Neutral Citation Number: [2023] EWHC 210 (Admin)

Case No: CO/1583/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2023

Before:

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court

Between:

THE KING (on the application of) SARAH LEADBETTER	**Claimant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Defendant**

- -
- -

Mr Jamie Burton KC and Ms Sarah Steinhardt (instructed by **Bindmans LLP**) for the **claimant**
Mr Robert Williams (instructed by **Government Legal Department**) for the **defendant**

Hearing date: 17 January 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 2 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HH JUDGE JARMAN KC:

Introduction

1. This claim involves an important issue for visually impaired people, namely the height of detectable kerbs to ensure safe navigation between footways and carriageways. The claimant says that guidance (the Guidance) issued by the defendant (the Secretary of State) in January 2022 recommending a minimum kerb height of 25mm was issued without proper inquiry of the effect upon visually impaired people, without adequate consultation, and is irrational. She has the support of three major charities for visually impaired people, namely Guide Dogs UK, the National Federation for the Blind UK (the National Federation), and the Royal National Institute for Blind People (the Royal Institute).

2. The Guidance deals with the public built environment and comprises two documents: Guidance on the Use of Tactile Paving Surfaces and Inclusive Mobility: A Guide to Best Practice on Access to Pedestrian and Transport infrastructure. It is the former which is the focus of this challenge. Both replaced earlier guidance published in 1998 and 2002 respectively. The Guidance is widely used and intended to be a guide to best practice by public or private bodies and individuals with a role in the provision, design, and improvement of the public realm. It covers a wide range of topics, and the height of kerbs which can be readily detectable by visually impaired people is a small, but important, point included in the Guidance. Visually impaired people need to be able to detect where the footway ends and the carriageway begins. Tactile paving surfaces leading to that line are designed to give underfoot warning of where it is.

3. As the Guidance makes clear, tactile paving is designed to give tactile information underfoot, in particular detectable contrasts in surface texture, to help visually impaired people move around the public realm. These surfaces give vital information, including hazard warning and directional guidance, and support independent mobility. However, such surfaces can have a negative effect on the experience of wheelchair users and people with walking and other difficulties, and accordingly should not be over used. The Guidance deals with six types of tactile surfaces, including what are called “blister” surfaces for use at controlled pedestrian crossings. These are surfaces with raised patterns, which warn of a lack of a kerb at that point and a guide to the crossing point.

The Guidance

4. Paragraph 1.6 of the Guidance deals with engagement in the following way.

> “Authorities or other agencies should carry out appropriately diverse engagement when considering and introducing schemes likely to include tactile paving surfaces. This engagement should take place with those having a good understanding of the ways in which tactile paving should be used. This and related consultation is likely, from early in the process, to include people with and organisations representing those with protected characteristics, including organisations of, or for, vision impaired people, and specialists such as rehabilitation officers or mobility officers. This should ensure that the

> information received reflects the needs of the population as a whole. Whether national or local groups should be consulted will vary. National organisations should be contacted if technical solutions are being sought as they are more likely to be aware of solutions that have been successfully developed elsewhere. Local organisations should be consulted to prioritise where tactile paving is to be installed. This might identify routes that are frequently used by vision impaired people, or locations that are causing particular problems. It is especially important that local organisations are consulted prior to the installation of the guidance path surface, to ensure it is installed where it will be of real benefit."

5. The Guidance goes on to note at paragraph 2.1, that visually impaired people in the absence of a kerb upstand "greater than 25mm high," may otherwise find it difficult to differentiate between where the footway ends and the carriageway begins.

6. The Guidance then goes on to deal with what types of tactile paving should be provided on the footway at points where vehicles cross the footway, for example to access petrol filling stations. These points are referred to as vehicle crossover or vehicle accesses. At paragraph 2.5.4 the Guidance provides:

> "At all vehicle crossovers, a minimum 25mm upstand should be provided between the carriageway and the vehicle crossover. This upstand should help ensure that vision impaired people do not inadvertently venture into the carriageway."

7. At paragraph 2.5.5, the Guidance deals with raised crossings for traffic calming purposes, and provides as follows:

> "Where the remaining interface between the footway and the raised carriageway is flush, or has an upstand of less than 25mm, it is vital to ensure that vision impaired people are not able to stray inadvertently onto the carriageway. This could be achieved by creating a level difference between the footway and carriageway of at least 25mm (so that the transition is not actually flush), or by using an appropriate form of physical barrier"

8. It was not in dispute before me that a potential consequence of these paragraphs in the Guidance, and it is only guidance, is that where a kerb is 25mm in height, tactile paving surfaces on the approach to the kerb may not be provided. In the absence of such surfaces, the only feature to enable visually impaired people to detect the line between the footway and the carriageway is the kerb itself.

