Queen's Bench Division

*Hamnett *v* Essex County Council

[2014] EWHC 246 (Admin)

2014 Jan 29; Feb 13

Singh J

Discrimination — Public sector equality duty — Nature of duty — Whether purely procedural duty to have due regard to various matters in process by which outcome reached — Whether having any substantive content — Whether duty breached — Equality Act 2010 (c 15), s 149(1)

High Court — Jurisdiction — Statutory review — Claim for statutory review of experimental traffic orders removing parking spaces for disabled people — Claimant alleging discrimination in exercise of public functions — Whether statutory review "claim for judicial review" — Whether High Court having jurisdiction to entertain discrimination claim on statutory review — Road Traffic Regulation Act 1984 (c 27), Sch 9, para 35 — Equality Act 2010, ss 29, 113(1)(3), 114(1)

A local highway authority made experimental traffic regulation orders under the Road Traffic Regulation Act 1984[1], which had the effect of preventing private cars from driving on certain roads. Parking spaces for disabled people, such as the claimant, were consequently removed from those streets. The claimant brought a CPR Pt 8 claim in the High Court for statutory review of the orders under paragraph 35 of Schedule 9 to the 1984 Act, on the grounds that the authority had breached its duty not to discriminate in the exercise of public functions and the public sector equality duty, under sections 29 and 149 of the Equality Act 2010[2] respectively, and that the decision to make the orders was irrational.

On the claim and on the questions, inter alia, whether a complaint of discrimination in breach of section 29 of the 2010 Act could be brought only in the county court pursuant to sections 113(1) and 114(1) of that Act, or whether a statutory review under the 1984 Act alleging such breach could be entertained by the High Court as a "claim for judicial review" within the exception in section 113(3)(a)—

Held, dismissing the claim, (1) that claims under section 29 of the Equality Act 2010 had to be brought in the county court, subject to the express exception in section 113(3)(a) of the 2010 Act made for a "claim for judicial review"; that "claim for judicial review" in section 113(3)(a) was a term of art referring only to a claim for judicial review in the strict sense of a claim under CPR Pt 54, which required the court's permission to proceed and could be brought only by a person with standing, and did not embrace a statutory review brought as of right by any person under CPR Pt 8, pursuant to paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984; and that, accordingly, the High Court hearing a claim for statutory review brought under paragraph 35 of Schedule 9 to the 1984 Act did not have jurisdiction to investigate an alleged breach of section 29 of the 2010 Act (post, paras 57, 58, 62–66, 80).

R (Lunt) v Liverpool City Council [2010] RTR 38 considered.

[1] Road Traffic Regulation Act 1984, Sch 9, para 35: see post, para 26.

[2] Equality Act 2010, s 29(6): see post, para 32.

S 113: "(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part . . . (3) Subsection (1) does not prevent— (a) a claim for judicial review . . ."

S 114(1): "A county court . . . has jurisdiction to determine a claim relating to— (a) a contravention of [sections 28–31] (services and public functions) . . ."

S 149(1): see post, para 39.

(2) That the public sector equality duty under section 149 of the Equality Act 2010 was an important procedural duty, to have due regard to various matters in the process by which an outcome was reached, but did not control the substance of a public authority's decisions; that, on the facts, the authority had discharged that duty; and that the decision was not irrational (post, paras 68, 69, 76–80).

The following cases are referred to in the judgment:

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 2 WLR 163; [1969] 1 All ER 208, HL(E)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Baker v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening) [2008] EWCA Civ 141; [2009] PTSR 809; [2009] LGR 239, CA

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 WLR 1096; [1982] 3 All ER 1124, HL(E)

R v Secretary of State for the Home Department, Ex p Mehari [1994] QB 474; [1994] 2 WLR 349; [1994] 2 All ER 494

R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139, CA

R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2008] EWHC 3158 (Admin); [2009] PTSR 1506, DC

R (Hajrula) v London Councils [2011] EWHC 448 (Admin); [2011] Eq LR 612

R (JM) v Isle of Wight Council [2011] EWHC 2911 (Admin); [2012] Eq LR 34

R (Kaur) v Ealing London Borough Council) [2008] EWHC 2062 (Admin)

