Easter Term
[2017] UKSC 40
On appeal from: [2015] EWCA Civ 328

JUDGMENT

R (on the application of Coll) (Appellant) *v* Secretary of State for Justice (Respondent)

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Hodge
Lord Toulson

JUDGMENT GIVEN ON

24 May 2017

Heard on 21 February 2017

Appellant
Dinah Rose QC
Iain Steele

(Instructed by Lound, Mulrenan and Jefferies Solicitors)

Respondent
Martin Chamberlain QC
Oliver Sanders QC
Katherine Apps
(Instructed by The Government Legal Department)

Intervener (The Howard League for Penal Reform)
Henrietta Hill QC
Sally Ireland
Ruth Brander
(Instructed by Clifford Chance LLP)

LADY HALE: (with whom Lord Clarke, Lord Wilson, Lord Hodge and Lord Toulson agree)

1. "Approved premises" ("APs") used to be known as probation hostels and bail hostels. Living there may be made a condition of release on licence for certain medium, high or very high risk prisoners. They are now all single sex establishments. There are 94 APs for men, scattered about England and Wales, with several in London. There are only six APs for women, in Bedford, Birmingham, Leeds, Liverpool, Preston and Reading, and none in London or in Wales. This means that women are far more likely than men to be placed in an AP which is some distance from their homes and communities. The issue in this appeal is whether the current distribution of APs constitutes unlawful sex discrimination against women.

2. This issue arises in the context of a long-standing concern that the prison system is "largely designed by men for men" and that women have been marginalised within it (*The Corston Report, A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, Home Office, 2007, para 4). This is scarcely surprising, as women constitute only 5% of the prison population and the system is struggling to cope with the ever-increasing demands made upon it. Many voices have been raised in support of Baroness Corston's call for a "radical change in the way we treat women throughout the criminal justice system", among them the Howard League for Penal Reform, who have intervened in this appeal to emphasise the particular difficulties which women face in the criminal justice system, including the problems of re-settlement with which we are concerned.

3. Those concerns are well understood. But the issue for this court is not whether the criminal justice system should be making better provision for women. The issue is whether the provision that it does make is, in one particular respect, unlawfully discriminatory. It is quite possible that the answer to be given to the first question is "yes", while the answer to be given to the second question is "no".

The facts

4. The appellant is now in her fifties. She has lived in London for almost the whole of her adult life and has no significant ties with Sunderland, where she spent her childhood, or anywhere else. She has two children in their twenties and two young grandchildren. In August 2004 she was sentenced to life imprisonment for murder, with a tariff of 11 years and three months. She was imprisoned first in HMP Holloway, where her family were able to visit; then in HMP Send near Woking,

where they did not visit; and then in Askham Grange open prison near York in 2013. She has been assessed as presenting a medium risk of harm. Her tariff expired in November 2015, nearly two years after these proceedings were begun. She has since been released on licence. As a condition of that release, she was required permanently to live in Approved Premises in Bedford, not to leave to live elsewhere even for one night, without the prior approval of her supervising officer, and thereafter to reside as directed by that officer.

5. These judicial review proceedings were launched in January 2013, because the appellant wanted to be released to the London area, albeit not to Haringey where she had lived before her sentence, so that she could be near her family, and she feared that she would be required to live in an AP far from there. She sought declarations that (a) the lack of provision for a women's AP in London is discriminatory contrary to the Equality Act 2010 and/or articles 8 and 14 of the European Convention on Human Rights; and that (b) the Secretary of State had acted in breach of the public sector equality duty in section 149 of the Equality Act by failing to have due regard, in relation to the provision of APs in London, to the need to eliminate discrimination against women, and advance equality of opportunity for them.

