Neutral Citation Number: [2021] EWHC 2108 (Admin)

Case No: CO/4740/2020

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

Leeds Combined Court,
1 Oxford Row, Leeds,
LS1 3BG
Date: 28th July 2021

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN	**Claimant**
(on the application of KATHERINE ROWLEY)	
- and -	
MINISTER FOR THE CABINET OFFICE	**Defendant**

- -
- -

Catherine Casserley (instructed by Fry Law) for the **Claimant**
Zoe Leventhal and Nathan Roberts (instructed by Government Legal Department) for the **Defendant**

Hearing date: 16.6.21

- -

Approved Judgment

MR JUSTICE FORDHAM :

Introduction

The case

1. This judicial review case is about the provision of British sign language ("BSL") interpreters for Government live briefings to the public about the Covid-19 pandemic ("Briefings"). The case focuses on two things in particular. The first is the absence of any BSL interpreter – by any means and in any medium – for two "Data Briefings" which took place on 21 September 2020 and 12 October 2020. The second is Government's continuing position that it will not use 'on-platform' BSL interpreters for Briefings (as are used for Scottish and Welsh Government live briefings); rather, it will use 'in-screen' BSL interpreters (a feature available in Government live online coverage). The legal analysis focuses on two statutory duties arising under the Equality Act 2010 ("EqA2010"). One is the duty to make reasonable adjustments for disabled persons (EqA2010 section 29(7)(a)). The other is the public sector equality duty ("PSED") (EqA2010 section 149(1)). These are obligations imposed by Parliament on the Defendant as a service-provider (reasonable adjustments) and as a public authority (PSED). These duties can be enforced by judicial review proceedings. They give rise to objective legal standards whose enforcement Parliament has entrusted to the Court. That means this case engages not only responsibilities which Parliament placed on Government, but also responsibilities which Parliament has placed on the Court.

The hearing

2. What the legal system calls the 'hearing' of this claim was undertaken by MS Teams, a mode arranged by the Court with the parties and agreed by them. I was satisfied that this mode was justified – eliminating any risk to any person from having to travel to a court-room or be present in one – and involved no prejudice to any person's interests. The open justice principle was secured. The case and its start time were published in the Court's cause list, as was an email address usable by any member of the press or public who wished to observe, as many did. I had previously directed – being satisfied that it was necessary, proportionate and promoted open justice to do so – that: "the Court shall arrange for two NRCPD-accredited BSL Interpreters to attend the hearing by remote access, free of charge"; and "any person ('the Observer') who has submitted their email address to the Court and is accessing the hearing may screen-share to any other person or persons present at the same location as the Observer, provided that no recording or image is to be made by any person". That prohibition on recording and making images was communicated prior to, and at, the hearing, and – once it had commenced – by email to anyone waiting in the MS Teams 'lobby' to be admitted. I informed participants that, provided they complied with that prohibition, they were free to use live social media. I also made them aware of the MS Teams 'live text' facility, together with the facts that this was not an official or Court-provided function, or part of the hearing, and that the Court could not vouch for its accuracy. My clerk provided the skeleton arguments, by email during the hearing, to any member of the press or public wanting copies.

Requests for recordings

3. On 14 June 2021 I refused a request by the BBC for permission to "make a Zoom recording" of the hearing for use in the BBC2 programme "See Hear". I explained in my reasons: that there was a serious legal controversy as to whether the Court had power to grant the request (the Defendant's submission was that I had no power); that the BBC had not identified a power, nor made submissions, nor provided evidence in support of an application; that there had been no request, or direction, for "broadcasting" the hearing; that I had serious concerns about allowing recording, there being far-reaching implications and no identified criteria or guidance; that the position of the Interpreters needed to be considered; that the hearing was imminent, a satellite hearing on this issue was not justified, the request had been made late in the day, and there was no basis to adjourn; that the Court would make its own recording; and that if the BBC wished to make an application to access that recording, such an application could be made and considered, on an informed basis, with a secure legal analysis identified. On 23 June 2021 I refused an application made by Drummer TV, supported by evidence and submissions, for an order permitting the release of the Court-directed audio-visual recording of the hearing. That was for the stated purpose of appropriate clips being included in a documentary, conditional on the parties' consent and appropriate liaison to protect the dignity of the Court and others involved. The basis of the application was: that, by the use of appropriate short clips it would be possible to provide a 'flavour' – give an 'illustration' – of how the hearing had been 'set up'; that this would 'facilitate open justice', showing the Court operating in a way empowering to Deaf people and BSL users; and that it was a key part of the story being told. My reasons were as follows. I was not satisfied that I had power to grant the request (the Defendant's position, with which the Claimant's team agreed, was that I did not). Section 85A of the Courts Act 2003 (as amended by the Coronavirus Act 2020) empowered me to direct that the proceedings could be "broadcast" in a specified manner "for the purpose of enabling members of the public to see and hear the proceedings": that was plainly concerned with live observation of a remote hearing, promoting open justice by ensuring a reasonable opportunity to 'follow the proceedings' as they happen (cf. R (Spurrier) v Secretary of State for Transport [2019] EWHC 528 (Admin) [2021] 4 WLR 33 §31). The making by the Court of the audio-visual recording (s.85A(1)(b)) was to produce "an audio-visual record of the proceedings", constituting an authorised recording for the purposes of the criminal prohibition on recording or transmission (s.85B(1) and (6)(a)). CPR 39.9(3) entitles any person to obtain a transcript of the recording of any hearing on payment of the authorised charges; while CPR PD51Y §4 deals with recordings being "accessed in a court building, with the consent of the court". All these provisions need to be put alongside the careful, clear and restrictive arrangements made to enable recording, broadcasting and transmission of court proceedings (see Re BBC [2021] EWHC 170 (QB) [2021] 4 WLR 37 §§9-10), and put alongside the evidenced will of Parliament and the practical effect of the application being made (cf. Spurrier §§26 and 28). I had in mind, in the context where remote hearings had become prevalent during the pandemic and recordings made, that any permission from the Court – presumably in its inherent jurisdiction and ostensibly to promote open justice – would give rise to this clear prospect: content which could not be broadcast live on television or online during the hearing could instead be broadcast on television or online just a short time after the

hearing, through an order allowing access to the Court recording. The permission sought appeared to be unprecedented. Considerable caution was called for. I was satisfied that what Drummer TV wished vividly to be able to do – 'illustratively' giving a 'flavour' of the way the hearing had been 'set up' – could be addressed in a different way: Drummer TV could illustrate and discuss the 'setup' and platform used, without showing actual footage or reconstructing actual content of the hearing, a course which the Claimant supported, with which her solicitors offered to help, and to which the Defendant did not object. I was not persuaded that allowing the application was necessary for the open justice principle or for respect for Article 10 rights. My conclusion, on both the BBC and Drummer TV applications, was that I was not satisfied that I had jurisdiction but, even had I been so satisfied, I would not have exercised it in all the circumstances.

The Evidence

4. There was a bundle of 1700-plus pages. There were witness statements in support of the claim for judicial review from: the Claimant (7.12.20 and 13.4.21); her solicitor Christopher Fry (14.12.20, 15.2.21, 14.4.21 and 19.5.21); Dr Kate Rowley (no relation of the Claimant) a Lecturer in the Department of Deaf Studies and Interpreting at the University of Wolverhampton (17.12.20); Amanda Casson Webb the Joint Chief Executive at the Royal Association for Deaf people ("RAD") (13.4.21); and Marcel Hirshman a Deaf and BSL Interpreter (14.4.21). There were witness statements on behalf of the Defendant from Peter Heneghan, the Deputy Director of Digital Communications in the Prime Minister's Office and the Cabinet Office (1.4.21 and 28.5.21). Permission to rely on Dr Rowley's statement, with no separate requirement for her to file a report in accordance with CPR35, was granted by Johnson J (26.2.21). Each party proved able to 'take in their stride' the evidence filed by the other, including its timing. No adjournment was sought. At a time when some evidence was contested, I made an order (8.6.21) directing that it would be considered 'de bene esse' at the hearing, with objections then ruled on. In the event, objections were withdrawn and we could focus on substance and relevance. The Defendant queried whether, but I am satisfied that, references to Hansard were properly made: as part of the relevant factual context and with no 'questioning' of proceedings in Parliament. Exhibits included "screenshots": an in-screen BSL interpreter; an in-screen BSL interpreter alongside a 'data slide'; a data slide together with a subtitle; a data slide with a BSL interpreter in an 'explainer video'; a sample social media post (embedded in a letter dated 15.3.21 from Julia Lopez MP to all MPs); 'on-platform' BSL interpreters in the Scottish First Minister's live broadcasts. Ms Leventhal confirmed as to evidenced signposting of web pages hosting relevant content – such as Mr Heneghan's signposting of the YouTube web page hosting "videos" from "Number10gov", and the "gov.uk" web page hosting "slides, datasets and transcripts to accompany coronavirus press conferences" (of which a hard copy print-out as at 18.3.21 was exhibited) – that the content was intended to be part of the evidence in the case.

Capital D Deaf

5. The phrase "affiliation to the Deaf community" is found in the Equal Treatment Bench Book (February 2021, p.411) used by the Courts. Other examples of "capital D 'Deaf'" included Amanda Casson Webb's evidence using the phrase "for Deaf people who use British Sign Language (BSL) as their first language" and Dr Kate Rowley's evidence

using the phrase "for Deaf BSL Users" (a phrase which I will also use). In the PSED Assessment (§42 below) the phrase used is "d/Deaf". Both Counsel commended the following description, which originates from the Scottish BSL National Plan 2017-2023: "The term 'deaf' includes people who are deaf, Deaf, Deafblind, deafened and hard of hearing. The capital D 'Deaf' is used as a cultural label and refers to people who are profoundly deaf, whose first or only language is sign language and are part of a cultural and linguistic minority known as the Deaf community".

The Briefings

6. Mr Heneghan's evidence speaks of "Briefings" and "Data Briefings". So will I. As he has explained: "In response to the pandemic, the Government has conducted a number of Briefings. The format of the Briefings can vary, but they are typically hosted by a Government Minister accompanied by one or two senior civil servants. The Minister will usually provide an update on developments related to the pandemic and the other expert civil servants will usually also speak. This is then usually followed by a question and answer session, with questions from people normally in the following order: members of the public, members of national media outlets, and members of local media outlets". He goes on to explain that "the first Briefing was held on 3 March 2020"; that the Briefings had been "hosted from a room in Downing Street"; that from "week commencing 29 March 2021, the Briefings moved to a designated broadcast room at No 9 Downing Street"; that as at 1 April 2021 there had been "around 130 Briefings to date"; and that "two particular Briefings" on 21 September 2020 and 12 October 2020 – the first two "Data Briefings" – were "of a different nature from most other Briefings in that they were not led by a minister, but rather were led by a medical or scientific adviser", being "more focussed on some of the underlying data relating to the pandemic, rather than on (for example) announcements of policy or changes in the law or guidance". On the gov.uk web page, where the various "slides and datasets" and "transcripts" are found, the Briefings (including Data Briefings) are called "coronavirus press conferences". They were called "Government coronavirus briefings" in the Defendant's pre-action correspondence. They have also been called "the Government's press briefings", "Government-hosted national briefings" and "national live broadcasts". The basic pattern, as regards the Briefings, was as follows. The first Briefing was conducted by the Prime Minister, together with the Government's Chief Scientific Adviser (Sir Patrick Vallance) and Chief Medical Officer (Professor Chris Whitty), on 3 March 2020. The next Briefings were held on 6 March 2020, 9 March 2020 and 12 March 2020. Then there was a Briefing on 15 March 2020, at which the Prime Minister announced that Briefings would now take place daily, as they did until 5 June 2020 by which time there had been some 79 Briefings. Slides and datasets were first used at the Briefing on 30 March 2020 and were frequently used from then onwards: by 5 June 2020 slides and datasets had been used and published in conjunction with some 67 of the 79 Briefings which by then had taken place. From 8 June 2020 to 23 June 2020 the Briefings took place on all weekdays, after which the pattern was less regular. On 21 September 2020 and 12 October 2020 there were the first Data Briefings. The Data Briefing at 11am on 21 September 2020 was hosted by Sir Patrick Vallance and Professor Whitty. The Data Briefing at 11am on 12 October 2020 was hosted by the Deputy Chief Medical Officer (Professor Jonathan

Van-Tam), accompanied by Professor Stephen Powis (NHS England's Medical Director) and Dr Jane Eddleston (Greater Manchester Medical Lead).

Accessibility Aspects

7. The following points are of particular relevance, in light of the issues in this case, as aspects relating to accessibility of the Briefings. (1) From the start (3.3.20), all Briefings have been covered live on BBC1, on the BBC News Channel – a channel freely available to any person with a functioning television – on BBC iPlayer, and on the Government online channels including YouTube. The Briefings remain accessible, for example on the 10 Downing Street YouTube channel, as videos. (2) From the start (3.3.20), live subtitles have been provided by the BBC, as an 'in-screen' option. (3) From 16 March 2020 an in-screen BSL interpreter was provided by the BBC on the BBC News Channel. That was a BSL interpreter provided for the BBC by the company Red Bee Media, superimposed on the screen using a live 'feed' from a studio. (4) By 7 May 2020 the BBC was also providing an in-screen 'prompt' on BBC1, at the start of all Briefings, publicising the in-screen BSL interpretation available on the BBC News Channel. (5) From 21 May 2020 it was arranged that the BBC would provide a clean BSL interpreter 'feed' for use by Government in its own media channels. (6) No BSL interpreter was provided, on any channel, for the Data Briefings on 21 September 2020 or 12 October 2020; nor in any uploaded video of those Data Briefings. (7) From 26 November 2020, there has been an arrangement involving prior confirmation as to whether the BBC is going to provide BSL interpretation for any Briefing and, if not, Red Bee Media provides it direct for use by Government in its own media channels.

The Claimant

8. The Claimant is in her mid-30s and is a self-employed actor and a writer. She became profoundly Deaf at the age of 3. Levels of deafness – "mild", "moderate", "severe" and "profound" – are measured by reference to the quietest sound that a person can hear: see the Disability Glossary in the Equal Treatment Bench Book at p.411. The Claimant is also a visually impaired person: she has full sight loss in her left eye and peripheral vision loss in her right eye as a consequence of Usher Syndrome Type 4. She was diagnosed with Dyslexia in 2003 aged 19. At the time of the Data Briefings in September 2020 and October 2020, she was living alone, pregnant and anxious (not least having previously suffered a series of miscarriages). By the time of her first witness statement (7.12.20) she was 25 weeks pregnant; by the time of her second witness statement (13.4.21) she had given birth to her first child, a son. She tuned in to watch the first Data Briefing at 11am on Monday 21 September 2020, having learned that it was taking place. She was unable to find any BSL interpretation. She tuned in again to watch the second Data Briefing at 11am on Monday 12 October 2020, having learned that it was taking place. She was again unable to find any BSL interpretation. As Mr Fry's evidence also explains, she promptly – on each of those two days – contacted Fry Law (of whom she was an existing client), raising her concerns about this and asking whether anything could be done. That contact was by means of a service called Sign Video: it connects BSL speakers to a BSL interpreter and then in turn communicates by phone with Fry Law. As Mr Fry's evidence puts it: the Claimant was outraged that there had been no BSL interpreter for the Data Briefings; she said she felt that the Government did not care about her, her unborn baby

or Deaf people who use BSL. Mr Fry agreed to write a letter before claim which he did (16.10.20). I accept the evidence summarised in this paragraph: it is relevant and there is no basis to reject it. I will need to return to the Defendant's submissions: (i) that the Court should bear in mind that factual matters have not been tested in judicial review as they would in a county court claim; and (ii) that two further specific aspects of the Claimant's witness statement evidence should be rejected by the Court.

The Claim

9. The Claimant's judicial review proceedings were commenced on 18 December 2020. Permission for judicial review was granted by Johnson J on 26 February 2021. The claim form and grounds for judicial review included these features. (1) The targets of the claim are "the decisions" not to – but the grounds also refer to "the failure" to – provide BSL interpreters for the Briefings on 21 September 2020 and 12 October 2020. (2) EqA2010 duties said to have been breached are the reasonable adjustments duty (Ground 1) and the PSED (Ground 2). (3) Ground 1 (reasonable adjustments) includes the claim that the Defendant has thereby "discriminated against the Claimant". (4) The grounds allege a "continuing breach", in the context of "ongoing briefings". (5) The grounds describe 'on-platform' provision ("the inclusive approach of having an interpreter standing with the person or persons who are conducting the briefing 'in platform'") as "the reasonable step" being "put forward", as to which there has been both a "failure to provide" (ground 1) and an absence of "due regard" (Ground 2). (6) The remedies sought are (i) "declarations that the Defendant has acted in breach of its obligations under [EqA2010]", (ii) a mandatory order that the Defendant "be required to comply with its duties to Deaf BSL users so that it gives effect to its obligations under [EqA2010]" and (iii) damages. (7) Remedy (ii) (mandatory order) has always been intended to be a mandatory order requiring 'on-platform' BSL interpreters at Briefings. This fits with (4) and (5). The Claimant's letter before claim (16.10.20) identified as the "action required" the provision at Briefings of "a BSL Interpreter … in attendance, in person" and identified as a "purpose of the proceedings" obtaining "an Order compelling" accessibility by that "means". Ms Casserley's skeleton argument (1.6.21) described what was sought as "a mandatory order… that the Defendant provide an on-platform interpreter". The PSED Assessment (28.5.21) (§42 below) itself addressed on-platform ("platform signer") provision, identified in Mr Heneghan's accompanying submission to Mr Blain as a key part of "the issue" in this judicial review claim. (8) As to remedy (iii) (damages), this was included without pleaded expansion; the focus in the materials and submissions on both sides has been on damages for discrimination against the Claimant from breach of the reasonable adjustments duty through the absence of any BSL interpretation for the two Briefings on 21 September 2020 and 12 October 2020.

