Racism in Housing

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A seminar presented by
One Pump Court Chambers'
Housing & Community Care Team

16th July 2025

Venue: HLPA Meeting

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Michael practices in housing, community care, education and general civil and public law.

Before taking up practice as a barrister Michael worked for the housing and homelessness charity Shelter. He has a wealth of knowledge in housing and community care law and has developed a broad practice in this field. Michael is well versed in all housing, community care and property law work including landlord & tenant, homelessness & allocations, leasehold (private and commercial) and planning based work. He is regularly instructed in all types of first instance, judicial review and appellate work in this field.

Michael also undertakes a wide variety of drafting and advocacy in general civil and public law fields. This includes actions against state bodies such as local authorities, schools and the police and regularly involves discrimination-based arguments under the Equality Act 2010.

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Michael practised in criminal law for a number of years at the start of his practice at the bar and this has equipped him with an ideal balance of skills and knowledge to undertake planning, licensing, forfeiture and regulatory-based matters heard before the Magistrates' Courts and other regulatory bodies.

Michael is dedicated to principles of access to justice for all. He has been a keen promoter of pro bono activities and is willing to take pro bono instructions in appropriate cases.

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Our Practice Manager Mycal Thomas, Assistant Practice Manager James Rourke and all our clerking term will be happy to discuss appropriate representation and advice for your lay clients in any case, including urgent matters, on 020 7842 7070.

Disclaimer

This seminar and the accompanying notes cannot be a substitute for legal advice on the facts of any individual case. We cannot accept liability for any adverse consequences of reliance upon the information provided. The views expressed are those of the individual speakers and do not necessarily represent those of other members of One Pump Court's housing team.

This is intended as an intermediate level seminar – assuming a practical knowledge of housing law. It is accredited with the Bar Council and SRA for 2 CPD hours.

Racism in a Possession Context

Public Law Defences

1. While it's fair to say that it is most likely that matters will be raised and pursued pursuant to the Equality Act 2010 (addressed in detail below) consideration ought always be given to whether a LA / RSL is acting in accordance with their obligations as a public body.

2. Where a public authority fails to conduct themselves in a lawful manner in breach of principles of public law this will amount to a defence to a claim for possession (*Barber v Croydon LBC [2010] EWCA Civ 51 per Patten LJ at paragraphs 44 to 45 and 48 to 49; Manchester CC v Pinnock [2011] 2 AC 104*).

3. The full range and scope of available public law grounds, i.e. judicial review grounds, is outside the scope of this paper. Advisers should refer to practitioners' texts on judicial review for further detail. Traditionally, the grounds are classified under three heads, namely illegality, irrationality and procedural impropriety (*Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374*). However, in practice these may overlap and public law errors are not always easy to categorise.

4. The following grounds are often useful in the possession context:

    a. Failure to follow the landlord's own policies. Often, local authority and other public-sector landlords will publish their policies online, in relation to issues such as equality and anti-social behaviour. These policies may contain very useful material – particularly if the landlord's (on paper) nuanced and sensitive procedures have been replaced in an individual's case by a single-minded pursuit of eviction. Unpublished policies may also have been relied upon and it may be necessary to obtain disclosure of these.

    b. Failure to honour a specific promise made to an individual, or to follow the landlord's usual practice or procedure. This may give rise to a legitimate expectation on the part of the individual.

c. Fettering of the landlord's own discretion, such as through the rigid application of a policy which does not allow for any exceptions.

d. Failure to observe obligations imposed on the landlord by the tenancy agreement itself. If an individual, it may be that the agreement makes provision for particular support or approaches to racism that has not been honoured.

e. Breach of the principles of "natural justice", such as by preventing an individual from explaining his or her circumstances before a decision is taken.

f. Failure to take relevant factors into account, for example those relating to an individual's personal circumstances. Alternatively, irrelevant factors might have been relied upon.

g. Failure to correctly apply the law, including a failure to fulfil the landlord's statutory duties.

h. Failure to give reasons for the decision (depending on the context).

5. The above list is not exhaustive and other judicial review grounds may well be applicable to a possession case.

6. Where the landlord is a local authority, it may be possible to argue that an individual has been treated unlawfully by departments of the authority other than its housing department. For example, failure to provide appropriate support in addressing racist abuse could be argued to have contributed to difficulties for the tenant in managing their tenancy.

7. Sometimes, a landlord's decision may be argued to be so unreasonable that no reasonable authority could have taken it, in which case it will be *Wednesbury* unreasonable.

8. Allegations of bias or deliberate misconduct are inherently difficult to prove and should be approached with caution, but that is not to say that they can never be established.

9. A court must dismiss a possession claim where to make an order would give effect to an unlawful act or decision by the social landlord (*Kay v Lambeth LBC [2006] 2 AC 465; Doherty v Birmingham CC [2009] 1 AC 367*).

