Neutral Citation Number: [2019] EWHC 1997 (Admin)

Case No: CO/1088/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before :

MR JUSTICE LEWIS

- -

Between :

THE QUEEN **on the application of** **(1) INDEPENDENT WORKERS' UNION OF GREAT BRITAIN** **(2) MUHUMED ALI** **(3) CATHERINE MINSHULL**	**Claimants**
- and - **THE MAYOR OF LONDON**	**Defendant**
- and - **TRANSPORT FOR LONDON**	**Interested Party**

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- -

Ben Collins QC, Nadia Motraghi, Nicola Newbegin and Tara O'Halloran (instructed by **TMP Solicitors LLP**) for the **Claimants**
Martin Chamberlain QC, Malcolm Birdling and David Heaton (instructed by **TfL Legal**) for the **Defendant and Interested Party**

Hearing dates: 10th and 11th July 2019

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Approved Judgment

Mr Justice Lewis:

INTRODUCTION

1. This is a claim for judicial review of a decision removing the exemption from liability to pay the congestion charge in Central London from private hire vehicles save for those designated as wheelchair-accessible vehicles. The decision was given effect to by the Greater London (Central Zone) Congestion Charging (Variation) Order 2018 ("the Order") made by the interested party, Transport for London, on 29 June 2018 and confirmed by the defendant, the Mayor of London, on 19 December 2018 by an Instrument of Confirmation 2018 ("the Confirmation Order"). The change came into effect on 8 April 2019.

2. There are three claimants. The first is the Independent Workers' Union of Great Britain which is a trade union representing low paid workers in the United Kingdom. It has a United Private Hire Drivers Branch representing such drivers. The second claimant is Muhumed Ali. He is a Dutch national born in Somalia. The third claimant is Catherine Minshull who works part-time as a private hire vehicle driver.

3. The claimants contend, in essence, first that the withdrawal of the exemption from private hire vehicles save for those which are wheelchair-accessible contravenes sections 19 and 29(6) of the Equality Act 2010 ("the 2010 Act") as they say it is discriminatory in relation to drivers from a black or ethnic minority background (referred to in this judgment as BAME drivers), female drivers and disabled passengers. They contend the majority of private hire vehicle drivers are from a BAME background and women are more likely to be part-time drivers. They claim that the changes given effect to by the Confirmation Order put them at a particular disadvantage as compared with non-BAME or male drivers, and also places disabled passengers at a particular disadvantage, and the defendant cannot show the measure to be a proportionate means of achieving a legitimate aim.

4. The second and third claimants also contend that the changes given effect to by the Confirmation Order involve an interference with the right to respect for their, and their families', private and family life within the meaning of Article 8(1) of the European Convention on Human Rights ("ECHR") which the defendant cannot show is justified under Article 8(2) ECHR. They also contend that the Order results in an interference with the peaceful enjoyment of their possessions within the meaning of Article 1 of the First Protocol ("A1P1) to the ECHR which the defendant cannot show is justified.

5. Finally, they contend that the changes given effect to by the Confirmation Order involve unlawful discrimination contrary to Article 14 ECHR. They contend that the Order involves differential treatment on grounds of race, ethnicity, sex, or disability in respect of matters which fall in any event within the ambit of either or both of Article 8 and A1P1 ECHR (even if it does not involve a breach of those Articles). They contend that the defendant cannot show that the effect on BAME or female drivers, or disabled persons, is objectively justifiable.

6. The defendant accepted initially that the amendments given effect to by the Confirmation Order put BAME and female drivers and disabled passengers at a disadvantage within the meaning of section 19 of the 2010 Act but contended that the

measure is a proportionate means of achieving a legitimate aim, namely reducing traffic and congestion in the central London charging zone without reducing the number of wheelchair-accessible vehicles. The defendant contends that the measure, involving as it does the application of the congestion charge, does not involve an interference with the right to respect for private or family life, or an interference with the peaceful enjoyment of possessions but, if it did, it is justified as a proportionate means of achieving a legitimate aim. The defendant contends that the matter does not fall within the ambit of either Article 8 or A1P1 ECHR but, if it does, the impact on the claimants, and BAME and female drivers and disabled passengers generally, is justified.

THE LEGAL FRAMEWORK GOVERNING THE CONGESTION CHARGE

The Greater London Authority Act 1999 ("the 1999 Act")

7. The 1999 Act provides for a Mayor of London and a London Assembly. Section 141(1) of the 1999 Act provides that:

> "(1) The Mayor shall develop and implement policies for the promotion and encouragement of safe, integrated, efficient and economic transport facilities to, from and within Greater London".

8. Those policies are to be included in a transport strategy which the Mayor is under a duty to prepare and publish: see section 142 of the 1999 Act.

9. Section 295 of the 1999 Act provides for the making of schemes for charging road users and, so far as material, is in the following terms:

> "(1) Each of the following bodies, namely –
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> (a) Transport for London,
>
> (b) any London borough council, or
>
> (c) the Common Council,
>
> may establish and operate schemes for imposing charges in respect of the keeping or use of motor vehicles on roads in its area.
>
> "(2) Schedule 23 to this Act (which makes provision supplementing this section) shall have effect."

10. Paragraph 3 of Schedule 23 to the 1999 Act provides that :

> "A charging scheme may only be made if it appears desirable or expedient for the purpose of directly or indirectly facilitating the achievement of any policies or proposals set out in the Mayor's transport strategy."

11. A charging scheme is to be contained in an order made by the body making the scheme and submitted to and confirmed by the Mayor (see paragraph 4 of Schedule 23 to the 1999 Act). A charging scheme must be consistent with the Mayor's transport strategy and, as provided for by paragraph 8:

"A charging scheme must –

(a) designate the area to which it applies;

(b) specify the classes of motor vehicles in respect of which charges are imposed;

(c) designate those roads in the charging area in respect of which charges are to be imposed; and

(d) specify the charges imposed."

12. There is provision requiring a charging scheme to specify or describe the events giving rise to a charge and providing that different charges, or no charges, may be imposed for different days, times of day, parts of a charging area, distances travelled or classes of motor vehicles (see paragraph 10 of Schedule 23 to the 1999 Act). There are further detailed provisions concerning charging schemes contained in Schedule 23 to the 1999 Act.

The Charging Scheme

13. A congestion charging scheme was first introduced in central London with effect from 17 February 2003. The current charging scheme is set out in the Schedule to the Greater London (Central Zone) Congestion Charging Order 2004 ("the Scheme"). The Scheme imposes a charge in respect of an area within Central London as shown on specified maps. That is the area referred to in this judgment as the Central Congestion Zone or CCZ. Article 4 of the Scheme provides for a charge (known as the congestion charge) to be imposed in respect of each charging day on which a vehicle uses a designated road, i.e. one in the CCZ, during charging hours. The charge is specified as £10.50 if a particular payment method (known as Auto Pay) is used, or £11.50 if any other payment method is used. The charges are payable for a vehicle which uses or is kept on a road within the CCZ between 7 a.m. and 6 p.m. on any day except Saturday or Sunday or certain designated public holidays.

14. Certain vehicles are non-chargeable, that is, they are exempt from paying the congestion charge. Initially, vehicles exempt from paying the congestion charge included both hackney carriages (i.e. vehicles licensed to ply for hire and known colloquially as taxis or black cabs, by reason of the traditional colour of the vehicle) and private hire vehicles. Article 5 of the scheme gave effect to Annex 2. Paragraph 2 of Annex 2 provided as follows:

"**Motorbicycles, licensed hackney carriages and licensed private hire vehicles**

"2(1) A vehicle which falls within any of the following descriptions is a non-chargeable vehicle:-

(a) a motorbicycle,

(b) a vehicle licensed as a hackney carriage under section 6 of the Metropolitan Public Carriage Act 1869;

(c) a vehicle being used as a private hire vehicle, so long as the conditions specified in sub-paragraph 2 are met"

15. The conditions that private hire vehicles had to meet were, essentially, that the vehicle had been hired to carry one or more passengers, and was being used lawfully for that purpose, that the booking had been accepted by a person with a relevant operator's licence and that details of the vehicle, the driver and the booking were properly recorded.

16. The effect of the change to the Scheme was to remove the exemption from liability to pay the congestion charge from private hire vehicles save for those designated as wheelchair-accessible. Hackney carriages (i.e. taxis) continued to be exempt (all hackney carriages are required to be wheelchair-accessible). That change was brought about by the amendment made by the Order which amended the heading of the relevant paragraph by substituting "designated wheelchair-accessible private hire vehicles" for "licenced private hire vehicles" and, amongst other amendments, amending paragraph 2(1)(c) of Annex 2 to the Scheme so that the paragraph provides that a non-chargeable vehicle includes:

> "(c) a designated wheelchair-accessible private hire vehicle being used as a private hire vehicle, so long as the conditions specified in sub-paragraph (2) are met."

17. The amendments also included a definition in the following terms:

> "designated wheelchair-accessible private hire vehicle means a vehicle that appears on a list of vehicles maintained by Transport for London under s167 (1) of Equality Act 2010."

18. The defendant confirmed the order on 19 December 2018 and the change came into force on 8 April 2019.

THE FACTUAL BACKGROUND

The Background

19. The congestion charge was originally introduced in 2003 with a view to reducing the amount of traffic within an area of central London. The period immediately after the introduction of the congestion charge saw a marked reduction in congestion and the amount of traffic in central London.

The Transport Strategy

20. The Mayor's Transport Strategy, published in March 2018, noted that cars, taxis and private hire vehicles now took up nearly half of all street space in central London but accounted for just 13% of distances travelled. The Transport Strategy noted that central London had seen a substantial increase in the number of private hire vehicles with more than 18,000 private hire vehicles entering the CCZ during charging hours each day. It noted that it was important to keep the Scheme under review to make sure that it tackled the congestion in central London. To that end, proposal 20 in the Transport Strategy provided that:

> "The Mayor, through TfL, will keep existing and planned road user charging schemes, including the Congestion Charge, Low Emission Zone, Ultra Low Emission Zone and the

> Silvertown Tunnel schemes, under review to ensure they prove effective in furthering the policies and proposals of this strategy."

21. There is also a section of the Transport Strategy dealing with making the public transport system more accessible and inclusive for disabled people. The section primarily deals with public transport but deals also with the need for improving the accessibility of taxi ranks and recognises the need that some disabled persons have for door-to-door transport services.

The Amendments to the Scheme

22. The process by which the Scheme came to be amended was as follows. On 20 January 2016, the then Mayor asked Transport for London to investigate the potential impacts of removing the exemption of private hire vehicles from liability to pay the congestion charge. In consequence, Cambridge Economic Policy Associates ("CEPA"), a firm of experts in traffic and economic modelling, were instructed to carry out a preliminary analysis. In 2017, CEPA were instructed to carry out a more detailed analysis and further research was commissioned in early 2018. CEPA had discussions with 13 private hire vehicle operators and three trade organisations. This work led to the CEPA report in March 2018 referred to in the judgment as the CEPA report. In addition, a firm of consultants, Mott MacDonald, were commissioned in April 2018 to undertake what is described as an integrated impact assessment of the consequences of removing the exemption of private hire vehicles from the congestion charge. They met and discussed the proposed removal of the exemption with a number of private hire operators and passenger and trade union groups. They presented a report in July 2018 known as the Integrated Impact Assessment or IIA.

