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Case No: CO/2856/2018 and CO/2863/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2019

Before:
THE HONOURABLE MRS JUSTICE ANDREWS DBE
- -
Between:

THE QUEEN on the application of
(1) LONDON BOROUGH OF HACKNEY
(2) CHRISTINE MOORE

Claimants

- and -
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

And Between:

THE QUEEN on the application of
LONDON BOROUGH OF WALTHAM FOREST

Claimant

- and -
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

- -
- -

Mr Nigel Giffin QC (instructed by **Hackney Legal and Democratic Services and Waltham Forest Legal Services**) for the **Claimants** in both actions
Sir James Eadie QC and Mr David Pievsky (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 22 and 23 May 2019
- -

Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. These claims for judicial review, which raise common issues, concern two local newssheets, "Hackney Today" and "Waltham Forest News", which for many years have been published by the respective local authorities approximately once a fortnight, and distributed free to all households within the boroughs to which they relate. The main purpose of these newssheets is to provide information to residents about local public services. They also contain statutory notices which the local authorities are legally obliged to publish in local newspapers, and which they would otherwise have to pay the local press to publish. Local authorities use advertisements placed in such newssheets as a source of revenue, helping to defray the expense of publication, which is otherwise met from public funds.

2. On 11 April 2018, the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") made directions under Section 4A of the Local Government Act 1986, ("the 1986 Act") prohibiting each of these local authorities from publishing its newsletter more frequently than quarterly.

3. Section 4A confers a power on the Secretary of State to direct one or more specified local authorities in England to comply with one or more specified provisions of a code issued under Section 4 of the 1986 Act that applies to them. The relevant provision ("the frequency requirement") is contained in the passage highlighted below in paragraph 28 of the Code of Practice on Local Authority Publicity 2011 ("the Code"):

   "Local authorities should not publish or incur expenditure in commissioning in hardcopy or on any website, newsletters, newssheets or similar communications which seek to emulate commercial newspapers in style or content. *Where local authorities do commission or publish newsletters, newssheets or similar communications, they should not issue them more frequently than quarterly, apart from parish councils which should not issue them more frequently than monthly*. Such communications should not include material other than information for the public about the business, services and amenities of the council or other local service providers."

   The Secretary of State does not suggest that these newssheets fail to comply with the Code in any other respect than the frequency of their publication.

4. The local authorities ("the Councils") challenge the lawfulness of the directions. Ms Moore, a resident of the London Borough of Hackney, who prefers to receive fortnightly newssheets, is a second Claimant in the claim brought by that Council, but she has taken no active part in it other than to provide a witness statement. The only significance of Ms Moore's involvement is that, unlike the Councils, she has the status to argue that the directions disproportionately interfere with her rights of access to information under Article 10 of the European Convention on Human Rights ("ECHR") and at common law.

FACTUAL BACKGROUND

5. The background to the regulation of local authority publicity is set out in some detail in the witness statement of Mr Alex Powell, a senior civil servant in the Department for Housing, Communities and Local Government. The following summary suffices for the purposes of this judgment.

6. The 1986 Act introduced an express statutory prohibition on local authority publicity of a party-political nature. Section 4 gave the Secretary of State the power to issue a code of recommended practice as regards the content, style, distribution and cost of local authority publicity and such other related matters as they thought appropriate. In 1988, the statute was amended to provide that local authorities had to have regard to any such code (section 4(1)).

7. The original Code of Recommended Practice on Local Authority Publicity was published on 15 August 1988, following a consultation process and approval in draft by both Houses of Parliament. That version of the code, and its first revision in April 2001, contained no provision about the frequency of local authority newssheets or similar publications.

8. In 2010, both the Conservative party and the Liberal Democrats set out in their respective manifestos a commitment to create greater transparency in local government, and to support a strong independent local media which would be able to hold local authorities to account. In furtherance of those objectives, the Coalition Government pledged to impose tougher rules to stop unfair competition by local authority newspapers. In September 2010, it launched a consultation on the implementation of a revised code which would contain specific guidance on the frequency of local authority publications as well as on their content and appearance.

9. The consultation document indicated that the Government considered that the existing rules on local authority publicity were inadequate. It proposed that the new code be grouped into seven principles, requiring that local authority publicity be lawful, cost-effective, subjective, even-handed, appropriate, have regard to equality and diversity, and be issued with care during periods of heightened sensitivity. In particular, it proposed that local authority newspapers or magazines (including any web-based editions) should not appear more than once a quarter, should only include material directly related to the business, services or amenities of the local authority or other local service providers, and should be clearly marked as being published by the local authority.

10. Following the consultation, in December 2010 the Communities and Local Government Select Committee undertook a short inquiry into the scope of the proposed revisions to the code and examined its likely impact on all tiers of local government. Its report, published on 27 January 2011, recorded the Committee's view that a local authority's needs to communicate information to residents would usually be satisfied by no more than quarterly publication, in line with the principle of cost effectiveness contained within the draft code. However, the Committee doubted that there was a need to specify a maximum frequency of publication.

