultimately eviction. However to evict someone for anti-social behaviour is lawful only if it is proportionate to do so, and when someone is disabled it is much more difficult to say that eviction is a proportionate response to anti-social behaviour.

- 2. You are a social worker for Careborough MBC. Your statutory client is Maggie, a fourteen year old who has been sleeping rough and, you believe, taking drugs. You have been accommodating Maggie with her mother Jane's agreement. Because of Maggie's frequent absconding you are considering secure accommodation. Jane has formed a relationship with John and wants Maggie to come home and the family to make a fresh start. Maggie's father Will wants Maggie to remain in local authority accommodation. You are about to set up a case conference. Maggie's headteacher does not want to participate if Will of Jane are present. Will wants to see copies of a psychologist's report which recommends that it would be disastrous for Maggie to return home or have contact with Will. John's former wife has phoned you to say she thinks***

John has sexually abused her daughter. Jane is deaf and can only communicate if a signer is present.

What are the human rights law considerations you should be aware of before the case conference takes place?

A case conference makes decisions which can affect the rights and responsibilities of individuals. In this respect it resembles a court or tribunal. The requirement that a public authority must respect the principles of the ECHR is set out in HRA s.6, so everything a social services authority does in running a case conference must be human rights compliant. Those affected by its decisions have certain minimum rights under the European Convention on Human Rights, which the case conference must respect. The rights are part of English law and a court can hear a complaint by an aggrieved party as a result of the Human Rights Act 1998. The following are likely to be relevant in the case conference:

Article 6: All parties whose rights may be affected are entitled to a fair determination of the issues which are to be decided, under article 6. Case law has indicated that this will cover access to all the information on which the decision will be based: see for example *Re L (Care: Assessment: Fair Trial)* [2002]; *R (on the application of S) v Plymouth City Council* [2002]. Will has, under article 6, a need and a right to know the evidence on which it is recommended that it would be disastrous for him to have contact with his child. John will likewise be entitled to know the substance of any evidence that he has sexually abused Maggie.

A fair determination means an ability to participate effectively. A conference in which Jane cannot communicate or understand because of her deafness will not meet this standard, so a signer will be required. Maggie's own future is at stake. Is she entitled to be present or at least to have her voice heard within the conference? Article 6 does not distinguish between the rights of a child and those of the adults; it is a question of 'fairness' and a failure to provide her with this right is likely to be open to challenge (we have not encountered any case law on this point yet).

Maggie has a right to liberty (article 5) – detention is only permitted in a limited range of circumstances where there is a lawful procedure for doing so. One of those circumstances under article 5 is 'the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority'. The lawful procedure for detaining a child is set out in the Children Act 1989 s.25 (chapter 12 of the book). It is not easy to shoehorn the precise wording of the exceptions permitted by article 5 above into secure accommodation; the lawfulness of locking up a child was however tested in *Re K (a child)(secure accommodation order: right to liberty)* (2001) and s.25 detention was held to be within this exception to the right to liberty.

All parties have under article 8 a right to respect for private and family life. Any of the people involved in the case conference are entitled not to have personal information divulged, which would be a breach of the respect for private life. Refusing to let Maggie live with her parent is a potential breach of respect for family life. But in each case article 8 allows an interference with an article 8 right 'for the protection of health or morals, or for the protection of the rights and freedoms of others'. This would also permit interference in order to establish the rights of a person who has been accused of, for example, sexually abusing a child to know what those allegations are under article 6. It is therefore a balancing act to determine how much divulging of personal information is appropriate, given that the requirement for a fair determination of the issues leads to a different result than respecting the private life of those who have information and don't want it discussed. A challenge in court under the Human Rights Act could occur if a person believes the wrong balance has been drawn. It will be necessary to show how any infringement of an article 6 or article 8 right was strictly necessary to protect health or morals or the rights of others. Experience suggests (see chapter 4) that the courts will sacrifice privacy sooner than a fair hearing where serious issues are at stake.

Note that it is open to the child protection conference to hold its proceedings in private if this is necessary for the protection of the interests of a minor under article 6, though there is no exception to the requirement to pronounce the result of the conference publicly (a point which has not been tested in court.)

3. Paragraph 2.5 of the Department of Health publication *Human Rights in Healthcare—A Framework for Local Action* contains a table which considers some Articles of the ECHR and their implications for health-care decisions. We reproduce an extract from this table in Figure 3.2 (see page 113).

Decide which Articles of the ECHR are most significant for your practice as a social worker, then decide which aspects of social work practice might raise possible compliance issues. Finally, illustrate your considerations with a specific example, as the Department of Health has done.

The point of this question is to raise awareness of the relationship between the Human Rights Act and your everyday practice as a social worker. There are several articles which are very relevant and which are fully discussed in the chapter. You might start with Article 8 and think about its relationship with child care proceedings. The Article requires respect for family life and on the face of it taking a child away from its family does not show the necessary respect. However the right is not absolute. A child may be taken into care where it is legitimate and proportionate to do so. So the proper proceedings must be followed and there must be a consideration of the proportionality of the action. Article 2 is likely to become of increasing importance to social workers as coroners courts are requiring local authorities to account for deaths of those who are, or should have been within their care. Local authorities, and ultimately social workers, will have to show that they took the necessary steps to protect the lives of service users, and potential service users. Other articles, in particular Article 6 and Article 3 should also be discussed.

4. What do you think are the Human Rights implications of Covid-19? Work through the relevant Articles and indicate where you think there may be breaches as a result of the various response to the pandemic.

There are a number of potential breaches although work needs to be done to provide evidence. The Joint Committee on Human Rights has done an initial report and the EHRC has also looked at the impact of Covid-19 on particular communities. The articles that need to be considered initially concern the right to life, the right to a fair trial and the right to privacy. The differential impact of the pandemic on different communities is relevant. The death rate for instance amongst people with learning disabilities seems to be worryingly high as well as the death rate of BAME people. Whilst deaths amongst prisoners seem to be unexceptional, this may well have come at a price, locking people down 24 hours a day. This is going to be an unravelling story and it is useful to share your thoughts at this stage. However it will be important to follow the research to see the longer term implications.