23. On 29 June 2018, Transport for London made the Order. There was then a consultation exercise. Addison Lee, a large private hire vehicle operator, submitted a report from its consultants, Oxera Consulting LLP ("the Oxera Report"). CEPA then responded to that. Over 10,000 others also responded to the consultation exercise. Ultimately, the matter was considered by the Mayor. The material placed before the Mayor included, but was not limited to, a request for a decision, a report to the Mayor, the CEPA Report, the Oxera Report and the CEPA reply. Given the nature of the issues in the claim, it is necessary to refer only to certain parts of the relevant documents.

The Aim of the Amendment

24. First, the purpose of the Order, as confirmed, and as appears from its terms, is to remove the exemption from the congestion charge previously enjoyed by private hire vehicles save for those which were wheelchair-accessible. Secondly, the underlying aim also appears clearly from the documentation leading to the making of the Order and its subsequent confirmation by the defendant. The aim was to reduce traffic and congestion within central London. Those benefits were to be achieved without reducing the number of wheelchair-accessible private hire vehicles which were considered to provide a means of transport for certain disabled passengers (those whose disability necessitated the use of a wheelchair). The request for a decision noted that although the purpose of the Scheme was to reduce traffic and congestion, there were consequential benefits in air quality resulting from the reduction in the number of vehicles in the CCZ.

25. The request for a decision recorded that the "primary objective of the Congestion Scheme was to reduce traffic and congestion in the CCZ". It noted that the Scheme had initially been very effective in achieving its objective as there had been a marked reduction (30%) in traffic congestion and in circulating traffic (15%). Over time, traffic within the CCZ had increased to levels not seen since before the introduction of the Scheme. One reason for the increase in congestion was the composition in traffic. Another factor was the allocation of road space from traffic use to other uses such as use for cycling or bus lanes.

26. The request noted (footnotes omitted) that:

> "London's streets are some of the most congested in the world contributing to poor air quality, delaying vital services and making walking and cycling less attractive options. Without further action, average traffic speeds are forecast to fall across London, with central London particularly affected. Excess traffic is estimated to be responsible for around 75% of congestion in London so managing demand for road space is crucial.
>
> "In addition to inconvenience to the road user, the annual cost of congestion in London is assessed at around £5.5 billion. By 2041, if action is not taken, it will take more than an hour to travel 10km by road in central London, 15 minutes longer than today. A reduction in traffic of about 10-15% (six million vehicle kilometres per day) is required by 2041 is required to keep congestion in check, whilst also achieving the aims of the Mayor's Transport Strategy."

27. The request noted that the number of private hire vehicles, and drivers, had increased substantially since the introduction of the Scheme. In 2008/2009, there were around 55,000 licensed private hire drivers and 50,000 licensed vehicles in London and in 2017/2018, there were over 113,000 licensed drivers and over 87,000 licensed vehicles. By contrast, the number of licensed hackney carriages (taxi) drivers and vehicles had remained relatively stable with 24,800 licensed taxi drivers, and 22,300 licensed taxis in 2008/09 compared with 23,826 licensed drivers and 21,026 in 2017/18.

28. At the time that it was decided in 2002 to recommend the exemption of private hire vehicles from the congestion charge, it was estimated that there were around 4,000 private hire vehicles in the CCZ each day during charging hours. By 2017, on an average chargeable day, 18,248 private hire vehicles were seen in the CCZ.

The CEPA Report

29. The CEPA report forecast that the removal of the exemption from private hire vehicles (other than wheelchair-accessible vehicles) could result in a 45% reduction in the number of private hire vehicles entering the CCZ each day (although those which entered the CCZ may remain there and carry out more journeys within the CCZ). It forecast that there could be a 6% reduction in the number of private hire vehicles in the CCZ overall. That amounted to a forecast reduction of 1% of traffic in the CCZ overall (i.e. private hire vehicles and other vehicles).

30. Reading the CEPA Report, and the request for a decision, it seems that the forecast was based on a certain number of assumptions. It seems that a reduction in congestion and traffic will result only if either fewer journeys are made into the CCZ or if a

smaller number of vehicles carry out more journeys in the CCZ. If, for example, passengers are required to bear all or part of the cost of the congestion charge but considered that to be too expensive, they might switch to (cheaper) public transport or decline to travel into the CCZ. In relation to the second possibility, if, to use a theoretical and very simplified example, there were 20 private hire vehicles each completing one journey into the CCZ prior the congestion charge, but changes in behaviour mean that 10 no longer travel into the CCZ and the work into, within and out of the CCZ is carried out by the other 10 vehicles, there may be a similar amount of journeys made but the number of vehicles involved in making those journeys is reduced. That may result in fewer vehicles in the CCZ. Consequently, there could in theory be a reduction in congestion within the CCZ.

31. On the first possibility, the response of passengers to increases in price due to part or all of the congestion charge being passed on to the passenger, CEPA forecast that customers were likely to be fairly price sensitive although this was likely to be less so in the case of small operators with localised markets and more loyal customers. CEPA forecast, however, that some customers would switch from one private hire vehicle operator to an alternative operator in order to find a lower price. They also considered that some of the customers who switched would change from private hire vehicles to taxis. They did not forecast that most passengers who did change their behaviour would switch away from private vehicles or taxis to public transport such as buses or the tube. Rather, CEPA said that it would "assume most customers would remain in the PHV/taxi sector with 'switching' customers allocated to operators with low fares and a large existing CCZ presence". That meant that some journeys would not be made by private hire vehicle (or taxi) and would either be made by public transport or not made at all. That would result in fewer vehicles, i.e. those that would otherwise have been used for such journeys, in the CCZ.

32. CEPA then considered changes in behaviour by private hire vehicle operators and the extent to which changes in behaviour could reduce traffic and congestion. CEPA noted that specialisation could occur when journeys were undertaken with fewer vehicles entering the CCZ, for example, by designating certain private hire vehicles for work within the CCZ or allocating work to private hire vehicles already within the CCZ. CEPA assumed that only the largest operators (in effect, two of the current operators) would be able to specialise in that way. Furthermore, drivers could also choose to spend more time within the CCZ, having paid the congestion charge.

33. Given all the assumptions made, CEPA forecast that private hire vehicle traffic within the CCZ could reduce by 6%. That could amount to a decrease in 1% in the overall traffic, i.e. the number of vehicles, in the CCZ in a year. It is not possible from the report to determine what proportion of the 6% forecast decline in traffic resulted from the reduction in demand from passengers for private hire vehicle and what proportion resulted from specialisation, that is the same number of journeys being undertaken in the CCZ by a lower number of private hire vehicles than was previously the case.

34. The report noted that the greatest impact of the change would be on small operators as they would be likely to be less able to accommodate the increased charge.

The Oxera Report and CEPA's Reply

35. The Oxera Report commissioned by Addison Lee took issue with the CEPA assessment and the assumption that there would be specialisation in the use of private hire vehicles within the CCZ. CEPA considered the matter again. In their reply, they set out the rationale for the specialisation assumption and their belief that there was some scope for specialisation. They indicated that the major driver, by which I understand they mean cause, of the predicted reduction in traffic would be the reduction in demand for private hire vehicles.

36. In other words, it seems that the bulk of the anticipated reduction of 6% private hire vehicles would result from a reduction in the amount of passenger journeys. That is, there will be less work available for private hire vehicles. In addition, some of the journeys still undertaken by vehicles will be undertaken by taxis, not private hire vehicles as some passengers will switch to taxis.

37. The issue is dealt with in the request for a decision in the following terms:

> "2.15 The CEPA Report forecasts that the removal of the PHV exemption would reduce traffic and congestion in the zone. In summary, they forecast that during charging hours in the Congestion Charging zone there would likely be:
>
> - 45% reduction in unique PHV entries;
> - 6% reduction in PHV traffic; and
> - 1% reduction in traffic overall.
>
> *(CEPA who forecasted these figures have stated that they represent broad estimates only but given the conservative approach they adopted, CEPA consider the 1% figure is at "the lower end of the range" (see page 5 of CEPA's further response dated 9 November 2018 (Appendix E to the Report to the Mayor which is attached at Appendix 2)).*
>
> 2.16 CEPA's forecast of a 45% reduction in the number of unique entries by PHVs into the zone during charging hours is based on the assumption that operators with larger fleets will distribute their bookings to minimise the number of PHVs needing to enter the CCZ. Doing so would mean that a smaller number of vehicles specialise in taking bookings within the zone, potentially undertaking more trips in the zone than they would have previously. The greatest impact on congestion will result from the expected lower demand for PHVs in the CCZ during charging hours as a consequence of the price per journey increasing to reflect the cost of the Congestion Charge.
>
> 2.17 Some have criticised CEPA's forecasts, in particular the Addison Lee Group who have submitted an independent report by Oxera, which contended that specialisation was a flawed concept and therefore the predicted traffic reduction of 1% was also unlikely to be realised. In response, TfL commissioned further work from CEPA to consider Oxera's report. The further work by CEPA (Appendix E to the Report to the Mayor at Appendix 2) states that their view remains that some specialisation is likely to occur as a response to competitive pressure. It also clearly acknowledges that there are

> uncertainties with regard to the scale of specialisation; however, the impact on traffic is not dependent on their judgement of specialisation. CEPA also explained that the 1% reduction in traffic is a conservative estimate. TfL support CEPA's analysis and note that the reduction in traffic is more closely tied to the demand response than specialisation. TfL also note that a 1% reduction in traffic in the zone is not an insignificant benefit where the potential for more radical change (during charging hours) is very limited, but congestion is still very high.2.18 Although the purpose of the Congestion Charging Scheme is to reduce traffic and congestion, there have always been consequential improvements in air quality from doing so. Removing the exemption for PHVs should reduce the number of vehicles in the zone and, therefore, help to improve air quality. The introduction of the CVD may further incentivise PHV drivers continuing to drive in the CCZ to do so in the cleanest possible vehicle. These will complement other initiatives including the introduction of the ULEZ Scheme in April 2019. "

The Position in relation to Wheelchair-Accessible Vehicles

38. The request for a decision noted that there was no proposal to remove the exemption from the congestion charge from taxis. It noted that the number of licensed taxi cabs and licensed taxi drivers had remained static or gradually declined over time. The request noted that there was believed to be "social value" in retaining the exemption for taxis given that in certain circumstances they represented the only method of transport available to wheelchair using disabled persons. The request noted that taxis were legally required to be wheelchair-accessible (whereas private hire vehicles are not and only 525 such vehicles, less than 1% of the total number of licensed private hire vehicles, are wheelchair-accessible). Taxis were also required to provide a range of other features which made them better placed to meet the needs of certain categories of passengers. The request noted the vital role played by taxis in the transportation of disabled passengers in central London and considered that the exemption for taxis should remain. The request said that:

> "For these same reasons, the proposals safeguard the exemption for the small number of [private hire vehicles] which are designated wheelchair accessible".