11. In its response to the consultation, published on 11 February 2011, the Government acknowledged that local authority publicity is important to transparency and to localism. In order to be able to hold their local authority to account, the public needed to know what their local authority was doing, and why. However, it was important

that there should also be an independent source of such information. It said that the proposed introduction of guidance relating to the frequency, content and appearance of local authority newsletters, newssheets and similar publications was intended to address the potentially detrimental impact on local newspapers of unfair competition by taxpayer-funded local authority publications. The Government considered that quarterly publication was the right frequency for the publication of such newsletters, attaining the right balance between keeping the public informed about local authority services and any changes to them, and avoiding unfair competition with local newspapers which are published daily or weekly.

12. The revised Code was published on 31 March 2011 following the approval of the draft by both Houses of Parliament, using the affirmative resolution procedure. It involved a significant restructuring of the earlier version, setting out the seven principles adumbrated above. An Explanatory Memorandum which was published alongside the Code reiterated the Government's objectives in making the revisions in the following terms:

"7.1 For a community to be a healthy local democracy, local understanding of the operation of the democratic process is important, and effective communication is key to developing that understanding. Local authority publicity is important to transparency and to localism, as the public need to know what their local authority is doing if they are to hold it to account.

7.2 The revised publicity code contains specific guidance on the frequency, content and appearance of local authority newsletters, news sheets or similar publications. The Department considers that the publicity code, rather than competition legislation, is the right vehicle for imposing tougher rules to stop unfair competition by local authority newspapers because the issues involved go beyond the purely economic considerations of, for instance, council newspapers diverting revenue from paid advertising away from local newspapers. The Department's view is that the proliferation of council newspapers can have the effect of reducing the impact of independent local newspapers. A healthy free press is important in providing information to the public to hold their local authority to account. Council newspapers, issued frequently and designed to resemble a local newspaper can mislead members of the public reading them that they are local newspapers covering council events and give communities a biased view of the activities of the council."

13. The Explanatory Memorandum went on to make the following statement in paragraph 12.1:

"There will be a post implementation review of the Publicity Code in 3 to 5 years after it comes into effect to check that the Code is operating as intended and with the intended effects, which are to address the problem of unfair competition to local newspapers by local authority newsletters. The baselines… will include evidence on the current state of the local newspaper industry… some degree of primary research may be necessary to generate accurate baselines. An assessment will be made through a focused monitoring exercise of the extent to which local newspapers remain subject to unfair competition from local authority newsletters…"

No such review has yet taken place, although more than 5 years have passed since the revised Code came into effect.

14. At the time when it was published, the Code contained no express mechanism for enforcement. It was expected that local authorities would abide by the Code, and the vast majority did. However, there were a small number, including these two Councils, who decided that they would continue to publish their local newssheets far more frequently.

15. Following a further consultation in 2013 on the protection of the independent press from unfair competition, two enforcement mechanisms were introduced, this time by the enactment of primary legislation, the Local Audit and Accountability Act 2014, which inserted sections 4A and 4B into the 1986 Act. It is fair to say that this was a controversial step, which was the subject of vigorous prior debate. In broad terms, those representing the newspaper industry were strongly in favour of the proposed changes, and those local authorities who were not adhering to the Code, in their view for good reasons, strongly opposed them.

16. In the course of the consultation, those opposed to the introduction of enforcement mechanisms relied on what they said was an insufficiency of empirical evidence that local authority publications were competing unfairly with local newspapers or causing any detrimental impact. They pointed out that local papers were under commercial pressures for other reasons – including the public's changing reading habits and the shift towards online publications. The Government's response to that objection, in its response to the consultation published in May 2013 was in these terms:

> "these arguments do not address the simple fact that if revenues are siphoned off from a fragile industry by taxpayer-backed competition this necessarily puts the continuation of that industry at risk, in the case of local newspapers an industry vital to a healthy local democracy."

17. A press release issued on 30 January 2014 by the Department for Communities and Local Government to coincide with the statute receiving Royal Assent, explained that the 2014 Act "introduces new measures to protect the independent free press from unfair competition by town hall newspapers *by strengthening the legal status of the existing publicity code.*" (Emphasis added).

18. The 2014 Act came into force on 30 March 2014. On 25 March that year, the Secretary of State wrote to all local authorities, urging compliance with the Code, and warning them that he would be "minded to" issue directions wherever there was relevant evidence of non-compliance. No attempt was made to challenge that approach by means of judicial review at that stage.

19. Under section 4A, the Secretary of State:

> "may direct one or more specified local authorities in England to comply with a code issued under section 4… A direction may require compliance with –
>
> a) one or more specified provisions of a code, or
>
> b) all of the provisions of the specified code."

20. Section 4B, by contrast, empowers the Secretary of State to make an order requiring *all* local authorities in England (or those of a specified description) to comply with a

code made under section 4, or with specific provisions of it. However, such an order can only be made by statutory instrument subject to the affirmative resolution procedure.

21. Both these sections contain provisions enabling the Secretary of State to exercise his powers "whether or not the Secretary of State thinks that the authority is complying with the code to which it relates" (sections 4A(4) and 4B(4)). Whilst those provisions enable the Secretary of State to take pre-emptive action, they also serve as an indication that Parliament intended that there should be no preconditions to enforcement.

22. As will become apparent, a dispute between the parties about the legal impact of the changes brought about by the 2014 Act lies at the heart of these claims for judicial review.

