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Litigating the Public Sector Equality Duty: the story so far*

Abstract

This paper considers the development and judicial application of the Public Sector Equality Duty now found in s149 Equality Act 2010, previously in a variety of forms in the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975. It identifies a number of emerging themes in the jurisprudence concerned, in particular, with the relationship between the PSED and *Wednesbury* review, the extent of the information-gathering obligation it imposes, the delegability of PSED decision-making and the timing of PSED challenge. It then considers the uncertainties which remain including, in particular, the application of the duty to various categories of decision-making, and concludes by assessing the impact of the PSED on challenges to "cuts" cases arising from the reductions to public sector funding, and on domestic equality jurisprudence.

Key words: discrimination, equality, Equality Act 2010, Public Sector Equality Duty, Judicial Review

1. Introduction

What has become known as the Public Sector Equality Duty (PSED) was first introduced in Britain in April 2001 by the Race Relations (Amendment) Act 2000, which amended s71 of the Race Relations Act 1976 (RRA). Similar duties were introduced by amendments to the Disability Discrimination Act 1995 (DDA) in December 2006 and the Sex Discrimination Act 1975 (SDA) in April 2007, before the implementation of the Equality Act 2010 (EqA) introduced from April 2011 a single PSED covering not only race, disability and sex (including gender reassignment, pregnancy and maternity), but also sexual orientation, religion, belief and age.

In May 2012 the-then (Coalition) Government announced that a review of the PSED "as part of the outcome of the Red Tape Challenge spotlight on equalities, to establish whether [it was] operating as intended.[1] That announcement caused concern among

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[1] www.gov.uk/government/policy-advisory-groups/review-of-public-sector-equality-duty-steering-group, accessed 9 October 2013.

many with an interest in equalities, not least because the "Independent Steering Group" consisted for the most part of those who might reasonably be regarded as having an interest in the evisceration of the duty. The review, published in September 2013, did not suggest any "final judgement about the impact of the PSED" but its tone was generally hostile and it insisted that public bodies "**must not seek to 'gold plate'**" compliance (original emphasis).[2] A Ministerial statement by the Minister for Women and Equalities, Maria Miller MP, agreed with a recommendation that a formal review of the PSED be carried out in 2016 and with a recommendation that "complementary or alternative [enforcement] means, other than judicial review" ought to be considered.[3] This statement was made in the midst of Government's concerted attack on judicial review and its funding.

The purpose of this paper is to consider the way in which the PSED (by which I refer both to the duties imposed by the RRA, SDA and DDA and to that more recently introduced by the EqA) has been applied by the courts to date. I do not claim to discuss all the PSED cases of which there are now many, much less to do so exhaustively, but I will consider the more important of them and will indicate the breadth and nature of the cases, together with some of the themes which have emerged from the caselaw.[4]

2. The current PSED and its predecessors

Section 149(1) of the EqA requires that public authorities "must, in the exercise of [their] functions, have due regard to" the three statutory needs to (a) "eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act", (b) "advance equality of opportunity" and (c) "foster good relations between persons" with different protected characteristics.[5] The duty applies to private persons exercising public functions, in the exercise of those functions (s149(2)). The PSED differs from its predecessor provisions in a number of respects but the judicial approach to s149 has been on all fours with that taken to the predecessor provisions.

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[2] www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf, accessed 10 October 2013 paras 12, 15, 18 & 22.

[3] www.gov.uk/government/uploads/system/uploads/attachment_data/file/237215/Public_Sector_Equality_Duty_Review_-_HoC.pdfwww.gov.uk/government/uploads/system/uploads/attachment_data/file/237215/Public_Sector_ Equality_Duty_Review_-_HoC.pdf

[4] See also my table of PSED cases available at http://www.matrixlaw.co.uk/Members/31/Aileen%20McColgan.aspx.

[5] Listed at s149(7) as "age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex [and] sexual orientation".

The PSED had its legislative precursor in Great Britain[6] in s71 RRA which imposed duties on local authorities (alone) "to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need — (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups." The precedents were not promising. There are no decisions in which s71, prior to its amendment by the 2000 Act, founded a judicial review challenge to a public authority, attempts by such authorities to rely on the duty as a basis for anti-apartheid actions having been rejected on a number of occasions.[7]

Section 71 RRA was amended by the Race Relations (Amendment) Act 2000, which was passed in the wake of the MacPherson inquiry's Report and which introduced a new s19B into the RRA which prohibited race discrimination in the carrying out of public functions.[8] A provision imposing positive obligations on public bodies was introduced by Lord Lester by way of a Liberal Democrat amendment to the Bill in the House of Lords on 13 January 2000,[9] and on 26 January 2000 Home Secretary Jack Straw announced that the government would include a statutory duty on public authorities to promote equality in the Bill "leaving room for consultation on how the duty will operate in practice and how it will be enforced".[10]

After its amendment by the 2000 Act, s71 required that every body listed in Schedule 1A of the Act "shall, in carrying out its functions, have due regard to the need— (a) to eliminate unlawful racial discrimination [[11]]; and (b) to promote equality of opportunity and good relations between persons of different racial groups". The amendment of s71 did not at first generate any litigation and a Formal Investigation carried out by the CRE in 2006 found that only 42.4% of local authorities had carried out any race equality impact assessments in the preceding four years.[12] The PSED was, according to John Halford (the solicitor responsible for the *Elias* case, discussed below), "considered a white elephant by many discrimination lawyers and little more than a target duty by their

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[6] Cf Northern Ireland Act 1998 s 75.

[7] *Wheeler v Leicester CC* [1985] AC 1054; *R v Lewisham LBC Ex p. Shell UK* [1988] 1 All ER 938.

[8] Previously, by reason of the decision of the House of Lords in *R v Entry Clearance Officer, Bombay, ex p Amin* [1983] 2 AC 818 on the materially identical provisions of the SDA, public authorities were only bound by the RRA when they exercised functions equivalent to those of private bodies, and not when they were engaged in the activities of the "state" as such.

[9] *Ibid* vol 608, col 773-788.

[10] See Race Relations Amendment Bill (HL) Bill, Commons Library Research Paper http://www.parliament.uk/briefing -papers/RP00-27 p.24, accessed 7 October 2013.

[11] After 1 October 2010 "discrimination and victimisation".

[12] CRE *Common Ground* (London: CRE, 2006) para 3.2.4a.

public law counterparts".[13]

3. The Early Caselaw

The first hint that the PSED might have real teeth came in July 2005 when the-then Elias J ruled, in R *(Elias) v Secretary of State for Defence*, that the defendant had breached s71 RRA by failing to have due regard to the need to eliminate unlawful racial discrimination in adopting a compensation scheme for former Japanese prisoners of war, further that this breach was relevant to the justification of the indirect race discrimination he accepted that the scheme involved.[14] The Court of Appeal in the same case declared (albeit *obiter*), and despite the relative absence of change in s71(1) itself[15] from its original (s71) to its amended (s71(1)) form, that the "clear purpose" of the duties imposed by the RRA, later by the SDA and DDA, was "to require public bodies to whom that provision applies to give advance consideration to issues of … discrimination <u>before</u> making any policy decision that may be affected by them".[16]

The compensation scheme challenged in *Elias* excluded from entitlement those British subjects who had not been born (and whose parents and grandparents had not been born) in the UK. Elias J ruled that, in view of the "obvious discriminatory effect of this scheme", s71 required that the Secretary of State consider in advance of adopting it whether any discriminatory effect was justifiable.[17] Further, the judge accepted that "the failure on behalf of the defendant apparently even to appreciate the potentially discriminatory nature of the scheme also made it harder for him now to establish justification" in respect of a claim of indirect discrimination pursued by the claimant.[18] Arden LJ then stated, *obiter*, in the Court of Appeal that the PSED was "an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation" and that it was "not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter".[19]

The importance of the decisions in *Elias* cannot easily be over-stated. Prior to the judgment of Elias J there was little to distinguish s 71(1) from its predecessor provision and scant reason to regard it as having potentially significant impact. After his judgment,

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[13] "Statutory duties and the Public Law Courts" (2007) 12(2) *Judicial Review* 89.
[14] [2005] EWHC 1435 (Admin) [2005] IRLR 788.
[15] As distinct from the supportive specific duties and the enforcement mechanisms therefor.
[16] [2006] EWCA Civ 1293; [2006] IRLR 934 [274].
[17] Fn 12 para 98.
[18] *Cf* his decision as Elias LJ in *Coll v SSJ* [2015] EWCA Civ 328.
[19] Fn 16.

and the Court of Appeal's endorsement of it, the PSED became an extremely valuable tool in the toolkit of public lawyers and radically altered the parameters of "discrimination law" in British law.

Another early indication of the importance of s71 RRA was *R (BAPIO Action Ltd) v Secretary of State for the Home Department* in which Stanley Burnton J, as he then was, found that changes to the regime for training international medical students in the UK had been made in breach of the PSED,[20] although he declined to quash the rule change in light of an equality impact assessment (EIA) subsequently carried out by the defendants. The Court of Appeal was asked to rule on other aspects of the decision and Sedley LJ took the opportunity to state, albeit *obiter*, at [3] that the withholding of relief below "does not in any way diminish the importance of compliance with s.71, not as rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government. It is the Home Office's good fortune that the eventual assessment did not force it to go back to the drawing board".[21] The following year, in *R(C) v Secretary of State for Justice*, in which the Court of Appeal quashed amendments to the Secure Training Centre (Amendment) Rules 2007 which had been implemented without any analysis of their likely racial impact,[22] Buxton LJ declared, for the Court, that "[a]lthough here characterised as a procedural defect", the defendant's failure to conduct an EIA "is a defect in following a procedure that is of very great substantial, and not merely technical, importance, as the observations of Arden and Sedley LJJ make clear. It continues to be of the first importance to mark that failure by an appropriate order."[23]

Elias, BAPIO and *C* all concerned s71(1) RRA. Section 49A DDA, which came into effect in December 2005, required that "due regard" be paid to a wider range of statutory needs including (s49A(d)) "the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons". The first s49A DDA decision was made in *Eisai Ltd v National Institute for Health and Clinical Excellence (NICE)*, in which the High Court considered a challenge to a decision of NICE to the effect that a particular drug was not cost efficient in the

[20] [2007] EWHC 199 (QB).
[21] [2007] EWCA Civ 1139 [3].
[22] [2008] EWCA Civ 882; [2009] QB 657.
[23] *Ibid*, [54]. See also *R (HA (Nigeria)) v SSHD* [2012] EWHC 979 (Admin) [200]. *Cf Barnsley MBC v Norton* [2011] EWCA Civ 834 and *R (Hurley & Moore) v SSBIS* [2012] EWHC 201 (Admin), *R (RB) v Devon* [2012] EWHC 3597 (Admin) and *R (E) v Governing Body of the Jews Free School & Ors* [2008] EWHC 1535 (Admin) [2008] ELR 445 [214], in which only declaratory relief was granted.

treatment of mild to moderate Alzheimer's Disease measured by reference to particular assessment criteria.[24] The High Court (Dobbs J) accepted that the defendant had breached s49A by failing adequately to consider the fact that the assessment criteria were flawed in their application to, *inter alia*, people with marked language problems, and those whose first language was not English.