10. Unlike the High Court, the County Court has no jurisdiction to make any of the prerogative orders stipulated in CPR 54 (which governs judicial review proceedings). It will therefore not be open to the county court to quash the local authority's decision to evict or to remit it back to the authority for consideration.

11. It was confirmed in *Barber* that after the dismissal of a possession claim the landlord is not prevented from issuing a fresh claim for possession based on a lawful decision-making process.

Equality Act Defences

12. The Equality Act 2010 defines and prohibits discriminatory conduct while, additionally, imposing a number of positive obligations on landlords and public authorities. Any of these restrictions and obligations could in theory provide the basis for a defence to possession proceedings.

13. A defendant against a social or local authority landlord can rely on the general public law principles detailed above to establish a defence to a claim for possession based on unlawful conduct in breach of the Equality Act 2010.

14. In addition, a defence under the Equality Act 2010 may be used where any landlord, public or private, is engaging in conduct that is discriminatory, and can be advanced even where a defendant may have no defence under landlord and tenant law (s.32-s38 Equality Act 2010):
    a. The County Court has jurisdiction to determine a claim for contravention of the prohibitions contained within Equality Act 2010 (*s.114 Equality Act 2010*).
    b. The County Court has jurisdiction to grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review (*s.119 Equality Act 2010*).

Race as a Protected Characteristic

15. The Equality Act 2010 defines Race as a protected characteristic in the following terms (*s.9 Equality Act 2010*):

Race

(1) Race includes –

(a) colour;

(b) nationality

(c) ethnic or national origins.

(2) In relation to the protected characteristic of race –

(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) A reference to person who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

16. While a full exploration of protected characteristics is outside of the remit of this paper it is worth noting the following in relation to Race:

a. Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins (¶*2.31 Services, public functions and associations: Code of Practice EHRC*)

b. Everyone has an ethnic origin but the provisions of the Act only apply where a person belongs to an "ethnic group" as defined by the courts. This means that the person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community. There are two essential characteristics which an ethnic group must have: firstly a long-shared history and a cultural tradition of its own. Secondly, an ethnic group may have one or more of the following characteristics: a common language, a common literature, a common religion or common geographical origin, or being a minority or an oppressed group (*Mandla v Dowell Lee [1983]2 AC 548*).

The courts have confirmed that the following are protected ethnic groups: Sikhs (*Mandla v Dowell Lee [1983]2 AC 548*), Jews (*Seide v Gillette Industries Ltd [1980] IRLR 427*), Romany Gypsies (*Commission for Racial Equality v Dutton [1989] IRLR 8)*, Irish Travellers (*O'Leary v Allied Domecq Inns Ltd CL 950275 July 200, Central London County Court*), Scottish Gypsies and Scottish Travellers (¶*2.32-33 & ¶2.35 Services, public functions and associations: Code of Practice EHRC*). Muslims and Rastafarians have not been able to show that they meet the criteria for an ethnic group (*Nyazi v Rymans Ltd (unreported) EAT/6/8 & Dawkins v Department of the Environment [1993] IRLR 284*)

c. An ethnic group or national group could include members new to the group for example a person who arrives into the group. It is also possible for a person to leave an ethnic group (¶*2.34 Services, public functions and associations: Code of Practice EHRC*).
d. National origins must have identifiable elements, both historic and geographic, which at least at some point in time indicates the existence or previous existence of a nation. For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense. National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries. A person's own national origin is not something that can be changed, though national origin can change through the generations (¶*2.36-38 Services, public functions and associations: Code of Practice EHRC*).
e. A racial group is a group of people who have or share a colour, nationality or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act. A racial group can be made up of two or more distinct racial groups. For example, a racial group could be 'black Britons' which would encompass those people who are both black and who are British citizens. Another racial group could be 'South Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans (¶*2.39 & ¶2.41 Services, public functions and associations: Code of Practice EHRC*).
f. A person may fall into more than one racial group. For example, a 'Nigerian' may be defined by colour, nationality or ethnic or national origins (¶*2.40 Services, public functions and associations: Code of Practice EHRC*).

g. Racial groups can also be defined by exclusion. For example, those of 'non-British' nationality could form a single racial group (¶*2.42 Services, public functions and associations: Code of Practice EHRC*).

Prohibited Conduct

17. A person who manages premises must not discriminate against or victimise a person (B) who occupies the premises (*Section 35 (1)&(3) Equality Act 2010*)–
    a. in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
    b. by evicting B (or taking steps for the purpose of securing B's eviction);
    c. by subjecting B to any other detriment.

18. A person who manages premises must not, in relation to their management, harass—
    a. a person who occupies them;
    b. a person who applies for them.