23. The Secretary of State issued the first written notice of the proposed directions to these two Councils on 16 April 2014. Three further written notices were issued between that date and 6 November 2017, which was when the Secretary of State first purported to exercise his powers under section 4A. However, following correspondence between the Councils and the Secretary of State, the latter agreed to treat the "directions" issued on 6 November 2017 as written notices of proposed directions and to receive further representations from the Councils before making a final decision. Those representations were submitted on 8 January 2018 and were considered before the directions under challenge were issued.

24. On 21 March 2018 civil servants within the Department provided the Secretary of State with advice and invited him to decide whether to direct either or both Councils to comply with the frequency requirement.

25. By email dated 4 April 2018 the Secretary of State indicated that he did wish to issue directions to both the Councils, and that decision was communicated by Mr Powell to each of the Councils on 11 April 2018, enclosing a copy of the directions. The covering letters noted that the Secretary of State had provided an extended period of time for compliance, in recognition of the forthcoming local elections on 3 May 2018. The Councils were required to be in a position to comply with the directions by 3 September 2018. The Councils subsequently resolved to challenge the directions, and the claims for judicial review were issued before that deadline expired.

THE CLAIMS FOR JUDICIAL REVIEW

26. Before addressing the various grounds on which the Claimants sought to challenge the lawfulness of the directions, the Court must pay tribute to the cogent, focused and attractively presented written and oral arguments advanced on their behalf by Mr Nigel Giffin QC, and on behalf of the Secretary of State by Sir James Eadie QC, ably assisted by Mr David Pievsky.

27. The Claimants raised grounds of challenge to the directions under five headings:

    a. Misdirection in law and lack of proportionality;

    b. Abuse of power;

c. *Wednesbury* unreasonableness/irrationality and breach of the *Tameside* duty of inquiry;

d. Breach of the Public Sector Equality Duty

e. State Aid.

However, as Mr Giffin readily accepted, these headings overlapped to some extent, and often constituted different ways of characterising the same essential objections to the way in which the Secretary of State had approached the exercise of his statutory discretion. Because of this, I have identified the key issues between the parties and addressed the various legal bases of challenge in the context of the issues to which they relate.

ISSUE 1 – WHAT IS THE CORRECT LEGAL APPROACH TO THE EXERCISE OF THE DISCRETION UNDER S.4A?

28. The first issue that the Court must address is the dispute between the parties as to the way in which the Secretary of State was obliged to approach the exercise of his discretion under section 4A. This is the key issue, because if the Claimants are right, there was a fundamental error of law and the other grounds of challenge are unnecessary; however, if the Secretary of State is right, it becomes far more difficult for the Claimants to establish that the decision was substantively or procedurally flawed.

29. Mr Giffin accepted that what the Code says about the frequency of publication is the starting point for the decision maker. However, he submitted that the Secretary of State is obliged to consider, in the light of the representations made to him, whether the purpose of the Code (the prevention of unfair competition with local newspapers) would be served by directing the local authority concerned to abide by the frequency requirement. That would require the Secretary of State to evaluate whether, in the case of each local authority, more frequent publication of its newssheets was indeed causing or likely to cause such unfair competition. If he did not carry out such an evaluation, the exercise of the discretion would be fundamentally flawed. A lawful direction could only be given if, having carried out that evaluation, the Secretary of State rationally concluded that it was necessary to prevent unfair competition in the relevant borough.

30. In support of that approach, Mr Giffin pointed out that Parliament has not repealed section 4(1), and the legal obligation of the local authority is therefore still an obligation to "have regard" to the Code. That means that Parliament still envisages that a local authority may depart from its terms in circumstances in which the authority rationally considers there is a justification for so doing. Where a local authority has made that judgment call, he submitted that no direction as to frequency of publication can be justified unless it is indeed necessary (or at least rationally considered to be necessary) to give such a direction in order to avoid unfair competition with the local press.

31. Mr Giffin submitted that the Secretary of State and those advising him approached the discretionary exercise from an incorrect starting point, namely, that the general policy objectives underlying the Code, rather than the specific circumstances of the local

authority in question, were sufficient justification for making a direction, and thus never asked the pertinent questions. They did not identify the relevant competition; they did not ask whether the competition was unfair; and they did not consider the proportionality of an enforcement direction in the sense of weighing any specific anticipated benefit by way of the removal of unfair competition against the detriments that forcing the Council concerned to publish its newsletters quarterly would, or would be likely to cause it. The failure to adopt the correct approach envisaged by the statutory scheme amounted to an error of law.

32. Despite the eloquence with which those arguments were put, I cannot accept them. The debate about whether there was sufficient empirical evidence of unfair competition to justify the enforcement of the Code, and about the difficulty of obtaining such evidence, has already taken place, and Parliament, having considered that objection, has decided as a matter of policy that the Code should be enforced. If Parliament had intended to restrict the Secretary of State's powers to situations in which it was possible to prove that non-compliance had caused material and identifiable prejudice to particular local papers, it could easily have said so; instead, it chose to enact widely drawn powers that can be exercised even if the non-compliance has not yet occurred but is merely threatened (and thus it would be impossible to prove the consequences for the local press).

