R. (ON THE APPLICATION OF LUNT) v LIVERPOOL CITY COUNCIL

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

(Blake J.): July 31, 2009

[2009] EWHC 2356 (Admin); [2010] R.T.R. 5

Disability discrimination; Disabled access; Judicial review; Jurisdiction; Local government policy; Taxis; Wheelchairs

LICENSING

H1 **Hackney carriage**

Wheelchair users—Refusal to license taxi designed to accommodate all wheelchairs— Requirement of minimum turning circle for taxis not met—Approved taxis unable to carry longer wheelchairs in safety and comfort—Whether policy discriminatory—Taxi built on chassis imported from France—Whether policy unlawful restriction on imports from Member State—Disability Discrimination Act 1995 ss.21, 49A—EC Treaty art.28.

H2 Section 21 in Pt III of the Disability Discrimination Act 1995 provides:

> "(1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.
>
> (2) Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to—(a) remove the feature; (b) alter it so that it no longer has that effect; (c) provide a reasonable means of avoiding the feature; or (d) provide a reasonable alternative method of making the service in question available to disabled persons . . ."

H3 Section 49A [as inserted by s.3 of the Disability Discrimination Act 2005] provides:

> "(1) Every public authority shall in carrying out its functions have due regard to—(a) the need to eliminate discrimination that is unlawful under this Act; (b) the need to eliminate harassment of disabled persons that is related to their disabilities; (c) the need to promote equality of opportunity between disabled persons and other persons; (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons; (e) the need to promote positive attitudes towards disabled persons; and (f) the need to encourage participation by disabled persons in public life.
> (2) Subsection (1) is without prejudice to any obligation of a public authority to comply with any other provision of this Act."

H4 Schedule 3, para.5 provides:

> "(1) Except as provided by s.25 no civil or criminal proceedings may be brought against any person in respect of an act merely because the act is unlawful under Pt III.
> (2) Sub-para.(1) does not prevent the making of an application for judicial review."

H5 Article 28 of the EC Treaty provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

H6 The second claimant applied to the defendant licensing authority for approval, for use as a public hire taxi, of its E7 vehicle, which it manufactured in the United Kingdom using chassis imported from France. The application was supported by the first claimant, who was one of a few hundred wheelchair users whose wheelchair was longer than the reference wheelchair adopted for public transport purposes, with the consequence that she was unable to travel comfortably or safely in the standard taxi approved for the reference wheelchair, whereas in the E7 design she could be properly secured and could be accompanied by ambulant passengers. An equality impact assessment report by the defendant's principal licensing officer, while acknowledging that the E7 created more space for manoeuvre and placement of wheelchairs, pointed out, inter alia, that, due to its size, the E7 could not conform to the minimum turning circle requirements associated with hackney carriages. The defendant's licensing committee refused the second claimant's application, because of concerns about the safety of the E7's sliding doors, the size of an intermediate step and the turning circle needed in the city centre. The claimants sought judicial review of the decision on the grounds that (1) the decision amounted to unjustified discrimination, contrary to ss.21D and 21E of the Disability Discrimination Act 1995; (2) the defendant had failed to have regard to its duty under s.49A(1) of the Act to eliminate discrimination and promote equality of opportunity; (3) the

defendant had exercised its discretion whether or not to license the E7 on the basis of a material error of fact; and (4) in reaching its decision the defendant was in breach of art.28 of the EC Treaty by imposing a product requirement having equivalent effect to a quantitative restriction on imports without justification.

H7 On the application for judicial review:

H8 **Held,** granting the application, (1) that a claim against a public authority under Pt III of the Disability Discrimination Act 1995 could be made by way of judicial review pursuant to para.5(2) of Sch.3 to the Act ([34]); that judicial review enabled the court to intervene where there had been either a procedural failure to explore the relevant question fairly and effectively, or, having explored it, the decision maker based its decision on a critical factual question that was proved to have been wrong ([38]); and that, in the light of the other issues under s.49A and Community law being properly advanced by judicial review, it was clearly appropriate that one action should dispose of the question rather than two ([39]).

H9 (2) That a lawful exercise of the defendant's discretion to approve the second claimant's vehicle could not have been performed unless the licensing committee properly understood the wheelchair users' problem, its degree and extent ([44]); that, however, the committee had clearly based its decision on the erroneous belief that (i) all its existing fleet of taxis were accessible to wheelchair users generally, (ii) problems as to the safe position and strapping of wheelchairs were the result of driver error rather than constrictions of space, and (iii) it was dealing with a wish by wheelchair users for greater choice rather than something that restricted their ability to access the benefits provided by the licensing regime at all ([45]); and that, since that error was critical to its decision in respect of its Disability Discrimination Act duties, the balance of competition considerations if Community law was engaged and generally, the decision would be quashed and the matter remitted for reconsideration informed by the conclusions below as to the disputed legal issues ([46], [52]).