The Equality Impacts

39. The request for a decision summarised the duty of the defendants in relation to equality matters under section 149 of the 2010 Act. It referred to the equality impact assessment prepared by Mott MacDonald. It noted, amongst others, the following impacts assessment:

> "*BAME PHV drivers*
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> • Around 94% of all PHV drivers are from a BAME background so they will be disproportionately impacted by the removal of the exemption;
>
> • Increased professional costs as a consequence of having to pay the Congestion Charge will be incurred. Those PHV drivers who enter

> the CCZ every day during charging hours could expect to pay around £230 a month (assuming a 22-working day month and use of Auto Pay). In cases where a driver would need to absorb all costs, and travel in the zone every day, the impact would be at its greatest. This scenario is unlikely to be typical, except in cases of specialisation (which itself implies that the business model is set up to absorb the costs beyond just the driver);
>
> • Overall, the impact is assessed as a minor adverse one because the distribution and scale of the impact is considered to be low. Not all drivers will regularly enter the CCZ in charging hours. The taxi and private hire driver diary survey undertaken by Steer Davies Gleave in 2017 indicates 33% of the sampled PHV drivers made journeys into the CCZ in charging hours, while 23% of trips involved travel to, from or within the CCZ. This data would suggest that there is a fairly large number of PHVs which do not regularly enter the CCZ and so would not see a substantial increase in operating costs through paying the Charge. As suggested in the CEPA Report, some operators may take on the costs themselves or choose to pass the cost on to passengers; and
>
> • Sensitivity to the impact was assessed as low because the overall financial costs will be reduced if the payment constitutes a tax deductible expense, drivers qualify for a 100% discount such as the CVD or they are able to spread the cost over multiple trips.
>
> *Part-time female PHV drivers*
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> • A higher proportion of women across all industries tend to work part-time as compared to men (42% of women versus 13% of men). Part-time PHV drivers will be less able to spread the cost of the Congestion Charge across a number of journeys. As women can be assumed to be more likely to work as part-time PHV drivers, they will be disproportionately affected.
>
> • However, this impact was assessed as being "very low" as women make up less than 2% of PHV drivers in London, of which not all will work part-time, or in the CCZ during charging hours. Notwithstanding the scale of the impact, for those women who fall within the 2% and work day time weekday shifts in the CCZ, sensitivity to increased professional costs may be high."

40. It also dealt with the impact on passengers, including disabled passengers. It noted that those with mobility problems used private hire vehicles more frequently than those without (8% of disable Londoners used them once a week compared with 6% of non-disabled Londoners). It noted that the impact was only relevant to those travelling within the CCZ during charging hours with the additional cost being nil (if absorbed by the driver or operator) or minimal (if spread by the driver or operator over a number of hires). It thought that the most likely scenario was that the charge would be passed on to customers who would pay around £1-£2 a trip. The request recognised that that sum may not be insubstantial for people such as the disabled, people on low income or women, but noted that there would be opportunities to minimise the

impact. That included the continuation of the exemption for wheelchair-accessible private hire vehicles (which would, of course, apply only to a section of disabled people). There were other mitigating features including, for those disabled persons with Blue Badges, the ability to nominate the vehicle for a journey and thereby be exempt from the congestion charge. There were also subsidised travel schemes for taxis and private hire vehicles that certain passengers could use.

The IIA and the Report

41. The IIA, and the report on the consultation responses, were both submitted to the Mayor at the same time as the request for a decision. They expanded on the potential impacts and the consequences of the proposed removal of the exemption from private hire vehicles. The report noted that London's streets were some of the most congested in the world, delaying bus services and freight trips, making places unpleasant for walking and cycling, and worsening air pollution. It noted that, without further action, average traffic speeds in London were forecast to fall. It noted that there were a number of causes of the increase in congestion one of which was the composition of the traffic in the CCZ. It identified the increase in private hire vehicles as a factor in the increased congestion. The report noted that the removal of the exemption from private hire vehicles was expected to bring about a small reduction in traffic and may, therefore, help improve air quality.

42. The report identified potential negative impacts from the proposed removal of the exemption. It said this:

> "Negative impacts
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> "2.5.13 This proposal may put pressure on earnings for PHV operators and drivers. This could result in negative health outcomes for individuals. It may be difficult for some individuals to cover these costs and as such the removal of the exemption may lead to stress related and mental health issues for PHV drivers. It may also impact on physical health as a result of potential longer working hours.
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> How sensitive PHV drivers are to this impact will depend upon whether they meet the criteria for alternative discounts and exemptions, whether they are able to pass all or some of the cost onto passengers, whether they can share all or some of the cost with operators and whether they can adapt their behaviour to operate in the CCZ outside charging hours or outside the CCZ. Additionally, the IIA notes that the cost of the Congestion Charge may be tax deductible as a business cost (for drivers and/or operators). In cases where a driver would need to absorb all costs, and travel in the zone every day, the impact would be at its greatest (around £230 a month assuming a 22-working day month and use of Auto Pay).
>
> This scenario is unlikely to be typical, except in cases of specialisation (which itself implies that the business model is set up to absorb the costs beyond just the driver). And as stated at the beginning of this chapter, the proposal may only affect a relatively small proportion of PHV drivers as two thirds of PHV drivers do not enter the CCZ in charging hours. The overall impact was assessed as minor adverse.

> "2.5.14 This proposal may lead to some smaller PHV operators experiencing a rise in price per trip and potentially a reduction in demand for their services. This may lead to poor health and wellbeing outcomes for operators. The sensitivity of operators to this impact will depend on a number of scenarios including whether drivers will absorb some or all ofthe cost, if drivers are eligible for alternative discounts, whether drivers frequently enter the CCZ and the ability to spread costs over multiple trips. This was assessed as a minor adverse effect.
>
> "2.5.15 The removal of the PHV exemption may also limit the ability of older or disabled passengers to access essential services related to their health and wellbeing. Although designated wheelchair accessible PHVs will remain exempt, disabled passengers who do not use a wheelchair could see an increase in fares of around £1-2 for trips in the CCZ, depending on how the cost is passed on, unless they are eligible for another discount or exemption (e.g. the Blue Badge discount). This was assessed as a minor adverse effect.
>
> "2.5.16 It is recognised that any increase in fares may not be an insubstantial sum for these categories of people. However, there may be opportunities to avoid increased fares or minimise the impact of them. Older and disabled passengers may also be eligible to use Taxicard services to access essential services related to their health and wellbeing. Black cabs are used to carry out around 90 per cent of Taxicard journeys. Capped fares for Taxicard journeys in black cabs are expected to come into effect from 1 January 2019. See paragraph 2.5.7 – 2.5.9 below for more information as to mitigation."

43. The report also noted the equalities impact of the proposed removal of the exemption from private hire vehicles. It said this:

> "Negative impacts
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> "2.5.33 This proposal may negatively impact PHV drivers, particularly those that operate regularly in the zone during charging hours as they find their costs increase and incomes reduce as they cover some or all of the cost of the charge. As the majority of PHV drivers (around 94 per cent) are from Black, Asian and minority ethnic backgrounds (BAME) and many are from deprived areas, there is a disproportionate impact on these groups. There will also be a very low impact on part-time female PHV drivers (although women make up less than two per cent of PHV drivers in London). The impact on BAME PHV drivers and female PHV drivers was assessed as minor adverse.
>
> "2.5.34 The overall financial costs will be reduced if the payment constitutes a tax deductible expense, or drivers are able to spread the cost over multiple trips. It could be neutralised if vehicles qualify for other 100 per cent discounts or exemptions such as the CVD.
>
> "2.5.35 Negative equality impacts on passengers are most likely to affect those on low incomes, female and disabled passengers who are more frequent users of PHVs and would be disproportionately impacted if fares increase or PHV availability declines. The impact is

> only relevant to those passengers who wish to travel within the CCZ during charging hours with the additional costs nil (if absorbed by the driver or operator) or minimal (if spread by the driver/ operator over several hires)."

44. It also discussed the negative equality impacts on passengers including disabled passengers who were more frequent users of private hire vehicles and would be disproportionately affected if fares increased or the availability of private hire vehicles declined. It noted matters that may mitigate that impact.

45. The report noted that the impact on private hire vehicle drivers would only be experienced by those who drive into the CCZ during charging hours. Only about 33% of drivers did so. 67% of private hire vehicle drivers did not. It noted that passengers would experience reduced choice if fewer operators offered a service into the CCZ and that may also increase the cost of fares if operators passed on the cost to passengers.

Subsequent Events

46. By way of background, bookings for a journey are made by the passenger via an operator. The operator will assign the journey to a private hire vehicle driver. The operator will usually determine the charge for the journey. The congestion charge itself is paid by the registered keeper of the private hire vehicle, usually the licensed driver. In the case of one operator, Addison Lee, the operator is the registered keeper and the driver leases the private hire vehicle from the operator. If the driver enters the CCZ during charging hours on a charging day (Monday to Friday 7 a.m. until 6 p.m.), the registered keeper, usually the driver, of the vehicle will be liable to pay the £10.50 (if paying by Auto Pay, or £11.50 if not).

47. The way in which private hire operators can (and have) reacted to the removal of the exemption differs. There is one hire vehicle operator, Uber, which operates in excess of 10,000 vehicles and, as at 13 May 2019, had more than approximately 50% of the number of licensed private hire vehicles (the total as at 2 June 2019 being 89,101) available to it. It levies a £1 charge for each journey into the CCZ whether made during charging hours or days or not. Thus the £1 is levied on journeys into the congestion zone on weekday evenings and weekends and Bank Holidays when the congestion charge is not payable. If the private hire vehicle makes 11 journeys into the CCZ during charging hours on a chargeable day, the driver will not suffer any loss (as the amount of the congestion charge will be covered by the amount of surcharge on the fare for the journeys carried out). If the driver makes 10 or fewer journeys, the driver will have suffered a loss as the driver will not have received sufficient £1 surcharges on the journeys to cover the £10.50 cost of the congestion charge. If the driver happens to work on a weekend, and enters the CCZ, then the driver will receive £1 for each journey but will not have to pay the congestion charge.

48. Since 25 June 2019, Uber has informed the driver of the first part of the postal code of the destination of the passenger before the driver accepts the job. If the postcode is within the CCZ, that enables the private hire vehicle driver to decline to accept the journey and not enter the CCZ and so avoid the congestion charge. Another private hire vehicle operator, ViaVan, licensed to operate between 1,000 and 10,000 private

hire vehicles, also introduced an option for drivers to indicate that they do not wish to take a journey into the CCZ.