Previous guidance and subsequent research

9. The minimum kerb height of 25mm in the Guidance repeats the figure set out in the 1998 guidance. The Secretary of State was not able, in these proceedings, to adduce evidence as to how that figure was calculated, other to say that it was based on research. No further details of what that research entailed were in evidence. Since

1998, there has been growing concern as to whether visually impaired people can detect a kerb with a height of 25mm, or even a higher kerb.

10. In 2009, Guide Dogs UK commissioned research by University College London, to ascertain the minimum detectable kerb heights for visually impaired people. The research was confined to that narrow issue and did not extend to other issues such as what kerb heights may present a barrier to wheelchair users, for example. The study was undertaken in controlled indoor conditions at the Pedestrian Accessibility Movement and Environment Laboratory (PAMELA). Out of the 36 participants, 11 were guide dog users, 17 used long canes, and 8 did not use any mobility aids. All participants could detect 60mm, 80mm and 120mm kerbs when stepping up or down, when approaching straight on, and at an oblique angle. 120mm is the height of a standard kerb. Some participants failed to detect kerbs of 40mm or lower at all when stepping up or down. The resulting report, Effective Kerb Heights for Blind and Partially Sighted People (the UCL report), concluded that: *"*For confidence that a kerb is detectable by blind and partially sighted people, it is recommended to install a kerb of 60mm or greater.*"* That report is the only such study in evidence to investigate the issue of detectability.

11. In light of the UCL Report, in May 2015 the Directive Engineering Memorandum DEM154/15 in Northern Ireland provided that "For public realm schemes, and in line with best practice, it is recommended that a 'standard' kerb height of 125mm should be generally used, … Exceptionally however, where there is a desire to incorporate a lower 'standard' kerb height to that either stipulated here … it is recommended that kerb heights should not be less than 60mm."

12. In England and Wales, there were several reports between 2015 and 2021, summarised in the following paragraphs, each of which essentially came to the conclusion that further research is needed. Some of these, as indicated below, considered the wider topic of shared space, but an important aspect of shared space is the issue of kerb heights.

13. A survey was initiated by Lord Holmes of Richmond MBE, in respect of the growing popularity of shared space. Shared space is an urban design approach that minimises the segregation between modes of road user, by lowering or removing kerbs and by changes to, or removal of, features such as signal controlled crossings. Whilst the present claim does not seek to challenge that approach as such, nevertheless reliance is placed upon the survey in so far as it relates to kerb heights.

14. In July 2015, the results of the survey were published in a report called Accidents by Design: The Holmes Report on shared space in the United Kingdom, which concluded that people's experiences of shared space schemes were overwhelmingly negative and that there were significant safety concerns. Accordingly, it recommended an immediate moratorium on shared space schemes while impact assessments were conducted.

15. The Holmes Report was submitted to the Women and Equalities Committee, a Commons Select Committee, which published a report called Building for Equality: Disability and the Built Environment, in April 2017. One of the recommendations was that local authorities should be required to call a halt to the use of shared space schemes, pending clear national guidance that explicitly addresses the needs of

disabled people. This should, in particular, instruct local authorities that "controlled crossings and regular height kerbs are to be retained and that they should undertake an urgent review of existing schemes."

16. The Government response was presented to the UK Parliament in March 2018, which was that it was awaiting the recommendations of the Chartered Institution of Highways and Transportation in relation to the issue of kerb heights, which had just published its report called Creating Better Streets. That report concluded that there was a lack of evidence of existing shared space schemes, and that a kerb height of between 50mm and 60 mm would appear to be suitable, but further research on this topic in the field is needed to inform this key design decision.

17. That call for more research was echoed in a statement in June 2018 by the Disabled Persons Transport Advisory Committee, established by the Transport Act 1985 to provide advice to the Secretary of State. The statement recommended that the implementation of shared space schemes should be paused, until independent evaluation has taken place.