Shortly after the decision in *Eisai*, the High Court considered what was to be the first of the many PSED "cuts challenges". The defendant in R *(Chavda) v Harrow LBC* had decided to ration adult care services to those whose care needs were deemed "critical".[25] An "equalities impact assessment" had been carried out which recognised the potential for disparate impact on those with disabilities but there had been "no effort proactively to seek the views of the disabled or to refer to the duty in the planning stages of the consultation" and no consideration of "what measures could be taken to avoid disadvantage to the disabled".[26] Judge Mackie QC, sitting in the Administrative Court, stressed the importance of the PSED, and remarked that there was "no evidence that th[e] legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes", and that an "oblique" reference in the documentation provided to the decision makers to "potential conflict with the DDA" was insufficient as it "would not give a busy councillor any idea of the serious duties imposed upon the council by the Act". He went on to state that "[t]he council could not weigh matters properly in the balance [for the purpose of paying "due regard" to them] without being aware of what its duties were" and that it was "not enough to accept that the council has a good disability record and assume that somehow the message would have got across". [27]

Among the other influential early PSED decisions was that in R *(Baker & Others) v SSCLG*, a s71 RRA challenge to the decision of a planning inspector.[28] The inspector had upheld a refusal of planning permission to Irish Travellers to build on Green Belt land, having followed a process which involved weighing the harm to the Green Belt against a variety of considerations which favoured the claimants' case, including their "gypsy status"

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[24] [2007] EWHC 1941 (Admin), 98 BMLR 70. The Court of Appeal decision ([2008] EWCA Civ 438, 101 BMLR 26) does not deal with the PSED.
[25] [2007] EWHC 3064 (Admin) [2008] LGR 657. Presenting adults have to have their needs rated critical, substantial, moderate or low with authorities having a discretion to determine the threshold at which care is provided.
[26] *Ibid* [36].
[27] *Ibid* [40].
[28] [2008] EWCA Civ 141, [2008] LGR 239.

and the disadvantage associated with it, taking into account guidance which incorporated a commitment to equality for members of the gypsy and traveller communities. The-then Dyson LJ, with whom May LJ and Sir Robin Auld agreed, emphasised that s71 RRA did not impose "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", but, rather, "a duty to have due regard to the need to achieve these goals". Further, "due regard" was "the regard that is appropriate in all the circumstances", including "on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision maker is performing." [29] Dyson LJ went on to declare that "Ultimately, how much weight [the Planning Inspector] gave to the various factors was a matter for her planning judgment." [30] He rejected the argument that "a person does not perform the s 71(1) duty unless he demonstrates by the language in which he expresses his decision that he is conscious that he is discharging the duty", agreeing with the dicta of Ouseley J in R *(Smith) v South Norfolk Council*[31] that the consideration required by the PSED "can be carried out without the section being referred to provided that the aspects to which it is addressed are considered, and due regard is paid to them …", and stated that "[t]he question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need".[32]

Baker is one of the most frequently cited PSED decisions. Equally influential is that of the Divisional Court in R *(Brown) v SSWP,* an unsuccessful challenge to post office closures,[33] in which Aikens LJ, with whom Scott Baker LJ agreed, adopted the *Baker* approach and went on to distil the now well-known six principles from the caselaw. In short summary, these required (1) that decision-makers must be aware of the duty of due regard; (2) which "must be fulfilled before and at the time that a particular policy … is being considered by the public authority in question", a process which "involves a conscious approach and state of mind" rather than *ex post facto* justification; (3) that the duty "must be exercised in substance, with rigour and with an open mind" and must be "integrated within the discharge of the public functions of the authority. It is not a

[29] *Ibid* [31].
[30] *Ibid* [34], [36].
[31] [2006] EWHC 2772 (Admin).
[32] Fn 28 [35], [37]. Dyson LJ went on to acknowledge at [38] that express reference to the PSED was good practice.
[33] [2008] EWHC 3158 (Admin), [2009] PTSR 1506.

question of 'ticking boxes', and failure to mention the PSED as such is not fatal; (4) that the duty is non-delegable though practical steps to fulfil it may be taken by others under proper supervision; (5) that it is continuing; and (6) that it is good practice to keep records on PSED compliance.[34]

4. Emerging Issues

A number of issues have emerged from the caselaw to date. These will be considered in turn.

(1) How much regard is "due"?: "due regard" and Wednesbury

In the early cases PSED challenges frequently succeeded because public authorities had flagrantly failed to pay any attention to the equality implications of their actions. In *R (Kaur) v Ealing LBC*, for example, the High Court ruled that the defendant had breached s71 RRA when it decided, without any analysis of the race equality implications, to replace "targeted" funding previously provided to Southall Black Sisters to work with women experiencing domestic violence with funds to be awarded to a provider who would provide services to all individuals experiencing domestic violence within the borough.[35] The evidence was that BME women were less likely to access services from a "generic" provider. Moses LJ found that the defendant had failed throughout "to assess the impact on black minority ethnic women" of its approach and ruled that the Council had not been entitled to reach a decision on funding "contingent on" the results of an EIA still to be undertaken.[36] It was, said his Lordship, "unlawful to adopt a policy contingent on an assessment" and the suggestion to the contrary "smack[ed] … of policy-based evidence rather than evidence-based policy..."[37]

Such cases still occur.[38] More common, however, is the situation in which <u>some</u> regard has been paid and the issue between the parties is whether such regard is "due", i.e., sufficient. In R *(Meany) v Harlow DC*, for example, a PSED challenge was brought to

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34 [90]-[96]. The *Brown* formula was approved by the Court of Appeal in R *(Domb) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941 [2009] LGR 843. Lengthier analyses have been adopted subsequently, for example by McCombe LJ in *Bracking* [2013] EWCA Civ 1345 [2014] EqLR 60 [26], but the *Brown* formula is still regularly cited with approval.

35 [2008] EWHC 2062 (Admin).

36 *Ibid* [24].

37 *Ibid* [35], [37]. See also *Watkins-Singh* [2008] EWHC 1865 (Admin), [2008] 3 FCR 203 and *Elias* fns 14 and 16, *E v JFS* and *EISAI* fn 24, and *JL v Islington* [2009] EWHC 458 (Admin), [2009] 2 FLR 515, the last of which is discussed below.

38 Relatively recent examples include R *(Medical Justice) v SSHD* [2011] EWCA Civ 1710 and R *(Luton BC & Ors) v SS Education* [2011] EWHC 217 (Admin), [2011] LGR 553.

the defendant's decision to reduce funding to welfare advice services.[39] Davis J (as he then was) rejected the argument put for the defendant that the claimant "either had to show that no regard was had to the statutory criteria or that the decision was irrational"[40] and ruled that "the question of due regard requires a review by the court... how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination".[41] The defendant had had some regard to the statutory needs, but had not weighed them in the balance against the countervailing factors on which it relied.[42] In particular, while it was arguable that sufficient regard was had to the statutory duties in respect of a budget cut of 50% (this having been one of the options on the table), there was nothing to show that any due consideration of the statutory criteria in respect of a reduction of … 80%, was given. It was, in effect, all treated as one".[43]

The amount of regard which is "due" will vary with the facts. In *R (Hajrula) v London Councils* the claimants successfully challenged a decision of the defendant to withdraw funding from the Roma Support Group because the defendant had failed to consider the impact on protected groups early enough in the process.[44] Calvert Smith J, quashing the funding decision, ruled that: "In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high".[45]

A particular question which has arisen in a number of cases concerns the relationship between the obligation to pay "due regard" to the various statutory needs and the application of the *Wednesbury* test. Davis J's rejection of the *Wednesbury* approach in *Meany* was relied upon by Judge Jarman QC in *R (Boyejo) v Barnet LBC* in dismissing the defendant's argument that the claimants "must show an absence of due regard in the *Wednesbury* sense of unreasonableness" and concluding that "the *Wednesbury* test applies to the consideration of the countervailing factors there referred to, <u>but not to the question of whether the necessary due regard has been had</u>" (emphasis added).[46] "References in the documentation before the decision makers in each case to disabilities

[39] [2009] EWHC 559 (Admin).
[40] *Ibid* [72].
[41] *Ibid.*
[42] *Ibid* [78].
[43] *Ibid* [81].
[44] [2011] EWHC 448 (Admin).
[45] *Ibid* [69].
[46] [2009] EWHC 3261 (Admin), [56].

or to rights of equality do not fulfil the requirement of such recognition. Nor does a general awareness amongst officers or decision-makers of the duty under s 49A(1).”[47]

The debate appears to have been settled by the Divisional Court in R *(Hurley & Anor) v SSBIS*, the tuition fees challenge, in which Elias LJ stated for the Court that “… the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors ”.[48] In R *(Williams & Anor) v Surrey CC*, a library cuts case, Wilkie J suggested *Hurley & Moore* involved a two stage approach, the first asking the non-*Wednesbury* question “whether the authority has, in fact, surmounted the threshold required by the statute” and the second requiring the application of a *Wednesbury* approach to the balance struck by the decision maker between equality considerations and “all the other relevant (possibly countervailing) factors”. [49]

Notwithstanding the role of *Wednesbury* in the scrutiny of public authorities' compliance with the PSED, the duty is a rigorous one. As set out in *Brown* and subsequently, the court does not reach the *Wednesbury* question until it has satisfied itself that the decision considered the “specific goals in play and [analyse] the relevant material with those goals in mind”; with “rigour and an open mind”; “before or at the time the particular policy is considered”, as “‘an essential preliminary’ to any important policy decision not a ‘rearguard action following a concluded decision’”; it being insufficient that the decision maker had “a mere general awareness of the duty” as distinct from “a conscious directing of the mind to the obligations”.[50] Having said this, the role of judicial review is to police the boundaries of decision-making by public authorities and not to step into the shoes of the decision-makers.