H10 (3) That for the purposes of ascertaining the duties of a service provider imposed by s.21 of the Disability Discrimination Act 1995 the relevant class of disabled persons, in a case such as the present, was not necessarily the group of wheelchair users as a whole, and, for s.21(2) to bite, there did not have to be a denial of access to a benefit to that class as a whole undifferentiated as to the size of the wheelchair or the particular disability that might distinguish one group of wheelchair users from another ([57]); and that, accordingly, it was a misdirection for the defendant to consider that, because some wheelchair users could access the standard taxi in dignity and safety, there was accessibility to wheelchair users as a class ([60]).

H11 (4) That the requirement to have due regard to the elimination of discrimination and promotion of equality of opportunity, imposed on public authorities by s.49A(1) of the Disability Discrimination Act 1995, was a relevant mandatory consideration, apart from the s.21 duties; that, as the defendant's retention of the turning circle requirement in its policy was one that made it more difficult for a class of wheelchair users to access public hire taxis, unjustified discriminatory

treatment might well be revealed on a reconsideration of its s.21 duties that would need to be addressed ([62]); and that ''due regard'' meant giving proper regard and full weight to the issue ([64]).

H12 (5) That the policy adopted by the defendant, whereby the turning circle requirement had to be met for public hire vehicles, resulted in the prevention or greatly restricted use in the city of Liverpool of the chassis base for the very purpose for which it was imported by the second claimant, and, while the policy did not amount to a product prohibition, as the chassis could be used for a people carrier or private hire vehicle, the loss of access to a market of some 1,400 public hire vehicles was considerable, when considering art.28 EC ([71], [72]); and that it would be for the defendant to justify the maintenance of the turning circle, or any other requirement, by showing that it was a proportionate means of achieving the legitimate purpose of ensuring the safety of the public ([77], [78], [80]).

H13 **Cases referred to in the judgment:**

Aklagaren v Mickelsson (C-142/05) [2009] All E.R. (EC) 842 ECJ

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223 CA

Chauffeur Bikes Ltd v Leeds City Council [2005] EWHC 2369 (Admin); [2006] R.T.R. 7

Commission v Italy (C-110/05) [2009] 2 C.M.L.R. 34 ECJ

Criminal Proceedings against Keck (C-267/91) [1993] E.C.R. I-6097 ECJ

E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] Q.B. 1044; [2004] 2 W.L.R. 1351

Quietlynn Ltd v Southend BC [1991] 1 Q.B. 454; [1990] 3 All E.R. 207 ECJ

R. (on the application of Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)

R. (on the application of Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] 1 A.C. 719; [2007] 3 W.L.R. 922; [2008] 2 All E.R. 95

R. (on the application of E) v JFS Governing Body [2008] EWHC 1535 (Admin); [2009] EWCA Civ 626; [2009] 4 All E.R. 375

R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport [2004] UKHL 55; [2005] 2 A.C. 1; [2005] 2 W.L.R. 1; [2005] 1 All E.R. 527

R. v Wirral BC, Ex p. Wirral Licensed Taxi Owners Association [1983] 3 C.M.L.R. 150 QBD

Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (120/78) [1979] E.C.R. 649

Roads v Central Trains Ltd [2004] EWCA Civ 1541

Claim for judicial review

H14 The claimants, Mrs Alma Lunt and Allied Vehicles Ltd, sought judicial review to quash a decision made on March 28, 2008 by the defendant, Liverpool City Council, whereby it rejected an application by the second claimant for approval of its E7 taxi for use as a public hire vehicle in the city of Liverpool.

H15 The facts and the grounds on which the decision was challenged are stated in the judgment.

H16 *Dinah Rose Q.C., Gerry Facenna* and *Catherine Casserley* for the claimants.
Francis Patterson Q.C. and *David Hercock* for the defendant.
Yvette Genn for the Equality and Human Rights Commission, intervening.

H17 Solicitors for the claimants: *Bindmans LLP.*
Solicitors for the defendant: *Solicitor, Liverpool City Council.*
Solicitors for the intervener: *Solicitor, Equality and Human Rights Commission, Manchester.*

H18 The claim was argued on July 28, 29 and 30, 2009.

Cur. adv. vult.

JUDGMENT

1 **BLAKE J.:** This is an application for judicial review of a decision of the Liverpool City Council taken through its Licensing Committee in March 2008.

1. Introduction

2 In 2007 the second claimant, Allied Vehicles Ltd, applied to the defendant for approval of its E7 taxi for use as a public hire taxi in the city of Liverpool. The E7 is a vehicle developed in consultation with the second claimant and Peugeot based in France. It is manufactured by the second claimant in the United Kingdom using a chassis base imported from France that is used in the Peugeot Expert Tepee range of vehicle. The Expert Tepee is a commercial passenger carrying vehicle that is also used as a taxi in many European cities. The E7 is a purpose-built design for publicly hired taxis in the United Kingdom.

