Neutral Citation Number: [2009] EWHC 2356 (Admin)

CO/6158/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 31 July 2009

B e f o r e:

MR JUSTICE BLAKE

- - - - - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF

(1) ALMA LUNT
(2) ALLIED VEHICLES LIMITED

Claimants

v

LIVERPOOL CITY COUNCIL

Defendant

EQUALITIES AND HUMAN RIGHTS COMMISSION

Intervener

- - - - - - - - - - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 0207 404 1424
(Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - -

Ms Dinah Rose Q, Mr Gerry Facenna and Ms Catherine Casserley (instructed by Bindmans) appeared on behalf of the **Claimant**
Ms Francis Patterson QC and Mr David Hercock (instructed by Liverpool CC) appeared on behalf of the **Defendant**
Ms Yvette Genn (instructed by EHRC) appeared on behalf of the **Intervener**

- - - - - - - - - - - - - - -

J U D G M E N T

36

MR JUSTICE BLAKE:

1. This is an application for judicial review of a decision of the Liverpool City Council taken through its Licensing Committee in March 2008.

1. Introduction

2. In 2007 the second claimant, Allied Vehicles Limited, applied to the defendant for approval of its E7 taxi for use as a public hire taxi in the city of Liverpool. The E7 is a vehicle developed in consultation with the second claimant and Peugeot based in France. It is manufactured by the second claimant in the United Kingdom using a chassis base imported from France that is used in the Peugeot Expert Tepee range of vehicle. The Expert Tepee is a commercial passenger carrying vehicle that is also used as a taxi in many European cities. The E7 is a purpose-built design for publicly hired taxis in the United Kingdom.

3. The second claimant has imported some 800 vehicles from Peugeot in 2008 into the United Kingdom, of which 647 were for use as E7 taxis, and 153 for use as Eurobus private hire taxis.

4. The first claimant is a resident of the city of Liverpool. She hurt her back some 27 years ago and has a disability that requires her to use a wheelchair. A combination of factors relevant to her medical history means that she has to distribute her weight by reclining the back of her wheelchair and using footrests. This means that that her wheelchair is somewhat longer than what has been known in these proceedings as the reference wheelchair for public transport purposes, that is 1200mm in length. She is not alone in having a wheelchair of greater length than 1200mm. A survey conducted in 2005 on behalf of the Department of Transport Mobility and Inclusion unit of some 1356 occupants and devices showed a range of wheelchair lengths from 775mm to 1604mm; and it appears that a few hundred users had a chair over 1200mm in length. The longest self-propelled wheelchair noted in that survey was 1534mm, which was itself an increase in size of the maximum self-propelled wheelchair by some 177mm since a similar survey in 1999.

5. The first claimant is the voluntary chair of the Merseyside Coalition of Inclusive Living and the Treasurer of the Liverpool Wheelchair Users Group. These are both voluntary organisations concerned with disability issues in the city of Liverpool and beyond. Amongst other things, she participates in the policy forum of the City Council concerned with wheelchair access issues.

6. In the autumn of 2007, she became aware of the application made by Allied Vehicles Limited, and she tried out the E7 vehicle in order to access it in her wheelchair. She was impressed with it because she had encountered substantial difficulties in getting into and travelling safely within the public hire taxis presently available in the city of Liverpool. The design specification of the 1400 such taxis approved for public hire, although intended since 2000 to meet the needs of wheelchair users, are confined to the London-style taxi developed in accordance with the requirements of the London Public Carriage Office, as they have developed over the years since the 19th century. There are various authorised models and manufacturers who comply with the specifications,

including the "TX" range of vehicles. But in this judgment, taxis that meet these requirements will be referred to generally as the "London taxi" or the "TX".

7. When these proceedings were launched, there was an issue as to precisely what and how great the difficulties were that the first claimant faced in accessing Liverpool public hire taxis, and also what precisely she had told the Council and Mr Edwards, its principal licensing officer, about them. Shortly before the hearing of this application in June 2009, there was a demonstration attended by Mr Edwards. Since that demonstration, it has been agreed that the first claimant cannot access the traditional London taxi in her manual powered wheelchair because she cannot turn her chair to face the rear and be secured by the straps and seat-belts provided for disabled use in such a taxi. That means that if she has to travel in such a taxi at all, she can only do so in a diagonal or sideways position unsecured by a seat-belt or a strap on the wheelchair itself. It is common ground that this state of affairs not only creates an uncomfortable ride in the vehicle if it breaks or turn corners sharply, it is an unsafe position and a breach of the local regulations governing the conveyance of wheelchair users.

8. The reason for these difficulties is the limited amount of space and the configuration of the floor plan of the London taxi as it rises to the side. By contrast, she can readily access the larger E7 taxi; she can face forward in the course of a journey and be properly secured, and moreover the space is such that she can also be joined by three or possibly four ambulant passengers in the other seats available in the vehicle, by contrast again with the London taxi where at most one passenger can travel with the claimant. The court was provided with a DVD showing a comparison with the E7, a London taxi and another vehicle that will be mentioned later in this judgment, from which it appears that the travelling passenger could only travel in a cramped, difficult and uncomfortable position.

9. The first claimant has a large family and would like to travel with more members of her family than just one person if that were possible. She therefore supports the second claimant's application that would relax the defendant's present policy that generally only authorises the London taxi for use as a public hire vehicle in Liverpool.

10. The policy was spelt out in a report of Mr Edwards. The first such report being on 31 October 2007, but it is repeated in the second report that he made in March 2008. He says as follows:

> "Before a type of vehicle may be licensed as a hackney carriage it needs to be approved by the City Council as a suitable vehicle for use as a taxi cab in Liverpool. The Council has accepted that purpose-built taxis which comply with the conditions of fitness of the London Carriage Office are suitable for such use. Other types of vehicle are considered on their merits, but to date no vehicle which is unable to meet the conditions of fitness has been approved by the Council."

11. Mr Edwards also referred to the policy of the defendant Council in a document that he had prepared in March 2008, which was the Equality Impact Assessment document. He notes that the standard of the London conditions of fitness:

"lays down critical standards which vehicles must attain before being licensed as a hackney carriage. The Licensing Committee makes reference to those standards. If a vehicle falls short of those standards it will generally not be approved for use as a hackney carriage".

2. The impugned decision

12. On 31 October 2007, the defendant's Licensing Committee first considered the matter. It heard a presentation from Mr Fryer, an employee of the second claimants. It heard from the first claimant, Mrs Lunt, and from a Mr Bruce, who was chair of the Liverpool Wheelchair Users Group.

13. The minutes record in summary form the gist of what they were being told, which includes the following:

> "They are in favour of the E7. Not all TX vehicles are wheelchair accessible."

14. Other people, including the manager of the TX range, opposed the application. It was adjourned for further information to be obtained and consultation with others, including other authorities on the types of vehicle they licence.

15. On 4 March 2008, there was a meeting of some few hours in length between Mr Edwards, Mr Bruce and Ms Price, who was another wheelchair user active in disability issues in the city of Liverpool and its surrounding region, and Mrs Lunt, the first claimant. As already indicated, there is some difference of recollection between those three on the one hand and Mr Edwards on the other as to precisely what was said at a meeting. Mr Edwards does not recollect anyone saying to him that wheelchairs could not be safely secured in the taxis as the statements of the three wheelchair users indicate they did inform them. But I am satisfied that it is at least clear that the difficulties created by the physical limitations of space were emphasised by all three, although not everyone had the scale of difficulty that Mrs Lunt, the first claimant, had.

16. Following that meeting, Mr Edwards completed the Equality Impact Assessment to which reference has already been made. He said as follows:

> "A specific application for the approval of a Peugeot E7 vehicle to be used as a hackney carriage presents the potential for a dis-benefit to wheelchair users if the vehicle is not approved. Those wheelchair users who wish to be accompanied by several of their ambulant friends have move manoeuvrability and be able to travel in a forward as well as a rear facing position would not be able to do so by access to the current wheelchair accessible fleet. The Peugeot E7 is a larger vehicle and by virtue of its size creates more space for manoeuvre and placement of such wheelchairs.
>
> However due to the vehicles size and the engineering considerations associated with the design, it can not conform to the minimum turning circle requirements associated with hackney carriages and is higher off

the ground creating increased wheelchair ramp angles."

Under the section of the Equality Impact Template headed "Please list the actions taken to remove or remedy the above effect", Mr Edwards wrote:

> "The Licensing Committee will consider any application on its merits submitted by any vehicle manufacturer who designs and builds a vehicle which is constructed to be used for public hire activity."

17. That report was dated the 18th March 2008 and was before the Licensing Committee when it met to take its decision later that month. It does not appear to have been supplied to the first claimant or others with whom there had been consultation before the decision was taken. Mr Edwards prepared a further report for the meeting of the Council in which similar language was used and pointing out, as is apparent from the Equality Impact Assessment, that the E7 does not meet the tight turning circle requirements of the London Public Carriage Office specifications and the London taxi. That is agreed between the parties. The benefits of the turning circle and its impact on health and safety are not agreed.

18. It is pertinent to point out some matters in the report which have been the subject of critical comment and appear to in part be inaccurate.

i. The report states that the "Merseyside Police has inspected Euro 7 and has indicated that they have reservations about the vehicle's use as a hackney carriage". It subsequently transpired that the police as a body do not have concerns and are neutral as to the merits of the matter, but it is undoubtedly the case that a Mr Gore, who was the Merseyside Force Vehicle Examiner, did inspect the E7 and made a statement identifying matters of concern to him.

ii. The report before the Council indicated that a previous version of the E7 had been inspected by the Council's senior vehicle inspector who raised concerns about the ramp angle. However, the ramp angle had been the subject of representations by the second claimant between Mr Edwards' first report and the second report, pointing out that the matter had been substantially altered since the earlier inspection, and the ramp that is now built-in to the version of the E7 for which authority was being sought is longer and consequently has a shallower angle than the London taxi. It was noted in the report that it also has the additional feature of lips to the edge of the ramp edge that wheelchair users considered was of assistance in bringing their chairs up the ramp into the vehicle.

iii.Mr Edwards' report noted the danger of sliding doors, which is a feature of the E7, and the fact that use by passengers of such doors when descending fail to warn oncoming traffic that passengers are exiting the vehicle, by contrast with the hinged doors of the London taxi. It is right that the second claimant also pointed out that that issue had been addressed by them by the insertion of a warning light visible to following traffic saying that the door was open.

19. The views of the first claimant and others who had discussed the matter on behalf of the voluntary organisations with Mr Edwards are summarised in the second report in the following terms:

> "The Liverpool Wheelchair Users Group in conjunction with Merseyside Coalition of Inclusive Living has made representations in support of the E7 and has requested that the vehicle be approved as it provides more room and comfort for both wheelchair users and those ambulant friends who accompany them. The groups have expressed the view that the ramps associated with the E7 vehicle are more reassuring than normal TX ramps. The Wheelchair Users Group advised the Licensing Unit that some 12,000 wheelchair users would find the alternative choice of the E7 to be a positive benefit in terms of accessible transport."

20. It is a theme of the various reports made by Mr Edwards whilst the matter was under consideration that Liverpool's fleet of London taxis is wheelchair accessible and Liverpool has an enviable reputation in so requiring since at least 2000.

21. The second claimant had by this time prepared a written report that it presented to the Council for consideration of its application. That report contains a number of appendices which is quoted from in the summary of the report, and it contains a letter from Mr Bruce of 6 September and a media release of 29 November 2007, which more accurately set out the concerns of the wheelchair users than Mr Edwards' summary of the consultation does in that report. It is unnecessary in this judgment to quote every relevant passage of the report, but the following themes emerge. It said:

> "1.1.2 The present public hire taxi fleet is not inclusive for many wheelchair using residents and visitors. This is because the only existing vehicles ... make it awkward and time consuming to load wheelchair users and make it difficult to turn and secure the wheelchair and occupant correctly within the cab.
>
> ...
>
> 1.1.7. A survey of 100 journeys was undertaken by wheelchair users in London-style hackney cabs. This showed that, due to the lack of turning space to manoeuvre the wheelchair within the vehicle, only on four occasions was the wheelchair user turned into place in the correct direction for travel and on only one occasion were the wheelchair and passenger restraints correctly applied.
>
> 1.1.8. The Lowland Report therefore provides firm evidence that in 99 per cent of journeys wheelchair using passengers were left to travel in a manner which is clearly highly dangerous, with no seat belt for the passenger and not even anything to hold his/her seat to the vehicle.
>
> ...
>
> 1.1.12. The practice of carrying wheelchair passengers facing sideways,

entirely unsecured and with no seat belt, places all such passengers using a publicly licensed service at grave risk of injury or death in the event of an accident. Disabled groups and Taxi Association representatives alike confirm that a key barrier giving rise to this appalling situation is the limited turning area available in the rear of a London-style taxi.

1.1.13. Numerous organisations have commented on the important contribution made by modern-style hackney taxis to improving accessibility for wheelchair users. In particular, organisations representing 12,000 wheelchair users in the report argue strongly against a one size fits all approach in specifying services or products to meet the needs of everyone in society. Having tested modern-style hackney taxis, wheelchair users recognise clear access and safety benefits for many wheelchair users compared with the existing Liverpool taxi fleet."

22. There is then reference to the disability legislation to which this judgment will turn in due course.

23. The Lowland Report referred to in that document was a report commissioned by Lowland Market Research of wheelchair user taxi journey experience. It indicates that a total of 100 taxi journeys were undertaken using a reference wheelchair (that is the 1200mm wheelchair, slightly smaller than Mrs Lunt's own wheelchair in the present case). The 100 taxi journeys were split between Manchester and London with 50 journeys in each city. The journeys started at a variety of locations, including shopping centres, taxi ranks and hailing the taxi on the street.