19. These prohibitions, by use of the term "person who manages premises", apply to landlords, both private and public and any agent of theirs.

<u>Harassment and Victimisation</u>

20. A person (A) harasses another (B) in the following circumstances:

    a. A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (*s.26(1) Equality Act 2010*).

    b. A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (*s.26(2) Equality Act 2010*).

    c. A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, the conduct has the purpose or effect

referred to in subsection (1)(b), and because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct (*s.26(3) Equality Act 2010*).

21. The definition of harassment is broadly drafted to cover all conduct related to a protected characteristic, not merely such conduct that has a causative relationship, and incorporates a wide range of scenarios including those where a complainant may not have the protected characteristic but be associated to someone who has such protected characteristics. The focus of the definition is on the purpose or effect of the conduct taking into account he perception of the complainant and whether it is reasonable for the conduct to have such an effect on the complainant (*s.26(4) Equality Act 2010*).

22. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act (*s.27(1) Equality Act 2010*). Each of the following is a protected act (*s.27(2) Equality Act 2010*)—
    a. bringing proceedings under this Act;
    b. giving evidence or information in connection with proceedings under this Act;
    c. doing any other thing for the purposes of or in connection with this Act;
    d. making an allegation (whether or not express) that A or another person has contravened this Act.

23. Victimisation is a concept concerned with the protection of an individual's right to exercise their rights under the Equality Act. Accordingly it engages no comparator exercise and is focused on whether the complainant suffered a detriment that was caused effectively, though not solely, by a person doing, or being thought to have done, a protected act.

24. It is unlikely that in the context of possession proceedings victimisation or harassment will arise independently of any other discrimination because the step of seeking possession following harassment or as part of an act of victimisation is likely to amount to direct or indirect discrimination. However where appropriate, consideration ought to be given to pleading harassment and/or victimisation alongside any such discrimination defence to strengthen any defendant's position.

Discrimination

Direct Discrimination

25. (1) A person (A) directly discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (*s.13(1) Equality Act 2010*) subject to the following:

    a. If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B (*s.13(3) Equality Act 2010*).

    b. If the protected characteristic is race, less favourable treatment includes segregating B from others (*s.13(5) Equality Act 2010*).

    c. If the protected characteristic is sex (*s.13(6) Equality Act 2010*)—
        i. less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
        ii. in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

26. Direct discrimination is the starkest form of discrimination; that is different treatment of two individuals where the reason for the difference in treatment is a protected characteristic. It requires a comparison exercise between a complainant and an actual or hypothetical comparator who has materially similar circumstances to that of the complainant save for the protected characteristic. The reason for the difference in treatment must be related to the protected characteristic such that the appropriate comparator in a race discrimination case is a person who is not of the same race as the complainant. The reality is that this comparison exercise is extremely difficult to satisfy and as a result it will only be in the most clear and apparent discrimination cases that direct discrimination will be established.

27. Less favourable treatment in relation to discrimination is a broad concept. Any disadvantage to which B has been subject will constitute less favourable treatment and there is no need for B to have suffered a tangible or material loss (*Chief Constable of the*

West Yorkshire Police v Khan [2001] UKHL 48; [2001] 1 WLR 1947 *per* Lord Hoffman at paragraphs 52-53).

28. Because direct discrimination need only arise "because of a protected characteristic" it need not be the complainant that has the protected characteristic nor need it be that the protected characteristic exists in reality. The complainant having an association to a protected characteristic or the discriminator having a perception of the existence of a protected characteristic is sufficient for the test. This could be relevant in a race context if someone were treated less favourably because their name was suggestive that they were of a particular race despite not being of that race.

29. Discrimination may be on grounds of race even though it is not the sole ground for the decision. To amount to direct discrimination the less favourable treatment must be because of race. In every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on ground of race? Or was it for some other reason? Save in obvious cases, answer the crucial question will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually, the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. This crucial question is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of direct race discrimination occurred (*Nagarajan v London Regional Transport [2000] AC 501 per Lord Nichols of Birkenhead at 510H-511C*).

Indirect Discrimination

30. A person (A) indirectly discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's (*s.19(1) Equality Act 2010*). A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (*s.19(2) Equality Act 2010*)—
    a. A applies, or would apply, it to persons with whom B does not share the characteristic,

b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
c. it puts, or would put, B at that disadvantage, and
d. A cannot show it to be a proportionate means of achieving a legitimate aim.

31. On a comparison of cases there must be no material difference between the circumstances relating to each case (*s.23(1) Equality Act 2010*). The comparison can be hypothetical and it is not necessary for there to be a causal link between the disadvantage and the protected characteristic. A complainant needs to demonstrate that people who share the complainant's protected characteristic would be put at a disadvantage and that the complainant has experienced or would have experienced that disadvantage.