49. In the case of Addison Lee, the response has been different. It is licensed to operate between 1,000 and 10,000 vehicles. As Addison Lee is the registered keeper of the vehicles, it pays the congestion charge (not the driver). However, drivers have to lease their private hire vehicles from Addison Lee and the fee has increased by £15 a week. Addison Lee has also added £1.50 to all account bookings.

50. One operator, Green Tomato, has increased fares to passengers and intends to pass this increase on to private hire vehicle drivers with a view to them not being adversely affected by the congestion charge. Another firm indicated that for those who undertook a certain number of journeys in May or June 2019, the operator would pay the congestion charge until the end of the year. That appears to be a very limited offer. It does not apply to those registering with that operator from June 2019 onwards and, even for those covered by the offer, the payment of the congestion charge only lasts until the end of 2019.

51. These private hire operators use a very large number of the private hire vehicle drivers. In addition, however, there are many thousands of smaller operators, with 10 or fewer drivers each. The number of drivers used by these small operators, however, will run into many thousands. There is little evidence of how these private hire operators and drivers are faring under the amended Scheme. It is also right to note, however, that a private hire driver can change and register with a different operator or register with more than one operator.

52. Since 8 April 2019, the number of occasions when private hire vehicles entered the CCZ had decreased by between 16% and 28% between 1 and 22 May 2019 as compared with January to March 2019. In absolute terms that was a decrease of between 2,978 vehicles and 5,267 vehicles. That has been sustained with a maxium 36% decrease during June 2019 or a decrease of 6,792 in the number of occasions when private hire vehicles entered the CCZ compared with January to March 2019.

53. Ms Calderato, who is employed by Transport for London as Head of Transport Strategy and Planning says in her second witness statement that, whilst bearing in mind the short time since the Scheme change came into force and the fact that the introduction of the Ultra Low Emission Zone charge ("the ULEZ") may be contributing to the reduction in vehicles in the CCZ, "the reduction remains within or just below the range CEPA predicted on a monthly basis".

The Individual Claimants

54. There is evidence from two individual claimants, Mr Ali and Mrs Minshull. In terms of the claims of a breach of Article 8 or A1P1 ECHR, their claims turn on their particular facts. In relation to the question of proportionality under section 19(2)(d) of the 2010 Act or Article 14 ECHR, the court has to look at all the relevant evidence (including their evidence). Their individual circumstances may be illustrative of the kinds of problems that it is said have been created by the removal of the exemption but the assessment of the proportionality of the measure is not limited to, or dependent upon, their particular circumstances.

55. Mr Ali is a private hire vehicle driver with Uber. He is married with 5 children aged 9 to 17 years. In his evidence he focusses on the difficulties created by the need to pay two charges, the ULEZ charge of £12.50 a day each day and the congestion charge. The former charge is not challenged in these proceedings. Difficulties arising out of the need to earn enough to pay for the ULEZ charge are not relevant in assessing whether the impacts resulting from the congestion charge are disproportionate. By reason of the way in which Mr Ali has grouped the two charges together, and the absence of detailed evidence of how he worked previously, it is not possible to be precise in arithmetic terms about the effect on him and his family of the imposition of the congestion charge.

56. Prior to the imposition of the congestion charge on 8 April 2019, he worked on average about 6 hours a day for 6 days a week. He normally started work at about 5 or 6 a.m. and finished at about 11 am or 12 noon. He has increased those hours so works up to 14 or 15 hours a day.

57. First, in financial terms, he had not in fact suffered a decline in income as a result of the imposition of the congestion charge. He has worked at weekends and bank holidays (when he receives £1 for each journey but does not pay the congestion charge). He has worked on weekdays and the effect of the congestion charge has been mitigated by the receipt of some money reflecting the £1 imposed for journeys in the CCZ. There have been a small number of days when he must have made 11 or more journeys in the CCZ as he has received more than £10.50 from journeys on that small number of days. In the period from 8 April to 16 June 2019, he incurred congestion charges of £155 (and airport drop off charges of £70.40) – a total of £225.40. He received from Uber in the form of £1 per journey into the CCZ and airport and toll charges a total of £293.20 which exceeded the amounts which he was liable to pay.

58. Secondly, there has been a change in his work pattern and the number of hours working. He now works on both days at the weekend (formerly he worked only one day at the weekend). He also works longer hours each day as indicated above. Some of those extra hours are worked, it seems, to pay the ULEZ charge. The likelihood is that the switch to working an extra day at the weekend is the result of the imposition of the congestion charge. There is an incentive to drive on weekends (as no congestion charge is payable but he still receives £1 a journey extra). The ULEZ is payable on every day so there would be no specific benefit in switching to working on a weekend from the point of view of the ULEZ charge as that charge will be payable anyway. The likelihood is that the switch to working an extra day at the weekend is attributable to the imposition of the congestion charge and a portion of the longer hours worked is also attributable to the congestion charge.

59. Thirdly, working on the weekend limits the amount of time Mr Ali spends with his family. It also means that he is unable to take his son to football on Saturdays. Working longer hours has meant that he is unable to help his children with their studies (one of the children is preparing for GCSE examinations so this is a particularly important time for that child) or to take them to activities in the afternoon or evenings. He has to take his daughter to hospital appointments but, as far as one can tell from the witness statement, he does that on the day that he does not work in the week. More generally, weekend working and longer hours (a proportion of which is attributable to the imposition of the congestion charge) means he is tired, which affects his concentration and his mood, and has less time with his family.

60. Mrs Minshull is 68 years old. Following the death of her husband, she started work as a private hire vehicle driver. She has a 37-year-old son for whom she is financially responsible and who has mental health problems. She has a daughter and two grandchildren. Her daughter works part-time and Mrs Minshull arranges working patterns to ensure that she can undertake some of the child care arrangements. Prior to 8 April 2019, Mrs Minshull worked five days each week, four in the week and one at weekends. She worked from about 5.30 a.m until 11.30 a.m. She spent a few hours with her son and then at 3 p.m. picked up her grandson from school. Mrs Minshull now works later, until about 1.30p.m each day, meaning that she spends about an extra 2 hours, five days a week working. It seems that, occasionally, she may work one extra day a week (which may be a weekday).

61. Mrs Minshall only does a few trips into the CCZ – one or two a day on average. As an Uber driver, when offered a journey Mrs Minshull is sent the postcode of the address and could decline it. If, therefore, the job was one of the one or two jobs involving entering the CCZ on one of four days in the week when she is working, Mrs Minshull could decline that job, not go into the CCZ and not pay the congestion charge. If one of the jobs involving entering the CCZ is offered on the day at the weekend when she works, there would be no need to refuse the job as Mrs Minshull would not be charged the congestion charge on that day.

62. Mrs Minshull provided a third witness statement on the second day of the hearing (after the claimants had finished their case and during the defendant and interested party's submissions). I allowed that evidence to be admitted. Mrs Minshull accepts that she could refuse a job. She refers to Uber maintaining confirmation rates which she says Uber describes in this way "your confirmation rate is based on the percentage of trip requests you confirm. High rates don't affect your account, but often mean shorter wait times." Mrs Minshull has understood that, in effect, to mean that if she does not maintain a high confirmation rate it will mean her being offered a lesser quantity and quality of work. That is based, it seems, on her reading of the message. The message appears to indicate that if there is a high confirmation rate she will be offered jobs more quickly. There is no indication of what a high confirmation would be or whether refusing the 4 to 8 jobs a week during weekdays when Mrs Minshull is asked to go into the CCZ would materially affect that. Mrs Minshull also says that she only has 15 seconds to decide whether to accept the job (this is not explained in her evidence) and she finds it difficult or impossible to identify if a job involves travelling into the CCZ. She has not, therefore, it seems, declined a job that would take her into the CCZ. The implication is that the working for about an extra two hours a day, five days a week, is necessary to pay the congestion charge that she incurs 4 times a week, i.e. a sum of £42 a week.

63. I allowed the defendants to put in a third witness statement from Ms Calderato responding to Mrs Minshull's third witness statement. Ms Calderato explains that the relevant Transport for London official has discussed matters with Uber. They have informed Transport for London they do not alter the jobs offered to drivers based on their confirmation rates, that is, on whether a driver accepts a job (and so Mrs Minshull's worries on that score are unnecessary). Cancellation rates -that is, refusing a job after accepting it – are a different matter. So far as the system of offering jobs with information about the postcode of destination is concerned, that was introduced on 25 June 2019, a few weeks before Mrs Minshull made her third statement. The

expectation of Transport for London is that drivers will become more adept at using that system over time to avoid journeys into the CCZ, if they do not wish to enter the CCZ. If that does not happen, then they expect that Uber will have to adapt the system to give drivers the necessary information to take that decision as that is the purpose of introducing the change. Ms Calderato also questions the extent to which the figures put forward by Mrs Minshull justify a conclusion that she needs to work on average about an extra 2 hours a day. It is fair to say that Mrs Minshull's statement (and Mr Ali's to a certain extent) are unclear on the details necessary to make a full and proper analysis of the impacts upon them of the imposition of the congestion charge. For present purposes, I will assume that the effect on Mrs Minshull is as she describes, namely about an extra 2 hours or so of working on five days and the occasional additional day.

THE ISSUES

64. Against that background, and given the claim form and oral and written submission of the parties, the issues that arise are as follows:

(1) In relation to section 19 of the 2010 Act, can the defendant demonstrate that the removal of the exemption from liability to the congestion charge from private hire vehicles other than designated wheelchair-accessible vehicles is a proportionate means of achieving a legitimate aim?

(2) In relation to Mr Ali and Mrs Minshull does the removal of the exemption involve:

(a) an interference with their right to respect for private and family life within the meaning of Article 8(1) ECHR and (b) if so, was it justified;

(b) a breach of A1P1 ECHR as it involved a deprivation of possessions and if so was it compatible with the requirements of A1P1?

(3) Does the removal of the exemption amount to unlawful discrimination contrary to Article 14 ECHR because it involves differential treatment on grounds of race, sex, or disability and if so, can the defendant demonstrate that the impacts of the removal of the exemption are objectively justified?

THE FIRST ISSUE- PROPORTIONALITY UNDER SECTION 19 OF THE 2010 ACT

65. Section 19 of the 2010 Act deals with indirect discrimination, that is, the application of a provision, criterion or practice which is expressed in apparently neutral terms but has a disproportionate impact on certain groups of persons. That section applies to the exercise of statutory functions such as those in issue here concerning the making and approval of amendments to the Scheme: see section 29(6) of the 2010 Act. Section 19 is in the following terms:

"**19 Indirect discrimination**

> **"(**1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> "(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> "(3) The relevant protected characteristics are—
>
> - age;
> - disability;
> - gender reassignment;
> - marriage and civil partnership;
> - race;
> - religion or belief;
> - sex;
> - sexual orientation."

