

## Sex discrimination against female offender released on licence, Supreme Court rules

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The Supreme Court has allowed an appeal by a female offender on the grounds of sex discrimination by the Secretary of State for Justice, challenging the distribution of women's Approved Premises (APs, formerly bail and probation hostels) across the country. APs are single-sex, and there are far fewer women's APs than men's. Evidence shows that rehabilitation of offenders is generally most effective when they are released on licence to APs close to their family. The appellant, Isobel Coll, had argued that being refused permission to be resettled close to family members in London upon her release was direct sex discrimination contrary to the Equality Act 2010 (EA 2010). Lawyers say the case makes important points about direct and indirect discrimination, and say further, similar cases are 'inevitable'.

Ms Coll was from London. She had been convicted of murder and sentenced to a mandatory life sentence. On 10 November 2015, the Parole Board directed her release with the condition that she should live in an AP in Bedford. Ms Coll did not say that there should be the same number of women's APs as men's, but that the current distribution was discriminatory and could not be justified.

As there are fewer women's APs than men's—six women's and 94 men's, with no women's AP in London—it would be more likely for women's family members to have to travel further than men's when the women were released on licence.

### High Court and Court of Appeal decisions

Ms Coll's claim that the requirement for placing prisoners in APs gives rise to unlawful sex discrimination was rejected by the High Court and Court of Appeal, both of which found no discrimination, either direct or indirect.

### The Supreme Court ruling

The Supreme Court unanimously allowed the appeal, granting a declaration that provision of APs constitutes direct discrimination against women, which is unlawful unless justified, and that the Secretary of State has not yet shown any such justification.

Lady Hale, giving the judgment, said: 'The risk of being placed far from home is much greater for women than for men. The reason for this is not any deliberate desire to treat the women less favourably than the men, but a function of the much smaller numbers of female offenders and the policy decision that the particular vulnerability of women required to live in an AP means that all APs should be single sex.'

'The appellant's case is one of direct rather than indirect discrimination.'

### Direct or indirect discrimination?

Katherine Apps of [Littleton Chambers](#), who was junior counsel for the Ministry of Justice (MoJ) in the case, said the case contains important analysis of:

- when direct discrimination rather than indirect discrimination will apply, and
- the significance of a finding that the Public Sector Equality Duty (PSED) had not been complied with where a directly or indirectly discriminatory provision, criterion or practice falls to be justified'

She added: 'The Supreme Court found that the number and distribution of women's APs was direct discrimination and was not indirect discrimination. This was despite the fact that some women would be in APs closer to home; others would not. If men's and women's APs were to be identically distributed, some women would have further to travel from that AP to their home town than if the current distribution of the six women's APs was to remain. The Supreme Court found that, because the provision of APs was itself sex segregated, the unequal distribution was prima facie direct sex discrimination.

'This is the first time that the Supreme Court has considered the provision of sex-specific services where there is a greater need for the services for one sex than the other.'

### **Relevance of PSED**

At the Queen's Bench Division in December 2013, Cranston J had found that the MoJ had breached the PSED. The MoJ had not appealed that finding.

In considering objective justification, the Supreme Court took particular account of the fact that there had been no appeal from the finding that there had been a breach of the PSED.

### **Is gender neutrality required?**

Katherine Apps added: 'It is sometimes assumed that [EA 2010](#) requires gender neutrality. This is not correct.

'For example, in the provision of services and public functions, both direct as well as indirect discrimination are capable of objective justification. Also, [EA 2010 ss 158](#) and [159](#) authorise positive action where people who share a particular protected characteristic have, for example, needs that are different, or are disproportionately underrepresented. This can apply to the protected characteristic of sex.

'Lady Hale's judgment notes that arguments based on "separate but equal" should be treated with a degree of suspicion, as history has shown that separate may well be anything but equal. The key will be the robustness of the objective justification.'

### **Failings by the Justice Secretary on direct discrimination**

Daniel Machover, Partner at [Hickman and Rose](#), said: 'The [Equality Act 2010](#) allows for direct discrimination where the discriminatory effect can be justified. In this case the Secretary of State failed in the duty to consider the impact on women of the policy relating to the provision of APs for prisoners on their release on licence.'

He pointed out that, following the finding at first instance that the Justice Secretary failed to discharge the PSED to address possible impacts on women prisoners, 'the Supreme Court has now found that the Justice Secretary directly discriminated against the appellant and failed to provide a justification for doing so'.

'Given the lower court's finding, which was not challenged', he said, 'it must be a matter of great public concern that the Justice Secretary remained unable to demonstrate to the Supreme Court that she has eventually turned her mind to the justification for her predecessors' policy.'

#### **'Further litigation is inevitable'**

Daniel Machover added: 'It is clear that, if the Justice Secretary does not identify and address the needs of women, and provide justification for any direct discrimination against them, further litigation in this area is inevitable.'

'More widely, the judgment emphasises the need for all those carrying out public functions to consider whether they are directly discriminating against a class of persons and, if so, to ensure they can be justified in doing so.'

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#### **Jurisdiction**

England; Wales

#### **Related Legislation**

Equality Act 2010

#### **Related Cases**

Coll v Secretary of State for Justice [2015] All ER (D) 61 (Apr); \*R (on the application of Coll) v Secretary of State for Justice (Howard League for Penal Reform intervening) [2017] UKSC 40



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