A 'then and now' claim

10. Given these features, I am satisfied that the claim form and grounds for judicial review stood as a fair and clear framework with two distinct temporal focuses. First ('then'): the position as at 21 September 2020 and 12 October 2020 when no BSL interpretation was provided at all for the two Data Briefings. Secondly ('now'): the current position as to the non-provision of on-platform BSL interpreters for Briefings. There is said ('then') to have been, and is said ('now') to be, a breach of the reasonable adjustments duty (Ground

1) and the PSED (Ground 2). The 'then' challenge does not impugn, but nor concede, the legality of the absence of any BSL interpretation for the early Briefings in March 2020: I was told that county court cases raise this issue. Judicial review is capable, and can be apt, for raising 'then' and 'now' issues. Declaratory relief can be 'then' or 'now' or both. Mandatory orders are by nature about 'now'. Dangers lie in 'rolling judicial review' where unfocused claims (or appeals) involve moving targets, especially where the Court is asked – for no principled reason, or without discipline, or without practical utility – to evaluate legality across a fluctuating factual matrix or an extended timeline. This is not such a case. I will come on to discuss relevant EqA2010 case-law. At this stage I note: examples of a 'then' analysis are Finnigan v Chief Constable of Northumbria Police [2013] EWCA Civ 1191 [2014] 1 WLR 445 and R (VC) v Secretary of State for the Home Department [2018] EWCA Civ 57 [2018] 1 WLR 4781 (a judicial review case) at §193; an example of a 'now' analysis is Royal Bank of Scotland Group Plc v Allen [2009] EWCA Civ 1213 [2010] 1 EGLR 13 at §6; an example of a 'then and now' analysis is R (Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ 1058 [2020] 1 WLR 5037 (a judicial review case) at §210(3).

Key Features of the Context

An unprecedented public health and economic emergency

11. This is the first of some key features of the context, having particular resonance for the legal analysis which follows. The Briefings were part of Government's response to the pandemic, delivered in the circumstances of the pandemic. Events were unfolding at speed – sometimes day by day, sometimes hour by hour – in circumstances which were quite exceptional. The Government response to the pandemic was evolving, often at pace, with decisions made and reviewed on an ongoing basis. Government was making difficult judgment calls, including about medical and scientific issues. It was doing so after taking advice from relevant experts, in the context of powerfully expressed conflicting views about many of the measures being taken and about how various balances should be struck. It was identifying appropriate measures and policies to address the pandemic. That included broad political questions as to how to respond to the needs of particular groups. Government was acting under huge pressure, responding to this public health and economic emergency. These features, expressed in this way, have all been recognised by the judicial review Courts. Ms Leventhal cited R (Detention Action) v Secretary of State for the Home Department [2020] EWHC 732 (Admin) (Divisional Court 25.3.20), a case about immigration detention measures, particularly at §§27 and 32; R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) [2020] PTSR 2198 (Divisional Court 15.6.20), a case about the coronavirus job retention scheme, particularly at §§43 and 44; and R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605 [2021] 1 WLR 2326 (Court of Appeal 1.12.20), a case about the lockdown restrictions, particularly at §§89 and 97. The phrase "an unprecedented public health and economic emergency" was adopted in Adiatu at §44. An early chronology of the pandemic and March 2020 events is in Adiatu at §§9-15 and Dolan §§3-8; reviews of the lockdown restrictions between April and June 2020 are summarised in Dolan at §9.

Multi-faceted challenges and actions including communications and accessibility

12. One part of the Government response to the pandemic involved communications to the public. That brought a host of issues and many multi-faceted questions, including as to accessibility. It is wrong to 'zoom-in' on one aspect of accessibility of one species of communication, without appreciating the overall picture and the vast number of difficult, burdensome and complex issues with which Government was having to deal. It is also wrong to use 'hindsight', and be 'wise after the event'. It is necessary to remember the steps taken and arrangements made, revised, improved and adjusted, as accessibility aspects (§7 above). Events unfolded against a backcloth of liaison and consideration. On 7 March 2020 Government had set up the National Resilience Covid-19 Communications Hub, bringing together the communication expertise across the UK Government, including behavioural scientists, researchers, digital experts, press, strategic communications, creative and programme managers, and partnership teams. One of the Communications Hub's important designated functions was to ensure that messages about the pandemic reached people who, including because of matters relating to protected characteristics such as language barriers or disability, might be in particular need of the information or find it harder to receive it. As Mr Heneghan explains, the context included steps to ensure accessibility of information for people with a wide range of impairments. He gives as examples the production of information in "easy read" format for people with lower reading comprehension skills, large print for people with sight impairments, audio recordings also for people with sight impairments and also some braille for a small number of products. In relation specifically to disability, the Cabinet Office in May 2020 established the Disability Communications Working Group (DCWG) which met on a monthly basis from May 2020. It comprised representatives from the Cabinet office and Government Equalities Office and representatives from eleven disability charities: Disability Rights UK, Scope, RNIB, National Autistic Society, Sense, Leonard Cheshire Disability, Mencap, MIND, MS Society and Muscular Dystrophy UK. The communications and accessibility context included liaison within Government, and between Government and relevant agencies. Examples related to the accessibility aspects (§7 above) include the discussions with the BBC that led to BSL interpretation being provided for the Briefings (from 16.3.20) and the feed (from 21.5.20); the arrangement with Red Bee (from 26.11.20) for direct BSL interpreter provision for any Briefing in respect of which the BBC was not intending to provide one on the BBC News Channel. Examples of other arrangements, described by Mr Heneghan, included the Department of Health and Social Care commissioning the charity SignHealth to produce five BLS videos in relation to those who are clinically extremely vulnerable, and commissioning the organisation Remark to produce three BSL videos on face coverings and exemptions. The context included steps taken of their own initiative – but of which Government was aware – by other organisations. One example was the BBC 'prompt', about which Government was told. Another is the production of other SignHealth BSL summaries, described elsewhere in the evidence as having been focused on issues relating to shielding.

BSL interpretation for Briefings: an issue raised

13. A series of questions and concerns were raised, by various persons and organisations, in relation to BSL interpretation and Briefings. There was the written question (16.3.20) from Drew Hendry MP (asking the Prime Minister "what assessment he has made of the merits of providing BSL during live televised statements"). There was a letter (16.3.20) from Mr Fry (a solicitor with a special interest in disability rights work who became the Claimant's solicitor in these proceedings) about the importance of BSL interpreters in the context of daily briefings and Government advice; a letter co-signed by 12 Deaf people's organisations and charities (the RAD; National Registers of Communication Professionals; Deaf4Deaf Ltd; UK Council on Deafness; Action Deafness; The Limping Chicken blog; National Union of British Sign Language Interpreters; the Deaf LGBTIQA project; SignHealth; Stop Changes to Access to Work; Association of Sign Language Interpreters; British Deaf Association ("BDA")). There were the various pre-action letters written by Mr Fry, on behalf of various clients on various dates (including 28.3.20, 6.5.20 and 22.6.20), and Mr Fry's letter (7.4.20) drawing attention to what was said in the WHO 'Disability Considerations' document (§35(5) below). There was the letter from the BDA (31.3.20). There was a letter from Dr Lisa Cameron MP, writing as chair of the Disability All-Party Parliamentary Group (29.4.20). There was a letter from the Equality and Human Rights Commission ("EHRC") (30.4.20) (§47(3) below). There was a campaign called "Where is the Interpreter?", launched by Lynn Stewart-Taylor in April 2020, supported – according to the evidence – by some 62 Deaf peoples' organisations. That campaign included a Petition which by 13 May 2020 had 26,306 signatures. There were the two queries from the Paymaster General during April 2020. There was the Freedom of Information Act 2000 request by Liam O'Dell, requesting a copy of the Government's Equality Impact Assessment relating to the Briefings. There was the letter from the RAD (9.9.20). There were, as Mr Heneghan describes in his evidence, the discussions at the DCWG meetings about the level of provision for BSL at the Briefings, with some organisations continuing to request an on-platform interpreter. There were the questions (on 12.10.20 and 23.11.20) asked by the Shadow Minister for Disabled People, Vicky Foxcroft MP. There was Mr Fry's pre-action letter (16.10.20) on behalf of the Claimant.

BSL interpretation for Briefings: an issue considered

14. Linked to the last feature is the fact that a series of documents came into being which reflect or record the thinking within Government on this issue. The Prime Minister responded (19.3.20) to Mr Hendry MP. The Government Legal Department ("GLD") responded to Mr Fry's letters before claim (from 3.4.20). The Government responded (13.5.20) to the "Where is the Interpreter?" Petition. Briefing notes were prepared, on this issue, for the chair of the DCWG for the meetings (7.5.20 and 1.10.20). The Minister of State for Media and Data (John Whittingdale MP) responded (2.6.20) to the BDA letter (31.3.20). A good practice guidance document called "Accessibility of Covid 19 Communications" dated July 2020, was developed as part of the Hub's work. The Government responded to the Freedom of Information Act request (31.7.20). The Prime Minister responded (12.10.20 and 23.11.20) to Vicky Foxcroft MP's questions. A Cabinet Office email (13.10.20) set out three different plans (all 'in-screen') for a BSL

interpreter for Briefings. GLD's pre-action responses to Mr Fry, in the context of these judicial review proceedings, were written (2.11.20 and 10.11.20). They followed a submission by Mr Heneghan to the Parliamentary Secretary Julia Lopez MP (30.10.20). Julia Lopez MP replied (1.12.20) to the RAD's letter (9.9.20). In the immediate run-up to the substantive hearing of this claim for judicial review, Jamie Davies completed a "PSED Assessment for No.10 Coronavirus Press Conferences" dated 28 May 2021 ("the PSED Assessment"), a document signed off by the Prime Minister's Official Spokesperson Max Blain, for whom Mr Heneghan wrote a submission also dated 28 May 2021. In addition, there is of course Mr Heneghan's evidence.

About BSL and Deaf BSL users

15. The following key points about BSL and the position of Deaf BSL users – linked to the issue of BSL interpretation for the Briefings (§13 above) and reflected in BSL interpretation as a 'paradigm' reasonable adjustment (§23 below) – were well made and properly evidenced by the Claimant and her representatives. The Defendant has pointed to no more reliable alternative picture, including in its thinking and any enquiry in the context of the PSED Assessment. I accept what follows in this paragraph. I also accept that this picture was available to the Defendant, and that a reasonable enquiry into these matters would have elicited it. (1) BSL is a language in its own right, with all the essential features of a human language. It is separate from English and is not a signed equivalent of English. It has its own complex grammatical structure and rules; its own phonology, morphology and syntax. It is a complex visual spatial language, involving a combination of hand shapes, facial expressions, lip patterns and body language. This was explained in the evidence of Dr Kate Rowley and Amanda Casson Webb. It has been recognised by the Court of Appeal: Finnigan §2. It was recognised by a 2003 written Ministerial Statement emanating from the Department of Work and Pensions (recorded, for example, in Ofcom's *Fair Treatment and Easier Switching for Broadband and Mobile Customers* proposals (December 2019) at §10.15). (2) BSL is regularly used by a significant number of people: see Finnigan §2. The BDA has estimated that there are 151,000 BSL users across the UK, of whom 87,000 are Deaf BSL users; with 127,000 BSL users in England, of whom 73,000 are Deaf BSL users. These estimates have frequently been used, for example: in OPM's report for the British Sign Language Broadcasting Trust entitled *Research into the Deaf Audience in the UK: A Review of Evidence* (December 2015); in Karen McCallion's Northern Ireland Assembly Research Paper *Sign Language Legislation* (13.11.20); and by the RAD, as referenced in the Defendant's own PSED Assessment (28.5.21) (§42 below). (3) So far as concerns literacy and the English language, many d/Deaf readers have an average reading age of 8 to 11 years; some d/Deaf people are reading at levels below 8 years of age; an estimated 20% of the deaf population have additional needs; and many d/Deaf people miss out on critical "incidental learning". All of this was explained in Dr Kate Rowley's evidence, in describing why "information broadcast with subtitles rather than BSL interpretation is problematic for Deaf BSL users"; why "it is not enough to suggest that deaf people can simply read subtitles"; and why "it is vital that government broadcasts are translated into BSL". An article by Kearsy Cormier et al, in the Neurology journal *Cognition* (2012) says this: "some degree of proficiency in the surrounding spoken language via reading and writing can be achieved by some deaf individuals. However, such successes with literacy are … highly variable

and not common. The average reading age for the adult deaf population in the UK and the USA is generally believed to be around 8 or 9 years, based on data from Conrad (1979) and Traxler (2000)". Ofcom's December 2019 *Fair Treatment* proposals document records (§10.15) that: "Census data indicates that a majority of prelingually deaf BSL users have serious difficulties with English, with limited opportunities to improve their access to a language that they cannot hear". OPM's December 2015 report – which explains that "there is a lack of recent data" – references reports which say that "literacy proficiency among deaf children is poor", that "[i]t is commonly claimed that D/deaf children aged sixteen have a reading age of nine", that "basic levels of literacy within the Deaf community are relatively low" and that there is "no substantive evidence that reading skills among D/deaf children are significantly improving". (4) Deaf people face isolation and barriers to health information. OPM's report records the following: the key finding that Deaf people are excluded from society and suffer from social isolation (§3.2.4); the suggestion (based on interviews with young Deaf people) that Deaf people would not face the level of social exclusion and marginalisation that they currently do if more services were provided in BSL and if more people had better levels of Deaf awareness" (§3.2.4); the key findings that Deaf people face many barriers when accessing health services, and that Deaf people overall have poor health knowledge, potentially due to a lack of health information in accessible formats (§3.2.5); and the fact that a number of studies have reported overall poor access and experience of health services due to communication difficulties, poor Deaf awareness and poor access to health information (§3.2.5).

Are any of the issues "academic"?

16. Ms Leventhal submits that the Court should decline to deal, on their legal merits, with the issues raised – or some of them – on the basis that they are "academic". She submits, in essence as I see it, as follows. The issue of real substance raised by the claim concerns whether BSL interpretation was required for Briefings. The 'target' is the two Data Briefings, for which there was no BSL interpretation. But that issue was addressed and resolved, by the direct Red Bee arrangements (26.11.20) (§7(7) above). Although 'on-platform' provision is "part of the issue" raised in the judicial review proceedings, and although the claim alleges "ongoing breach" and seeks a "mandatory order", there is an inescapable and important "logical inconsistency" in the position of the Claimant: she has not impugned each (or any) subsequent Briefing as a 'target' for judicial review; she should not be permitted to "ride two horses". Her position in relation to 'on-platform' provision is, moreover, patently unsustainable: letters from both Mr Fry (7.4.20) and the BDA (31.3.20) expressly accepted the appropriateness of 'in-screen' provision. It is true that public authority breaches of EqA2010, and damages for a relevant breach, can in principle be raised by judicial review. It is also true that the Defendant has not (and does not) advance an 'alternative remedy' basis for resisting judicial review. Nevertheless, caution is appropriate, especially given that judicial review proceedings do not readily allow evidence to be tested, and where any 'historic' claim of breach of EqA2010 and any claim for damages could have been brought in the county court. The principled approach of the judicial review Court to "academic" issues is described in Dolan. There, the target for judicial review – on grounds of ultra vires, inconsistency with common law public law principles and incompatibility with the Human Rights Act 1998 – was Covid

'lockdown' regulations which had been repealed and replaced. The claim was "clearly academic" in circumstances where "the regulations under challenge have been repealed" (§38). That left as the "crucial question" whether the Court should permit the grounds for judicial review to proceed "in the public interest" (§39). There was "a discretion to hear disputes which have become academic", which "must be exercised with caution" and requires "a good reason in the public interest" such as – by way of example – "a discrete point of statutory construction… which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future" (§40). In Dolan there was a public interest in substantively addressing the vires issue, only, as a question of law which could be raised potentially as a defence in criminal proceedings in magistrates' courts regarding the original lockdown regulations, and in circumstances where new and extant regulations continued to be made under the same enabling power (§41). There was "no good reason" to address the other aspects of the claim (§42) (although the Court went on to do so having heard full argument: §42). Further, in considering the issue of whether the claim was "academic", the Court of Appeal recognised the force in the submission made by the Secretary of State, that since the public law and human rights grounds "would turn on the facts and, in particular, the facts as they were at the time and the regulations were made", a decision on them "would not lay the foundation for any useful precedent for the future" (§38). In the present case, there is no discrete point of statutory construction or question of vires. Rather, there is an 'historic' question which turns on the facts on 21 September 2020 and 12 October 2020. There is no good reason in the public interest for consideration of any of the issues in this case.