3 The second claimant has imported some 800 vehicles from Peugeot in 2008 into the United Kingdom, of which 647 were for use as E7 taxis, and 153 for use as Eurobus private hire taxis.

4 The first claimant is a resident of the city of Liverpool. She hurt her back some 27 years ago and has a disability that requires her to use a wheelchair. A combination of factors relevant to her medical history means that she has to distribute her weight by reclining the back of her wheelchair and using footrests. This means that her wheelchair is somewhat longer than what has been known in these proceedings as the reference wheelchair for public transport purposes, that is 1,200mm in length. She is not alone in having a wheelchair of greater length than 1,200mm. A survey conducted in 2005 on behalf of the Department of Transport Mobility and Inclusion Unit of some 1,356 occupants and devices showed a range of wheelchair lengths from 775mm–1,604mm; and it appears that a few hundred users had a chair over 1,200mm in length. The longest self-propelled wheelchair noted in that survey was 1534mm, which was itself an increase in size of the maximum self-propelled wheelchair by some 177mm since a similar survey in 1999.

5 The first claimant is the voluntary chair of the Merseyside Coalition of Inclusive Living and the treasurer of the Liverpool Wheelchair Users Group. These are both voluntary organisations concerned with disability issues in the city of Liverpool and beyond. Amongst other things, she participates in the policy forum of the city council concerned with wheelchair access issues.

6 In the autumn of 2007, she became aware of the application made by Allied Vehicles Ltd, and she tried out the E7 vehicle in order to access it in her wheelchair. She was impressed with it because she had encountered substantial difficulties in getting into and travelling safely within the public hire taxis presently available in the city of Liverpool. The design specification of the 1,400 such taxis approved for public hire, although intended since 2000 to meet the needs of wheelchair users, are confined to the London-style taxi developed in accordance with the requirements of the London Public Carriage Office, as they have developed over the years since the 19th century. There are various authorised models and manufacturers who comply with the specifications, including the ''TX'' range of vehicles. But in this judgment, taxis that meet these requirements will be referred to generally as the ''London taxi'' or the ''TX''.

7 When these proceedings were launched, there was an issue as to precisely what and how great the difficulties were that the first claimant faced in accessing Liverpool public hire taxis, and also what precisely she had told the council and Mr Edwards, its principal licensing officer, about them. Shortly before the hearing of this application in June 2009, there was a demonstration attended by Mr Edwards. Since that demonstration, it has been agreed that the first claimant cannot access the traditional London taxi in her manual powered wheelchair because she cannot turn her chair to face the rear and be secured by the straps and seat belts provided for disabled use in such a taxi. That means that if she has to travel in such a taxi at all, she can only do so in a diagonal or sideways position unsecured by a seat belt or a strap on the wheelchair itself. It is common ground that this state of affairs not only creates an uncomfortable ride in the vehicle if it breaks or turn corners sharply, it is an unsafe position and a breach of the local regulations governing the conveyance of wheelchair users.

8 The reason for these difficulties is the limited amount of space and the configuration of the floor plan of the London taxi as it rises to the side. By contrast, she can readily access the larger E7 taxi; she can face forward in the course of a journey and be properly secured, and moreover the space is such that she can also be joined by three or possibly four ambulant passengers in the other seats available in the vehicle, by contrast again with the London taxi where at most one passenger can travel with the claimant. The court was provided with a DVD showing a comparison with the E7, a London taxi and another vehicle that will be mentioned later in this judgment, from which it appears that the travelling passenger could only travel in a cramped, difficult and uncomfortable position.

9 The first claimant has a large family and would like to travel with more members of her family than just one person if that were possible. She therefore supports the second claimant's application that would relax the defendant's pre-

sent policy that generally only authorises the London taxi for use as a public hire vehicle in Liverpool.

10 The policy was spelt out in a report of Mr Edwards. The first such report being on October 31, 2007, but it is repeated in the second report that he made in March 2008. He says as follows:

> ''Before a type of vehicle may be licensed as a hackney carriage it needs to be approved by the City Council as a suitable vehicle for use as a taxi cab in Liverpool. The Council has accepted that purpose-built taxis which comply with the conditions of fitness of the London Carriage Office are suitable for such use. Other types of vehicle are considered on their merits, but to date no vehicle which is unable to meet the conditions of fitness has been approved by the Council.''

11 Mr Edwards also referred to the policy of the defendant council in a document that he had prepared in March 2008, which was the Equality Impact Assessment document. He notes that the standard of the London conditions of fitness:

> ''... lays down critical standards which vehicles must attain before being licensed as a hackney carriage. The Licensing Committee makes reference to those standards. If a vehicle falls short of those standards it will generally not be approved for use as a hackney carriage.''