6. Cranston J dismissed her discrimination claim, principally because comparing men prisoners with women prisoners was not comparing like with like. But he did declare that the Secretary of State had failed to discharge the public sector equality duty: [2013] EWHC 4077 (Admin). As he explained, at para 65:

> "What is required is that the Secretary of State address possible impacts, assessing whether there is a disadvantage, how significant it is, and what steps might be taken to mitigate it. In the context of advancing equality of opportunity - one aspect of the duty - that means taking the opportunity to see whether more might be done for women, having regard to their particular circumstances. Nothing even approaching this has been done."

7. The Secretary of State has not challenged that finding, although we have no evidence of what has since been done to give effect to it. The appellant did challenge the finding that there was no discrimination, either direct or indirect, but failed in the Court of Appeal: [2015] EWCA Civ 328. At that stage, she had still not been released and it was regarded as unlikely that, if released, she would be required to live in an AP. On any view, therefore, she had not then personally suffered from the discrimination of which complaint was made, which was that the configuration of APs meant that it was inevitably harder to place women close to home than men.

8. Since then, of course, she has been released and required to live in an AP in Bedford. So if there is discrimination, she has been the victim of it. We are told by her counsel that she was required to live there for over nine months, was unable to get travel warrants to look for accommodation in London, and is now living in rented accommodation near Bedford. Thus the placement in the Bedford AP has had further consequences for her and perpetuated the separation from her family. She has now brought a discrimination claim in the county court, but this has been stayed until the outcome of these proceedings is known.

Approved premises

9. Approved premises are premises which have been approved by the Secretary of State under the Offender Management Act 2007, among other things "for, or in connection with, the supervision or rehabilitation of persons convicted of offences" (section 13(1)(b)). Under section 2 of that Act, the Secretary of State is responsible for ensuring that sufficient provision is made throughout England and Wales for "probation purposes". These are defined in section 1(1)(c) to include "the supervision and rehabilitation of persons charged with or convicted of offences". Under section 1(2)(b) to (d), this includes, in particular, assisting in the rehabilitation of offenders being held in prison, supervising persons released from prison on licence and providing accommodation in APs. Under the current Offender Management Act 2007 (Approved Premises) Regulations 2014 (SI 2014/1198), regulation 6(1)(a)(iii), among the general duties of providers of APs is a requirement that "at least two members of staff are present on the premises at all times" (the same was required by the predecessor Regulations (SI 2008/1263), regulation 7(1)(a)(iii)). Assuming three eight hour shifts in a day, this means that each AP must have a minimum of six staff no matter how many people are housed there.

10. According to Probation Circular 37/2005, *The Role and Purposes of Approved Premises*, APs are "a criminal justice facility where offenders reside for the purposes of assessment, supervision and management, in the interests of protecting the public, reducing re-offending and promoting rehabilitation". Their "core purpose" is "the provision of enhanced supervision as a contribution to the management of offenders who pose a significant risk to the public". They cater for male and female prisoners who are assessed as "very high" or "high" risk, but in order to increase take-up APs also cater for female "medium" risk offenders such as the appellant. Although APs also cater for people on bail or serving a community sentence, the majority of residents are there because of the conditions of their release on licence from prison. They have to abide by a curfew and a code of conduct and any breach of the conditions of their licence can result in recall to prison.

11. The six APs for women have a total capacity of 112 places. This is sufficient to meet demand. They have an annual occupancy rate of 81% compared with 94%

in the 94 APs for men. There is a presumption that offenders should be placed in their "home" probation area, although this can be displaced if there are good reasons for placing them in a different area. However, the limited number and geographical distribution of the women's APs mean that women are far more likely than men to be placed in an AP outside their home area and, indeed, many miles away from their homes and families.