All that having been said, a trenchant, reminder of the limits to the judicial function in the particular context of the PSED was issued by the Divisional Court in R *(MA & Ors) v SSWP*.[51] Dealing with a challenge to the imposition of a cap on housing benefits (the “bedroom tax”), Laws LJ ruled that “Where the protected characteristics specified in s 149 of the 2010 Act are potentially affected by a forthcoming public measure, the decision-maker is obliged to conduct a rigorous examination of the measure's effects,

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[47] *Ibid* [63]. See also *JM & NT v Isle of Wight Council* [2011] EWHC 2911 (Admin) [104].
[48] Fn 23 [77]-[78], citing Dyson LJ in *Baker*.
[49] [2012] EWHC 867 (QB) [24]. See similarly R *(D) v Worcestershire CC* [2013] EWHC 2490 (Admin).
[50] *D v Worcestershire ibid* [95(iii)] citing the decisions in R *(Harris) v LB Haringey* [2010] EWCA Civ 703, [2010] LGR 713, [40], *Brown* fn 33, [92], *BAPIO* (CA) fn 20 and *Meany* fn 39 [74].
[51] [2013] EWHC 2213 (QB).

including due enquiry where that is necessary [but] … does not, however, have to undertake a minute examination of every possible impact and ramification", citing the decisions of the Court of Appeal in R *(Bailey & Ors) v Brent LBC*[52] and in the *Greenwich* case to the effect that "'The courts must ensure that they do not micro-manage the exercise'".[53] Laws LJ went on to adopt the statement of HHJ Keyser QC in *Copson* that "[t]he public sector equality duty is not a back door by which challenges to the merits of decisions may be made",[54] and to stress that "the discipline of the PSED lies in the required quality, not the outcome, of the decision-making process".[55] This, in his view:

> "reflects a more general constitutional balance. Much of our modern law, judge-made and statutory, makes increasing demands on public decision-makers in the name of liberal values: the protection of minorities, equality of treatment, non-discrimination, and the *quietus* of old prejudices. The law has been enriched accordingly. But it is not generally for the courts to resolve the controversies which this insistence involves. That is for elected government. The cause of constitutional rights is not best served by an ambitious expansion of judicial territory, for the courts are not the proper arbiters of political controversy. In this sense judicial restraint is an ally of the s 149 duty, for it keeps it in its proper place, which is the process and not the outcome of public decisions. I would with respect underline what was said by Elias LJ at para 78 in *Hurley*, rejecting a submission for the Claimants that it was for the court to determine whether appropriate weight has been given to the duty: 'it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making".

The Court of Appeal upheld the Divisional Court's decision, accepting *per* Lord Dyson MR that "the Secretary of State well understood that there are some disabled persons who, by reason of their disabilities, have a need for more space than is deemed to be required by their non-disabled peers", and "did have due regard to his statutory duties", the recognition of "the serious impact that the bedroom criteria would have on disabled persons" being "why so much effort was devoted to seeking a solution to the problem".[56]

(2) Information gathering

Wednesbury applies to the weighing of the various factors by the decision maker but the question whether adequate steps have been taken to take account of the equality

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52 [2011] EWCA Civ 1586, [2012] LGR 530.

53 Respectively [2011] EWCA Civ 1586 [2012] LGR 530, [77[-[83] & [102] and [2012] EWCA Civ 496, *per* Elias LJ [30].

54 [2013] EWHC 732 (Admin) [57(4)] cited at [73].

55 *Ibid* [74].

56 [2014] EWCA Civ 13 [92].

implications of decision-making is a hard-edged one. Of particular significance is the question whether the decision maker has been provided with adequate information on which to undertake the required balancing exercise. In R *(Lunt) v Liverpool CC* Blake J ruled that a "lawful exercise of discretion could not have been performed unless the [decision maker] properly understood the problem, its degree and extent".[57] The defendant was found to have breached s49A DDA when it failed to take into account the implications for users of particular types of wheelchair of refusing to approve a new taxi which was suitable for those wheelchairs. The decision had been based in part on a mistaken view of the facts. The judge ruled the implications for wheelchair users were a mandatory relevant consideration under both s49A and, importantly, the common law.

The importance of adequate evidence gathering was again emphasised in *Rahman v Birmingham CC* in which Blake J ruled that the defendant had failed to pay due regard to the statutory duties imposed by s 49A DDA when it decided to stop funding particular types of adult services.[58] The defendant had relied on an equalities impact assessment the content of which "seem[ed] to have been driven by the hopes of the advantages to be derived from a new policy rather than focussing upon the assessment of the degree of disadvantage to existing users of terminating funding arrangements until new arrangements can be put in place". The assessment was not based on consultation with those who would be affected by the policy and "would have been best placed to explain the consequences of termination of funding in the absence of satisfactory alternative provision or service users", and was an inadequate basis for the decision based on it.[59]

In R *(W) v Birmingham CC* Walker J ruled that the defendant had failed to comply with s 49A DDA because, despite an extensive equality impact assessment of a proposed restriction of council-funded care to those whose needs were adjudged to be "critical" (rather than "substantial" or "moderate"), it had failed to assess "the practical impact [of the restriction] on those whose needs in a particular respect fell into the 'substantial' band but not into the 'critical' band".[60] And in R *(Green) v Gloucestershire CC* the High Court (HHJ McKenna) ruled against the defendants in library closures because the EIAs on which the decisions were based were superficial and failed properly to analyse the potential for disparate impact of library closures or reductions in opening hours on

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[57] [2009] EWHC 2356 (Admin), [2010] 1 CMLR 43, [44.1].
[58] [2011] EWHC 944 (Admin), [2011] EqLR 705. And see *Blake & Ors v LB Waltham Forest* [2014] EWHC 1027 (Admin) [59]-[72].
[59] *Ibid* [35].
[60] [2011] EWHC 1147 (Admin), [2012] LGR 1 [176].

people with disabilities and women (particularly single mothers).[61] The regard which had been had, accordingly, was less than that which was "due".[62]

The requirement that the decision-maker be armed with adequate relevant information is useful in requiring those who advise decision-makers to spell out very clearly the potential costs to the vulnerable of their decisions, an obligation which tends to run counter to political imperatives to avoid such hostages to fortune. The requirement that decision makers be furnished with information as to the implications of their potential decisions is not, of course, unlimited, the duty imposed by the PSED being only to pay such regard as is "due". In *Bailey v Brent LBC*, for example, the Court of Appeal rejected a s 149 EA challenge to library closures which was based on the failure of the defendant to analyse the potentially discriminatory impact of the closures on Asian residents who were disproportionately heavy users of libraries.[63] Davis LJ, with whom Richards LJ agreed, summarised the claimant's PSED complaint as relating to the alleged failure of the defendant to "'analyse' … the situation: the raw information was there … so far as potential indirect discrimination with regard to Asians was concerned, but had not been sufficiently assessed…".[64] In his view, and bearing in mind the difficulties in determining "*how* such an investigation could, realistically and sensibly, be undertaken by the council amongst the various groupings collectively categorised as 'Asian'",[65] "an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s 149 which a QC might deploy in court…."[66]

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[61] [2011] EWHC 2687 (Admin), [2012] LGR 330 [121]-[127].
[62] *Ibid* [129], [130]-[131]. See similarly *JM & NT v Isle of Wight Council* fn 47, [121]. The EIAs in the *W* and *Isle of Wight* cases were critical despite the absence of any statutory obligation for the production of those documents because they contained the information on which the decision makers based their decisions. Where this information is gleaned from additional or alternative sources, any shortcomings in (or absence of) an EIA will not be determinative of the discharge of the PSED: see for example *D v Worcestershire* fn 49 [99]-[100].
[63] Fn 52. See also *R (Primrose) v SS Justice* [2008] EWHC 1625 (Admin); *R (Brooke) v SS Justice* [2009] EWHC 1396 (Admin) (DC).
[64] *Ibid* [94].
[65] *Ibid* [100]. See, somewhat similarly, *R (Coleman) v Barnet LBC* [2012] All ER (D) 256 (Dec) in which Lindblom J ruled that the defendant had not been required to go beyond the relevant categories of protected characteristics (age and disability) by disaggregating the several types of disability and giving separate treatment to physical, mental and learning disabilities, or to different types of physical disability from another.
[66] *Ibid* [102]. See also *R (Dudley MBC) v SSCLG* [2012] EWHC 1729 (Admin), [2013] LGR 68, [85], [88] & [89]. In the *Greenwich* case fn 53 [30] Elias LJ accepted that Elias LJ qualified the statement that "It is only if a characteristic or combination of characteristics is likely to arise in the exercise of the public function

The extent of the duty to gather information was also in issue in *CPAG v SSWP*, which involved a challenge to the imposition of limits on housing benefit the effect of which was to disadvantage single parent and large families resident in the South East (in particular, London) which were disproportionately likely to be headed by a woman and to be BME respectively.[67] It was asserted that the defendant had failed to comply with the PSED, in particular by declining to follow the advice of the Social Security Advisory Committee that the cuts should be preceded by a full race EIA, this notwithstanding its acknowledgment that the measures might impact disproportionately on some BME groups which tended to have larger families. The Government had taken the view that "extensive analysis of the measures outlined … has shown that the cumulative impacts of these measures do not appear to disadvantage one group more disproportionately than another" and that there was in place "a range of measures … mitigate the impacts of these changes" on families. "In addition, the Department for Work & Pensions is considering the scope for commissioning primary research into the impact of the change on particular groups such as large families and ethnic minority groups…".[68]

The claimant in *CPAG* argued that the defendant had failed to take account of available statistical information on which it should have concluded that the changes would, rather than might, have a significantly disproportionate effect on BME groups. The defendant did not accept the statistical basis on which the claimant relied and took the view that "Neither the assessment conducted by the Claimant nor that conducted by DWP has been able to quantify accurately the level of impact on ethnic minority groups."[69] Supperstone J rejected the challenge, ruling that the defendant was entitled to rely on the data it had available and that the claimant was wrong to assert that the defendant ought to have "concluded that the introduction of the measures was 'likely' to impact on ethnic minority groups disproportionately (still less the Defendant could accurately have assessed the percentage amount of any such likely impact)".