24. Under the heading "Summary of results", the following bullet points are made:

"• In only four of the 100 taxi journeys taken was the wheelchair turned to face rearwards in the correct direction of travel. In all cases this required a degree of bumping and shuffling in order to get the wheelchair turned, which was uncomfortable for the wheelchair occupant.

• In only one journey was the wheelchair both turned to face away from the direction of travel and also properly secured within the taxi.

• In only one journey was the seat belt and seat belt extension provided and correctly fitting.

• In all other journeys (96 per cent) the wheelchair either remained side on or at some other angle. In these situations neither the wheelchair nor the passenger could be safely secured and the passenger tended to feel uneasy at bends and when stopping.

• For those taxi drivers that did not turn the wheelchair to face away from the direction of travel they either made no comment regarding this or stated that the wheelchair was too large to turn inside the vehicle.

• In 94 per cent of the journeys taken the wheelchair passenger stated that

they felt either fairly or very unsafe during the journey.

Concluding comments

• The experience of a wheelchair user whilst travelling on a London-style taxi was, almost without exception, uncomfortable and, in particular, unsafe. The predominant issue contributing to this situation was the lack of space available in which to manoeuvre the wheelchair and occupant into a safe travelling position."

25. The general tenor of the second claimant's submissions in the Lowland Report were supported by other documentary material before the Committee, including the letter from Mr Bruce and the media information release to which reference has already been made. The Committee also heard evidence from another wheelchair user currently unconnected with the interest groups that Mr Bruce, Mrs Price and Mrs Lunt were connected with, and that was a Mr Cronin. He in fact wrote to the Council on 7 April 2008 indicating that the minutes mis-recorded the nub of what he was saying, and said that he did not support either side in this debate and has never even seen the E7-style cab. His letter says:

> "I merely inform the Committee that I was unable to be seated correctly by Mr Kelsey and this would have necessitated me travelling sideways, un-tethered. I further stated that sideways travel was, in the experience of my peer group, very much the norm when using a London-style taxi."

26. On this second occasion as well, the Committee heard from Mrs Lunt herself, though it seems only for a very short period, but she had apparently handed in photographs which were made available to the court showing the difficulties of securing her wheelchair, or a wheelchair of her size, in the London-style taxi by contrast with the E7. One of the photographs showed the wheelchair user in the E7 with two other ambulant passengers, and it may be that two to three is the number of extra passengers that can be fitted into that vehicle.

27. Mrs Price also spoke to the Committee, but despite this material, the minutes note that the chair of the meeting interjected to state that he thought that the problems being described were all driver error that could be addressed by training. A similar point is made subsequently in the correspondence before this claim was lodged.

28. The written submissions of the second claimant also made the point that 383 local authorities had licensed the E7 for use as a public hire taxi by 2008, and in some cases going back to 2000. Those include such large cities as Edinburgh, Glasgow, Leeds and Newcastle, and it also includes all the local authorities who licence public hire taxis surrounding the City of Liverpool itself, those at least include the authorities for the Wirral, Knowsley, St Helens, Sefton and West Lancashire. Thus it seems that the E7 was considered both safe and appropriate by these authorities, and as a result was permitted to make journeys ending in Liverpool City Centre, but not beginning there or being hailed on the streets there. It is to be noted that both Manchester and London have retained the London taxi design with its turning circle.

29. The Committee having met on 28 March and heard all this material, then excluded the public in order to consider its decision, and decided by a vote of four to two to refuse the application. In due course, the minutes of its reasons, and a letter in explanation indicated that it was conscious of the need to give due regard to the Disability Discrimination Act, but three features caused it concern about the E7: firstly, the sliding doors and safety issues arising therefrom (the Council, it should be noted, had looked at the E7 itself); secondly, the size of an intermediate step; and thirdly, the turning circle needed in Liverpool where some ranks in the City Centre would need a three-point turn without the tight London-style turning circle.

30. Following further correspondence, this judicial review challenge was brought.

3. The challenge

31. Ms Rose QC has developed four essential bases of challenge that may be summarised as follows:

> 1. The decision amounted to unjustified discrimination contrary to section 21D and E of the Disability Discrimination Act 1995 (DDA), as amended with effect from 4 December 2006.
>
> 2. It failed to have due regard to its duty under section 49(1) of the DDA, introduced in June 2006, of the need to eliminate discrimination and promote equality of opportunity.
>
> 3. It exercised its public law discretion as to whether to license the E7 on the basis of a material and undisputed error of fact. Its judgment was thus based on a decisive error. There were also other grounds of unfairness argued.
>
> 4. In reaching the decision that it did, the City Council breached Article 28 of the European Union Treaty in that it imposed a product requirement (or similar requirement) that had equivalent effect to a quantative restriction on imports of material from an EU state without justification.

32. Although those four submissions raised some disputed issues of law to be addressed by this court in due course, the challenges at common law under the DDA and under community law all eventually shared a common factual foundation, and it is submitted that, in each case, the decisions were undermined by the error of fact made by the Council that at least includes the following:

> 1. The defendant through its officer, Mr Edwards, and consequently the chair, failed to understand that not all its licensed hackney carriage fleet was accessible to all wheelchair users, irrespective of their particular conditions and the size and characteristics of their wheelchairs.
>
> 2. The defendant misunderstood and therefore mis-stated the impact of the maintenance of the present practice as merely restricting the choice and the convenience of wheelchair users as opposed to the ability of some

users, including Mrs Lunt, to use the present licensed taxis in Liverpool at all in the safe position. It could therefore reach no lawful judgment on the merits of the application and the extent to which it constituted discrimination, and the comparative safety benefits when considering the matter more generally.

3. Insofar as in its response to the DDA point and the Community law claims the Council sought to base a justification of its decision on safety considerations, the material upon which it relied was inadequate, and it failed to obtain relevant evidence from a competent source to advise it on the question.

33. Ms Patterson QC for the defendants responds by submitting, amongst other things:

1. The section 21 challenge is unsuitable for determination by judicial review, and a damages claim by the first claimant in the County Court is the appropriate venue for the first of the four challenges made.

2. Although the section 49 duty is a public law duty that can be enforced by judicial review, the Council was aware of its duty and came to a decision on the merits that it was entitled to reach.

3. Even if it misunderstood the degree of difficulty Mrs Lunt faced in gaining access to a London-style taxi, it was entitled to conclude that all its taxi fleet was wheelchair accessible in general terms, and accordingly there was no duty to modify in accordance with section 21E of the DDA.

4. The claim fell outside the reach of Article 28 as it was not a sufficiently substantial interference with use.

5. In any event the Council was entitled to refuse the licence on safety grounds, even if other local authorities took a different view. In particular, the Council was entitled to use its local knowledge of what it would consider was appropriate for Liverpool to make the decision it came to.

4. Suitability for Judicial Review

34. I accept the claimant's submissions that claims against public authorities under Part 3 of the DDA do not have to proceed by way of private law action for torts alone. There are a number of reasons for that conclusion. First, and most relevantly, that is because DDA Schedule 3, paragraph 5 says so. It provides as follows:

"(1) Except as provided by section 25 no civil or criminal proceedings may be brought against any

person in respect of an act merely because the act is unlawful under Part III.

(2) Sub-paragraph (1) does not prevent the making of an application for judicial review."

35. Second, the law on the comparable duty in race relations claims demonstrate that a challenge can be made by way of judicial review even where there is a factual dispute as to what the defendant's practice amounts to: see Roma Rights [2004] UKHL 55; [2005] 2 AC 1 at paragraphs [96] to [97]; see also the decision in R(E) v Governing Body of the JFS [2008] EWHC 1535/1536 (Admin), a decision of Munby J reversed by the Court of Appeal on other grounds. The conclusion of suitability for judicial review was not challenged or disturbed in the Court of Appeal.

36. Third, I do not accept that the factual disputes that exist between the parties as to what was said to Mr Edwards in consultation prevents this challenge in judicial review proceedings. I do not need to resolve all the differences in the witness statements, although I find the witness statements of Mrs Lunt, Mrs Price and Mr Bruce compelling, whereas that of Mr Edwards is far less clear and precise, and his reports have been shown to be inaccurate in a number of ways on one or two other topics.

37.However, in my judgment, at least the following conclusions results from the examination of the materials in the case:

(i) There was sufficient documentary evidence before the Committee that some wheelchair users could not access the London taxi for space reasons, and that was not a question of either driver error or mere convenience or preference of wheelchair users.

(ii) Since it is now an agreed fact that Mrs Lunt cannot access a London taxi in her wheelchair, save with the difficulty and in the unsafe sideways manner that has been demonstrated, and that there has been no material change of circumstances since October 2007 and today, then at the least Mr Edwards must have seriously misunderstood what was being said to him. If he did not understand what was being said to him, in my judgment he was required to explore the basis of the physical difficulties with manoeuvring the taxi to a safe position that was being described to him.

38. Judicial review enables the court to intervene where there has either been a procedural failure to explore the relevant question fairly and effectively or at all, or having explored it, bases a decision on a critical factual question that proves by the time the judicial review proceedings are brought to have been wrong: see in that context the decision in the case of E v the Secretary of State [2004] EWCA Civ 49; [2004] QB 1044, which provides, so far as material:

"61. As the passage cited by Lord Slynn shows, the editors of the current edition of De Smith (unlike Wade and Forsyth) are somewhat tentative as to whether this is a separate ground of review:

"The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration or the

failure to provide reasons that are adequate or intelligible or the failure to base the decision upon any evidence." (para 5/-094).

62. We are doubtful, however, whether those traditional grounds provide an adequate explanation of the cases. We take them in turn.

(i) Failure to take account of a material consideration is only a ground for setting aside a decision, if the statute expressly or impliedly requires it to be taken into account (Re Findlay [1985] AC 318, 333-4, per Lord Scarman). That may be an accurate way of characterising some mistakes; for example, a mistake about the development plan allocation, where there is a specific statutory requirement to take the development plan into account (as in Hollis). But it is difficult to give such status to other mistakes which cause unfairness; for example whether a building can be seen (Jagendorff), or whether the authority has carried out a particular form of study (Simplex).

(ii) Reasons are no less "adequate and intelligible", because they reveal that the decision-maker fell into error; indeed that is one of the purposes of requiring reasons.

(iii) Finally, it may impossible, or at least artificial, to say that there was a failure to base the decision on "any evidence", or even that it had "no justifiable basis" (in the words of Lord Nolan: see above). In most of these cases there is some evidential basis for the decision, even if part of the reasoning is flawed by mistake or misunderstanding.

63. In our view, the CICB case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

(i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

(ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

(iii) The claimant could not fairly be held responsible for the error;

(iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

(v) The mistaken impression played a material part in the

LS

reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in Tameside, the Council and the Secretary of State, notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities. The same thinking can be applied to asylum cases. Although the Secretary of State has no general duty to assist the appellant by providing information about conditions in other countries (see Abdi and Gawe v Secretary of State [1996] 1 WLR 298, he has a shared interest with the appellant and the Tribunal in ensuring that decisions are reached on the best information. It is in the interest of all parties that decisions should be made on the best available information (see the comments of Sedley LJ in Batayav, quoted above).

(We have also taken account of the judgment of Maurice Kay J in R (Cindo) v Secretary of State [2002] EWHC 246 para 8-11, drawn to our attention since the hearing by Mr Gill, in which some of these issues were discussed.)"

39. In my judgment, no other obstacle to proceeding by judicial review exists in this case, and in the light of the other issues under section 49 and Community law being properly advanced by judicial review, it is clearly appropriate that one action disposes of the question rather than two.

40. The court, in my judgment, will not be substituting its own conclusions on disputed questions of fact or policy, since the remedy sought is to quash the decision and remit it for reconsideration in accordance with the law set out in this judgment.

41. A different objection was faintly advanced by Ms Patterson that, as the Secretary of State had power to make Regulations about accessibility under Part V of the DDA and section 32, and there is a consultation now underway as to what the required specifications for taxis should be, it would be wrong to explore the issues in a discrimination claim under Part III.

42. I am satisfied that such a submission is wholly misconceived for the reasons given by Ms Rose in response. The claimant's case is not a challenge to the minimum conditions for taxi specifications. The claimant does not submit that all taxis should have the space features of the E7. It is clear that many wheelchair users can access the London-style taxi and have no expressed concerns about it, but this case is concerned with a class of persons who cannot do so in safety and without difficulty. They merely want the opportunity to be able to use the E7 as a public taxi alongside the London-style taxis, and are not seeking a minimum one size fits all approach.

5. Error of fundamental fact

43. I accept Ms Rose's primary submission that this decision is liable to be quashed because the judgment of the Committee was based on the fundamental misunderstanding as to the true factual position. In my judgment, that true factual position was a mandatory relevant consideration, both under section 49A of the DDA and at common law, applying the approach in E v the Home Secretary (already cited).

44. A lawful exercise of discretion could not have been performed unless the Committee properly understood the problem, its degree and extent. The margin of discretion as to fact and policy that the common law affords to decision-makers under the test in the Wednesbury Corporation case only applies to decision-makers who have acted fairly and directed themselves accurately on the relevant considerations to be weighed in making a matter of judgment or exercise of discretion. However, whether the failures came about as a result of the deficiencies in Mr Edwards' report, or a failure by the Committee to take into consideration and understand the factual position emerging from the documentary submissions and annexes in the second claimant's written submissions, the result is the same.