12. In March 2008 there was published the report of a joint inspection of APs by the chief inspectors of probation, prisons and constabulary, *Probation hostels: Control, Help and Change*? Because of local opposition to new hostels, places had been taken from the women's hostels estate to provide more places for men. This was an understandable, but not acceptable, strategy, nor, in the inspectors' view was it compatible with equalities legislation (para 8.1.1). As they explained:

> "The number and location of hostels for women perpetuated the discrimination experienced by women in prison in that a higher proportion than men were forced to stay a long way from home. For women, in particular, enforced separation from their families and support networks compounded the problems associated with their offending, eg relationships and mental health. (para 8.1.3)
>
> The research [Sheehan, McIvor and Trotter, *What Works with Women Offenders*, 2007] found that women in prison tended to be the primary carers of children and were often single parents. It estimated that over two-thirds of women prisoners were mothers. Only a small proportion of male prisoners had primary care of children. The main element of discrimination against female prisoners and by extension against female hostel residents was the distance between their family and community and where they were located during the custodial and licensed supervision elements of their sentences. … (para 8.1.6)
>
> Given the location of the [then] seven hostels, it followed that many potential residents would face several hours of travel to visit their children. Travel was expensive, unlikely to be direct, given the geography, and slow. In addition, as most hostel residents had lost their own accommodation, regaining suitable accommodation for themselves and their children in a different part of the country could seem or actually be insurmountable. … (para 8.1.7)"

13. The report quoted part of the argument from *The Corston Report*:

> "'Equality does not mean treating everyone the same. The new gender equality duty means that men and women should be treated with equivalent respect, according to need. Equality must embrace not just fairness but also inclusivity. This will result in different services and policies for men and women.' Our findings supported this approach." (para 8.3.4.)

14. Apart from the closure of the few remaining mixed gender hostels, which soon happened, the report recommended:

> "Adequate and appropriate provision for female offenders meeting the national target profile for hostel accommodation is established within each probation region in the short-term and plans drawn up by NOMS [The National Offender Management Service] to ensure reasonable access from all major centres of population by 2011." (p 46)

15. The only immediate response to this report, and to the Corston Report, was Probation Circular 16/2008, *Expanded use of female approved premises*. This promised a survey of the need for AP places, which would pay particular attention to the need for APs for female offenders. In the meantime, greater use of the current female estate was encouraged, for a wider range of women offenders, including those who presented only a medium risk of harm. Apart from this, nothing else changed between then and the bringing of these proceedings.

16. In 2013, the House of Commons Justice Committee published its report, *Women offenders: after the Corston Report* Session 2012-13, HC 92. This began with the comment that:

> "Now, six years after her report, we found that it is well recognised that women face very different hurdles from men in their journey towards a law abiding life, and that responding appropriately and effectively to the problems that women bring into the criminal justice system requires a distinct approach." (p 3)

17. Discussing APs, they observed:

> "Sometimes being required to live away from a home area can provide the break with a set of circumstances which, if a woman were to return to them, would be likely to perpetuate the problems that caused her to offend in the first place. Having only six approved premises for women limits the number of women who can benefit from their constructive regimes and support. More women could benefit from safe, secure and supervised accommodation. Approved premises have the expertise and experience of working with female offenders across the full risk of harm continuum and we consider that the approved premises estate could usefully be expanded to manage more women safely and cost-effectively in the community. We would like to see the review consider how existing approved premises regimes could safely be adapted for a broader range of women, and how more creative use of a greater number of approved premises could be funded." (para 196)

18. This was all part of their preference for a gradual reconfiguration of the female custodial estate, with a significant increase in the use of residential alternatives to custody and the reduction of the numbers of women sentenced to short periods in custody (para 197). In their summary, they commented:

> "There is little evidence that the equality duty, and its forerunner the gender equality duty, have had the desired impact on systematically encouraging local mainstream commissioners to provide services tackling the underlying causes of women's offending, or on consistently informing broader policy initiatives with the Ministry of Justice and the National Offender Management Service. Both struggle to reflect fully the distinct needs of female offenders. … We urge NOMS to consider gender as a matter of course, rather than seeking to reduce any detrimental impact on women of their general approach after the event."

