

Equal family justice – its pursuit in a pandemic

Nkumbe Ekaney QC, 1GC Family Law
Rebekah Wilson, Garden Court Chambers

The international Covid-19 pandemic and a knee on a neck for almost 9 minutes have resurrected the debate about racial justice and equality. A justice system tasked with delivering for the most vulnerable in any society, children, must be diverse, tackle inequality, and be accessible to all. Historic injustices which resonate with most in our democracy have ignited the discourse about racial inequality.

There is now a unique opportunity to address fundamental inequities. Solutions are not all immediately apparent and cannot be exhaustive but surely debate or discourse, education and attention to the voice of black, Asian and minority ethnic ('BAME') people are powerful tools in confronting inequality.

The potential disproportionate impact of the current pandemic on BAME communities in terms of participation in the family justice system ('FJS') needs to be considered in the wider context of the prevailing national and international situation.

The definition of a BAME is complex. No attempt will be made to define it here. The term is however used in the UK to refer to people who are not white. According to the last census (2011), the total population of England and Wales was 56.1m, and 86.0% of the population was white. People from Asian ethnic groups made up the second largest percentage of the population (at 7.5%), followed by black ethnic groups (at 3.3%), mixed/multiple ethnic groups (at 2.2%) and other ethnic groups (at 1.0%)

In 2017, the then UK Prime Minister (Teresa May) commissioned a Race Disparity Audit with results published on the Ethnicity Facts & Figures website (www.ethnicity-facts-figures.service.gov.uk).

Some of the figures make difficult reading, for instance:

- In the year to March 2019, black people were more than four times as likely as white people to be detained under the Mental Health Act – 306.8 detentions per 100,000 people, compared with 72.9 per 100,000 people.
- Out of the 16 specific ethnic groups, black Caribbean people had the highest rate of detention out of all ethnic groups (excluding groups labelled 'other').
- The highest rate of detention was for people in the black other ethnic group, followed by those in the mixed other ethnic group – however, these rates are considered to be overestimates because 'other' categories may have been used for people whose specific ethnicity was not known.
- There were four stop and searches for every 1,000 white people, compared with 38 for every 1,000 black people.
- Gypsy and Roma, and traveller-of-Irish-heritage pupils had the highest school exclusion rates (both permanent and temporary) in the 2017 to 2018 school year. But mixed white and black Caribbean, and black Caribbean pupils also had high exclusion rates, and were both nearly three times as likely to be permanently excluded as white British pupils.

These grim statistics by no means provide the whole picture but demonstrate a factual backdrop of some aspects of life for the BAME population.

The effect of social poverty in some BAME communities and the current Covid-19 pandemic has brought into sharp and

unavoidable focus the significant disadvantages faced by some in the BAME community in the FJS.

Legal empowerment and access to justice are essential tenets in any free and democratic society. There is a view that poor or marginalised BAME people do not effectively participate in the FJS. Poverty entails a lack of income or funds to meet basic needs. It also includes physical or psychological vulnerability and a sense of powerlessness within a system. (See Bernstein and Anderson 2003). This inevitably includes structural disadvantage. A society that jealously guards the rights of its majority citizens should approach the rights of its minorities with equal vigour.

Practice Direction 3AA of the Family Procedure Rules 2010 addresses the fair participation of the ‘vulnerable’ in family proceedings. The rules set out a number of factors which are potentially relevant to BAME communities;

‘2. Factors to which the court has to have regard when considering the vulnerability of a party or witness mentioned: Rule 3A.3(1) FPR

2.1 Rule 3A.3 FPR makes clear that when considering the vulnerability of a party or witness for the purposes of rule 3A.4 FPR (the court’s duty to consider how a vulnerable party other than a child can participate in the proceedings) or rule 3A.5 FPR (the court’s duty to consider how a vulnerable party or witness can give evidence), the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR. Where rule 3A.7(d) refers to questions of abuse, this includes any concerns arising in relation to any of the following-

- a) domestic abuse, within the meaning given in Practice Direction 12J;
- b) sexual abuse;
- c) physical and emotional abuse;
- d) racial and/or cultural abuse or discrimination;
- e) forced marriage or so called ‘honour based violence’;

- f) female genital or other physical mutilation;
- g) abuse or discrimination based on gender or sexual orientation; and
- h) human trafficking.’