45. The Committee clearly based its decision on the erroneous belief that:

> 1. all its existing fleet of 1400 London-style taxis were accessible to wheelchair users generally, and that must mean to all wheelchair users;
>
> 2. problems as to the safe position and strapping of wheelchairs were the result of driver error rather than the result of constrictions of space;
>
> 3. it was dealing merely with a wish by wheelchair users to greater choice rather than something that restricted their ability to access the benefits provided by the licensing regime at all.

46. Since this error was critical to its decision in respect of its DDA duties, the balance of competing considerations if EC law was engaged and generally, it must be quashed and the matter remitted for reconsideration unless Ms Patterson could satisfy me that it could make no difference to the outcome. I conclude that she cannot so satisfy me.

47. In reaching that conclusion, I bear in mind that, following my conclusion on the legal issues considered below, the inadequacy of the material relied upon to support safety objections can now be supplemented by three pieces of post-decision evidence that the claimants have placed before the court.

48. The first of those is a London Transport survey done in 2003 on the accessibility of the London taxi in respect of six wheelchairs. The following relevant information can be gleaned:

> "2. Background
>
> Although this report covers only the experiences of the six wheelchair users a range of wheelchairs were included - both manual and electric. It

emerged very clearly that there are three major difficulties to be taken into account when designing vehicles to meet the needs of wheelchair users: (a) differences in the individual's size and weight; (b) differences in the nature of the disability; and (c) differences in the wheelchair design. These difficulties were compounded by the fact that the individual's size and the nature of their disability may require the wheelchair to be set up differently to meet the individual's needs. So, even though the wheelchair design may be standard, if (for example) the occupant requires the foot rests to be raised this can make it difficult or impossible for the passenger to get into or turn around in the vehicle. Another passenger with the same wheelchair would not have such difficulties.

It should also be noted that two of the wheelchairs used in this study were large electric wheelchairs. These were of the same design but set up very differently. While these large, electric wheelchairs may not be as widely used as smaller, manual wheelchairs, they are increasing in popularity. It is also likely that for people wishing to travel independently on public transport they represent a greater proportion of wheelchairs in use than for the general disabled population. It is essential, therefore, that any future vehicle designs are able to accommodate large, electric wheelchairs.

Previous research conducted by Surface Transport has shown that a major issue for disabled passengers on public transport is the desire to travel with their partner, friends and to be able to carry on and store shopping, luggage and/or medical supplies and aids. It should be recognised also that for many wheelchair users their friends or partners are also wheelchair users. Therefore, a taxi that can only accommodate one wheelchair is not acceptable. Fully accessible taxis need to be evaluated not simply as to whether the vehicle is accessible and comfortable for the wheelchair user but also whether it meets all their travel wishes and requirements.

...

3.2. <u>In the taxi</u>

Once the wheelchair user had managed to get into the taxi they were then faced with the problem of turning the chair around to use the safety harness. This was impossible in the two standard, London taxis even for the manual wheelchairs (and the electric wheelchairs could not be accommodated at all). The occupant, therefore, was forced to ride sideways to the direction of travel and without a safety harness. During this study no vehicle was allowed to move off where it was felt that the occupant was unsafe or the seating arrangement illegal.

The drivers said, however, that on the street they would be prepared to carry a wheelchair user in a sideways position without a safety harness if the passenger was prepared to take the risk. Consideration should be

WS

given, not only to the safety and legal issues, but also the validity of insurance under these circumstances."

49. The second new piece of material is the strikingly different approach displayed to both equal opportunities assessment by the Council in an application which is presently outstanding for a licence for another vehicle for approval as a taxi cab. This is a Mercedes vehicle, which has a larger rear space available for wheelchairs than the London-style taxi although the space is still smaller than the E7. Like the E7, it has sliding doors, though those are button rather than manually operated. It appears from the DVD supplied to the court that Mrs Lunt cannot properly access even the Mercedes vehicle, although it could be said that the Committee's consideration of that vehicle is moving in the right direction.

50. It is noticeable that this is a vehicle with sliding doors, although it appears that none of the safety concerns about exiting from sliding doors were noted by Mr Gore in his comment on that vehicle. The Mercedes vehicle does however meet the turning circle requirements of the Public Carriage Office, and in that respect is similar to the London taxi.

51. The third, is the information collected by the second claimant from a number of local Councils, including those adjacent to Liverpool itself, indicating that no safety concerns arose regarding the E7 either as regarding sliding doors, turning circle or anything else. Particularly cogent amongst that material is a report prepared for Edinburgh District Council in May 2006 examining whether the turning circle requirement of the standard London taxi gives rise to safety considerations. The relevant part of that report provides as follows:

> "2.8.8. If it is was shown that the TRC was unequivocally unsafe, we would recommend a licensing condition that forbids the use of U-turn manoeuvres by taxis. However we agree with the PCO conclusions that there is no over-riding evidence either way regarding the safety risks of U-turns against 3 point turns. Nevertheless, unlike the PCO, we do not consider this a reason to retain the TCR.
>
> 2.8.9. In any case, all vehicles used as taxis must meet the appropriate standards for European Whole Vehicle Type approval. This includes vehicles used as taxis that do not have the TTC property. Although very useful, the results from our surveys our consultation exercise and the details and arguments from the PCO report reviewed above have not persuaded us that the TCR is essential to the taxi trade in terms of providing a safe working environment. Given that its inclusion may be
>
> detrimental to the broader interests of the trade, especially in the longer term, we adhere to our original recommendation that Condition 181 should be removed from The City of Edinburgh Council's taxi licensing conditions."

52. On reconsideration of this matter, all this material will be available along with the material originally supplied. I therefore propose to quash the decision and remit it for reconsideration. What then follows in this judgment are my conclusions on the disputed legal issues that should inform that reconsideration.

6. Relevant class under section 21(B) and (E)

53. A detailed exposition of the DDA section 21 is not now necessary. Ms Patterson did not dispute Ms Rose's suggested six-step approach to section 21 that a court and a public authority will need to address in making decisions under it.

1. Did the Council have a practice policy or procedure?

2. Did that practice policy or procedure make it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be, conferred by the Council?

3. If so, is it under a duty to take such steps as is reasonable in all the circumstances of the case for it to change that practice policy and procedure so it no longer has that effect?

4. Has the Council failed to comply with its duty to take such steps?

5. If so, is the effect of that failure such as to make it unreasonably difficult for Mrs Lunt to access such benefit?

6. If so, can the Council show that its failure to comply is justified in that either-

(a) it reasonably holds an opinion that the non-compliance is necessary in order not to endanger the health or safety of any other person; or

(b) its failure is justified as a proportionate means of achieving another legitimate aim?

54. That sequence of decisions is identified in the legislation and is supported by the decision of the Court of Appeal in Roads v Central Trains [2004] EWCA Civ 1541. In that case a wheelchair user sued the train company because he complained that he could not cross over from one track to another in order to catch a train to Norwich. It was common ground that he could not use the footbridge. There was a track that crossed the line that could be used, but the uneven ground presented perils to wheelchair users in general and the claimant in particular.

55. The train company contended that it did not have to provide a wheelchair accessible vehicle to enable the claimant to cross the line but that a reasonable adjustment was to require him to travel in the opposite direction and change trains there in order to continue his journey.

56. Sedley LJ upheld the finding of discrimination made in the County Court and made the following observations:

> "11. It is desirable first to say something about the cross-appeal. Manifestly no single feature of premises will obstruct access for all disabled persons or - in most cases - for disabled persons generally. In the present case, for instance, the footbridge is not likely to present an insuperable problem for blind people. The phrase 'disabled persons' in section 21(2) must therefore be directing attention to features which impede persons with one or more kinds of disability: here, those whose disability makes them dependent on a wheelchair. The reason why it is expressed in this way and not by reference to the individual claimant is that section 21 sets out a duty resting on service providers. They cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability - impaired vision, impaired mobility and so on. Thus the practical way of applying section 21 in discrimination proceedings will usually be to focus the question and the answer on people with the same kind of disability as the claimant.
>
> 12. The personal right created by section 19 of the DDA operates by fastening a cause of action on to the section 21 duty if the effect of a breach of the duty is "to make it impossible or unreasonably difficult for the disabled person to make use" of the service in question. Thus there is a double test, albeit both limbs use the same phraseology: first (in paraphrase), does the particular feature impede people with one or more kinds of disability; secondly, if it does, has it impeded the claimant?
>
> ...
>
> 26. ... I do accept, however, that it is not necessary, in order to trigger the section 21(2) duty, for the feature in question to cause unreasonable difficulty for all or most disabled persons: any significant impact on, say, wheelchair users as a class will in my judgment suffice. The question may often have to be answered without reference to direct evidence from which some kind of statistical analysis can be made: indeed the assembly of such evidence, whether pro or con, may well be invidious or arbitrary and therefore an inappropriate exercise to attempt. Judges are likelier to be assisted by their own appraisal and, where necessary, expert evidence."

57. In my judgment, Sedley LJ was not there stating that, as a matter of law that in every case of this sort the relevant class was the group of wheelchair users was the group of wheelchair users as a whole, and for s.21 (2) to bite there has to be a denial of access to a benefit by that class as a whole undifferentiated as to the size of the chair or the particular disability that may distinguish one group of wheelchair users from another. I observe that the distinction between types of wheelchairs was not the issue

in that case, and such an approach would be contrary to the whole tenor and purpose of the Act.

58. The court has been assisted by the intervention of the intervenor (now called the Equalities and Human Rights Commission). Ms Genn appeared for them and drew the court's attention to some material, including the Code of Practice issued by the former Disability Rights Commission that is an aid to decision-making in this field. Paragraphs 6.4 and 6.36 provide as follows:

> "6.4. The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. Accordingly, the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.
>
> ...
>
> 6.36. However, when considering whether services are unreasonably difficult for disabled people to use or whether disabled people's experiences are
>
> unreasonably adverse, service providers should
>
> take account of whether the time, inconvenience
>
> effort, discomfort, anxiety or loss of dignity
>
> entailed in using the service would be considered
>
> unreasonable by other people if they had to
>
> endure similar difficulties ..."

I note that paragraphs 7.11 and 11.40 of the Code reflect a similar approach.

59. The intervenor emphasises the importance of access to public transport by people with disabilities if the policies and purposes of the Act are to be promoted and not frustrated. It is not, in my judgment, a minimal duty, but seeks broadly to put the disabled person as far as reasonably practicable in a similar position to the ambulant user of a taxi. That submission is also reflected in another passage of the judgment of Sedley LJ in the case of Roads at paragraph 13:

> "Where there is only one practicable solution, it may have to be treated as reasonable even if it is demeaning or onerous for disabled people to use it. If on the other hand there is a range of solutions, the fact that one of them, if it stood alone, would satisfy section 21(2)(d) may not be enough to afford a defence. This is because the policy of the Act, as I would accept,

is what it was held to be by Mynors Ch (albeit by way of restricting the duty) in In re Holy Cross, Pershore [2002] Fam 1, §105: "to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large". While, therefore, the Act does not require the court to make nice choices between comparably reasonable solutions, it makes comparison inescapable where a proffered solution is said not to be reasonable precisely because a better one, in terms of practicality or of the legislative policy, is available. That was this case.

60. I accordingly conclude that it is misdirection for the Council to consider that because some wheelchair users can access the London taxi in dignity and safety that there is accessibility to wheelchair users as a class, and that any problem that Mrs Lunt has must be regarded as entirely individual to her. I accept that there must be a class of persons rather than mere problems encountered by a single individual, but the written and oral evidence presented to the Committee and its officers upon its true construction, as in the witness statements on behalf of the claimants in this case, showed serious difficulties for a class of wheelchair users that was wider in extent than Mrs Lunt personally, and that of that class there are some, like Mrs Lunt, who could not access the safe and secure position at all. As already indicated, that evidence has increased with the post-decision material now available for consideration.

7. Duty to give due consideration under section 49

61. Section 49A(1) of the DDA 1995 provides as follows:

"Every public authority shall in carrying out its functions have due regard to –

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life."

62. Both sides accept that this is a mandatory relevant consideration to be considered, even apart from section 21 duties. Clearly a proper analysis of the section 21 duties on reconsideration may well reveal unjustified discriminatory treatment that requires addressing. The Council's retention of the turning circle requirement in its policy is

one that makes it more difficult for a class of wheelchair users to access public hire taxis.

63. It is agreed that the proper approach to section 49 is set out in the decision of the Divisional Court in the case of R(on the application of Judy Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158, given on 18 December 2008. All of the judgment of Scott Baker LJ at paragraphs [79] to [96] is of interest, but the passages at [90] to [96] are particularly relevant for the guidance of the decision-makers and provide as follows:

> "90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A(1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context R(Watkins - Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 at paragraph 114 per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraph 45.
>
> 91. Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: R(Elias) v Secretary of State for Defence [2006] 1 WLR 3213 at para 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in R(C) v Secretary of State for Justice [2008] EWCA Civ 882 at paragraph 49.
>
> 92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes". Compare, in a race relations case the remarks of Moses LJ in R(Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraphs 24-25.
>
> 93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in Baker at paragraph 36. But it is good practice for the policy or decision maker to make reference to the

56

provision and any code or other non - statutory guidance in all cases where section 49A(1) is in play. "In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced": Baker at paragraph 38.

94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non - delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. Compare the remarks of Dobbs J in R (Eisai Limited) v National Instituted for Health and Clinical Excellence [2007] EWHC 1941 (Admin) at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in R(Bapio Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin) at paragraph 69, those of Dobbs J in R(Eisai Ltd) v NICE (supra) at 92 and 94, and those of Moses LJ in Kaur and Shah (supra) at paragraph 25."