19. Cranston J did, of course, find that the Secretary of State was in breach of the equality duty. The issue for us is whether the provision of APs for women is unlawful sex discrimination.

Direct and indirect discrimination

20. Section 13(1) of the Equality Act 2010 defines direct discrimination as follows:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

By section 4, sex is a protected characteristic.

21. Section 19(1) and (2) defines indirect discrimination as follows:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

By subsection (3), sex is among the relevant protected characteristics for this purpose.

22. By section 23(1), on a comparison of cases for the purposes of sections 13 and 19, there must be "no material difference between the circumstances relating to each case".

Public function

23. Not all conduct which falls within those definitions of discrimination is unlawful. Relevant here is section 29 of the Equality Act 2010. By section 29(1) and (2), a person concerned with the provision of services to the public, or a section of the public, whether or not for payment, must not discriminate by not providing the service, or as to the terms on which it is provided, or by terminating it, or by subjecting a person to whom the service is provided to any detriment. By section 31(3), this applies to the provision of a service in the exercise of a public function; by section 31(4), a public function is a function of a public nature for the purpose of the Human Rights Act 1998. The provision of APs under the Offender Management Act is clearly a function of this nature. However, APs are commissioned rather than directly provided by the Secretary of State. But section 29(6) provides that:

> "(6) A person must not, in the exercise of a public function that is not the provision of a service to the public, do anything that constitutes discrimination, harassment or victimisation."

24. While what would otherwise amount to indirect discrimination may be justified if the discriminator can show that the "provision, criterion or practice" [the "PCP"] is a proportionate means of achieving a legitimate aim, direct discrimination is only justifiable in certain limited and defined circumstances. One of these is set out in paragraph 26 of Schedule 3 (which is given effect by section 31(10)). This relates to the provision of separate services for men and women:

> "(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if -
>
> (a) a joint service for persons of both sexes would be less effective, and
>
> (b) the limited provision is a proportionate means of achieving a legitimate aim.

> (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if -
>
> > (a) a joint service for persons of both sexes would be less effective,
> >
> > (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and
> >
> > (c) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service."

25. It was not necessary for the courts below to make a finding on this exception, because they both found that there was no discrimination, direct or indirect, which might require justification. On its face it is capable of applying to both direct and indirect discrimination, although, as we shall see, it is difficult to see how it could arise in a case of indirect discrimination.

Is there direct discrimination here?

26. The appellant's case on direct discrimination is a simple one. Being required to live in an AP a long way away from home is a detriment. A woman is much more likely to suffer this detriment than is a man, because of the geographical distribution of the small number of APs available for women. This is treating her less favourably than a man because of her sex.

27. Ms Rose QC, on behalf of the appellant, argues that this case is on all fours with the well-known case of *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] 1 AC 1155. Birmingham City Council maintained a system of selection for secondary school places but, for historical reasons, it had fewer places at selective schools for girls than for boys. This meant that the pass mark for girls in the entrance examinations was higher than for boys. This was treating the girls less favourably than the boys because of their sex. The

Council had not deliberately set out to discriminate against girls; it was a historical accident. But "whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys and so are subject to discrimination under the [Sex Discrimination Act 1975]" (per Lord Goff at p 1194). The House of Lords also rejected an argument that the failure to provide enough selective school places for girls was not an act or deliberate omission which constituted sex discrimination under section 23 of the 1975 Act:

> "It is unlawful for a local education authority, in carrying out [certain] of its functions under the Education Acts 1944 to 1981 ..., to do any act which constitutes sex discrimination."

Ms Rose points to the similarity of wording in that section and in section 29(6) of the 2010 Act (para 23 above). The provision, or lack of provision, of places in APs is therefore "treatment" for the purposes of the 2010 Act (as indeed both courts below held). She also points out that the *Birmingham* case, like this, was a challenge to the system brought by way of judicial review, rather than a complaint of discrimination against an individual. The outcome was a declaration that the arrangements made by Birmingham City Council for the provision of selective secondary education were unlawful pursuant to section 23 of the 1975 Act. A similar declaration is sought here.