Justification of Indirect Discrimination

32. An individual seeking to justify such discrimination cannot do so by relying on generalisations since any claim of justification will be subject to rigorous scrutiny (*Osborne Clarke Services v Purohit* [2009] IRLR 341).

33. In order to be legitimate an aim must not be discriminatory in itself, and must represent a real objective consideration. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost (*Ministry of Justice v O'Brien [2013] UKSC 6; [2013] 1 WLR 522 per Lord Hope of Craighead DPSC and Baroness Hale of Richmond JSC at ¶69*)

34. Consideration of proportionality requires a consideration of whether the conduct is necessary in pursuit of the legitimate aim. Necessary in this context does not mean that it is the only course of conduct. However if it is possible to pursue the relevant legitimate aim by undertaking less discriminatory measures such conduct will not be deemed necessary.

35. The Right to Rent requirements under the Immigration Act 2014 put those without a British passport at a disadvantage when seeking to secure a tenancy but the Courts have held they are justified because the requirements are capable of being operated in a

proportionate manner by landlords in most cases (*R(JCWI v SSHD [2020] EWCA Civ 542 per Hickinbottom LJ at ¶118-¶119*). However its application clearly exposes tenants to the risk of direct and indirect discrimination and landlords to risks of discriminating against tenants if they fail to apply the scheme in a proportionate manner and advisers ought to be alert to this risk.

The Public Sector Equality Duty

36. The Public Sector Equality duty imposes a duty to have due regard to the need (Section 149(1) Equality Act 2010):
    a. to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010,
    b. to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and
    c. to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

37. A local authority's duty under section 149 of the Equality Act 2010 is not limited to matters pertaining directly to the protected characteristic of the individual concerned. It is a general duty that applies to carrying out of any function by the local authority including the decision to seek possession of a property (*Barnsley Metropolitan Borough Council v Norton and others [2012] PTSR 56 per Lloyd LJ at paragraph 17*).

38. The public sector equality duty must be exercised in substance, with rigour and an open mind. There is a risk that such words can lead to no more than formulaic and high-minded mantras in in documents. The equality duty, does require a public body to focus very sharply on (i) whether the individual concerned is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability or any other protected characteristic, when taken together with any other features, on the individual and their circumstances (*Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening) [2015] UKSC 30 per Lord Neuberger of Abbotsbury at paragraph 78*).

39. The Public Sector Equality duty applies to public authorities and those who are not public authorities but who are exercising public functions. Accordingly it can apply to both social as well as public landlords. It is not necessarily to be assumed that a social landlord is exercising a public function. In *R (Weaver) v London and Quadrant Housing Trust [2010] 1 WLR 363* the Court of Appeal held that an RSL was engaging in acts as a public body when seeking to recover possession of a property because of the following features:
    a. Significant reliance on public finance enabling the housing trust to achieve its objectives.
    b. The trust's operation in close harmony with the local authority assisting the latter to meet its statutory duties and objectives
    c. The trust's freedom to allocate properties being circumscribed by the allocation agreements with the local authority and by the trust's statutory duty to co-operate
    d. The provision of subsidised housing
    e. The charitable objectives of the trust.

    However in *R (MacLeod) V Governors of Peabody Trust [2016] EWHC 737 (Admin)* a PSED challenge of a mutual exchange decision the Court held that because the RSL had used its own funds to purchase the properties concerned and they were let at a rent above those for most social housing and could be let to key-worker families with an income of up to £60,000.00 the properties were not social housing for the purpose of s.69 Housing and Regeneration Act 2008 and that the mutual exchange decision in relation to those properties was not a public function susceptible to judicial review.

40. The Public Sector Equality duty is of assistance where a social landlord has failed to take any steps in relation to an individual with a protected characteristic. While it is a useful tool in these circumstances it ought to be noted that the duty is limited to a duty "to have due regard" and therefore is only of assistance where it is arguable that that due regard would have resulted in alternative steps being taken. It also should be noted that even where there has been a breach of the PSED the court will not refuse a possession order if it was highly likely that there would have been the same outcome if the duty had been complied with – it does not have to have been inevitable (Luton Community Housing Ltd v Durdana [2020] HLR 27 per Patten J at ¶31-¶32 and ¶38-¶39and Forward v Aldwyck Housing Group Ltd [2020] 1 WLR 584 per Longmore LJ at ¶21-¶25, ¶31-¶32, ¶34-¶37 & ¶41-¶43).

41. The Public Sector equality duty is entirely general and applies to the carrying out by a public authority of any public function throughout their exercise of such functions.