33. Prior to the introduction of section 4A, Parliament had indeed left it to local authorities to follow the Code, and if a local authority decided to depart from it, the only means of challenging its decision to do so would have been judicial review. Provided the authority properly took the Code into account and reached a rational decision to depart from it, its decision would be unimpeachable, irrespective of the detrimental impact it might be having on local newspapers. The 2014 Act was enacted in the wake of concerns about the small minority of Councils who were perceived to be openly flouting the Code. It brought about a fundamental change whereby local authorities were no longer allowed to be the arbiters of whether they could publish their newsletters more frequently; that was now a matter for the Secretary of State.

34. The whole purpose of the introduction of sections 4A and 4B was to enforce compliance with the Code, the difference between the two sections being that the procedure under s.4B would admit of no exceptions, whereas s.4A gave the Secretary of State the flexibility to decide not to enforce compliance if he concluded that there was sufficient justification for non-compliance in an individual case. Viewed against the legislative background, it was plainly the intention of Parliament that the Code should be complied with, and the power of enforcement was given to enable the implementation of established socio-economic policy.

35. Thus, in exercising the discretion to enforce, the Secretary of State is entitled to have particular regard to the fact that the Code states that newssheets should not be published more frequently than quarterly, and to proceed on the basis that, in the absence of special circumstances, local authorities should be expected to comply with that requirement. He does not need to go further and demonstrate that enforcement is necessary to protect local papers against unfair competition in that particular borough, or that there is some justification for enforcement over and above the fact of non-compliance. Whilst, as Sir James readily accepted, the Secretary of State must take into account any specific circumstances relied upon by the local authorities as

justification for more frequent publication, he is entitled to regard adherence to the policy adopted by Parliament as a factor weighing heavily in favour of enforcement.

36. Therefore, the Secretary of State did not misdirect himself as alleged.

ISSUE 2: WAS THE DECISION TO ENFORCE RATIONAL AND (SO FAR AS APPLICABLE) PROPORTIONATE?

37. The correct legal test for judicial review of the exercise of a ministerial discretion is whether the decision was rational, not whether it was proportionate. The concept of proportionality only arises if the Court is required to consider whether an act of a public body is justified under EU law (which is not an issue here) or whether there is an interference with rights arising under the ECHR.

38. Public authorities, such as the Councils, have no right to freedom of expression under Article 10 ECHR. Individual residents, such as Ms Moore, do have such a right, and a related right to receive ideas or information, both at common law and under Article 10. However, the only impact that the decision under challenge will have on those rights is that residents will receive the Council's newssheets containing the information less frequently than they did before. Even if this does constitute an interference with their Art 10 rights, it is extremely limited. They will still have access to the same information, either in paper form or by other means of dissemination such as the internet or email, or in notices placed in public places such as libraries and doctors' surgeries. Much of the information will be available in the local press. Residents will not be materially deprived of their right to receive information, though it may be less easily obtained.

39. Such interference as there may be with the rights of residents of these boroughs under Art 10 or at common law is plainly justified, given the policy aims of the legislature and the decision taken by Parliament as to where the balance between the competing public interests is to be struck. Indeed, there seems to me to be considerable force in Sir James' argument that the enforcement of the restriction on local authority publications *promotes* freedom of expression by protecting and encouraging the development of the local independent press.

40. Mr Giffin contended that because the Secretary of State had approached the matter in this case on the basis of the advice he had received that enforcement must be "necessary, justifiable and proportionate" he had set a standard to which he was obliged to adhere; but that was not, nor could it have been, a concession by the Secretary of State of the correct legal standard to be applied when reviewing his decision. In any event, as Mr Giffin was ultimately constrained to accept, if the Secretary of State's decision is rational, then it is likely to be regarded as proportionate.

41. The intensity of the review of the decision under challenge depends on the subject-matter. This decision was taken in an area of socio-economic policy, a paradigm example of something falling within the remit of the Executive, and a matter with which the Court will not lightly interfere, especially where the policy has been endorsed in primary legislation. Moreover, the decision involved the exercise of predictive judgment by the Secretary of State as to how best to realise that policy, coupled with value judgments on matters such as the seriousness or significance of

the departure from the Code. It therefore falls within an area where a wide margin of appreciation is to be afforded to the decision maker.

42. Much of the criticism levelled at the substantive decision was integrally bound up with the Claimants' case on the first issue. The essential complaint was of a lack of engagement with the specifics of the Councils' "reasoned case as to why the presence of local authority newssheets was of minimal relevance by comparison with the more fundamental forces affecting the publishers of local commercial newspapers," and with the arguments and evidence adduced in support of their contention that their respective publications did not have a material impact upon local independent media.

43. However, the rationality of the Secretary of State's decision is not dependent upon empirical proof of impact, let alone proof of unfair competition. That debate is over, and Parliament has formed a value judgment as to where the balance should be struck across the board. Put another way, despite strong opposition, much of it based on the same grounds as those on which the Councils sought to rely, Parliament was satisfied that the principles underlying the policy were sufficiently established. It is therefore unnecessary to seek to re-establish them in each local area prior to enforcement. The Secretary of State is entitled to pursue the Government's policy of creating, so far as is practicable, an environment which is as conducive as possible to the flourishing of independent and politically free local media and to use the powers given to him to ensure that limits on the frequency of publication of local newsletters are adhered to.

