Neutral Citation Number: [2021] EWHC 2440 (Admin)

Case No: CO/4854/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd September 2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

HHRC Limited	**Claimant**
- and -	
Hackney Borough Council	**Defendant**

- -
- -

Daniel Stedman Jones and Tom van der Klugt (instructed by **Dowse & Co**) for the **Claimant**
Kelvin Rutledge QC and Jack Parker (instructed by **London Borough of Hackney**) for the **Defendant**

Hearing dates: 30th June 2021 & 1st July 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove:

Introduction.

1. The claimant brings this application for judicial review in relation to the decision of the defendant's Cabinet on 29th September 2020 to adopt an emergency transport plan entitled "Rebuilding a Green Hackney – Emergency Transport Plan: responding to the impacts of COVID-19 on the transport network" ("the ETP"). In particular the claimant is concerned about the proposals within the ETP to introduce Low Traffic Neighbourhoods ("LTNs") as one of the suite of alternative traffic management measures included within the ETP's proposals.

2. The claimant brings this claim on four grounds. Ground 1 advanced by the claimant is the contention that the defendant failed to discharge its duty under section 16 of the Traffic Management Act 2004 in approving the ETP proposals. Section 16 of the 2004 Act, which is dealt with in greater detail below, creates the network management duty, and it is contended that the defendant failed to properly examine the impact of the ETP proposals upon the movement of traffic not simply on neighbourhood road networks, but also on the busier and more strategic highways surrounding the areas affected by the proposed LTNs. Ground 3, which is allied to these considerations, is the contention that the approval of the ETP failed to properly investigate or have regard to the impact on air quality of the LTN proposals.

3. Ground 2 of the claimant's application is the submission that the defendant breached its public sector equality duty ("PSED") under section 149 of the Equality Act 2010 by failing to have due regard in approving the ETP to the impact which its LTN proposals would have upon groups with protected characteristics. Finally, under Ground 4, the claimant submits that there was a failure to undertake any proper consultation on the ETP before it was promulgated in breach of the consultation requirements of the common law.

4. The claimant was represented by Mr Daniel Steadman Jones assisted by Mr Tom van der Klugt; the defendant was represented by Mr Kelvin Rutledge QC assisted by Mr Jack Parker. I would wish to record my thanks to all counsel in the case and their supporting legal teams for the helpful and focused written and oral submissions which were provided to the court, along with the obviously careful preparation of the papers which they had undertaken for the purpose of the hearing.

The facts.

5. The defendant is the highway authority for the vast majority of the roads within its administrative area. There are certain strategic, or distributor, roads which are separately the responsibility of Transport for London ("TfL"). In 2015 the defendant published a replacement Hackney Transport Strategy covering the period 2015–2025. It comprised an overarching strategy document together with six complementary plans in relation to particular themes. One of these themes was the "Liveable Neighbourhoods Plan". The Liveable Neighbourhoods Plan incorporated, as policy LN15, a proposal to reduce the impact of through motor traffic on residential streets by implementing what were termed filtered streets, or streets with filtered permeability, which allowed for through access for pedestrians and cyclists, whilst preventing vehicular traffic through the imposition of street features which precluded use by cars and goods vehicles. It was

noted that where there was strong resident support, the defendant would consider fast-tracking the implementation of trialled filtered streets and road closures on a temporary basis.

6. Both the transport strategy, the Liveable Neighbourhoods Plan and other thematic documents were the subject of an Equality Impact Assessment ("EqIA") which concluded that the strategy, in prioritising walking, cycling and public transport, in addition to improvements to road safety, the public realm and reducing pollution, would give rise to equalities impacts which would be generally positive. A more accessible borough for all groups using a choice of transport modes was intended to result from the proposals. In particular, in relation to permeability measures, the assessment matrix noted a positive impact in relation to each of the protected characteristics identified in the 2010 Act and observed:

> "These schemes will particularly benefit pedestrians and cyclists. The associated environmental social and safety benefits of schemes will benefit all groups."

7. In 2015 the defendant also published the Hackney Air Quality Action Plan 2015–2019 ("the HAQAP") which noted that in localised areas nitrogen dioxide was found at levels almost twice those of the annual mean air quality objective adopted by the plan. The defendant had previously designated an Air Quality Management Area ("AQMA") within its administrative area (see below). In particular, pollution levels were noted to be at their highest in the most densely built up areas of the borough, particularly along the borough's busiest main roads. Away from the main roads air quality objectives were being met. The HAQAP noted that there were barriers to the uptake of cycling and walking, and it further noted that working with TfL there would be a need to improve traffic flows at key junctions in the borough in order to reduce air pollution.

8. Pursuant to the Mayor of London's Transport Strategy of April 2017, in March 2019 the defendant approved its Third Local Implementation Plan (2019–2022) ("the LIP"). Within the LIP, and cross referenced to policy LN15, Objective 20 was to "improve the efficiency of our streets with the continued reduction of motorised vehicles". This was to be achieved by the restriction of the levels of external vehicular traffic entering and exiting the borough using it as a rat-run. In order to take practical steps to achieve this, the LIP specifically referenced filtered streets preventing vehicular through traffic in residential areas. The LIP again reiterated the problem of poor air quality caused by vehicular traffic on the TfL parts of the road network in the borough, and reiterated that the borough was a designated AQMA (the designation having occurred in 2006).

9. The LIP noted that in highly polluted areas children could suffer permanent lung damage and that there was evidence of the local population suffering from breathing related diseases such as asthma and COPD. An EqIA was produced in relation to the LIP. This assessment noted no negative impacts on any people with protected characteristics, and in relation to Objective 20 noted:

> "A reduction in through traffic will result in less congestion and better air quality for all residents. BAME groups tend to live nearer busy arterial roads – therefore a reduction in traffic should benefit this group in particular."

10. In November 2004 the Department for Transport ("DfT") published Guidance on the Network Management Duty ("the 2004 Guidance"). Full details of the relevant parts of the 2004 Guidance are set out below in the section of this judgment dealing with the relevant law. In the early part of 2020 the UK became beset with the COVID-19 pandemic, leading to the imposition of a national lockdown on 23rd March 2020. In response to this national emergency the Secretary of State for Transport published statutory guidance entitled "Traffic Management Act 2004: network management in response to COVID-19". ("the COVID-19 Guidance") In his forward the Secretary of State observed as follows:

> "The coronavirus (COVID-19) crisis has had a terrible impact on the lives and health of many UK citizens, as well as severe economic consequences. But it has also resulted in cleaner air and quieter streets, transforming the environment in many of our towns and cities.
>
> And millions of people have discovered, or rediscovered, cycling and walking. In some places, there's been a 70% rise in the number of people on bikes – for exercise, or for safe, socially distanced travel.
>
> When the country gets back to work, we need them to carry on cycling, and to be joined by millions more. With public transport capacity reduced, the roads in our largest cities, in particular, may not be able to cope without it.
>
> We also know that in the new world, pedestrians will need more space. Indications are that there is a significant link between COVID-19 recovery and fitness. Active travel can help us become more resilient.
>
> …
>
> We recognise this moment for what it is: a once in a generation opportunity to deliver a lasting transformative change in how we make short journeys in our towns and cities. According to the National Travel Survey, in 2017-2018 over 40% of urban journeys were under 2 miles – perfectly suited to walking and cycling.
>
> …
>
> The government therefore expects local authorities to make significant changes to their road layouts to give more space to cyclists and pedestrians. such changes will help embed altered behaviours and demonstrate the positive effects of active travel."