The Court's Approach to a defence based on the Equality Act 2010

42. In *Aster Communities Ltd (Formerly Flourish Homes Ltd) v Akerman-Livingstone* [2014] EWCA Civ 1081 the Court of Appeal held that with a disability discrimination defence and a defence under article 8 of the ECHR the court was concerned with the same proportionality exercise and that where either defence was relied upon the interest of the appellant would be outweighed by a social landlord's countervailing interest in obtaining possession in most cases and that in such circumstances such defences ought to be dealt with summarily (Per Arden LJ at paragraphs 27-28 and 37). This decision was overturned by the Supreme Court in *Aster Communities v Akerman-Livingstone* [2015] UKSC 15 where the Supreme Court provides substantial guidance on the proper approach to such defences:

    a. The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a balance to be struck between the seriousness of the impact on the tenancy and the importance of the landlord's aims. (Baroness Hale of Richmond DPSC at paragraph 31).

    b. A landlord would have to show that there was no less drastic means of solving the problem and that the effect on the occupier was outweighed by the advantages (Baroness Hale of Richmond DPSC at paragraph 34).

    c. Where a defence under the Equality Act 2010 is raised in possession proceedings the public policy and public benefit of recovering possession has to be weighed against the public policy and public benefit inherent in the Equality Act 2010, aiming as it does to secure equal treatment and thus equal respect for the human dignity of all people irrespective of their protected characteristics. These are matters that a court is well equipped to address and ought to address undertaking the proportionality exercise themselves, rather than adopting a role akin to judicial review (Baroness Hale of Richmond DPSC at paragraph 32 and 38).

    d. In possession actions against tenants who otherwise have no right to remain in the property, once facts are established that could give rise to a discrimination claim, the burden shifts to the landlord to prove that they have complied with their

obligations under the Equality Act 2010 (Baroness Hale of Richmond DPSC at paragraph 34).

e. Defences based on the Equality Act 2010 ought to have their merits considered at a trial where the evidence is considered and properly challenged and the summary disposal of such defences will be rare and only where a landlord could show (i) that the appellant or relevant individual had no real prospect of proving that he had a protected characteristic within the meaning of the act, (ii) that it was plain that possession was not being sought because of a protected characteristic (whether directly or indirectly); or (iii) that bringing and enforcing the claim were plainly a proportionate means of achieving a legitimate aim (Baroness Hale of Richmond DPSC at paragraphs 36 and 38-40 and Lord Neuberger of Abbotsbury PSC at paragraph 60).

f. The substantive right to equal treatment that is protected by the Equality Act 2010 is different from and stronger than the right protected by Article 8 of the ECHR (Baroness Hale of Richmond DPSC at paragraphs 32 and 38 and Lord Neuberger of Abbotsbury PSC at paragraphs 43 and 55-58).

43. The Court of Appeal has affirmed that it is unlikely that such defences, when raised can be dealt with summarily, particularly at first instance. Where details of such a defence are brought to a court's attention an adjournment for the defendant to at least plead his position ought to be granted (*Birmingham City Council v Stephenson* [2016] EWCA Civ 1029)

Burden of Proof

44. In relation to any proceedings relating to a contravention of the Equality Act 2010 if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred unless A shows that A did not contravene the provision (*s.136 Equality Act 2010*).

45. The burden of proof therefore in Equality Act cases involves a two-stage test. Firstly, the complainant must establish facts from which the Court could infer contravention of the act.

Secondly, if such facts are proved it is for the alleged discriminator to show that it did not commit a contravention.

Remedies

Disposal of Possession Claims

46. As already detailed above, the County Court has jurisdiction to grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review (s.119 Equality Act 2010).

47. Accordingly in relation to social and local authority landlords the County Court has a wide range of powers to dispose of proceedings, including quashing their decisions and mandating action.

48. Further, in relation to private landlords, it is arguable that the Equality Act 2010 empowers the County Court to dismiss any claim on the basis that any notice to such proceedings is unlawful and thereby invalid or further and alternatively that any claim for possession is unlawful.

Damages

49. Discrimination is a statutory tort and the normal position in such cases ought to apply. Any complainant is therefore entitled to be restored to the position that they would have been in, had the tort not been committed, insofar as this can be done by the payment of money. Accordingly any identifiable loss or damage arising from the discrimination ought to be compensated under the generally recognised principles that fall outside the scope of this paper. Aggravated and Exemplary damages may also be available in proper circumstances.

50. In April 2025 Sarah Steinhardt began authoring a Discrimination: quantum update series for Legal Action Magazine. The April 2025 article and future articles ought to be essential reading for any lawyer practising in this area and equally if any practitioners have the details of any discrimination quantum cases that they feel would be relevant for the series I’m sure Sarah would be grateful if you contacted her with details.

