

The Brown Principles

2.21 There are many cases in which the courts have considered whether a body has complied with the equality duties on race, disability and gender which the public sector equality duty has replaced. The principles set out in those cases will be relevant to the duty under s.149.

In *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 the court considered what a relevant body has to do to fulfil its obligation to have due regard to the aims set out in the general equality duty. The six 'Brown principles' it set out¹ have been accepted by courts in later cases.² Those principles are that:

- In order to have due regard, those in a body subject to the duty who have to take decisions that do or might affect people with different protected characteristics must be made **aware of their duty** to have 'due regard' to the aims of the duty.
- Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration as well as at the time a decision is taken. Due regard involves a **conscious approach and state of mind**.
- A body subject to the duty cannot satisfy the duty by justifying a **decision after it has been taken**. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision are not enough to discharge the duty.
- The duty must be **exercised in substance, with rigour and with an open mind** in such a way that it influences the final decision. The duty has to be integrated within the discharge of the public functions of the body subject to the duty. It is not a question of 'ticking boxes'. However, the fact that a body subject to the duty has not specifically mentioned [s.149]³ in

¹ *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 at paras 90-96.

² Including cases about the duty in s.149 of the Act. See, for example, *R. (on the application of Greenwich Community Law Centre) v. Greenwich London Borough Council* [2012] EWCA Civ 496.

³ The equality duty in *Brown* was the Disability Equality Duty in s.49A of the Disability Discrimination Act 1995. Later cases have confirmed that the principles in *Brown* also apply to the duty in s.149 of the Act.

carrying out the particular function where it is to have 'due regard' is not determinative of whether the duty has been performed. But it is good practice for the policy or decision maker to make reference to [s.149] and any Code or other non-statutory guidance in all cases where [s.149] is in play. 'In that way the decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced'.

- The duty is a **non-delegable** one. The duty will always remain the responsibility of the body subject to the duty. In practice another body may actually carry out the practical steps to fulfil a policy stated by a body subject to the duty. In those circumstances the duty to have 'due regard' to the needs identified will only be fulfilled by the body subject to the duty if (1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so (2) the body subject to the duty maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty.
- The duty is a **continuing one**.
- It is good practice for those exercising public functions to keep an **accurate record** showing that they had actually considered [the general equality duty] and pondered relevant questions. Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake the duty conscientiously. If records are not kept, it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by [s.149].

In addition to the Brown principles courts have also said that:

- The general equality duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to **have due regard to the need** to achieve these goals.⁴
- A body subject to the duty will need to consider whether it has sufficient information to assess the effects of the policy, or the way a function is being carried out, on the aims set out in **the general equality duty**.⁵

2.22 Whilst questions of available resources may form part of its decision-making consideration, a body cannot avoid complying with the duty by claiming that it does not have enough resources to do so.

The courts have said that even where the context of decision making is financial resources in a tight budget, that does not excuse non-compliance with the duty and ‘indeed there is much to be said that in straitened times the need for clear, well informed decision making when assessing the impacts on less advantaged members of society is as great, if not greater’.⁶

⁴ *R. (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, Dyson LJ at para 31.

⁵ See, for example, *Child Poverty Action Group v. Secretary of State for Work and Pensions* [2011] EWHC 2616 at para 76.

⁶ *R. (W) v. Birmingham City Council* [2011] EWHC 944, Blake J at para 45.