It is impossible to assess the efficacy of the above rules without considering some aspects of the FJS. Who for instance is judging in ‘? The independence and impartiality of the judiciary within the FJS is not in doubt. The judiciary nonetheless remains an elite profession largely drawn from members of the Bar. There have been laudable strides to diversify the pool from which judges are drawn but it is the case that a great deal more can to be done. The more the diverse the decision makers, the better will be decisions.

The 2019 Judicial Diversity Statistics show that all the judges of the Supreme Court are white. BAME people make up 6% of Court of Appeal judges and 3% of High Court judges. No fulltime Family Division judge is of a BAME background. Of all the judges appointed last year in the High Court, all but one of the nine were Oxbridge educated. People with BAME heritage make up 4% of Circuit Judges, 9% of District Judges (County Courts) and 9% of Deputy District Judges (County Courts).

Under-representation of BAME people in the judiciary is real and may feed into a sense of inevitable structural disadvantages for BAME participants in the FJS.

Sir Geoffrey Bindman QC and Karon Monaghan QC in their report *Judicial Diversity: Accelerating Change* (November 2014) said:

‘The near absence of women and black, Asian and minority ethnic judges in the senior judiciary, is no longer tolerable. It undermines the democratic legitimacy of our legal system; it demonstrates a denial of fair and equal opportunities to members of underrepresented groups, and the diversity deficit weakens the quality of justice.’

It cannot be argued that the appearance of preference of people of a certain ethnicity or

background is conscious or deliberate. All the candidates may well be of high calibre. But it is important to be alive to the risks of actual or perceived discrimination. These were already identified over 20 years ago (in an employment law context) by Lord Nicolls in *Swiggs v Nagarajan* [1999] All ER (D) 790

‘I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated.’

The curtailment of legal aid, LASPO, the reduction in legal aid solicitors in the most deprived parts of the country with higher BAME communities has significantly undermined access to public interest lawyers and adequate legal advice. The consequence is potential unfairness to for instance the litigant in person, settled in the UK from say Sierra Leone for 20 years with no university education, holding onto their accent who is unfamiliar with a court room (or during this period Zoom or other internet platform) and in what feels like an entirely alien environment.

The lack of information and knowledge regarding legal norms and practice or basic court etiquette is disempowering. This is in the context of a court system under immense resource strains with and a statutory requirement to make the most far-reaching and life-changing decisions in public law cases within 26 weeks. Judges are required to address all of these potential inequalities with an under-resourced and sometimes limited arsenal.

The challenges faced by the FJS have been significantly exacerbated by the current Covid-19 pandemic. The effect of the disease on BAME families is beyond the terms of this paper but it is unquestionably the case that in the health service and in the community at large BAME people have been disproportionately affected by the pandemic. According to the recent report by Public

Health England, death rates from Covid-19 in England have been higher among people of black and Asian origin than any other ethnic group. Deaths among black males were 3.9 times higher than expected between 20 March and 7 May (www.gov.uk/government/publications/covid-19-review-of-disparities-in-risks-and-outcomes?utm_source=2e046dd4-5550-4042-b5a7-372873716a2a&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate).