51. An important and distinctive feature of Discrimination cases is that damages are available for injury to feelings. It is important therefore that any evidence for a complainant details any injury to feelings because the court is not entitled to award for injury to feelings without evidence of the same available to the Court (*Roget v Esporta Health Clubs & others UKEAT/0591/12/RN per HHJ Richardson at ¶8-¶9i).* Provided such evidence is provided the Courts have observed that it would be surprising if in most cases such an award is not made (*Ministry of Defence v Sullivan [1994] ICR 193 per Tuckey J at 199F-200A*)

52. It is generally recognised that the Vento guidelines ought to be applied to discrimination cases when determining what award of damages ought to be made for injury to feelings. The Vento guidelines were provided in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 where Mummery LJ detailed the following three broad bands of compensation for injury to feelings in discrimination cases at §65 (figures updated for inflation in brackets):

    a. <u>The top band should normally be between £15,000 (£33,857.14) and £25,000 (£56,428.57).</u> Sums in this range should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000 (£56,428.57).

    b. <u>The middle band of between £5,000 (£11,285.71) and £15,000 (£33,857.14)</u> should be used for serious cases which do not merit an award in the highest band.

    c. <u>Awards of between £500 (£1,128.57) and £5,000 (£11,285.71)</u> are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general awards of less than £500 (£1,128.57) are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

53. There are few published guidance/equivalent cases in relation to such claims but some guidance can be found in *Hickmet and Cheerz Express Ltd v Dragos* (*HHJ Murch County Court at Luton 19th January 2024 Legal Action April 2025 p.29*) in which possession proceedings were brought against the tenant, Mr Dragos pursuant to grounds 8, 10 and

11 which were ultimately dismissed due to procedural failings. Mr Dragos counterclaimed alleging harassment, direct race discrimination and racial harassment (as well as breaches of the tenancy deposit requirements under HA 2004). The Court accepted Mr Dragos allegations in full finding that the claimants had engaged in deliberate and sustained discriminatory conduct. The proven allegations, which covered a period of 19 months, included persistent harassment characterised by repeated unannounced visits at unsociable hours, intimidation to sign a new tenancy at higher rent, abusive conduct including shouting and swearing, threats of forcible entry and eviction and explicitly racist abuse directed at Ms Dragos referring ton her as a foreigner and suggesting that no one would help her. On more than one occasion, Mr Hickmet had attended late at night accompanied by other men yelling at her in front of her children and demanding that she leave her home. HHJ Murch adopted a holistic approach in relation to the inury to feelings causes by the breached of both the Protection from Harassment Act 1997 and the Equality Act 2010 and concluded that given the serious nature of the conduct and distress caused an award in the upper *Vento* bracket was justified applying a single sum of £32,000.00 (£34,107.94 – updated for inflation) for injury to feelings caused.

54. It is hard to see how any discrimination arising in possession proceedings is unlikely to secure an award in the middle or top bracket of *Vento*, particularly if the claim for possession itself is part of the discriminatory conduct and it is appropriate for complainants to seek substantial awards in cases of this nature, as it can be seen from *Dragos* that such awards will be granted.

Stage of Proceedings

55. Best practice would be to seek to rely on the Equality Act 2010 when defending proceedings prior to a possession order being made. There is a prospect that any attempt to raise such a defence at a later stage where it could have been raised earlier will be regarded as an abuse of the Court's process (*JL v Secretary of State for Defence [2013] EWCA Civ 449; [2013] HLR 27*). Further the issue may be regarded as *res judicata* if it relates to conduct of the landlord prior to the grant of the possession order. Where a possession order has already been made after the issue of discrimination was already raised in proceedings a tenant can require the Court to reconsider the issue of breach of the Equality Act 2010 at enforcement only if there has been a relevant change of

circumstances (*Paragon Asra Housing Ltd (formerly Paragon Community Housing Ltd) v Neville [2018] EWCA Civ 1712 per Sir Colin Rimer at ¶51-¶52*).

56. s.89 Housing Act 1980 does not act to constrain a court from considering and granting an application made by a tenant to stay enforcement of a possession order on the basis that to enforce the possession order would breach the applicant's rights as a disabled individual. This is because what is sought is to challenge and restrain the local authority's discriminatory conduct rather than an order postponing the effect of the order for possession such as would come within s.89 Housing Act 1980 *(London Borough of Croydon v Doreen Wright [2007] EWHC 3465 per Mr Justice Eady at paragraphs 13 and 14*).

57. Accordingly challenges at enforcement stage ought to be given due and proper consideration consistent with the approach proposed by the Supreme Court in *Akerman Livingstone*. It is likely that a Court will be more welcoming of such arguments where there is also a good reason that the matters were not raised or addressed when the possession order was made, for example:

    a. A protected characteristic impacted on the defendant's ability / capacity to raise an Equality Act defence before the possession order was made.

    b. A protected characteristic has come to the knowledge of the parties since the possession order was made but before it is enforced.

    c. Discriminatory conduct has arisen since the possession order was made but before the possession order is enforced.