44. Once it is appreciated that the Secretary of State was entitled to approach the exercise of the discretion in the manner that he did, the attack on the rationality of his decisions to issue the directions becomes much harder to sustain. He was entitled to proceed on the basis that the circumstances that would justify departure from the frequency of publication laid down in the Code are relatively narrow. The conclusion that neither of these cases justified making an exception was one that he was entitled to reach, after taking into account (as he did) what the Councils had to say about their reasons for publishing fortnightly, the correlation between the frequency of publication of their newssheets and the circulation and commercial fortunes of local independent papers, and any detrimental impact that less frequent publications would have on them and their constituents, including the financial impact of having to pay for the publication of statutory notices in the local press. He did not need to provide rebuttal evidence or give further reasons for considering that the material and submissions relied on by the Councils were insufficient justification for allowing them to continue to publish their free newssheets six times more frequently than Parliament intended.

45. The Secretary of State acknowledged that it may not be easy to obtain empirical evidence of the impact of newssheets issued by particular local authorities on the fortunes of the independent press in their borough, but that was no impediment to his making a rational judgment that the very frequent publication by these Councils of a free local newssheet disseminated to each household in their boroughs was likely to hinder the market for independent local newspapers. He was entitled to take the view that residents who obtained free newssheets delivered directly to their door every fortnight would be less likely to buy a local paper.

46. It was also rational for him to conclude that at least some of the advertising revenue received by the Councils from adverts published in their newssheets would potentially

become available to the local press, if those authorities were only to publish their newssheets quarterly. He did not need to be satisfied that restricting the newssheets to quarterly publication would release enough advertising revenue to call other commercial newspapers into existence, or that the placing of adverts in the free newssheets gave the Councils an unfair competitive advantage over the existing local press.

47. The Councils complained that there was an inconsistency in the Secretary of State's approach in actively encouraging them to advertise online, and the approach adopted towards the alleged diversion of newspaper advertising revenues away from local papers. They pointed out that local papers are also advertising on websites. However, that is not a relevant consideration. What matters here is whether it was rationally open to a decision maker to conclude that if an advertiser who was going to use a print medium had the choice between placing his advert in a free newssheet delivered to all households every fortnight, or in a paid-for newspaper that appeared weekly, he would be likely to opt for the former. Plainly it could.

48. Criticism was made of the fact that in the decision letters, some reliance was placed on unparticularised and unattributed assertions in the introduction to a report by the London Assembly in August 2017 that there had been a negative effect "in some cases" and that "to clamp down… will help local newspapers." As the Councils pointed out to the Secretary of State, there was nothing in the body of the report itself to support those assertions. The Secretary of State noted that concern in his decision letters, but still placed reliance on the assertions. It seemed to me that this was a fair point, so far as it went, but it was of limited assistance to the Claimants, especially as the Secretary of State was not required to provide additional justification for enforcing compliance with the Code, it was a matter for the Councils to justify non-compliance. It was not the only basis on which the Secretary of State reached his decision, nor does it suffice to demonstrate that the decision fell outside the scope of decisions that could have been made by a reasonable decision maker. Indeed, the sentiment that to clamp down will help local newspapers underpinned the enactment of section 4A.

49. The Councils' remaining criticisms of the substance of the reasoning behind the decisions went nowhere near establishing that the decision was irrational.

50. In the context of submissions about proportionality, Mr Giffin complained about the failure by the Secretary of State to consider whether the aim of promoting a healthy local independent press could more proportionately be achieved by limiting publication to monthly rather than quarterly. In a case in which the issue of proportionality arises, the correct question is not whether a more limited objective might be thought capable of achieving the objective sought; it is whether a less intrusive measure could have been used without unacceptably compromising the objective: see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 per Lord Sumption at [20] and Lord Reed at [74]-[75]. Given that Parliament has already decided where the line should be drawn, it is difficult to see how a more frequent publication rate could be regarded as doing anything other than unacceptably compromising the objective.

51. In any event, the Secretary of State has no power to require the Councils to publish their newsletters monthly and they have never offered to do so. Taken to its logical conclusion, therefore, Mr Giffin's submission would mean that even in a case where a

local authority was publishing daily newssheets, the Secretary of State could not issue a direction under section 4A if there was a realistic prospect that publication less frequently than daily but more frequently than quarterly might suffice to protect the local press in that borough. That would render the power of enforcement nugatory in practical terms.

52. Therefore, even if this had been a case in which it was necessary to consider proportionality, I do not accept the argument that it was incumbent upon the Secretary of State to consider some intermediate frequency of publication, or that adhering to the frequency specified in the Code could be regarded as disproportionate.

53. Finally, there was a complaint made by the Councils that the Secretary of State has not taken enforcement action against other local authorities who are publishing their newsletters monthly rather than quarterly. That does not mean that it is unfair or disproportionate for him to enforce the Code against those who are publishing even more frequently. It is not an attractive argument (and it does not logically follow) that because someone whose behaviour is not as serious a departure from the Code as yours has not yet been made to comply, it is unfair to make you do so. In any event, it was open to the Secretary of State to decide to take enforcement action against the most prolific flouters of the Code first; there has been no decision taken that he will not make the rest of them comply with its provisions in due course.