17. Ms Casserley does not accept that any of the issues are "academic" and in any event invites the Court to deal with them in the "public interest". I have reached the conclusion that it is appropriate for this Court to determine these questions, on their legal merits:

> **(Q1) Was the absence of any BSL interpretation for the Data Briefings on 21 September 2020 and/or 12 October 2020 discrimination against the Claimant by reason of breach by the Defendant of the reasonable adjustments duty? (Q1A) If so, what should this Court do regarding remedies?**
>
> **(Q2) In relation to 'on-platform' BSL interpretation for Briefings, is there any present and continuing breach of (i) the PSED and/or (ii) the reasonable adjustments duty involving discriminatory treatment of the Claimant? (Q2A) If so, what should this Court do regarding remedies?**

These are all questions which fairly arise from the claim and grounds for judicial review. The Defendant has had, and has taken, a full and fair opportunity to deal with them. The Court has jurisdiction. The claim was brought promptly, by a person with a sufficient interest, and no alternative remedy point has been raised. Permission for judicial review has been granted. It is true that (Q1) is 'historic', and that the Red Bee arrangements (26.11.20) (§7(7) above) changed the position. The Court has jurisdiction on judicial review to make a declaration as to a past breach, and to award (or deal by directions with) damages. (Q1) reflects the fact that, under the statutory scheme, a past breach of the reasonable adjustments statutory duty constitutes – if the element of detriment to the Claimant is made out – a statutorily-prohibited act of discrimination against the Claimant, which in principle sounds in damages. Parliament has expressly recognised that a person discriminated against by breach of the reasonable adjustments duty may make a claim,

including for damages, and may bring that claim by judicial review. There is in my judgment a strong public interest in the Court determining (Q1). To decline to deal on its legal merits with (Q1) would, without any 'alternative remedy' being invoked, mean dismissing a claim of discrimination under EqA2010 without reference to its legal merits, in a case where the Court had jurisdiction. In my judgment, that course would not promote the interests of justice or the public interest; rather, it would be contrary to both. Damages have been claimed, in the context of the challenge to the 21 September 2020 and/or 12 October 2020 Data Briefings. There is a question as to transfer of assessment of any damages, but that is part of (Q1A). There are other 'historic' questions. In particular: whether there was a breach of the PSED as at 21 September 2020 and/or 12 October 2020; and whether the reasonable adjustments duty required an 'on-platform' BSL interpreter for the Data Briefings on those dates. I am satisfied that it is not appropriate to answer those further 'historic' questions, nor any other (except insofar as the answer necessarily arises from the reasoned analysis on (Q2)). In circumstances where there was no BSL interpretation for those two Data Briefings, it is sufficient in my judgment, in the circumstances of this case, to analyse the 'historic' cause of action (and remedy) by asking whether there was a duty to secure BSL interpretation. It is not necessary to go further and determine whether, in the circumstances as they then stood, discharge of the duty required 'on-platform' provision. Neither Counsel submitted that this further point would be material to any quantum of damages. So far as the PSED and 'on-platform' provision of BSL interpreters is concerned, what really matters – as a live and properly pleaded claim with practical utility and whose resolution on the legal merits is in the interests of justice and the public interest – is whether there is current compliance or current breach (Q2, Q2A). In my judgment, nothing in this approach is inconsistent with Dolan (whose principled approach I will treat as not restricted to "appeals" which are academic between the parties: Dolan §40). For the reasons I have given: (Q1) although 'historic' is not "academic between the parties"; (Q2) raises present, live issues of controversy; (Q1A) and (Q2A) then flow naturally and necessarily. I note that in Dolan "the original remedy sought" was "a quashing order", which "could no longer be granted since the regulations [were] no longer in force", though I also note that declaratory relief was later floated as a possibility (§37). In Dolan, resolution of the vires issue was held to exhaust the public interest necessity (though, in the event, the other issues were addressed on their legal merits). Cases in EqA2010 context are, I think, particularly instructive. I have made some points about 'then and now' claims (§10 above). The appropriateness in principle of judicial review to deal with breach of the PSED – in particular where there is a live, non-historic issue – is very well-recognised. As to the reasonable adjustments duty, Finnigan was a case decided in the county court regarding BSL interpretation for 'historic' police searches: the case, including in the Court of Appeal, addressed whether there had been a past breach, and whether the claimant had been discriminated against. As to judicial review and the reasonable adjustments duty, examples cited to me included the welfare benefits case of MM v Secretary of State for Work and Pensions [2013] EWCA Civ 1565 [2014] 1 WLR 1716 and the immigration detention case of VC. In VC, the claimant had been transferred from immigration detention in September 2015. The High Court nevertheless addressed (in April 2016) the substantive issues of compliance or non-compliance with EqA2010. The Court of Appeal also dealt with the case on its substantive legal merits. One reference point is §7.21 of the Statutory Code of Practice issued by the EHRC (§19 below), explaining that the "failure to anticipate" the need for an adjustment may mean that such an adjustment, although subsequently made, "may not in itself provide a defence to a claim for a failure to make a reasonable adjustment". This recognises that there can be an 'historic' claim, and the substantive issue may be whether

there is "a defence". Ms Leventhal's points about whether the claim regarding 'on-platform' provision is sustainable go to its legal merits. As to 'logic', it is right that the Claimant has not challenged each Briefing that has taken place since 12 October 2020, or since 26 November 2020. Nor has she made any concession. She has clearly claimed "ongoing" breach and sought a "mandatory order". She is not 'riding two horses' by advancing a proper and focused 'then and now' claim (§10 above); and she has not invited the Court to examine legality on a 'rolling' basis at every stage of the timeline between September 2020 and today. That is a virtue. As to the PSED and on-platform provision, the Court can focus on the position now, including in light of present realities: like the PSED Assessment; and the change (29.3.21) by which "the Briefings moved to a designated broadcast room at No 9 Downing Street".

Was the absence of any BSL interpretation for the Data Briefings (21.9.20 and/or 12.10.20) discrimination against the Claimant by reason of breach by the Defendant of the reasonable adjustments duty?

The reasonable adjustments duty

18. The structure of EqA2010, so far as concerns the reasonable adjustments duty, was set out by the Court of Appeal in MM at §§37-45. The key provisions of EqA2010 can I think – for the purposes of the present case – be sufficiently encapsulated as follows. (For reasons to which I will come in due course, the focus is on "service-provider" and the "third requirement": "auxiliary aid".) A "service-provider" owes a statutory "duty to make reasonable adjustments" (s.29(7)(a)). That duty is breached when there is "a failure to comply" with any one of three "requirements" (s.21(1)). That breach constitutes "discrimination against a disabled person" where the breach of the duty – by reason of the failure to comply with the requirement – is "in relation to that person" (s.21(2)). Of the three relevant requirements (s.20(2)-(5)), the "third requirement" is triggered where "disabled persons generally" (Schedule 2 §2(2)) "would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" (s.20(5)). That trigger test therefore involves a test of *comparative substantial disadvantage*, as is also found in the first requirement (arising in the case of "a provision, criterion or practice": s.20(3)), and the second requirement (arising in the case of "a physical feature": s.20(4)). So triggered, the third requirement is that the service-provider is "to take such steps as it is reasonable to have to take to provide the auxiliary aid" (s.20(5)). Where the third (or first) requirement "relates to the provision of information the steps which it is reasonable for [the service-provider] to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format" (s.20(6)). The service-provider may be a public authority or discharging a public function (s.31(3)), in which case proceedings relating to a contravention by the service-provider of EqA2010 (s.113(1)) can be brought by judicial review (s.113(3)(a)). Where discrimination against a disabled person, by breach in relation to them of the reasonable adjustments duty through failure to comply with the third requirement (s.21(2)), involves subjecting that person to a detriment (s.29(2)(c)) there is a contravention of Part 3 (s.114(1)(a)). Damages may be awarded (s.119(1)(4)) (which the High Court on judicial review also has jurisdiction to award: Senior Courts Act 1981 s.31(4)). Where "there are facts from which the court could decide, in the absence of any other explanation" that the service-provider contravened

the reasonable adjustments duty, "the court must hold that the contravention occurred", unless the service-provider "shows that [it] did not contravene the duty" (s.136(2)-(3)). There is a definition of "disabled person" (s.6(1)-(2)); "auxiliary aid" includes "an auxiliary service" (s.21(11)); and "substantial" means "more than minor or trivial" (s.212(1)).

19. The reasonable adjustments duty involves disciplined sequence of steps (a "stepped approach": see R (Imam) v Croydon London Borough Council [2021] EWHC 739 (Admin) at §87). I tread that path guided by what is said in the authorities cited to me, and taking into account where it appears to me to be relevant (Equality Act 2006 s.15(4)) provisions from the Statutory Code of Practice (Services, Public Functions and Associations) ("Code") issued by the EHRC, chapters 5 and 7 of which were put before the Court by the parties. I will identify and resolve the principal areas of controversy as I go along. Authorities on the reasonable adjustments duty cited to me by the parties included these five Court of Appeal cases. (1) Roads v Central Trains Ltd [2004] EWCA Civ 1541 104 Con LR 62 (5.11.04). That was a case under the Disability Discrimination Act 1995 ("DDA95"), where the defendant train company was found to have failed to comply with its reasonable adjustments duty in not making arrangements for a free taxi, so that wheelchair users – who could not use the footbridge nor reasonably navigate the half-mile detour along Station Lane – could access eastbound trains from Thetford, rather than the alternative relied on by the train company (a 60 minute-plus train journey west to Ely to change platforms there and travel back eastwards). Mr Roads obtained a judgment in his favour and general damages of £1,000. (2) Allen (20.11.09). That was a case under DDA95, where the defendant bank was found to have failed to comply with the reasonable adjustments duty in not installing a platform lift in its Sheffield main branch, so that wheelchair users could access in-person services, rather than the combination of internet, telephone and other branches relied on by the bank. Mr Allen obtained a judgment in his favour, a mandatory order requiring the bank to install a platform lift, and damages of £6,500. (3) MM (4.12.13). That was a judicial review case under EqA2010, concerning the application of the reasonable adjustments duty in relation to mental health patients applying for employment and support allowance. The claimants had obtained a declaration of substantial disadvantage from the Upper Tribunal, who had then gone wrong in the application of the reasonable adjustments duty by making certain directions to the Secretary of State. (4) Finnigan (8.10.13). That was a case analysed under both DDA95 and EqA2010, in which it was concluded that, although the police had failed to comply with the reasonable adjustments duty in conducting searches of the home of a person known to them to be deaf without reasonable steps to have a sign language interpreter present or on standby (rather than relying as they did on gestures, lip reading and writing down information), that failure did not give rise to damages for discrimination against Mr Finnigan, there having been no detrimental effect on him (since he was able effectively to communicate). (5) VC (2.2.18). That was a judicial review case under EqA2010, in which it was concluded that the Home Secretary had failed to comply with the reasonable adjustments duty in holding mentally ill detainees in immigration detention without assistance – whether by the appointment of mental health advocates or the provision of automatic independent reviews – to understand reasons and make representations. The claimant obtained a declaration that

the Home Secretary had discriminated against him by failing to make reasonable adjustments to the decision-making processes.

Legislative policy: closest reasonably approximated access

20. The key statutory purposes, so far as concerns the reasonable adjustments duty, are identified – by reference to previous authority, relating to the predecessor DDA95 – in MM (§35) as follows. "The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life". EqA2010 "does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people [which] necessarily entails an element of more favourable treatment". In imposing the reasonable adjustments duty:

> ***the purpose … is 'so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public'.***

This comes from Roads §30, where Sedley LJ explained that this is "not a minimalist policy of simply ensuring that some access is available to the disabled". He also described this "policy of the Act" as being "to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large" (Roads §13). This legislative policy is identified in the Code (§7.4), and throughout the rest of the case law (Allen §§28-29; Finnigan §40). So, the reasonable adjustments duty is a *proactive* statutory duty concerned with securing for disabled persons *closest reasonably approximated access*, to promote their 'entering everyday life as fully as possible'.

Disability

21. This is the first step in the analysis. The Claimant has a disability (s.6(1)) and so is a disabled person (s.6(2)). This is common ground. She has a physical or mental impairment having a substantial – more than minor or trivial – and long-term adverse effect on her ability to carry out normal day-to-day activities (ss.6(1), 212(1)). She advances a claim that the Defendant has discriminated against her as a disabled person by breaching the reasonable adjustments duty, applicable to it as a service-provider (s.29(7)), through failing to comply with a relevant requirement, in relation to her (s.21(2)). Like the claimants in MM and VC, she advances the claim by judicial review (s.113(3)(a)), in circumstances where the Defendant is a public authority amenable to judicial review in relation to the functions under consideration. She claims damages (s.119(4)) for contravention of Part 3 (ss.119(1), 114(1)(a)), given the applicability of the reasonable adjustments duty (s.29(7)), its contravention, and the detriment (s.29(2)(c)).

Service-Provider and Service

22. Next, the Defendant is a service-provider in relation to national briefings to the public about the pandemic. It was common ground before me that this case is to be analysed as concerning service-provision even if also involving the exercise of a public function (see section 29(7)(b)). The Defendant is a person concerned with the provision of a service to the public or a section of the public (s.29(1)) and, in providing the service, must comply with the duty to make reasonable adjustments, where that duty is triggered through the

application of the test of comparative disadvantage. As regards the "service" being provided by the Defendant, Ms Casserley's formulation ("a service in the form of national briefings to the public with information about the pandemic") and Ms Leventhal's formulation ("providing information about the pandemic through the briefings") each look (i) more broadly than an individual Briefing or pair of Data Briefings and (ii) less broadly than providing information about the pandemic. In my judgment this focus on the Briefings as a distinctive "service" is appropriate and sufficient and I adopt it. The Briefings are a distinctive course of conduct. There is a clear pattern of provision of Briefings, albeit evolving as to precise timing and nature. They are grouped together: for example, in the Government web page where transcripts and slides/datasets are to be found (see §4 above). The Briefings properly attract the operation of the applicable legal standards to protect against discrimination and promote equal treatment, including the "continuing, evolving" duty (see §31 below) of reasonable "adjustments". The application of those standards to this "service" will then, necessarily, have regard to both the narrower picture (a Briefing) and the wider picture (Government provision of information about the pandemic). One reference point, albeit in the context of banking and reasonable adjustments relating to a physical feature, is Allen (§§23-25), where the Court characterised as the relevant service "the provision of banking facilities at the main branch" (§23), emphasising that "the means by which a service is delivered is often an integral part of the description of the service" (§25). Another, albeit in the context of employment and the first requirement (s.20(3)) of "provision, criterion or practice" is Ishola v Transport for London [2020] EWCA Civ 112 [2020] ICR 1204 (§§36 and 38), considering a "state of affairs" – which may in an appropriate case be a 'one-off' (the Code at §7.34 describes holding "a large public conference") – and which, consistently with the statutory purpose, properly attracts a comparison as to treatment.

Auxiliary aid or service; BSL as a paradigm

23. Ms Casserley focused, as her "primary" case, on the third requirement (auxiliary aid or service). She accepted that, if the claim analysed by reference to the third requirement fails, her suggested alternative analysis by reference to the first requirement would be "very unlikely" to succeed. I go further: I cannot see that it could. I make one observation: I would have characterised as the relevant "practice" that of "providing the Briefings in spoken English", in parallel with Finnigan (§§30 and 43) where the practice was 'the conducting of police searches in spoken English'. So, the focus is squarely, and in my judgment rightly and sufficiently, on the third requirement. The next step, therefore, is that BSL interpretation is an "auxiliary aid or service" for the purpose of the third requirement (s.20(5)(11)), as are subtitles. The essence of the third requirement (s.20(5)) is that the provision of an auxiliary aid or service can constitute a necessary reasonable adjustment. Parliament made clear (see s.20(5)(6)), that reasonable steps for the purposes of the third requirement can include steps for ensuring that "information is provided in an accessible format", and will include those steps where the third requirement "relates to the provision of information". It follows that the test of comparative substantial disadvantage "in relation to a relevant matter" can be concerned with the provision of information, and specifically provision in an accessible format. The same is true in a case concerning the first requirement (provision, criterion or practice), as is illustrated by Finnigan. In the present case, information is the very nature and essence of the service-

provision. The Code explains (§7.47) that an "auxiliary aid or service is anything which provides additional support or assistance to a disabled person", giving among the examples: "the provision of a sign language interpreter, lip-speaker or deaf-blind communicator". As the Code explains (§7.38), in the context of the 'large public conference' illustration, "providing qualified BSL interpreters for deaf delegates who use BSL" would be an "auxiliary service", whose effectiveness may moreover depend on accompanying steps (such as ensuring that "deaf delegates who use BSL … have the option to be seated near and in full view of the interpreters (who are themselves in a well-lit area)". As the Code also explains (§7.34), provision for BSL interpretation is one response, but it may need to be made alongside others, for example "those delegates with hearing impairments … who do not use BSL but can lip-read". A BSL interpreter can therefore be seen as a paradigm when it comes to auxiliary aids or services, and therefore reasonable steps by way of reasonable adjustments. Parliament has seen it as a paradigm too: s.21(4) of DDA1995 (see Roads §6) described "an auxiliary aid or service", adding "for example, the provision … of a sign language interpreter".

Disabled people generally

24. The trigger test of comparative substantial disadvantage (s.20(5)) (see §18 above) involves comparing the position of "disabled persons generally" (Schedule 2 §2(2)) (with "persons who are not disabled"). By replacing "a disabled person" (s.20(5)) with "disabled people generally" (Schedule 2 §2(2)) in the test of comparative substantial disadvantage, Parliament ensured that the test is not individualised but class-based. As the Code puts it (§7.19): "It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services or who is affected by the exercise of a public function". It is therefore an error to consider the reasonable adjustments duty by reference to the needs of the individual claimant, rather than by reference to the needs of the relevant class: Finnigan §31. The focus is on barriers which "impede persons with one or more kinds of disability", and "with particular kinds of disability" (Roads §11; Finnigan §31). This class-based comparison is a suitable trigger for what is 'an anticipatory duty' (see §30 below): "Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take are reasonable steps to overcome barriers that may impede people with different kinds of disability" (Code 7.24); "the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service …" (Code §7.20); the service-provider "has to anticipate the reasonable steps necessary to ensure that disabled persons generally, or of a particular class, will not be substantially disadvantaged" (MM §43). It is thus "important … to keep in mind the distinction between (anticipatory) changes … which are applicable to a category or sub- category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis", and to focus on the former (Finnigan §36). But what is the relevant 'class'? I much prefer – and adopt – Ms Casserley's formulation: Deaf BSL users ("people who are Deaf and use BSL"). That is a sub-class of Ms Leventhal's wider formulation ("people who are hearing-impaired"). Having said that, I cannot see that the answers in this case turn on that choice. In the Code, where reference is made to "people with different kinds of disability" (§7.24),

examples given include: "people with dementia"; "people with… mental health conditions"; "people with … mobility impairments"; but also "visually impaired people who use guide dogs"; and "visually impaired people who use white canes" (§§7.24 and 7.25). If "visually impaired people who use guide dogs", or "visually impaired people who use white canes", can be the relevant class, then I cannot see what excludes "hearing impaired people who use BSL". A reference point can be found in EqA2010 when it speaks (s.6(3)(b)) of persons who share the protected characteristic of disability as referable to persons who "have the same disability". In Finnigan, the Court of Appeal had spoken of the relevant group as being "deaf persons" and "deaf persons as a class" (§§31, 33 and 39). In MM the Court focused on "mental health patients" (§66). In VC the Court focused on "mentally ill detainees" (§153). In my judgment, the most reliable and authoritative guide is the idea of "people disabled in the same way", derived by the Court of Appeal in VC at §153 from Supreme Court authority (citing Paulley v FirstGroup plc [2017] UKSC 4 [2017] 1 WLR 423 §25). That approach identified "wheelchair users" – not 'people who are mobility-impaired' – as the relevant group. That, again, like "visually impaired people who use guide dogs", or "visually impaired people who use white canes", shows that the relevant group may be a sub-group. It fits alongside Roads, where the Court took as the relevant group "those whose disability makes them dependent on a wheelchair" (§11), from which it derived "wheelchair users as a class" (§§14, 25, 26 and 28). I cannot accept Ms Leventhal's submission that that key contextual feature of the case, the unprecedented circumstances of the pandemic (§11 above) – although plainly highly relevant to questions of reasonable steps and reasonable adjustments – can, or should, have the consequence of narrowing down the relevant class or subclass of "disabled persons generally" for the trigger test of comparative substantial disadvantage. At times in the argument Ms Leventhal's focus went in the opposite direction, focusing on a sub-sub-group of BSL users 'who would tune into the Briefings'. The same focus was to be found in her skeleton argument where she described Roads as being a case where the relevant group was "wheelchair users using [the Thetford] train station". I cannot accept that. In Roads, the relevant group was "wheelchair users as a class". In Finnigan the Court did not take 'deaf persons whose properties may be searched by the police', a group which it recognised was likely to be small (Finnigan §40). In Allen the focus was not on 'wheelchair users wishing to use services at the main Sheffield branch of the bank', but on wheelchair users.