Procedural Matters

Assessors

58. On a claim for discrimination the Court must exercise its power to appoint an assessor unless it is satisfied that there are good reasons or not doing so (*s.114(7) Equality Act 2010*).

59. The Equality Act 2010 Code of Practice for Services, public functions and associations, a statutory code which must be taken into account by this court (*s.15(4) Equality Act 2006*), provides the following:

> "14.14
>
> In cases about unlawful acts a judge or sheriff (in Scotland) will usually have to appoint an 'assessor' to assist him or her. These are persons of skill and experience in discrimination issues who help to evaluate the evidence. The Act says that unless the judge or sheriff is satisfied that there are good reasons for not doing so, they must appoint an assessor.
>
> 14.15
>
> It would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings."

60. It is worth noting that the explanatory notes to the Equality Act 2010 provide the following,

> "There is a presumption that a judge or sheriff will appoint an assessor to assist the court when hearing discrimination cases. However, an assessor need not be appointed where there are good reasons not to (for example, after an assessment of the judge's own level of experience, the nature of the case and the wishes of the claimant)."

The references to the judge's own level of experience providing a good reason ought to be considered consistently with the Code of Guidance, that is to say that a court believing itself capable of hearing the issues without an assessor is not a good reason.

61. In *Ahmed v University of Oxford* [2002] EWCA Civ 1907 Waller LJ considered the appointment of assessors in Race Relations Act the principles contained therein are equally relevant to the provisions now contained in the Equality Act 2010 and can be

articulated in the following terms (*at §32 cited with approval in Deman v Commission for Equality and Human Rights per Sedley LJ at §10*):

*"…*the persons to be appointed as assessors are not scientists or seamen with special expertise in the true sense of that term, but ordinary lay people who have a particular experience in life, an experience which, if it is to be of any real assistance to a judge, involves being able to assess the likelihood of whether some conduct or another is … [motivated by a protected characteristic]…. Their expertise (if that is what it should be called) embraces assessing the implications of factual situations, and assisting in reaching a conclusion as to whether… [a protected characteristic]… has or has not played a part. That in our view points to it being the intention of Parliament that in…[discrimination cases]…judges were to be assisted by assessors in the broadest sense of helping them evaluate the evidence in the area of…[discrimination relating to the relevant protected characteristic]... The fact that an assessor may be involved in the fact finding role, whether it be of primary fact or by way of drawing inferences from the primary facts, does not mean that the assessor is actually deciding the facts."

62. It is further noted that the appointment of assessors in Equality Act cases provides a number of benefits:
    a. It furthers the Equality Act's purpose of making the law easier to understand, to enable judges to draw on specialists trained to deal with discrimination complaints.
    b. It strengthens protection by recognising that the sensitive nature of discrimination and vulnerability requires an added layer of safeguarding.
    c. The assessors are able to assist the court with determining whether individuals are deceiving the court. The can better understand the sort of masks, pretences and protests that are often put forward by those who discriminate or allege discrimination as well as how unconscious bias or stereotyping can operate.

63. The assistance to be given by an assessor will typically involve bringing their expertise to bear in assisting the judge with the evaluation of the evidence as it applies to particular issues. But it need not be limited to that and the role of an assessor in certain contexts has long been recognised as going beyond evaluation of the evidence adduced by the parties, to the extent of the assessor being regarded as a Court-appointed expert. The more the assessor has provided material of the latter nature the interests of justice demand that such input is disclosed. However in housing cases it is more likely that it will be the former

and no disclosure is required (*Laidley v Metropolitan Housing Trust Ltd [2025] EWCA Civ 448*).

Notice to the EHRC

64. The Practice Direction – Proceedings Under Enactments Relating to Equality, requires a claimant give the EHRC notice of the commencement of proceedings by posting a hard copy of the notice using the reference "commencement to proceedings" or e-mail the notice to commencementofproceedings@equalityhumanrights.com.

65. The Practice Direction doesn't specify what form the notice should take, but the ECHR's website confirms providing a copy of the claim form is usually sufficient.

66. The Practice Direction applies to claims under section 114 of the Act, so is likely to cover Equality Act counterclaims.

67. The court will consider whether to take any steps for non-compliance, but any step should not involve a sanction (including any stay, dismissal or striking out) or costs penalty or other costs order against the claimant.