ISSUE 3 -WAS DUE PROCESS FOLLOWED?

54. In each case the decisions were made after the prescribed statutory process had been followed; the Councils were given ample opportunity to make representations and provide evidence, and the Secretary of State took these into account. The process ended with the decision being conveyed to each Council in a substantial and detailed reasons letter. The reasons were sufficient to enable the Councils to know why the Secretary of State had decided to issue the enforcement directions. He did not need to answer every specific objection that they raised.

55. Two criticisms were made of the procedure, which were to an extent interlinked. The main point was based on paragraph 12.1 of the Explanatory Memorandum, which Mr Giffin contended was a clear and unequivocal assurance or promise made to Parliament at the time when the Code came into force, giving rise to a legitimate expectation that there would be an evidence based post-implementation review of its operation within 5 years. It was not necessary for the Councils to demonstrate that they relied upon the assurance because, as the Court of Appeal put it in the recent decision in *R(Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2019] 1 WLR 929 at [38] - [39]:

> "..if a public body indicates a clear and unequivocal policy that will be followed and applied in a particular type of case, then an individual is entitled to expect that policy to be operated, unless and until a reasonable decision is taken that the policy be modified or withdrawn … or implementation interferes with that body's other statutory duties."

56. The argument that it would be an abuse of power to enforce the Code without first carrying out the review referred to in Paragraph 12.1 of the Explanatory Memorandum was raised by the Councils and considered before the decisions to enforce were made. The advice given to the Secretary of State pertaining to this issue was in these terms:

> "it is … a matter for you to consider whether a Direction, if otherwise appropriate, justified and proportionate, should be made, or whether, as suggested by these authorities, there ought to be a further general review of the Code first."

57. The Secretary of State decided not to carry out a review of the Code before making the directions. Each reasons letter explained why in these terms:

> "The Secretary of State does not agree that it would be an abuse of power to make a direction. The intention to review the Code and the proposed research and analysis was the intention of a previous Government. The legal framework remains as per the legislation which has been made by Parliament and the Secretary of State has power to enforce aspects of the Code where he considers it right and appropriate to do so."

58. Mr Giffin submitted that it was incumbent upon the Secretary of State to consider the assurance given to Parliament, and what the practical implications would be of pausing to enable it to be honoured before seeking to enforce the Code. The Secretary of State was legally obliged to comply with the promise to carry out such a review, unless he concluded for rational reasons that it was inappropriate to do so, because the purpose of the intended review was to inform consideration of whether the Code should remain in its present form. That would have a potential bearing on whether non-compliance with its provisions should be met by an enforcement direction. Mr Giffin submitted that the review would have been a good starting point for seeing whether the picture had significantly changed since 2011 and whether the assumptions made at the time the Code was introduced about the impact of publication of newssheets on the local press were still justified.

59. In my judgment the Claimants' argument is fundamentally misconceived. It is unnecessary for these purposes to resolve the question whether paragraph 12.1 did contain a promise or assurance of the type that could give rise to a substantive legitimate expectation, though I have considerable doubts about that. Even on the assumption that it did, the short answer to the argument is that no promise was made to Parliament, let alone a clear and unequivocal promise, that the Code would not be enforced without such a review. Indeed, a promise could not have been made in those terms, because at the time of the Explanatory Memorandum there was no power of enforcement.

60. Therefore, even if there was a promise to carry out a review which was capable of giving rise to a legitimate expectation that it would be fulfilled, there is no link

between that promise and the exercise of the power to enforce compliance with the Code, and the absence of that link is fatal.

61. The power of enforcement was brought into being three years after the Explanatory Memorandum by primary legislation. That was enacted within the 5-year timescale of the envisaged review, precisely because the expectation in 2011 that local authorities would voluntarily adhere to the Code was not fulfilled. The idea of having a review to see whether the Code was working as intended must have been premised upon that expectation. Plainly, if some local authorities decided not to adhere to the frequency provisions, it would not be possible if those provisions were having the desired impact, at least in the boroughs concerned. There was no general promise to carry out a review within five years for some other purpose.

62. In any event, by the time the Secretary of State came to make his decisions, matters had moved on since the statement about the anticipated review was made. Insofar as the envisaged review was to inform decisions about the Code, then, at the time when the review might otherwise have taken place, informed decisions *were* being taken about the Code by Parliament, as part of the primary legislative process. Parliament concluded not only that the Code was still justified, but that the Secretary of State should be given the means to enforce it. If anything, that points against an intention by Parliament that enforcement should await a further review. It cannot possibly be an "abuse of power" for the Secretary of State to have followed Parliament's intention and to have used the powers conferred on him in 2014, provided that he did so otherwise lawfully and appropriately.

63. Moreover, as Sir James pointed out, no local authority could have thought that it could continue publishing its newssheets fortnightly with impunity, in the light of the clear statements made in March 2014 that the Secretary of State would be minded to enforce the Code wherever he perceived there to be non-compliance. Whilst detrimental reliance is not a condition precedent to making out a case based on legitimate expectation, it is rare for a court to find unfairness in the defeating of a legitimate expectation when, as in the present case, detrimental reliance is not present: see the recent discussion by Lord Kerr of the principles to be derived from the main authorities in *Re Geraldine Finucane* [2019] UKSC 7 at [60] – [72].