R (Lunt) v Liverpool City Council [2009] EWHC 2356 (Admin); [2010] RTR 38

R (Williams) v Surrey County Council [2012] EWHC 867 (QB); [2012] Eq LR 656

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

R v Secretary of State for Employment, Ex p Equal Opportunities Commission [1995] 1 AC 1; [1994] 2 WLR 409; [1994] ICR 317; [1994] 1 All ER 910; 92 LGR 360, HL(E)

R (Diedrick) v Chief Constable of Hampshire Constabulary [2012] EWHC 2144 (Admin), DC

R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 AC 148; [2005] 3 WLR 793; [2006] 4 All ER 736, HL(E)

R (Rahman) v Birmingham City Council [2011] EWHC 944 (Admin); [2011] Eq LR 705

R (Shoesmith) v Ofsted [2011] EWCA Civ 642; [2011] ICR 1195; [2011] PTSR 1459; [2011] LGR 649, CA

Roads v Central Trains Ltd [2004] EWCA Civ 1541; 104 Con LR 62, CA

CLAIM

By a CPR Pt 8 claim form the claimant, Jade Hamnett, brought a claim for statutory review under paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 of two experimental traffic regulation orders made by the defendant local highways authority, Essex County Council, under sections 9 and 10 of the 1984 Act, which had the effect of preventing private cars from driving in to park on the High Street in Colchester and a neighbouring street. In consequence of the orders parking spaces for disabled people with blue badges had been removed from those streets.

The claimant, a disabled blue badge holder, challenged the orders on the grounds that they were unlawful and ultra vires because (i) they breached section 29 of the Equality Act 2010, read with sections 15 and 20; (ii) in making the orders the authority had breached its public sector equality duty under section 149 of the 2010 Act; and (iii) the authority's decision to make the orders was irrational. The issue arose at the hearing whether the court had jurisdiction to entertain the claim in respect of the breach of section 29 of the 2010 Act.

The facts are stated in the judgment.

Andrew Hogan (instructed by *Unity Law, Sheffield*) for the claimant.

Barbara Hewson (instructed by *County Solicitor, Essex County Council, Chelmsford*) for the local highways authority.

The court took time for consideration.

13 February 2014. **SINGH J** handed down the following judgment.

Introduction

1 This is a claim for statutory review of two experimental traffic regulation orders made by the defendant pursuant to its powers under the Road Traffic Regulation Act 1984. The claim is made under paragraph 35 of Schedule 9 to the 1984 Act. Such a claim does not need the permission of the court, unlike a claim for judicial review brought under CPR Pt 54.

2 The two orders under challenge were made on 4 March 2013 and came into force on 17 March 2013. They were suspended on 21 April 2013, although some elements of them relating to bus lanes (which are not material to the issues in the present case) were reintroduced by the defendant on 13 October 2013. Nevertheless the orders remain valid and in force for the duration of their lifetime, which is 18 months. It has not been suggested before this court that the issues are academic and should not be decided simply because the orders are currently suspended.

3 The orders have the effect of preventing private cars from driving in to park on the High Street in Colchester and also the neighbouring street of Head Street. The consequence is that parking spaces for disabled people with blue badges have been removed from those streets. The defendant has sought to provide an additional 32 parking spaces for disabled people in other parts of Colchester.

4 The claimant contends that the orders are unlawful and ultra vires on the grounds that: (1) they breach section 29 of the Equality Act 2010, read with sections 20 and 15; (2) in making the orders the defendant breached its duty in section 149 of the 2010 Act, often known as the public sector equality duty; and (3) the defendant's decision to make the orders was irrational.

The claimant

5 The claimant is 25 years old and has a number of disabilities. As a result of her disabilities she is unable to walk any significant distance without aid. She uses walking sticks for very short distances but struggles to stand for more than 30 seconds. She therefore uses an electric wheelchair.

A 6 The claimant is a registered disabled person with a blue badge and requires her car for mobility purposes. She also chairs a campaigning group for disabled people known as Fair Access to Colchester ("FA2C"), which was established in March 2010.

7 The claimant travels into Colchester town centre approximately once a week. With her blue badge she was able to park in a parking space on the
B High Street or Head Street, directly outside the shops and facilities that she wished to use. The building society with which she has an account is located on Culver Street West. She also has a savings account with a bank which is located on the High Street. She also uses the town centre for social purposes, for example meeting friends at restaurants and cafes.