Mr Justice Supperstone took a similar approach in *R (B & Ors) v Sheffield CC* in which he rejected a PSED challenge to the defendant's decision to reduce Council Tax.[70] The Council's EIA had assessed the impact level in relation to 'Age' (in particular, on

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that they need to be taken into consideration" with the observation that "there may be cases where that possibility exists in which case there may be a need for further investigation before that characteristic can be ignored".

[67] [2011] EWHC 2616 (Admin).

[68] *Ibid*, [53].

[69] *Ibid*, [62].

[70] [2013] EWHC 512 (Admin).

children) as 'High' and that in relation to disability as 'medium', making reference to the development of an additional hardship scheme. The judge accepted the defendant's argument that "the impact on children cannot be divorced from the position of households in which they live. There is no separate impact in relation to children that councils should have considered separately". He then rejected the claimant's submission that the decisions in *W v Birmingham* and *Isle of Wight* cases "required the Council to identify the number of children and disabled persons affected by the proposal, to analyse the impact of the proposal on them and to consider whether any negative impact could be avoided or mitigated". "The impact of the proposal on persons who share a relevant protected characteristic is not uniform, rather it depends on individual circumstances. Some families with children will be able to meet the proportion of their liability more easily than others". The defendant was "entitled to conclude that the impact on disabled people and children was not uniform; and that in the circumstances the creation and operation of the hardship fund is the best way to help those in severe financial hardship", this regardless of the size of the fund (£500 000 in respect of 34 000 households who which would have to pay at least 20% of their council tax rather than, as before, nothing).

The decision in *B v Sheffield* is perhaps open to question, the availability of a fund of £500 000 to be set against 34 000 households, each with a minimum additional liability of around £400 p.a.,[71] in the event that they experienced undue levels of hardship smacking of the very kind of "ad hockery" the PSED was intended to prevent. Whatever the rights or wrongs of any individual decision, however, it is clear from that neither the PSED nor the caselaw above imposes a blanket obligation on public authorities to engage in minute equality analysis of everything that they do.[72] Also on this theme, in *MA & Ors v SSWP*, discussed above, Laws LJ rejected the claimant's argument that there was a "failure to confront the difficulties of those who need larger accommodation … the Regulation's impact on children… no analysis of disability-related matters [or of] … the numbers of disabled persons with housing needs which would not be met under the new regime [or] … the implications of the measure for disabled people, or (in particular)

[71] Band A Council Tax in Sheffield in 2013 is £992.71 rising to £1,158.17 for Band B, £1,323.62 for Band C and £1,489.08 for Band D.

[72] See also *R (Zacchaeus 2000 Trust) v SSWP* [2013] EWHC 233 (Admin), [2013] PTSR 785; *R (Buckinghamshire CC & Ors) v SST* [2013] EWHC 481 (Admin); *Keyu & Ors v SSFCA & Anor* [2012] EWHC 2445 (Admin) [130] and *R (LB Lewisham) v AQA* [2013] EWHC 211 (Admin) [148]. These decisions emphasise that the purpose of the information gathering etc. is to enable "due regard" to be paid to the statutory needs, rather than as an end in itself.

for those with mental and learning difficulties".[73] The claimant's criticisms of the defendant's approach to the PSED, in particular the assertion that the defendant had failed to carry out the necessary "rigorous investigation" in relation to the impact of the policy on children and disabled people, amounted to "an attempt to persuade the court to 'micro-manage' the policy-making process", contrary to authority:[74] "it is not the court's task 'to prescribe fact-specific issues which [the Secretary of State] is obliged to consider in any given case in order to satisfy the court in relation to his PSED'" and the claimant's case "looks very like a list objections to the policy under the guise of a litany of matters left unconsidered... all but an assault on the outcome … rather than the process".[75]

It is perhaps unsurprising that the courts in the *CPAG*, *Sheffield* and *MA* cases were not inclined to take too fine a toothcomb to the kind of decision-making there at issue.[76] These decisions might be seen as indicative of a rowing-back on the parts of the courts to the PSED. But any conclusion to this effect would be premature in view of the decision of the Court of Appeal in *Bracking* in which that Court overturned the decision of the High Court and ruled that the Secretary of State had failed to comply with the PSED because she had inadequate information before her of the likely impact of closure of the Independent Living Fund on the independence of those disabled people in receipt of payments from it. McCombe LJ, with whom Kitchin LJ agreed, ruled that there was "simply not the evidence, merely in the circumstance of the Minister's position as a Minister *for Disabled People* [original emphasis] and the sketchy references to the impact on ILF fund users by way of possible cuts in the care package in some cases, to demonstrate … that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of the statutory requirements for disabled people as a whole". Further, there was no evidence of Ministerial focus on the specific duties imposed by s149.[77] Elias LJ stated at [75] that there was "considerable force" in the submission made for the appellant that the documentation placed before the Minister:

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[73] *Ibid* [76].
[74] *Ibid* [86] citing *Greenwich* fn 53 [30] *per* Elias LJ.
[75] *Ibid*.
[76] See also *R (FDA & Ors) v SSWP & Anor* [2011] EWHC 3175 (Admin), [2012] 3 All ER [90] in which criticism of the defendant's information gathering was dismissed as "too nit picking" where it was "plain … that the government well understood that in broad terms more women would be adversely affected than men"; also *R (HC) v SSWP* [2013] EWHC 3874 (Admin) [83].
[77] Fn 34 above, [62], [66]-[67].

> "painted what he characterised as a Panglossian view as to the effects of the proposed decision on those who would cease to receive payments from the fund... [failing to] identif[y] in sufficiently unambiguous terms the inevitable and considerable adverse effect which the closure of the fund will have, particularly on those who will as a consequence lose the ability to live independently. It may be that this is because of a tendency for officials to tell the Minister what they thought she would want to hear – a tendency which, as Sedley LJ pointed out in [*Domb*] must be strenuously resisted. I suspect also that part of the problem may be that these documents are for public consumption and give the impression that they have been drafted with at least half an eye to sending an up-beat message about the merits of the policy. This necessarily involves down-playing the adverse effects of the decision and exaggerating its benefits. As understandable as that may be from a political perspective, forensically it inevitably creates doubt whether the true impact of the decision has been properly appreciated. The Minister cannot then complain if the documents are taken at face value".

Somewhat surprisingly, in view of these words. Elias LJ went on to suggest that "had the only issue been whether the Minister had properly appreciated the full impact of the decision on those most adversely affected, I would have been prepared to accept that she did", partly because "[a]s Minister for Disabled People she would have known and understood the objectives of the fund" and because "there was evidence that she consulted personally with many affected groups and I have no doubt that evidence of hard cases would have been forcefully drawn to her attention".[78] But there was "simply no material from which one can properly infer that" the Minister had "properly appreciated and addressed the full scope and import of the matters which she is obliged to consider pursuant to the PSED… A vague awareness that she owed legal duties to the disabled would not suffice" and the fact that she had been "alert[ed] … to the obligation to have regard to the matters identified in the EIA and the IA" was insufficient where those documents did not identify the various statutory needs to which due regard was required to be paid.[79]

Elias LJ also made reference to the absence from the documentation of any reference to the UNCRPD "which ought to inform the scope of the PSED with respect to the disabled", in particular Art 19 thereof "which requires states to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living".[80] Whereas it was in his Lordship's view "reasonable to assume that [the Minister] would be

[78] *Ibid* [76].
[79] See also Lord Dyson MR in *R (MA & Ors) v SSWP* fn 56 [91].
[80] *Ibid* [77].

well briefed on the purpose and operation of the fund", accepting that she "must be taken to be fully aware of her legal duties and to have complied with them … would undermine the important role which this duty should play in governmental decision-making"[81] and would conflict with the PSED caselaw.

(3) Timing PSED challenges

Difficulties arise concerning the timing of PSED challenges. This is not the only area in which lawyers can be faced with the risk of taking action prematurely, on the one hand, and being regarded as having delayed unduly on the other. But the prevalence of public sector cuts challenges in the PSED caselaw has meant that the question regularly arises whether challenge should be brought to the overarching budgetary decision to reduce expenditure, or to subsequent decisions to make particular cuts to give effect to the macro decision.