Race Discrimination Highlights in the Context of Allocations and Homelessness

R (Ward) v Hillingdon, R (Gullu) v Hillingdon [2019] EWCA Civ 692

68. This case provides a helpful example of indirect discrimination. It was a combined appeal involving challenges to changes in Hillingdon's allocations policy, which changes were introduced to reflect the guidance in "Providing Social Housing for Local People: Statutory Guidance on Social Housing Allocations for Local Authorities in England". This provided guidance to housing authorities on qualifying persons for the housing register, and encouraged housing authorities to prioritise applicants with a close association to the area, for instance by introducing a residency requirement; stating a minimum two year residency requirement may be reasonable. It also advised authorities to have regard to the Equality Act when deciding on their criteria
69. Under Hillingdon's new policy, most individuals who either were not entitled to reasonable preference under section 166A of the Housing Act 1996, or who failed to satisfy a 10 year residency requirement, would not qualify for the housing register. Where an applicant qualified only as a result of being awarded reasonable preference because they were homeless, they would be in the lowest band D.
70. Hillingdon had carried out an equality impact assessments in 2013, and again in 2016, after Mr Gullu had initiated his claim. The later assessment (like the first) considered the impact of the policy by reference to applicants' ethnicity, but not with reference to either refugees or non-UK nationals.
71. Claims were brought by two individuals who argued the policy resulted in indirect race discrimination. Firstly by Ms Ward, an Irish Traveller who relied on, amongst other grounds, sections 19 and 29 of the Act, and secondly, by Mr Gullu, a refugee, who relied on sections 19 and 149. In both cases Hillingdon conceded the policy discriminated. It did not justify the discrimination, but argued there were sufficient "safety valves" in the policy, including a discretion to be awarded a higher banding, which negated the discrimination.
72. The safety valves weren't limited to applicants within certain protected groups, but were available to applicants generally, provided they satisfied any relevant criteria.
73. The Court concluded:
    a. Whether the policy contained sufficient safeguards (or safety valves) to prevent some aspects of the policy from being discriminatory, was different to whether

there was justification for the discriminatory policy. However, Hillingdon had conflated both issues.

b. The burden to establish justification lies on the policy maker, but retrospective justification following the introduction of the policy may be sufficient.
c. Regarding the extent to which local authorities need to consider the impact of their policies the Court stated:

I do not consider that compliance with the PSED requires a policy maker to consider, in advance of formulating a policy, its potential impact on every conceivable protected group. There must be some trigger for considering a particular group. But that is not a complete answer. It may well be the case that, in formulating a policy, a policy maker has conscientiously attempted to assess the potential indirect discriminatory effect on a number of protected groups; but has reasonably and in all good faith overlooked a particular such group.
In my judgment, it is incumbent on the policy maker once confronted with the omission, to justify the discrimination as regards that particular group. If a policy amounts to indirect discrimination against group E, I do not consider that it is an answer for the policy maker to say that it has considered groups A, B, C and D.

d. As to the safety valves, because they were available to applicants generally, they couldn't counter the disadvantage that protected groups suffered.
e. The Court stated:

If a PCP results in a relative disadvantage as regards one protected group, any measure relied on as a "safety vale" must overcome that relative disadvantage. Put simply, if the scales are tilted on one direction, adding an equal weight to each side of the scales does not eliminate the tilt.
f. Therefore Hillingdon would have needed to establish justification, but failed to do so.

g. Whether there had been justification wasn't a disputed issue, and therefore was dealt with relatively briefly. The Court stated:

> *It is common ground that the correct approach to justification of indirect discrimination is to follow the structure described by Lord Reed in* ***Bank Mellat v HM Treasury (No.2) [2013] UKSC 39; [2014] A.C. 700 at [74]:***
> *"… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter … In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."*

Discrimination on a s.204 Appeal

74. In *Adesotu v Lewisham Borough Council* [2019] EWCA Civ 1405 the Court of Appeal held that the County Court had no jurisdiction to determine grounds of appeal alleging discrimination in breach of section 19 Equality Act 2010 (*per Bean LJ at §16-20*)

75. However it may not always be practicable for an applicant to mount a judicial review of an authority's policy relating to suitability of out of borough placements and such an applicant must be able to rely on any point of law arising from the decision under appeal including the legality of the policy which has been applied in her case (*Nzolameso v Westminster City Council [2015] UKSC 22 [2015] PTSR 539 per Baroness Hale of Richmond DPSC at §41*). An appellant must be able to rely on any point of law arising from a review decision under appeal including the legality of an antecedent policy which has been applied in their case (*James v Hertsmere BC [2020] EWCA Civ 489 per Peter Jackson LJ at §24 §31*).

76. We've all been left in a bit of a pickle as to what to do in cases where discrimination has arisen whether in the manner with which the review was conducted or in the manner with which polices were applied. It seems however that the case of *(RZH) v Sutton LBC; R (RZH and DTU) v Sutton LBC* [2025] EWHC 713 (Admin); May 2025 Legal Action 48 may have provided the answer of what to do in this situation. Fordham J indicating that the proper approach to such a situation is to issue a separate part 8 claim for discrimination

alongside the 204 appeal. See Nick Bano's helpful article on this issue in the June Legal Action 2025.