28. Mr Chamberlain QC, for the Secretary of State, raises a new argument before this Court. Not all women suffer the detriment complained of. Some are placed reasonably close to home. Therefore, there cannot be direct discrimination, because that requires exact correspondence between the disadvantaged class and the protected characteristic, as held by this Court in *Patmalniece v Secretary of State for Work and Pensions (AIRE Centre intervening)* [2011] UKSC 11, [2011] 1 WLR 783, and discussed at some length in *Preddy v Bull (Liberty intervening)* [2013] UKSC 73, [2013] 1 WLR 3741.

29. However, as Ms Rose correctly points out, the "exact correspondence" test is only relevant where the actual criterion used by the alleged discriminator is not a protected characteristic but something else. In *Patmalniece* it was not having the right to reside in the United Kingdom; in *Preddy v Bull*, it was not being married. The question is whether some other criterion is in reality a proxy for the protected characteristic. The best-known example is *James v Eastleigh Borough Council* [1990] 2 AC 751, where people who had reached the state retirement age were allowed free entry to the council's swimming pool. The differential state retirement ages for men and women meant that a 61-year-old woman got in free whereas her 61-year-old husband did not. This was held to be direct discrimination on grounds

of sex. In this case, there is no doubt what the criterion is. It is sex, which is itself a protected characteristic.

30. Furthermore, it cannot be a requirement of direct discrimination that all the people who share a particular protected characteristic must suffer the less favourable treatment complained of. It is not necessary to show, for example, that an employer always discriminates against women: it is enough to show that he did so in this case. In the *Birmingham* case, some of the girls achieved a high enough pass mark to gain a place at a selective school. What all the girls suffered from was the risk that if they did not get a high enough mark, they would not get a place - just as, in the recent case of *Essop v Home Office (Border Agency)* [2017] UKSC 27; [2017] 1 WLR 1343, all the BME candidates suffered from the greater risk of failing the core skills assessment required for promotion, but of course some of them passed it. In the *Birmingham* case, some of the girls did of course achieve a high enough mark to get a place. But there were some who achieved a mark which would have been high enough had they been boys but was not high enough because they were girls. That is direct discrimination on grounds of sex.

31. I can see no valid distinction between the *Birmingham* case and this one. In this case, all the women who would be required to live in an AP when released on licence suffered the much greater risk than the men that they would be sent to an AP far from their homes and families. The fact that some of them would not suffer this detriment does not mean that those who do suffer it have not been discriminated against.

32. It was argued in the courts below that there was a material difference between the circumstances of the male and female offenders so that their cases were not comparable for the purpose of section 23 (para 22 above). Cranston J accepted that comparing the women prisoners with the men prisoners was not comparing like with like (para 54). The women had different characteristics from the men, fewer being of high or very high risk, and the criteria for admitting them to APs were different. However, in the Court of Appeal, Elias LJ rejected this argument. Those differences were not material to the present issue, which was accommodating them close to home (para 44). I agree. The question of comparing like with like must always be treated with great care - men and women are different from one another in many ways, but that does not mean that the relevant circumstances cannot be the same for the purpose of deciding whether one has been treated less favourably than the other. Usually, those circumstances will be something other than the personal characteristics of the men and women concerned, something extrinsic rather than intrinsic to them. In this case, the material circumstances are that they are offenders being released on licence on condition that they live in an AP. Those circumstances are the same for men and women. But the risk of being placed far from home is much greater for the women than for the men.