11. In addition to introducing various elements of emergency legislation in respect of traffic orders, the guidance provided as follows:

> "Reallocating road space: measures.

Local authorities in areas with high levels of public transport use should take measures to reallocate road space to people walking and cycling, both to encourage active travel and to enable social distancing during restart (social distancing in this context primarily refers to the need for people to stay 2 metres apart where possible when outdoors). Local authorities where public transport use is low should be considering all possible measures.

Measures should be taken as swiftly as possible, and in any event within weeks, given the urgent need to change travel habits before the restart takes full effect.

None of these measures are new – they are interventions that are a standard part of the traffic management toolkit, but a step-change in their roll-out is needed to ensure a green restart. They include:

…

Modal filters (also known as filtered permeability); closing roads to motor traffic, for example by using planters or large barriers. Often used in residential areas, this can create neighbourhoods that are low-traffic or traffic free, creating a more pleasant environment that encourages people to walk and cycle, and improving safety.

…

Other considerations.

All these measures can be introduced temporarily, either in isolation or as a combined package of measures. Some interventions, including new lightly-segregated cycle lanes, will not require Traffic Regulation Orders (TROs). Others will require TROs, of which there are different types. The main ones are:

- Permanent: this process includes prior consultation on the proposed scheme design, a 21 day notice period for statutory consultees and others who can log objections; there can be a public inquiry in some circumstances.

- Experimental: these are used to trial schemes that may then be made permanent. Authorities may put in place monitoring arrangements, and carry out ongoing consultation once the measure is built. Although the initial implementation period can be quick, the need for extra monitoring and consultation afterwards makes them a more onerous process overall.

> - Temporary: these can be in place for up to 18 months. There is a 7 day period prior to making the TRO and a 14 day notification requirement after it is made, plus publicity requirements. These are most suitable for putting in place temporary measures and road closures.
>
> …
>
> Authorities should monitor and evaluate any temporary measures they install, with a view to making them permanent, and embedding a long term shift to active travel as we move from restart to recovery.
>
> …
>
> Authorities should seek input from stakeholders during the design phase. They should consult with the local chiefs of police and emergency services to ensure access is maintained where needed, for example to roads that are closed to motor traffic. Local businesses, including those temporarily closed, should be consulted to ensure proposals meet their needs when they re-open. Kerbside access should be enabled wherever possible for deliveries and servicing.
>
> The public sector equality duty still applies, and in making any changes to their road networks, authorities must consider the needs of disabled people and those with other protected characteristics. Accessibility requirements apply to temporary measures as they do to permanent ones."

12. Alongside this the Mayor of London published the "London Streetspace plan – Interim Guidance to Boroughs". Within this document guidance was provided on LTNs as a means of offering safe outdoor space and attractive environments for walking and cycling. The document noted that interventions could include modal filters, using temporary materials or bollards, and the document included, at appendix 6, supplementary guidance on LTNs. TfL had undertaken a strategic analysis to examine the potential suitability of different areas for LTNs, providing a broad indication of where they may be most suitable. However, this was produced for guidance only. It was noted that "well planned LTNs can lead to traffic reduction, particularly where LTNs cover a wider area or several are implemented together". It was also noted that engagement in relation to LTN proposals would be crucial to successful implementation.

13. It was against the background of this material that the defendant prepared the ETP. It was taken to Cabinet for approval on 29th September 2020, and in the Cabinet Report produced for members the introduction noted the following:

> "1.7 This ETP outlines the creation of an entirely new network of liveable Low Traffic Neighbourhoods (LTNs) right across the borough through the reallocation of road space; new permeable filters that eliminate through-traffic and rat-runs while

> maintaining full access to residential areas; further investment in green infrastructure and tree planting; new bus prioritisation and a full review of bus lane hours of operation; and the provision of the new cycle parking."

14. The Cabinet Report recorded that most of the schemes in the ETP were already contained in the Hackney Transport Strategy, and noted that in June 2020 the defendants had been invited to bid at short notice for emergency funding from the DfT: priority was being given within the ETP for "shovel ready" schemes. In order to fast track the schemes, the ETP was proposing the use of Experimental Traffic Orders ("ETOs") which would be carefully monitored to assess their impact and adjusted if necessary. At paragraph 5.1 of the Cabinet Report, it was noted that it would have been possible to bring forward a transport response on a scheme-by-scheme basis "but this would make strategic response to the pandemic difficult and would be an inefficient use of officer and member time".

15. The Cabinet Report contained a section dealing with the EqIA, which is dealt with below in the context of the ETP in greater detail. Under the heading of sustainability, the report noted that "benefits are predicted to exceed the disbenefits to some residents on surrounding roads, and drivers using Hackney's road network". The urgent need to avoid a car-led recovery from lockdown was also noted alongside the potential to help address climate change. Section 10 of the document dealt with the topic of risk assessment and provided as follows:

> "Risk Assessment
>
> 10.1 The main risk to the Council with these proposals is reputational as, in order to be most effective in helping to address the social distancing issues and the dangers of a car-led recovery in the quickest way possible, the schemes would be introduced using Experimental Traffic Orders. Owing to the time required for detailed assessments of traffic flows and the large number of changes being introduced by the ETP the potential impacts and interactions between the different schemes have been assessed at a 'high level' only.
>
> 10.2 However, as the plan describes, the risks of taking no or minimal action are both real in terms of increased risk of death or serious health impact on our residents and the consequent reputational damage on the Council that those risks being realised would entail.
>
> 10.3 The mitigation to the risk of unanticipated traffic impacts is to use experimental traffic orders. This means that Hackney Council has the means to be nimble to a rapidly changing situation and to amend or reverse individual schemes should the need arise. We are strengthening our engagement processes to enable continuous feedback on the scheme via the Commonplace platform.

> 10.4 The first six months is the period where any feedback/objections received is considered. This is consultation and this will be made clear in Notification leaflets/letters, although there will not be a separate dedicated consultation leaflet.
>
> 10.5 The Council is aware that schemes affecting traffic circulation often take a while to bed-in as drivers and other road users get used to the new permitted routes and road space allocations. With this in mind the Council must ensure that it considers the views and needs of all residents, and does not risk any premature reversal of changes, whilst waiting for robust results from any 'experimental orders' used."

16. Amongst other lead officers contributing to the report the Director of Legal Governance Services provided advice in relation to ETOs and pointed to the requirements of section 122(1) of the Road Traffic Regulation Act 1984 to secure expeditious, convenient, safe movement of vehicular and other traffic when considering the making of ETOs.