18. That recommendation was accepted the following month by the Department for Transport (the department) in its Inclusive Transport Strategy: Achieving Equal Access for Disabled People, in which it was noted that groups representing visually impaired people expressed concern that shared space schemes were dangerous and difficult to navigate. In August and September 2018 the department wrote to local authorities requesting that they should pause shared space schemes that included a level surface design. The request did not apply to schemes which had progressed beyond the design stage or to streets within new residential areas.

The decision making process leading to the Guidance

19. In November 2017, the department instructed independent consultants, Transport Research Laboratory Limited (TRL), to advise on the extent to which the Guidance was still relevant and might require updating. TRL carried out an initial literature review of some 50 documents, including the UCL report, and stakeholder engagement. In its first report produced in July 2018, TRL recommended that shared space should be researched further with a view to creating and including suitable guidance for both Inclusive Mobility and Guidance on the Use of Tactile Paving Surfaces. TRL noted that the UCL report did not consider the impact of kerb height on the mobility of wheelchair users and other people who have difficulty with mobility, nor did it investigate the potential impact on children or people with learning disabilities. TRL concluded that the UCL report offers "very limited relevant information," and it was not one of the six documents taken forward by TRL's client steering group for a fuller review. The reports referred to in paragraphs 12, 13 and 15 above were not considered at all.

20. In this report TRL also noted that the issue had been raised that visually impaired people were often excluded from consultation because they could not access printed documents, and recommended that guidance should be produced for making information accessible. TRL was then commissioned to undertake further research, which involved a further literature review, site visits, user surveys, and engagement with stakeholders at workshops.

21. On 12 July 2019 an online survey was sent to the National Federation for circulation to its members, with 12 days to respond. Braille or other accessible formats were not available for the survey. The National Federation emailed TRL and the department on 19 July 2019, setting out the importance of kerbs for long cane and guide dogs users in particular, and requesting an extension for responding to the survey, up to October/November 2019, on the basis that the people most effected by kerb heights, namely visually impaired people, should be enabled to give their opinions. In response, an online link to the survey was sent, but the request for an extension was not addressed. The survey closed on 24 July 2019.

22. TRL published its second report in February 2020, called Accessible Public Realm: Updating Guidance and Further Research-Overview and Recommendations, one of which was that the question of whether 25mm remains an appropriate boundary between what is or Apprved Jis not flush should be subject to further consideration. The executive summary also summarised other research which was carried out, for example as to changes in the availability of wheeled mobility devices and impact of accessible realm on people with mental health issues. In both instances, the research included surveys, and was said to show "good evidence" of changes to such devices and to identify "many aspects" that adversely effected people with mental health issues and their ability to navigate the built environment.

23. A further report, jointly commissioned by Transport Scotland and the department and called Inclusive Design in Town Centres and Busy Street Areas, was published in February 2021. It concluded that a firm recommendation on kerb height cannot be made without further research, although it noted the UCL report. It recommended further quantitative research to define the kerb height provision with and without tactile demarcation taking into consideration all types of disabled street users. Transport Scotland followed that recommendation and commissioned further research into what constitutes an appropriate kerb height, and in the spring of 2021, the department joined in that project. TRL were then commissioned to update the guidance to incorporate its recommendations, whilst the result of that research were still outstanding, as it still is.

24. No feedback was given to any of the three charities following the July 2019 survey, and the next communication they had from TRL or the department was an email dated 1 April 2021, when each received an invitation from TRL to participate in a stakeholder workshop to review the draft guidance documents. They were requested to suggest any published evidence believed to be missing from the drafts by 13th April. The email included the following:

> "Please see attached for the drafts of the updated guidance documents (in both PDF and plain text formats). As the documents will need to be evidence-based, we would be grateful if you could use this survey to suggest any published evidence you believe is missing from these drafts by Tuesday 13th April. Your suggested evidence will be used to guide discussion during the workshops"

25. In response, the charities referred to the UCL report, calling into question the reference to a 25mm minimum kerb. The workshops took place on 26 and 27 April

2021 via video link. One representative from each of the three charities was permitted to attend the workshops.

26. The evidence of Sandy Taylor, of the National Federation, who attended, includes the following:

> "At the start of the meeting we were informed that the draft guidance was due to be presented to the [department] the following week and that there would not be any further consultation on the guidance. We were therefore concerned that the workshops were effectively a 'tick box' exercise, and that decisions had already been made in relation to the contents of the guidance. There was clearly insufficient time for our feedback to be incorporated into the drafts before they were submitted to the [department]. This concern proved to be well founded, as none of the feedback that we had provided at the workshops was in fact taken into consideration within the final guidance published on 10 January 2022.