66. Prior to the hearing, it was accepted by the defendant that the measure in issue in this case satisfied the requirements of section 19(2)(a), (b) and (c) of the 2010 Act and the sole issue was whether the defendant could show that the measure was a proportionate means of achieving a legitimate aim within the meaning of section 19(2)(d) of the 2010 Act. In argument, questions arose as to whether the measure did put BAME persons at a particular disadvantage and the defendant ceased to accept that that the requirements of section 19(2)(b) were satisfied in relation to that group although they contend that the requirement is justified in any event. They accepted that the measure put female drivers and disabled passengers at a particular disadvantage and would have to be justified under section 19(2)(d) of the 2010 Act. I deal with the particular question of section 19(2)(c) of the 2010 Act as it applies to BAME drivers at the end of this judgment. For present purposes, I assume that the amendments to the Scheme, which remove the exemption from liability to the congestion charge from private hire vehicles (other than those which are wheelchair-accessible as defined), and rendered the registered keepers of such vehicles liable to the congestion charge, fall within section 19(2)(a)(b) and (c) so far as BAME persons, women and disabled passengers are concerned. The issue is, therefore, whether the defendant can show that the measure is a proportionate means of achieving a legitimate aim.

67. Mr Collins Q.C. for the claimants emphasises that the burden is on the defendant to demonstrate that he is acting for a legitimate aim, and that the measure is a proportionate means of achieving that aim. He submits that the defendant cannot show that the legitimate aim was to reduce traffic and congestion whilst not reducing the number of wheelchair-accessible private hire vehicles as the defendant did not give any thought or consideration at the time the measure was approved to the question of the need for wheelchair- accessible private hire vehicles. He submits that, as part of the legitimate aim is said to include such matters, and as they were not

thought of at the time, the defendant has not established a legitimate aim and the Confirmation Order must be quashed. In terms of proportionality, Mr Collins Q.C. submits, correctly, that what has to be justified is not the decision to amend the Scheme to remove the exemption from liability to pay the congestion charge, but the decision to do so in way which impacts disproportionately on persons with the characteristics of race, sex and disability. He submits that given the impacts of this measure on BAME persons who are low earners living predominantly in areas of relative deprivation, and on women and disabled passengers, the defendant cannot establish that the measure is a proportionate means of achieving a legitimate aim. He further submits that the defendant has not demonstrated that the measure was the least intrusive measure to achieve the aims.

68. Mr Chamberlain Q.C. for the defendant and the interested party submits that the defendant can show that the measure is a proportionate means of achieving a legitimate aim. The aim is the reduction of traffic and congestion within the CCZ without the loss of wheelchair-accessible vehicles and that aim was considered at the time. He submits the measures correspond to a real need to reduce traffic and congestion in the CCZ and are appropriate and reasonably necessary to that end. The potential impacts on BAME drivers, female drivers and disabled passengers were expressly considered at the time. The elected and accountable body (the Mayor of London) considered that the aim of reducing traffic and congestion was sufficiently important that the potential impacts on those groups was proportionate. Further, he submitted that care should be taken not to overestimate the likely impacts on the groups in question. Overall, he submitted that the defendant had discharged the burden of establishing that the measure was a proportionate means of achieving a legitimate aim.

The Proper Approach

69. The parties are agreed on the appropriate approach for this court to adopt in determining whether the defendant has established that the measure is a proportionate means of achieving a legitimate aim. They submit that the approach set out by the Employment Appeal Tribunal in the employment context in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraph 10 (subsequently approved by the Court of Appeal in *Lockwood v Department of Work and Pensions* [2014] ICR 1257) is appropriate, with suitable modifications to the language to reflect the fact that this case involves a public body and the needs of the public as identified by that body, rather than an employer. The relevant principles are set out in paragraph 10 of the judgment and are as follows:

> "10. The legal principles with regard to justification are not in dispute and can be summarised as follows:
>
> (1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways* [2005] IRLR 862 at [31].
>
> (2) The classic test was set out in *Bilka-Kaufhas GmbH v Weber Von Hartz* (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality

> principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board (HL)* [1987] ICR 129 per Lord Keith of Kinkel at pp 142–143.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paras 19–34, Thomas LJ at 54–55 and Gage LJ at 60.
>
> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA."

70. Furthermore, the claimants accepted that where the decision giving rise to the differential impact is made by a public body taking a decision to pursue a particular social policy, it is appropriate to accord what is described as a margin of appreciation, or discretion, to the public body. Similarly, in assessing whether the means adopted to pursue that policy are proportionate, a margin of discretion needs to be accorded to the assessment of the public body as to what is proportionate. In both cases, the identification of a legitimate aim and the assessment of proportionately, the court must ultimately be satisfied objectively that the aim is legitimate and the impact on those affected is proportionate but an appropriate margin of appreciation is to be accorded to the public body in considering those issues: see *Lord Chancellor v McCloud and others* [2019] IRLR 477 at paragraphs 143 to 145 and *R (Lumsdon) v Legal Services Board* [2016] AC 697 especially at paragraph 66.

Discussion

71. It is clear that the aim of the measure in question was to reduce traffic and congestion within the CCZ whilst not taking steps which might reduce the number of wheelchair-accessible vehicles available. Maintaining the exemption for wheelchair-accessible private hire vehicles was, from the outset, part of the thinking when the Order, and the Confirmation Order were made. That follows from the wording of the amendments to the Scheme made by the Order. They replace in terms the former exemption for "licensed private hire vehicles" with an exemption limited to "designated wheelchair-accessible private hire vehicle": see, for example, the substituted heading for paragraph 2 in Annex 2 to the Scheme and the amended description of which private hire vehicles remain exempt in paragraph 2(1)(c) of Annex 2 to the Scheme. The Order, confirmed by the Confirmation Order, provides a definition of what constitutes a wheelchair-accessible vehicle for these purposes. The contemporaneous documentation relating to the Confirmation Order confirms that position as appears from paragraphs 2.20 to 2.22 of the request for a decision which is summarised at paragraph 37 above.

72. In the circumstances, therefore, the claimants' submission that maintaining the current level of available wheelchair accessible vehicles formed no part of the thinking at the time, and hence no part of the legitimate aim, is untenable. The fact is that the defendant did intend to reduce traffic and congestion but to do so in a way which did

not risk imposing additional disincentives to those who drove designated wheelchair-accessible private hire vehicles. Furthermore, the defendant has demonstrated that he had sufficient information to justify formulating the aim in a way which included avoiding the risk of providing a disincentive to existing wheelchair-accessible private hire vehicles from continuing to operate. The number of taxis (all of which are wheelchair-accessible as defined) was around 21,026. There were 525 such private hire vehicles (less than 1% of those registered as private hire vehicles). The number of persons in Greater London using a wheelchair is thought to be about 130,000. The request for a decision recognised the significance of access to a wheelchair-accessible taxi or private hire vehicle for such persons as they may well have no alternative to using a taxi or private hire vehicle. Introducing a disincentive for wheelchair-accessible private hire vehicles (in the form of liability to the congestion charge) would have run the risk of reducing the number of such vehicles for a group particularly dependent on the availability of such vehicles.

73. As indicated, the aim of the amendment to the Scheme is to reduce traffic and congestion in the CCZ without affecting the number of wheelchair-accessible private hire vehicles. The congestion reflects the fact that there are more cars in the CCZ. This leads to delays in journeys. Furthermore, average traffic speeds for journeys were forecast to fall and, logically, journey times would take longer still if no action were taken. The presence of vehicles in central London was also considered to contribute to poor air quality and one consequential benefit of reducing the number of vehicles in the CCZ would be a small improvement in air quality. All these factors appear reasonably clearly from the contemporaneous documentation. The aim that the defendant sought to pursue, namely achieving a reduction in the number of private hire vehicles in the CCZ, is a legitimate one adopted as a measure of economic, social and environmental policy.

74. The measure adopted by the defendant does correspond to a real need. The need is to reduce the number of vehicles within the CCZ. The removal of the exemption from the congestion charge for private hire vehicles does reflect, or correspond, to a real need. The number of private hire vehicles had increased substantially since the Scheme was introduced in 2003. The number of private hire vehicles had increased from around 50,000 to over 87,000 and the number of licensed private hire vehicle drivers has more than doubled from around 55,000 to over 113,000 between 2008/2009 and 2017/2018. There was no similar increase in taxis or taxi drivers. The forecast was that the removal of the exemption could lead to a reduction of 6% in the number of private hire vehicles in the CCZ (which would amount to a reduction of 1% in traffic overall). The measure would, therefore, address the need to reduce the number of vehicles in the CCZ. Furthermore, where a measure is intended to operate, at least in part, by seeking to change the behaviour of individuals (here operators and drivers of private hire vehicles, and passengers) it is reasonable to rely on forecasts of the likely change. At the time that the measure was adopted, the forecast was of a reduction. The defendant was entitled to rely on those forecasts. It is also permissible to have regard to subsequent events to determine whether the forecast changes have materialised. As it happens, in the relatively short time since the amendments to the Scheme came into force, and bearing in mind there may be other factors at play, the evidence is that the reduction in traffic is broadly in line with the forecast. The evidence of Ms Calderato, in her second witness statement, is that private hire

vehicles are making between approximately 3,000 and 6,800 fewer entries into the CCZ.

75. The removal of the exemption from private hire vehicles (other than the small number of wheelchair-accessible vehicles) was an appropriate and suitable method of reducing the number of vehicles in the CCZ. It could result either in fewer journeys into the CCZ or a more rational use of the road space within the CCZ with a smaller number of private hire vehicles performing the number of journeys previously undertaken by a larger number of such vehicles (and reducing the number of vehicles travelling empty within the CCZ). The method adopted was reasonably necessary for that end. Unless steps were taken to reduce the number of private hire vehicles in the CCZ there would remain a real problem of a large number of private hire vehicles driving into the CCZ. Taking steps by removing the exemption from congestion charge would have an impact on that as it was forecast to result in fewer trips into, and better use of private hire vehicles within, the CCZ.

76. The defendant has also established that there are no other less intrusive measures which could realistically achieve the same aim. Various suggestions of alternative measures had been raised by the claimants in their claim form but were not pursued in their written or oral submissions. I am satisfied by the evidence of Ms Calderato that those measures were not available measures. There was a suggestion that the congestion charge could be increased for all those presently liable to the charge (but private hire vehicles remaining exempt) and that might result in a reduction in traffic of 1% overall. First, that would not, in fact, address the increase in the number of private hire vehicles in the CCZ, nor the fact that a large number circulate without passengers. The aim is to reduce the number of such vehicles in the CCZ, by making changes which will either encourage fewer journeys into the CCZ or which will result in more efficient and better utilisation of private hire vehicles within the CCZ (fewer vehicles undertaking the journeys required, and fewer vehicles present in the CCZ without passengers). Measures aimed at producing a 1% reduction in traffic overall would not, of themselves, address the particular problems of the increase in the number of private hire vehicles in the CCZ. Furthermore, the evidence of Ms Calderato is that even a large increase in the congestion charge for those currently liable to pay it is unlikely to yield substantial reductions in the number of vehicles in the CCZ. Ms Calderato points out that an increase from £5 to £8 (more than 50%) in 2005 did not lead to any discernible reduction in traffic.

