



Discrimination Law Association

*Briefings* 973-986

## High Court stresses importance of monitoring, including collection and capture of data, and evaluation in PSED disability challenge

*R (on the application of DMA, AHK, BK and ELN) & R (AA) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin); December 14, 2020

### Implications for practitioners

This case highlights the importance of public authorities collecting adequate information about disabled people in order to discharge their s149 Equality Act 2010 (EA) public sector equality duty (PSED) and avoid discrimination against them. The judge's reflections on monitoring obligations underline the need to collect, capture and evaluate data to ensure a government body knows what reasonable adjustments to make and avoids discriminating against disabled people.

### Facts

The claimants were five failed asylum seekers who remained in the UK awaiting consideration of further representations. They sought what is known as 'asylum support accommodation'. The Secretary of State for the Home Department (SSHD), the defendant, accepted that each claimant was eligible for accommodation under the Immigration and Asylum Act 1999, Part 1, s4(2) on the basis that they were destitute and that provision of accommodation was necessary to avoid breach of their Article 3 European Convention on Human Rights (ECHR) rights (the right to freedom from torture and inhuman and degrading treatment). However, there were substantial delays in providing accommodation pursuant to s4(2) and the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. The claimants experienced delays of 45 days to 151 days, with nine months in the case of AA.

The defendant used private contractors to provide accommodation on her behalf, managing the contractors using key performance indicators (KPIs). Their performance was monitored on a monthly basis and, where persistent failures occurred for three consecutive months, the defendant would ask for a service improvement plan.

One of the claimants (AA) had chronic kidney disease, hypertension and other serious conditions. His disabilities gave rise to a need for single person ground floor or lifted accommodation with easy access to bathroom and self-catering kitchen facilities. He also

needed to be able to access his clinic in North London for dialysis three times a week.

The claimants sought judicial review of the SSHD's approach to her duty to provide or arrange for the provision of accommodation for destitute failed asylum seekers.

AA focused on the discrimination arising from the lengthy delays in accommodating him as a severely disabled person, which were much longer than the target times set in the contracts. AA claimed that the defendant's failure to accommodate him within a reasonable time amounted to disability discrimination under s15 EA, indirect disability discrimination under s19 EA, a breach of the duty to make reasonable adjustments under s20 EA, and a breach of the PSED under s149 EA.

### High Court

Knowles J gave judgment as follows. First, the defendant failed to provide accommodation within a reasonable period of time. The defendant accepted that, in the absence of an express time limit, she was obliged to provide support within a reasonable period but had not accepted that the periods in the claimants' cases were unreasonable. Although her guidance in 'Asylum Accommodation and Support Transformation Service Delivery Guide' specifies the provision of accommodation within 24 hours up to nine days, that bore no relation to what the claimants had experienced and there was evidence that such experiences were not confined to the claimants.

Second, the defendant failed to capture data properly and, using that data, to monitor properly, in order to know whether she was acting lawfully and in accordance with her duty, and could act immediately if there was a sign that either was not the case. However suitable the monitoring scheme might be in other contexts, it was not suitable in the context of vulnerable destitute people. The defendant did not have information about the true position and there was evidence of a real risk of a breach of her statutory duty in a significant number of cases. The court outlined a number of features

which could contribute to a proper monitoring system, including having regard to the context, following the progress of each case, and alerting cases which were at risk of exceeding a reasonable period in sufficient time for that to be addressed. There was a real risk of a breach of the SSHD's duty to provide accommodation under s4(2) in a significant number of cases, and the court declared the SSHD to be in breach of that duty and of s6 of the Human Rights Act 1998 (in light of the real risk of breaches of Article 3 ECHR).

Third, the defendant unlawfully discriminated against AA under s15(1)(a)EA. Medical dietary needs and access to a clinic providing kidney dialysis were things arising in consequence of AA's disability. The huge delays and failure to meet the necessary dietary requirements amounted to *'unfavourable treatment'* [paras 264 - 267].

The court rejected the defendant's argument that there was no unfair/particular disadvantage because non-disabled asylum seekers who are pregnant and have small children would be similarly disadvantaged. That simply identified another group which may be placed at a comparative disadvantage. The defendant could not justify this treatment by reference to the interests of immigration control. There was no rational connection between immigration control and the unfavourable treatment of disabled people, as the defendant tried to argue. That was not a basis to justify treating disabled people less favourably.

Fourth, in failing to monitor the numbers of disabled applicants and failing to have an effective system for prioritising claims, the defendant had failed to make reasonable adjustments for severely disabled people as required under s20 EA. She had failed to take the steps it was reasonable to take to avoid the disadvantage they faced. The defendant could not show that the treatment was a proportionate means of achieving a legitimate aim. The judge refused to accept that limited resources justified the position: it was impossible to accept that single room, ground floor accommodation which allowed for self-catering and was in a location suitable for travel to the dialysis clinic was not available.

This judgment is a rare example of the court finding several systemic breaches of the disability discrimination provisions under the EA, with a detailed focus on monitoring. The court said that the scheme's failure to monitor *'goes to the heart of things'* because *'if you do not monitor disability and the needs of those with a disability then you will not know the needs and the problems (and, I would add, the solutions)'* [para 298]. The court identified not only straightforward disability discrimination in the treatment of AA but went on to identify two clear reasonable adjustments (monitoring and prioritisation of accommodation claims) which could and should have been made to reduce the disadvantage for disabled people of having to wait longer for their accommodation because of the needs arising from their disability.

This judgment thus underlines the importance for public authorities of having an adequate evidence base to assess whether they are complying with both their general public law duties, and specifically their duties towards disabled people under the EA including the PSED.

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