27. The Secretary of State disputes that this was a tick box exercise or that the feedback was not considered. Mr Burton made clear he was not maintaining that no consideration had been given to the feedback. However, the evidence as to what was said at the meeting and the concern which was felt, whether or not well founded, is not in dispute

28. The discussion in the workshops of the height of kerbs detectable by visually impaired people may be summarised as follows. The issue was specifically addressed. TRL representatives expressed uncertainty as to where the 25mm figure had come from, but said "it is what it is." They accepted that this figure needed to be reviewed and stated that the UCL report was not robust enough for the review to be based on it, as the research had not been carried out "in the real world."

29. Charity representatives responded that their members were very concerned about this figure set out in the draft guidance. They said that kerb heights should be at least 60mm high in order for visually impaired people to detect them, and that detectable kerbs were vital to avoid the risk of visually impaired people stepping into the carriageway and into cycle paths. They expressed difficulty in understanding the definition of evidence which had been called for by TRL, and concern about the short time scale which had been given to table such evidence. They pointed out that the UCL report was the only report which was based into research on kerb hights detectable by visually impaired people. TRL representatives acknowledged this "strong representation from respected charities" but maintained that the UCL report was not accepted or approved by the department.

30. In the days following the workshops, the charities put these concerns in writing to the TRL review team, but received no substantive response. In an email dated 4 May from the Royal Institute to TRL and the department, this was said:

> "We want to express our concern with the lack of full and public consultation on these important guidance documents. The contents of the guidance documents in question have

> significant and serious implications for the lives of blind and partially sighted people, so it is paramount these are properly consulted on and we note that a previous proposed update was subject to a full public consultation. These updated documents must undergo a full public consultation and it is not all clear why this update warrants a different approach to previously.
>
> In addition, the draft documents were only provided to us on the 1st of April, with the ask to review and feed back on any additional evidence to be considered, by 19th April i.e. including the easter break and during the school easter holidays. This was not sufficient time given we are a charitable organisation with many pressures on our time and limited resources. We were surprised to hear that this minimal time allowance for feedback and one workshop per guidance seems to be the extent of this consultation process"

31. Also in May 2021, the Royal Institute wrote to the Secretary of State and after chasing for a reply received one in September 2021 referring to its "valuable contribution" but taking the issue no further. In the meantime, in May 2021, TRL published its consultation report, which detailed the strong criticisms of the draft by the charities as summarised above, but concluded that on this issue "No change required – refer to client to consider messaging around this"**.** The report also stated that the department was "to consider [kerb heights] for future iterations – this point be contentious and [the department] may consider a statement that this will be addressed in future."

32. In October 2021, Royal Institute representatives met with department officials and repeated their criticisms, which were noted. The officials, however, reiterated that more robust evidential basis for change was needed than the UCL report and referred to the ongoing research. They said that the department didn't want to change the guidance now and then have to change it again once the further research is published. The following month, the Royal Institute's chief executive wrote to the Secretary of State requesting that references to detectable kerbs of 25mm be removed from the draft guidance as existing research shows 60mm as a minimum detectable height, which should be recommended "at least until the Scottish government research reports in 2022 or 2023*."*

33. On 25 November 2021 a ministerial submission was prepared for the Secretary of State, which stated that potential negative reactions were "manageable" if the Guidance were published with messages that it would "not be left untouched for another 20 years," that suggestions and evidence were invited which might inform future updates, and that the next update might, depending on new evidence, be considered within five years.

34. The submission contained the following:

> "… some disabled people's organisations, including RNIB and Disability Rights UK, have preferences for some further technical changes - the evidence for which remains equivocal - and for a full public consultation. Disability Rights UK recently wrote to ministers complaining that it had not been properly

> consulted and requesting a public consultation. Baroness Vere responded setting out that an appropriate level of engagement has been conducted, including with disabled people, with Disability Rights UK invited to take part in consultation workshops during the redrafting."

35. By letter dated 9 December 2021, the Secretary of State responded to the Royal Institute saying that there was a need to establish the evidential base for change, that further research was underway to inform the best approach to the changes requested and that consideration was being giving to the possibility of more frequent updates in the future, depending on new evidence. On 10 January 2022 the department published the final Guidance.