64. The duty is to have regard rather than merely to achieve the improvement of the equality considerations at stake, but it is to have *due* regard, which must mean proper regard and full weight to the issue must be given.

8. Is Article 28 of the EC Treaty engaged?

65. The defendants have come a long way towards accepting the claimant's submissions since the lodging of the summary grounds and skeleton argument. In my judgment, the previous indications of the UK case law (namely the first instance he case of R v Metropolitan Borough Council of the Wirral [1983] 3 CMLR 150, and a decision of the Court of Appeal in Quietlynn v Southend-on-Sea District Council [1990] 3 All ER 207) that were formerly relied upon by the defendants in their

SS

pleadings and skeleton argument can no longer be considered relevant in the light of the development of the jurisprudence of the European Court of Justice.

66. Two recent decisions of the European Court of Justice define and curtail the potential exemptions to the principle set out in (case C-120/78) Cassis de Dijon (case C-120/78); Rewe-Zentrale AG [1979] ECR 649, as modified by the exclusions identified in cases C-267 and 268/91, Keck and Mithouard [1993] ECR 1-6097.

67. First, there is a decision of the European Court of Justice in case C110/05 Commission v Italy, given on 10 February 2009 and reported at 2 CMLR 34, where the Grand Chamber distinguished between mere selling arrangements that fell outside the scope of Article 28 and product requirements that were in it and therefore required justification.

68. Secondly, in the very recent decision in case C-142/05 Aklagaren v Mickelsson and Roos 4 June 2009, where the ECJ has developed and explained the distinction between general non-discriminatory conditions attached to the selling of goods in a member state on the one hand, and conditions attached as to product requirements and restricting use of imported goods on the other. Paragraphs [26] and [27] of that judgment provide as follows:

> "26. Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State (see to that effect, Commission v Italy, paragraph 56).
>
> 27. Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, Commission v Italy, paragraph 57)."

69. Ms Patterson accepts that these rules apply to local emanations of the state such as local authorities, if the restrictions resulting from the maintenance of the licensing policy requiring the turning circle requirement to be met have the effect set out in the judgment of the ECJ, namely did they prevent or greatly restrict the use of the product?

70. There is some difficulty in applying these principles developed in case law that concerned national rules of scope and application to decisions of local authorities applicable in only one region of the state. I accept that Liverpool is one of the great cities of the United Kingdom and the market for public hire vehicles there is a significant one. Further, I am conscious that the policy applied by Liverpool is also applied by London and Manchester, and the consequences of this judgment is that there will be broader implications than merely the local ones.

71. I consider that the policy adopted by the defendant results in the prevention or greatly restricted use in the city of Liverpool of the Tepee Expert chassis base for the very purpose for which it is imported by the second claimant, namely as a public hire taxi.

72. I accept Ms Patterson's submission that this is not a product prohibition as the product can be used as a people carrier or private hire vehicle without conflict with the policy, and some vehicles were imported by the second claimant for this purpose. It does appear, however, that there are at present no private hire vehicles authorised by the defendant in Liverpool that consist of an E7-style taxi. However, a loss of access to a market of some 1400 public hire vehicles is a considerable one.

73. In evidence submitted late in the hearing of this case that the defendants have not yet had a chance to check and respond to, Mr Gow for the second claimant explains how he reached the estimate of approximately 80 new registered taxi vehicles entering the market each year. He does that by reference to a postcode, which is accepted is somewhat broader than the city of Liverpool itself. Based on past experiences of Allied in cities of a similar size, if permitted to do so, Allied would hope to be making sales of some 48 vehicles in the first year of opportunity in Liverpool. That represents some 7.5 per cent of its total UK sales of the E7 taxi. Such a level of sales would equate to an additional £1 million in turnover for the company.

74. In my judgment, the policy provides a substantial restriction on the use of the vehicle in Liverpool, as the E7 is designed specifically as a public hire taxi, but it cannot be sold for such a purpose in Liverpool because the policy being impugned prevents its use as such.

9. Justification

75. I do not accept Ms Rose's further submission that as there is harmonising EU legislation in the field, the national or local authority has no right to conduct its own safety and proportionality assessment to justify the interference with the Article 28 right.

76. In my judgment, the issue of the safety of the E7 as a public hire vehicle is different from its use as a passenger vehicle per se. Some support for such a distinction can be derived from a decision of the Divisional Court in Chauffeur Bikes v Leeds City Council [2005] EWHC (Admin) 2369; [2006] 170 JP 24 at para [17].

77. The fact that the Peugeot vehicle meets EU requirements for safety specification as a vehicle is thus not conclusive of the question of justification. It will be for the Council on reconsideration of the case to justify the maintenance of the turning circle, or indeed any other requirement that it considers relevant if it continues to believe that, for example sliding doors do represent a safety issue in Liverpool in public hire taxis. However, justification must be for a legitimate end. Here, it would be the safety of the public.

78. Second, the Council must show that its restrictions are proportionate and no more intrusive than is needed to give effect to the legitimate end. In this context, I accept the claimant's submission that little assistance can be derived from the approach of the House of Lords and Lord Bingham in Countryside Alliance [2008] 1 AC 719 at paragraph [50], where the justification of any restriction on the use of Irish horses was on morality grounds set out in a primary Act of Parliament that had been the subject of intensive and very prolonged debate.

79. There is recent guidance given by the European Commission, summarising the case law of the ECJ in its document "Free Movement of Goods" prepared in May 2009:

> "6.1.2 ... Protection of health and life of humans, animals and plants is the most popular justification under which Member States usually try to justify obstacles to the free movement of goods. While the Court's case law is very extensive in this area, there are some principal rules that have to be observed: the protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market, even though in the absence of harmonisation it is for a Member State to decide on the level of protection; the measures adopted have to be proportionate, i.e. restricted to what is necessary to attain the legitimate aim of protecting public health. Furthermore, measures at issue have to be well-founded - providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information.
>
> ...
>
> 6.4 ... An important element in the analysis of the justification provided by a Member State will
>
> therefore be the existence of alternative measures hindering trade less. The Member State has an obligation to opt for the "less restrictive alternative" and failure to do so will constitute a
>
> breach of the proportionality principle."

80. In my judgment, the test for justification, both under the DDA and Community law, will be very similar, focusing on the legitimate aim established by the evidence and the proportionate means of reaching the relevant result.

81. I do not consider that the material identified by Ms Patterson as that relied upon by the Committee to date is sufficient for it to discharge its duty of justification. In particular-

> i. It is unclear what expertise Mr Gore, the force vehicle examiner, had to speak of the safety implications of turning circles and sliding doors. Examining a vehicle for road worthiness or compliance with the regulations is not the same as a comprehensive consideration of the merits or demerits of a particular design on safety grounds.

SK

ii. There is a distinction between convenience and lack of familiarity with a sliding door and real concerns of safety. The new is not to be deprecated simply because it is a feature that may be unfamiliar to some. I have great difficulty in seeing how descent from a commercial vehicle designed to carry people which has a sliding door can be said to represent a safety issue given the scale of the use of such vehicles in London and elsewhere as private hire vehicles precisely for that purpose.

iii. The fact that the E7 is used as a public hire taxi extensively in the UK without reported incident is a compelling source of relevant evidence that would have to be addressed. It is particularly notable that no concerns have been reported in Liverpool itself resulting from the dropping off of passengers by E7 vehicles licensed in neighbouring authorities. Of course the turning circle is useful for the avoidance of three point turns in narrow streets where someone seeks to specifically hail a passing taxi. However, where a particular assessment has been made as to the safety consideration of this issue, as it has in the Edinburgh study, the Liverpool Council would have to consider whether it has a cogent basis for disagreeing with such evidence and why.

iv. Local knowledge is a well recognised virtue of local democracy, where decision-makers reach decisions on matters of broad policy: generally a political decision. It is not to be equated with expertise in a specialist area of assessment. The fact that other Councils have different policies as to which vehicles types are authorised does not by itself suggest that Liverpool is wrong in maintaining its policy. If, however, the issue is safety, then the practice and experience of other authorities over a reasonable period of time cannot be ignored. It is impermissible to speculate if the answer to the relevant inquiry can be ascertained by demonstrated experience.

v. What should weigh in the balance on any discussion of justification on safety grounds is the clear safety benefits for secure travel for all wheelchair users, irrespective of the dimensions of their chairs, that can be apparently accommodated in the E7. It is common ground that travelling unsecured sideways in a cab is unacceptable. The introduction of the E7 alongside but not in replacement of the TX is likely to make a substantial contribution to eliminating such practices.

Conclusions

82. Beyond these considerations it is of course for the defendant itself to re-determine this application on the merits in accordance with the law set out in the judgment. I conclude that no other claim for relief is made out, save for quashing with a view to reconsideration. For the reasons I have given, this application for judicial review succeeds.

SG

MR FACENNA: My Lord, taking notice of the time, can I hand up something very short which is a draft order, and a very short draft submission on one aspect of that order. The first page is the draft order. Immediately following that is a very short submission going to the second paragraph of that draft order which relates to a request by the claimants that this is made part of your Lordship's order: that the chair of the Licensing Committee, Mr Kelly, should play no part in the reconsideration exercise.

MR JUSTICE BLAKE: He is the chair of the Committee?

MR FACENNA: He is the chair of the Committee.

MR JUSTICE BLAKE: I am sure that local democracy has some vibrant views and he will have to reconsider the matter in light of this decision.

MR FACENNA: My Lord, can I invite you to look very briefly at the submission which immediately follows the order because there is authority on this point. The reasons why we ask are set out there, and we accept obviously the appropriate relief is a re-determination. In his witness statement in these proceedings Mr Kelly expressed very strong and forceful views about the nature of the claim, and did seem to take some personal offence at the way in which the evidence was presented. You will see there that he describes himself in his witness statement as being staggered --

MR JUSTICE BLAKE: I think I have the gist of this. Do you want me to flick my way through this? I will try and do this quickly.

MR FACENNA: That might be sensible, my Lord. I have summarised the two authorities in the submissions so you may not need to go to them. (Pause)

MR JUSTICE BLAKE: Yes, well, apart from that, I am not sure I am going to have time to read the authority before 1 o'clock.

MR FACENNA: It is a very simple point, which is there is authority that the Administrative Court will in appropriate circumstances --

MR JUSTICE BLAKE: I think I see the point. Since this is a case in which I am sure that Liverpool will reconsider with a fresh mind in the light of the very different picture in this judgment, and that the more one puts the past aside and gets on with the future the better, I am not proposing to make the order that you seek in terms of Mr Kelly. It will be for the Liverpool Council to decide how it best goes about its task, but I am not prepared to exclude him from the considerations. I will not need to hear you on that.

MR FACENNA: That is understood. Thank you, my Lord. The second point is of course the claimants apply for their costs of this claim.

MR HERCOCK: I cannot resist that.

MR JUSTICE BLAKE: No, then you will get them.

MR HERCOCK: Could I raise one very brief point, if possible, and it will be brief? My Lord's judgment raises matters of importance to the City Council, and they would wish to have time to reflect on them, both in terms of the issues of disability discrimination and also the Article 28 point. It is with that in mind and the fact that the Council wishes properly to reflect, and I anticipate that that will mean the Licensing Committee being convened to consider my Lord's judgment, whether in terms of any application for permission to appeal my Lord would be prepared to extend the time period for any such application to, say, two weeks from receipt of the approved judgment.

MR JUSTICE BLAKE: Yes, there is not going to be anyone around to approve it for the next 28 days, I can tell you that.

MR FACENNA: My Lord, just on the point, the short-hand typist has indicated that the transcript will be available either at the end of today or on Monday --

MR JUSTICE BLAKE: I will not be, but I am delighted to hear that.

MR FACENNA: You are not around early next week?

MR JUSTICE BLAKE: No, I will not be in an E7 Peugeot vehicle but I might he be headed to where the vehicle came from.

MR FACENNA: Leaving the transcript aside -- we obviously all want to see it as quickly as possible -- but we understand where we are in terms of dates, in terms of the applications being made, they do not need the approved judgment to consider whether they want permission to appeal. They have your Lordship's judgment this morning, and the sooner that we have certainty for both claimants the better.

MR JUSTICE BLAKE: There is a problem about timing since we are about to hit August, so do I bite the bullet now and address your application for permission to appeal?

MR HERCOCK: I am not in a position to make the application at this stage, my Lord. My instructions are that the Council would obviously like time to reflect on the judgment given that the matter has been dealt with effectively extempore, and then to make the application in writing, if that could be done, say, within a particular timescale.

MR JUSTICE BLAKE: I think in the circumstances I will consider any application for permission to appeal in writing if it is before me by 7 September.

MR HERCOCK: I am grateful. Thank you.

MR JUSTICE BLAKE: I recognise of course that there are some broader issues of policy here, but there is equally quite a solid core to the reasons I have reached for why the decision should be set aside.

MR FACENNA: My Lord, of course, if such an application is made, we would want a short opportunity, maybe only two or three days, in order to --

MR JUSTICE BLAKE: You will have to sort out between yourselves sequencing. If you are both going to be around in August and the early part of September, so much before then, but I will probably approve the transcript and consider the permission to appeal at the same time.

MR FACENNA: Which will be, sorry, at the end of August?

MR JUSTICE BLAKE: No, from the week beginning 7 September when I know I am back on vacation duty in the Administrative Court.

MR FACENNA: My Lord, one final comment, which is that both my clients have asked me to express their thanks to your Lordship for the thorough and speedy way with which you dealt with this, and Mrs Lunt and Mrs Price in particular are grateful to you and your clerk for the arrangements made in terms of getting an accessible court room.