Persons who are not disabled

25. The next step is to identify who are the "persons who are not disabled", with whom the "disabled persons generally" are to be compared in applying the trigger test of comparative disadvantage. It is tempting – logically and analytically – to take 'everybody else' having identified the relevant class for "disabled people generally". The Code says (§7.13): "The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability" (the word is "a" not "the"). In MM, the Court of the Appeal spoke of a comparison between mental health patients and "those not so disabled" (§59) (the word is "so": meaning "in the same way"). My own preference would be to compare the relevant group – or sub-group – of disabled people with people who are not disabled. That reflects the statutory language (s.20(5)) and fits with the Code. It avoids the risk of

introducing invidious comparisons with those who may have other disabilities, disadvantages and needs (for which different reasonable adjustments may also be necessitated). Having said that, I am quite satisfied that the outcome could not, in the circumstances of the present case, turn on which is chosen.

The base position

26. Next, Ms Casserley submits that the trigger test of comparative disadvantage has to be applied after 'stripping out' any steps already been taken by the Defendant by way of potential reasonable adjustments (for example, in this case, subtitles). I accept that submission. The existing steps identified by the Defendant – considered in the context of the relevant group – belong to evaluation of whether the reasonable steps/ reasonable adjustments duty is being complied with, not to the prior trigger test by which the duty arises. In Finnigan, the police relied on steps which had been taken at the time of searching Mr Finnigan's home: "a combination" engaging "his lip-reading skills, the police mouthing and his indicating his assent or dissent by making gestures and by written communication with him and/or his wife" (§25). The Court of Appeal, in identifying the relevant "provision, criterion or practice" for the purposes of the first requirement (in that case, the DDA95 "practice, policy or procedure"), emphasised that the test of comparative disadvantage involved taking "the base position before adjustments are made to accommodate disabilities", constituting "practices and procedures which apply to everyone", but which excluded "adjustments", including for example "the use of lip reading" (§29). I can see no reason in principle why that approach should not apply, with equivalent force and cogency, when considering service-provision, and every reason why there should be principled congruence.

Applying the trigger test of comparative disadvantage

27. Next, I turn to apply the trigger test. This was the first key point of controversy. On this question, the burden of proof is on the Claimant. For reasons which I have explained, I think the trigger question can appropriately be formulated in this way (remembering that the provision of information in an accessible format (s.20(6)) can appropriately be characterised as the "relevant matter" (s.20(5)): see §23 above). My formulation is:

> ***Unless there is provision for BSL interpreters, would Deaf people who use BSL be put at a more than minor or trivial disadvantage in comparison with persons who are not disabled, regarding the provision of information in an accessible format in relation to the Briefings, if delivered with no aid or service providing extra support or assistance to people with disabilities?***

In my judgment, the answer is:

> ***Yes, they would be put at such a disadvantage, whose nature and extent are serious.***

I recognise that there are other candidate formulations. Perhaps the formulation which would be least favourable to the Claimant would be:

> ***Unless there were provision for BSL interpreters for the two Data Briefings, but bearing in mind the provision of subtitles, would people with a hearing impairment be put at a more than minor or trivial disadvantage in comparison with people not having a hearing impairment, in relation to the Government provision of information about the pandemic?***

I do not think that is the right question but, even on that formulation, I would give the same answer: yes, they would be put at such a disadvantage, whose nature and extent are serious. In answering the question, I have had regard to the Code (§5.10) suggesting, as relevant to "disadvantage", the concept of "something that a reasonable person would complain about", so that "an unjustified sense of grievance would not qualify", but that the disadvantage "does not have to be quantifiable and the service user does not have to experience actual loss (economic or otherwise)", it being "enough that the person can reasonably say that they would have preferred to be treated differently". One reference point, albeit one arising in the context of functions involving detriments, is Parliament's description of "an unreasonably adverse experience" (Schedule 2 §2(5)(b)). I have in mind the relevance of evaluating not only whether the trigger test of comparative substantial disadvantage is met (as an on/off switch), but also the nature and extent of any substantial disadvantage (on a scale). That is important when it comes to be able to address the question of the content of the reasonable adjustments duty, and the question of reasonable steps in all the circumstances (see §29(1) below).

28. My reasons, for identifying a comparative substantial disadvantage, whose nature and extent are serious, are as follows. The very nature of the Briefings was to provide information to the public. That information related to a subject matter of the greatest public interest and a vital concern: the pandemic. That was true of each of the two Data Briefings (21.9.20 and 12.10.20). They were important. They were focused on objective data. They were led by Government scientists. In the context of the pandemic (§11 above), the circumstances were unprecedented and challenging for Government; but they were also unprecedented and challenging for the public, who needed access to information, to help them to understand and to adhere and to manage their conduct and expectations for the future. Messages or alarm or reassurance, about being 'in this together' and acting responsibly, about 'following the science', required inclusion and accessibility. This was information being supplied to the public by Government. It was information provided in a fast-moving context, needing clarity, with frequent resort to science and statistics. Engaging the involvement of an understanding and adherent public was a high value. Given the position regarding BSL and Deaf BSL users (§15 above), without BSL interpretation there was a clear barrier, for a vulnerable and marginalised group, undermining accessibility of information. The message was blocked, or scrambled, or delayed. The barrier to information in an accessible format arose by reason of disability. The lack of provision – the provision of subtitles only – was a failure of inclusion, suggestive of not being thought about, which served to disempower, to frustrate and to marginalise. The immediate experience was of important urgent messaging being delivered to the public, known to be being provided, but with an inability to access or understand it. The substantial, foreseeable and palpable effect would be an exclusion, and a justified sense of grievance, about which a reasonable person would certainly have good reason to complain, and about which affected people would reasonably say that they would have expected and urged – let alone preferred – to have been treated differently. All this, moreover, for a significant and substantial number of people. All of which fits with BSL interpretation as a paradigm auxiliary aid or service, and a paradigm reasonable adjustment (§23 above). BSL interpretation takes its place as a reasonable adjustment, a reasonable step, which the reasonable adjustments duty may

require. It does so because – as in this case – the duty is triggered in the application of the test of comparative substantial disadvantage.

Approaching the 'reasonable steps' duty

29. Next, it is helpful to identify some key points about how the Court should approach the duty to take reasonable steps. (1) Asking what steps it was reasonable for the Defendant to have to take to provide an auxiliary aid or service needs to be addressed in light of the conclusions reached as to the nature and extent of the comparative substantial disadvantage (see Imam at §§87 and 89). (2) The duty is to take "such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments", so that "[w]hat is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case" and "will vary according to: the type of service being provided; the nature of the service provider and its size and resources; and the effect of the disability on the individual disabled person" (Code §7.29). "Whether a step is or is not unreasonable involves an exercise of judgment taking into account all the circumstances of the case" (Allen §46). (3) "The question of the reasonableness of an adjustment is an objective one for the courts to determine" (Code §7.33): "what is reasonable for the purposes of the test… must be judged objectively" (Allen §40). (4) Because the test is a reasonableness test for the Court to apply objectively, the ultimate focus is on substance rather than on reasoning process or decision-making procedure. The fact that a defendant "did not consider" a particular step does not render unlawful, by reference to the reasonable adjustments duty, the failure to adopt it (Allen §43), though a "failure even to consider whether adjustments may be needed" is something which "certainly makes" a defendant's "task more difficult" (VC §161), and the Court will "inevitably" have to "consider the grounds relied on" by the defendant and "the reasons advanced by" it (Allen §§40 to 41). The Court will look to the evidence submitted by the defendant to explain the decision-making (VC §68) and in some cases may need to "adjourn to allow further evidence to be adduced on the reasonableness issue" (MM §83). As to the decision-making, it is appropriate to have in mind what have been identified (Code §7.80) as "measures" which may "constitute good practice", such as: "planning in advance for the requirements of disabled people and reviewing the reasonable adjustments in place"; "asking disabled customers for their views on reasonable adjustments"; "consulting local and national disability groups"; "drawing disabled people's attention to relevant reasonable adjustments so they know they can use the service"; "properly maintaining auxiliary aids and having contingency plans in place in case of the failure of the auxiliary aid". (5) Although an objective question of substance, the duty and its enforcement allow for an appropriate 'latitude' on the part of the service-provider. The objective standard is one of "reasonableness". That allows for the possibility of there being "reasonable alternative methods", so that one way of putting the question is "whether it was a sufficient discharge of [the] duty that the [defendant] made available the alternative facilities on which it relies", so that "the duty [was] discharged by the provision of reasonable alternative methods" (Allen §§46 and 48). The statutory test concerns such steps as it is reasonable "to have to" take (Allen §§33 to 35, 67). The standard is contextual, informed by practical reality, viewed at the relevant time. The Court may have to do "determine whether the adjustment identified by the claimant is reasonable" and – where the burden of proof shifts (EWA2010 s.136)

– to determine whether the defendant has been able to "demonstrate that it is not" (MM §82). Beyond that, the Court has no 'freewheeling' function "to determine for itself what constitutes a reasonable adjustment or to supervise the process of evidence-gathering", and it does not "step into the… shoes" of Government (MM §82). (6) As the Code recognises, "some of the factors which might be taken into account when considering what is reasonable" include effectiveness, practicability, cost, disruption and resources (§7.30), articulated as follows: "whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question; the extent to which it is practicable for the service provided to take the step; the financial and other costs of making the adjustment; the extent of any disruption which taking the steps would cause; the extent of the service provider's financial or other resources; the amount of any resources already spent on making adjustments; and the availability of financial or other assistance".

An anticipatory duty

30. Next, it is important to have in mind that this is an "anticipatory" duty (VC §157). The "anticipatory" nature of the duty is an important point. It was stated five times by the Court of Appeal in Finnigan between §§32 and 37. As the Code explains: "The duty to make reasonable adjustments… requires service providers to anticipate the needs of potential disabled customers for reasonable adjustments" (Code §7.3); "the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service" (Code §7.20); so that service-providers "should anticipate the requirements of disabled people and the adjustments that may have to be made for them" and "failure to anticipate the need for adjustment may… render it too late to comply with the duty to make the adjustment [or]… may not in itself provide a defence to a claim of a failure to make a reasonable adjustment" (Code §7.21). The "anticipatory" nature of the duty forms part of the explanation for the non-individualised, "disabled persons generally" test (§24 above).

A continuing, evolving duty

31. The duty is a "continuing" one (VC §157). As the Code explains: "The duty to make reasonable adjustments is a continuing duty. Service providers should keep the duty and the ways they are meeting the duty under regular review in light of their experience with disabled people wishing to access their services. In this respect it is an evolving duty … What was originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might… have to be considered" (§7.27); "Equally, a step that might previously have been an unreasonable one for a service provider to have to take could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may provide new or better solutions to the problems of inaccessible services" (§7.28). Making a change or adjustment may therefore reflect compliance with the statutory duty, as is to be expected of a statutory duty to make "reasonable adjustments". Or an "adjustment" taken could be a step – and a reasonable step – which a defendant chooses to take, in circumstances where failure to do so would involve no breach. Where an adjustment is made, which is judged objectively to have been necessary to comply with the reasonable adjustments

duty, the question may be whether failing to take it earlier was non-compliance. As the Code puts it (§7.21): "Failure to anticipate the need for an adjustment may… not of itself provide a defence to a claim of a failure to make a reasonable adjustment". Put another way, the question may be whether, prior to the change, there was a "lacuna" in respect of which there was at that time "a failure to make anticipatory adjustments" (VC §158).

Multiple and alternative steps

32. The Court may well be considering a range of steps. These may be steps relevant to the same group or sub-group, or relevant to a different group or sub-group. They may be steps which are already in place, steps advocated by the claimant as necessary, or by the defendant as sufficient. They may be steps which could operate in combination, or steps which are alternatives. The Code (§7.47) refers as examples to "the provision of a sign language interpreter, lip-speaker or deaf-blind communicator". Using its "large public conference" example (§7.34) the Code illustrates a combination of steps for deaf delegates who use BSL (§7.38): the provision of BSL interpreters, who are in a well-lit area, with the option of those delegates being seated near and in full view of them. In some cases the 'superiority' of a step when compared with another – in terms of practical accessibility and the legislative policy of closest reasonably approximated access (§20 above) – will lead the Court to reject the 'lesser' step as not being a reasonable step. That was the position in Roads where the Ely alternative was not reasonable by comparison with the free taxi alternative. So: it "may not be enough" that one solution "if it stood alone" would satisfy the statutory duty; the solution does not 'stand alone' where there are "a range of solutions"; the statutory duty "makes comparison inescapable" where the defendant's "proffered solution" is said by the claimant "not to be reasonable precisely because a better one, in terms of practicality or of the legislative policy, is available"; but the statutory duty "does not require the Court to make nice choices between comparably reasonable solutions". All of these points derive from Roads at §13. The Code puts the position this way (Code §7.35): "Where there is an adjustment that the service provider could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the service provider to take some lesser step that would not render the service in as accessible a manner". One question, in considering the approach to multiple and alternative steps is whether the burden of proof has switched to the defendant. Ms Casserley advanced this neat proposition: where a step is clearly superior in terms of the legislative policy of closest reasonably approximated access the defendant will bear the burden of demonstrating the unreasonableness of a superior alternative. I can see, where the burden of proof has switched, that this proposition may operate in an individual case as a reliable reflection of Roads §13 and Code §7.35. But it may not be watertight: for example, 'less accessible' may be a function of practical effectiveness not just closest reasonable approximation. And the same factors – including what Ms Leventhal considered the 'balance of pros and cons' – may inform the ideas of 'superiority', 'reasonably approximated, 'unreasonableness' and 'lesser'. Overall, in my judgment, the points made in Roads §13 and Code §7.35 – put alongside section 136 (the switched burden of proof) and the other features of the duty – provide the Court with a solid foothold in the context of multiple and alternative steps.

Has the burden of proof switched?

33. This is a necessary step in the analysis. By virtue of EqA2010 section 136(2)(3), if the Claimant is able to demonstrate that "there are facts from which the court could decide, in the absence of any other explanation, that [the Defendant] contravened" the applicable duty to make reasonable adjustments (ss.21 and 29(7)), then the burden of proof will switch to the Defendant. In that situation, "the court must hold that the contravention occurred" unless the Defendant "shows that [it] did not contravene" the duty. The case-law explains that the claimant must have given "some indication as to the adjustments it is alleged should have been made" and have "outlined adjustments… which could be made" (VC §§159-161). Where the burden has switched, the claim will succeed if the Court concludes, in the light of the evidence (VC §166) and of the submissions, that the Defendant "has not discharged the burden of proof" and "has not demonstrated that she complied with her duty to make reasonable adjustments" for the relevant group in respect of the relevant matter (VC §171). In my judgment, in relation to the absence of any BSL interpretation for the two Data Briefings, viewed in the context of the service-provision, the burden in this case does switch to the Defendant. BSL interpretation is an identified adjustment. In my judgment, the Claimant has clearly demonstrated "facts from which the court could decide, in the absence of any other explanation, that [the Defendant] contravened" the third requirement and the reasonable adjustments duty. The key "facts" are these: the absence of any BSL interpretation for the Data Briefings; the importance of the Briefings and the information being communicated; the nature and extent of the comparative disadvantage; the demonstrable practicability of making provision for a BSL interpreter; the opportunity for liaison between Government and the BBC, and Red Bee Media; the fact that BSL interpretation for the Briefings had long been an issue raised; all viewed in the context of a proactive duty.

Was the absence of BSL interpretation for the two Data Briefings a breach?

34. This is the next step. I address this question in light of everything identified so far. Ms Leventhal says there was no breach of the reasonable adjustments duty. She has two lines of argument whose essence, as I see it, is as follows. First, she says the Defendant was not under a statutory duty to ensure BSL interpreters for Briefings, or alternatively for Data Briefings, even at and after 26 November 2020 when the further arrangements with Red Bee were implemented. That arrangement (26.11.20) was a virtuous reasonable choice and so the next Data Briefing (2.12.20) could – without any breach – have been carried out without securing any BSL interpretation. Secondly, she says that even if all of that is wrong, the Government arrangement (26.11.20) constituted an appropriate "adjustment" which was "reasonable" including as to its timing and a discharge of the continuing, evolving duty, in light of what had emerged. There was no breach on 21 September 2020, or on 12 October 2020. Those are the two lines of argument. Key points in support of them were these. The Defendant was acting in extremely challenging circumstances, in responding to the unprecedented public health and economic emergency (§11 above), and was still doing so in the autumn of 2020. The Defendant was dealing with multi-faceted challenges and actions, including in relation to communications and accessibility (§12 above). The service – the provision of information to the public through the Briefings – needs to be seen as a whole and in the

round. A number of important accessibility aspects (§7 above) had, properly and proactively, been addressed by arrangements effected by, or to the knowledge of, the Defendant. There was a combination of measures in place for people with disabilities, for people with hearing impairments, and also for Deaf BSL users. The issue of BSL interpretation for Briefings had been raised – often specifically in conjunction with policy announcements from the Prime Minister and Government Ministers – and had been considered. There were live subtitles, an aid or service clearly relevant and intended to assist those with hearing impairments, as a real and practical benefit. These Data Briefings need to be seen in the context of the Briefings as a whole, and the accessibility of information as a whole. BSL interpretation was, and remained, available for all Briefings led by a Minister, and therefore all Briefings involving policy announcements or new measures, and accessible to anyone with a TV and anyone wanting to follow online. The first Data Briefing (21.9.20) was followed the very next day by a Briefing conducted by the Prime Minister (22.9.20), for which there was BSL interpretation. The second Data Briefing (12.10.20) was followed by a Briefing at 6pm that same day by the Prime Minister, for which there was BSL interpretation. The Defendant was entitled to rely on the BBC – as national broadcaster covering all Briefings – to make suitable provision and it was the BBC, unknown to the Defendant, who decided that BSL interpretation was not needed for the Data Briefings. These were a new type of Briefing, organised for a new time of day (11am) involving the Government scientists and involving no Ministerial lead or involvement. They were organised at short notice: the Data Briefing conducted at 11am on Monday 21 September 2020 was organised over the preceding weekend, with a note to the media provided at 11am on Sunday 20 September 2020; the Data Briefing of 11am Monday 12 October 2020 involved a notice to the media issued at 7pm on Sunday 11 October 2020. Viewed in the context of the Briefings as a whole – and viewed in the context of this and other Government information about the pandemic, communicated by Government and communicated or reported on by reliable secondary sources – these two Data Briefings were isolated incidents. There was no conscious Government decision to proceed without BSL interpretation. Government, and Mr Heneghan, were not aware and were not alerted to the fact that the BBC would choose not to use a BSL interpreter for a Briefing which was not being led by a Minister and had been organised at short notice. That particular issue came to light subsequently – and even Mr Fry waited for the second Data Briefing before writing his letter before claim – and was then promptly and properly addressed. Hindsight is inappropriate. This is a classic case of reasonable improvements, properly chosen, in changing circumstances. So runs the argument.