R (Fawcett Society) v HM Treasury & HMRC involved a s76A SDA challenge to the 2010 Budget.[82] The claimant challenged the failure to undertake an equality impact assessment of the budget as a whole. Ouseley J ruled that there was no need to assess the budget as a whole or, specifically, its cumulative impact, and that the government could wait until policy was formulated before decided whether an equality assessment is necessary and if so, undertaking one. In *R (L) v Lancashire CC*, similarly, a s49A DDA challenge to a budget determination was rejected as premature on the basis that there was no policy formulation on which it could bite.[83] Mr Justice Ryder declared in *R (D & Anor) v Manchester CC*, in which the claimants argued that a failure on the part of the defendant to conduct an EIA in advance of the budget or otherwise to consider its equality implications breached the PSED,[84] that the PSED "categorically" applied to budgetary decisions. But (agreeing with Kenneth Parker J in *R (JG & Anor) v Lancashire CC*[85]) "where flexibility is built into the budget so that subsequent corporate decisions and decisions relating to individuals can still lawfully be made by reference to the potential impact of the proposals on the persons affected then it is possible for the duty to be complied with i.e. there is nothing wrong in principle with such an approach and nothing inconsistent with the [PSED]".[86] Here, as in *JG*, it was "'sensible, and lawful, for

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[81] Emphasis added.
[82] [2010] EWHC 3522 (Admin).
[83] [2011] EWHC 2331 (Admin).
[84] [2012] EWHC 17 (Admin).
[85] [2011] EWHC 2295 (Admin) [2011] LGR 909.
[86] *Ibid* [59]-[60].

the Defendant first to formulate budget proposals and then, at the time of developing the policies that are now under challenge, to consider the specific impact of proposed policies that might be implemented within the budgetary framework'."[87] although "an *ex post facto* rationalisation which seeks to excuse an adverse effect subsequently identified is not the same as and will not pass as a substitute for due regard being had at the time when the budget was approved".[88]

In R *(Barrett) v Lambeth LBC*, by contrast, Ouseley J allowed a s149 EA challenge to a decision to cut funding to a charity which provided services in the defendant local authority's area to people with learning disabilities.[89] Where (as in *Barrett*) a budgetary decision was final and did not involve any "general delegated authority to reduce a cut in one area of a department at the expense of a larger cut in another",[90] the PSED applied to it (by contrast with the position as he found it in the *Fawcett* case): "It is impossible to avoid the conclusion that the budgetary decision was the exercise of the council's functions. The equality duty was clearly engaged since the decision concerned the type of services which would be cut or reprovided ... It follows that unless the regard had by officers can be attributed to the councilors… no due regard can be attributed to the council to the disability equality duty." [91]

Finally, it should not be forgotten that the PSED imposes continuing obligations on decision makers. In R *(Bracking & Ors) v SSWP* Blake J rejected a PSED challenge to the decision of the defendant to close the Independent Living Fund (ILF) by which support had previously been provided to people with disabilities.[92] That decision was overruled by the Court of Appeal.[93] What is of interest in the present context, however, is Blake J's statement that:

> "as the fifth *Brown* principle explains, the public sector equality duty is a continuing one, and the express terms of the UN Convention on the Rights of Persons with Disabilities [UNCRPD] may well need due consideration and … reflection [upon] by public bodies developing and implementing the policy of closure taken in this case. If the intended legislative reform set out in the White Paper is stalled or diluted, if the intended Code of Guidance to ease transition does not arrive in time or turns out to be too anaemic in content to enable the Convention principles to be brought to bear in individual cases, the application

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[87] *Ibid* [61] citing *JG v Lancashire* fn 85 above [52] *per* Kenneth Parker J. Ryder J also relied at [60] on the approach of Ouseley J in *Fawcett* fn 82 above.
[88] *Ibid* [62]. See also R *(Nash) v Barnet LBC* [2013] EWHC 1067 (Admin).
[89] [2012] EWHC 4557 (Admin), [2012] LGR 299.
[90] *Ibid* [97]. See also R *(Rotherham MBC & Anor) v SSBIS* [2014] EWHC 232 (Admin), [2014] LGR 389 [91].
[91] *Ibid* [99].
[92] [2013] EWHC 897 (Admin).
[93] [2013] EWCA Civ 1345, discussed below.

> of the PSED may need to be revisited in the light of these developments. Similarly, this will need to be the case if the level of Treasury funding for disabled people generally or for this class of ILF users in transition back to the statutory scheme in particular is so austere as to leave no option but to reverse progress already achieved in independent living".[94]

(4) "Delegation", duties and "due regard"

As mentioned above, in *Brown* the Divisional Court suggested that the duty of due regard was "non-delegable".[95] In *Domb* Sedley LJ stated that Council members' "heavy relian[ce] on officers" made it "doubly important for officers not simply to tell members what they want to hear but to be rigorous in both inquiring and reporting to them" and criticised the equality analysis by officers in that case as "Panglossian" in parts.[96]

In the *Barrett* case Ouseley J ruled that the decision-maker, rather than officers, had to have due regard to the statutory needs in order to comply with the PSED.[97] There, in a case in which the defendant had chosen to consider the equality implications of its decision making through an EIA,[98] Ouseley J rejected the suggestion that the decision makers (there the councillors) "could not realistically have been given all the EIAs to read and absorb for all the budgetary decisions which required full EIAs, and therefore the process, if it was adopted in reality, of leaving the due regard to officers had to be lawful". The provision of a "fair summary" to councillors might have been sufficient "but it would have to cover the essential features of how the duty was being fulfilled".[99]

In R *(Essex CC) v SS Education*, changes in funding of early learning which resulted in the removal of funding from projects to which the claimant was contractually committed were challenged on the basis, *inter alia*, of the defendant's alleged non-compliance with the race and disability PSEDs.[100] Mitting J adopted the summary of the *Brown* principles set out by Holman J in R *(Luton BC) v SS Education*,[101] but qualified what he classified as

[94] A similar approach was adopted by the Divisional Court in R *(Unison) v Lord Chancellor* [2014] EWHC 218 (Admin) [2014] IRLR 266 [89] and see also R *(Bapio Action Ltd) v Royal College of GPs & Anor* [2014] EWHC 1416 (Admin) [29]. The Court in *Unison* stated that "If it turns out that over the ensuing months the fees regime as introduced is having a disparate effect on those falling within a protected class, the Lord Chancellor would be under a duty to take remedial measures to remove that disparate effect and cannot deny that obligation on the basis that challenges come too late…". The following month the statistics showed a 79% reduction in tribunal claims. Permission to appeal has been granted by the Court of Appeal.

[95] Fn 33 above [94].

[96] Fn 34 above [79].

[97] Fn 89 above.

[98] This is not, of course, required but where the EIA is relied upon it must be capable of founding a PSED-compliant decision if the decision itself is to comply with s149.

[99] *Ibid* [101].

[100] [2012] EWHC 1460.

[101] Fn 38 [104].

an otherwise "uncontroversial summary"[102] the statement in *Luton* [104(iv)] that "'The duty is non delegable'" by quoting the more extensive statement of principle in *Brown* [94] (see * above). Mitting J suggested that Aikens LJ "was not purporting to override or in any way qualify the long-established principle that central government acts not personally by a Secretary of State but by a Secretary of State advised by numerous officials".[103] Rather, what was "prohibited, subject to the qualifications identified by Aikens LJ, is the delegation of that responsibility to outsiders, whether they be another department of state or public authority or private concern."[104] In the instant case, Mitting J ruled that the Secretary of State had breached the PSED by failing to consider "either personally or by his officials", "the overall impact of cuts in [early years] funding in Essex or in local authorities generally".[105]

The Divisional Court rejected the PSED challenge in *R (FDA & Ors) v SSWP & Anor*, which involved to the defendant's decision to use the retail price index rather than the consumer price index in uprating public sector pensions in part on the basis (*per* Elias LJ) that the Treasury, which had the power of veto over the up-rating order, had complied with the PSED and "it would be elevating form over substance to require the Secretary of State to do so as well".[106] Just as the principles in *Carltona Ltd v Works Comrs*[107] allowed a minister to rely on workings and a review of effects carried out within his department to satisfy the "due regard" requirement of the PSED, so the duty could be discharged if the minister "can be satisfied that the relevant equality assessment has been carried out by another government department as well or better placed than his own to undertake the task, particularly where that other department has policy responsibility in relation to the effects under review".

5. Uncertainties

Some of the uncertainties that surround the judicial application of the PSED are apparent from the foregoing. In particular, the decisions of Supperstone J in the *CPAG* and *Sheffield* cases appear to set the bar fairly low as regards the degree of analysis required of decision makers, and appear to contrast not only with decisions such as those of Blake J in *Rahman*, Lang J in *Isle of Wight* and Walker J in *W v Birmingham* but also with

[102] *Ibid* [41].
[103] Fn 100 above [42] adopting Lord Greene MR in *Carltona v Commissioners of Works* [1943] 2 All ER 560, 563.
[104] *Ibid* [42].
[105] *Ibid* [45]-[47].
[106] [2011] EWHC 3175 (Admin) [89].
[107] Fn 102.

that of the Court of Appeal in *Bracking*. It is never easy to predict the degree of information gathering and analysis will be required of decision-makers. In addition to these uncertainties are those generated by a number of cases which appear to suggest that the PSED has little or no impact to particular categories of decision-making. An early example was the decision in *Smith*, mentioned above, which involved a challenge to enforcement action against a group of gypsies.[108] Ouseley J was satisfied that the matters relevant to s71 RRA had been mainstreamed into and properly considered in the application of the defendant's planning policy. A similar approach was taken in the influential case of *Baker*, considered above and in *Defence Estates v JL*.[109] There Collins J granted an order for possession, declaring that the defendant "recognises that [the claimant] is disabled and has recognised at all material times that they must assist, so far as they are able, in helping her to find suitable alternative accommodation... But to suggest that s 49A enables someone who otherwise would fail to have any defence to a possession order nonetheless to remain is to take that much too far."[110]

Most notable of this line of decisions is that of the Supreme Court in R *(McDonald) v RB Kensington & Chelsea* rejecting by a majority a s49A DDA challenge to a decision in respect of the funding of the claimant's adult social care package.[111] Lord Brown, with whom the majority agreed, categorised as "hopeless" the argument that the defendant's failure to make reference to that provision in its documentation amounted to a failure to comply with the PSED: "Where, as here, the person concerned is *ex hypothesi* disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to s 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here."[112]

McDonald is regularly relied upon by defendants to suggest that the PSED does not apply to particular types of decision-making. This is not, however, correct and a careful reading of *McDonald* (as of *Smith*, *Baker* and other similar cases) indicates that, as Lord Brown went on to point out in *McDonald*, "[t]he question is one of substance, not of

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[108] Fn 30.
[109] [2009] EWHC 1049 (Admin). *Cf* the approach taken by the Court of Appeal in *Norton* fn 23.
[110] *Ibid* [23]. See, similarly, *A v North Somerset Council* [2009] EWHC 3060 (Admin), though the decision there under challenge was quashed on other grounds; R *(AC) v Berkshire West PCT* [2010] EWHC 1162 (Admin), (2010) 116 BMLR 125; R *(AM) v Birmingham CC* [2009] EWHC 688 (Admin); R *(Broster) v Wirral MBC* [2010] EWHC 3086 (Admin); R *(MS) v Oldham MBC* [2010] EWHC 802 (Admin).
[111] [2011] UKSC 33 [2011] 4 All ER 881.
[112] *Ibid* [24].