77. I turn then to the issue of proportionality. The issue here is whether the defendant can demonstrate that the impacts on BAME and female drivers and disabled passengers are justified as a proportionate means of achieving the aim. It is the impact on those groups that has to be justified not the measure. The starting point is to consider the likely impacts on those affected.

78. It is accepted that 94% of private hire vehicle drivers are from a BAME background and 71% live in the most deprived areas of London. The mean annual earnings from available statistics for private hire vehicle drivers, taxi drivers, and chauffeurs is currently thought to be £29,097 per annum gross, less than £23,000 per annum net. That may overstate the earnings of private hire vehicle drivers. 2% of private hire vehicle drivers work part-time. It is accepted that the likelihood is that the majority of these will be women. It is convenient to consider the impact on BAME and part-time, largely female, drivers, together.

79. The maximum financial consequence that could arise as a result of removal of the exemption from the congestion charge is that a private hire vehicle driver who drove into the CCZ area during charging hours on the 5 days a week when it is payable would, if the driver were the registered keeper, have to pay the congestion charge of £10.50 a day (assuming the driver paid by Auto Pay). If charges were not increased to cover the cost of the congestion charge, a driver would face having to pay £52.50 a week, or approximately £230 a month, in congestion charges. That, as the claimants submit, is a loss of about 10% of income.

80. In assessing the likely impact, it is appropriate to bear in mind what was anticipated and what has happened. First, the CCZ applies to a small but significant area of London, i.e. the central area. The evidence is that substantial numbers, in the region of 2/3, of private hire vehicles, never enter the CCZ. They work, and undertake journeys, in the vast area that forms greater London but which lies outside the CCZ. By way of example, a 2017 survey found that 67% of private hire vehicles never entered the CCZ and only 33% did. As the contemporaneous documents noted, "[t]his data would suggest that there is a fairly large number of [private hire vehicles] which do not regularly enter the CCZ and so would not see a substantial increase in operating costs through paying the Charge" (see paragraph 4.4 of the request for a decision).

81. Secondly, it was expected that operators would make changes which would enable drivers to recover some of the cost of the congestion charge thereby reducing its impact. The defendant was entitled to proceed on the basis that changes in behaviour would be likely to result following the amendments to the Scheme. In fact, that has happened. Uber, the largest operator, with a very large number of drivers, levies a charge of £1 on all journeys passing through the CCZ (whether made during charging hours or not). That levy is passed on to drivers. The extent to which such a levy reduces the impact on a driver depends on the number of times the driver carries a passenger within the CCZ. The evidence is that some operators have also introduced levies which will, at least in part, reduce the financial impact on drivers. In the case of one large operator, with a large number of drivers (Addison Lee), their operating model is different. They are the registered keeper of their vehicles and pay the congestion charge but they have introduced an increase of £15 a week on the rental fee that they charge to their drivers for leasing the vehicle. It seems, therefore, that the impact on those private hire vehicle drivers will be in the order of £15 a week, or about £60 a month, not the £52.50, or £230 a month that the worst case scenario would suggest of a driver having to pay the congestion charge 5 times a week.

82. Thirdly, there is evidence that some operators are modifying their operating practices and this, too, is likely to lead to a reduced impact. One operator, ViaVan, allows drivers to indicate if they wish to drive into the CCZ. Those who do not wish to do so will not be affected by the congestion charge. Uber now provides the postcode for the destination. That enables drivers to decide if they wish to accept the fare and, if the postcode is within the CCZ, they can decide not to accept it. There are means, therefore, by which some operators at least, have enabled drivers to avoid going into the CCZ if they wish so they will not be affected by the congestion charge. Some drivers may continue to go into the CCZ. This may be because some at least will have calculated that they can do enough journeys in the CCZ with the levy to cover the cost, or a sufficient part of the cost, of the congestion charge to make that worthwhile.

83. That said, there will be a number of drivers who are likely to be economically adversely affected to some degree by the withdrawal of the exemption from the congestion charge and will either see their income reduced or will have to work longer hours to meet their basic costs which will include payment of the congestion charge if they enter the CCZ.

84. The claimants contend that the effect on individual drivers, and their families, is illustrated by the circumstances of the second and third claimants, Mr Ali and Mrs Minshull. As discussed above, in Mr Ali's case the impact is not said to be loss of income (he has received more from the £1 levy than he has paid in congestion charge). It is said that he has had to work one day a week extra at weekends and longer hours in the week to enable him to earn enough to pay the congestion charge. Some of the extra hours would be worked to cover the additional cost, as an additional overhead, of the ULEZ charge. The extra hours of work has impacted on his family life as he cannot spend that time with his family. By way of example, he cannot take his young son to football on Saturdays; he cannot help another child with homework in preparation for GCSE examinations and he has reduced time, and energy, to devote to other family activities. He is tired and stressed. Mrs Minshull has to work about an extra 2 hours or so a day for the five days a week that she works (and an occasional additional day). That reduces the time that she spends with her family, and in particular, with her son who has his own particular needs arising from his mental health condition. Mrs Minshull has not taken up the opportunity provided by her operator, Uber, to decline journeys into the CCZ as she is concerned that this will affect her confirmation rate (the number of jobs she accepts) and she fears that this may adversely affect the quantity and quality of work she receives. She also says that she finds it difficult to determine from the postcode, in the time available for a decision, whether a journey would involve entering the CCZ.

85. Fourthly, it is important to bear in mind that the public authority responsible for deciding whether to confirm the Order is the Mayor. He is elected and accountable for the decisions taken in relation to the management of road user charging systems within London. He was informed of the potential effects of the removal of the exemption on BAME drivers and part-time drivers who were likely to be women as appears from the request for a decision, the report on the consultation responses and the IIA. He considered that the importance of the aim – the reduction of traffic and congestion in central London – did justify the potential impacts on the drivers concerned. That is relevant in the assessment by this court of the proportionately of the measure.

86. In all the circumstances, I am satisfied that the defendant has demonstrated that the removal of the exemption from the congestion charge from private hire vehicles (other than designated wheelchair-accessible vehicles) is a proportionate means of achieving a legitimate aim. The likely impacts on a proportion of BAME and female private hire vehicle drivers, in terms of reduced income and/or additional hours of work for drivers and the effects on drivers and their families, is a proportionate means of achieving that aim in the circumstances.

87. Turning then to disabled passengers, the anticipated effect on such passengers is likely to be either the increase in charges for journeys (where, for example, all or part of the congestion charge is passed on to customers) or possibly a reduction in the availability of private hire vehicles willing to travel into the CCZ. The likely increase

was thought to be £1 or £2 a journey. The request for a decision recognised that an increase of even £1 or £2 would not be an insubstantial amount for some disabled persons. The contemporaneous documentation noted that some of the impact could be mitigated. In particular, and likely to be of greatest relevance, is a scheme offering subsidised taxi and private hire vehicle journeys. For those disabled persons whose disabilities do not include mobility issues (or disability issues relating to transport) they may be forced to use less convenient but cheaper public transport. There is, therefore, likely to be an impact on disabled persons. The elected and accountable decision-maker was aware of that when deciding to make the Confirmation Order. Again, in all the circumstances, the differential treatment, in terms of the likely impacts on a proportion of disabled persons, particularly those on low incomes, in terms of increased charges and/or reduced availability of private hire vehicles willing to travel to the CCZ, is proportionate in the circumstances.

88. For all those reasons, the defendant has shown that the removal of the exemption from the congestion charge for private hire vehicles (other than designated wheelchair-accessible vehicles) is a proportionate means of achieving the legitimate aim of reducing traffic and congestion within central London. The measures do not, therefore, involve any discrimination contrary to sections 19 and 29(6) of the 2010 Act.

THE SECOND ISSUE – ARTICLE 8 ECHR

89. Public bodies must exercise their powers in a way that is compatible with Convention rights, i.e. rights derived from the ECHR and incorporated into domestic law by the Human Rights Act 1998 ("HRA"): see section 6 HRA. One of those Convention rights is Article 8 ECHR which provides:

> **"Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or for the protection of the rights of others."

90. Mr Collins submitted, on behalf of the second and third claimants, that removal of the exemption from the congestion charge involves an interference with their right to private and family life. He submitted that this does not arise from the loss of income that may arise from having to pay the congestion charge. Rather that loss of income results in their need to work longer hours and the reduction of time with their families, and the effect on the health of Mr Ali and Mrs Minshull, involves an interference with the right to respect for their, and their families', rights under Article 8 ECHR. He relies on passages in *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR at paragraph 37 and in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 where Lord Reed said at paragraph 80 that:

> "The cases indicate that a reduction in income may have consequences which are such as to engage article 8, as for example where non-payment of rent leads to the

> threat of eviction from one's home, but they do not indicate that the reduction in income itself within the ambit of article 8."

91. Mr Collins submitted that the defendant is unable to demonstrate that the measure is necessary to meet a legitimate aim within Article 8(2) ECHR, essentially for the same reasons as relied upon in relation to section 19 of the 2010 Act. Mr Chamberlain submitted that the measure did not involve an interference within Article 8(1) ECHR and, in any event, would be justified for, essentially, the same reasons that he submitted the measure was proportionate under section 19 of the 2010 Act.

Discussion

92. The removal of an exemption from the congestion charge for private hire vehicles does not involve an interference within the meaning of Article 8(1) ECHR. It is a measure concerned with managing the use of the available road system and seeks to remove the exemption from liability to charges for one group of vehicles, namely private hire vehicles. As with many legislative changes to a regulatory scheme, those affected by the changes may well have to adapt their behaviour in response to the changes. The fact that a person may have to work different or longer hours, or both, in order to earn enough to pay increased overheads because of a change in the regulatory scheme would not normally give rise to an interference with private or family life within the meaning of Article 8(1) ECHR. Not all changes in a regulatory scheme, even those which have economic impacts for individuals, involve an interference within Article 8(1) which has to be justified under Article 8(2) ECHR. By way of example, where regulators approve increases in train or tube fares, that may well result in individuals having to adapt their working patterns to deal with the increase in fares. That would not, of itself, amount to an interference within the meaning of Article 8(1) which has to be justified under Article 8(2). Similarly, changes in transport costs as a result of increases in road or bridge tolls, or charges for road usage, such as the congestion charge, would not normally involve an interference with private or family life within the meaning of Article 8(1) ECHR. There may be instances in which the consequences of particular changes have such an effect on an individual or his or her family as, potentially, to give rise to issues under Article 8(1) ECHR.