17. The foreword to the ETP explained that it outlined the creation of an entirely new network of liveable LTNs across the borough through the reallocation of road space and new permeable filters eliminating through traffic and rat-runs whilst maintaining full access to residential areas. In Table 1 of the ETP a range of measures were set out including LTNs in various locations. In anticipation of concerns being raised, a section of the document set out what were considered to be likely frequently asked questions together with the defendant's answers to them:

> "**Traffic reduced during lockdown, therefore restrictions are not required to achieve cleaner air, safer roads and more active travel?**
>
> It is becoming increasingly clear that the traffic reduction seen during lockdown was temporary and that levels could increase behind the pre-lockdown levels as people switch from public transport. This is set out in more detail in Section 1. But traffic reduction measures do not just reduce traffic levels, they enable us to take back public space, currently underutilised and create people focussed places not car focussed places. This concept is described in the Liveable Neighbourhoods section of the Hackney Transport Strategy and has been a guiding policy principle for many years. Failing to act now, would not only lead to short term problems but would also set the Council on a backwards course away from achieving long term and clearly established objectives.
>
> **Restricting traffic just moves the problem elsewhere?**
>
> This is a common fear when residential road closures are installed which assumes that trips which used to pass along a road simply to divert to other roads in the immediately surrounding area and problems are shifted to those other roads.

> This ignores the fact that roads are designed for different purposes. Roads in residential areas are not designed to carry through traffic which is better accommodated on main roads. It also ignores the phenomenon of 'traffic evaporation' where some short car trips will not divert when the journey becomes slightly less convenient because of road closure. Instead the person making the trip might decide to walk or cycle instead of using a car or they might decide not to make the trip at all. There is strong recent evidence for the reality of traffic evaporation, for instance, from the 'villages' created as part of Waltham Forest's Mini Holland programme.
>
> **What is traffic evaporation?**
>
> The concept of 'traffic evaporation' reflects the fact that, when changes such as modal filters and low traffic neighbourhoods are introduced, some drivers change their traffic choices to alternative forms of transport, while others (i.e through-traffic) make diversions further away to avoid the locality altogether. The concept was established in academic research carried out by Sally Cairns, Carmen Hass-Klau, and Phil Goodwin in 1998 and followed up in 2002 and has since been widely observed in scheme evaluations. Cairns et al looked at 70 case studies and found that in half of the case studies examined, where road space for traffic was reduced, there was an 11% reduction in the number of vehicles across the whole area, including on the main roads. More recently, in neighbouring Waltham Forest, an overall traffic reduction of 16% was reported following their Mini-Holland scheme.
>
> Therefore, under pre-pandemic, business-as-usual conditions, an estimated traffic reduction of 10-15% for a scheme that reallocates road space from motorised modes to walking and cycling would be consistent with the evidence. However, these are not business-as-usual times and we have observed a huge increase in the uptake of cycling during the lockdown, and a change in people's travel patterns that indicate a potential for higher levels of behaviour change."

18. The ETP noted that vulnerable populations, including those living in more deprived areas, were more likely to be impacted upon by exposure to higher levels of air pollution and road danger, as well as being less likely to be car owners and therefore more likely to be impacted upon by reduced capacity on public transport. In relation to the proposals of the ETP the document observed as follows:

> "2.1.5 All proposed measures will be introduced using an experimental traffic order for a maximum period of 18 months, which means residents and businesses can see how the closures work in practice before having their say. The views of residents and businesses, including any suggested changes to how schemes operate, will be taken into account before any decision

> on whether or not to make the measures permanent. This process is in line with specific guidance from TfL and the DfT, whose guidance states that: 'authorities should monitor and evaluate any temporary measures they install, with a view to making them permanent, and embedding a long-term shift to active travel as we move from restart to recovery'. Residents can have their say up until six months after measures have been implemented. Letters will be sent to all residents and businesses in the local area prior to implementation, outlining how they can have their say."

19. In the section of the ETP dealing with LTNs it is noted that "background work was in progress prior to the COVID-19 crisis to produce a LTN strategy which has been integrated into this chapter". Schemes have been organised on the basis of how quickly they could be delivered and funding was being secured. Figure 10 identified those LTNs which had been completed, and those which were proposed and were either funded or unfunded. References were made to a Traffic Study from 2019 that assessed how much of the traffic on the defendant's streets started and ended outside the borough, and which demonstrated that 40% of the traffic in the borough was through-traffic. The data was then used to identify rat-runs so as to inform the LTN proposals. The document records at paragraphs 2.8.9 to 2.8.11 the objective of locking in the traffic reduction witnessed during lockdown, and ensuring that traffic is not displaced from "a wealthy business district" into residential areas, many of which being described as being amongst the most deprived in the UK. The urgency required to make an impact post-lockdown is recorded.

20. Section 5 of the document contained an EqIA. Having noted the importance of walking as an easy form of physical activity suitable for all ages and abilities, and the need to design intervention supporting walking and cycling holistically, the section noted the relevant provisions of the Equality Act 2010. It then provided as follows in relation to equalities considerations:

> "5.6 Officers have ensured that all impacts on protected characteristics have been considered at every stage of the development of this programme. This has involved anticipating the consequences on these groups and making sure that, as far as possible, any negative consequences are eliminated or minimised and opportunities for promoting equality are maximised. **The creation of an inclusive environment is one of the key design considerations of projects** and it is expected that the overall effect on equality target groups will be positive. It is important that the impact of temporary measures on all groups are considered, for example the difficulties of wheelchair users negotiating temporary barriers. Particular attention will be paid to roads that include sensitive receptors.
>
> 5.7 The overarching inequalities impact of providing enhanced conditions for active travel has a positive effect on many groups – women, older people, Black, Asian and other non-White British communities, lower income groups, and those with existing health conditions are already much less active than

> average… a car-led recovery which this plan seeks to prevent risks exacerbating these inequalities further.
>
> Equalities Impact Assessment of programmes within the plan.
>
> 5.8 A full analysis of the Equalities Impacts will take place for each scheme at the design stage. As a guide, **Table 12** below sets out some of the considerations that will be included. The full EQIAs will be publicly accessible documents

21. Within Table 12 of the document more detailed assessments of the equalities impacts of the various types of scheme were set out, including the impact of LTNs. The analysis in relation to LTNs identified that the overall impact in relation to every protected characteristic was "P", or positive. The following comments were provided to explain this:

> "Low Traffic Neighbourhoods will have positive impacts on all equality groups in terms of congestion, air quality and health. The majority of Hackney's households (70%) do not own cars. Any measures to provide alternatives to private ownership will benefit them. It is recognised that some residents including disabled and older people and carers will continue to require the use of a car particularly where the use of Community Transport or Dial a Ride cars or car clubs are unsuitable. We are also aware that behaviour change may be more challenging among groups with large families such as the Charedi Jewish population who in some cases are currently quite car dependent."

22. Section 6 of the ETP addressed monitoring. The ETP indicated that an estimate was going to be made of the road links most likely to be affected by the LTNs and that these key links would be the subject of traffic counts following implementation of the relevant changes. Paragraph 6.3.3 of the ETP explained that in order to determine whether the implementation of an LTN had an impact on air quality, traffic data from 2018 and traffic data gathered after the implementation of the LTN would be compared. If there was a significant change in traffic flow and composition from the 2018 position, then air pollution concentrations would be modelled at sensitive receptors within the LTN area. It was also intended that a 2018 baseline of air pollutant concentrations for the whole of the borough would be undertaken as part of the assessment of whether there was a significant impact on air pollutant concentrations from implementing the LTN.