form". Thus, in cases such as these, the nature of the consideration engaged in by a defendant pursuant to the statutory framework within which a decision was reached sufficed in substance to satisfy the PSED even though no conscious consideration was given to that duty (and whether or not the decision maker was aware of it as such[113]). That is far from establishing, however, that the PSED does not apply to categories of decision-making such as planning or individual social care matters. So, for example, in *R (JL (A Child)) v Islington LBC* a challenge to the authority's decision, taken without reference to s49A DDA, to cap the support available from children's services to the claimant succeeded.[114] And in *R (Harris) v LB Haringey* the Court of Appeal quashed a grant of planning permission permitting demolition and redevelopment of an area predominantly comprising local BME independent traders and residents.[115] In that case, unlike in *Baker*, the relevant statutory needs (the promotion of equality of opportunity between persons of different racial groups and good relations between such groups) were not incorporated within the defendant's planning policies and had not been otherwise referred to in the decision making process.[116] The PSED was not "a general duty when taking decisions to improve the lot of ethnic minority communities" but was "a duty, when taking decisions, to have due regard to three specific needs"…. The council policies to which reference has been made may be admirable in terms of proposing assistance for ethnic minority communities, and it can be assumed that they are, but they do not address specifically the requirements imposed upon the council by s 71(1)". [117]

The Court of Appeal in *Pieretti v Enfield LBC* relied on this dicta in rejecting the defendant's argument that the PSED applied only to matters of general policy,[118] ruling it was of relevance, *inter alia*, in relation to "the priority of need, the intentionality of homelessness and the suitability of accommodation"[119] where, again by contrast with

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[113] There is certainly no obligation, contrary to the suggestion made by the Prime Minister in November 2012 in which he promised to "call time" on equality impact assessments: http://www.bbc.co.uk/news/ uk-politics-20400747, that public authorities are required to produce EIAs of proposed decisions, though such EIAs may be useful to document the analysis of the equality implications of decision-making which may be required by the PSED.
[114] Fn 37.
[115] Fn 50.
[116] *Ibid* [39].
[117] *Ibid* [8], [39]. *Ibid* [8], [39]. Note, however, that in particular cases there may not be, as Lord Dyson MR pointed out in *R (MA & Ors) v SSWP* fn 56 [91], "any *practical* difference between what was required by the various duties" (original emphasis).
[118] [2010] EWCA Civ 1104, [2011] 2 All ER 642.
[119] *Ibid* [31]. See *Swan Housing Association Ltd v Gill* [2013] EWCA Civ 1566 in which the Court of Appeal ruled that a District Judge had erred in finding that the appellant had breached the PSED by seeking injunctive relief against the respondent, a supported tenant who claimed to suffer from dyslexia and

Baker, the relevant provisions of housing law did not "addresses the rights and needs of the disabled so comprehensively that there is no room for introduction into the scheme for making provision for the homeless of further protection" by s49A DDA. According to Wilson LJ, for the court, "The part of [the duty] with which we are concerned is designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal".

There are, however, some types of decisions which, by their nature, are regarded by the courts as requiring little or no attention to be paid to equalities issues, and others which are more rather than less likely to be regarded by the courts as having incorporated the necessary attention to the PSED.[120] One example is R *(Greenwich Community Law Centre) v Greenwich LBC*, in which the Court of Appeal stated, *per* Elias LJ, that "[a] change from one provider to another without more will not usually engage equality considerations".[121] That case concerned a decision to reallocate funding for free legal advice and assistance between Law Centres, no evidence having been provided "that [the Claimant's] clients have been disadvantaged or could not transfer to the new provider".[122] Further, "the whole purpose of [the defendant's] funding legal advice services was to assist priority groups" and the contract awarded contained specifications for accessibility, disability and ethnicity".[123] There was no suggestion, by contrast with *Hajrula* (discussed above), that the way the defendant chose to "cut the cake" had equality implications, or (as in *Kaur & Shah*, also discussed above) that one provider was best placed to serve a particular client group.[124]

In R *(RB) v Devon*, which concerned a PSED challenge to appoint Virgin Care as the preferred bidder for the provision of services under the defendant's Integrated Children's Services Scheme (ICS),[125] HHJ Vosper QC stated that: "not every function undertaken by a public authority will engage the public sector equality duty (or putting it another way,

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Asperger's syndrome, where there was no evidence of those conditions, or of a causal connection between such conditions and the appellant's actions.

[120] Even leaving aside decisions, such as those reached in the exercise of a judicial function, which are excluded from the PSED: see R *(Howard) v Official Receiver* [2013] EWHC 1839 (Admin).

[121] Fn 53 [32], approving the statement of Ouseley J in *Barrett* fn 89 above to this effect. In R *(Sanneh & Ors) v SSWP & Ors* [2015] EWCA Civ 49 [122] Arden LJ, with whom Elias LJ and Burnett J agreed so far as relevant here, characterised the decision in *Greenwich*, in common with that at issue there, as being one which had no effect on the claimants.

[122] [2011] EWHC 3463 (Admin) [44].

[123] *Ibid* [49] and see [14].

[124] See also *Flint v CC North Yorkshire* [2010] EWHC 2025 (Admin); R *(Antoniou) v C&NE London NHS Foundation Trust & Ors* [2013] EWHC 3055 (Admin).

[125] [2012] EWHC 3597 (Admin) [36].

though engaged the duty will be irrelevant and can be ruled out at the outset)."[126] The judge concluded that the PSED was engaged at the stage when the decision was taken to retain ICS under a single provider (such equality analysis as occurred following rather than preceding this point), distinguishing the decision in *Greenwich* on the basis that, whereas the legal services at issue there were "widely and conventionally supplied" and might be provided by "any number of potential suppliers, all having skill and experience in giving legal advice",[127] ICS was a service "unique to Devon" and the change in provider "was a much more fundamental change than that contemplated in Greenwich… [having] the potential to affect the supply of services to vulnerable members of the community, many, if not all, of whom possess protected characteristics".

The approach adopted by the Court of Appeal in *Greenwich* appears to be defensible: it would be a triumph of form over substance if public authorities were required to engage in the same level of equality analysis when deciding which supplier to use for stationery and which services to impose budget savings upon. But bearing in mind in particular the three statutory needs referred to in s149 (i.e., the need to eliminate unlawful discrimination to advance equality and to foster good relations), it should not be too readily assumed that decisions which appear to have no significant equality implications permit a cursory approach to the PSED. An example is the decision in R *(Copson) v Dorset Healthcare University NHS Foundation Trust* in which the challenge concerned a decision to reconfigure mental health services which had been taken after extensive consultation and equality analysis and which HHJ Keyser QC found had been intended for the benefit of mental health service users.[128] The decision of the court was that, in the circumstances, the flaws in the EIA upon which the defendant relied did not render the decision inconsistent with the PSED. HHJ Keyser QC went on to suggest that, where the very policy at issue concerned "the provision of services to persons with a relevant protected characteristic (ie disability), … the relevant protected characteristic was the reason for the provision of services to them", and "the very decision [under challenge concerned] the proper balance between a diminution in choice and control of those with the relevant protected characteristic (ie adult community care service users) in favour of a reduction

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[126] *Ibid* [36]. *Cf* R *(LB Lewisham) v AQA* [2013] EWHC 211 (Admin) [146] –[148]. See similarly *Greenwich* fn 53 above [30] to [32]. R *(BAPIO)* (2014), fn 94 above, raised the interesting question whether the PSED could require an authority to exercise a function it was not presently exercising. Mitting J ruled that it could not but granted permission to appeal.

[127] *Ibid* [59].

[128] This, like *Barrett*, fn 89, was a case in which the defendant relied closely on the EIA in connection with its alleged compliance with the PSED.

of pubic expenditure [sic] … the subject matter of the … decision makes the Claimant's contention that the Cabinet failed to have due regard rather less plausible". He accepted, however, that "it does not necessarily follow that the [defendant] had due regard to the need to advance equality of opportunity".[129]

The caselaw makes it clear, more generally, that it is dangerous to proceed too quickly to any conclusion that, because a decision by its nature impacts in particular on groups of people defined by reference to one or more of the protected characteristics, the PSED requirements are incorporated into the framework for such decision-making. In R *(Sefton Care Association & Ors) v Sefton Council*, the Administrative Court ruled that the defendant was not obliged to comply with the PSED in setting fees payable to the providers of residential care, this because the defendant was required in any event by the relevant statutory guidance[130] to fix the fees with due regard to the actual cost of providing such care.[131] In R *(South West Care Homes Ltd & Ors) v Devon CC*, however, Judge Jarman QC accepted, contrary to the decision in *Sefton*, that the PSED did apply to decisions on residential care home fees.[132]

The defendant in the *South West Care Homes* case had set fees for 2012-13 at a level which the claimants contended allowed a zero rate of return to capital, this with the effect that residents funded by the defendant were not covering their costs. HHJ Jarman QC referred to the obligations imposed by the UNCRPD, pointed out that the conclusions in *Sefton* on the PSED were *obiter*,[133] ruled that the PSED applied to the defendant's function of arranging the provision of accommodation and care to the elderly and inform and that the decision on fee rates "may adversely affect residents",[134] and rejected the defendant's argument that the fee setting exercise was "remote" from the defendant's provision of accommodation. And in R *(Rotherham MBC & Anor) v SSBIS* Stewart J accepted that the defendant had breached the PSED by failing to consider the equality impacts of changes in the distribution of EU regional funds, there being evidence that the decision had a disparate effect on people with disabilities.[135] Rejecting the defendant's submission that the decisions in the *Fawcett* case and in *JG v*

[129] [2013] EWHC 732 (Admin) [59] though *cf* the case-specific comments of Lord Dyson MR in *MA*, fn 56 above.
[130] LAC (2004) 20.
[131] [2011] EWHC 2676 (Admin) [100].
[132] [2012] EWHC 2967 (Admin) and see R *(South Tyneside Care Home Owners) v South Tyneside* [2013] EWHC 1827 (Admin) to similar effect.
[133] *Ibid* [144]. Similarly that in R *(East Midlands Care Ltd) v Leicestershire CC* [2011] EWHC 3096 (Admin).
[134] *Ibid* [33].
[135] Fn 90 [92]-[93].