2. The impugned decision

12 On October 31, 2007, the defendant's licensing committee first considered the matter. It heard a presentation from Mr Fryer, an employee of the second claimants. It heard from the first claimant, Mrs Lunt, and from a Mr Bruce, who was chair of the Liverpool Wheelchair Users Group.

13 The minutes record in summary form the gist of what they were being told, which includes the following: ''They are in favour of the E7. Not all TX vehicles are wheelchair accessible.''

14 Other people, including the manager of the TX range, opposed the application. It was adjourned for further information to be obtained and consultation with others, including other authorities on the types of vehicle they license.

15 On March 4, 2008, there was a meeting of some few hours in length between Mr Edwards, Mr Bruce and Ms Price, who was another wheelchair user active in disability issues in the city of Liverpool and its surrounding region, and Mrs Lunt, the first claimant. As already indicated, there is some difference of recollection between those three on the one hand and Mr Edwards on the other as to precisely what was said at the meeting. Mr Edwards does not recollect anyone saying to him that wheelchairs could not be safely secured in the taxis as the statements of the three wheelchair users indicate they did inform them. But I am satisfied that it is at least clear that the difficulties created by the physical limitations of space were emphasised by all three, although not everyone had the scale of difficulty that Mrs Lunt, the first claimant, had.

16 Following that meeting, Mr Edwards completed the Equality Impact Assessment to which reference has already been made. He said as follows:

> ''A specific application for the approval of a Peugeot E7 vehicle to be used as a hackney carriage presents the potential for a dis-benefit to wheelchair users if the vehicle is not approved. Those wheelchair users who wish to be accompanied by several of their ambulant friends have move manoeuvrability and be able to travel in a forward as well as a rear facing position would not be able to do so by access to the current wheelchair accessible fleet. The Peugeot E7 is a larger vehicle and by virtue of its size creates more space for manoeuvre and placement of such wheelchairs.
> However due to the vehicle's size and the engineering considerations associated with the design, it can not conform to the minimum turning circle requirements associated with hackney carriages and is higher off the ground creating increased wheelchair ramp angles.''

Under the section of the Equality Impact Template headed ''Please list the actions taken to remove or remedy the above effect'', Mr Edwards wrote:

> ''The Licensing Committee will consider any application on its merits submitted by any vehicle manufacturer who designs and builds a vehicle which is constructed to be used for public hire activity.''

17 That report was dated March 18, 2008 and was before the licensing committee when it met to take its decision later that month. It does not appear to have been supplied to the first claimant or others with whom there had been consultation before the decision was taken. Mr Edwards prepared a further report for the meeting of the council in which similar language was used and pointing out, as is apparent from the Equality Impact Assessment, that the E7 does not meet the tight turning circle requirements of the London Public Carriage Office specifications and the London taxi. That is agreed between the parties. The benefits of the turning circle and its impact on health and safety are not agreed.

18 It is pertinent to point out some matters in the report which have been the subject of critical comment and appear in part to be inaccurate:

i. The report states that the ''Merseyside Police has inspected Euro 7 and has indicated that they have reservations about the vehicle's use as a hackney carriage''. It subsequently transpired that the police as a body do not have concerns and are neutral as to the merits of the matter, but it is undoubtedly the case that a Mr Gore, who was the Merseyside Force Vehicle Examiner, did inspect the E7 and made a statement identifying matters of concern to him.
ii. The report before the council indicated that a previous version of the E7 had been inspected by the council's senior vehicle inspector who raised concerns about the ramp angle. However, the ramp angle had been the subject of representations by the second claimant between Mr Edwards' first report and the second report, pointing out that the matter had been substantially altered since the earlier inspection, and the ramp that is now built-in to the version of the E7 for which authority was being sought is longer and consequently has a shallower angle than the London taxi. It was noted in the report that it also has the

additional feature of lips to the edge of the ramp edge that wheelchair users considered was of assistance in bringing their chairs up the ramp into the vehicle.

iii. Mr Edwards' report noted the danger of sliding doors, which is a feature of the E7, and the fact that use by passengers of such doors when descending fail to warn oncoming traffic that passengers are exiting the vehicle, by contrast with the hinged doors of the London taxi. It is right that the second claimant also pointed out that that issue had been addressed by them by the insertion of a warning light visible to following traffic saying that the door was open.

19 The views of the first claimant and others who had discussed the matter on behalf of the voluntary organisations with Mr Edwards are summarised in the second report in the following terms:

> "The Liverpool Wheelchair Users Group in conjunction with Merseyside Coalition of Inclusive Living has made representations in support of the E7 and has requested that the vehicle be approved as it provides more room and comfort for both wheelchair users and those ambulant friends who accompany them. The groups have expressed the view that the ramps associated with the E7 vehicle are more reassuring than normal TX ramps. The Wheelchair Users Group advised the Licensing Unit that some 12,000 wheelchair users would find the alternative choice of the E7 to be a positive benefit in terms of accessible transport."

