



Guidance on ‘preferencing’ refugee candidates

Please note that this resource is not legal advice. Tent member companies should take their own legal advice if and when considering how to address this issue.

For more guidance and information about “preferencing” refugee candidates, see the following pages.

In summary:

what companies need to know

- A policy of “preferencing” refugees over non-refugee candidates in a recruitment exercise could give rise to an indirect race discrimination claim under the Equality Act 2010 by unsuccessful candidates. There is no cap on the amount of compensation that can be awarded by an employment tribunal if an individual was to successfully bring a claim for discrimination.
- “Positive discrimination” is generally unlawful under the Equality Act 2010, but under “positive action”, an employer could treat a refugee more favourably than others in recruitment or promotion, as long as the refugee is “as qualified as” the others. (This would apply to a “tie-breaker” scenario).
- Outside of recruitment, employers may offer refugees attendance on courses or schemes that, for example, assist with the recruitment process. This would be on the basis that it would give them more confidence and the skills they need to progress. But employers should consider the risks of offering employment to refugee candidates in circumstances where they are less qualified than non-refugee candidates, as this could give rise to an indirect discrimination claim.



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Advice note for the Tent Partnership for Refugees (‘Tent’)

Please note that the guidance below assumes all right to work legislation has been complied with, and the relevant visas are in place.

Tent has requested guidance to better understand the legal parameters around “preferencing” refugee candidates in any recruitment processes. Tent has provided two hypothetical examples of what is meant by this:

- A company hiring a refugee candidate over a non-refugee candidate if both candidates are about equal.
- A company putting refugee candidates at the “front of the line” for a job opening.

This note seeks to provide answers to the following hypothetical questions:

- 1. Are there UK employment laws that concern companies “preferencing” (specifically) refugee candidates when hiring for open positions?**
- 2. Are there UK employment laws that concern employers “preferencing” any kind of candidate (i.e., not just refugee candidates) that could apply to refugee-hiring companies?**

Both questions 1 and 2 have been considered together as there is significant overlap.

The Equality Act 2010 (“the Act”) forms the basis of anti-discrimination law in England, Scotland, and Wales. The Act sets out the “protected characteristics” that are protected by the law, and the associated behaviour that is unlawful. The Act not only protects individuals from discrimination and harassment in the workplace, but also in wider society.

Among other things, the Act makes it unlawful for companies and organisations in the UK to discriminate during recruitment if the discrimination is related to one or more of nine protected characteristics. This does include “positive discrimination”. While “positive discrimination” is generally unlawful under the Act, “positive action” is lawful, subject to certain conditions being met, and more particularly described in this note.

The nine protected characteristics covered under the Act are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.



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Race, in the context of the Act, includes colour, nationality, citizenships, and ethnic or national origins. For ease, any reference in this note to “race” will include colour, nationality, citizenship, and ethnic or national origins.

Being a refugee is not a protected characteristic. Therefore, there may be an argument that decisions are not being made due to a protected characteristic, but because of their status as a refugee, and therefore the Act is not triggered. We consider this to be a high-risk approach. Refugees are made up of a limited number of nationalities (e.g., Afghanistan, Iran, India, Pakistan, etc.). Refugees will not be British nationals or have British citizenship. The risk therefore when considering the recruitment of refugees, and “preferencing” them over other candidates, is that it could give rise to a race discrimination claim from non-refugees.

Each stage of a recruitment process is covered by the Act – this can be anything from the wording of the job vacancy to preparation of the job specification to inducting the employee. The Act makes discrimination, harassment, and victimisation in recruitment in relation to any of the nine protected characteristics unlawful. Individual employees, publishers of job advertisements, recruitment agents, and the company itself are all capable of being liable for discrimination in recruitment.

A company will likely be liable for discrimination if they opt to hire a candidate because of their race. Clearly, if a company opts to hire a refugee, it is not because of their race – however, their refugee status is inevitably linked to their race. By way of a hypothetical example:

- Ahmad is an Afghan refugee who has applied for the role of Engineer at Tent Engineering Ltd (“TEL”) along with Brian, a British citizen who currently works at TEL in a junior role.
- TEL’s workforce has low numbers of ethnic minority employees. It is aware that Ahmad is likely to face some difficulty in obtaining a new job, as he is a refugee, his English language speaking skills are weak, and he also has little work experience.
- TEL has a “preferencing policy” that permits hiring managers to preference candidates of refugee status.
- TEL undertakes a recruitment process that involves scoring the candidate’s interviews. Ahmad scores 10, and Brian scores 12.
- In light of Ahmad’s extenuating circumstances, and the fact that Brian is already engaged in a role TEL, the hiring manager implements its policy on preferencing and opts to hire Ahmad so that he has a good chance at starting his career.

This scenario presents a significant risk that Brian could have an **indirect race discrimination** claim. Indirect race discrimination is concerned with acts, decisions, or policies that, in practice, have the effect of disadvantaging a group of people with a particular protected characteristic. Where such a policy disadvantages an individual with that characteristic, it will amount to indirect discrimination unless it can be objectively justified.



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TEL’s policy puts Brian, as a British National, at a disadvantage because it preferences refugees. A British National, by definition, would not be a refugee, and therefore all British Nationals are disadvantaged by this policy. If Brian was of Afghan heritage and had British citizenship, the same risk would be present, as citizenship is included in the definition of race.