35. I cannot accept either of Ms Leventhal's two lines of argument on this issue. In my judgment, in all the circumstances and having regard to the context and all the material before the Court, the legally correct answer – as the only answer which the Court can properly give in discharging its own responsibilities in enforcing the duties imposed by Parliament in EqA2010 – is that the Government action of failing to secure BSL interpreters for the Data Briefings was a breach of the reasonable adjustments duty, by reason of breach of the third requirement. In giving my reasons, I keep in mind (see §29(1) above) the points I made (§28 above) regarding the serious nature and extent of the comparative substantial disadvantage. (1) The statutory duty is owed by the Defendant. Whilst it is entirely appropriate for arrangements to be made with other

entities and agencies, including in this case the BBC, it was the statutory responsibility of Government as service provider to ensure delivery of the discharge of the reasonable adjustments duty. This is why it was no answer in VC (see §144) for the Home Secretary to say that compliance involved engagement with other public bodies and non-governmental organisations who were part of the legal analysis but absent from the proceedings. It would be the service-provider in relation to the large public conference (Code §7.38) who would have the duty to ensure BSL interpreters in a well-lit area of the hall (§32 above). (2) The duty is a proactive, anticipatory duty, as the Code and the case law strongly emphasise (§§24, 30, 31 above). It is important, of course, to have in mind the position 'on the ground' in which the Defendant (and Mr Heneghan) came to be, as at the time of the Data Briefings. But in the context of this proactive, anticipatory duty it is also relevant to consider – fairly and without being 'wise after the event' – how it came to that. As a document entitled "Accessible Communications During Covid-19" put it, referring to the reasonable adjustments duty as including the duty to take "positive steps, anticipating potential needs, so disabled people can access services", the answer to the question "What do you need to do?" was: "It is each department's responsibility to ensure their communications meet the duties above, including to ensure that communications and information [are] provided in accessible formats". (3) It is true that the Briefings evolved, and that the Data Briefings were new in not being Minister led. But the Briefings had evolved throughout, for example (§6 above): in becoming daily (from 15.3.20) and then weekdays (from 5.6.20) and then more ad hoc (from 23.6.20); in being led by the Prime Minister and then involving other Ministers. All this, across a six-month timeframe. The Briefings had moreover, and from early on (30.3.20), frequently involved Government scientists delivering important data, and using data slides. Such information was no less important in September and October 2020 than it had been before. Indeed, the fact that the Data Briefings were arranged at relatively short notice is itself reflective of importance, and urgency, of the information. The Prime Minister told the House of Commons at 3:35pm on 12 October 2020 that: "This morning, the deputy chief medical officer set out the stark reality of the second wave of the virus". That explanation of that "stark reality" was in a Data Briefing, for which there was no BSL interpretation. It was, moreover, the second such Briefing for which there was no BSL interpretation, notwithstanding the passage of a three-week period since the first. (4) The context for what happened engages the important points about the nature of BSL and the position of Deaf BSL users (§15 above). None of that was new. All of it served to emphasise why "subtitles" – fast-moving text in relation to technical information in a language which is not the first language of BSL users and assumes a level of literacy in that further language which very many of them simply will not have – are not an answer for Deaf BSL users. I would go further. The idea that 'subtitles are an answer' amounts to "a stereotypical opinion or feeling about individuals who share a protected characteristic … formed without proper knowledge of people with that protected characteristic" and thus constitutes "prejudice" (EHRC, Technical Guidance on the PSED §3.38). (5) It is right, of course, that Government was dealing with an unprecedented public health and economic emergency (§11 above). But that was also the context for the public and for Deaf BSL users. Yes, this increased the burden of the challenges on Government. Yes, this informs the appreciation which any Court must have when considering actions in extremely challenging circumstances. However, it also increased the importance of

information and its accessibility, particularly for groups and subgroups of people with different disabilities. The issue of BSL interpretation for Briefings had been raised (§13 above), in clear and sustained ways. It was in the context of the pandemic that the July 2020 Good Practice Guide on Accessibility of Covid 19 had emphasised, with specific reference to BSL interpretation, consideration being given of the "accessibility of information shared in press conferences … broadcast directly as a means of sharing new and vital information to UK citizens for the first time". It was in the context of the pandemic that the May 2020 Covid 19 Accessibility Principles had emphasised that "critical government information on coronavirus must be accessible to the widest audience possible", identifying formats to cater for additional needs (the first example given was BSL), and recognising that TV "usually has widest reach and high spend so always needs to have alternative formats". It was in the context of the pandemic that, on 26 March 2020, the World Health Organisation issued a document entitled "Disability Considerations During the Covid-19 Outbreak". Mr Fry specifically wrote (7.4.20) drawing this document to the Defendant's attention, in the context of BSL interpreters for Briefings. In the WHO's document, under the heading "Why are additional considerations needed for people with disability during the Covid-19 outbreak?", the WHO referred to "barriers to accessing public health information". Under a subsequent heading "Actions for governments", a subheading (the first, in fact) was:

> ***Ensure public health information and communication is accessible***

And, under that subheading, a bullet point (the first, in fact) was:

> ***Include captioning and sign language for all live and recorded events and communications. This includes national addresses, press briefings and live social media.***

(6) Challenging, burdensome and multi-faceted though the circumstances were for the Defendant, this is not one of those cases where there was a conflict between considerations pulling in different directions, needing to be reconciled. No conflict has been identified. There is for example no choice, no trade-off, between subtitles and BSL interpretation. And the same imperatives driving the need for Government to respond to the pandemic also drove the need for public information and drove the need for its accessibility. There is no evidence that anything would have been sacrificed, or detracted from, in securing BSL interpretation for all Briefings. There is no evidence of any problem of practicability. Viewed in terms of the factors identified in the Code (§7.30): securing BSL interpretation would be effective in overcoming the substantial disadvantage that Deaf BSL users face in accessing the relevant services; it was practicable for the Defendant as the service provided to take the steps to secure BSL interpretation; there was no financial cost impediment in making the adjustment; there would have been no disruption caused by the taking of steps to secure it; the Defendant had the financial and other resources, notwithstanding resources already spent on other steps. (7) A serious underlying problem was that arrangements for BSL interpretation for Briefings were allowed to be and remain the subject of an undocumented informal arrangement (from 16.3.20 onwards) between Government and the BBC. In the context of the Briefings Government did not have – and could not have – visibility and clarity, as to what the BBC BSL interpretation would cover, nor as to any 'warning' if a gap arose. Government did not and could not know whether the BBC's BSL interpretation arrangement would or would not continue, or keep step with the evolving nature and

pattern of Briefings. As Ms Leventhal accepts, Government and Mr Heneghan did not know whether or not there would be BSL interpretation for the two Data Briefings (21.9.20 and 12.10.20). That is why, when the absence of BSL interpretation was raised, the response given was (in GLD's letter of 2.11.20 to Mr Fry): "Unfortunately, as you note, the BBC did not provide a BSL interpretation service in respect of the Briefing on 21 September and the first of the two Briefings on 12 October 2020… This was a decision of the BBC". Undocumented informality produced an unknown, unknowable, uncontrollable and unalerted gap. (8) The Defendant failed to secure provision for two important Briefings, in a context where the nature and pattern of Briefings was changeable, where Briefings had been underway for a period of 6 months, and where the significance of BSL interpretation for Briefings was conspicuous. Although arranged at relatively short notice, the fact is that arrangements were being made over the weekend beforehand, on each occasion. Presentations were being prepared. Data slides were being prepared. Communications clearly were taking place regarding the Briefings, including between Government and the media, and between broadcasters and the public. There is no reason why BSL interpretation could not have been provided. Secure and clear arrangements had not been made. The problem was not anticipated. Those are features not of excusability, but rather of non-compliance. I cannot accept that the Defendant complied with the duty to take reasonable steps. I do not accept that the Defendant has discharged the burden of demonstrating that compliance. When Government made the Red Bee arrangement (26.11.20) to ensure BSL interpretation for all future Briefings it was not merely making a reasonable policy choice. It was discharging a statutory duty. A decision to leave Briefings uncovered by BSL interpretation could not have been compatible with the statutory duty of reasonable adjustments. This does not detract from the fact that the failure to secure BSL interpretation for the two Data Briefings (21.9.20 and 12.10.20) was itself a breach, on each of those occasions. This was a situation where all the circumstances "failure to anticipate the need for an adjustment" meant that the taking of action (26.11.20) does "not in itself provide a defence" (Code §7.21). Even if, in the circumstances, there had been no breach in respect of the first Data Briefing (21.9.20), I would have found a breach in respect of the second (12.10.20): the Defendant had three weeks to appreciate the gap and close it. That was in circumstances where the briefing note for the DCWG (1.10.20) recorded in relation to "stakeholder concerns" and "accessible broadcasting": "BSL interpretation to be provided as standard for all live public broadcasts". Eleven days later, such provision was – again – not made.

Detriment to the Claimant

36. The final stage of the analysis involves asking whether the Claimant herself suffered any detriment from the absence of BSL interpretation for the Data Briefings (21.9.20 and 12.10.20). This is the issue discussed and applied in Finnigan §§43-45 and in VC §§172-177. The burden of proof in showing detriment is on the Claimant. Ms Leventhal invites the conclusion that there was no detriment on the basis that I should reject two aspects of the Claimant's evidence: (i) that she was unable to read the live subtitles; and (ii) that she cancelled a scan and a visit, and did not pursue work opportunities, by reason of being unable to access the Data Briefings. I start with (i). I have already described evidence regarding the Claimant which I have accepted (§8 above). In her first witness statement the Claimant's evidence, alongside the evidence regarding visual impairments and diagnosis with dyslexia: that she was assessed at the age of 19 as having a reading level of 7½ years; that she has the reading understanding of a 7 year old; that she has struggled

to understand what was happening when in hospital because of the absence of the BSL interpreter (written notes from the staff in the hospital gave her only a basic outline in view of her limited understanding of written English); that she could not understand the data in the Data Briefings because there was no BSL interpretation and so the information was not in a language she could understand; and that subtitles are not a solution for her. Mr Heneghan's first witness statement exhibited what he described as publicly available information about the Claimant, including tweets in English written text. The Defendant's grounds of resistance raised these points: that the Claimant has not supported by documentary evidence that she has substantial reading problems, apparently such that she cannot obtain information from subtitles; that the Claimant's witness statement described herself as an actress, whereas in the public domain she also describes herself as an author; that she "appears to be clearly capable of engaging in the written form online"; that "it is not accepted that the Claimant did suffer detriment on the facts"; and that "there are concerns that the Claimant factual case is exaggerated and "not supported by documents". In her second witness statement the Claimant explains that although she is an author as well as an actor – something, I interpose, which had been stated in her solicitors' judicial review letter before claim – her two online books were written using BSL interpreters, except for the back cover which she wrote without BSL interpretation. She goes on in that witness statement to describe: the use of BSL during her college studies; the time she can take over a tweet and her everyday video-calling of friends for help; and how BSL interpretation has helped her recently when at the hospital. Mr Fry has independently confirmed in his own evidence that the claimant communicated with him by means of the signing facility. The Defendant made no application for cross-examination (ACO Judicial Review Guide §10.2.2). There is no undisputed objective evidence with which the Claimant's evidence regarding her inability to read and understand the subtitles is inconsistent. The evidence in relation to this point is clear and detailed. The Claimant's undisputed ability to upload written English for a book cover – it being unnecessary to comment on spelling, grammar and punctuation – or in tweets, and however laboriously, does not begin to sustain a conclusion that the Claimant could understand subtitles appearing at speed on a screen to describe technical matters in a Data Briefing. I accept her evidence that she could not. On that basis, in my judgment, she has discharged the burden of demonstrating detriment. This conclusion is not undermined by the fact that the evidence is far less clear as to whether any appointment or visit was cancelled of which the cause was the inability to access the information in the Data Briefings. One problem with inaccessible information is not knowing what was missed and it is not as though a BSL-interpreted video of the two Briefings was uploaded after the event. I accept that there are factual matters of detail, which a county court would be better able to resolve (something to which I will return in relation to damages). I accept that the Claimant's first witness statement was wrong, or confused, in thinking that the 'tier system' was announced in a Data Briefing. Even if there is exaggeration as to cause, and thus as to consequence, that does not undermine the Claimant's evidence – or her credibility – as to whether she could understand the Briefings from the subtitles. Further, I have approached detriment having in mind the way in which it is described in the Code (§5.10): something that a reasonable person would complain about; not merely an unjustified sense of grievance. Detriment can arise, even if "for … a limited period" (VC §175). There is "at least a real prospect" that BSL interpreters "would have made a

difference" (VC §177). Saying that the Claimant could get the information in the end brings to mind telling a wheelchair user to wait for the first bus without a buggy in the wheelchair space; or telling Mr Roads to travel to Ely, change there and then travel home. The Claimant's position is not like that of Mr Finnigan, for whom the absence of a BSL interpreter during police searches "did not have any effect" on communication (Finnigan §44).

If so, what should this Court do regarding remedies?

37. In my judgment, the Claimant is in principle entitled in the present case to a declaration that the Defendant discriminated against her, by not complying with the reasonable adjustments duty, through the failure to secure the provision of any BSL interpretation for the Data Briefings (21.9.20 and 12.10.20). A declaration is just as appropriate here as it was in VC (§§8 and 193). But what about damages? In opening, Ms Casserley invited me to award damages and assess quantum (at, she said, something in the order of £3,000). Ms Leventhal had two lines of argument. First, she says the Court should, in the exercise of the discretion afforded to it in judicial review proceedings, decline to award any damages or alternatively award only nominal damages. Secondly, if not persuaded by that, the Court should transfer the question of quantum of damages to the county court. In her reply, Ms Casserley made clear that the Claimant did not resist transfer to the county court. In my judgment, it would not be appropriate either to dismiss the damages claim or to award nominal damages, but transfer to the county court for assessment of quantum of damages is the appropriate course. That is what I will direct. My reasons are as follows. (1) In principle, the judicial review Court has jurisdiction to make an award of damages in a case in which it has found a breach of EqA2010 which sounds in damages, as does discrimination against the claimant by breach of the reasonable adjustments duty. (2) Ms Leventhal reminds me of R (Fayad) v Secretary of State for the Home Department [2018] EWCA Civ 54, a case emphasising the importance of damages claims in judicial review proceedings being "properly raised and pleaded", with the courts being "prepared to use the full range of their powers to ensure that they are" (§56). In this case, damages were squarely raised, the basis was the pleaded act of discrimination, and the evidence addressed the detriment to the Claimant. It would be unjust to dismiss the damages part of the claim on grounds of inadequacy of pleading. Transfer to the county court will allow an opportunity for any appropriate greater clarity. (3) Ms Leventhal emphasises that Senior Courts Act 1981 section 31(4) uses the word "may" when speaking of the judicial review court awarding recovery in damages, restitution or debt. I do not accept her submission that this injects a principle of public interest discretion into (i) principles applicable to a cause of action or (ii) the assessment of quantum. The judicial review Court "may" deal with any claim for damages, restitution or debt. Or it "may" transfer the matter to another appropriate judicial forum (an example is immigration detention damages for false imprisonment). Or it "may" leave the claimant to pursue a claim in another appropriate judicial forum (an example is a Woolwich-type sequel claim for restitution). If the judicial review Court decides to deal with damages, it does not then do so by reference to a general discretion to alter the principles of recoverability or alter the basis of the recoverable quantum. The point of including these monetary remedies in judicial review is to allow a one-stop shop for remedies including monetary remedies arising out of the impugned public authority

action. The judicial review Court does not rewrite – in favour of the defendant or the claimant – the principles of recoverability. Nor would I exercise such a "discretion" in this case, even if I had one. (4) I raised with both Counsel the question whether EqA2010 damages, in whatever judicial forum they arise, operate in a similar way to Human Rights Act 1998 "just satisfaction". If they could, it might be argued that the strong vindication by virtue of the Court's judgment (with any declaratory remedy) can – in an appropriate case – operate as a sufficient 'just satisfaction'. Neither Counsel submitted that EqA2010 operates in this way. I was shown SXC v Secretary of State for Work and Pensions [2019] EWHC 2774 (Admin) which points the other way, contrasting HRA just satisfaction with the "statutory tort" of damages for discrimination contrary to the provisions of EqA2010 (§13). (5) Damages play an important role in discrimination cases. Damages were recovered by Mr Roads, and by Mr Allen. There was no analysis of damages for breach of the reasonable adjustments duty in VC, a case in which the tort of false imprisonment was also in play in respect of the immigration detention at the relevant time. Damages featured in the Court of Appeal in the judicial review race discrimination case of R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293 [2006] 1 WLR 3213, after quantification in the county court under an exclusive jurisdiction provision. It being inappropriate to dismiss the claim for damages or order nominal damages, the appropriate course – as is agreed – is to transfer the quantum of damages for assessment, unless disposed of by consent, by that court.