MR JUSTICE BLAKE: Thank you for that. I am sorry things did not get off to a brilliant start given the subject matter of the claim when we started to hear this case in court 2 to which wheelchair users had difficulty in securing access. But there we are. Thank you to all counsel, and my thanks to both your leaders and you, Ms Genn.

The Queen on the Application of 007 Stratford Taxis Limited v Stratford on Avon District Council

Case No: C1/2010/1568

High Court of Justice Court of Appeal (Civil Division)

23 February 2011

[2011] EWCA Civ 160

2011 WL 578991

Before: President of the Queen's Bench Division Lady Justice Smith and Lord Justice Aikens

Date: 23/02/2011

On Appeal from QBD Administrative Court in Birmingham

The Recorder of Birmingham

CO/6524/2009

Hearing dates: 25th and 26th January 2011

Representation

James Findlay QC and Ben Blakemore (instructed by Allansons LLP) for the Appellants.
David Lock and Philip Williams (instructed by Legal Services , Stratford-on-Avon District Council) for the Respondents.

Judgment

President of the Queen's Bench Division

This is the judgment of the court

Introduction

1 What most people call taxis are still sometimes referred to as hackney carriages. This is mainly because that is the name of the horse-drawn vehicles which used to ply for hire in the 19th century, when sections 36 and 47 of the Town Police Clauses Act 1847 , which are still in force, provided for the carriages and their drivers to obtain licences. Taxi licences are now issued by district councils, and section 47 of the Local Government (Miscellaneous Provisions) Act Act 1976 provides that a district council may attach such conditions to the grant of a taxi licence as the district council may consider reasonable. A person who objects to any condition so attached to a licence may appeal to a Magistrates' Court.

2 District councils comprise elected members, and a council may exercise its powers in a number of ways. These may include decisions taken by the full council. Decisions of the council may be devolved to committees, whose membership is required to represent the political composition of the full council. Since the Local Government Act 2000 , decisions may also be taken by an executive, which, in the case of Stratford-on-Avon District Council, comprises a cabinet drawn from the majority party of the council. Intrinsically, questions of policy, being political in nature, are suitable for decision by such a cabinet.

3 Section 13(2) of the 2000 Act provides that any function of a local authority which is not specified in regulations under subsection (3) is to be the responsibility of an executive of the authority under executive arrangements. Section 48(4) of the 2000 Act provides that any reference to the discharge

of any functions includes a reference to the doing of anything which is calculated to facilitate, or is conducive or incidental to, the discharge of those functions. Regulation 2(1) of the Local Authorities (Functions and Responsibilities (England)) Regulations 2000 provides by reference to schedule 1 that the power to license hackney carriages and private hire vehicles is not to be the responsibility of an authority's executive. On the other hand, regulation 5 of the regulations provides, with reference to schedule 4 , that the adoption or approval of a plan or strategy, which might be the responsibility of an executive, shall not be the responsibility of the executive where the authority determines that the decision whether the plan or strategy should be adopted or approved should be taken by them, that is by the authority. One issue in the present appeal is whether adopting a policy that all taxis should have wheelchair access constitutes adopting a plan or strategy within regulation 5 and schedule 4 , or whether it is doing something which is calculated to facilitate, or is conducive or incidental to, the discharge of the council's power to license taxis within regulation 2 and schedule 1 . If it is the first, Stratford's cabinet had power to decide to adopt the wheelchair policy. If it is the second, they did not. With such nice points is 21st century appellate judicial life made interesting.

Wheelchair access policy

4 Stratford's policy decision that all new taxis should from 1st January 2010 have wheelchair access was made by the authority's cabinet on 15th December 2008, following a recommendation to that effect from the General Purposes Licensing Committee taken on 10th November 2008. The Committee had considered the matter from at least April 2003 when they were examining ways of increasing the number of taxis with wheelchair access. In June 2003, the local taxi trade reported that this would happen, but it did not. No progress had been made by April 2004 following a consultation exercise in January and February 2004. The committee's preliminary view in 2004 was that all taxis should have wheelchair access, but they were persuaded to accept a compromise, whereby a restriction on the number of new drivers' licences was removed, but new drivers' licences would only be issued in conjunction with vehicles with wheelchair access. An existing licence holder could replace his vehicle with one which did not have wheelchair access. On 18th May 2007, the council published a draft document entitled *Hackney Carriage and Private Car Driver, Vehicle and Operator Handbook* which was distributed in June 2007 to various public bodies, the local Chamber of Commerce and authorised garages. This handbook proposed a change whose effect was to remove the earlier protection from existing licence holders. There was a period of consultation to 31st August 2007.

5 The committee meeting of 10th November 2008 was provided with a summary of the comments and objections which had been made. The first part of this committee meeting was in public and those present were able to express views. The claimants, who operate taxis in Stratford, were not present at the meeting nor had they provided comments. They relied on a detailed written response from their Trade Association, whose representative also did not attend the meeting. On 15th December 2008, the cabinet approved and adopted the policy recommended by the committee.

The claimants' case

6 The claimant accepts in these proceedings that this is a policy which the council could rationally reach, but they have a number of procedural objections to the way in which the decision was reached. They say that:

a) the cabinet was not competent to take the decision. It should have been taken by the council.
b) if it was a decision for the cabinet, that body did not itself sufficiently consider and determine all the various matters that the decision-maker needed to decide and determine.
c) the decision should not have been a policy decision. It should have been made as a condition to the grant of individual licences. If it had been, there would have been an appeal to the magistrate's court. Because of the way in which the decision was taken, applicants for licences have been wrongly deprived of this route of challenging the decision.

d) the respondent did not conduct a sufficient consultation.
e) the respondent did not sufficiently take account of the responses to the consultation.
f) the decision contravened section 49A of the Disability Discrimination Act 1995 because it failed to have due regard to the fact that it discriminated against those who are disabled but do not use a wheelchair, it being more difficult for the walking disabled to get into an expensive taxi with wheelchair access than into a less expensive taxi which is a saloon vehicle.

The litigation

7 The claim was heard and determined by HH Judge Davis QC, the Recorder of Birmingham, who gave judgment in favour of the respondents on 9th June 2010. His judgment may be found at [2010] EWHC 1344 (Admin) and may be referred to for greater detail than this judgment need contain. The grounds of appeal essentially restate the matters which the Recorder dismissed. There is a Respondents' Notice, which contends that the proceedings should have been dismissed because they were started well out of time. The Recorder did not determine this matter because he dismissed the claim for other reasons.

8 The decision under challenge was taken on 15th December 2008. The proceedings were not started until 24th June 2009, more than 6 months later. Rule 54.5 of the Civil Procedure Rules provides that a judicial review claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. The claimants contended that the claim was in time, but in the alternative they did seek an extension of time, contending that they were not aware of the decision of 15th December 2008 until they attended a meeting on 24th March 2009. Nicola Davies J in granting permission to bring the judicial review proceedings did not grant an extension of time, saying wrongly that an extension of time was not needed. The position therefore is that the needed extension of time was sought but not granted, and Mr Findlay QC for the appellants applied for an extension at the hearing before this court. Mr Lock for the respondents opposed this saying that an extension should not be granted when no proper explanation for the delay after March 2009 had been offered. He contended in the alternative that the court should refuse to grant relief under section 31(6) of the Senior Courts Act 1981 because to do so would be detrimental to good administration.

The appeal - Ground 1

9 The appellants wished to contend before the Recorder that the cabinet, in taking the decision, did not themselves properly consider the matters relevant to the decision because they had not been provided with the material which had been provided to the committee, nor with details of the committee's recommendation. The Recorder considered that this ground had been raised very late, being first raised in recognisable form in the week before the hearing in the appellants' skeleton argument. The Recorder decided that the appellants needed his permission to argue this ground. He refused permission, saying that the entire thrust of the appellants' case and the evidence had concentrated on the meeting of the Licensing Committee and that the cabinet issue was raised too late to allow the respondents properly to meet it. The appellants' first ground of appeal is that they should have been permitted to argue this point because, as may be seen from their claim form, their challenge was and always had been to the cabinet's decision of 15th December 2008. They had been given permission to make this challenge by Nicola Davies J and they should not have been prevented from advancing this part of their case. Mr Lock accepted before us that there would have been no real prejudice to the respondents if they had been required to meet this point. He further accepted that the cabinet had not themselves given systematic and detailed consideration (as the committee had) to the various matters relevant to the decision. They could not be said to have done so in the short time which their consideration of this and other matters took, despite the fact

that Councillor Brain, who had attended the committee meeting on 10th November 2008, was also a member of the cabinet which took the decision on 15th December 2008.

10 In our judgment, the judge was wrong not to permit the appellants to contend that the cabinet took the decision on 15th December 2008 without themselves adequately considering the matters which needed consideration. It was not contentious that the operative decision was that of the cabinet on 15th December 2008. The appellants' claim form had expressly asserted that it was this decision which was challenged. The main thrust of the evidence and written submissions may have related, until shortly before the hearing, to the proceedings before the committee. But we are satisfied that the respondents were aware that it was the cabinet's decision which was under challenge, and the judge's view that the issue was raised too late to allow the respondents to meet it properly does not stand up to scrutiny. The first ground of appeal therefore succeeds.

11 Mr Lock was unable to contend that the cabinet took the decision after themselves giving sufficient material consideration to the main matters which required their consideration. Decision-making bodies in the position of the cabinet here are not required to give personal detailed attention to every strand of fact and argument capable of bearing on the decision they are making. But they are required to have drawn to their attention the main lines of relevant debate, or, as Sedley LJ put it in R (National Association of Health Food Stores) v Secretary of State for Health [2005] EWCA civ 154 at paragraph 61, adopting Brennan J in Minister of Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24 at paragraph 65:

> "A minister may retain his power to make a decision while relying on the department to draw his attention to the salient facts."

Here, the cabinet adopted the committee's decision upon very short consideration and without either being provided with the material that was before the committee or a résumé of the committee's consideration and reasons. If, therefore, contrary to the appellants' contention in their third ground of appeal, the cabinet was competent to take this decision, there was a significant flaw in their process.

Ground 2

12 The second ground of appeal is insubstantial and the Recorder rightly so regarded it. It is contended that the respondents were not competent to take a policy decision that all taxis should have wheelchair access, because to do so deprived the appellants and others of the possibility of an appeal to the Magistrates' Court under section 47 of the 1976 Act which might otherwise challenge on its merits a decision to attach a condition to the grant of an individual licence. Such an appeal could not succeed (without special facts) if the condition was attached to the licence as a result of an antecedent policy decision. It is said that the policy is unenforceable unless conditions are attached to a licence. It is said that the policy, which magistrates would have to adhere to – see R (Westminster City Council) v Middlesex Crown Court and Chorion [2002] EWHC 1104 (Admin) – is contrary to the statutory framework and unlawful.

13 In our judgment, this ground of appeal has no merit. It is open to an authority to decide to adopt a policy of this kind – see R (A, D & G) v North West Lancashire Health Authority [2001] WLR 977 . Such a decision is open to challenge on orthodox judicial review grounds. There is no process of statutory construction or implication to the effect that, because there is a route of appeal (which may still be exercised in individual cases upon grounds particular to the individual case) against conditions attached to a licence, the adoption of a general policy relevant to the grant of licences which may affect such an appeal is unlawful.

6

75

Ground 3

14 The third ground of appeal (but logically the first) is that the judge was wrong to decide that the respondents' cabinet was competent to make the decision which they did by adopting a policy that all taxis must have wheelchair access. This matter turns on the construction and application of sections 13(2) and 48(4) of the 2000 Act and regulation 2(1) and schedule 1 of the 2000 regulations, to which we have already referred. In our judgment, this regulation and schedule are to be construed in the light of regulation 5(1) and schedule 4 . The appellants' case is that a decision to adopt a policy that all taxis should have wheelchair access is the exercise of a function which is calculated to facilitate, or is conducive or incidental to, the discharge of the power to license hackney carriage and private hire vehicles.

15 The Recorder decided that the policy did not purport to apply a condition to every licence irrespective of the individual application. The policy provided that every application would be considered against the policy. Applicants were able to ask for an exception to the policy, but must be able to demonstrate sound and compelling reasons why the committee should depart from the policy. The Recorder considered that, when the cabinet made its decision on 15th December 2008, it was not exercising the function of licensing hackney carriages. The appellants contend that the regulations make it clear that all powers under the 1847 Act and the power to impose conditions under the 1976 Act are for the council. Any policy is ancillary to the statutory power to license hackney carriages and is in reality part of the exercise of that power, as attaching conditions to the grant of a licence is the only way in which the policy can be enforced. The respondents submit that adopting a policy (subject to exceptions in individual cases) is not exercising the power to license hackney carriages – which plainly it is not – nor is it doing something which is calculated to facilitate, or is conducive or incidental to, the exercise of the power to license hackney carriages. Mr Lock draws a distinction between taking broad decisions of policy, which is the province of a political majority and appropriately exercised by a cabinet, and individual decisions about the grant or refusal of licences, which may appropriately be taken by the politically diverse council or its delegate committee. He says that this is exemplified by regulation 5 and schedule 4 , by which a decision to adopt or approve a plan or strategy may be taken by a cabinet unless the council determines otherwise.