20 It is a theme of the various reports made by Mr Edwards whilst the matter was under consideration that Liverpool's fleet of London taxis is wheelchair accessible and Liverpool has an enviable reputation in so requiring since at least 2000.

21 The second claimant had by this time prepared a written report that it presented to the council for consideration of its application. That report contains a number of appendices which are quoted from in the summary of the report, and it contains a letter from Mr Bruce of September 6 and a media release of November 29, 2007, which more accurately set out the concerns of the wheelchair users than Mr Edwards' summary of the consultation does in that report. It is unnecessary in this judgment to quote every relevant passage of the report, but the following themes emerge. It said:

> "1.1.2 The present public hire taxi fleet is not inclusive for many wheelchair using residents and visitors. This is because the only existing vehicles . . . make it awkward and time consuming to load wheelchair users and make it difficult to turn and secure the wheelchair and occupant correctly within the cab.
>
> . . .
>
> 1.1.7. A survey of 100 journeys was undertaken by wheelchair users in London-style hackney cabs. This showed that, due to the lack of turning space to manoeuvre the wheelchair within the vehicle, only on four occa-

sions was the wheelchair user turned into place in the correct direction for travel and on only one occasion were the wheelchair and passenger restraints correctly applied.

1.1.8. The Lowland Report therefore provides firm evidence that in 99 per cent of journeys wheelchair using passengers were left to travel in a manner which is clearly highly dangerous, with no seat belt for the passenger and not even anything to hold his/her seat to the vehicle.

. . .

1.1.12. The practice of carrying wheelchair passengers facing sideways, entirely unsecured and with no seat belt, places all such passengers using a publicly licensed service at grave risk of injury or death in the event of an accident. Disabled groups and Taxi Association representatives alike confirm that a key barrier giving rise to this appalling situation is the limited turning area available in the rear of a London-style taxi.

1.1.13. Numerous organisations have commented on the important contribution made by modern-style hackney taxis to improving accessibility for wheelchair users. In particular, organisations representing 12,000 wheelchair users in the report argue strongly against a one size fits all approach in specifying services or products to meet the needs of everyone in society. Having tested modern-style hackney taxis, wheelchair users recognise clear access and safety benefits for many wheelchair users compared with the existing Liverpool taxi fleet.''

22 There is then reference to the disability legislation to which this judgment will turn in due course.

23 The Lowland Report referred to in that document was a report commissioned by Lowland Market Research of wheelchair user taxi journey experience. It indicates that a total of 100 taxi journeys were undertaken using a reference wheelchair (that is the 1,200mm wheelchair, slightly smaller than Mrs Lunt's own wheelchair in the present case). The 100 taxi journeys were split between Manchester and London with 50 journeys in each city. The journeys started at a variety of locations, including shopping centres, taxi ranks and hailing the taxi on the street.

24 Under the heading ''Summary of results'', the following bullet points are made:

''• In only four of the 100 taxi journeys taken was the wheelchair turned to face rearwards in the correct direction of travel. In all cases this required a degree of bumping and shuffling in order to get the wheelchair turned, which was uncomfortable for the wheelchair occupant.

• In only one journey was the wheelchair both turned to face away from the direction of travel and also properly secured within the taxi.

• In only one journey was the seat belt and seat belt extension provided and correctly fitting.

• In all other journeys (96 per cent) the wheelchair either remained side on or at some other angle. In these situations neither the wheelchair nor the

passenger could be safely secured and the passenger tended to feel uneasy at bends and when stopping.

• For those taxi drivers that did not turn the wheelchair to face away from the direction of travel they either made no comment regarding this or stated that the wheelchair was too large to turn inside the vehicle.

• In 94 per cent of the journeys taken the wheelchair passenger stated that they felt either fairly or very unsafe during the journey.

Concluding comments

• The experience of a wheelchair user whilst travelling on a London-style taxi was, almost without exception, uncomfortable and, in particular, unsafe. The predominant issue contributing to this situation was the lack of space available in which to manoeuvre the wheelchair and occupant into a safe travelling position.''

25 The general tenor of the second claimant's submissions in the Lowland Report was supported by other documentary material before the committee, including the letter from Mr Bruce and the media information release to which reference has already been made. The committee also heard evidence from another wheelchair user currently unconnected with the interest groups that Mr Bruce, Mrs Price and Mrs Lunt were connected with, and that was a Mr Cronin. He in fact wrote to the council on April 7, 2008 indicating that the minutes mis-recorded the nub of what he was saying, and said that he did not support either side in this debate and has never even seen the E7-style cab. His letter says:

> ''I merely inform the Committee that I was unable to be seated correctly by Mr Kelsey and this would have necessitated me travelling sideways, untethered. I further stated that sideways travel was, in the experience of my peer group, very much the norm when using a London-style taxi.''