To consider whether TEL could objectively justify the policy, it would first need to identify a legitimate aim, and demonstrate that the preferencing policy is a proportionate means to achieve this aim. TEL’s legitimate aim must simply amount to a real business need; social policy aims are irrelevant, and indirect discrimination cannot be justified based on purely social aims. TEL is therefore unlikely to be able to justify its preferencing policy, as it does not appear to be a business aim but a social one, leaving itself open to an indirect discrimination claim.

There is no upper limit on the amount of compensation that can be awarded by an employment tribunal if an individual was to successfully bring a claim for discrimination. Any compensation would relate to an injury to feelings award, as well as compensation that would include any loss of earnings.

- 3. Can companies use “positive action” and/or “protected characteristics” to “preference” a refugee candidate over a non-refugee candidate when hiring for open positions?**
- 4. Are there any scenarios in which a company can “preference” a refugee candidate when hiring for open positions?**
- 5. What must refugee-companies not do when hiring refugees so as not to fall foul of UK employment law as it relates to discrimination?**

To avoid any duplication, these questions have been answered together, as there is significant overlap. While positive discrimination in employment is generally prohibited under the Act, the use of **positive action** is lawful, under s.158 and s.159 of the Act.

The Act contains provisions concerning lawful positive action where people who share a protected characteristic suffer a disadvantage connected to the characteristic have needs or are disproportionately under-represented. Employers are permitted to take certain actions to address these problems without opening themselves up to discrimination claims brought by people without the relevant protected characteristic. Being a refugee is not a protected characteristic, and refugees will not all share the same protected characteristic – i.e., they will not be of the same race. However, the refugee community will be made up of a limited number of nationalities etc. – therefore, it is likely that positive action would be applicable to refugees.



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There are two positive action provisions:

- I. **The general positive action rule (s.158):** this can apply where the organisation reasonably thinks refugees (which, although is not a protected characteristic, is made up of different groups of people who share the same protected characteristic) are disadvantaged, have different needs, or are disproportionately under-represented. The employer can take proportionate measures to enable or encourage people with that characteristic to overcome that disadvantage, meet their needs, or enable/encourage increased participation.
- II. **Positive action in recruitment and promotion (s.159):** this can apply where the organisation reasonably thinks that refugees are disadvantaged (i.e., those of a particular race), or that their participation in an activity is disproportionately low.

The employer can treat a refugee more favourably than others in recruitment or promotion, as long as the refugee is **“as qualified as”** those others. This would apply to a tie-breaker scenario, and allows the employer faced with making a choice between two or more candidates who are of equal merit to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce. Therefore, a refugee candidate who is objectively weaker than a non-refugee candidate cannot be hired on the basis of their refugee status, nor can they be placed at the “front of the queue” for accepting a specific job opening. This would potentially give rise to an indirect race discrimination claim on the basis that a refugee will be a different nationality/race/citizenship to the other candidate.

Furthermore, for positive action to apply, the employer cannot have a policy of routinely treating people who share the protected characteristic more favourably in connection with recruitment than people who do not share it. All suitably qualified candidates must be considered. However, this does not prevent an employer having a routine policy of being prepared to use positive action where it is appropriate to do. However, where this is the case, care must be taken in exercising the terms of the policy in a fair and proper way.

Finally, taking the action must be objectively justified as a proportionate means of achieving a legitimate aim. The company should carefully consider its legitimate aim and ensure that it carefully documents the decision made, and why. There does not appear to be any guidance or case law on whether, in this context, there is a requirement for the legitimate aim to be only a business need.

If we go back to our case study above, TEL would be unable to argue that its decision amounted to lawful positive action because it: (i) had a policy in place of routinely treating refugees (who are likely to share the same race, nationality) more favourably than others who do not; and (ii) the candidates were not of equal merit.

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An example of lawful positive action is as follows:

- A counselling service for teenagers has no employees who are Syrian, despite being located in an area with a high Syrian refugee population. When a vacancy arises, two candidates of equal merit are in a tie-breaker situation, with the employer having to find some way to choose between them.
- One candidate is a Syrian refugee; the other is not. The hiring manager chooses to offer the job to the Syrian candidate.
- This is likely to be permitted under the positive action provisions because the Syrian candidate has a protected characteristic that is underrepresented in the employer’s workforce, which is relevant to the work undertaken, and he is of equal merit with the other applicant. As such, it is unlikely that the other candidate would be successful in any claim of unlawful race discrimination.

Other examples of positive action provided by ACAS include:

- An employer that has an equal representation of male and female employees but more than 75% male managers offers women management courses to give them more confidence to apply for managerial roles. However, when making recruitment decisions, the employer must treat men and women equally, as promoting a woman simply because she is a woman would be discrimination towards the male candidates.

To use positive action provisions in a tie-breaker situation, the employer must first establish that the candidates are of equal merit. To prevent (insofar as is possible) unsuccessful candidates from raising concerns about how their scoring was undertaken, and how the decision was made to assess both candidates as “of equal merit”, companies should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidate’s overall ability, competence, and professional experience together with any relevant formal or academic qualification, as well as any other qualities required to carry out the particular job.

Consideration will also need to be given to regularly monitoring the use of positive action within the company. If positive action continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have remedied the situation the positive action was initially taken to resolve. This could make it unlawful to continue to take the action.

With that said, outside of recruitment, employers may offer refugees attendance on courses or schemes that assist with, for example, the recruitment process. This would be on the basis that it would give refugees more confidence, and the skills they need to progress. But employers cannot offer roles to refugee candidates who are less qualified than non-refugee candidates, as this would likely be discriminatory.