The reasons for these distressing statistics are multifaceted and complicated. However, being poor, underlying physiological conditions or being on what is controversially described as the ‘frontline’ may provide some explanations. Low paid employment, zero-hour contracts and a lack of savings, all contribute to BAME people being more vulnerable in a shut or lockdown. The lack of immediacy in identifying the reason BAME people are disproportionately affected by the pandemic calls for a public enquiry. The effect of poverty, poor diet, lack of exercise, overcrowding, digital discrimination are other factors which may also account for this situation. As former US President Barack Obama recently said regarding the USA:

‘Let’s be honest, a disease like this just spotlights the underlying inequalities and extra burdens that [black] communities have historically had to deal with in this country . . .’

A call for a more wide- ranging review of the inequalities faced by the BAME community within the UK has been made by Lord Woolley, Chair of the Government Race Disparity Unit Advisory Group. BAME communities are 48% more likely to work in a zero-hours contract and black people are twice as likely to be unemployed. (www.obv.org.uk/news-blogs/bame-leadership-demand-covid-19-race-equality-strategy).

The effect of these figures on participation within the FJS are obvious.

Many courts ground to a halt in the UK but the family courts continued sitting and it is

argued with justification; children and families needed urgent cases resolved.

The use of technology, when health and social distancing made in person hearings undesirable or dangerous, is plainly necessary. Indeed, the Family Court is at the forefront of adapting to the new reality. The judiciary, litigants and the legal profession admirably rose to a steep challenge and learning curve. High levels of education and intellectual flexibility gave the legal profession and the judiciary adaptive advantages. The question, nonetheless, has repeatedly arisen during the pandemic concerning the participation and contribution of those at the centre; the litigants themselves.

There has been a well-publicised consultation into remote hearings by the Nuffield Family Law Observatory (www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf).

Remote hearings present a myriad of challenges to BAME people and the poor at large, which may lead to potential inequalities. With the knowledge that many BAME people continued to work during the lockdown, it is suggested that a correlation exists between poverty and the ability to attend court or participate remotely. On a very basic level, the lack of an appropriate internet connection and or hardware, disenfranchised some BAME people from access to an essentially digital process. Language barriers present another layer of complication. Again, the FJS pioneered some impressive work on the use of intermediaries, translators and interpreters in remote hearings. However, the most disadvantaged in our society and some BAME people remain unable to successfully participate in the hearings for some of the reasons given above.

There have now been a number of important decisions on whether important hearings should proceed remotely or not ; (See *Re P (A Child: Remote Hearing)* [2020] EWFC 32 (reported at [2020] Fam Law

669), *Re Q* [2020] EWHC 1109 (Fam) (reported at [2020] Fam Law 679), *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 (reported at [2020] Fam Law 674), *A Local Authority v Mother and Father and SX* [2020] EWHC 1086 (Fam) (reported at [2020] Fam Law 678) and *Re B (Children) (Remote Hearing: Interim Care Order)* 2020 EWCA Civ 584 (reported at [2020] Fam Law 676). It is considered that they have culminated in the President of the Family Division Sir Andrew MacFarlane observing that each case is to be decided at the discretion of the judge on case by case basis.

‘I have, in a manner that might impress the cast of the Cirque du Soleil, bent over backwards to stress that the decision whether or not to proceed with a remote hearing is a matter for the individual judge concerned, and should not be the subject of blunt ‘do or do not’ national guidance based upon the length of hearing, the issue before the court, whether there is to be oral evidence or some other characteristic.’ (www.judiciary.uk/announcements/president-of-the-family-division-welcomes-nuffield-report-into-effectiveness-of-remote-hearings-during-covid-19)

Race and equality may not have directly featured in any of these decisions, but they are surely important considerations when determining the ability of litigants to participate in and access to justice. The tribunal should be alert to the guidance in the Equalities Act, PD 3AA of the FPR 2010 and the *Equal Treatment Bench Book* so as to avoid potential inequality or discrimination.

The imperative for inclusivity and diversity in the administration of justice cannot be overstated. Both are at the heart of any just society. The challenges brought about by the pandemic and the effect on BAME people and society at large should and will be addressed. The FJS is dynamic and has adapted admirably to previous challenges and will surely rise to this latest.