The experimental traffic regulation orders

C 8 The first order which is challenged in this claim is the Essex County Council (Colchester Town) (Experimental Waiting Restriction) Order 2013. The second order which is challenged is the Essex County Council (Stockwell and Head Street, Colchester) (Experimental Movement Restriction) Order 2013.

9 The two orders were made by the defendant in exercise of its powers
D under sections 9 and 10 of, and Part IV of Schedule 9 to, the 1984 Act. Although made by the defendant as the local highway authority, the orders were made after close cooperation with the local district council, Colchester Borough Council.

10 The orders were made on 4 March 2013 and came into effect on 17 March 2013. While they were in force and before their suspension on 21 April 2013, the effect was that between 11 a m and 6 p m the High Street
E was accessible only by bus, cycle, motorcycle, taxi and licensed private hire vehicles. The space which was previously reserved for blue badge parking was converted to a new taxi rank, for nine vehicles, operating for 24 hours a day. Access to Head Street was not altered but parking bays for blue badge holders were removed.

11 The defendant added 32 additional parking spaces for disabled
F people in car parks at Vineyard Street, Priory Street, St Mary's and Culver Square. However, there is evidence from the claimant and other witnesses before the court that these parking spaces are too far away, certainly compared to what disabled people previously had access to. There is also evidence of steep gradients in Colchester, which add to the difficulty that disabled people have in walking to the High Street and Head Street from those other car parks.

G 12 It is clear from both the claimant's evidence and submissions made on her behalf in this court that she does not necessarily insist that the defendant must retain the existing provision for disabled parking spaces on the High Street and Head Street. She has put forward possible alternative solutions which would still, in her view, allow people in her position to be able to access the facilities in the town centre in an adequate way.

H 13 The claimant's position was summarised as follows in an e-mail from her to Alan Lindsay, an officer with the defendant, dated 1 November 2011:

> "The current situation is that blue badge holders have 26 spaces in the High Street, and a further ten in Head Street. The council have proposed

to remove these, and replace them with 32 spaces in the car parks around the town. Our issue is not about the number of spaces, but where these spaces are located. The important issue is that the proposed new spaces should provide equivalent access to the High Street and Head Street, and related services as far as possible by comparison with those lost. The current parking is central, level, and is in very close proximity to shops, banks and other services. This criteria is what any alternative parking suggested should aim to meet. All the proposed locations for new spaces already exist in the sense that blue badge holders are able to park there currently; and being significantly further away with some also entailing long gradients, they do not address the issue of equivalence. The straightforward removal of existing spaces from the high street without the equivalent provision suggests a failure to grasp the crucial significance of location (proximity) in blue badge parking."

14 In her first witness statement the claimant states that a number of alternatives were proposed to the defendant. One suggestion was that blue badge holders should be allowed access to the High Street, supported by number plate recognition or some other enforcement mechanism for those who entered that street without permission. It was also suggested that on Head Street spaces should be designated as dual bays, so that blue badge holders could use them during the day and taxis could use them at night; alternatively that five spaces should be designated for blue badge holders and five for taxis. A third suggestion was that there should be a reduction in the parking spaces on the High Street, with accessible parking retained at either end, and central spaces replaced by alternative spaces in Culver Street West, Nun's Road and St Nicholas Street. Another suggestion was to permit the loading bays at either end of the High Street to be used by blue badge holders from 10 a m.

The defendant's evidence

15 On behalf of the defendant evidence has been filed in the form of two witness statements by Alan Lindsay. He is the strategy and engagement manager for Haven Gateway, currently in the defendant's economic growth and development team and formerly in its environment, sustainability and highways directorate.

16 Mr Lindsay observes that, where there are double yellow lines on a road, having a blue badge means that a person can park for up to three hours in any event, provided that there are no restrictions for loading and unloading. This means that blue badge holders are not restricted to parking in designated parking spaces in car parks on the periphery of the town centre. For example Head Street has always had double yellow lines. The orders have not changed the ability of a blue badge holder to park there for up to three hours.

17 Mr Lindsay states that the proposals were initially published by the defendant in 2010 and the consultation period ended on 31 December 2010.

18 He observes that the number of blue badge holders in Colchester borough is 7,756. They include people with a wide range of disabilities.