64. Whilst the point made in the decision letters that the assurance was given by a previous Government may not have been a sufficient justification for defeating a legitimate expectation, at least in the context of this particular case, (where the "promise" or the policy underlying it was not, for example, contrary to the policy of the succeeding Government), that was not the only reason given. The Secretary of State rightly approached the matter on the basis that he was not legally obliged to wait for such a review and that Parliament had left it to him to decide when he should issue an enforcement direction. In those circumstances, there was no requirement for the Secretary of State to give any weight to the fact that no review of the type envisaged in 2011 had taken place. That matter had no bearing on the exercise of his powers of enforcement. The contents of paragraph 12.1 of the Explanatory Memorandum were drawn to the Secretary of State's attention and he was given the option of waiting until after such a review had been undertaken, but he rationally decided not to do so, and that was a matter entirely for him.

65. There is a similar answer to the complaint that the Secretary of State should have waited for a review of the local and regional press ("the Cairncross Review") which had been commissioned by the Department for Culture Media and Sport, and was about to commence at the time when the impugned decisions were made. That complaint arose in the context of a wider submission that the Secretary of State had failed to fulfil the *Tameside* obligation to take reasonable steps to acquaint himself with relevant information before taking his decision (see *R v Secretary of State for Education and Science ex parte Tameside MBC* [1977] AC 1014 at 1065.)

66. However, the questions whether (a) there is enough information on which to make a decision (b) further information is or might be relevant to the decision and (c) whether to pursue further inquiries or gather such information are matters for the judgment of the decision-maker, which cannot be impugned unless it is irrational. In the present case, the fate of the *Tameside* challenge largely depended on the outcome of Issue 1. The Secretary of State was not legally obliged to commission or to wait for further evidence about the challenges facing regional or local newspapers or the impact on them of local authority newssheets. It was rationally open to him to decide not to do so because he already had enough information on which to reach his decision to enforce the Code. The Code was not part of the terms of reference of the Cairncross review; and waiting for the outcome of that review was not a rational precondition to enforcement of the Code. There was no breach of the *Tameside* duty in this case.

ISSUE 4 - DID THE SECRETARY OF STATE COMPLY WITH HIS DUTY UNDER SECTION 149 OF THE EQUALITY ACT 2010?

67. The duty set out in section 149(1) of the Equality Act (the Public Sector Equality Duty or "PSED") is concerned with process, not outcome. It is a duty to have "due regard" to the need to advance equality of opportunity between persons who share a relevant protected characteristic, and persons who do not share it. Under section 149(3) that means having due regard, in particular, to the need to:

    a. Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

    b. Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and

    c. Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

68. The relevant principles relating to the exercise of the PSED are well established. They were adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]-[26] and endorsed by Lord Neuberger in *Hotak v Southwark LBC* [2016] UKSC 30 [2016] AC 811 at [73].The duty must be exercised in substance, with rigour and with an open mind. The decision maker must be properly informed before taking the decision, and that would normally entail making an assessment of the risk and extent of any likely adverse impact of the proposed decision on those with protected characteristics.

69. If there has been a proper and conscientious focus on the statutory criteria, the weight to be given to the equality implications of the decision is essentially a matter for the decision maker and the Court cannot interfere with the decision simply because it would have given greater weight to those implications than he did: see generally *R(Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin).

70. The Court should only interfere where the decision maker's approach is unreasonable or perverse: Flaux J provided a useful summary of the relevant authorities in *R(SG and others) v Secretary of State for the Home Department* [2016] EWHC 2639 at [313]-[314] and [329]. Although the production of an Equality Impact Assessment (EIA) is not a mandatory requirement, if one is produced in appropriate form it is likely to be regarded as convincing evidence that the public authority has had due regard to the duty when making the relevant decision.

71. The Councils contended that if the frequency of their newssheets was curtailed to quarterly, they would be less able to communicate effectively with protected groups. That was the only identified detrimental impact. The protected characteristics which were regarded as particularly relevant in this regard were age and disability, though there was also a recognised association between digital exclusion and relative economic deprivation, which may be a proxy for other protected characteristics such as race.

72. There was no dispute between the parties that access to information about local services and activities is a matter of importance to equality of opportunity generally, and to the matters set out in Section 149(3) in particular. However, it must be borne in mind that the objective of the restriction on the frequency of publication of local newssheets was to foster greater access to an independent local press which could hold local authorities to account. That is also a matter of importance to equality of opportunity.

73. An EIA was carried out, leading to an Equality Statement which was originally produced in January 2015 and updated in October 2016 (albeit with minimal changes). The Equality Statement engaged at some length with representations made by these Councils and by other local authorities who were expected to be directed to comply with the Code. It concluded that the proposed decisions "were not expected to have any substantial equalities impact on discrimination, fostering good relations or advancing equality of opportunity." The Equality Statement contained a careful and substantial analysis of the equalities issues, with the necessary conscientious focus on the statutory criteria, and there were no material changes in the period between its publication and the taking of the impugned decisions to issue the directions. Insofar as there was further evidence of the likely impact on those with protected characteristics, it was taken into account.