16 We have not found this ground of appeal easy to decide, since, at first blush, adopting a policy that generally all taxis should have wheelchair access may be said to be calculated to facilitate, or to be conducive or incidental to, the power to license hackney carriages. On the other hand, we accept that a policy falls within the wording "plan or strategy" used in the regulations. In our view on consideration, there is a distinction between the political decision to adopt a policy of this kind and the particular power to license hackney carriages. On this view, adopting the policy is not conducive or incidental to the power to license hackney carriages, nor is it calculated to facilitate the exercise of that power, because it does not make the exercise of the licensing power easier in individual case precisely because it is not directed to the individual exercise of the power. Logically, a plan or strategy or a policy on whether hackney carriages should have wheelchair access comes first; and that function is one that a cabinet may undertake. The function of licensing individual hackney carriages and anything that is calculated to facilitate or is conducive or incidental to the exercise of that particular function (by the council) comes second and it is a function to be performed in the light of the plan or strategy or policy that the cabinet has determined.

17 For these reasons, in our judgment, the third ground of appeal fails. This, taken with our decision on the first ground of appeal, means that the cabinet was competent to take the policy decision

that all taxis should have wheelchair access; but that their decision of 15th December 2008 was taken on consideration of significantly inadequate information.

Grounds 4 and 5

18 The fourth and fifth grounds of appeal are that the Recorder was wrong to find that there was adequate consultation and wrong to find that proper consideration was given to the product of consultation. The Recorder reproduced in his judgement (paragraph 34) the very well known test to be applied to a consultation process by a public body in paragraphs 108 and 112 of *R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213* . It is not necessary to reproduce these paragraphs again in this judgment. He also referred to the judgment of Sullivan J in *R (Greenpeace Limited) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin)* , who referred to Coughlan at paragraphs 55 to 57 of his judgment. At paragraphs 62 and 63, he said that a consultation process which is flawed in one, or even a number of respects is not necessarily so procedurally unfair as to be unlawful. In hindsight, it is almost invariably possible to suggest ways in which a consultation exercise might have been improved upon. A decision-maker has a broad discretion as to how a consultation exercise should be carried out. A conclusion that a consultation exercise was unlawful on the grounds of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went clearly and radically wrong.

19 The Recorder tabulated in paragraph 36 of his judgment a number of alleged failures by the respondents, which he dealt with one by one in paragraph 37. He decided that, in so far as the failures could be made out, they did not individually or cumulatively demonstrate that something went clearly and radically wrong with the consultation process.

20 The appellants made two main criticisms of the respondents' consultation process. First, it is said that there was a failure to consult the general public; second, a failure to consult those concerned with the walking disabled. It is perhaps noteworthy that it was not contended that there was a failure to consult taxi drivers or owners nor the appellants themselves, and that the claimants were raising complaints on behalf of people who had not themselves complained. The judge decided that there was a wide consultation in 2004 and that the way in which the respondents proceeded in 2007 was within the proper range of their discretion. As to the walking disabled, the judge found that the respondents sent the consultation letter to a number of organisations and people concerned with the disabled, and that no group of the kind suggested by the appellants was obviously identifiable. The appellants restate the case which failed to persuade the Recorder. There should have been consultation with the trade's customers, that is the general public. The consultation was limited and the 2007 letter did not highlight the proposed change for wheelchair access. The 2003/4 consultation had been much wider. Written responses only came from taxi drivers or proprietors or wheelchair users – which, we note, is scarcely surprising. The judge was wrong that no organisation concerned with walking disabled people was identified.

21 Mr Lock points out that the appellants themselves were consulted, and he suggests that the court should treat with caution contentions made on behalf of others who do not make them on their own account. The original contention alleged that there was no proper consultation at all and that the appellants themselves and the trade had not been consulted, which was wrong. The complaint about walking disabled had not been mentioned in the written response from the Trade Association on the appellants' behalf. The respondents had sent out 650 letters to drivers, vehicle owners and operators and others and the documents were publicised on the respondents' website and in libraries. The Recorder was entitled to come to the conclusion he did on the evidence set out in the respondents' Grounds of Defence and the witness statement of Ms Baird. Mr Lock says that this was

a non-statutory consultation process by a district council that was not obliged to consult at all.

22 In our judgment, there is no proper basis for disturbing the Recorder's finding on this part of the case. It was a finding of fact derived from a judgment about the evidence tendered on behalf of the parties which was reached upon a proper basis in law. There could have been a more extensive consultation, but there is no proper basis for concluding that this consultation was obviously inadequate nor that something went clearly and radically wrong.

23 Ground 5 of the grounds of appeal also seeks to revive in this court submissions mainly of fact which failed before the Recorder. The matters relied on before the Recorder are listed in paragraph 38 of his judgment, as to which Mr Findlay accepted before us that there was some reference to most of them at the meeting of 10th November 2008. The Recorder dealt with these matters in paragraph 39 of his judgment, noting that the difficulties with the walking disabled were specifically considered, as demonstrated by a visit to the manufacturer of purpose built taxis in Coventry (see paragraph 20 of the judgment); that a paragraph in the report to the committee about the government's position was inaccurate (see paragraph 18 of the judgment), but that Mr Brain was aware in outline of the true position; that an EU report which was not drawn specifically to the decision-makers attention did no more than rehearse the issues considered by the Committee; and that cost implications were at the forefront of the Committee's discussions. The meeting had lasted from 10.00 a.m. to 3.35 p.m. and what occurred at the meeting was recorded in two contemporaneous notes – see paragraphs 21 and 22 of the judgment. The report to the committee did not suffer from substantial deficiencies when the overall circumstances were known to the committee. Looking at it in the round, and recognising that improvements could have been made to the initial process, the evidence was that the issues raised in the consultation were sufficiently taken into account.

24 Mr Findlay points us to differences between the consultation responses of taxi operators and the Trade Association and the oral and written reports to the committee. Although Ms Baird prepared a summary of responses, which Mr Findlay characterises as wholly inadequate to convey the depth and weight of objections, he says that it is doubtful if this was before the committee. He says that the judge was wrong to give significance to consideration given prior to the meeting, because proper consideration must be given by the ultimate decision-marker. He says that the judge was wrong to consider that, if Councillor Brain knew something, that was to that extent sufficient. There was no proper basis for supposing that because the chairman of the meeting had the Trade Association's response, it was before the meeting. The same applied to the visit to the taxi manufacturers in Coventry and to the finding that Councillor Brain was aware that government policy had changed but that the officers did not report why that change had occurred. There was no reference to the published view that there was no vehicle which could be said to be accessible for all disabled people. The point emphasised by the proprietor of the appellants that implementation of the policy would put him out of business was not put before the committee. Mr Findlay also relies on what he says was a failure to deal with Best Practice Guidance, a failure to deal with health and safety concerns, and inadequacies in the officer's report to the committee with a regard to the consultation process and costs which adopting the policy would generate.

25 Mr Lock points out that the contention that the written summary of responses to the consultation may not have been before the committee is unsustainable. The evidence of both Ms Baird and Councillor Brain states that it was and this is confirmed by an independent solicitor, Mr Elliott, who attended the meeting and came away with a copy of the schedule attached to his file note and annotated by him. The judge noted this evidence. Further, Ms Baird gave an oral

6

presentation to the committee about the responses to the consultation. There was further evidence, in addition to that from Councillor Brain, from Councillor the Rev. Neville Beamer. Ms Baird was also able to confirm that she had all the written responses, including that from the appellants' Trade Association, at the meeting, and referred to them at various points. As to the government's position, the consistent message was that it was up to local authorities to decide for themselves whether to adopt a policy that all taxis should have wheelchair access. Many local authorities had done so.

26 In our judgment, this is an insubstantial ground of appeal and, so far as the committee is concerned, we reject it. It was well open to the Recorder on the evidence to find, as he did, that the 5½ hour committee meeting gave sufficient consideration to the main points that had been raised in the consultation. As a matter of fact, the written summary of responses was used at the meeting and Ms Baird enlarged upon it orally.

Ground 6

27 The sixth ground of appeal concerns section 49A of the Disability Discrimination Act 1995 , which relevantly provides that every public authority shall in carrying out its functions have due regard to the need to promote equality of opportunity between disabled persons and others, and to the need to take steps to take account of disabled persons' disabilities. It is said (and to an extent accepted) that taxis with wheelchair access are not reasonably accessible by some walking disabled, and that there is no taxi design which can economically cater for all disabled. The case is that, if all taxis have to have wheelchair access, some other disabled people will be disadvantaged. The appellants say that this is a point which was not raised at the time of the decisions.

28 The Recorder referred at some length to *R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)* paragraphs 79 to 96 for the proposition that having "due regard" does not impose a duty to achieve results. The duty in one of its relevant forms is to have due regard to the need to take steps. There is no statutory duty to carry out a formal Disability Equality Impact Assessment. The Recorder also referred to Domb v London Borough of Hammersmith and Fulham [2009] EWCA civ 941 at paragraph 52. The Recorder said at paragraph 44 that the evidence of Ms Baird and Councillor Brain was that substantive regard was given to the needs of all sections of the disabled community. The notes of the meeting showed that the issue was raised by more than one contributor. There was no basis for a finding that it was ignored. Accordingly the committee did have regard to the relevant needs for the purpose of section 49A of the 1995 Act.

29 The ground of appeal is that the judge reached the wrong conclusion. The respondents' own Equality Scheme declared that they would meet their legal responsibilities by carrying out an equality impact assessment. The officers' report had wrongly stated that there was no Disability Discrimination Act issue. There had to be an analysis with the specific statutory considerations in mind. There was no structured analysis of material before the committee in the context of the duty. Consideration by an officer is not sufficient. Councillor Brain was only one of the decision-makers.

30 Mr Lock points out that this was not a matter which featured in the Trade Associations' response to the consultation. The responses from disabled people were in favour of taxis with wheelchair access. The issue was considered on the visit to the manufacturer in Coventry when Councillor Brain and Ms Baird were assured that other disabled people could use taxis with wheelchair access. The vehicles are fitted with ramps which can be used by the walking disabled as well as those in wheelchairs. Equality impact issues were covered in Ms Baird's report. The facts that there was no vehicle which covered all needs and that not all disabled people are in wheelchairs were raised specifically by two people who attended the committee meeting. There is no proper basis for saying

that the committee did not have due regard to these matters. Councillor Brain's evidence was that these various factors were taken into account. The Council's policy about Equality Impact Assessments related to services provided by the council, not to their acting as a regulator for taxi services provided by others.

31 In our judgment, the Recorder was fully entitled on the evidence before him to which we have referred to reach the conclusion he did on this issue for the reasons he gave. This ground of appeal is insubstantial and we reject it.

32 We therefore reject all grounds of appeal except ground one. The effect of this is that the respondents conducted proper consultation and their General Purposes Licensing Committee gave proper consideration to the responses to consultation and to the matter generally. The decision that all new taxis should from 1st January 2010 have wheelchair access was taken by the cabinet, who were lawfully competent to do so. However there was a significant procedural flaw in the process in that the main matters relevant to the decision were not placed before the cabinet nor specifically considered by it. We accept that the main matters were properly considered by the committee. But given our conclusions on ground one, we must consider what, if any, relief should be granted to the claimants.

Relief - the effect of delay

33 Relevant to this is the fact that the judicial review proceedings were brought substantially out of time and no persuasive excuse is available for a significant part of the delay. We accept that the appellants did not know of the cabinet's decision of 15th December 2008 until late March 2009. Time for commencing proceedings had already expired and it was incumbent upon the appellants to act with expedition. Instead, they delayed for a further three months until late June 2009, ostensibly because they had to take advice and organise funding. Those excuses are not impressive. We conceive that the question for us is whether we should decline to grant the necessary extension of time in which to bring these judicial review proceedings. The alternative option is whether we should decline to grant relief because of the claimants' delay. Section 31(6) of the Senior Courts Act 1981 provides that, where there has been undue delay in making the application, the court may refuse to grant relief if it considers that to do so would be detrimental to good administration.

34 Mr Lock submits that we should decline to grant relief because the procedure adopted by the respondents was not so conspicuously unfair as to amount to an abuse of power requiring judicial intervention. Mr Lock refers here to *R v Secretary of State for Home Department ex parte Doody [1994] 1 AC 531* at 560/1 and R v Devon County Council ex parte Baker [1985] 1 All ER 73 at 85. It is of some relevance that the decision of 15th December 2008 was not a wholly new decision, but a modification of the details of a policy which had been introduced in 2004. In our judgment, the cabinet's endorsement of the recommendation of the committee without proper consideration of the issues was a significant procedural flaw which, if the proceedings had been brought promptly, would have warranted the grant of relief. The proceedings were not brought promptly; there was undue delay. We do not consider that the council's actions amounted to an abuse of power; we do not think that there was any intentional or reckless flouting of the principles and procedures of proper decision-making. We think it more likely that the council did not think carefully about the procedures which should be followed in taking a decision of this kind. Nor do we think that the result of this procedural flaw has been conspicuously unfair. If we had thought that the council had abused its powers or that the result had been conspicuously unfair, we might have extended time, notwithstanding that we are unimpressed by the appellant's explanations for the delay. We do, however, think that it would be detrimental to good administration if the cabinet were now required

to reconsider this matter given the time which has elapsed. Accordingly we decline to extend time and there will be no grant of relief. The appeal fails.

72

Case No: C1/2009/1736

Neutral Citation Number: [2011] EWCA Civ 31
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
Mr Justice Burton
CO/5324/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2011

Before:
THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE LAWS
and
LORD JUSTICE TOULSON

Between:

THE QUEEN ON THE APPLICATION OF HOPE AND GLORY PUBLIC HOUSE LIMITED	**Claimant/ Appellant**
- and -	
CITY OF WESTMINSTER MAGISTRATES COURT	**Defendant**
-and-	
THE LORD MAYOR AND THE CITIZENS OF THE CITY OF WESTMINSTER	**Interested Party/ Respondent**

Mr Ian Glen QC and Mr Gordon Bishop (instructed by **Jeffrey Green Russell**) for the **Claimant/Appellant**
Mr David Matthias QC and Ms Emma Dring (instructed by **Westminster City Council**) for the **Interested Party/Respondents**
The **Defendant** being neither present nor represented

Hearing date: 9 November 2010

Judgment

Lord Justice Toulson delivered the judgment of the Court:

Introduction

1. This appeal raises a question about how a magistrates' court hearing an appeal from a decision of a licensing authority under the Licensing Act 2003 ("the Act") should approach the decision.