19 Mr Lindsay states that both the local authorities did consider whether blue badge holders should be exempt from the proposed new restrictions. However, the problem was that blue badge holders (along with

A other private motorists) tended to circle the town centre, waiting for parking spaces to become available, thereby increasing congestion, which was what the authorities were seeking to reduce.

20 Initially it was proposed that the orders should be in permanent form. The defendant advertised its intention to publish the permanent orders for the High Street in 2012. A number of representations were made in response. Following this a number of amendments were made and it was B decided to make the orders experimental, as permitted under the 1984 Act.

21 One of the reasons why the claimant and others object to the orders is the exemption for motorcyclists. Mr Lindsay explains the reason for that exemption. This is council policy for reasons of safety. Like pedal cyclists, motorcyclists are particularly vulnerable in collisions with cars: they are safer in zones restricted to professional drivers of buses, taxis etc.

C **22** In his second witness statement Mr Lindsay disputes that the main shopping area of Colchester is the High Street. In his view, many of the town centre shops and facilities are located behind the High Street or accessed at the rear of the High Street. For example a number of premises in the High Street have access for disabled people at their rear. Furthermore he states that the High Street has never had a complete vehicle ban. It has remained D open to private vehicles as such. Furthermore he states that access to Head Street has not been changed by the orders.

23 He also notes that Colchester, which has a population of over 173,000, has a number of out of town supermarkets, retail parks and shopping areas offering banking, post office and pharmacy services as well as restaurants, bars and cafes.

24 Mr Lindsay observes that nearby towns such as Ipswich and E Chelmsford in fact have fully pedestrianised high streets. He is not aware that there is significantly different parking provision in either of those towns. Initially Colchester Borough Council wished to introduce a wholly pedestrianised scheme into the centre of Colchester but that was not pursued by the defendant: instead there were the more limited orders which are the subject of the present challenge.

F

Road Traffic Regulation Act 1984

25 The orders under challenge in this claim were made by the defendant authority under sections 9 and 10 of the 1984 Act.

26 Paragraph 35 of Schedule 9 to the 1984 Act provides that

> G "if any person desires to question the validity of, or of any provision contained in, an order to which [Part VI] of this Schedule applies [which includes section 9], on the grounds— (a) that it is not within the relevant powers, or (b) that any of the relevant requirements has not been complied with in relation to the order, he may, within six weeks of the date on which the order is made, make an application for the purpose to the High Court."

H It will be noted that there is no specific requirement of standing in paragraph 35: the claim can be made as of right by "any person."

27 By virtue of paragraph 36 of Schedule 9, on any claim of that kind, this court may, if satisfied that the order, or any provision of the order is not within the relevant powers, or that the interests of the applicant have been

substantially prejudiced by failure to comply with any of the relevant requirements, quash the order or any provision of the order.

28 Paragraph 37 of Schedule 9 provides: "except as provided by this Part of this Schedule, an order to which this Part of this Schedule applies shall not, either before or after it has been made, be questioned in any legal proceedings whatever."

Equality Act 2010

29 Part 2 of the 2010 Act sets out some "key concepts." In particular it defines the "protected characteristics" in section 4: these include disability. Disability is then defined for the purposes of the 2010 Act by section 6. There is no dispute in the present case that the claimant has a disability in that sense.

30 Chapter 2 of Part 2 of the 2010 Act sets out what is "prohibited conduct." This includes, in the case of disability discrimination, a special provision in section 15: this provides that a person discriminates against a disabled person if he treats him unfavourably because of something arising in consequence of his disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim.

31 Furthermore, in the context of disability, there can arise a duty to make reasonable adjustments under section 20. This can arise in particular, for present purposes, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled: section 20(3).

32 Part 3 of the 2010 Act deals with discrimination in the context of services and public functions. Section 29(6) provides that

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

33 Schedule 3 to the 2010 Act sets out a number of exceptions. For example paragraph 1 provides that section 29 does not apply to the exercise of a function of Parliament or a function exercisable in connection with proceedings in Parliament. Section 29 does not apply to preparing, making or considering an Act of Parliament etc: see paragraph 2. Nor does it apply to judicial functions: see paragraph 3.