93. On the facts of this case, however, I do not consider that either Mr Ali or Mrs Minshull has begun to demonstrate that the impact upon them of the changes to the Scheme, and the removal of the exemption from liability to the congestion charge, involves an interference within the meaning of Article 8(1) ECHR. In the case of Mrs Minshull, the evidence is that on five days a week, she works approximately 2 hours a day longer (from 5.30 a.m. until 1 or 1.30 p.m., rather than 11 or 11.30 a.m.) and that restricts the time that she can spend with her adult son who, himself, has health issues. She also occasionally works an additional day a week. Mr Ali is working an extra day at weekends and longer hours in the week, which limits his ability to spend time with his family, and causes in part the additional tiredness described above. I do not underestimate the impact of the changes, nor the importance of the changes seen from the perspective of the claimants and their families. I do not, however, consider that the impacts are such as to render a change in the regulatory regime surrounding road pricing, involving the removal of exemption from the congestion charge for a category of vehicles, an interference with the second and third claimant's private or family life within the meaning of Article 8(1) ECHR.

94. Mr Collins relied upon the decisions of the European Court of Human Rights in *Monory v Romania and Hungary* (2005) 41 EHRR 37 and *Elsholz v Germany* (2002) 34 EHRR 58. In both cases, the Court observed that the mutual enjoyment of each other's company by parent and child constituted a fundamental element of family life. The context in which those observations was made were very different in factual terms from the present. In *Monory*, a family lived together in Hungary. The wife left and commenced divorce proceedings and took the daughter to Romania. The father took steps to have his daughter returned to Hungary. The Court held that the Romanian authorities had failed to make adequate and effective efforts to assist the father to have his child returned to him with a view to him exercising his parental rights. It was for that reason that there was an interference within the meaning of Article 8(1) ECHR. In *Elsholz*, a court refused a father access to his son. He and the son's mother were unmarried but lived together, and with the son for the first year and a half of the son's life. The father had continued to see his son frequently for the next three years. The Court found that the decisions refusing the father access to his son interfered with his right to family life guaranteed by Article 8 ECHR. It was in that context that the Court referred in each case to the mutual enjoyment by parent and child of each other's company. The facts of those two cases do not support a conclusion that the changes in the present case to the pattern of work and family life, resulting from the imposition of the congestion charge, amount to an interference with family or private life within the meaning of Article 8 ECHR.

95. If I were wrong about that, the defendant has justified any interference under Article 8(2) ECHR. The measure is in accordance with law: the 1999 Act and the Scheme made under that Act, and the terms of the Order as confirmed by the Confirmation Order. The measure pursues a legitimate aim within the meaning of Article 8(2) ECHR. It aims to reduce traffic and congestion within central London and is a measure of social, environmental and economic policy aimed at the protection of the rights and freedoms of others or, alternatively, the economic well-being of an important sector of the economy. It is necessary in a democratic society, and is proportionate, for the reasons given above in relation to section 19(2)(d) of the 2010 Act. The amendments to the Scheme are not, therefore, incompatible with Article 8 ECHR.

THE THIRD ISSUE – A1P1

96. A1P1 provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in accordance in the public interest and subject to the conditions provided by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

97. Mr Collins submitted that the removal of the exemption from, and consequent imposition of, the congestion charge on the second and third claimants constitute a deprivation of possessions within the meaning of the second sentence in A1P1. He submitted that the sum paid by way of the congestion charge (the £10.50, if using auto pay, paid on entry into the CCZ during charging hours) amounts to a possession

within A1P1. He submitted that the requirement to pay amounted to a "deprivation" of that possession. He made it clear that he was not claiming or relying upon any expectation of future income on the part of the 2nd and 3rd claimants (presumably from fares from passengers).

98. Mr Chamberlain submitted that the payment of a charge did not require payment from identified money, rather an individual chose to incur liability by entering the CCZ. As such it could not amount to a deprivation of a possession. In his detailed grounds, Mr Chamberlain submitted that, in any event, under the third sentence of A1P1 states have a right to control property and that a measure in the nature of a charge would be compatible with A1P1 unless devoid of reasonable foundation, relying on *Gasus Dosier und Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403, and *R (Federation of Tour Operators) v Her Majesty's Treasury* [2008] EWCA Civ 752.

Discussion

99. The established case law is that A1P1 comprises three distinct rules. The first, general, rule contained in the first sentence concerns the principle of peaceful enjoyment of property. The second rule concerns the deprivation of possessions and that may only be carried out subject to compliance with certain conditions. The third rule, in the second paragraph of A1P1, recognises that the state is entitled to control the use of property in accordance with the general interest or to secure the payment of taxes, contributions or penalties. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property: see *Gasus* at paragraph 54, and *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 at paragraph 61. The second paragraph of A1P1 must be construed in the light of the first sentence of A1P1 so that an interference with possessions must achieve a fair balance between the demands of the general interests of the community and protection of individual rights. There must, therefore, be a relationship of proportionality between the means employed and the aim pursued: *Gasus* at paragraph 62.

100. In the present case, the imposition of liability to pay the congestion charge on the second and third claimants if they enter the CCZ does not involve a deprivation of possessions within the meaning of the second sentence of A1P1. The circumstances in which the charge comes to be payable do not involve a deprivation. An individual must choose to enter the CCZ during charging hours and if the individual does do so he or she will be liable to pay the congestion charge. That does not involve anything resembling a deprivation of property.

101. The case would, therefore, most naturally fall within A1P1 only if liability to pay a charge on entering the CCZ amounted to the exercise of control of property within the second paragraph of A1P1 as action to secure the payment of a tax or contribution or a penalty. I am conscious that I heard limited argument on A1P1 and was not referred in argument to any domestic or Strasbourg authority on the meaning of "possessions" (or indeed, "deprivation" within A1P1) or the applicability of A1P1 to schemes such as the present. I will, therefore, assume without deciding that the case does fall within either the first sentence of A1P1 or, more naturally, within the second paragraph. On that assumption the question is whether the removal of the exemption, and the consequent imposition of the congestion charge, on the registered keeper of private hire vehicles such as the second and third claimants, was done for a legitimate aim

and reflects a fair balance between the general interest and the interests of the individual.

102. The amendments to the Scheme involving the removal of the exemption from the congestion charge do seek to achieve a legitimate aim and does reflect a fair balance between the general community interest in reduced traffic and congestion within central London and the interests of the second and third claimants, largely for the reasons given above in relation to section 19 of the 2010 Act. The amendments to the Scheme and the imposition of congestion charge on private hire vehicles (other than designated wheelchair-accessible vehicles) is compatible with A1P1.

THE FOURTH ISSUE – ARTICLE 14 ECHR

103. Article 14 ECHR provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

104. The claimants contend that the amendments to the Scheme fall within the ambit of Article 8 or A1P1 to the ECHR. They contend that the removal of the exemption for private hire vehicles involves differential treatment in respect of BAME and female drivers which the defendant cannot justify. The defendant contends that the matters do not fall within the ambit of either Article 8 or A1P1 so that Article 14 is not applicable. If Article 14 is applicable, they accept that there is a differential impact on BAME and female drivers and disabled passengers but contend that that it is justified.

Discussion

105. In considering whether the amendments to the Scheme involve a breach of Article 14 read with Article 8 or A1P1 ECHR in this case, it is necessary to consider whether (1) there is differential treatment (2) on grounds of race or gender (3) in relation to a matter falling within the scope, or ambit, of Article 8 or A1P1 ECHR and (4) which the defendant cannot show is objectively justified.

106. The subject-matter may fall within the scope of an article, such as Article 8 or A1P1 ECHR notwithstanding that there is no substantive breach of the article. In relation to objective justification, what the defendant needs to justify is the differential treatment complained of, that is, it is the discriminatory effects of the measure or policy, not the policy itself: see the discussion by Baroness Hale at paragraph 188 of *R(SG) v Secretary of State for Work and Pensions* [2015] 1 WLR. 1449. The effects here are the impacts on private hire vehicle drivers having to work longer hours, with the consequential effect on the time they have to spend with their families and their health.

107. First, the subject-matter of this claim does not fall within the scope or ambit of Article 8 ECHR. The introduction of charging private hire vehicles for entry to the CCZ with the consequence that drivers adjust their behaviour and work different or longer hours or both, does not fall within the ambit of Article 8 ECHR. Mr Collins relies on the decision of the European Court of Human Rights in *Petrovic v Austria* (2001) 33 EHRR 14. That case concerned the provision of financial assistance to enable parents

to stop working in order to look after children. The Court found that the matter did fall within the scope of Article 8 ECHR. It noted at paragraph 29 of its judgment that Article 14 ECHR came into play whenever the "subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed" or the measures complained of are "linked to the exercise of a right guaranteed". In the context of that case, as the Court observed, the provision of parental leave allowance was the means by which the State demonstrated respect for family life. It is not surprising, therefore, that the matter fell within the scope of Article 8 ECHR, notwithstanding the fact that failure to provide an allowance would not, of itself, involve a breach of Article 8 ECHR. Here, the position is different. The amendments to the Scheme introducing the congestion charge for private hire vehicles are not linked to the exercise of any rights under Article 8 nor does it constitute one of the modalities or means of exercising it. The effects in terms of longer working hours, with consequential effects on time spent with family and, potentially for some, wider health concerns are far too remote to bring the matter within the scope of Article 8 ECHR.

108. Mr Collins also relies on cases such as *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 and also *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449. In *DA*, the Supreme Court was dealing with a cap on the welfare benefits available to those in need. Lord Wilson noted at paragraph 37 of his judgment that "provisions for a reduction in welfare benefits to well below the poverty line will strike at family life". In *SG*, Lord Reed observed that reductions in income would not, of themselves, fall within the scope of Article 8 but may do so if they had consequences such as eviction from a home due to non-payment of rent. Both of those cases contemplated situations where a measure had clear and significant consequences for the ability to maintain family life. They are far removed from the situation in the present case. The consequences for individuals reacting to the economic changes brought about by the introduction of the congestion charge for private hire vehicles are not of the order, and are far too removed, to bring the measure within the ambit or scope of Article 8 ECHR.

109. As for A1P1, the position is more balanced. I proceeded above on the assumption, without deciding, that the matter involved either an interference with possessions or the control of property. I noted that there had been limited argument on that issue. I found that the amendments to the Scheme did not involve a breach of A1P1 for other reasons. On balance, and with some hesitation given the lack of argument on this issue in this case, I would find that the imposition of charges in the exercise of a statutory power in this case does fall within the scope or ambit of A1P1. It is using the statutory power to levy charges in order to achieve public goals, namely the management of traffic within central London. It is something that is linked, at the very least, to the situation envisaged in the second paragraph of A1P1. If the public body were to do so in a way which involved unjustified differential treatment on grounds of race, sex or other status, then that would be contrary to Article 14 ECHR.