Background

2. The appellant owns the Endurance public house in Berwick Street, Soho. The premises are licensed for the sale and supply of alcohol and for the provision of entertainment and late night refreshment. The licence was granted on 12 March 2007 by Westminster City Council ("the council") as the local licensing authority.

3. On 15 April 2008 the council's Environmental Health Consultation Service ("EHCS") applied under s51(1) of the Act for a review of the licence after complaints were made by residents about the level of noise caused by customers taking their drinks out of the pub and congregating on the street during the evenings.

4. The hearing of the review took place before the council's Licensing Sub-Committee on 26 and 27 June 2008. The sub-committee heard submissions and evidence lasting about 5 hours. It decided to attach a number of conditions to the licence, the main condition being that no customer should be permitted to take drink from the premises in an open container after 6 pm. The decision and the sub-committee's reasons were notified to the appellant's solicitors by a letter dated 4 July 2008. The sub-committee stated:

> "We have no policy to ban outside drinking, and we have accordingly not approached the case on that basis. We were not referred to the Council's statement of licensing policy by any party. We have had regard, as we must, to the policy,...but we have reached our decision based on the evidence that has been put before us in relation to these premises, and not on any policy ground.
>
> The application was made on the grounds of public nuisance, and we first consider whether it was established that a public nuisance for the purposes of the Act exists. The evidence we heard was that large numbers of customers of the Endurance congregate on a daily basis outside the public house in Kemps Court in the evening, the numbers involved ranging from very few (5-10) to very many (180 or more). Those customers drinking and talking outside the premises make a noise. The noise is amplified by the configuration of buildings in the area. The noise causes public nuisance to surrounding residents, including, in particular residents directly opposite the public house.
>
> The licensee argued that the noise was not so bad as to constitute a nuisance and that the complaints...were

exaggerated. He called expert evidence in support of that proposition. We are completely satisfied that the noise is indeed a serious nuisance…

A number of local residents and other customers of the premises gave evidence about the way in which the premises were run, and we accept that the premises are valued by its customers and that a number of people enjoy being able to drink outside. We reject however the argument that a licensee has a fundamental right to, in effect, appropriate a part of the public realm for his own commercial purposes, if the effect of doing so is to cause serious public nuisance to his neighbours. Accordingly, we are persuaded that it is appropriate to take steps to prevent that public nuisance from continuing.

We recognise that steps should only be taken where they are necessary and that it cannot be necessary to take disproportionate steps…"

5. The sub-committee then considered the conditions proposed by EHCS and additional conditions proposed by the police. It concluded that most of the proposed conditions were required.

6. The appellant appealed against the decision to the City of Westminster Magistrates Court under s181 and schedule 5 of the Act.

7. At a preliminary hearing on 7 May 2009 District Judge Snow heard argument about how he should approach the decision of the sub-committee on the hearing of the appeal. He held that he was bound by the decision of the Court of Appeal in *Sagnata Investments Limited v Norwich Corporation* [1971] 2 QB 614, in the light of which he ruled:

"I will therefore

(1) Note the decision of the licensing sub-committee.

(2) Not lightly reverse their decision.

(3) Only reverse the decision if I am satisfied it is wrong.

(4) I will hear evidence.

(5) The correct approach is to consider the promotion of the Licensing Objectives. To look at the Licensing Act 2003, the Guidance made under section 182 LA03, Westminster's Statement of Licensing Policy and any legal authorities.

(6) I am not concerned with the way in which the Licensing Sub-Committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of Judicial Review."

8. The district judge heard the appeal over 5 days between 11 and 25 June 2009, during which he heard 4 days of evidence, considered 1797 pages of statements and exhibits and visited the site. On 30 June 2009 he delivered a 22 page written judgment. His conclusions in summary were:

> "I find, on the balance of probabilities, that given the number of Residents, Students and Teachers affected, and given the geographical spread, that the nuisance clearly is a public nuisance.
>
> ...
>
> The evidence is clear, that the public nuisance arises between 6 pm and 11 pm. The conditions imposed by the Licensing Sub-Committee are necessary and proportionate to ensure the promotion of the licensing objectives.
>
> ...
>
> On 7 May 2009 I set out that I would only interfere with the decision of the sub-committee if I was satisfied that it was wrong. In fact I am satisfied that it was right. This appeal is dismissed."

9. The appellant applied for judicial review of the district judge's decision on various grounds. The primary argument was that the district judge's ruling about how he should approach the decision of the sub-committee was wrong in law.

10. The appellant's application for permission to apply for judicial review was dismissed by Burton J in a judgment dated 21 July 2009.

11. Permission to appeal was refused by Moses LJ on paper but was granted by Sir Mark Waller after an oral hearing on 19 May 2010. The permission was limited to the single question whether the district judge's self-direction was correct. As to that, Sir Mark Waller observed:

> "So far as the direction is concerned, the position may well be covered by the authority *Sagnata Investments Limited v Norwich Corporation* [1971] 2 QB 614, but it seems to me that the question of whether it is an appropriate direction and the question of whether that is the right way in which a magistrate should approach an appeal in which he is hearing all the evidence de novo is a matter of some importance. We can spend a great deal of time arguing about the arguability of the point and it is better to have a decision which clarifies the position, which at present there is not."

Fresh evidence

12. In addition to the ground on which leave to appeal was granted, Mr Glen QC sought leave on behalf of the appellant to introduce fresh evidence. The purpose of the fresh evidence was to rebut evidence given by a witness, Ms Bailey, at the hearing before

the district judge to the effect that noise from the Endurance disturbed lecturers and students at the nearby Westminster Kingsway College. Ms Bailey had provided a witness statement on 15 January 2009, which had been disclosed to the appellant's representatives soon afterwards, i.e. several weeks prior to the hearing before the district judge. The fresh evidence came from others at the college and was obtained in October 2010, i.e. several months after Waller LJ granted limited permission to appeal. We can see no basis on which the late discovery of this evidence could provide a proper ground for judicial review of the district judge's decision and we refuse the application for permission to introduce it.

Licensing Act 2003

13. The short title of the Act is:

> "An Act to make provision about the regulation of the sale and supply of alcohol, the provision of entertainment and the provision of late night refreshment, about offences relating to alcohol and for connected purposes."

14. The Act brought about major changes to the licensing system in England and Wales. The background, nature and purpose of its provisions are summarised in the Explanatory Notes to the Act.

15. Essentially, the Act integrated alcohol, public entertainment, theatre, cinema, night café and late night refreshment licensing. Previously there was a patchwork system under which liquor licences were granted by licensing magistrates but other licensing functions, such as public entertainment licensing, were the responsibility of local authorities. The Act followed the publication in April 2000 of a White Paper (Cm 4696) entitled "Time for Reform: Proposals for the Modernisation of Our Licensing Laws".

16. The Act created a unified system of regulation of the activities of the sale and supply of alcohol, the provision of regulated entertainment and the provision of late night refreshment, referred to in the Act as the "licensable activities". The White Paper proposed that the licensing authority under the new scheme should be the local authority; and the Act follows that proposal. The government explained its reasons in the White Paper as follows:

> "117. The current responsibility of magistrates for liquor licensing reflects their traditional role in maintaining the peace and the association of alcohol with crime. Entertainment licensing came on the scene at a time when the magistrates' role had moved a long way from law enforcement towards the administration of justice. With an integrated system of licensing it is necessary to decide if the responsibilities should fall to the magistrates or the local authorises or some third body which might involve both.
>
> ...

123. There are three compelling reasons in favour of giving the local authority (at district level) the responsibilities we have described in this White Paper. They are:

- Accountability: we strongly believe that the licensing authority should be accountable to local residents whose lives are fundamentally affected by the decisions taken

- Accessibility: many local residents may be inhibited by court processes, and would be more willing to seek to influence decisions if in the hands of local councillors

- Crime and disorder: Local authorities now have a leading statutory role in preventing local crime and disorder, and the link between alcohol and crime persuasively argues for them to have a similar lead on licensing.

124. In reaching our conclusion, we do not in any way seek to devalue the importance of the wider contribution the local licensing justices have made for so many years. While in our proposals they would be relieved of administrative licensing responsibilities, they would retain, in their capacity as magistrates, the responsibility for dealing with people charged with offences under licensing law and for the imposition of sanctions and penalties in respect of personal licence holders."

17. Magistrates also have an appellate function, which lies at the heart of this appeal.

18. Section 4 sets out general duties of licensing authorities. It identifies "licensing objectives" which licensing authorities are to promote. These include the prevention of public nuisance. Section 5 requires licensing authorities to produce statements of licensing policy for three year periods. In carrying out its licensing functions, a licensing authority must have regard to its licensing statement and to any guidance issued by the Secretary of State for Culture, Media and Sport under s182. Before determining its policy for a three year period, a licensing authority must go through a process of public consultation: s5(3). Section 6 provides for licensing authorities to conduct their licensing functions through licensing committees. Section 9 deals with proceedings before licensing committees and empowers the Secretary of State to make regulations about them.

19. There are various types of "personal licence" and "premises licence" which a licensing authority may grant. The present case concerns a premises licence granted under s18. It is open to a licensing authority to attach such conditions to a licence under s18 as it considers necessary for the promotion of the licensing objectives identified in s4.

20. Under s51 an "interested party" or a "responsible authority" may apply to the licensing authority for a review of a premises licence. An interested party includes

anyone living or involved in a business in the vicinity: s13(3). A responsible authority includes the local authority which has statutory responsibilities in relation to the protection of the environment and human health: s13(4)(e). In the present case the applicant for the review was the council, acting through the EHCS. Section 53 expressly permits a local authority to make an application under s51 for a review of a premises licence in its capacity as a responsible authority and to determine the application in its capacity as the licensing authority.

21. Section 52 provides that a licensing authority which receives an application under s51 may, after holding a hearing to consider it and any relevant representations,

> "take such of the steps mentioned in subsection (4) (if any) as it considers necessary for the promotion of the licensing objectives."

The steps mentioned in subsection (4) include modifying the conditions of the licence.

22. Section 52(10) requires the licensing authority to notify its determination, and its reasons for making it, to the holder of the licence, the applicant, any person who made relevant representations and the local chief officer of police.

23. Section 181 and schedule 5 provide a system for appeals from decisions of a licensing authority to a magistrates' court. Paragraph 8 of schedule 5 deals with appeals against decisions made under s52. It provides:

> "(1) This paragraph applies where an application for review of a premises licence is decided under section 52.
>
> (2) An appeal may be made against that decision by-
>
> (a) the applicant for the review,
>
> (b) the holder of the premises licence or
>
> (c) any other person who made relevant representations in relation to the application."

24. The powers of a magistrates' court on an appeal from a decision of the licensing authority are to dismiss the appeal, to substitute any other decision which could have been made by the licensing authority, or to remit the case to the licensing authority to dispose of it in accordance with the direction of the court: s181(2).

25. The Magistrates' Courts Rules 1981 (made under the Magistrates' Court Act 1980) provide that where a statutory appeal lies to a magistrates' court against a decision or order of a local authority or other authority, the appeal shall be by way of complaint for an order (rule 34). The rules also provide that on the hearing of a complaint, it is for the complainant to go first in calling evidence (rule 14).

The appellant's submissions

26. Mr Glen submitted that the district judge wrongly placed the burden on the appellant to disprove that the noise caused by customers of the Endurance was such as to

amount to a public nuisance and that the conditions imposed by the licensing authority were necessary and proportionate. He submitted that it was for the EHCS to prove its allegation of public nuisance and to establish that the modifications to the licence were necessary and proportionate. The hearing before the district judge was a hearing de novo, at which evidence was given and tested by cross-examination. Mr Glen pointed out that the licensing sub-committee itself stated that its decision was not based on any policy ground. Rather, it turned on the sub-committee's assessment of the facts. On factual issues of that kind, it undermined the nature of an appeal process by way of rehearing if the court started with a presumption in favour of the licensing authority. Moreover, such an approach did not comply with the requirement of article 6 of the European Convention that in the determination of his civil rights everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In support of this submission he relied on the following passage from Paterson's Licensing Acts, 2009, para 5.4:

> "Assuming we are correct in saying that the hearing in the magistrates' court needs to be article 6 compliant, then the magistrates would not be an "independent and impartial" tribunal if the court starts off from a position favouring the decision of the licensing authority. The licensing authority will be a party to any appeal and the success or failure of the appeal should depend on the evidence which is given and the arguments which are put forward."

27. Mr Glen also cited the decision of the Divisional Court in *R(Chief Constable of Lancashire) v Preston Crown Court* [2001] EWHC Admin 928. That case concerned an appeal from licensing justices to the crown court under the Licensing Act 1964. It was argued that there was a breach of article 6 because the composition of the court included two members who belonged to the same licensing committee as the magistrates whose decision was under appeal. The argument was rejected, but Mr Glen relied on a passage (at para 18) where Laws LJ, who delivered the main judgment, referred to the crown court conducting "a rehearing in the full and proper sense". If it was to be a rehearing in that sense, Mr Glen submitted that it must follow that the burden of proof on the appeal was the same as on the original hearing.