34 On behalf of the claimant it is submitted that what is significant is that the exceptions in Schedule 3 do not include the making of an order of the kind under challenge in the present claim. However, it should be noted that that point goes to the substantive law: what is or is not prohibited conduct and made unlawful under the 2010 Act? A different question arises, as will be seen later, as to jurisdiction: which court has the jurisdiction to consider a complaint of breach of section 29?

35 Enforcement of the relevant provisions is dealt with in Part 9. Section 113 provides that proceedings relating to a contravention of the 2010 Act must be brought in accordance with that Part: see section 113(1).

36 Under section 114 (which has the side note "Jurisdiction"), it is provided that a county court has jurisdiction to determine a claim relating to a contravention of Part 3 (services and public functions): see section 114(1).

37 Moreover, the county court has power to grant any remedy which could be granted by the High Court: (a) in proceedings in tort; and (b) on a

A claim for judicial review. When used in that context, the phrase "a claim for judicial review" must contemplate the prerogative orders that can be made on a claim for judicial review, such as a quashing order and a mandatory order.

38 Section 113(3) provides that section 113(1) does not prevent "a claim for judicial review." An important question which arises in the present case is the meaning of "a claim for judicial review" in this context. B In particular does it include a claim for statutory review under paragraph 35 of Schedule 9 to the 1984 Act? This goes to the court's jurisdiction and will be considered later.

39 Section 149(1) of the 2010 Act, which has the side note "public sector equality duty", provides that:

> C "A public authority must, in the exercise of its functions, have due regard to the need to— (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

D **40** Further detail as to the duty to have due regard is set out in section 149(3).

41 Section 149(4) provides that the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled person's disabilities.

E *Case law on the public sector equality duty*

42 In *R (JM) v Isle of Wight Council* [2012] Eq LR 34 Lang J, at paras 95–108, summarised the relevant principles to be found in the extensive case law on the public sector equality duty. I did not understand there to be any material difference between the parties in the present case as to the relevant principles and I adopt that summary here.

F **43** When carrying out their functions, public authorities must have "due regard" to the relevant need. Each need represents a particular goal which, if achieved, would further the overall goal of the disability legislation. However, the public authority is not under a duty to achieve those goals. It is a duty to have due regard to the need to achieve those goals: see *Baker v Secretary of State for Communities and Local Government* G [2009] PTSR 809, para 31. When considering section 49A(1)(d) of the Disability Discrimination Act 1995 (inserted by section 3 of the Disability Discrimination Act 2005 but repealed and replaced by the 2010 Act) the duty is to have due regard to the need to take steps to take account of disabled person's disabilities: see *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506, para 84.

H **44** Due regard is the regard that is appropriate in all the circumstances: see *Baker's* case, para 31. The authority must give "proper regard" to all the goals in section 149 of the 2010 Act in the context of the function it is exercising and, at the same time, pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the authority to consider. The weight to be given to the

countervailing factors is a matter for the public authority rather than the court unless the assessment is unreasonable or irrational: see *Baker's* case, para 31, and *Brown's* case, para 82.

45 The test whether a decision-maker has had due regard is a test of the substance of the matter, not of mere form or box ticking. The duty must be performed with "vigour and an open mind". Since the question of due regard is one of substance, it is unnecessary expressly to mention section 149. Similarly the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed.

46 In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high: see *R (Hajrula) v London Councils* [2011] Eq LR 612, para 69.

47 Due regard must be given 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: see *Brown's* case, para 91. It is an essential preliminary to any important policy decision, not a rearguard action following a concluded decision: see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at [3] (that was a case under the analogous provision in the Race Relations Act 1976, as amended).

48 If a risk of adverse impact is identified, consideration should be given to measures to avoid that impact before fixing on a particular solution: see *R (Kaur) v Ealing London Borough Council* [2008] EWHC 2062 (Admin) at [44].

49 The question of whether due regard has been paid by a public authority is for the court itself to review. The court should not merely consider whether there was no regard to the duty at all or whether the decision was *Wednesbury* unreasonable: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. However, as I have already indicated, once that first stage has been passed, at the second stage of the resulting decision, questions of weight are for the public authority subject to *Wednesbury* review: see *R (Williams) v Surrey County Council* [2012] Eq LR 656, paras 18–24.