74. As those advising the Secretary of State rightly pointed out, the points made by these two Councils in response to the notices of proposed directions in November 2017 primarily consisted of restating what had been said on this topic in response to earlier written notices that were served on them. The Equality Statement expressly addressed the problem of digital exclusion but pointed out that, apart from using their websites or email, local authorities could communicate with their residents through paid for advertising, or by using targeted communications distributed in leisure centres,

schools, libraries, doctors' surgeries or via health visitors, social workers, care homes and community care workers.

75. The Secretary of State, having regard to the Equality Statement, accepted that there might be some adverse impact on elderly or disabled residents, in that they would less readily be able to obtain the information currently circulated in the newssheets delivered fortnightly to their door; however, bearing in mind that most local authorities were able to communicate effectively with members of the public without needing to produce a newssheet more often than quarterly, and the other communication channels that were open to the Councils, he concluded that there were sufficient mitigating measures that could be taken to minimise those possible adverse effects.

76. In their representations made prior to the decisions being taken, the Councils took issue with the effectiveness of the alternative means of disseminating information that the Secretary of State had suggested would substantially mitigate the effects on the elderly and disabled residents of restricting the free newssheets to quarterly. Mr Giffin submitted that the Secretary of State had failed to engage in substance and with rigour with the equality impacts of the decision, because there was insufficient engagement with the detailed points that were made by the Councils in this respect. By way of example he pointed to the submissions of Hackney Council that many of their residents were among the least likely to engage with the Council through channels such as libraries or childrens' centres. He also relied on the substantial material relating to digital exclusion in 2018, including papers produced by Age UK and the Carnegie Trust.

77. Having carefully considered the Equality Statement, the Council's representations and the evidence they relied on, the advice to the Secretary of State and the decision letters, I am satisfied that the Secretary of State did sufficiently confront the evidence of what the practical impacts of his decisions would be for people with protected characteristics in these two boroughs. He rightly accepted that some such people would find it more difficult to obtain the information. Whilst Hackney made a forceful point that some of their most vulnerable and disadvantaged residents were unlikely to engage with them through certain of the suggested alternative channels of communication, that point was not overlooked. It was pointed out that the Councils could enlist the help of social services and others, such as carers, in direct contact with elderly or disabled residents in making sure that the information got through to them. The PSED did not require the Secretary of State to address every point made to him, let alone to be satisfied that all the adverse impacts identified could be overcome.

78. There might well be room for debate as to the extent to which the mitigating measures identified by the Secretary of State would help to overcome the disadvantages identified, but the question for the Court is not whether the Secretary of State the right value judgment about that, but whether he sufficiently engaged with the evidence that was put before him to be clear precisely what the equality implications of his decision were when he weighed them in the balance. In my judgment, he plainly did. The weight to be given to the equality implications, once they were properly identified, was a matter for him.

79. Finally, the PSED did not oblige the Secretary of State to take into account the forthcoming Cairncross review or the fact that a review of the Code had been envisaged in 2011.

ISSUE 5 – DID THE DIRECTIONS AMOUNT TO UNLAWFUL STATE AID, CONTRARY TO ARTICLE 107(1) OF THE TFEU?

80. Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) provides as follows:

> "Save as otherwise provided in the Treaties any aid granted by a Member state or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

81. The aim of Article 107(1) is to prevent trade between Member States from being affected by advantages conferred by Member States on their own undertakings: see Case C-39/94 *SFEI v La Poste* [1996] 3 CMLR 369 at [58]. The underlying premise of the argument in this case is that the giving of the directions will force the Councils into conferring a significant financial benefit on certain media undertakings, because they will need to pay the publishers of one or more local newspapers for the publication of statutory notices in those newspapers.

82. The short, and fatal, answer to this objection is that even if (which is doubtful) the enforcement of a Code designed to protect the local press from unfair competition could somehow be characterised as a direct or indirect transfer of State resources, there is no evidence from which it could be demonstrated that this intervention of the State is liable to affect trade between Member States.

83. That being the case, it is unnecessary to prolong this judgment by reference to the other cogent points made by Sir James, including the point that the aid is of a social character falling within Article 107(2)(a) of the Treaty.

CONCLUSION

84. The Secretary of State adopted the correct legal approach to the exercise of his discretion. He gave the Councils a proper opportunity to persuade him that what he regarded as a significant and substantial departure from the Code was justified, but having taken their representations into account, he rationally concluded that it was not. There was no obligation to seek further information or evidence in order to make his decisions in respect of each borough, and the Secretary of State rationally concluded he did not need to do so. Nor was there any obligation to wait until after a review had been carried out to see how the Code was working, though the Secretary of State expressly considered whether he should do so and decided not to. His decision to go ahead came nowhere near an abuse of power; indeed, it might have been said that he was abrogating his responsibilities, had he failed to act as Parliament intended.

85. The decisions to enforce the Code were taken with sufficiently informed awareness of the potentially detrimental impact on persons with protected characteristics who lived

within the affected boroughs, and after consideration of the steps that might go some way towards ameliorating it. The decision to enforce the Code neither amounts to a disproportionate interference with Art 10 ECHR or equivalent common law rights of Ms Moore and her fellow residents, nor to the provision of an unlawful State Aid.

86. These claims for judicial review are therefore dismissed.