26 On this second occasion as well, the committee heard from Mrs Lunt herself, though it seems only for a very short period, but she had apparently handed in photographs which were made available to the court showing the difficulties of securing her wheelchair, or a wheelchair of her size, in the London-style taxi by contrast with the E7. One of the photographs showed the wheelchair user in the E7 with two other ambulant passengers, and it may be that two to three is the number of extra passengers that can be fitted into that vehicle.

27 Mrs Price also spoke to the committee, but despite this material, the minutes note that the chair of the meeting interjected to state that he thought that the problems being described were all driver error that could be addressed by training. A similar point is made subsequently in the correspondence before this claim was lodged.

28 The written submissions of the second claimant also made the point that 383 local authorities had licensed the E7 for use as a public hire taxi by 2008, and in some cases going back to 2000. Those include such large cities as Edinburgh, Glasgow, Leeds and Newcastle, and it also includes all the local authorities who license public hire taxis surrounding the city of Liverpool itself, those at least

include the authorities for the Wirral, Knowsley, St Helens, Sefton and West Lancashire. Thus it seems that the E7 was considered both safe and appropriate by these authorities, and as a result was permitted to make journeys ending in Liverpool city centre, but not beginning there or being hailed on the streets there. It is to be noted that both Manchester and London have retained the London taxi design with its turning circle.

29 The committee having met on March 28 and heard all this material, then excluded the public in order to consider its decision, and decided by a vote of four to two to refuse the application. In due course, the minutes of its reasons, and a letter in explanation indicated that it was conscious of the need to give due regard to the Disability Discrimination Act 1995, but three features caused it concern about the E7: first, the sliding doors and safety issues arising therefrom (the council, it should be noted, had looked at the E7 itself); secondly, the size of an intermediate step; and thirdly, the turning circle needed in Liverpool where some ranks in the city centre would need a three-point turn without the tight London-style turning circle.

30 Following further correspondence, this judicial review challenge was brought.

3. The challenge

31 Ms Rose Q.C. has developed four essential bases of challenge that may be summarised as follows:

1. The decision amounted to unjustified discrimination contrary to ss.21D and 21E of the Disability Discrimination Act 1995 (DDA), as amended with effect from December 4, 2006.
2. It failed to have due regard to its duty under s.49A(1) of the DDA, introduced in June 2006, of the need to eliminate discrimination and promote equality of opportunity.
3. It exercised its public law discretion as to whether to license the E7 on the basis of a material and undisputed error of fact. Its judgment was thus based on a decisive error. There were also other grounds of unfairness argued.
4. In reaching the decision that it did, the city council breached art.28 of the EC Treaty in that it imposed a product requirement (or similar requirement) that had equivalent effect to a quantitative restriction on imports of material from an EU state without justification.

32 Although those four submissions raised some disputed issues of law to be addressed by this court in due course, the challenges at common law under the DDA and under Community law all eventually shared a common factual foundation, and it is submitted that, in each case, the decisions were undermined by the error of fact made by the council that at least includes the following:

1. The defendant through its officer, Mr Edwards, and consequently the chair, failed to understand that not all its licensed hackney carriage fleet was accessible to all wheelchair users, irrespective of their particular conditions and the size and characteristics of their wheelchairs.

2. The defendant misunderstood and therefore mis-stated the impact of the maintenance of the present practice as merely restricting the choice and the convenience of wheelchair users as opposed to the ability of some users, including Mrs Lunt, to use the present licensed taxis in Liverpool at all in the safe position. It could therefore reach no lawful judgment on the merits of the application and the extent to which it constituted discrimination, and the comparative safety benefits when considering the matter more generally.
3. Insofar as in its response to the DDA point and the Community law claims the council sought to base a justification of its decision on safety considerations, the material upon which it relied was inadequate, and it failed to obtain relevant evidence from a competent source to advise it on the question.

33 Ms Patterson Q.C. for the defendant responds by submitting, amongst other things:

1. The s.21 challenge is unsuitable for determination by judicial review, and a damages claim by the first claimant in the county court is the appropriate venue for the first of the four challenges made.
2. Although the s.49A duty is a public law duty that can be enforced by judicial review, the council was aware of its duty and came to a decision on the merits that it was entitled to reach.
3. Even if it misunderstood the degree of difficulty Mrs Lunt faced in gaining access to a London-style taxi, it was entitled to conclude that all its taxi fleet was wheelchair accessible in general terms, and accordingly there was no duty to modify in accordance with s.21E of the DDA.
4. The claim fell outside the reach of art.28 EC as it was not a sufficiently substantial interference with use.
5. In any event the council was entitled to refuse the licence on safety grounds, even if other local authorities took a different view. In particular, the council was entitled to use its local knowledge of what it would consider was appropriate for Liverpool to make the decision it came to.