28. Mr Glen cited a number of other authorities for the proposition that an appeal against a licensing decision has long been recognised to be a rehearing. It is not necessary to refer to them, because it is not in dispute that the appeal is a rehearing at which the affected parties are all entitled to call evidence, and that the court must make its decision on the full material before it. The issue is what is the proper approach to the original decision and, in particular, the reasons given for it. Mr Glen did not submit that they should be disregarded. He accepted that the court hearing the appeal could properly take into consideration the reasons given by the licensing authority, but not to the point of placing a legal burden on the appellant.

29. Mr Glen submitted that the district judge went wrong in attaching too much significance to a sentence from a judgment of Lord Goddard CJ in *Stepney Borough Council v Joffe* (1949) 1 KB 599 cited by Edmund Davies LJ in *Sagnata Investments Limited v Norwich Corporation.* In *Sagnata Investments Limited v Norwich Corporation* an application was made under the Betting Gaming and Lotteries Act 1967 for a permit to open an amusement arcade in Norwich. The application was

refused by the local authority and the applicant appealed to quarter sessions. The recorder who heard the appeal had written reasons for the refusal furnished by the town clerk and evidence of witnesses on both sides as to the merits of the application. He did not have any information about what had happened before the licensing committee. He allowed the appeal. The local authority appealed to the Divisional Court (whose judgment is not reported) and then to the Court of Appeal (Lord Denning MR, Edmund Davies and Phillimore LJJ). Its appeal was dismissed by the majority, Lord Denning dissenting. Lord Denning considered that the local authority was entitled to its opinion that it was socially undesirable to have such arcades in Norwich and that the recorder was wrong to substitute his view for those of the elected body responsible for making such decisions.

30. The majority considered that the recorder had been entitled to conclude that the local authority had effectively decided that it would not grant any permit under the Act for an amusement place in Norwich and that there was no error of law in his decision to allow the appeal. Edmund Davies LJ, at page 633, quoted Lord Denning in the course of argument as summarising the issue in this way:

> "Is the hearing to be treated as a new trial to be determined on evidence de novo, without being influenced by what the local authority has done; or is the hearing to be treated as an appeal proper, in which the local authority's decision is to be regarded as of considerable weight, and is not to be reversed unless their decision is shown to be wrong?"

31. Edmund Davies LJ considered that this was a false antithesis. From the reasons which he gave for preferring an intermediate position, he must have understood the second of Lord Denning's alternatives ("an appeal proper") as confined to deciding whether the local authority's decision was wrong in law on the material before it. He went on to say, at page 636:

> "The provision for an appeal to quarter sessions seems to me largely, if not entirely, "illusory" if the contention of the appellant council is right. If it is, I am at a loss to follow how the recorder set about discharging his appellate functions. Lacking all information as to what had happened before the local authority, save the bare knowledge that they had refused the application and their written grounds for refusal, he would be powerless, as I think, to make any effective examination of the validity of those reasons."

32. Edmund Davies LJ expressed his conclusion as follows:

> "...I hold that the proceedings before this recorder were by way of a complete rehearing.
>
> But, contrary to what has been contended, this conclusion does *not* involve that the views earlier formed by the local authority have to be entirely disregarded by quarter sessions. It is true that in *Godfrey v Bournemouth Corporation* [1969] 1 WLR 47, after observing that an appeal to quarter sessions under

81

schedule 6 to this same Act was by way of a complete rehearing, Lord Parker CJ said, at p 52, "the discretion is a discretion which the recorder in the present case had to arrive at himself uninfluenced by what the local authority had done". But with respect, I do not accept this. It went much too far, it was in direct conflict with the view which Lord Parker had earlier expressed in *R v Essex Quarter Sessions, ex parte Thomas* [1966] 1 WLR 359-363, it was contrary to the approach adopted both by the recorder and by Lord Parker CJ himself in the instant case, and it was, with deference, an uncalled-for observation. Here again, *Stepney Borough Council v Joffe* [1949] 1 KB 599 establishes what I regard as the proper approach, for, having made the point that there was in that case an unrestricted appeal, Lord Goddard CJ continued at pp 602, 603:

> "That does not mean to say that the court of appeal, in this case the metropolitan magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it always sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

Phillimore LJ's judgment was to similar effect.

33. Mr Glen observed that that case was one in which the local authority's decision had been based on a general policy, and that it was therefore right for the recorder to attach weight to the local authority's policy, although he still had to form his own judgment on the evidence whether a permit should be granted. The decision, he submitted, provided no support for taking a similar approach where (as the licensing sub-committee recognised in the present case) no question of licensing policy was involved. The core question in this case was whether the noise caused by the customers of the Endurance amounted to a public nuisance, and this was a matter for the EHCS to establish on the evidence called before the district judge.

The council's submissions

34. Mr Matthias QC submitted that Burton J was right in his approach to *Stepney Borough Council v Joffe* and *Sagnata Investments Limited v Norwich Corporation* and his dismissal of the appellant's claim. Burton J said in his judgment:

> "43. I conclude that the words of Lord Goddard approved by Edmund Davies LJ are very carefully chosen. What the appellate court will have to do is to be satisfied that the judgment below "is wrong", that is to reach its conclusion on the basis of the evidence put before it and then to conclude that the judgment below is wrong, even if it was not wrong at the

82

> time. That is what this district judge was prepared to do by allowing fresh evidence in, on both sides.
>
> 44. The onus still remains on the claimant, hence the correct decision that the claimant should start, one that cannot be challenged as I have indicated.
>
> 45. At the end of the day, the decision before the district judge is whether the decision of the licensing committee is wrong. Mr Glen has submitted that the word "wrong" is difficult to understand, or, at any rate, insufficiently clarified. What does it mean? It is plainly not "*Wednesbury* unreasonable" because this is not a question of judicial review. It means that the task of the district judge – having heard the evidence which is now before him, and specifically addressing the decision of the court below – is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong."

35. Mr Matthias submitted that as a matter of principle, as well as precedent, there are good reasons why the magistrates' court should pay great attention to the decision of the licensing authority and should only allow an appeal if satisfied, on the evidence before it, that the decision was wrong. He pointed out that Parliament had chosen to make the local authority central to the promotion in its area of the licensing objectives set out in the Act, because local councillors are accountable to the local electorate and are expected to be sensitive to the needs and concerns of the local populace. In licensing matters there is often no single "right answer". Mr Matthias pointed to the conditions which the licensing authority attached to the licence on the review in the present case as an example. The ban imposed on customers taking drink from the premises in an open container after 6pm might equally have been imposed somewhat earlier or somewhat later. It is normal for an appellant to have to show that the order challenged was wrong. The only unusual feature about this type of appeal is that all parties have carte blanche to call evidence. It does not, however, follow that the respondent to the appeal should bear the responsibility of showing that the order should be upheld and so should be required to present its case first.

36. On the article 6 issue, Mr Matthias's propositions may be paraphrased as follows:

> 1. The decision of the licensing authority was an administrative decision, which admittedly involved a determination of the appellant's "civil rights" within the meaning of article 6, as it has been interpreted in the European case law.
>
> 2. The extent to which article 6 requires such a decision to be subject to review by an independent and impartial tribunal depends greatly on the nature of the decision. Article 6 is an important expression of the rule of law, but the rule of law itself allows proper scope for democratic process in administrative decision making.

> 3. Administrative decisions often involve making judgments and assessing priorities on matters of social and economic policy. It accords with democratic principles for such decisions to be taken primarily by democratically accountable bodies. The power of the High Court in judicial review proceedings to review the legality of such decisions and the procedures followed is sufficient to ensure compatibility with article 6.
>
> 4. Some administrative decisions, although not necessarily involving wide issues of policy, call for particular knowledge or experience on the part of the decision maker. Often such decisions will involve an evaluative judgment and the exercise of discretion. In such cases, too, the availability of judicial review in the High Court is sufficient to meet the requirements of article 6. It would be perverse if article 6 were to require a full fact-finding appeal to a tribunal which lacked the degree of knowledge and expertise of the original decision maker.
>
> 5. There may be cases where an administrative decision does not depend on what may be described as democratic questions (questions of local or national policy, such as belong to the political forum), but which depends essentially on a question of fact requiring no special knowledge or experience on the part of the decision maker. In such a case article 6 may require that an aggrieved person whose civil rights are determined by the decision should be entitled to have it reviewed by a tribunal whose power includes whatever factual review is necessary for justice to be done.
>
> 6. There is nothing in domestic or Strasbourg case law to suggest that there is a general principle that it is incompatible with article 6 for a person aggrieved by an administrative decision to bear the responsibility of establishing his complaint.

37. Mr Matthias's concession that article 6 is engaged in the present case followed from the decision in *Kingsley v The United Kingdom* (2002) 35 EHRR 10, paragraph 34, where it was held that article 6 is engaged in proceedings which determine whether or not an individual is entitled to undertake licensable activities. For his other submissions he cited a number of authorities including particularly *R (Alconbury Developments Limited) v Secretary of State for the Environment, Trade and the Regions* [2001] UKHL 23, [2003] 2 AC 295, *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, *Tsfayo v United Kingdom* 48 EHRR 47, [2007] LGRI, and *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39.

38. Mr Matthias submitted that in this case the appellant's right of appeal to the district judge amply satisfied the requirements of article 6.

Conclusion

39. Since Mr Glen accepted (in our view rightly) that the decision of the licensing authority was a relevant matter for the district judge to take into consideration, whether or not the decision is classified as "policy based", the issues are quite narrow. They are:

> 1. How much weight was the district judge entitled to give to the decision of the licensing authority?
>
> 2. More particularly, was he right to hold that he should only allow the appeal if satisfied that the decision of the licensing authority was wrong?
>
> 3. Was the district judge's ruling compliant with article 6?

40. We do not consider that it is possible to give a formulaic answer to the first question because it may depend on a variety of factors - the nature of the issue, the nature and quality of the reasons given by the licensing authority and the nature and quality of the evidence on the appeal.

41. As Mr Matthias rightly submitted, the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in *Alconbury* at para 74.)

42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.

43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.

44. The evidence called on the appeal may, or may not, throw a very different light on matters. Someone whose representations were accepted by the licensing authority may be totally discredited as a result of cross-examination. By contrast, in the present case the district judge heard a mass of evidence over four days, as a result of which he reached essentially the same factual conclusions as the licensing authority had reached after five hours.

45. Given all the variables, the proper conclusion to the first question can only be stated in very general terms. It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal.

46. As to the second question, we agree with the way in which Burton J dealt with the matter in paragraphs 43-45 of his judgment.

47. We do not accept Mr Glen's submission that the statement of Lord Goddard in *Stepney Borough Council v Joffe*, applied by Edmund Davies LJ in *Sagnata Investments Limited v Norwich Corporation* is applicable only in a case where the original decision was based on "policy considerations". We doubt whether such a distinction would be practicable, because it involves the unreal assumption that all decisions can be put in one of two boxes, one marked policy and the other not. Furthermore, *Stepney Borough Council v Joffe* was not itself a case where the original decision was based on "policy considerations". In that case three street traders had their licences revoked by the London County Council after they were convicted of selling goods at prices exceeding the maximum fixed by statutory regulations. On appeal the magistrate decided that they were still fit to hold the licences. The county council unsuccessfully argued before the Divisional Court that the magistrate's jurisdiction was limited to considering whether or not there was any material on which the council could reasonably have arrived at its decisions to revoke the licences. The court held that the magistrate's power was not limited to reviewing the decision on the ground of an error of law, but that he was entitled to review also the merits. It was in that context that Lord Goddard went on to say that the magistrate should, however, pay great attention to the decision of the elected local authority and should only reverse it if he was satisfied that it was wrong.

48. It is normal for an appellant to have the responsibility of persuading the court that it should reverse the order under appeal, and the Magistrates Courts Rules envisage that this is so in the case of statutory appeals to magistrates' courts from decisions of local authorities. We see no indication that Parliament intended to create an exception in the case of appeals under the Licensing Act.

49. We are also impressed by Mr Matthias's point that in a case such as this, where the licensing sub-committee has exercised what amounts to a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the magistrates' court that the sub-committee should not have exercised its discretion in the way that it did rather than that the magistrates' court should be required to exercise the discretion afresh on the hearing of the appeal.

50. As to article 6, we accept the propositions advanced by Mr Matthias and we agree that the form of appeal provided by s182 and schedule 5 of the Act amply satisfies the requirements of article 6.

51. Although the point is academic in the present case, we doubt the correctness of part of the district judge's ruling where he said:

> "I am not concerned with the way in which the licensing sub-committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of judicial review."

52. Judicial review may be a proper way of mounting a challenge to a decision of the licensing authority on a point of law, but it does not follow that it is the only way. There is no such express limitation in the Act, and the power given to the magistrates' court under s181(2) to "remit the case to the licensing authority to dispose of it in accordance with the direction of the court" is a natural remedy in the case of an error of law by the authority. We note also that the guidance issued by the government under s182 and laid before Parliament on 28 June 2007 states in para 12.6:

> "The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both."

However, this point was not the subject of any argument before us.

53. For the reasons which we have given, the appeal is dismissed.

IN THE BLACKBURN MAGISTRATES' COURT
CASE NUMBER:

CHARLES OAKES

-v-

BLACKBURN WITH DARWEN BOROUGH COUNCIL

APPELLANT'S SKELETON ARGUMENT AND DRAFT SUBMISSIONS

James Parry
Solicitor Advocate

Parry Welch Lacey LLP
4 Gentwood Parade
Huyton
Liverpool
L36 2B

Tel: 0151 480 4061
Fax: 0151 480 4330
E mail:
jamesparry@parrywelchlaceyllp.co.uk