Southall Black Sisters: The case against Ealing

R (Kaur & Shah) v London Borough of Ealing

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In July 2008, two service-users of Southall Black Sisters (SBS) took Ealing Council to court over their decision to change the way they funded support services for victims of domestic violence. The judgment is helpful in clarifying the law on a number of points concerning local authorities' duties under the Race Relations Act (RRA) and the provision of specialist services for BME groups.

Background and the basis of the claim

The case was about a decision by Ealing Council to switch funding away from SBS' specialist domestic violence service for BME women and to use that funding to provide an "all-women" service of the same standard which would also target certain groups. However, no additional funding was being made available by the council; the successful bidder was to provide a similar level of service to all women without any extra funding.

Initially Ealing intended to implement this decision (i.e. go ahead with commissioning a new service on this basis) and then carry out a race equality impact assessment (REIA). When litigation was first threatened by the service-users in December 2007 (on the basis that the REIA should be done first), the council agreed to withdraw its decision, do the REIA and then re-take the decision.

However, the REIA that was then produced and consulted on was seriously flawed, and Ealing's decision to approve the new grant criteria was therefore unlawful. The service-users relied on a number of legal points to argue that Ealing had acted unlawfully:

…no additional funding was being made available by the council; the successful bidder was to provide a similar level of service to all women without any extra funding

- The REIA was inadequate and the council therefore had not met its duty under s.71(1) RRA (the duty to promote race equality)
- The council had failed to follow its own EIA guide
- The council had misinterpreted the figures and so had made false assumptions about the prevalence of DV amongst BME communities

…the council withdrew from the case, agreeing to its decision on the grant criteria being quashed, and confirming that it would go back to the drawing board

- The council had wrongly relied on the cohesion guidance for funders and its cohesion strategy generally to argue that a generic service was necessary
- The council had misunderstood how it should (or could) promote good race relations.

In response, the council claimed their REIA was sufficient and it carried out a further, fuller REIA after the case started. It also claimed that it would be unlawful to fund SBS unless there was a special case (i.e. specific evidenced need for BME only services) and s.35 of the RRA applied. Section 35 is the part of the RRA that allows services to be for particular groups only, an essential part of equality and anti-discrimination legislation.

The court case

Proceedings were begun in the High Court in April and a two-day trial started on Thursday 17 July. At lunchtime on Friday, the council withdrew from the case, agreeing to its decision on the grant criteria being quashed, and confirming that it would go back to the drawing board and start the entire process again including a fresh REIA on any new proposals. This meant that Ealing did not finish its legal submissions, but the judge agreed to give judgment to provide guidance on the key issues.

The key findings for the voluntary sector are as follows (see below for notes of what the judge actually said):

- REIAs must be undertaken before policy is decided upon or implemented;
- REIAs cannot be a rearguard action to justify a policy already decided;
- the impact on those losing a service should be assessed, not just the new service that is being proposed;
- in this case Ealing should have done the REIA before it decided to limit applications to one provider or a consortium;

"…a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption."

- Ealing's interpretation of s.35 RRA was wrong; it was not unlawful to fund such a group, in fact it was sometimes essential to do so.

Quotes from the judgment by Lord Justice Moses

"The jurisprudence [legal theory] relative to the issues reinforces the importance of considering the impact of any proposed policy before it is adopted as part of the significant role of section 71 in fulfilling the aims of anti-discriminatory legislation…In considering the impact, the authority must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated."

"The need for advanced consideration must be distinguished from the use of such impact assessments for what Lord Justice Sedley described as a rearguard action following a concluded decision….What is important is that a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption."

"I should observe at this stage that it was Ealing's obligation to ensure that its criteria for funding did not have an impact adverse to those for whom services had hitherto been provided."

"This was a clear error. The authority was not entitled to formulate policy before any equality impact assessment. Thus it is unlawful to adopt a policy contingent on an assessment."

"There was no full racial equality impact assessment until some time after these proceedings were launched, namely on 5 June 2008. This failure establishes a clear breach of Section 71 of the 1976 Act, the statutory code and the specified duties which Ealing was required to follow under the 2001 Order. In determining as criteria that the provider should be a single source of services to all throughout the borough or a consortium with a single leader before a full racial equality impact assessment had been undertaken, the Council acted unlawfully. Moreover it was wrong to fix on a solution with only the prospect of monitoring its effect on minorities in the future."

"… specialist services for a racial minority from a specialist source is anti-discriminatory and furthers the objectives of equality and cohesion."

"There is no dichotomy between the promotion of equality and cohesion and the provision of specialist services to an ethnic minority. Barriers cannot be broken down unless the victims themselves recognise that the source of help is coming from the same community and background as they do."

"It [the Council] appreciates that it was in error and that in certain circumstances the purposes of section 71 and the relevant statutory code may only be met by specialist services from a specialist source."

"As I have endeavoured to explain, specialist services for a racial minority from a specialist source is anti-discriminatory and furthers the objectives of equality and cohesion."

The full judgment is available at:
http://www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html.

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