50 There is no statutory duty to carry out an equality impact assessment as such: see *Brown's* case [2009] PTSR 1506, para 89. At the most section 149 imposes a duty to consider undertaking an assessment, along with other means of gathering information about the impact on disabled people.

Jurisdiction

51 As I have already mentioned an important issue arises in the present case of whether this court has jurisdiction to entertain a complaint of breach of section 29 of the 2010 Act. There is no dispute that the court has jurisdiction to consider the complaint based on section 149 of that Act.

52 Mr Andrew Hogan submits that this court has jurisdiction under paragraph 35 of Schedule 9 to the 1984 Act. He submits that the powers conferred by that Act have to be read with, and subject to, the requirements of section 29 of the 2010 Act; in other words, that a public authority has no power to act in a way which breaches the 2010 Act, because that would be unlawful and therefore ultra vires.

A 53 In support of his submissions on behalf of the claimant that this court does have jurisdiction Mr Hogan relied on the decision of Blake J in *R (Lunt) v Liverpool City Council* [2010] RTR 38. In that case a complaint made under the predecessor provision to section 29 (section 21 of the Disability Discrimination Act 1995) was permitted to proceed in this court by way of a claim for judicial review. Blake J, at paras 34–36, set out his reasons for that conclusion. First that was because paragraph 5 of B Schedule 3 to the 1995 Act, as amended, so provided. That included a provision, similar to the one now to be found in the 2010 Act, that the jurisdiction provision in that Act "does not prevent the making of a claim for judicial review." Secondly, the law on the comparable duty on race relations claims demonstrated 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 C amounts to. Thirdly, Blake J did not accept that the factual disputes that existed between the parties in that case prevented the challenge in judicial review proceedings. He did not need to resolve all the differences in the witness statements.

54 I do not find that submission, and the judgment on which it is based, decisive in the present case. This is because in *Lunt's* case it was clear that the proceedings before the High Court were "an application for judicial D review." There was at the time, and remains, an express statutory provision which makes it plain that a complaint under (now) the 2010 Act can be made by way of a claim for judicial review. The question in the present case is whether that concept includes a statutory claim under, for example, paragraph 35 of Schedule 9 to the 1984 Act.

55 Mr Hogan submits that, as a matter of language and principle, E a statutory claim such as this is a "claim for judicial review" because it is a claim that the court should review the legality of administrative action. He submits that there is no difference in substance between the grounds on which this court can review administrative action whether the case is brought by way of a statutory claim or by way of a claim for judicial review in the strict sense of a claim under CPR Pt 54. In support of his submission F he cites a passage in *Wade and Forsyth, Administrative Law,* 10th ed (2009), p 621, where statutory review provisions are described as a form of "judicial review."

56 Mr Hogan also submits that it would be strange if a challenge to an administrative act like the orders in the present case could be brought in the county court under the 2010 Act, perhaps long outside the short six-week time limit which Parliament has laid down in paragraph 37 of Schedule 9 to G the 1984 Act. He submits that it would be far better and conducive to good order if such a challenge, which is in substance a matter of public law, is brought in the Administrative Court, which is the specialist court used to dealing with such grounds of challenge.

57 I do not accept those submissions on behalf of the claimant. I accept the submission made by Ms Barbara Hewson on behalf of the defendant that this court does not have jurisdiction to entertain the claim in so far as H it is based on section 29 of the 2010 Act, essentially for the reasons she has advanced.

58 In my judgment the phrase "claim for judicial review" as used in section 113 of the 2010 Act is a term of art and refers only to a claim for judicial review in the strict sense of a claim under CPR Pt 54. By the time of

the enactment of that Act the phrase "claim for judicial review" had become well established in our legal system. It was clearly intended to equate to what had in earlier legislation been called an "application for judicial review", ie in the Disability Discrimination Act 1995. That earlier language, which predates the replacement of the Rules of the Supreme Court by the Civil Procedure Rules in 1998, in fact replicates more accurately what is still the governing provision in primary legislation in the field of judicial review: section 31 of the Senior Courts Act 1981, which refers to an "application for judicial review."