Duty of enquiry under common law and the Equality Act 2010

36. The common law duty to make enquiries was dealt with by the House of Lords in *Secretary of State for Education & Science v Tameside* [1977] AC 1014 where at 1065B the question was stated as whether the Secretary of State asked the right question and took reasonable steps to obtain the relevant information to enable it to be answered correctly. In *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB) the Divisional Court at paragraph 100 put the question this way:

> "Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?"

37. The extent of the enquiry required depends upon the context of the decision and may be an onerous duty where the consequences of the decision are significant (see *R (Refuge Action) v The Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) paragraph 121).

38. Visual impairment is a disability which is a protected characteristic within the meaning of the Equality Act 2010, section 149 of which provides as follows;

> "(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 characteristic 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 participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> (5) Having due regard to the need to foster good relations 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) tackle prejudice, and
>
> (b) promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

39. In order to comply with that duty, there must be a conscious consideration of the statutory imperatives, and it must be exercised "in substance, with rigour and with an open mind" (*Brown v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin) per Scott Baker LJ at paragraph 90. At paragraph 85, Aikens LJ said that in having due regard to the need to take steps to take account of disabled persons' disabilities, the public authority concerned will have to have due regard to the need to gather relevant information in order that it can properly take into account disabled persons' disabilities in the context of the particular function under consideration.

40. It has been emphasised many times that judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a

matter for the courts and must be a matter for the elected government alone, see for example the judgment of the Court of Appeal in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA 1020. At paragraph 59, the Court (Sir Terence Etherton MR, Irwin and Singh LJJ) cited the principles on *Tameside,* set out in another judgment of the Court (Underhill, Hickinbottom and Singh LJJ) in *Balajigari & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673, as follows:

> "...First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see R *(Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

41. The same approach applies to the duty of enquiry pursuant to section 149 of the 2010 Act. Whether or not there has been a failure to carry out that duty is subject to normal principles of rationality. It will only be unlawful for a public body not to undertake a particular enquiry if it was irrational for it not to do so, though the application of that test is necessarily context specific (see *R (D) v Hackney LBC* [2019] EWHC 943 (Admin) paragraph 84*, R (Joint Council for the Welfare of Immigrants) v SSHD* [2021] EWHC 638 (Admin) at paragraphs 21-24, and *R (on the application of Khalsa Academies Trust Ltd) v Secretary of State for Education* [2021] EWHC 2660 (Admin) at paragraph 118).

42. There have been many examples where the courts have found that a public authority has acted in breach of this duty. In *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) the council failed to obtain information on the minimum turning circle for wheelchairs, before licensing a taxi company whose vehicles were too small for some wheelchairs. Blake J at paragraph 43 and 44 observed held that a proper understanding of the factual position was a mandatory relevant consideration, so that

a lawful exercise of discretion could not have been performed unless the committee properly understood the problem, its degree and extent.

43. In *R (Law Centres Federation Limited t/a Law Centres Network) v The Lord Chancellor* [2018] EWHC 1588 (Admin), Andrews J, as she then was, held that the Lord Chancellor's decision to enlarge the geographic areas for which housing possession court duty scheme contracts were awarded was irrational and in breach of the public sector equality duty. He had failed to conduct a proper enquiry into the financial impact of the proposed changes on service providers or to give due regard to their effect on vulnerable clients

44. In *Re Toner's Application for Judicial Review* [2017] NIQB 49 the claimant who was visually impaired challenged the lowering of kerb heights in a city centre from 100-130mm to 30mm. The court held that the authority had failed to pay due regard to its duty to consider the needs of disabled people as required under section 75 of the Northern Ireland Act 1998. In the course of a six day hearing before Maguire J, the UCL report was referred to. On the basis of that report, Transport NI had published guidance which included the following;

> "For Public Realm Schemes, and in line with best practice, it is recommended that a 'standard' kerb height of 125mm should be generally used, though this may be reduced to a desirable minimum of 100mm to suit local site circumstances. Exceptionally, however, where there is a desire to incorporate a lower standard kerb height to that either stipulated here or in DMBR…such as in a public realm scheme where a shared surface street is envisaged, it is recommended that kerb heights should not be less than 60mm. It is also recommended that these lower kerb heights should only be introduced following meaningful consultation with organisations representing the accessibility needs of local people, particularly those with a disability…"

45. At paragraph 149, the judge said this

> "The matter should have been revisited with the public sector equality duty in mind and Council officials should have prepared for councillors advice in relation to the performance by it of its duties in this regard. A conscious approach to section 75 was required at this stage and officials should have appreciated the need for councillors to receive advice on the equality aspect of the matter now before them, which would have included or be likely to include an analysis of the UCL research and an assessment of the impact of the 30mm kerbs on the position of blind or partially sighted persons."