33. Of course, the reasons for this are not any deliberate desire to treat the women less favourably than the men. They are a combination of two things. The first is the much smaller number of women offenders for whom the system has to cater. That by itself would not lead to the problem were it not for the second. This is the policy decision that all APs should be single sex. If they were all mixed sex, then men and women would have exactly the same chance of being placed close to home. If there were some mixed sex APs, the geographical spread would be much better and the corresponding risk for the women would be much lower. There used to be some mixed sex APs, but the Joint Inspection Report (above para 12) recommended that all APs should be single sex. This was because of the particular vulnerability of the women required to live in an AP on release. Their chances of successful reintegration into the community were thought much higher if they were protected from the risks associated with mixed sex premises.

Paragraph 26 of Schedule 3

34. This brings us, therefore, to paragraph 26 of Schedule 3 to the 2010 Act (para 24 above). The history of the United States of America and of the Republic of South Africa, to take the two most obvious examples, has taught us to treat with great suspicion the claim that, if the races are segregated, "separate but equal" facilities can be provided for both, quite apart from the affront to dignity in the assumption that the races have to be kept separate. There have been periods in our own history where segregation of the sexes has led to separate facilities which were very far from equal. Paragraph 26 recognises that there may be good reasons for providing separate facilities for men and women. As Ms Rose points out, paragraph 26 proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination. The question, therefore, is whether in this case the discriminatory effect of providing only single sex establishments can be justified.

35. Ms Rose characterises paragraph 26(1) as providing for "separate but equal" facilities for men and women. This permits the provision of separate services for persons of each sex, provided that a joint service for both sexes would be "less effective" and the "limited provision is a proportionate means of achieving a legitimate aim". She characterises paragraph 26(2) as referring to "separate and different" services. It permits providing separate services differently for persons of each sex, provided that a joint service for both services would be "less effective", that "the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex", and that the "limited provision" is a "proportionate means of achieving a legitimate aim". She argues that "limited" must here mean "limited by sex". I agree, because there is nothing else that "the limited" can be referring back to, other than providing separate services for each sex, whether equally or differently.

36. Although the wording of paragraph 26(1) and (2) is aimed at the people actually providing the service in question, paragraph 26(3) applies the paragraph to a "person exercising a public function in relation to the provision of a service as it applies to the person providing the service". It is difficult to see how the commissioning (and regulation) of APs under the Offender Management Act is not the exercise of a public function "in relation to" the provision of those APs. As Elias LJ observed "the words 'relate to' are broad and would in principle cover all administrative decisions which are inextricably linked with the policy of creating sufficient APs to meet the needs of both sexes separately" (para 48).

37. As he had already concluded that there was no discrimination and therefore no need for justification, Elias LJ considered paragraph 26 only briefly. He considered that paragraph 26(1) applied and so it was unnecessary to decide whether paragraph 26(2) applied (para 49). Ms Rose argues that the provision of APs is not "separate but equal" because of the limited number and distribution of APs for women compared with those for men. The applicable exception is in paragraph 26(2), dealing with "separate but different" services. Once again, I agree with her, because the services are different in this important respect. They may very well be different in other respects too, because the needs of women offenders are recognised to be different from the needs of male offenders, but that is by the way.

38. In any event, it does not matter which sub-paragraph is applicable here, because the issue is the same whichever it is. Ms Rose accepts that a joint service for persons of both sexes would be less effective. Expecting women offenders, with their many vulnerabilities, to share premises with male offenders who by definition present a high or very high risk of harm is not likely to be an effective way of helping them with the transition to an independent and law abiding life in the outside world. Ms Rose also accepts that paragraph 26(2)(b) is fulfilled - the much lesser extent to which women require the service makes it "not reasonably practicable" to provide it otherwise than as a separate service provided differently. It would not be reasonably practicable to provide 94 APs for the 112 places for women required. This must be correct. The minimum staffing costs, for example, are the same no matter how many residents there are.