59 That provision originally (in what was then called the Supreme Court Act 1981) followed the reforms made to RSC Ord 53 in 1977, by which the prerogative orders could only be sought by way of a speedy procedure which required the leave (now permission) of the court, with a short time limit. Those reforms were considered by the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237 and led to the rule in that case, generally requiring a case brought under "public law" to be brought under RSC Ord 53 rather than by way of (for example) a writ action seeking a declaration, although many of the classic cases in modern administrative law had been brought in that way, such as *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

60 It is permissible in principle to have regard to subordinate legislation as a persuasive aid when interpreting primary legislation: *Bennion, Statutory Interpretation,* 5th ed (2008), para 233. In *R v Secretary of State for the Home Department, Ex p Mehari* [1994] QB 474, 486 Laws J said that delegated legislation can be used to construe primary legislation where the two are meant to form a comprehensive code. In the present context it seems to me appropriate to have regard to the meaning of "claim for judicial review" in the Civil Procedure Rules when interpreting that phrase in the 2010 Act. Although the Rules were not made under that Act, section 113 of the 2010 Act was clearly enacted with the provisions of those Rules in mind and deals with the same subject matter, namely the bringing of civil proceedings. To that extent they can be regarded as forming part of the same "code."

61 CPR Pt 54 on the face of its heading covers both "judicial review" and "statutory review." Ms Hewson submits that the fact that it uses those two terms indicates that they are understood to have different meanings. However, in my view, that point needs to be treated with caution, because the phrase "statutory review" in the heading of CPR Pt 54 was being used in a different sense from that used in the present case and in fact has become redundant now. At one time CPR Pt 54 governed both judicial review and statutory review in the sense of review under the Nationality, Immigration and Asylum Act 2002, which was governed by sections II and III of CPR Pt 54. Those sections have now been removed: see *Civil Procedure 2013*, vol 1, para 54.0.2. All that remains in CPR Pt 54 is section I, which is headed "judicial review." The former provisions of rules 54.21 to 54.36, which were in sections II and III, are no longer there but, perhaps through oversight, the heading "judicial review and statutory review" remains in the heading of CPR Pt 54. However, the point which remains good, in my view, is that a claim for judicial review is, in the scheme of the Civil Procedure Rules, different from an application for review under a statute such as the 1984 Act in the present case.

A **62** CPR r 54.1(2)(a) defines a "claim for judicial review" in that section as a claim to review the lawfulness of (i) an enactment or (ii) a decision, action or failure to act in relation to the exercise of a public function. Although, as a matter of language, that taken by itself could be taken to include any proceedings in which a court reviews the lawfulness of administrative action, matters do not stop there. Rule 54.1(2)(e) defines "the judicial review procedure" as the CPR Pt 8 procedure as modified by
B that section of CPR Pt 54. The judicial review procedure must be used to bring a claim for judicial review if one of the prerogative orders is sought: rule 54.2. This reflects the requirements of section 31(1) of the Senior Courts Act 1981 and in effect replicates what the former Rules of the Supreme Court required in the "new" Order 53 from 1977—which is what led to the rule in *O'Reilly's* case [1983] 2 AC 237. In my view, it is significant that
C the present claim is made under CPR Pt 8 alone, in other words not in accordance with the judicial review procedure in CPR Pt 54.

63 Furthermore, in my view, this interpretation is supported by practical considerations. In general the Administrative Court is not well suited to hear factual disputes of the sort that may arise under section 29 and other similar provisions of the 2010 Act. In suitable cases this can be done and there can be live evidence and cross-examination but that is not normal,
D whereas the county court is used to conducting such trials on a daily basis.

64 The clear intention of Parliament is that claims under section 29 "must" be brought in the county court. There is an exception to that expressly made for claims for judicial review but that does not mean that it is always desirable that a case should proceed by way of judicial review. The procedure for a claim for judicial review under CPR Pt 54 is sufficiently
E flexible that justice can be done in all manner of cases. Permission is required before the case can proceed to a substantive hearing. Normally permission would not be granted where there is an adequate alternative remedy. The claimant has to have standing in the sense of a sufficient interest in the matter to which the claim relates: section 31(3) of the Senior Courts Act 1981. In contrast, a statutory claim under paragraph 35 of Schedule 9 to the 1984 Act can be brought by "any person." These procedural rules mean that
F the Administrative Court can keep a tight rein on such a case if it is allowed to proceed by way of judicial review at all. None of that is possible in the case of a statutory claim such as the present case.