Grounds 1 and 3: duty of enquiry and rationality

46. I now turn to the grounds. Both parties dealt with grounds 1 and 3 together, because of the interconnection between them, and I shall do the same.

47. Mr Burton KC for the claimant submits that, in this case, the Secretary of State failed to obtain the information necessary on the impact of kerb heights on visually impaired people and was therefore unable properly to exercise his functions under the 2010 Act or under common law. The recommendation for further research on this issue was made repeatedly in the reports referred to above from 2015 to 2021, but the results of such research was not obtained before the Guidance was published. This should have been obtained, particularly as the importance of kerb heights had increased in light of better understanding of the risks to visually impaired people shown by the UCL report and responses consultation. The 25mm minimum is arbitrary. It is clear from all the reports that a firm recommendation on kerb heights cannot be made without further research. The fact that such research has now been commissioned does not alter the position, as the Guidance is in force now and a further update might, but only might, be considered within five years. In the meantime, the Guidance will be relied upon to design infrastructure in urban planning.

48. He accepts that the identification of a minimum kerb height has potentially extremely serious implications for disabled pedestrians generally, including wheelchair users and those with impaired mobility, and balances may have to be struck. The challenged part of the Guidance does not seek to do that, but instead sets out the minimum kerb height to provide for the safety of visually impaired people. That should not have been set out in the Guidance without an adequate evidential basis regarding the risks involved.

49. Mr Williams for the Secretary of State submits that as the 25 mm minimum kerb height was contained in the 1998 guidance, it was reasonable to maintain this in the Guidance pending the results of further research. The Guidance deals with a wide range of issues and it was reasonable to update it after some 24 years without waiting for this very narrow point to be determined. The information before the Secretary of State included conclusions that it was a firm recommendation on kerb heights could not be made without it. That research was underway and expected in late 2023, and the indication had been given that a further review might be carried out in light of it. In those circumstances it was rational in the meantime to maintain the reference to 25mm, particularly as the Guidance makes clear that engagement with people with and organizations representing people with protected characteristics should take place early in the process of schemes involving tactile paving surfaces.

50. In my judgment, the fact that the 25mm minimum kerb height had formed part of guidance for 24 years does not, of itself, justify the lack of enquiry in deciding that that figure should be maintained in the Guidance. This is especially so given that lack of clarity as to what the figure was originally based upon and given the subsequent findings of the UCL report.

51. On the other hand, subsequent reports highlighted the limitations of that report, including that it was based on research in a controlled indoor environment. Mr Burton submits that that was likely to produce a more conservative conclusion than experience in the real world, and some of the evidence filed on behalf of the claimant supports that submission. However, as Mr Williams submits, the material also suggests that in the real world there may be other stimuli which would help detect the nearness of the carriageway, so just how real word research is likely to compare to the controlled research carried out is not clear cut.

52. In my judgment, there was a clear consensus in the reports mentioned above that further research was needed before a clear recommendation for a minimum kerb height could be made. That research was already commissioned, albeit some years since first suggested. It might have been sensible to make an adjustment to the figure in the Guidance, especially as a review may be five years or more away, as Transport NI decided to do. The *Toner* case was not focused on the legality of the guidance by Transport NI, but a particular scheme approved by a local authority.

53. However, in my judgment three main factors in particular indicate that it was a matter of political judgment for the Secretary of State to maintain the 25mm minimum in the meantime. First, the results of the research were then expected in a year or so. Second, the Guidance deals with a very wide range of topics of which kerb heights was a small (although important) issue, and was in need of updating generally. Third, the Guidance makes clear that there should be relevant engagement in schemes for tactile paving surfaces.

54. Accordingly, whilst I well understand why the claimant, and the charities which support her, strongly believe that proper enquiry was not made before maintaining the 25mm minimum in the Guidance (and I will deal with the question of consultation next), I cannot be satisfied that the high threshold of irrationality has been reached to enable the court to interfere, and accordingly grounds 1 and 3 are not made out.