23. The defendant has filed evidence from Mr Andrew Cunningham, their Head of Streetscene in their Public Realm division. In his evidence he explains that every LTN that was implemented in the borough was established by means of an ETO made under section 9 of the Road Traffic Regulation Act 1984. Many of the authorisations for LTNs were made, and the schemes implemented, before the approval of the ETP on 29th September 2020, including ETOs in relation to 29 roads on 7th August 2020. He sets out that in relation to each of the LTN's, residents who were likely to be affected were written to and their views were sought. This letter was in addition to the formal advertising of the ETO in the press. The letter explained that for up to six months after the implementation of the measures a website was available to receive the views of

residents about the LTN scheme. In his evidence, Mr Cunningham also explains that the defendant is undertaking "experimental scheme reviews" which are already underway in relation to the LTNs that have been implemented, and that these are wide-ranging, addressing equalities issues as well as involving traffic surveys and air quality impact analysis. In due course, when the material is ready, the defendant intends to place it in the public domain.

The law.

24. As set out above, the network management duty in relation to roads is placed on the local traffic authority (in this case the defendant) by section 16 of the Traffic Management Act 2004 which provides as follows:

> "16 The network management duty
>
> (1) It is the duty of a local authority [or a strategic highways company ("the network management authority")] to manage their road network with a view to achieving, so far as may be reasonably practicable having regard to their other obligations, policies and objectives, the following objectives
>
> (a) securing the expeditious movement of traffic on the authority's road network; and
>
> (b) facilitating the expeditious movement of traffic on road networks for which another authority is the traffic authority.
>
> (2) The action which the authority may take in performing that duty includes, in particular, any action which they consider will contribute to securing –
>
> (a) The more efficient use of their road network; or
>
> (b) The avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on their road network or a road network for which another authority is the traffic authority;
>
> And may involve the exercise of any power to regulate or co-ordinate the uses made of any road (or part of a road) in the road network (whether or not the power was conferred on them in their capacity as a traffic authority)."

25. There are provisions in section 17 of the 2004 Act enabling the making of arrangements for the performance of the network management duty. As set out above, the DfT published the 2004 Guidance in relation to the network management duty to assist in the implementation of the network management duty. Key elements of the 2004 Guidance for the purposes of this case are as follows:

> "27. The duty to identify current and false causes of congestion and disruption, and to plan and take action accordingly, will

> mean that authorities will need to have access to the information needed to do this. The needs of utilities (and the authorities themselves) to work on roads, and the wide range of road users can all affect network capacity. So it is important that LTAs promote pro-active co-ordination of the network, adopt a planned, evidence-led approach to known events, and develop contingencies for the unseen.
>
> 28. This will mean putting arrangements in place to gather accurate information about planned works or events, consider how to organise them to minimise their impact, and agree (or stipulate) their timing to best effect.
>
> …
>
> 64. The LTA should seek the views of residents, local businesses and the different road users both when deciding which policies on network management to adopt and when monitored whether these policies are delivering the required outcomes. Such consultation should preferably be part of the authority's overall public consultation programme."

26. Turning to ETOs, section 9 of the 1984 Act provides the power for a traffic authority, such as the defendant, to make an ETO for up to, but no longer than, 18 months. In relation to consultation and publicity there is a requirement within the Local Authorities Traffic Orders (Procedure) (England and Wales) Regulations 1996 to consult certain specified persons and to publish notice of the order seven days prior to it coming into effect, as well as providing for inspection of deposited documents. Once made, the authority is obliged by the 1996 Regulations to publish notice of the order in the local newspaper and the *London Gazette*. These requirements in relation to publicity and inspection were relaxed in ways which do not concern this case directly between 23rd May 2020 and 29th April 2021. By virtue of paragraphs 35 to 37 of Schedule 9 to the 1984 Act a person is provided with six weeks within which to apply to this court to question the validity of an order, but an order may not otherwise be questioned in any other legal proceedings whatever.

27. Provision is also contained with the 1996 Regulations for the making permanent of an ETO. This requires that there be notification of the intention that the order is to be made permanent, and the opportunity for a person to object to this taking place. Prior to making a permanent order the authority is required to consider all the objections which have been made in response. Again, the provisions of paragraphs 35 to 37 of Schedule 9 to the 1984 Act apply to any such order making the ETO permanent.

28. Turning to the public sector equality duty, that is set out in the provisions of section 149 of the Equality Act 2010 as follows:

> "149 Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination, harassment victimisation and any other conduct that is prohibited by or under 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 characteristics and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

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

…

(7) The relevant protected characteristics are –

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation."

29. One of the most recent decisions of the Court of Appeal on the public sector equality duty is *R (on the application of End Violence Against Women Coalition) v DPP* [2021] EWCA Civ 350 where, in giving the judgment of the Court, at paragraph 85 of the judgment Lord Burnett of Maldon CJ observed as follows:

> "85. The claimant relies on para 26 of the judgment of McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA (Civ) 1345 for four propositions which are said to derive from section 149 of the 2010 Act about which there was no argument (see the second sentence of para 25 of the judgment). In para 44 of *Powell v Dacorum Borough Council* [2019] EWCA (Civ 23), McCombe LJ said that the previous decisions about section 149 must be taken in their contexts. The way in which section 149 will apply on the facts will be different in each case depending on what function is being exercised. The judgments, including the judgment in *Bracking*, must not be read as if they were statutes. He referred, with approval, to a similar statement by Briggs LJ in para 41 of *Haque v Hackney London Borough Council* [2017] EWCA (Civ) 4.
>
> 86. Section 149 of the 2010 Act applies to a public authority when it exercises its functions (see section 149(1)). It requires a public authority to give the equality needs which are listed in section 149 the regard which is 'due' in the particular context. It does not dictate a particular result. It does not require an elaborate structure of secondary decision making every time a public authority makes any decision which might engage the listed equality needs, however remotely. The court is not concerned with formulaic box-ticking, but with the question whether, in substance, the public authority has complied with section 149. A public authority can comply with section 149 even if the decision maker does not refer to section 149 (see, for example, *Hottak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811)."

30. This is the background against which the earlier jurisprudence is to be read. That earlier jurisprudence was helpfully set out and distilled by Lang J in *Singh v Royal Borough of Kensington and Chelsea* [2019] EWHC 2964 (Admin) at paragraphs 87–92 as follows:

> "87. The public sector equality duty has been the subject of detailed consideration by the courts over the years. As Elias LJ held in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [78], there must be a proper and conscientious focus on the statutory criteria.
>
> 88. In *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809, Dyson LJ said:

"31. In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have *due regard* to it. What is *due regard*? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.

89. *In R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [2009] PTSR 1506, Aikens LJ said, at [82]:

"82… There must be a proper regard for all the goals that are set out in [the statute], in the context of the function that is being exercised at the time by the public authority. At the same time, the public authority must pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational: see Dyson LJ's judgment in *Baker's* case para 34.

90. In *Moore and Coates v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 44 (Admin), Gilbart J provided a helpful summary of the law on the public sector equality duty, at [109] – [111]:

"109. In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, para 26 McCombe LJ summarised the principles to be derived from the authorities on s.149 as follows:

"(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213, equality duties are an integral and

important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213 (Stanley Barton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of the officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard option' following a concluded decision: per Moses LJ sitting as a Judge of the Administrative Court in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at 23-24.