In relation to 'on-platform' BSL interpretation for Briefings, is there any present and continuing breach of the PSED?

Introducing the PSED

38. This question arises in the context of the PSED Assessment (28.5.21: §42 below), accompanied by Mr Heneghan's Submission to Mr Blain (also 28.5.21). I was provided with a feast of decided cases on the PSED, some of which I will mention as the analysis goes along. I can start with these points. In principle, it is open to a claimant in judicial review to claim that there is a continuing breach of the PSED and seek a declaration to that effect. An example is Bridges where there was a claimed continuing failure to discharge the PSED as an ongoing obligation (§§167-169). That claim succeeded, securing a declaration that the Chief Constable had failed to comply with the PSED "on an ongoing basis" (§210(3)). Conversely, a claim that a defendant public authority breached the PSED may fail because, by the time of the hearing before the Court, any "defect in compliance with the PSED" has been "remedied" by a subsequent and up to date "assessment": see Powell v Dacorum Borough Council [2019] EWCA Civ 23 [2019] HLR 21 at §50. The PSED is the statutory duty imposed by Parliament (EqA2010 s.149) on public authorities in the exercise of their functions. The PSED is to "have due regard to the need to – (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it". Limbs (b) and (c) are expanded upon in section 149(3) and (5) respectively. Disability is a relevant protected characteristic

pursuant to section 149(7). The Court will ask whether the function in question 'engaged the equalities duties' (see Adiatu §209), as is plainly the case here.

A 'process' duty

39. The PSED is characterised as being concerned with 'process' rather than 'outcome' (or 'result'): Bridges §176; Adiatu §204. But 'process' here includes enquiry, thinking-process and reasoning-process. Indeed, 'regard' is the language of statutorily-prescribed 'relevancy'. But the PSED is more than a 'relevancy' provision. The special nature and value of the PSED is linked to the ideas of "due" and "need", to the limbs (a) to (c) of the PSED, and to the statutory purposes in a statute concerned with equality. Like other 'process' breaches, a PSED breach can vitiate an impugned decision or action ('outcome'), subject to principles of materiality and the statutory test of 'highly likely: not substantially different': R (Durant Education Trust) v Secretary of State for Education [2020] EWCA Civ 1651 [2021] ELR 213 §71. Enforcement of the PSED does not extend to the question of how much "weight" to give to the duty, or what "weight" should be given to the equality implications of a decision or action: these are matters which fall outside the PSED as a 'process' duty: Hotak v Southwark LBC [2015] UKSC 30 [2016] AC 811 §75; Bridges §175(6). As to whether the 'outcome' can stand – leaving aside vitiation for material breach of the PSED – that will be governed by whatever substantive legal criterion is applicable to answer that question in the particular context. The substantive legal criterion may be the conventional reasonableness standard, or a proportionality standard, or it may be the statutory reasonable adjustments duty (as in this case). As has been seen (§29(3) above), in enforcing the reasonable adjustments duty the substantive question for the Court remains the application of the objective reasonableness standard, albeit that a failure as to proper consideration may make it more difficult for the Defendant authority to discharge any burden of proof (VC §161: §29(4) above), and albeit that 'good practice' as to process may be relevant (Code §7.80: §29(4) above). The PSED and the reasonable adjustments duty may therefore appropriately fall for consideration side by side.

Applying the PSED

40. The principles concerning compliance with the PSED are contextual in their application: Powell §44. The extent of the "regard" which must be had is what is "appropriate in all the circumstances" and "weight and extent of the duty are highly fact-sensitive and dependent on individual judgment" (Hotak §74). In the present case the following linked themes, regarding the principled application and enforcement of the PSED duty, are of particular significance: (i) importance; (ii) proactivity; and (iii) rigour, together with the recognised virtues of (iv) evidence-based thinking; and (v) legal sufficiency of enquiry. All of these themes feature in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 [2014] Eq LR 60 §26(1), (4), (5), (7) and (8). The theme of importance of the PSED is reflected in Bridges §176 and Adiatu §203. The themes of proactivity, rigour and sufficiency of enquiry are all reflected in Bridges §175(1)(2)(5).

Ms Casserley's critique

41. Ms Casserley submits, in essence as I see it, as follows. The Defendant is in present breach of the PSED in relation to the Briefings and provision for BSL interpretation. Although the PSED Assessment (§42 below) has been produced and placed before the Court, and although it addresses relevant considerations arising for the purposes of the PSED, it is 'too little too late'. As to 'too little": there is within the PSED Assessment no meaningful evidence-based thinking (eg. concerning the position of Deaf BSL users and levels of literacy); there is no exploration of the on-platform provision of BSL interpreters in Scotland and Wales; there has been no commissioning of any research; there is no clarity as to policy implications; assertions are made without being underpinned by evidence or enquiry, including points referable to the position of Deaf BSL users themselves (eg. asserted disadvantages for them of on-platform provision of BSL interpreters); there is an underlying absence of a legally sufficient enquiry and consultation with those affected; and the PSED Assessment does not grapple with the reasonable adjustments legislative policy of 'closest reasonably approximated access'. As to 'too late': the PSED Assessment was provided at 6:30pm on Friday 28 May 2018, just one working day prior to the deadline for the Claimant's skeleton argument for the substantive hearing; it is clearly a 'last-minute job', produced in response to judicial review proceedings; and as a "rear-guard action" (Bracking §26(4)).

The PSED Assessment

42. The PSED Assessment (28.5.20) is an important document. Its text is as follows:

> **Introduction.** This document concerns a review of the current arrangements for British Sign Language (BSL) provision at COVID-19 pandemic, televised press briefings. It records the analysis undertaken by the Department in respect of the requirements placed on it by the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010. The PSED requires Government to pay due regard to the need to: [a] eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act; [b] advance equality of opportunity between people who share a protected characteristic and those who do not; and [c] foster good relations between people who share a protected characteristic and those who do not. This review has been prompted by a number of considerations including calls for different BSL provision, ongoing litigation and technical issues which have arisen.
>
> **Brief outline of policy or service.** In response to the COVID-19 pandemic, televised press briefings have been used as a means to convey information to the public in relation to the pandemic and to allow for scrutiny from both the public and media. The first of these briefings was held on 3 March 2020. Having been held daily from late March, the briefings are currently held on average once a week with no present expectation this will increase. The briefings are typically hosted by the Prime Minister or a Cabinet Minister. They will usually be accompanied by one or two scientists/medical experts. Other speakers representing the NHS, Police and Military have also joined ministers for the briefings. The format of the briefings typically includes the Minister providing an introductory topical update on developments related to the pandemic followed by a statistical update from one of the medical experts. The presentation of the latest statistics is done so visually by way of slides. These slides are made available to broadcasters in advance of the briefing in order for to the slides to be shown full screen. This is then usually followed by a Q&A session that consists of two questions from the public and six from members of the media. The members of the media attend remotely and their videos are also broadcast. Since 29 March 2021, the briefings have been hosted from a new designated broadcast room at No 9 Downing Street (and were previously hosted in No 10). Usually, the only people the only people present in the room during the course of a briefing are the speakers themselves and a small number of people to perform necessary technical roles. The briefings are recorded and transmitted live, using two in-room cameras, and are broadcast live on

television on the BBC and other news channels such as Sky. To ensure as wide a reach as possible, and given 93% of people now have access to the internet, the briefings are also broadcast live online, including on BBC iPlayer and on a number of the Government's social media platforms, such as YouTube, Facebook and Twitter.

BSL provision to date. The Government has sought to ensure that as many people as possible are able to engage with the briefings. This is particularly important for messages giving the public instructions that may require them to change their behaviour. To that end the Government made the briefings available to national broadcasters as well as streaming it online. Due to the format of the briefings, the Government identified potential impacts under the PSED, specifically in relation to d/Deaf viewers including BSL users, who would clearly find it difficult or impossible to hear the information being conveyed orally. According to the Royal Association for Deaf People, there are approximately 87,000 people in the UK whose first or preferred language is BSL (BSL users) [fn. https://www.royalDeaf.org.uk/about-us/what-is-bsl/]. The briefing viewing figures vary from day to day but can attract on average around 10 million views. We do not have figures for how many of those viewers are BSL users, but if equal proportions of BSL users watch the briefings, this would amount to very approximately 13,000 people. Subtitles are provided by the BBC in respect of the briefings and so are available both on television and online. Captioning is also provided on some of the Government's social media channels (such as YouTube), particularly where there is no BSL interpreter. We have found these captions to be largely very reliable. We do not have any reliable figures of BSL users who cannot use subtitles or captions. The literacy rate in the UK is very high, albeit with different levels of reading comprehension within that. In addition to the provision of subtitles and captions, we have sought to ensure there is BSL interpretation provided in respect of the briefings. The Government and the BBC agreed that from mid-March 2020 the BBC would provide "in screen" live BSL interpretation. This is done through the image of a BSL interpreter being superimposed onto the main image. This has been broadcast on the BBC News Channel. The BBC also have a visual prompt on BBC1 alerting viewers to the fact that BSL footage is available on the News Channel in order to prompt d/Deaf viewers. This BSL provision continues and is broadcast live on the BBC News Channel. BSL footage is also available online on BBC iPlayer, with subtitles also available. The Government has also agreed with the BBC and Red Bee Media, the company that provides the BSL interpretation to the BBC, that Red Bee will provide their BSL footage to the Government to use on its own media channels. The BBC and the company Red Bee agreed this in May 2020, and since then BSL interpretation has been available on the 10 Downing Street YouTube, Twitter and Facebook channels for almost all the briefings. These videos remain on the 10 Downing Street channels and can be accessed after they have taken place if an individual was unable to watch at the time of broadcast. In the last 5 months of 2020, 10 Downing Street social media streams averaged over 160,000 viewers per stream (across Facebook, Twitter and YouTube). Since November 2020 the Government has had in place an agreement with Red Bee directly that enables the Government to continue to provide this service on its own media channels and for this to be provided even in the unlikely event that the service is not available on the BBC. Before every broadcast, the Government contacts Red Bee to ascertain whether they are providing BSL interpretation on the BBC, and if not the Government will commission them to do so directly. This arrangement has been in place since 26 November 2020. In practice, every time the Government has contacted Red Bee, they have confirmed, or they have contacted the BBC to confirm, that they will be providing BSL for the BBC and therefore also for the Government. Both the provision of BSL interpretation, and equalities impacts arising in relation to it, have been considered from an early stage of the Pandemic and have remained under consideration throughout. This has been given effect in particular through the National Resilience COVID-19 Communications Hub (created on 7 March 2020) and the Disability Communications Working Group (created in May 2020). External representatives on this group include those from 11 disability charities: Disability Rights UK, Scope, RNIB, RNID, National Autistic Society, Sense, Leonard Cheshire Disability, Mencap, MIND, MS Society and Muscular Dystrophy UK. BSL provision has been discussed repeatedly as an issue in this group and a number of organisations had requested that an on platform interpreter be provided. Cumulatively, the provision of BSL has been effective. BSL interpretation has been provided in respect of almost every briefing since mid-March 2020. There have been few exceptions to this. For example, the BBC did not provide BSL interpretation in respect of two data briefings in early autumn 2020 (the subject of an ongoing judicial review). This led to the further agreement with Red Bee effective from 26 November 2020. There have also been technical issues meaning that on a small number occasions the BSL feed did not reach the Government's channels, but was still provided on the BBC (television and online). More recently, an issue has arisen with briefings

that have gone past 6pm.This is because the BBC usually switch over from any live event to accommodate the start of their 6pm news bulletins. This is a key reason why the main part of the Covid briefings (the ministerial statement and data presentations) are completed by this time. Ordinarily, the Red Bee coverage continues (for example on the Government's channels). However, in a recent example there was a loss of the BSL feed at the 6pm changeover While the public and media questions continued, the BBC switched to their BBC One news bulletin. RedBee Media confirmed that the loss of the BSL feed on this occasion which was caused by re-routing issue at the BBC technical end. This has since been resolved and should not happen again.

Alternative approaches. Alternative types of BSL provision that could be adopted are as follows:

Firstly, providing "on platform" BSL interpretation, i.e., an interpreter or interpreters in the room standing behind the speaker. This has been judged so far not to be a suitable or proportionate approach and this remains the view. There are some advantages for BSL users of providing on platform interpretation. These include that the interpretation is more likely to be carried on media outlets that do not provide BSL, and the risk of technical issues of the limited kind we have experienced to date is reduced. Similarly, the BSL interpreter is visible automatically to all viewers which raises awareness of BSL use and needs. However, there are also disadvantages. For example, the BSL interpreter would be much less prominent. At present, they are at the front of the screen, clear and well lit. If on platform, they would be less visible. Further, when data slides are presented they are presented "in screen" for clarity. Therefore a choice would have to be made between making the data slides less clear (by filming the slides on a screen with an interpreter stood next to them) and losing the BSL interpreter altogether. The same problem arises in relation to questions from journalists, who are not present in the room. Requiring two people always to be in shot will also significantly limit the angles and scope of any footage. Other disadvantages, which had particular force in the early stages of the pandemic, arose from the need to ensure people in the briefing room were socially distanced and also the need to send an appropriate and clear public message about the importance of social distancing. Further, whilst media outlets would be more likely to broadcast footage with BSL provision if it already included an on platform interpreter, BSL footage is available to broadcasters to use. If they choose not to use it, their media coverage will presumably not be in BSL either, and so likely to be of no more assistance. Whilst the current arrangements have had a very small number of technical issues over the course of the past c.14 months, problems with delivery can arise with any arrangement. For example, an on platform BSL interpreter may be late, unwell, unavailable, or fail vetting. It has also not been judged to be necessary or proportionate. This is a service that principally only benefts people who are d/Deaf, who also speak BSL, and who cannot read subtitles. For that cohort, BSL the briefings are already accessible, both on television (with visual prompts for the correct channel) and online (on the BBC website and Government channels). The briefings are now comparatively few in number and just one means of communicating to the public about the pandemic. They sit alongside large scale Government campaigns across multiple platforms including: [i] National print media advertising; [ii] Local press partnerships; [iii] Social media content, conveying key messaging visually; [iv] Mass advertising including in key transport hubs and billboards around the country; [v] Direct communications with individuals, such as text messaging; and [vi] Ministerial interviews every day across all of the main broadcasters. It is not proportionate or realistic to ensure every piece of information about the pandemic is either contained in the briefings or translated into BSL. Other steps have also been taken to ensure that BSL users receive accessible information about the pandemic (as set out below).

Secondly, directly providing "in screen" BSL interpretation, i.e., the Government directly producing the broadcast of superimposed BSL provision. This method would amount to almost identical provision of BSL interpretation as is currently provided, save that the Government would be directly responsible for the production of the BSL footage. This is not considered to be suitable for a number of reasons. It would ultimately be an additional and unnecessary expense, and duplicative of the existing provision, where arrangements for in screen interpretation are already be[ing] made. This is also likely to be a service that is better provided by a specialist entity, on an outsourced basis, rather than in house by the Government, particularly if the benefits appear to be relatively minimal.

PSED considerations. As the provision of BSL interpretation is specifically for d/Deaf people, this document focusses on the protected characteristic of disability. Whilst all protected characteristics

have been considered as part of the wider communications strategy, we have not identified any other particular impacts in respect of other protected characteristics.

1. Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the 2010 Act. It is recognised that disabled people, including d/Deaf people, have been disproportionately affected by Covid-19, including because they may be in higher risk categories for the virus. It is therefore particularly important that public health messages such as those contained in the briefings are provided in a format so far as possible which is accessible to disabled people and in particular to d/Deaf people including BSL users. The existing provision of BSL at the briefings has had and continues a positive impact on eliminating discrimination, harassment and victimisation. It enables BSL users who cannot use subtitles to access the briefings and thus ensures that this important information is accessible to them. The Government is under a duty to make reasonable adjustments in the provision of services and in the exercise of public functions. Insofar as this applies in relation to the provision of BSL, the Government has made significant efforts to ensure important information reaches BSL users in an accessible format. This includes the steps outlined above. Additionally, video explainers of important events in the pandemic in BSL format have been created. The Government both publishes them online and makes them available for other organisations to use and download. Upon further consideration, making substantial changes to the provision of BSL interpretation at this stage is not considered necessary or reasonable. Work will continue to ensure that BSL continues to be provided with as little disruption as possible to that provision.

2. Advance equality of opportunity between people who share a particular protected characteristic and people who do not share it. With the above BSL provision in place, this has a positive contribution towards advancing equality of opportunity for d/Deaf viewers. For the reasons outlined above, although there might be additional benefits in terms of equality of opportunity if alternative options were adopted, there may also be disadvantages. These alternatives are therefore overall not considered to have a materially higher positive impact under this limb.

3. Foster good relations between people who share a particular protected characteristic and people who do not share it. The presence of BSL interpretation in respect of the press briefings across the Government's social media channels is likely to assist in fostering good relations between d/Deaf people and other people, as it raises awareness of the need for BSL interpretation, and its benefits for those who use it. This could have positive consequences for fostering the inclusion for d/Deaf people (and disabled people generally) in wider society, particular during the Pandemic. For the reasons outlined above, having an on platform interpreter could have a more significant positive contribution to fostering good relations in this regard because all viewers would see them automatically. A proportionate balance has to be struck bearing in mind the various considerations set out above, and therefore it has not been judged appropriate to adopt an alternative form of provision at this time despite these potential benefits in equalities terms.

Monitoring and evaluation. Government will continue to monitor and assess the needs of all demographics in relation to the accessibility of COVID-19 related information.