Lancashire indicated that "where high level decisions are being taken as to budget levels or a spending envelope, detailed assessment of Equality Impact may be neither appropriate nor possible", concluding that "in both [of these] cases it was an essential part of the judicial reasoning that the public authority's decision was not a final one, and that the PSED could be carried out further down the line", whereas in this case the allocations under challenge were "in no sense preliminary or provisional".[136] Further, "[t]he fact that the individual regions would themselves have to consider the PSED when deciding how to use the funds allocated to them cannot absolve the Defendant from the PSED" in relation to its own functions.[137]

6. Conclusions

As is clear from the discussion of the caselaw above, the PSED has the potential to reach into much public sector decision making. Many PSED challenges have been concerned with funding cuts and the service changes resulting therefrom. Interpreting the "cuts" category fairly broadly to include all expenditure-driven decisions, the success rate of such challenges which have reached full hearing has been just under 40% (see table at **), an impressive figure in view of the general judicial reticence when it comes to interfering with socio-economic decision-making. It would be difficult to assert that the PSED has made any significant difference to the fact that the cuts have impacted disproportionately on those disadvantaged by sex, disability and/or ethnicity. But it has begun to require that decision-makers establish and confront, rather than turn a blind eye, to those impacts and it is this which may produce different outcomes in the longer term.

PSED challenges falling outside the "cuts" category have been mainly concerned with planning enforcement (in particular, the impact thereof on gypsies/ travellers[138]), immigration matters including detention[139] and prison/ Young Offender Institution related challenges.[140] Notable victories have included *Harris*, discussed above, a rare example of such in a planning case, and the securing of declarations that Home Office

[136] Ibid [88]-[89].
[137] Ibid [91].
[138] R *(Casey) v Crawley BC & Ors* [2006] EWHC 301 (Admin), [2006] LGR 239; *Smith* fn 31; *Baker* fn 28; R *(McCarthy) v Basildon DC* [2009] EWCA Civ 13 [2009] LGR 1013; *O'Brien v South Cambs DC* [2008] EWCA Civ 1159, [2009] LGR 141; *Stokes v LB Brent* [2009] EWHC 1426 (QB); *Harris* fn 50; *Broxbourne BC v Robb & Ors* [2011] EWHC 1626 (QB); *Medhurst v SSCLG* [2011] EWHC 3576 (Admin); *Burton v SSCLG* [2012] EWHC 3254 (Admin).
[139] *BAPIO* fn 20; *Medical Justice* fn 38; R *(BE) v SSHD* [2011] EWHC 690 (Admin), R *(HA (Nigeria))* fn 23, R *(D) v SSHD* [2012] EWHC 2501 (Admin).
[140] R *(Primrose) v SSJ* fn 63; R*(C) v SSJ* fn 22; R *(EHRC) v SSJ* [2010] EWHC 147 (Admin); R *(S) v SSJ* [2012] EWHC 1810 (Admin), [2013] 1 All ER 66; R*(T) v SSJ* [2013] EWHC 1119 (Admin); *Griffiths & Anor v SSJ* [2013] EWHC 4077 (Admin).

policies on the removal of detainees, and policies and practice on the detention of people with mental illness pending their deportation, were unlawful.[141] There have also been victories in PSED challenges to provisions permitting the use of physical restraints on young offenders (R *(C) v SSJ*, discussed at ** above), removal arrangements for foreign prisoners and the provision of bail hostels for women prisoners.[142] Other successful challenges from among the smorsgabord of PSED cases have included R *(Watkins-Singh) v Aberdare Girls' High School*, a challenge to a rigid school uniform policy which precluded the wearing of a narrow steel *kara* bangle by a Sikh schoolgirl;[143] R *(E) v JFS* (in respect of the defendant's failure to consider the equality implications of its admissions policy);[144] *Lunt*, *Easai*[145] and *Pieretti* considered above (challenges to taxi specifications, NICE drugs guidance and a homelessness decision respectively).

The relative significance in the overall body of PSED caselaw of cuts cases has had the effect that much of the analysis has been focused on the first of the statutory equality needs (the elimination of discrimination), there being limited scope in reducing public spending positively to <u>promote</u> or(, more recently,) to <u>advance</u> equality and foster good relations.[146] Having said this, the PSED caselaw appears to have helped to shift the judicial conceptualisation of equality/ non-discrimination as being concerned with the avoidance of treatment which differentiates in form or substance, to something with a more radical edge. In *Kaur & Shah*, discussed above, the defendant sought to argue that its continued funding of the Southall Black Sisters would have entailed unlawful race discrimination. Moses LJ, in rejecting this submission, relied on s35 RRA which permitted the provision of access to facilities or services to persons of a particular racial group where the facilities or services "meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits". Refusing to read that provision strictly as an exception to the principle of equality, as was urged upon him by the defendant, his Lordship declared that s35 was "not an exception to the [RRA]. It does not derogate from it in any way. It is a manifestation of the important principle of

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[141] Respectively R *(Medical Justice) v SSHD* fn 38 and R *(HA (Nigeria))* fn 23 (and see R *(BE) v* SSHD, R *(D) v SSHD* fn 202).
[142] Respectively R *(EHRC) v SSJ* and *Griffiths*. Unsuccessful prisoner cases include *Primrose*, R *(S) v SSJ* and *R(T) v SSJ*, all fn 203.
[143] [2008] EWHC 1865 (Admin) [2008] 3 FCR 203.
[144] Fn 23.
[145] See similarly R *(Servier Laboratories Ltd) v NICE* [2009] EWHC 281 (Admin), 108 BMLR 1.
[146] *Cf Harris* fn 50 in which the planning decision, which related to an area comprising predominantly local Turkish, Cypriot, Latin American and Afro Caribbean independent traders and BME-occupied housing, was flawed by the defendant's failure to take account of the statutory needs to promote equality of opportunity between persons of different racial groups and good relations between such groups.

anti discrimination and equality measures that not only must like cases be treated alike but that unlike cases but must be treated differently".[147] He went on to rule that there was "no dichotomy between the promotion of equality and cohesion and the provision of specialist services to an ethnic minority" and that "in certain circumstances the purposes of [the PSED] and the relevant statutory code may only be met by specialist services from a specialist source".[148]

Kaur, although reached over thirty years after the enactment of the RRA, was one of very few examples of cases in which that provision fell to be judicially considered, much less determined the outcome.[149] It is unlikely to have been a coincidence that the non-formalistic approach to equality was taken in a case in which the relevant duty was to "have due regard to the need— (a) to eliminate unlawful racial discrimination and (b) <u>to promote equality of opportunity</u> and good relations between persons of different racial groups" (emphasis added). With the implementation of the Equality Act 2010 the PSED's reference to the <u>promotion</u> of equality was replaced with a requirement to have due regard to the need to <u>advance</u> equality of opportunity.[150] There is, as yet, no indication that the courts regard this difference as material, and the caselaw which has developed under s149 has been on all fours with the approach taken under the predecessor provisions. But any assumption that the reference to equality <u>of opportunity</u> as distinct from "equality of results", "equality of outcome" or simply "equality" is meant to indicate a symmetrical approach to concept is contradicted by s149(3) which provides in terms that:

> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to--
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> (b) take 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;
> (c) encourage persons who share a relevant protected characteristic to

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147 Fn 35 [52].
148 Ibid [55]-[56].
149 The provision was referred to in *R (Stephenson) v Stockton-on-Tees BC* [2005] 1 FCR 165 [28] but, any discrimination there at issue being indirect, was unnecessary (a justification defence being available). In *E v JFS* fn 23 [176], Munby J advocated a narrow approach to s.35, though his remarks were *obiter*. The provision was mentioned in *Conwell v Newham LBC* [2000] 1 WLR 1 and in *Lambeth LBC v CRE* [1990] ICR 768 but in neither case was it substantively considered.
150 "The Public Sector Equality Duty" (2011) *Industrial Law Journal* 405, 410. The duty is also discussed by Tom Hickman in Too hot, too cold or just right? The development of the public sector equality duties in administrative law" (2013) *Public Law* 325.

> participate in public life or in any other activity in which participation by such persons is disproportionately low.

As stated above, the application of the PSED to austerity decision-making is not the most promising context for the advancement of equality as distinct from the avoidance of discrimination. Having said this, in the *Chavda* case, which involved a challenge to a decision to ration adult care services to those whose care needs were deemed "critical",[151] Judge Mackie QC made specific reference to "the need to promote equality of opportunity <u>and to take account of disabilities even where that involves treating the disabled more favourably than others</u>" (emphasis added) and ruled that the failure to draw attention to this obligation rendered the decision unlawful. And in R *(South West Care Homes Ltd and others) v Devon CC*, a decision on care home fees was struck down in part because of the defendant's failure to take into account the potential impact on the rights of residents under the UNCRPD "to choose where they live and to have support so as to prevent isolation or segregation from the community".[152] In the latter case the judge relied on the decision in *Burnip & Ors v SSWP*[153] in which the Court of Appeal had ruled, on the strength of the ECtHR's decision in *Thlimmenos v Greece*,[154] that the defendant's failure to make allowances for the fact that the claimants needed larger properties by reason of their or their children's disabilities, and were therefore placed at a particular disadvantage by the bedroom tax, breached Art 14.