4. Suitability for judicial review

34 I accept the claimant's submissions that claims against public authorities under Pt III of the DDA do not have to proceed by way of private law action for torts alone. There are a number of reasons for that conclusion. First, and most relevantly, that is because DDA Sch.3 para.5 says so. It provides as follows:

> "(1) Except as provided by section 25 no civil or criminal proceedings may be brought against any person in respect of an act merely because the act is unlawful under Part III.
> (2) Sub-paragraph (1) does not prevent the making of an application for judicial review."

35 Secondly, the law on the comparable duty in race relations claims demonstrates that a challenge can be made by way of judicial review even where there is a factual dispute as to what the defendant's practice amounts to: see *R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55; [2005] 2 A.C. 1 at [96]–[97]; see also the decision in *R. (on the application of E) v JFS Governing Body* [2008] EWHC 1535 (Admin), a decision of Munby J. reversed by the Court of Appeal on other grounds ([2009] 4 All E.R. 375). The conclusion of suitability for judicial review was not challenged or disturbed in the Court of Appeal.

36 Thirdly, I do not accept that the factual disputes that exist between the parties as to what was said to Mr Edwards in consultation prevents this challenge in judicial review proceedings. I do not need to resolve all the differences in the witness statements, although I find the witness statements of Mrs Lunt, Mrs Price and Mr Bruce compelling, whereas that of Mr Edwards is far less clear and precise, and his reports have been shown to be inaccurate in a number of ways on one or two other topics.

37 However, in my judgment, at least the following conclusions result from the examination of the materials in the case:

(i) There was sufficient documentary evidence before the committee that some wheelchair users could not access the London taxi for space reasons, and that was not a question of either driver error or mere convenience or preference of wheelchair users.

(ii) Since it is now an agreed fact that Mrs Lunt cannot access a London taxi in her wheelchair, save with the difficulty and in the unsafe sideways manner that has been demonstrated, and that there has been no material change of circumstances since October 2007 and today, then at the least Mr Edwards must have seriously misunderstood what was being said to him. If he did not understand what was being said to him, in my judgment he was required to explore the basis of the physical difficulties with manoeuvring the taxi to a safe position that was being described to him.

38 Judicial review enables the court to intervene where there has either been a procedural failure to explore the relevant question fairly and effectively or at all, or having explored it, bases a decision on a critical factual question that proves by the time the judicial review proceedings are brought to have been wrong: see in that context the decision in the case of *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044, which provides, so far as material:

> ''61. As the passage cited by Lord Slynn shows, the editors of the current edition of *De Smith* (unlike *Wade and Forsyth*) are somewhat tentative as to whether this is a separate ground of review:
>
> 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into

account of an irrelevant consideration or the failure to provide reasons that are adequate or intelligible or the failure to base the decision upon any evidence.' (para 5/-094).

62. We are doubtful, however, whether those traditional grounds provide an adequate explanation of the cases. We take them in turn.

(i) Failure to take account of a material consideration is only a ground for setting aside a decision, if the statute expressly or impliedly requires it to be taken into account (*Re Findlay* [1985] AC 318, 333-4, per Lord Scarman). That may be an accurate way of characterising some mistakes; for example, a mistake about the development plan allocation, where there is a specific statutory requirement to take the development plan into account (as in *Hollis*). But it is difficult to give such status to other mistakes which cause unfairness; for example whether a building can be seen (*Jagendorff*), or whether the authority has carried out a particular form of study (*Simplex*).

(ii) Reasons are no less 'adequate and intelligible', because they reveal that the decision-maker fell into error; indeed that is one of the purposes of requiring reasons.

(iii) Finally, it may impossible, or at least artificial, to say that there was a failure to base the decision on 'any evidence', or even that it had 'no justifiable basis' (in the words of Lord Nolan: see above). In most of these cases there is some evidential basis for the decision, even if part of the reasoning is flawed by mistake or misunderstanding.

63. In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between 'ignorance of fact' and 'unfairness' as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that 'objectively' there was unfairness. On analysis, the 'unfairness' arose from the combination of five factors: (i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) The fact was 'established', in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) The claimant could not fairly be held responsible for the error; (iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) The mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in *Tameside*, the Council and the Secretary of State,

notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities. The same thinking can be applied to asylum cases. Although the Secretary of State has no general duty to assist the appellant by providing information about conditions in other countries (see *Abdi and Gawe v Secretary of State* [1996] 1 WLR 298, he has a shared interest with the appellant and the Tribunal in ensuring that decisions are reached on the best information. It is in the interest of all parties that decisions should be made on the best available information (see the comments of Sedley LJ in *Batayav*, quoted above).
(We have also taken account of the judgment of Maurice Kay J in *R (Cindo) v Secretary of State* [2002] EWHC 246 para 8-11, drawn to our attention since the hearing by Mr Gill, in which some of these issues were discussed.)''