The PSED has now been complied with

43. I cannot accept Ms Casserley's critique (§41 above). In my judgment, the Defendant is not in current breach of the PSED duty in relation to the function of the Briefings and in the context of BSL interpretation. It is obvious that the PSED Assessment has been produced in the context of the judicial review proceedings, and 'at the door of the Court'. Nothing is more likely to focus the judicial mind. But the standards of scrutiny remain the same. I do not accept that the PSED Assessment is a rear-guard shield. No evidence before me suggests that it was produced with an 'agenda', or that the writer was reasoning backwards from a chosen policy position being defended before a Court. If any material or information existed of that kind it would have to be disclosed under the duty of candour and cooperation, one feature of the relationship of trust between Court and public

authority which is so central to the rule of law and access to justice. The Court has been presented with the PSED Assessment as an objective and open-minded consideration of the issues. I accept what is presented to me: that the document is what it purports to be. In my judgment, and on that basis, the PSED Assessment is a rigorous evaluation which recognises the features of the statutory duty and which cannot, in any material respect, be said to be a failure of "due regard". In the language of Bracking (§26(8)(i)) this Court must "ensure that there has been a proper and conscientious focus on the statutory criteria". I have. In the language of Bridges (§175(6)) this Court must be satisfied that the PSED has been rigorously considered "so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them"; and (§181) this Court must also be satisfied that the Defendant has taken "reasonable steps to make enquiries about what may not yet be known to" it. I am.

Question-marks arising out of the PSED Assessment

44. I have reached those conclusions notwithstanding three question-marks which arise out of the PSED Assessment. (1) Neither the PSED Assessment nor the submission which accompanied it directly address the reasonable adjustments legislative policy of 'closest reasonably approximated access' (§20 above). (2) The PSED Assessment identifies as a "disadvantage" of on-platform provision of BSL interpreters that they are worse for Deaf BSL users themselves, in particular as to prominence and visibility ("the BSL interpreter would be much less prominent. At present, they are at the front of the screen, clear and well lit. If on platform, they would be less visible") but no link is made to what is known about what Deaf BSL users themselves think about such a "disadvantage". (3) The PSED identifies this and other "disadvantages" of on-platform provision (in the context of data-slides and journalists' questions) but no link is made to what is known about the experience in Scotland and Wales, where on-platform provision is made. Those are three serious question-marks. They form part of Ms Casserley's critique (§41 above). In my judgment, they each operate as weaknesses in the Defendant's reasoning when the Court comes to apply the objective standard in enforcing the reasonable adjustments duty (§29(2)(4) above). I accept that (2) and (3) can be characterised as aspects of rigour, proactivity, evidence-based thinking and sufficiency of enquiry (§40 above). But, in my judgment, they are points, in the present case, whose force properly belongs to the Court's substantive objective analysis of the reasonable adjustments duty. Putting the point another way, the vice – if there is one – lies not in the 'process' or the 'enquiry'. It is not about things "not yet … known" to the Defendant (Bridges §181: §43 above). The Defendant has the fruits of enquiry, sufficient in order to make a lawful decision. The issue is known to have been raised (§13 above; §47 below), with views expressed, and points made about Scotland and Wales. The PSED Assessment itself (§42 above) refers to the issue of on-platform provision having been repeatedly raised; it refers to the DCWG, including RNIB (see §12 above), and to the "number of organisations [who] had requested that an on-platform interpreter be provided". If there is a vice in these question-marks, it is not one lost to the legal analysis. Rather, it is one which informs the area in which the Court is applying the substantive criterion of reasonable adjustments, to which I now turn.

In relation to 'on-platform' BSL interpretation for Briefings, is there any present and continuing breach of the reasonable adjustments duty involving discriminatory treatment of the Claimant?

The 'stepped approach' revisited

45. In order to answer this question, I must revisit and apply the same disciplined sequence of questions which I discussed and identified earlier (§§19-36 above). (1) There is the same disability (§21 above), service-provider and service (§22). The auxiliary aid or service, in my judgment, is appropriately still characterised as provision of a BSL interpreter (§23), rather than as provision of on-screen interpreter. As to the latter, the question of reasonable steps would engage the way in which the auxiliary aid or service is provided (just as it would with the BSL interpreter on the "well-lit" part of the conference platform, with Deaf BSL users having the option of sitting in that part of the hall in the Code §7.38 example: §32 above). The relevant class (§24 above) remains the same: Deaf BSL users. The comparison is with people who are not disabled (§25). (2) Taking the base position (§26) the trigger test of comparative disadvantage is the same (§27). So is the answer ('yes, they would be put at such a disadvantage, whose nature and extent are serious': §27) and so are the reasons (§28). (3) My answer to the trigger test of comparative substantial disadvantage would also be the same if I framed the question in this way, changing the description of the auxiliary aid: 'Unless there is provision for on-platform BSL interpreters, would Deaf people who use BSL be put at a more than minor or trivial disadvantage in comparison with people who are not disabled, regarding the provision of information in an accessible format in relation to the Briefings, if delivered with no aid or service providing extra support or assistance to people with disabilities?' (4) If I were to posit the formulation least favourable to the Claimant, it would be this: 'Unless there were provision for on-platform BSL interpreters, but bearing in mind the provision of in-screen BSL interpreters and subtitles, would people with a hearing impairment be put at a more than trivial disadvantage in comparison with people not having a hearing impairment, in relation to the Government provision of information about the pandemic.' My answer to that question would still be 'yes' (given the points at §48 below) but I would no longer use the word 'serious' to describe the nature and extent (given the premise of the question: that in-screen BSL interpretation is provided). However, as I have explained, it is not in my judgment the correct question at this stage in the analysis. (4) Having addressed the trigger test of relative substantial disadvantage, the focus turns back to the approach to reasonable steps (§29 above) and the application of the reasonable steps test. (5) As to the burden of proof (§33 above), in light of the way in which the issue was raised (§47 below), and given the points made in the case for on-platform provision (§48 below), the Claimant has in my judgment pointed to facts from which the court could decide, in the absence of any other explanation, that the Defendant is contravening the reasonable adjustments duty. That means the burden of proof switches to the Defendant. (6) All of this sets the scene for addressing the question of whether there is a breach. I turn to address that question. In doing so, I will start by discussing some key topics which are directly relevant to it.

The 'reasonable alternatives' analysis

46. I have addressed the Court's approach to multiple or alternative steps (§32 above). Ultimately, Ms Leventhal submits that – even put at its highest – on-platform and in-screen provision of BSL interpreters for the Briefings are 'reasonable alternative methods', falling within the Defendant's latitude (§29(5)), and that for the Court to seek to prefer on-platform provision would be "to make nice choices between comparably reasonable solutions" (Roads §13). That analysis would fit this case alongside MM where the Court of Appeal identified the alternative reasonable steps of (i) requiring further medical evidence for mental health patients and (ii) considering requiring further medical evidence for mental health patients. It would fit alongside Finnigan where the Court of Appeal considered the different reasonable steps capable of discharging the duty: (i) BSL interpreters on site at the time of a house search; and (ii) BSL interpreters on standby in case of being needed at short notice; and (iii) deployment of police officers themselves trained in BSL (Finnigan §36). It would fit alongside VC where the Court of Appeal considered the different reasonable steps capable of discharging the duty namely: (i) the appointment of mental health advocates; and (ii) automatic independent reviews (see VC §153). It fits with the Code, which recognises alternatives that may be properly available to a service provider acting compatibly with the reasonable adjustments duty, as seen for example in the "busy post office" example (Code §7.30): where reasonable adjustments for disabled customers unable to stand for more than a couple of minutes include an adjustment to the queueing policy; alongside the alternative of enabling the customer to take a seat while waiting their turn; or alternatively providing a separate service desk with seating for disabled customers. Examples such as these demonstrate that the Court does not apply fine judgments as to whether one alternative 'more closely approximates' to the experience of the public generally, so far as concerns the legislative policy (§20). She submits that in-screen provision of BSL interpretation for the Briefings, first made in conjunction with the BBC (16.3.20), amply discharges the reasonable adjustments duty, is maintained fully appreciating the reasons why on-platform provision has been advocated, and is fully justified in the context and circumstances and the cogent reasoning now found in the PSED Assessment (§42 above).

On-platform BSL interpretation: an issue raised

47. It is important to recognize the clear and sustained way, as a strong theme throughout the raising of the issue of BSL interpretation for Briefings (§13 above), in which *on-platform* provision has been requested, demanded and advocated. As the PSED Assessment (§42 above) puts it: "a number of organisations had requested that an on-platform interpreter be provided". Three examples of this strongly advocated theme will suffice. (1) When the Petition (with its 26,306 signatures as at 13.5.20) sought a Government "commitment to provide BSL interpreters alongside any emergency announcement", the word "alongside" was well understood to mean 'live', on-platform provision. As an internal Government email (29.4.20) recorded: "they are asking why a *live* BSL interpreter hasn't been in the room for these announcements". It described "this issue" as "clearly gaining traction" and invited "the No.10 Covid briefing team" to "consider whether a live BSL interpreter can be present for daily meetings. If this can be done then we can give a more adequate response to the Petitions Committee. If however this isn't possible, then a

statement from No.10 justifying why would be helpful for DCMS's response and to put this matter to rest". (2) The first query from the Paymaster General in mid-April 2020 raised "the possibility of a sign language interpreter being present at the coronavirus briefings". (3) The letter (30.4.20) from the EHRC raising its "concerns about the lack of provision of live BSL interpretation" at the Briefings, pointed out that only an "on-screen interpreter" had been provided, and said this: "including a BSL interpreter live at your daily briefings will allow you to demonstrate your commitment to equality for all, meeting your obligations to make reasonable adjustments under [EqA2010]".

The case for on-platform BSL interpreter provision

48. The case for on-platform BSL interpreter provision for the Briefings, put forward by the Claimant and by others who have throughout raised the issue (§47 above), is a powerful one. In this paragraph I will seek to encapsulate its essence. It has a principal comparison point: the fact that on-platform BSL interpreters have been used, throughout, in Wales and Scotland for coronavirus briefings. It also has a principal practicability point: the fact that an on-platform BSL interpreter could be readily and inexpensively arranged. It then has four distinct strands. These, importantly, are directly linked to the relevant legislative policy of closest reasonably approximated access (§20 above). (1) Replication. By having an on-platform interpreter, standing behind the speaker and in camera, it will necessarily follow that whenever and wherever any "clips" are subsequently shown, there is the BSL interpreter. In the PSED Assessment this advantage is described as follows: "the [BSL] interpretation is more likely to be carried on media outlets that do not provide BSL". So: if there is a "clip" on the evening TV news, or in a post on social media, there is the BSL interpreter. Always. Every time. (2) Elimination. Having an on-platform interpreter, standing behind the speaker and in camera shot, guarantees that nothing can be missed through miscommunication or a technical issue or for any other cause or reason, in relying on an in-screen BSL interpretation feed for live event coverage. Problems do arise. When they arise, they present an immediate exclusionary barrier. The following are described in the evidence. On 26 January 2021 and 3 February 2021 the Briefings given by the Prime Minister involved a breakdown of the BSL feed for Government online coverage (though it continued for those watching the BBC News Channel). On 28 April 2021 (9 minutes) and 14 May 2021 (16 minutes) the in-screen BSL interpreter was lost on the Government social media channels. The first time (28.4.21) was because Red Bees' digital feed hardware required a reboot. The second time (14.5.21) was because of a BBC re-routing issue in circumstances where the BBC was prioritising coverage of its 6 o'clock news. Mr Heneghan's evidence is that such issues are addressed and resolved. But on-platform provision, in the context of an anticipatory duty, would eliminate them before they happen; rather than relying on resolving them promptly after they have happened. The PSED Assessment acknowledges that one of the "advantages for BSL users of providing on platform interpretation" is that "the risk of technical issues of the limited kind we have experienced to date is reduced". (3) Inclusion. By having an on-platform interpreter, standing behind the speaker and in camera shot, the experience for Deaf BSL users is that they are being included, alongside everybody else, through the same primary routes and the same choice of routes as are available to the public generally. The provision is inclusive and immediate. Deaf BSL users are not required to 'go elsewhere'. This, clearly, is the 'closest approximation' to the experience of the public

generally. (4) Promotion. By having an on-platform interpreter, standing behind the speaker and in camera shot, the clear message and experience – for everybody – is that Deaf BSL users are being included. This constitutes clear action to promote understanding, including as to the importance of inclusion. As the EHRC – with its special role, insight and responsibility – compellingly put it (30.4.20) this constitutes a demonstration of the commitment to equality for all. As the PSED Assessment acknowledges, one of the "advantages for BSL users of providing on platform interpretation" is this "the BSL interpreter is visible automatically to all viewers which raises awareness of BSL views and needs'. As the PSED Assessment records, in relation to the PSED consideration "foster good relations between people who share a particular protected characteristic and people who do not share it": "The presence of BSL interpretation in respect of the press briefings across the Government social media channels is likely to assist in fostering good relations between d/Deaf people and other people, as it raises awareness of the need for BSL interpretation, and its benefits for those who use it. This could have positive consequences of fostering the inclusion of d/Deaf people (and disabled people generally) in wider society, particularly during the Pandemic". It continues: "having an on-platform interpreter could have a more significant positive contribution to fostering good relations… because all viewers would see them automatically". These are things that matter.

The original justification: social distancing and a cramped briefing room

49. The documents which show how the issue was considered (see §14 above) clearly demonstrate that what emerged as the answer, "justifying why" it was not "possible" for a live BSL interpreter to be "present" at the Briefings (in the language of an internal Government email of 29 April 2020) was a concern about social distancing and the importance of giving clear signals about social distancing, in the context of the cramped briefing room at No.10 Downing Street. The Government response of 13 May 2020 to the 26,306-signature petition was as follows: "The Government has assessed that in accordance with PHE guidelines, we cannot safely include a BSL interpreter in the room for daily briefings without potentially putting them and others at risk". The explanation continued: "In line with Public Health England (PHE) guidelines, it is not possible to safely include a physical British Sign Language (BSL) interpreter in the room for daily briefings as this would require additional operations staff such as an additional cameraman to be present. At Downing Street the Government is working within the constraints of a historical site with limited space. Everyone in government continues to practice social distancing, which means staying two metres apart where possible, and journalists are currently attending the daily briefings remotely rather than in person in order to prevent unnecessary risk. Having an interpreter physically attend, along with any additional staff required to facilitate broadcast of the interpretation, contradicts the PHE guidelines, and potentially puts them and others at risk. For these reasons the Government believes that it is right to limit the number of people present in the daily briefings to protect all those who must be present from additional risks. However, it is vital that that public health information reaches everyone across the country, which is why BSL interpretation of the daily Covid briefings is now provided via the BBC News Channel and iPlayer, which are available on a wide range of platforms – including satellite and cable services, as well as Freeview and over the Internet. The Government continues to

engage with the broadcasters to ensure greater replication of this 'remote' signed interpretation across a wider range of media channels". These same points were made in the response of John Whittingdale MP, Minister of State for Media and Data (2.6.20) to Linda Richards the chair of the BDA. Mr Whittingdale MP recorded that the BDA's own letter (31.3.20) had recognised the social distancing rationale. The BDA had said this: "The British Deaf Association has consistently advocated the government's position about staying at home, washing one's hands, and keeping one's distance. Having an interpreter in situ with officials within No.10 or other government office contradicts this information, and potentially puts them and others around them at risk". Similarly, when Mr Fry wrote (7.4.20), following up a letter before claim (28.3.20) seeking confirmation of on-platform BSL interpretation, Mr Fry confirmed that his client (Mr Kelberman) "recognises that at present, given the evolution of the Covid-19 threat, and requirements to strengthen social distancing that it is reasonable to prefer studio-based live BSL English Interpreting, rather than in person[] attendance". The internal briefing note for the chair of the DCWG stakeholders briefing (1.10.20) recorded the 'line to take': "If pressed: We did not provide a BSL interpreter in the room to maintain social distancing". The letter of Julia Lopez MP, Parliamentary Secretary (1.12.20), replying to the letter from the joint chief executives of the RAD (9.9.20), said this: "I have been advised that including a BSL interpreter in the room requires additional equipment and camera operators. Unfortunately, due to the physical constraints of the historical site at 10 Downing Street, it is not possible to place a BSL interpreter in the same room as those conducting the daily briefings whilst maintaining safe social distancing measures. This means signing must be done remotely". Mr Heneghan's submission to Julia Lopez MP (30.10.20) had set out "the rationale behind the current provision for a BSL interpreter at Covid-19 press briefings", recording that "the absence of an in-room BSL interpreter at Covid press briefings remains a sticking point" and setting out "a robust solution". Describing the "decision not [to] have an in-room BSL interpreter", Mr Heneghan's submission to Julia Lopez MP said this: "Due to the physical constraints of the historical site and the space at 10 Downing Street, and the Public Health England social distancing guidance in place to mitigate risk of infection during the pandemic, it has not been judged to be reasonable or appropriate to place a BSL interpreter and an additional camera operator in the same room as those conducting the daily briefings. The view of government was that it would not be appropriate to put staff and others at risk in this way. This paved the way for an alternative BSL interpreter solution by the BBC". This was the robust answer given.

The original justification (social distancing and a cramped briefing room) has faded

50. The PSED Assessment (28.5.21) (§42 above) says this about on-platform provision and social distancing: "Other disadvantages, which had particular force in the early stages of the pandemic, arose from the need to ensure people in the briefing room were socially distanced and also the need to send an appropriate and clear public message about the importance of social distancing". The past tense is unmistakeable, as is the reference to "the early stages". No great weight is placed on the original, "robust", response. That is unsurprising. In particular, as Mr Heneghan's witness statement (1.4.21) told the Court: "This week, week commencing 29 March 2021, the Briefings move to a designated broadcast room at No.9 Downing Street". As Mr Fry's witness statement (14.4.21)

explained: "Number 9 Downing Street has recently been converted into a larger Studio for the purposes of Daily Briefings to journalists about various Government matters, at a reported cost of £2.6m". The witness statement of Ms Casson Webb, joint chief executive of the RAD describes having "inquired about the steps being taken by Government to ensure the visibility of BSL interpreters at the new studio constructed for the Downing Street Press Briefings". Mr Fry had long since (3.6.20) withdrawn Mr Kelberman's acceptance, in the light of alternative options (said to include the rose garden, used for another kind of briefing on 25.5.20), that on-platform provision of BSL interpretation for the Briefings was justifiable on social distancing grounds. The PSED Assessment says: "Since 29 March 2021, the briefings have been hosted from a new designated broadcast room at number 9 Downing Street". It also says that: "Usually, the only people… present in the room during the course of a briefing are the speakers themselves and a small number of people to perform necessary technical roles". I have found no clear statement anywhere that it is still being said that the briefing room is cramped, or that social distancing or social distancing messaging, is a justification for not making on-platform provision for BSL interpretation.