65 In those circumstances, in my view, when Parliament enacted the exception it did in section 113 of the 2010 Act, it cannot have intended that a statutory claim such as the present, which can be brought as of right under
G CPR Pt 8 and can be made by any person, should be embraced within the term "claim for judicial review."

66 Accordingly I have come to the conclusion that this court does not have jurisdiction to entertain the present claim in so far as it is based on an alleged breach of section 29 of the 2010 Act, read with sections 15 and 20.

The public sector equality duty

H **67** There is no doubting the importance of the public sector equality duty. It was originally enacted in part as Parliament's response to the sort of concerns that had been highlighted by the Stephen Lawrence inquiry, in the Race Relations (Amendment) Act 2000. Subsequently the concept was extended to other contexts such as sex discrimination and disability

discrimination. Now it applies more generally in the scheme of the 2010 Act.

68 However, important as the duty is, it also needs to be recalled that it is a procedural duty and does not control the substance of a public authority's decisions. At times it appeared to me that Mr Hogan's submissions on behalf of the claimant risked straying into the area of substantive decision-making. For example he eloquently submitted that, although the defendant had rightly decided to provide more designated parking spaces for disabled people, it had put them in the wrong place. He submitted that the defendant had simply not asked itself whether the alternative provision could in practice be used by people such as the claimant.

69 I do not accept those submissions. In my judgment, the defendant did, in conjunction with Colchester Borough Council, have due regard to the various matters required of it in section 149 of the 2010 Act.

70 The defendant carried out two equality impact assessments, the first in September 2011 and the second in July 2012. Although strictly speaking a public authority is not required to carry one out, the fact that it did provides some support for the view that the public sector equality duty was taken seriously and was performed. Clearly this was no cosmetic exercise, since changes were made by the defendant in its proposals between the two assessments. First, it adopted the proposal by Colchester Borough Council to make additional parking spaces available for blue badge holders in other car parks. Other examples of changes were that the restriction on blue badge holders would only come into effect at 11 a m each day rather than 10 a m; and that additional seating was to be provided along the routes that people would have to use from the other car parks, to enable a rest to be taken.

71 Furthermore, an assessment was done by Colchester Borough Council, with which the defendant worked closely on the project. That assessment was more detailed and had regard to the interests of both disabled people and people with other protected characteristics within the meaning of the 2010 Act, for example older people.

72 The defendant also commissioned a review by consultants, the Non-motorised User Review dated 2 December 2011 This again took account of the potential problems that the proposed orders would cause for blue badge holders and recommended, for example that extra benches be provided for people walking from the alternative car parks.

73 The defendant engaged in consultation with affected individuals and groups. In particular it has on the evidence clearly been prepared to discuss its proposals with the claimant, the campaigning group which she now chairs FA2C and others.

74 Finally, the fact that the orders were made experimental only, rather than permanent, and the fact that the defendant has been prepared to suspend them indicate that it has been prepared to consider the impact of the orders on those affected, including disabled people with blue badges, and to keep the need for the orders under review.

75 The decision that the defendant had to take was a difficult one, raising a number of competing interests which had to be balanced. Furthermore, it was one in which the interests of different groups of people with "protected characteristics" within the meaning of the 2010 Act did not

A necessarily coincide and were in tension or perhaps even potential conflict. This is because the underlying aims of the defendant including creating a safer environment for pedestrians and reducing pollution.

76 This was classically a polycentric decision-making context. It was one for the public authority to which Parliament has entrusted such functions, provided of course that it complied with its legal duties. Although the outcome was no doubt disappointing to the claimant and to others who B support the campaign which she chairs, it is important to recall that the public sector equality duty does not require any particular outcome to be achieved by a public authority; rather it imposes a procedural duty (and an important one) to have due regard to various matters in the process by which an outcome is reached.

77 In my judgment, the defendant did discharge its legal duty to have C due regard to the relevant matters under section 149.

Irrationality

78 For reasons I have already mentioned in the context of the public sector equality duty, this was a context in which the defendant had to make a difficult polycentric decision, balancing a number of competing interests.

D 79 In my view it cannot possibly be said that the decision was irrational.

Conclusion

80 For the reasons I have given this claim is refused.

Claim dismissed.

E Ms Avneet K Baryan, Barrister

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