39. The crucial question, therefore, is whether the limited provision is a proportionate means of achieving a legitimate aim. In discussing justification, Cranston J focussed principally on the problem of cost. The cost of building or converting a building into an AP was between £1.5 and £2.2m. No matter how small, the annual running cost of an AP was said to be in the region of £500,000 to £750,000 per annum. There was also likely to be community opposition to establishing new APs. Female APs were under-used, so that women who needed them would readily find a place. The average stay was only 80 days on average. So the current provision was proportionate (para 60). Elias LJ did not think that the only objective was saving cost in a time of austerity. It was also to ensure that men and

women were in similarly appointed establishments, because there was a real risk of discrimination claims if they were not. Given the limited disadvantage, because of the short average stay, the finding of justification was in principle sustainable (para 64).

40. Saving cost is, of course, a legitimate objective of public policy. But, as the Court of Justice of the European Union emphasised in *O'Brien v Ministry of Justice* [2012] ICR 955, "budgetary considerations cannot justify discrimination" (para 66). In other words, if a benefit is to be limited in order to save costs, it must be limited in a non-discriminatory way. There was no evidence and no finding that the aim was to ensure that men and women were accommodated in similarly appointed premises. Given that the Act permits different provision to be made if their needs are different, this would not by itself be a sound basis for the discrimination.

41. Despite her criticisms of the aims identified by the respondent and the courts below, Ms Rose accepts that in principle the different provision made for men and women might be justified. Her complaint is that the Ministry of Justice has never properly addressed its collective mind to the problem of providing sufficient and suitable places in APs for women which achieve, so far as practicable, the policy of placing them as close to home as possible. There are other options which could have been considered, including: replacing one or more of the current, relatively large women's APs with a larger number of smaller units, more widely spread; closing one or more of the existing women's APs and replacing them with APs closer to the areas where large numbers of serious women offenders have their homes and families; redesignating one of the men's APs in London for women and one of the women's APs for men to make up the loss of male places; or considering alternative forms of accommodation for women released on licence.

42. Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the Ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the respondent to show that the discrimination is justified. Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim.

Indirect discrimination

43. Ms Rose accepts that it is difficult to analyse this case in terms of indirect discrimination. The whole point of indirect discrimination is that a PCP is applied equally to, in this case, men and women, whereas the complaint here is of unequal provision. "Shoe-horning" the complaint into indirect discrimination by identifying the PCP as the requirement to live in an AP on release on licence does not really work, because what has to be justified is the PCP, and such a PCP is readily justifiable by the aims of protecting the public, reducing reoffending and assisting the offender's rehabilitation. In my view, no such shoe-horning is required. Conduct cannot at one and the same time be both direct and indirect discrimination. The finding that this is direct discrimination, albeit potentially justifiable, rules out a finding of indirect discrimination.

Relief

44. There is still the issue of relief. Even if he had found that this was a case of discrimination, Elias LJ would not have made a declaration (para 65). This is a discretionary remedy and in this case would do no more than tell the Secretary of State that he (now she) had to comply with the public sector equality duty, which Cranston J had already done. If it were clear that the current state of affairs could not be justified, then there would be merit in declaring it to be unlawful. But it was rightly conceded that it was capable of justification, and so this could not be done.

45. Ms Rose now seeks a different declaration from that sought in the claim form, to the effect that the provision of approved premises discriminates unlawfully and has not been justified. That is a simple statement which reflects the findings I have made. I would be prepared to grant a declaration that:

> "The provision of Approved Premises in England and Wales by the Secretary of State pursuant to section 2 of the Offender Management Act 2007 constitutes direct discrimination against women contrary to section 13(1) of the Equality Act 2010 which is unlawful unless justified under paragraph 26 of Schedule 3 to the 2010 Act. No such justification has yet been shown by the Secretary of State."

This makes it clear that an individual woman who is less favourably treated as a result of the provision of APs may bring a sex discrimination claim in the county court, but that it will be open to the Secretary of State to resist the claim (assuming

it to be made out on the facts) on the ground that the provision is justified under paragraph 26.

46. To that extent, I would allow this appeal.