Chavda, *South West Care Homes* and *Burnip* all concerned people with disabilities, and might be seen as no more than applications of the relatively uncontroversial principle that the avoidance of disability discrimination may well require special treatment (this being the underpinning presumption of the duty to make reasonable adjustments). But more recently, in R *(Knowles & Anor) v SSWP*, Hickinbottom J applied the *Burnip* approach to a challenge to the fact that housing benefit payments in respect of the costs of accommodation at caravan sites are calculated by reference to ordinary sites, and did not allow for the additional costs associated with Gypsy sites (additional site management, maintenance, clearance costs, fencing and security, education facilities for children, resolution of disputes, and personal support, which together were estimated to account for about a third of the total costs).[155] The judge accepted that "the state may

[151] Fn 25.
[152] Fn 132 [43].
[153] [2012] EWCA Civ 629 [2012] LGR 954.
[154] (2001) 31 EHRR 411.
[155] [2013] EWHC 19 (Admin), [63], [76], [77].

have a positive obligation to allocate a greater share of public resources to a particular person or group to ameliorate" what might be termed a *Thlimmenos* difference; that "[a]lthough very different on its facts, conceptually, this case appears to me indistinguishable from *Burnip*, in which the analysis was made in *Thlimmenos* terms"; and that "[f]ollowing *Burnip*, there is of course no conceptual or jurisdictional difficulty in finding a prima facie positive obligation on the state to allocate resources to remedy such a difference; and then proceeding to consider the reasons for the difference and whether they amount to an objective and reasonable justification".[156] The claim failed, the bulk of the additional costs being ineligible to be met within the housing benefit scheme, but the case may suggest increased judicial confidence with a non-symmetrical approach to equality.

Knowles was not a PSED case and it would be wrong to suggest that all of the work in the area of equality law is being done by the PSED.[157] It is however noteworthy that a duty which began with relatively limited apparent potential has proved so significant in practice. Perhaps most worthy of remark is the fact that the specific duties, which were introduced simultaneously with the race, disability and sex PSEDs, have proven to be of such limited impact by comparison with the PSED itself even prior to being watered down by the Equality Act 2010. Home Office Parliamentary Under-Secretary of State Mike O'Brien told the Commons Committee which scrutinised the Race Relations (Amendment) Bill not only that that "[t]he Bill is one of the most significant steps that the Government will take on race equality in Britain" but also that "[m]uch of the detail of how the general duty will operate in practice will depend on the content of th[e] orders" introducing the specific duties. In the event, the specific duties were something of a damp squib, due in part perhaps to the lack of enthusiasm shown by the CRE, the sole body capable of enforcing the original specific duties; a 2006 report published by the Public Interest Research Unit suggested that the CRE had served only four compliance notices in connection with failures to comply with the specific duties and had taken no enforcement action in connection with the general duty other than by intervening in the *Elias* case, discussed above.[158]

In *Kaur & Shah* Moses LJ relied significantly, in deciding that the respondent had

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156 *Ibid* [73].

157 See for example the decision of the Divisional Court (Moses LJ, with whom Collins and Jay JJ agreed) in *R (Public Law Project) v SSJ* [2014] EWHC 2365 (Admin).

158 Rupert Harwood, "Teeth and their Use: Enforcement Action by the three equality commissions" (2006: PIRU), http://disability-studies.leeds.ac.uk/files/library/harwood-tuwnov9.pdf, accessed 7 October 2013.

acted unlawfully, on its failure to comply with its own policy, published in pursuit of its specific duties, for conducting racial equality impact assessments.[159] It is also noteworthy that the precise finding of breach of the PSED related to the failure to carry out a race EIA as required by the specific duties. It has subsequently become clear that the carrying out of an EIA as such is not a requirement for compliance with the PSED, though adequate analysis, based on appropriate and sufficient information, on the equality impacts of decisions, practices etc is. But the removal of the specific duties which underpinned decisions such as *Kaur & Shah* has made little difference to the operation of the PSED itself.

The future of the PSED itself is under threat. The Independent Steering Group established by the Coalition Government in May 2012 was mentioned above. The Group did not in fact recommend any legislative changes, believing it "too early to make a final judgement about the impact of the PSED"[160] for all the skeptical tone of the report it published in September 2013. Meanwhile, however, the Prime Minister, millionaire beneficiary of Eton and Oxford, had declared in a November 2012 speech to the CBI that "we are calling time on Equality Impact Assessments" and that he had "smart people in Whitehall who consider equalities issues while they're making the policy".[161] Whatever the inadequacies of the Prime Minister's grasp of the relationship between EIAs and the PSED, his remarks do not bode well for the latter. This is particularly the case as a result of the 2015 General Election which has delivered a Conservative Government unconstrained by the (in this matter) moderating hand of the Liberal Democrats.

Cuts cases (as of 17 April 2015)

Succeeded	**Failed**[162]
R (Elias) v SSD[163]	*McCahery, Petitioner*[164]
R (Chavda) v LB Harrow[165]	*R (Brown) v SSWP* [166]
R (Kaur & Shah) v LB Ealing [167]	*R (Domb) v Hammersmith & Fulham LBC*[168]

[159] Fn 35 [126]-[127].
[160] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237200/PSED_Revised_Report_Final_030913_-_FINAL.PDF.
[161] Fn 113.
[162] See also *Hunt v North Somerset Council* [2012] EWHC 1928 (Admin) in which, although the Court of Appeal accepted that the judge below had erred in dismissing the PSED claim, it dismissed the appeal on the basis, essentially, that too much time had elapsed since the decision was made. The Supreme Court will hear an appeal in April 2015.
[163] Fns 14 & 16.
[164] [2008] CSOH 73.
[165] Fn 25.
[166] Fn 33.

R (Meany) v Harlow DC[169]	*R (Fawcett) v CE*[170]
R (JL) v Islington[171]	*R (Robin Murray & Co) v* LC[172]
R (Boyejo) v Barnet LBC[173]	*R (Rajput) v LB Waltham Forest,* R *(Tiller) v East Sussex*[174]
R (Hajrula) v London Councils[175]	*R (L) v Lancashire*[176]
R (Luton BC) v SSE[177]	*R (JG) v Lancashire*[178]
R (Rahman) v Birmingham CC[179]	*CPAG v SSWP* [180]
R (W) v Birmingham CC[181]	*R (Bailey) v Brent LBC*[182]
R (JM) v Isle of Wight Council [183]	*R (Sefton Care Association) v Sefton Council* [184]
R (Green) v Gloucestershire CC[185]	*R (Greenwich CLC) v Greenwich LBC*[186]
R (Hurley & Moore) v SSBIS[187]	*R (East Midlands Care Ltd) v Leicestershire CC*[188]
R (Williams & Anor) v Surrey CC[189]	*Staff Side of the Police Negotiating Board v SSWP*[190]
R (Essex CC) v SSE [191]	*R (RP) v LB Brent*[192]
South West Care Homes v Devon CC[193]	*R (D) v Manchester*[194]
R (Bracking) v SSWP[195]	*R (Barrett) v Lambeth LBC*[196]
R (STCHO) v South Tyneside[197]	*R (Law Society) v LC*[198]
R (Rotherham MBC & Anor) v SSBIS[199]	*R (Siwak) v LB Newham*[200]
Blake v Waltham Forest[201]	*R (Dudley MBC) v SSCLG*[202]
R (Winder & Ors) v Sandwell MBC[203]	*R (Branwood) v Rochdale MBC*[204]
R (Cushnie) v SSH[205]	*R (Zacchaeus 2000 Trust) v SSWP*[206]

[167] Fn 35.
[168] Fn 34.
[169] Fn 39.
[170] Fn 25 (permission).
[171] Fn 37.
[172] [2011] EWHC 1528 (Admin).
[173] Fn 46.
[174] [2011] EWCA Civ 1577, [2012] LGR 506.
[175] Fn 44.
[176] Fn 83.
[177] Fn 38.
[178] Fn 85.
[179] Fn 58.
[180] Fn 67.
[181] Fn 60.
[182] Fn 52.
[183] Fn 47.
[184] Fn 131.
[185] Fn 61.
[186] Fn 53.
[187] This was a partial success only and the claimants were denied relief on this ground
[188] Fn 133.
[189] Fn 49.
[190] [2011] EWHC 3175 (Admin) [2012] 3 All ER 301.
[191] Fn 100.
[192] [2011] EWHC 3251 (Admin).
[193] Fn 132.
[194] Fn 84.
[195] Fn 34.
[196] Fn 89.
[197] Fn 132.
[198] [2012] EWHC 794 (Admin) [2012] 3 Costs LR 558.
[199] Fn 90.
[200] [2012] EWHC 1520 (Admin).
[201] Fn 58.
[202] Fn 66.
[203] [2014] EWHC 2617 (Admin), [2015] PTSR 34.
[204] [2013] EWHC 1024 (Admin).
[205] [2014] EWHC 3626 (Admin).
[206] Fn 72.

R (Fakih) v SSHD[207]	*R(B) v Sheffield CC*[208]
R (Hardy) v Sandwell MBC & Zaccheus Trust[209]	*R (MA) v SSWP*[210]
	R (D) v Worcestershire CC[211]
	R (T & Ors) v Sheffield CC[212]
	R (LH & CM) v Shropshire Council[213]
	R (LB Islington) v Mayor of London[214]
	R (Unison) v Lord Chancellor[215]
	R (West & Ors) v Rhondda Cynon Taft CBC[216]
	R (Essex CC) v SSE[217]
	R (Draper) v Lincolnshire CC[218]
	R (Sumpter) v SSWP[219]
	R (Karia) v Leicester CC[220]
	R (Robson & Anor) v Salford CC[221]
	R (Aspinall) v SSWP[222]
	R (A) v SSWP[223]
	R (Sanneh & Ors) v SSWP & Ors[224]

[207] [2014] UKUT 513 (AAC).
[208] Fn 70.
[209] [2015] EWHC 890 (Admin).
[210] Fn 56.
[211] Fn 49.
[212] [2013] EWHC 2953 (Admin).
[213] [2014] EWCA Civ 404.
[214] [2013] EWHC 4142 (Admin).
[215] Fn 94.
[216] [2014] EWHC 2134 (Admin).
[217] [2014] EWHC 2424 (Admin) (permission).
[218] [2014] EWHC 2388 (Admin) [2014] LGR 673.
[219] [2014] EWHC 2434 (Admin).
[220] [2014] EWHC 3105 (Admin).
[221] [2015] EWCA Civ 6.
[222] [2014] EWHC 4134 (Admin).
[223] [2015] EWHC 159 (Admin).
[224] [2015] EWCA Civ 49.