(5) These points and other points were reviewed by Aitkens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506, as follows:

i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be 'exercised in substance, with rigour and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non delegable; and

v) Is a continuing one.

vi) It is very good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria" (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at 84, approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at 74-75)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be 'rigorous in both enquiring and reporting to them': *R (Domb) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941 at 79 per Sedley LJ."

110. McCombe LJ went on to identify three further principles, which may be summarised as follows:

(8) It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to equality implications of the decision (following *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) per Elias LJ at [77] - [78]).

(9) "The duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required" (*R (Hurley & Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) per Elias LJ at [89]).

(10)The duty of having due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal (*Bracking*, per McCombe LJ at [40]).

111. As to the importance of the second principle, McCombe LJ stated at [60] – [61]:

"it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise)

> are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude" and "In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged"."
>
> 91. Failure to discharge the duty of inquiry led to a breach of the duty in *R (Ward) v London Borough of Hillingdon* [2019] EWCA Civ 692, per Underhill LJ at [71] – [74]. In R (JM) v Isle of Wight Council [2011] EWHC 2911 (Admin), I held that the Council did not gather sufficient information to enable it to discharge the public sector equality duty (at [122], [123], [140]).
>
> 92. Compliance with the duty is an essential preliminary to a decision: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1293, per Sedley LJ, at [3]. However in R (Unison) v Lord Chancellor [2015] EWCA Civ 935, [2016] ICR 1, Underhill LJ observed "I can see nothing wrong in making a reasonable judgment and then monitoring the outcome with a view to making any adjustments that may seem necessary: the section 149 duty is ongoing" (at [121])."

31. The examination of the requirements of the public sector equality duty in the context of ETOs was recently considered by Kerr J in the case of *R (on the application of Sheakh) v London Borough of Lambeth* [2021] EWHC 1745 (Admin). Kerr J concluded, on the particular facts of that case, that the duty under the 2010 Act had been complied with. He made the following observations about the approach to the public sector equalities duty in the context of ETOs in the following paragraphs of his judgment:

> "163. There is nothing in section 149 of the 2010 Act which prevents, in an appropriate case, performance of the duty by means of a conscious decision to undertake equality assessment on a 'rolling' basis. A decision to do that is not, as a matter of law, contrary to the key pre-requisites of performance identified in McCombe LJ's judgment in *Bracking* at [26].
>
> 164. However, a decision maker who decides to proceed with equality impact assessment on a rolling basis, does so at their peril. The legislation and case law does not preclude rolling assessment as a matter of law; but neither do they legitimise it for all cases. The more 'evolutionary' the function being exercised, the more readily a rolling assessment approach may be justified. Conversely, for a 'one off' function, it is hard to see how it could be justified.
>
> 165. So that this judgement is not misunderstood, I should make it clear that I am not deciding that equality impact assessment on a rolling basis is always acceptable where the function is being exercised is to initiate an experiment, as in the case of a decision

> to make an ETO. It may or may not be on the facts, depending in each case whether such regard (if any) that was had to the equality objectives in section 149(1) of the 2010 Act was sufficient to pass the test of being 'due regard' to those objectives.
>
> 166. Here, it was acceptable because of unusual factual features: the urgency expressed in the statutory guidance, the near stasis of public transport and the need to restrain vehicle traffic in residential areas to allow walking and cycling to flourish. Those factors (all caused by the prevalence of the virus) propelled Lambeth to curtail its research and truncate the timescale, using ETOs. Had those factors been absent, Mr Dosunmu's approach to equality assessment might well not have passed the 'due regard' test.
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> 167. For those brief reasons, I prefer Lambeth's submission to those of the claimant. She has demonstrated that her particular problem of dependence on car transport with increased journey times and stress, was not identified until after the operative decision in October 2020; but she has not demonstrated that Lambeth thereby, or at all, breached the public sector equality duty."

32. Turning to questions related to air quality, the Environment Act 1995 provides at section 82 a requirement for local authorities to undertake air quality reviews. Section 82 provides as follows:

> "**82 Local Authority Reviews.**
>
> (1) Every local authority shall from time to time cause a review to be conducted of the quality for the time being, and the likely future quality within the relevant period, of air within the authority's area.
>
> (2) Where a local authority causes a review under subsection (1) above to be conducted, it shall also cause an assessment to be made of whether air quality standards and objectives are being achieved, or are likely to be achieved within the relevant period, within the authority's area.
>
> (3) If, on an assessment under subsection (2) above, it appears that any air quality standards or objectives are not being achieved, or are not likely within the relevant period to be achieved, within the local authority's area, the local authority shall identify any parts of its area in which it appears that those standards or objectives are not likely to be achieved within the relevant period."

33. Pursuant to section 83 of the 1995 Act, where from the results of an air quality review it appears that air quality standards and objectives are not being achieved then the local

authority is required to designate an AQMA. As noted above, the defendants designated an AQMA in 2006 pursuant to this duty.

34. In relation to the question of consultation, as the Supreme Court observed in the case of *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947; [2014] UKSC 56, a duty to consult can arise in a number of circumstances, for instance as an obligation created by statute, or generated by legitimate expectation in the context of the requirements of fairness. At paragraph 25 of his judgment Lord Wilson endorsed what are known as the Sedley Criteria in relation to consultation, namely that where consultation is required, firstly, it is undertaken at a time when proposals are still at a formative stage; secondly, that the decision maker must give sufficient reasons for any proposal to permit intelligent consideration and response by the consultee; thirdly, adequate time must be provided for consideration and response to the consultation exercise; and fourthly, the product of any consultation must be conscientiously taken into account in the assessment of the proposals.

35. Beyond responding to the grounds, the defendant relies upon other submissions which are contended to justify the withholding of relief from the claimant. Firstly, it is contended that the statutory procedure outlined above under the 1984 Act for the making of ETOs is a convenient and effective means of challenging the ETOs, and that it would be unfair if the claimant were able to obtain by way of judicial review of the ETP that which it could not have obtained by way of statutory review in respect of the ETOs. Not only did the claimant have the opportunity to challenge ETOs which were made to introduce LTNs in Hackney and failed to do so, the claimant is now well outside the statutory challenge period of six weeks in relation to those ETOs. Thus it is contended that the claimant has a suitable alternative remedy.

36. In addition to this point the defendant relies upon delay in bringing the claim and the exercise of discretion under section 31(2A) of the Senior Courts Act 1981 on the basis that given the majority of ETOs were made before the ETP was adopted, the outcome in the present case would be unlikely to be substantially different even were there found to be illegality in the process of adopting the ETP.

Ground 1: submissions and conclusions.

37. In relation to Ground 1 the claimant submits that the network management duty under section 16 of the 2004 Act is a duty with substance and content. In considering the objectives set out by section 16 of the 2004 Act, including in particular securing the expeditious movement of traffic on the authority's road network and road networks of other authorities, it is necessary for the authority to have proper data and suitable analysis upon which to base any conclusion that the duty is being discharged by policies which are being adopted. Discharge of the duty should be evidence-led, and in the present case the defendant had little or no evidence to support the assertions that were being made in the ETP, and no analysis of the impacts outside the LTNs which would arise as a consequence of their introduction.