110. Secondly, the defendant accepts that there is a differential impact, and hence differential treatment within the meaning of Article 14 ECHR, in the present case so far as BAME and female drivers are concerned. Although the defendant and interested party sought to withdraw that concession in relation to section 19 of the 2010 Act, they have not sought to argue that there is no differential impact in the

present case for the purposes of Article 14 ECHR. I proceed, therefore, on the basis that there is.

111. Thirdly, the question then is whether the defendant has shown the measure to be objectively justified. Differential treatment

> "is, however, discriminatory if it has no objective or reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised" (per the Grand Chamber in *Carson v United* Kingdom (2010) 51 EHRR at paragraph 61)."

112. In broad terms, one way of approaching that question is to ask whether the defendant has demonstrated that (1) the measure pursues a legitimate aim (2) the measure is rationally connected to that aim (3) no less intrusive measure could have been adopted to achieve that aim and (4) bearing in mind the consequences of the measure, its importance, and the extent to which the measure will achieve the aim, the defendant has a fair balance been struck between the interests of the community and the individuals. In general terms, the courts will respect, and give significant weight to, the decisions of democratically elected and accountable bodies making choices in areas of general economic or social policy, particularly those involving difficult questions relating to the allocation of resources. That is especially the case where the particular issue has been given active consideration by the accountable body (be it Parliament, or the government, or as here, the Mayor who is given specific responsibility by Parliament for deciding whether to confirm a charging scheme). Even here, the court must still consider the grounds of justification carefully and a point may come "where the justification for the policy is so weak, or the line has been drawn in such an arbitrary position, that even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable" (see per Baroness Hale at paragraph 18 in *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545).

113. There is an issue between the parties as to whether the approach should be reformulated, particularly in relation to the fourth stage (the fair balance stage) so that the court should respect the choice made by the decision-maker unless the choice was manifestly without reasonable foundation, as foreshadowed by the decision of the Supreme Court in *DA* (see, particularly, the judgment of Lord Wilson at paragraphs 55 to 66 and per Lord Carnwarth, with whose judgment Lord Reed and Lord Hughes agreed, at paragraphs 110 to 118). Mr Collins submits that that case concerned welfare benefits and is not applicable in the present context. Mr Chamberlain submits that the approach applies to cases involving a general measure of economic or social policy of which a decision on when and at what level welfare benefits should be payable is an example.

114. In my judgment, the approach adopted by the majority of the Supreme Court in *DA* reflects the fact that, in areas involving general social and economic policy adopted by the legislature or government, there is a need to respect the democratic legitimacy of the decision-maker. Where such a body has given careful consideration to what aim is to be achieved and whether the achievement of that aim justifies the anticipated adverse effects on particular groups, the courts ought to give significant weight to such assessments in considering the proportionality of the measure. The weight to be given may be affected by the extent to which the matter was specifically considered

by the relevant body, or whether the likely adverse consequences were anticipated. The court will still need to ensure that there is a reasonable foundation for the measure and that the justification is not so weak or arbitrary as to be unjustifiable.

115. The question is whether this is such a case. In my judgment it is. Parliament has provided for the making of charging schemes for road use. It has specifically ensured that responsibility for confirming such schemes rests with a democratically elected and accountable body. The nature of the measure – road charging schemes applicable within the capital city – involves difficult decisions about the importance of the public interest involved and weighing the competing claims of the public interest against particular groups within society. It is the type of social or economic measure taken by a public body, after full consideration of the potential impacts, where the court should give significant weight to the views of the decision-making body. The courts should be cautious about concluding that the amended Scheme, confirmed by the Mayor, is disproportionate in its effects. In the circumstances, I would not find the amendments to the Scheme to be unlawful unless they were manifestly without reasonable foundation. For the avoidance of doubt, however, I propose to assess the proportionality of the measure by that approach and also by asking whether the measure struck a fair balance between the interests of the individuals and the community.

116. The defendant has demonstrated that the amendments to the Scheme, involving the removal of the exemption and the imposition of the congestion charge during charging hours on private hire vehicles (other than wheelchair-accessible vehicles) are objectively justified. This is largely for the same reasons that it is a proportionate means of achieving a legitimate aim under section 19 of the 2010 Act. The measure seeks to achieve a legitimate aim: the reduction of traffic and congestion in central London with the resultant benefits that would follow. The measure adopted is rationally related to that aim. Other, less intrusive, measures would not achieve that aim. The measure is not manifestly without reasonable foundation. It is a carefully considered measure, based on expert economic forecasts, and after consideration of the likely impacts on particular groups of persons such as BAME and female drivers and disabled passengers. Applying the approach preferred by the claimants, the measure does strike a fair balance. The aim is an important one. The measure is anticipated to make a realistic contribution to that measure, reducing the number of private hire vehicles by 6% and overall traffic by 1%. Whilst the claimants describe that as limited, it is a significant attempt to address the problems of increasing use of private hire vehicles within central London and is seen as an important and significant contribution to the reduction of traffic and congestion within central London by the decision -making body. There will be an adverse impact for a proportion of drivers, in particular in terms of working different and longer hours, and to disabled passengers in terms of increased cost for journeys and possible reduction of private hire vehicles prepared to travel into the CCZ. The measure, however, strikes a fair balance between the general public interest in tackling traffic and congestion in central London and the interests of private hire vehicle drivers and passengers. The defendant has established that the measure is, on any test, objectively justified. The amendments to the Scheme, and the imposition of the congestion charge on private hire vehicles does not involve any unlawful discrimination and is not contrary to Article 14 read with Article A1P1 ECHR. For completeness, I note that, even if I had considered the matter fell within the ambit of Article 8 ECHR, I would still have concluded that the

measure was objectively justified and did not involve any breach of Article 14 even read with Article 8 ECHR.

THE ADDITIONAL ISSUE –WHETHER THE MEASURE PUTS BAME DRIVERS AT A PARTICULAR DISADVANTAGE

117. An issue arose during argument as to the way in which the requirements of section 19(2)(a) (b) and (c) of the 2010 Act were satisfied in the present case and, in particular, whether the provision, criterion or practice put BAME drivers at a particular disadvantage. The difficulty was perceived to be this. The provision, criterion or practice was, it seems, assumed to be either the Confirmation Order, removing the exemption from private hire vehicles, or the application of the charging provisions in the Scheme as amended to private hire vehicles. That was applied by the defendant (A within the meaning of section 19(2)(a) of the 2010 Act) to a private hire vehicle driver who was from a BAME background (B within the meaning of section 19(1) and (2) of the 2010 Act) and also to persons who did not share B's characteristics (i.e. white private hire vehicle drivers).

118. The defendant and interested party had accepted in his detailed grounds that the requirements of section 19(2)(c) of the 2010 Act were satisfied. That is understandable. 94% of private hire vehicle drivers are from a BAME background. The impact of removing the exemption from the congestion charge had a greater impact, statistically, on BAME drivers than white drivers. The question that arose in argument was how the removal of the exemption from the congestion charge, and the imposition of liability to pay the congestion charge on private hire vehicles, put BAME drivers at a particular disadvantage, as white, or non-BAME drivers, were put at the same disadvantage? The question was were both BAME drivers and drivers who did not share that characteristic put at the same disadvantage?

119. The problem did not arise with the other two groups. The amendments to the Scheme did put part-time drivers (the majority of whom were assumed to be women) at a particular disadvantage as they worked fewer hours and had less opportunity to make up the shortfall from the imposition of the congestion charge (which was £10.50, if using Auto Pay for a single entry in the CCZ in charging hours). Similarly, disabled passengers were thought to be put at a particular disadvantage as they would be less able to use cheaper alternatives such as public transport and would be more likely to pay higher fares for journeys in private hire vehicles.

120. In the light of the discussion during argument, Mr Chamberlain, understandably, sought to withdraw the concession in relation to section 19(2)(c) being satisfied. Mr Collins, equally understandably, objected to the withdrawal of the concession at this late stage. I gave the claimants time to put their submissions in writing. They object to the defendant being given permission under CPR 14.1(5) to withdraw the concession. I would have been minded to permit the defendant to do so as the matter raised, essentially, arguments of law and did not require further evidence and raised a potentially important issue concerning the interpretation and application of section 19(2)(b) of the 2010 Act.

121. In the circumstances, however, it is not necessary for me to decide whether or not the measure complained of does satisfy the requirements of section 19(2)(b) of the 2010 Act as I am satisfied, in any event, that the defendant has established that the measure

is a proportionate means of achieving a legitimate aim. It would not be sensible, nor fair to the claimants, to decide what could be an important issue for them, and for other cases, when the issue was raised late by the defendant and not the subject of full legal argument.

122. For completeness, I record in brief the arguments of the claimants lest the matter go further. They contend that section 19 of the 2010 Act applies in the following way. A, in section 19 of the 2010 Act, is the Mayor of London. B is a BAME driver of a private hire vehicle. The practice, criterion or provision is the Scheme which, since 8 April 2019, applies to vehicles for hire for the transportation of passengers and requires that the vehicle either be a licensed hackney carriage (i.e. a taxi) or a designated wheelchair-accessible private hire vehicle in order to benefit from the exemption to the congestion charge. The provision, criterion or practice applies to persons who do not share the protected characteristic, namely non-BAME drivers (of taxis, or private hire vehicles). It places BAME drivers at a particular disadvantage as non-BAME drivers are more likely to drive a taxi (71% of taxi drivers are white, 94% of private hire vehicle drivers are BAME). Mr Chamberlain would respond that it is not permissible to compare taxis and taxi drivers with private hire licenced vehicles and drivers as there are material differences between the regulatory regimes for taxi and private hire vehicles and drivers and so they cannot be compared: see section 23 of the 2010 Act.

123. As indicated, it is not necessary to decide that issue. There may be other answers to this problem. Instinctively, the fact that a measure applies to a group of persons, and 94% of the members of that group are BAME, leads one to think that the measure is giving rise to differential impact which needs to be justified as it has a statistically greater impact on one (racial) group as compared with another. It may be that the answer is that the Scheme applies to private hire vehicles and has the result of putting persons who are BAME at a disadvantage as they are more likely than non-BAME persons to be drivers (and the registered keeper) of such a vehicle and likely now to be liable to pay the congestion charge. For present purposes, it is not necessary to resolve these issues.

CONCLUSION

124. The removal of the exemption from the congestion charge for private hire vehicles does not involve any discrimination within the meaning of section 19 of the 2010 Act as the defendant has shown that it is a proportionate means of achieving a legitimate aim, namely the reduction of traffic and congestion within the CCZ without reducing the number of designated wheelchair-accessible vehicles. The amendments to the Scheme are compatible with, and involve no breach of, Articles 8, and 14 and A1P1 ECHR. For those reasons, this claim is dismissed.