Ground 2: consultation

55. I turn then to the issue of consultation. Where a public body engages in a consultation process, whether there or not there is a duty to consult, the process must accord with the fairness requirements imposed by common law (*R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 as endorsed by the Supreme Court in *R (Moseley) v LB Haringey* [2014] UKSC 56.

56. In this case, Mr Burton submits that the duty to consult arises first out of the public sector equality duty, and second because a failure to consult would result in conspicuous unfairness. The principles were summarised by Hickinbottom LJ in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 as follows:

> "i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted…
>
> ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated...
>
> iii) As I have indicated…, the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose…

> iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed…
>
> v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown"… or as Sullivan LJ said in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: "… a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."
>
> vi) The product of the consultation must be conscientiously taken into account before finalising any decision…"

57. In submitting that clear unfairness is shown in this case, Mr Burton submits that the consultation period of 12 days in July 2019 was clearly insufficient having regard to the fact that it fell within the holiday period and in the context that there was no particular urgency (the Guidance was not published until 2022). It was conducted by online survey, in a format not easily accessible to visually impaired people. A request for an extension of time was refused. The Secretary of State and TRL were aware of the need for quantitative evidence.

58. In respect of the April 2021 workshops, just over three weeks' notice was given of the workshop and less for the call for evidence. Again the charities asked for more time and again it was not given. TRL indicated at the workshops that the draft guidance, which had already been prepared, would be submitted to the steering group the following week. Accordingly, this was not carried out at a formative stage and what response there was, was not properly taken into account. However, Mr Burton made clear he was not maintaining that no consideration had been given to it.

59. In response, Mr Williams submits that the 2019 survey was not a consultation but only a survey which was properly conducted. This informed the subsequent report in 2020 and it is now too late to complain. The 2021 workshops included targeted engagement with stakeholders. It was for the Secretary of State, through TRL, to decide how the carry out this consultation, particularly as there was no proposal to alter the original guidance. The fact that draft guidance had been produced takes the matter no further, and it is clear from the subsequent TRL report that some suggestions from the workshops had been taken on board. The Secretary of State did not have to accept all suggestions.

60. In this regard, I prefer the submissions of Mr Burton. The 2019 survey was in my judgment part of the stakeholder engagement to inform the process of deciding whether the guidance needed updating, and it is not in dispute that the survey result informed the TRL 2020 report, from which it is clear that surveys on issues of mobility devices and impacts on those with mental health issues provided valuable

information. The 2019 survey was undertaken in the context of the previous reports from 2015 until then which all called for further research. The charities involved asked for more time, and understood that this was a consultation exercise. That request was refused. In my judgment a period of 12 days to respond, during a holiday period, when many users were known to be visually impaired, was clearly insufficient. It would have been premature to challenge this exercise until the result of it was known by publication of the Guidance.

61. Even if Mr Williams' points are accepted in relation to the 2019 survey, in my judgment the 2021 workshops clearly amounted to consultation and were referred to as such by TRL. Given the clear need for further research and user evidence in the real world, it was obvious that adequate time to respond was essential. The three weeks or so given was not, in the circumstances where the charities involved with visually impaired persons were asking for more time and it was obvious that potential respondents included such persons. The claimant is not in a position to say what responses might have come forward with more time, or what effect that may have had on the outcome. In my judgment, based on user experience in the real world, there would have been a realistic possibility that further evidence may have come forward. That evidence may well have impacted on references to the 25mm minimum in the Guidance pending the further research and review, whether by a change in the figure in the meantime or, at least, by caveats as to detectable kerb heights pending the further research.

Conclusions

62. In my judgment, grounds 1 and 3 are not made out but ground 2 succeeds. That however, as Mr Burton realistically accepted, is not sufficient to quash the Guidance in respect of the 25mm minimum kerb height, where the necessary research results are expected later this year and an early review of the Guidance in this respect might then be undertaken. At the most, declaratory relief as to the lack of proper consultation or enquiry should be sufficient in those circumstances. Mr Burton indicated that if a period of 21 days were given from hand down of this judgment, he and Mr Williams would liaise to attempt to agree any appropriate wording.

63. A draft order, agreed if possible, should be filed within that time scale, together with written submissions on any matters not agreed. These will then be determined on the basis of such submissions, unless the parties require a further oral hearing and the court agrees.

64. I end by thanking all counsel involved for their focussed submissions, written and oral.