38. The claimant draws attention to the 2004 Guidance produced in relation to the network management duty which makes clear, it is submitted, that a structured and evidence-based assessment of proposed traffic measures is required in order to discharge the network management duty. The claimant contends that it is notable that the frequently asked questions section of the ETP does not engage with the impacts on roads around

the LTNs and, in order to discharge the duty, the defendant ought to have undertaken some analysis of the extent and duration of displaced traffic, and the impact which that would have on the expeditious movement of traffic on the road network, as required by section 16 of the 2004 Act. By the time of the ETP decision some schemes had been in place for several months and there was no reason why surveys and modelling of traffic movements could not have been undertaken to enable a properly informed decision. The claimant also notes that there is no specific reference to the duty under section 16 of the 2004 Act in the Cabinet Report.

39. In response to these submissions, the defendant notes that the duty under section 16 of the 2004 Act is one which is broad and heavily qualified in its specific terms. It is a duty which is specifically noted to be placed alongside all of the other duties which an authority has to consider in addressing the management of its roads and does not take precedence over those other duties.

40. In particular, the defendant contends that the context for discharging the duty in the present case was the specific guidance provided by the Secretary of State for Transport in the COVID-19 Guidance, which required that in areas with high levels of public transport use reallocation of road space to walking and cycling modes should be undertaken as swiftly as possible, "and in any event within weeks", in the light of the urgent need to change travel habits and avoid a car-led recovery. This guidance fostered the use of experimental schemes, accompanied by monitoring arrangements and ongoing consultation after the measures had been implemented.

41. In so far as the claimant relies upon the failure to undertake data gathering and modelling prior to the adoption of the ETP, the defendant observes that this in effect an allegation of a breach of the *Tameside* duty, and against the backdrop of the Secretary of State for Transport's COVID-19 Guidance it could not be characterised as irrational for the defendant to proceed to adopt the ETP without further detailed modelling and data. In any event, the implementation of the ETOs was designed to provide evidence to support a final decision in due course, but not to anticipate that final decision.

42. In evaluating these competing submissions there are, in my judgment, some important elements of context. Firstly, it is clear in my view that the terms of section 16 of the 2004 Act provide the defendant with broad parameters within which to act consistently with the duty. This necessarily constrains the scope for a conclusion that the duty has been breached. The objectives that are identified are broad objectives and are qualified by the need to act as far as reasonably practicable having regard to the authority's other obligations and policies.

43. Secondly, it is important to note that for the purposes of section 16 of the 2004 Act the term traffic includes pedestrians by virtue of section 31 of the 2004 Act; there was a consensus that the term also included cycling. Thus all transport modes of use of the road network are the subject of consideration under the network management duty.

44. Thirdly, regard needs to be had to the publication of the statutory guidance pursuant to section 18 of the 2004 Act issued by the Secretary of State for Transport in the form of the COVID-19 Guidance. This was issued specifically for the purpose of enabling highway authorities to deliver their network management duty. Thus it is reasonable to conclude that the measures identified in the COVID-19 Guidance, and the injunction to act urgently with "a step-change in their roll out", was regarded by the Secretary of

State for Transport as being consistent with the discharge of the network management duty.

45. Against the background of these contextual matters I am not satisfied that the claimant is justified in contending that the adoption of the ETP was in breach of the network management duty under section 16 of the 2004 Act. In my judgment it is important to appreciate the significance at the time of the adoption of the ETP of the emergence of the COVID-19 Guidance, and to recognise the circumstances referred to within it and which prompted the Secretary of State for Transport to act by producing it. It would be trite to observe that the COVID-19 global pandemic created an entirely unprecedented emergency and one which called for prompt action to address a situation for which there was little precedent and no blueprint. The nature of these circumstances was identified in the Foreword to the COVID-19 Guidance. Given the extremity of these circumstances the COVID-19 Guidance itself contemplated action being taken urgently, and in any event within weeks, to reallocate road space to walking and cycling both so as to provide space for social distancing, but also so as to accommodate and embed altered behaviours in relation to active travel. The guidance contemplated experimental schemes (no doubt because of the urgency involved) which would upon installation be monitored and the subject of ongoing consultation.

46. The steps adopted in the ETP in relation to LTNs were entirely consistent with this advice. The ETP's promotion of temporary and experimental LTNs accompanied by further monitoring and consultation reflected the guidance provided to address the extraordinary circumstances of the COVID-19 pandemic. In my view it follows that the ETP reflected guidance which was itself consistent with the Secretary of State for Transport's view of discharging the network management duty whilst operating in response to the COVID-19 pandemic. Given the breadth of the scope for action provided by the terms of section 16 of the 2004 Act I have no difficulty concluding that, in principle, the measures contemplated by the COVID-19 Guidance and incorporated within the ETP did not breach the network management duty. The duty is owed to all road users, and requires balances to be struck between their interests in formulating policies for managing the road network. The impact on travel behaviours caused by the pandemic, together with the challenges faced by public transport and the need to avoid a car-led recovery were all relevant factors properly reflected in the COVID-19 Guidance and the ETP. The proposals sought to grapple with the issues created by the pandemic and act rapidly in response to them by advocating and designing temporary traffic management measures to address these concerns urgently, as was required. The promotion of walking and cycling, the need to avoid a car-led recovery and consideration being given to the potential for traffic to be displaced by new measures were all matters relevant to the discharge of the duty, and they were reflected in the ETP and the Cabinet Report which supported its adoption. In my view this is sufficient to deal with much of the claimant's case that the ETP was in breach of the duty under section 16 of the 2004 Act.

47. As set out above, the claimant also contends that it was in breach of the network management duty for the defendant to adopt the ETP without conducting proper surveys, modelling and evaluation of the impact on road users and residents caused by the introduction of the LTNs. In my view the answer to this contention again lies with the need to rapidly address the emergency created by the COVID-19 pandemic, and the specific guidance produced by the Secretary of State for Transport to respond to that

emergency in the form of the COVID-19 Guidance. Bearing in mind the need for urgent action, both to facilitate travel and social distancing during the pandemic and also to avoid a car-led recovery, it was justified both in terms of the COVID-19 Guidance and generally, for the defendant to seek to implement temporary LTNs by way of ETOs alongside monitoring and further evaluation in order to address these issues based on how the measures actually worked in practice. In the absence of the global pandemic and the bespoke guidance provided by the Secretary of State for Transport to address it, the earlier 2004 guidance might in some instances have supported deploying the time and resources necessary to undertake detailed surveys and traffic modelling to attempt to predict the operation of the proposals. However, that was not the situation with which the ETP was seeking to grapple. In the circumstances presented to the defendant, and with the assistance of the Secretary of State for Transport's specific statutory COVID-19 Guidance identifying the requirement for urgent action, it cannot, in my judgment, be characterised as irrational for the defendant to have proceeded in the way in which it did through the adoption of the ETP, or to have failed to undertake further enquiries or investigations. There was, in my view, no breach of the *Tameside* duty.