No suggested 'disbenefit in people seeing a feature they do not need to use'

51. Ms Leventhal made clear in her oral submissions that it is no part of Government's thinking or justification – for deciding against on-platform provision of BSL interpretation for Briefings – that such provision constitutes the "disbenefit of a BSL interpreter appearing, on the platform behind the speaker, for those who do not need to make use of such provision". That phrase had featured – hypothetically – during her oral submissions. Such a 'disbenefit' does not feature in the PSED Assessment.

Points made about adequacy and proportionality

52. The PSED Assessment states that on-platform provision of BSL interpreters has "not been judged to be necessary or proportionate", being "a service that principally only benefits people who are d/Deaf, who also speak BSL and who cannot read subtitles", in circumstances where: "For that cohort, BSL briefings are already accessible, both on television (with visual prompts for the correct channel) and online (on the BBC website and government channels)". That is an important point. Put another way, the substantial disadvantage, viewed in terms of inaccessibility to BSL interpretation during the Briefings, is effectively overcome by the in-vision provision (Code §7.30: §29 above). In the PSED Assessment, and in Mr Heneghan's submission which accompanied it, emphasis is placed on the aspects of accessibility (§7 above): in-screen provision of BSL interpreters in conjunction with the BBC, and in conjunction with Red Bee Media for any briefing not being covered by the BBC; the arrangements for the clean feed enabling in-screen BSL interpreters on the Government's own online and social media channels; the visual prompt on BBC1. The points are also made that the Briefings are "now comparatively few in number", are "just one means of communicating to the public about the pandemic", and sit alongside large-scale government campaigns across multiple platforms including national print media advertising, local press partnerships, social media content, conveying key messaging visually; mass advertising including key transport hubs and billboards around the country; direct communications with individuals, such as text messaging; and ministerial interviews every day across all of the

main broadcasters. The point is also made that it is "not proportionate or realistic" for Government "to ensure" that "every piece of information about the pandemic is either contained in the Briefings or translated into BSL".

Points made qualifying replication and elimination

53. In the PSED Assessment, replication and elimination (§48(1)(2) above) are identified among the "advantages for BSL users of providing on platform interpretation", but 'yes but' points are then made which qualify these two strands. The replication point is qualified in this way: "whilst media outlets would be more likely to broadcast footage with BSL provision if it already included an on platform interpreter, BSL footage is available to broadcasters to use. If they choose not to use it, their media coverage will presumably not be in BSL either, and so likely to be of no more assistance". In other words, yes the 'clip' from the Briefing shown on the evening news would always show the BSL interpreter, for everybody to see, but it would appear in programming which does not itself have BSL interpretation (unless accessed by means of an in-screen BSL interpreter route). The elimination point is qualified by these points: that there have been "a very small number of technical issues over the course of the past 14 months"; and that problems with delivery can arise "with any arrangement", examples being an on-platform BSL interpreter "who is late, unwell, unavailable or fails vetting".

Points made about disadvantages

54. The PSED Assessment (§42 above) describes "disadvantages" of on-platform BSL interpretation. Having first identified "advantages", it then says this:

> ***However, there are also disadvantages. For example, the BSL interpreter would be much less prominent. At present, they are at the front of the screen, clear and well lit. If on platform, they would be less visible. Further, when data slides are presented they are presented "in screen" for clarity. Therefore a choice would have to be made between making the data slides less clear (by filming the slides on a screen with an interpreter stood next to them) and losing the BSL interpreter altogether. The same problem arises in relation to questions from journalists, who are not present in the room. Requiring two people always to be in shot will also significantly limit the angles and scope of any footage.***

There are two themes here. The first theme concerns <u>what promotes accessibility for BSL users</u>. That is the clear focus of the points made about greater prominence and better visibility of the BSL interpreter. The second theme concerns <u>what promotes accessibility for all viewers</u>. That is the focus of the points about how best to show data slides, how best to show questions from journalists, and the angles and scope of the footage when having to ensure that whoever is speaking (whether they are a single speaker, one of several speakers, or a journalist asking a question) and the BSL interpreter (the "two people") are "always … in shot".

Is the absence of BSL interpretation for the Briefings a breach?

55. Having considered these relevant topics, I turn to apply the objective standard which governs enforcement by the Court of the reasonable adjustments duty. My analysis and reasons are as follows. (1) In principle, on-platform provision of an BSL interpreter 'approximates' the accessibility of Deaf BSL users to the provision of information in the Briefings 'more closely' to the accessibility enjoyed 'by the rest of the public', being

closer to the standard of access normally offered to the public at large. Subject to questions of reasonable practicability, and questions of what is reasonably possible, on-platform provision better promotes the legislative policy (§20 above) and in-screen provision is a 'lesser' step (§32 above). (2) There is a substantial disadvantage which moreover, viewed in the correct way, is serious (§45(2) above). (3) The burden of proof has switched to the Defendant (§45(5) above) to show that in-screen provision for BSL interpretation of the Briefings constitutes the taking of such steps as it is reasonable to have to take to provide BSL interpretation for the Briefings. (4) In considering whether the Defendant has discharged that burden it is appropriate to consider the points which have been made by and on behalf of the Defendant, including in particular in the PSED Assessment, both individually and cumulatively. (5) Relevant and material qualifications have been identified in the PSED Assessment, in relation to replication and elimination (§53 above), which serve to lessen the force of those points. But their force is not extinguished: elimination is a concrete advantage; replication retains real force, particularly in conjunction with inclusion and promotion. (6) In-screen BSL interpretation is an accessible format in relation to the provision of information (s.20(6)) and the points are well made as to adequacy and proportionality (§52 above). (7) In light of the case for on-platform provision (§48 above), the Defendant cannot, in all the circumstances, discharge the burden of proof in showing that in-screen BSL interpretation constitutes such steps as it is reasonable to have to take to provide BSL interpretation for the Briefings unless it can point to some disadvantage as to on-platform provision. Having regard to those factors (Code §7.30: §29 above) which are in play, that disadvantage could be as to (a) practicability or (b) disruption or (c) reduced effectiveness of accessibility for Deaf BSL users or (d) reduced effectiveness of accessibility for another group or the public as a whole or (e) some other reason. (8) The disadvantage originally identified as the rationale for not adopting on-platform provision – relating to social distancing, social distancing messaging, and the cramped briefing room at No.10 Downing Street – is no longer a convincing disadvantage (§§49-50 above). (9) The disadvantages which have been identified in the PSED Assessment in relation to what is best for Deaf BSL users themselves – in particular as to the general prominence and visibility of the BSL interpreter on-platform compared with in-screen – are unpersuasive. They have the patent weakness (§44 above) of not being linked to what is said by Deaf BSL users or groups representing Deaf BSL users. Ms Leventhal showed me the BDA letter (31.3.20) which said BSL interpreters in "designated broadcast studios ensures safe standards in terms of broadcast quality, appropriate lighting, and with the interpreter in a fixed position on the screen. Knowing there is a set position and size on the screen – such as on BBC News – is extremely helpful for those members of our Deaf Community who have Usher or Deafblindness". But that letter was a letter written in the context of, and to support, the social distancing rationale for in-vision provision (§49). It did not say, and no material which I have been shown says, that an in-screen BSL interpreter is better for Deaf BSL users than an on-platform BSL interpreter. The BDA did not say that "appropriate lighting", and a fixed position, were unachievable on-platform, still less in the new Downing Street press room. Government has had good access, not least given the sustained way in which the issue has been raised (§§13, 47 above), to views expressed by Deaf BSL users and groups speaking for Deaf BSL users; it has elicited their views (Code §7.80: §29(4) above). The Court has ample evidence of Deaf BSL users, and

groups who represent them, advocating on-platform provision. The fact that the Defendant has identified no support from any such persons or group leaves the suggestion that 'Deaf BSL users are themselves better off' with a hollow ring fatally undermining its capacity to persuade.

56. I pause to break at this point in the reasoning. I do so for transparency. By reference to the points made so far in the analysis, I would not have accepted, in light of the case for on-platform provision (§48 above), that the Defendant had discharged the burden of showing compliance with the reasonable adjustments duty. But the analysis, and my reasons, continue. (10) The more general disadvantages – in relation to all viewers – which have been identified in the PSED Assessment are about data slides, journalists and camera angles. These too suffer from a patent weakness (§44 above): they are put forward without making any comparison with the principal reference-point of briefings conducted by the Scottish and Welsh governments, where on-platform BSL interpretation has consistently been used. (11) However, and notwithstanding that weakness, the Defendant has identified a substantial problem – which links to the factors of reasonable practicability, and of disruption – concerning general accessibility and data-slides. The evidence before the Court includes examples of the detailed nature of the information which is included in typical data slides for the Briefings. The evidence shows how those slides look in-screen: occupying the full screen, with the speaker and platform no longer in picture. The evidence also establishes a clear pattern of the high prevalence of the use of data slides in the Briefings. As I have explained, data slides were used in Briefings from 30 March 2020; and by 5 June 2020 slides and datasets had been used and published in conjunction with some 67 of the 79 Briefings which had taken place. The pattern continued. Data slides were used at the two Data Briefings which are the focus of the 'then' part of this claim. The PSED Assessment explains that data slides are "presented 'in screen'", which is a step taken "for clarity". The point is, powerfully, made that "filming the slides on a screen with an interpreter stood next to them" would involve "making the slides less clear". What follows from this is clear. If the data slides are being shown "in screen", Deaf BSL users will need an in-screen BSL interpreter for the Briefing, when the slides are being shown. (13) The use of slides is also addressed in the evidence on behalf of the Claimant. In his statement, Mr Hirshman convincingly explains the virtues of in-screen BSL interpreters for live broadcasts in which speakers delivering the message are or can be static. He has also assisted me in relation to slides. His evidence is: "In Scotland … the Interpreter is designed into the production to the extent that slides are also visible in the background without being blocked by the Interpreter or the First Minister". He then exhibits "a screen shot of this". That screenshot shows the Scottish First Minister standing in front of a slide which says "Coronavirus: Stay Safe: Protect Others: Save Lives", with the BSL interpreter standing on-platform. I accept Mr Hirshman's evidence that this is a way of showing slides. But the Defendant has convincingly reasoned that the visibility of detailed data slides – of the sort which is in evidence and has been used at the Briefings – would be compromised by adopting that approach to slides. That position is plainly open to the Defendant on the evidence. There is also force in the similar point made about journalists asking questions, being shown in full-screen. That does not have the same force as in relation to a detailed data slide, but it nevertheless has real force. No doubt points could be made about 'hybrid' approaches

or about sub-species of Briefings. But this case is squarely about the service-provision of the Briefings. The on-platform point has been addressed in relation to the Briefings. Whether with on-platform provision of BSL interpreters, or with in-screen provision of BSL interpreters, the premise on both sides has been to approach the issue across the practice of the Briefings. That fits with the idea of a consistent practice and people knowing where they stand as regards accessibility. (14) These points need to be considered 'in the round', and together with the other points which have been made including as to 'adequacy and proportionality' (§52 above), albeit that those points were not of themselves sufficient to discharge the Defendant's burden of showing compliance. (15) In conclusion, I am satisfied that the Defendant has by reason of the PSED Assessment discharged the burden of showing (EqA2010 s.136(3)) – through an "explanation" (s.136(2)) – that it is not in breach of the reasonable adjustments duty: that it has, through in-screen provision, taken such steps as it is reasonable to have to take to provide BSL interpreters for the service of providing information about the pandemic through the Briefings. I reach that conclusion in all the circumstances of the case (§29(2) above), judging what is reasonable objectively (§29(3) above), focusing on the substance but having regard to the reasons advanced by the Defendant (§29(4)). If I apply Ms Casserley's proposition (§32 above), the answer is this: the Defendant has shown, in the context of the Briefings, that on-platform provision of BSL interpretation is not reasonable as a step for it to have to take. Putting it another way, the Defendant has identified in-vision provision of BSL interpretation, in the context of the Briefings, as a reasonable alternative method (§§26(5), 46 above).

On-platform provision is a policy choice for Government

57. Whether to have an on-platform BSL interpreter for announcements and briefings from the Downing Street press room remains, as a policy choice, for Government to make and 'own', in respect of which it is accountable to Parliament and to the public. Government is accountable to the Court, and has been through these judicial review proceedings, on questions of law and legality. A cardinal feature of the Court's constitutional responsibility is to recognise, and not lose sight of, the limits on the judicial role. The fact that the Court is applying an objective standard, in the context of equality considerations, calibrates the Court's responsibility. But the room for an appropriate latitude remains (§29(5) above). The duty which the Court is entrusted with enforcing in this case is the duty of "reasonable" adjustments; the duty is to take steps that "it is reasonable to have to take"; and the legislative policy (§20 above) concerns closest "reasonably" approximated access. It is not the Court's role in enforcing the reasonable adjustments duty – whether in a judicial review case involving a public authority service-provider, or in a county court claim involving a public authority or any other service-provider – to make or impose a choice from "comparably reasonable solutions" in a case where there are different "steps" which it would be "reasonable to have to take". For reasons which I have explained, a choice between subtitles and BSL interpretation for the Briefings would not be a choice between 'reasonable alternatives'. But, for reasons which I have also explained, the choice between in-screen and on-platform BSL interpreters for the Briefings is a choice between 'reasonable alternatives'.

Detriment and remedy

58. For the reasons which I have explained, I have found present compliance with the reasonable adjustments duty. In those circumstances, the question of detriment to the Claimant – through the provision of in-screen BSL interpretation rather than on-platform BSL interpretation for the Briefings – does not arise. Nor does the question of remedies. Had I concluded that there was a present breach of the reasonable adjustments duty I would have found a detriment to the Claimant. Mr Finnigan failed on the detriment point because of his unimpaired ability to understand what was happening during the police searches (Finnigan §44). The Claimant is able to understand Briefings through an in-vision interpreter. And the burden is on her. She would have discharged it, given the nature of the four strands in the case for on-platform provision (§48 above), together with the concept of 'detriment' as something which a reasonable person could complain about; not an unjustified sense of grievance (Code §5.10: §36 above). There is a further point which would have arisen had I found in the Claimant's favour on all points except detriment. I would I think have invited further submissions, and relevant authorities, on the point had this position arisen. It is this. Breach of the service-provider's reasonable adjustments duty (EqA2010 s.29(7)(a)) is a contravention of the Act (s.113(1)), proceedings for which can be brought by judicial review (s.113(3)(a)). If the Claimant, a person with a sufficient interest (Senior Courts Act 1981 s.31(3)), had shown present breach of a statutory duty, I would have been most reluctant to refuse a remedy. The absence of detriment (if that is what I had found) would have prevented the Claimant from establishing Part 3 discrimination against her (EqA2010 s.29(2)(c)), in contravention of Part 3 (s.114(1)(a)), to give rise (s.119(1)) to damages (s.119(4)). But would it have precluded a finding of breach and a declaration or mandatory order? One answer could be that detriment is a necessary component of any breach of the reasonable adjustments duty by a service-provider, which duty is breached only through Part 3 and section 29(2)(c). I understand Finnigan to have been, in essence, a damages claim. In VC, detriment was treated as a precondition to a declaration on judicial review (§§172-177), but I note that the declaration was that the Secretary of State had "discriminated against the claimant by failing to make reasonable adjustments" (§193). In the circumstances, I can leave it there.

Conclusions

59. For the reasons which I have set out, my conclusions – on the questions (§17 above) which it is appropriate for this Court to address – are as follows. (Q1) The absence of any BSL interpretation for the Data Briefings on 21.9.20 and 12.10.20 constitutes discrimination against the Claimant by reason of breach by the Defendant of the reasonable adjustments duty. (Q1A) The Court should make a declaration to that effect and transfer assessment of the quantum of damages to the county court. (Q2) In relation to on-platform BSL interpretation for Briefings the Defendant is not in present or continuing breach (i) of the PSED or (ii) of the reasonable adjustments duty. (Q2A) The question of remedies does not arise. Having circulated this judgment to the parties in draft, I am able to deal here with certain consequential matters. The Claimant's team requested, the Defendant's team supported, and I granted, permission for the confidential finalised judgment and a summary of it to be interpreted into BSL, for dissemination

immediately after hand-down. That involved prior circulation to three identified individuals, each of whom gave undertakings to comply with the conditions of the embargo. I granted requests by the Claimant for a little time for the filing of the parties' costs submissions, and by the Defendant for a little further time to reflect on whether to make an application for permission to appeal. The substantive paragraphs of my order were as follows (the terms of (1), (2) and (4) being helpfully agreed). (A) It is ordered that: (1) The Claimant's claim is allowed in part, insofar reflected in the terms of the Court's declaration set out at paragraph (4) below. (2) The Claimant's claim for damages arising from the declaration set out at paragraph (4) below is transferred to the county court for determination, following a period of 3 months from the date of this order. During that period, the parties may confirm to the Court that such transfer is no longer required in that the claim is withdrawn and/or resolved between the parties. (3) The remainder of the Claimant's claim is dismissed. (B) It is hereby declared that: (4) The Defendant discriminated against the Claimant, within the meaning of s.21(2) of the Equality Act 2010 and contrary to s.29(2), by reason of a failure to make reasonable adjustments (in breach of s.20(5)) in respect of the absence of British sign language interpretation for the broadcast of two data briefings which took place on 21 September 2020 and 12 October 2020. (C) Costs: (5) The parties are to file and serve written submissions on costs (if not agreed) by (i) Claimant by 4pm on Monday 2 August 2021; (ii) Defendant by 4pm on Wednesday 4 August 2021; (iii) Claimant in reply by 4pm on Friday 6 August 2021. (D) Further consequential matters: (6) The Defendant is to submit any application for permission to appeal from this Court to the Court of Appeal (or confirmation that no such application will be made) by 4pm on Wednesday 11 August 2021. (7) The Defendant's time for filing his Appellant's Notice with the Court of Appeal (if so advised) is extended to 21 days from the date of the High Court's order in respect of permission to appeal for which application is made pursuant to paragraph (6) above, in accordance with CPR 52.12(2)(a).