48. The claimant also contends, in relation to this ground and the others, that a key failing of the defendant was the failure to deal with the totality of the LTNs proposed on a comprehensive basis. They would each have a potential interaction with other schemes, and this was a further feature which was left out of account. In my view there are two difficulties with this argument. The first is that this point is an aspect or reiteration of the points raised in relation to the failure to obtain survey data and undertake modelling before approving the ETP, and is answered by the same observations set out above in relation to those points. The second is that it is important to appreciate the purpose of the ETP and its role in the defendant's transport policies. The ETP provided a framework for the development of LTNs, but was not a replacement for the statutory decision-making process which would have to be gone through in making the ETO required before any temporary measure could be put in place. In the circumstances, in particular those created by the publication of the COVID-19 Guidance, I am not persuaded that the absence of a cumulative assessment of all the LTNs in the ETP amounted to a breach of the network management duty. The requirements of the duty were addressed by the approach which was taken to the COVID-19 Guidance, the consideration given to the management of the present and future needs of the various modes of travel using the road network, and the use of ETOs with the opportunities which they provided for monitoring, survey and review of the performance of the proposed measures.

49. Before leaving this ground it should, of course, be noted that the LTNs which have been, or are proposed to be, implemented are temporary and experimental in nature. The defendant has made clear in evidence its commitment to examining the effects of the schemes on both traffic movements and air quality during the experimental operation of them. No doubt this material, and any consequential analysis will be the subject of careful scrutiny and consultation in the event that it were proposed that any ETO were to be made permanent in the future.

50. For the reasons set out above Ground 1 must therefore be dismissed.

<u>Ground 2 submissions and conclusions</u>

51. The principles in relation to the court's role in applying section 149 of the 2010 Act are set out above. Against the backdrop of these principles the claimant submits that the defendant wholly failed to assess properly or at all the impacts of the proposals of the ETP upon people with protected characteristics. In particular, the effects of the proposals upon air quality, and the impacts of poor air quality upon deprived members of the community, together with the effects on safety, were not properly analysed. These impacts would be particularly acute in relation to traffic displaced from residential roads on to the busier roads already adversely effected by safety and air quality issues. Moreover, the interests of the BAME and the Orthodox Jewish or Charedi community are not specifically addressed in the EqIA. Within the claimant's evidence, in particular from Ms Shiva Kashizadeh-Scott, specific evidence is provided of the impacts upon those communities which will be detrimentally effected by LTN schemes, along with the specific impacts upon young children as a consequence of air quality and safety impacts in particular. In effect, it is contended, the approach taken by the defendant was effectively an exercise in "cut and paste" which baldly asserted that all of the impacts in relation to those with protected characteristics would be positive without any explanation in relation to the assessment of LTNs as to how that could possibly be the case. In particular, again, there was a failure to assess in this connection the impact of traffic displaced as a consequence of the creation of the LTNs.

52. In response to these contentions the defendant observes, based on the relevant authorities, that the public sector equality duty is a continuing duty that can be revisited over the course of time, and one which does not have a prescribed form as to its discharge. The defendant draws attention to the section of the ETP specifically devoted to equality impacts which sought to evaluate the effects of the various types of proposal contained within the ETP. This section included a specific evaluation of the impact of LTNs on the various protected characteristics relevant to the duty. This was necessarily carried out at a high level bearing in mind the stage in the process of implementation at which the ETP was being adopted and the nature of the plan as setting a framework. As the ETP itself observed, there would be a fuller analysis of the impact of each individual scheme at their design stage which would be made publicly accessible.

53. The starting point for considering these submissions is the need to observe that it is not the case that the defendant paid no regard to the PSED in formulating and adopting the ETP, and thus the issue is whether or not the regard which the defendant did give to that duty was that which was due in the particular circumstances of the case. Amongst the circumstances which were relevant to that evaluation were, firstly, that the ETP was addressing the impact of the LTNs at a borough wide level as an overall framework, and that following on from that, individual impact assessments would be undertaken in respect of individual schemes, bearing in mind the detailed local circumstances of the proposal. Secondly, bearing in mind the need to take action in response to the global pandemic, and to take account of the COVID-19 Guidance, it was part of the context of the assessment to bear in mind that the ETP was proposing temporary and experimental LTNs which were to be the subject of further monitoring in terms of both traffic impact and air quality after their implementation and prior to any decision being taken as to their future. Whilst the claimant draws attention to the fact that the evaluation suggests that LTNs would have positive effects for all of those with protected characteristics it needs to be born in mind that that assessment is an overall evaluation, based on the information available at the time.

54. The ETP's EqIA itself acknowledges the need for further detailed evaluation of each specific proposal, which itself provides a safeguard in relation to evaluation of impacts upon those with protected characteristics by the making of detailed adjustments in the context of a detailed specific design, or indeed perhaps not progressing a proposed scheme, bearing in mind the ongoing evaluation of the impact of any particular scheme upon those protected characteristics. I share the view of Kerr J set out in his judgment in the case of *Sheakh* that it is possible in some circumstances for a form of iterative, or progressive, assessment of equalities impacts to properly discharge the PSED, and whether that is the case is, of course, sensitive to the facts of individual cases (see paragraphs 163 -165).

55. In the present case the fact that LTNs or similar schemes had been included within earlier transport policies adopted by the defendant which had themselves been subject to, and withstood the scrutiny of, EqIA is part of the context. A further part of the context was the anticipated future examination of the equalities impacts of detailed individual schemes. The explanatory text accompanying the EqIA in relation to LTNs in the ETP set out above showed, in my view, a due regard to the relevant equalities issues and properly reflected the necessary sensitivity to these issues, bearing in mind the relatively high-level nature of the policy under consideration. It identified those with protected characteristics who might be affected and also the impacts which were relevant to them in terms of air quality, congestion and health. Whilst the claimant disputes the conclusion that the impacts could be positive overall, that was a judgment which was open to the defendant on the basis of what was known about earlier policies and their EqIAs, taken together with the knowledge of the impacts discussed in the ETP (including its FAQs and their answers) and the understanding of the availability of review of the impacts in the light of monitoring, consultation and experience.

56. I accept that in seeking to discharge the PSED it is open to the defendant to take account of the position of the document being evaluated within the decision making process, along with the purpose of the policy under consideration. The defendant could also bear in mind the opportunities for further more detailed and site-specific examination of the equalities issues at the time of promoting ETOs for an LTN being scrutinised through the statutory process. In the present case, the ETP was designed to provide an overall strategy to provide an overview and assist streamlining progress without by-passing future LTN scheme preparation or the statutory requirements for creating ETOs. Given these considerations the extent and detail of the material in the EqIA for the ETP contained an adequate and appropriate examination of the issues.

57. Bearing in mind the circumstances and the context of the EqIA undertaken by the defendants in relation to the ETP, I am satisfied that due regard was paid in the preparation of the ETP to the PSED. The ETP is part of a continuum and its focus upon equality impacts was sufficient and proportionate for the stage within the process which it occupied. I am not therefore satisfied that the claimant has made out its complaints under Ground 2.

Ground 3: submissions and conclusions

58. The claimant's submissions in relation to Ground 3 are closely related to its submissions under Ground 1. The essence of the claimant's Ground 3 is that the defendant failed to address the impact on poor air quality of the implementation of the LTNs, and instead of focusing upon the congested main strategic roads which it was acknowledged

suffered the poorest air quality, focused instead upon the areas away from those main roads which were not a problem in respect of air quality.

59. This issue was particularly acute bearing in mind the designation of the AQMA under section 83 of the EA 1995 and the provisions of the HAQAP which had been published in 2015. The HAQAP specifically noted that in localised areas of the borough nitrogen dioxide was to be found at levels twice those of the annual mean air quality objective, and that pollution levels were highest "in the most densely built-up areas, in the south of the borough and along the borough's busiest main roads". Away from busy roads, air quality objectives tended to be met. Against that background, and the struggle to meet national air quality objectives identified in the HAQAP, it was wholly inappropriate for the defendant to focus upon air quality within areas where compliance with air quality standards was generally met, whilst failing to evaluate the impact of LTNs on the already congested major roads within which air quality standards were not being met.

60. In response to these submissions the defendant observes that section 82 of the 1995 Act simply creates a duty to review air quality from time to time and leaves a local authority with a very broad discretion to determine when any such exercise is to be undertaken. Thus, it is not open to the claimant to rely upon any breach of such a duty. Secondly, the defendant submits that the ETP was not prepared in the absence of any consideration of air quality issues. The question of displaced traffic was addressed in the frequently asked questions section of the ETP, and it was reasonable and appropriate for the defendant to approach matters on the basis that it was not possible at the time of formulating the ETP to know exactly where, and to what extent, any increase in vehicular traffic would arise. It was not irrational for the defendant to approach the matter as they did by introducing the LTNs on an experimental or temporary basis and then monitoring their impact including an assessment of the impact on air quality. In essence, the defendant relies on those matters raised under ground 1 in the form of the nature of the emergency facing the country, and the need to engage urgently with the specific guidance produced by the Secretary of State for Transport in the COVID-19 Guidance, thereby avoiding a car-led recovery and properly accommodating a shift to walking and cycling modes of travel.

61. There is clearly a relationship between this ground and the contentions raised in relation to Ground 1. The issue of air quality, and particularly worsening of air quality in those part of the borough already significantly effected by poor air quality, was clearly a material consideration to be considered by the defendant in formulating the ETP proposals. The question which arises is as to whether or not it was lawfully open to the defendant to approach the impact of the LTNs on air quality in the way in which it did, namely for the LTNs to be imposed and, thereafter, traffic surveys and monitoring to be undertaken and air quality impacts to be surveyed and modelled. As the defendant observes, the duty under section 82 of the 1995 Act is broad and to be discharged by periodic review. As such it provides little support to the claimant's arguments in relation to this Ground. For the reasons given in relation to Ground 1 concerning the nature of the COVID-19 pandemic and the need for an urgent response to it in the light of the additional specific statutory guidance given by the Secretary of State for Transport, I am unable to accept that it was unlawful for the defendants to treat the issue of air quality in the way in which they did.

62. The urgent need for action promoted by the Covid-19 Guidance clearly justified the imposition of ETOs as a mechanism to address the urgent concerns it identified. The approach comprising implementation on an experimental and temporary basis followed by air quality monitoring and subsequent evaluation of air quality impacts is an approach which is consistent with the COVID-19 Guidance. I have no doubt that bearing in mind the existence of the AQMA and the evidence in relation to poor air quality in and adjacent to the borough's main strategic highways this is an issue which will require detailed scrutiny in the ongoing evaluation of any temporary scheme. The issue, however, is whether or not the approach taken in the ETP to the question of air quality was one which was lawful, and for the reasons explained I am satisfied that it was.

Ground 4: submissions and conclusions

63. In support of Ground 4 the claimant places reliance upon the 2004 Guidance in relation to the traffic management duty set out above, in particular for instance at paragraph 64 of that document. The 2004 Guidance expects that an authority would seek out the views of residents, local businesses and road users when deciding on policies in relation to the network management duty. Furthermore, the claimant contends that in accordance with the Sedley principles it is necessary for consultation to occur at a stage when proposals are being formed. The reality here was that by the time of the approval of the ETP decisions had already been taken in relation to the implementation of LTNs, and therefore this principle was clearly breached. The claimant's concerns in relation to consultation are not met by the provisions for consultation in relation to individual ETOs for the six months following their introduction bearing in mind the overall policy trajectory which was set by the ETP.

64. In response to these contentions the defendant submits, firstly, that there is no duty to consult created by the provisions of section 16 of the 2004 Act. Secondly, the defendant contends that the references to consultation contained within the 2004 Guidance are concerned with the approach to be taken in normal circumstances, but the operative guidance to be followed during the course of the COVID-19 pandemic was that provided by the Secretary of State for Transport in the bespoke statutory guidance dealing with the response to COVID-19. The COVID-19 Guidance provided for the implementation of temporary measures through ETOs within short timescales, with monitoring and ongoing consultation occurring alongside implementation of the measures. Against this background the defendant contends that there was no common law duty to consult in relation to the ETP, bearing in mind the specific proposals of the COVID-19 Guidance. Alternatively, the defendant contends that because the ETOs were experimental in nature the policy in respect of their permanent implementation was still at a formative stage.

65. It is, in effect, an agreed position that the specific terms of section 16 of the 2004 Act do not provide for an express duty to consult in relation to proposals related to the discharge of the network management duty. Whilst the claimant correctly refers to the provisions of the 2004 Guidance in relation to consultation, it is clear that specific guidance in relation to the approach to be taken to the traffic management duty under the conditions imposed by the COVID-19 pandemic were provided in the COVID-19 Guidance. Whilst the COVID-19 Guidance did not replace the 2004 Guidance, it "provides additional advice on techniques for managing roads to deal with COVID-19 response related issues". It envisaged consultation on a scheme-by-scheme basis in

relation to the individual designs of proposals in the way in which the defendant has conducted its engagement with the public, coupled with the statutory publicity and consultation required, and accompanied by ongoing consultation on the basis of the way in which the LTN performed in practice after implementation. The implementation of LTNs on an urgent temporary and experimental basis subject to monitoring and ongoing consultation after the measure has been implemented is a specific proposal contained with the COVID-19 Guidance. This additional guidance, therefore, specifically contemplates the approach to consultation taken by the defendant, namely that it is undertaken in respect of the ETOs alongside their operation during the experimental period for which they have been introduced. None of this gives rise, in my view, to an entitlement to, or expectation of, additional consultation in relation to a policy document like the ETP: in short there was no legal duty to consult with the public in relation to the decision to adopt it, bearing in mind the particular factual context with which this case is concerned.

66. In these circumstances I am not satisfied that, judged against the backdrop of the totality of the statutory guidance under which the defendant was operating at the time, there was a common law duty to consult upon the ETP itself. The approach taken by the defendant reflected the COVID-19 Guidance which had been specifically produced to deal with the conditions created by the pandemic which envisaged that in relation to these COVID-19 related traffic management initiatives consultation would accompany their experimental implementation. In those circumstances I am not satisfied that there is any substance in the claimant's Ground 4.

Conclusions

67. For the reasons set out above, having considered the claimant's case in respect of all four grounds upon which this application for judicial review is advanced, I am not satisfied that there is merit in the substance of the claim. It is therefore not necessary to proceed to evaluate the defendant's contentions in relation to alternative remedy, delay or discretion as, in the result, they do not arise as I am not satisfied that there is any basis upon which the claimant could be entitled to relief. For all of the reasons which have been set out above this claim must be dismissed.