39 In my judgment, no other obstacle to proceeding by judicial review exists in this case, and in the light of the other issues under s.49A and Community law being properly advanced by judicial review, it is clearly appropriate that one action disposes of the question rather than two.

40 The court, in my judgment, will not be substituting its own conclusions on disputed questions of fact or policy, since the remedy sought is to quash the decision and remit it for reconsideration in accordance with the law set out in this judgment.

41 A different objection was faintly advanced by Ms Patterson that, as the Secretary of State had power to make Regulations about accessibility under Pt V of the DDA and s.32, and there is a consultation now under way as to what the required specifications for taxis should be, it would be wrong to explore the issues in a discrimination claim under Pt III.

42 I am satisfied that such a submission is wholly misconceived for the reasons given by Ms Rose in response. The claimant's case is not a challenge to the minimum conditions for taxi specifications. The claimant does not submit that all taxis should have the space features of the E7. It is clear that many wheelchair users can access the London-style taxi and have no expressed concerns about it, but this case is concerned with a class of persons who cannot do so in safety and without difficulty. They merely want the opportunity to be able to use the E7 as a public taxi alongside the London-style taxis, and are not seeking a minimum one size fits all approach.

5. Error of fundamental fact

43 I accept Ms Rose's primary submission that this decision is liable to be quashed because the judgment of the committee was based on the fundamental misunderstanding as to the true factual position. In my judgment, that true factual position was a mandatory relevant consideration, both under s.49A of the DDA and at common law, applying the approach in *E v Secretary of State for the Home Department* [2004] Q.B. 1044.

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

discretion as to fact and policy that the common law affords to decision-makers under the test in the *Wednesbury Corporation* case [1948] 1 K.B. 223 only applies to decision-makers who have acted fairly and directed themselves accurately on the relevant considerations to be weighed in making a matter of judgment or exercise of discretion. However, whether the failures came about as a result of the deficiencies in Mr Edwards' report, or a failure by the Committee to take into consideration and understand the factual position emerging from the documentary submissions and annexes in the second claimant's written submissions, the result is the same.

45 The Committee clearly based its decision on the erroneous belief that:

1. all its existing fleet of 1400 London-style taxis were accessible to wheelchair users generally, and that must mean to all wheelchair users;
2. problems as to the safe position and strapping of wheelchairs were the result of driver error rather than the result of constrictions of space;
3. it was dealing merely with a wish by wheelchair users to greater choice rather than something that restricted their ability to access the benefits provided by the licensing regime at all.

46 Since this error was critical to its decision in respect of its DDA duties, the balance of competing considerations if EC law was engaged and generally, it must be quashed and the matter remitted for reconsideration unless Ms Patterson could satisfy me that it could make no difference to the outcome. I conclude that she cannot so satisfy me.

47 In reaching that conclusion, I bear in mind that, following my conclusion on the legal issues considered below, the inadequacy of the material relied upon to support safety objections can now be supplemented by three pieces of post-decision evidence that the claimants have placed before the court.

48 The first of those is a London Transport survey done in 2003 on the accessibility of the London taxi in respect of six wheelchairs. The following relevant information can be gleaned:

> **"Background**
>
> Although this report covers only the experiences of the six wheelchair users a range of wheelchairs were included - both manual and electric. It emerged very clearly that there are three major difficulties to be taken into account when designing vehicles to meet the needs of wheelchair users: (a) differences in the individual's size and weight; (b) differences in the nature of the disability; and (c) differences in the wheelchair design. These difficulties were compounded by the fact that the individual's size and the nature of their disability may require the wheelchair to be set up differently to meet the individual's needs. So, even though the wheelchair design may be standard, if (for example) the occupant requires the foot rests to be raised this can make it difficult or impossible for the passenger to get into or turn around in the vehicle. Another passenger with the same wheelchair would not have such difficulties.

It should also be noted that two of the wheelchairs used in this study were large electric wheelchairs. These were of the same design but set up very differently. While these large, electric wheelchairs may not be as widely used as smaller, manual wheelchairs, they are increasing in popularity. It is also likely that for people wishing to travel independently on public transport they represent a greater proportion of wheelchairs in use than for the general disabled population. It is essential, therefore, that any future vehicle designs are able to accommodate large, electric wheelchairs.

Previous research conducted by Surface Transport has shown that a major issue for disabled passengers on public transport is the desire to travel with their partner, friends and to be able to carry on and store shopping, luggage and/or medical supplies and aids. It should be recognised also that for many wheelchair users their friends or partners are also wheelchair users. Therefore, a taxi that can only accommodate one wheelchair is not acceptable. Fully accessible taxis need to be evaluated not simply as to whether the vehicle is accessible and comfortable for the wheelchair user but also whether it meets all their travel wishes and requirements.

. . .

In the taxi

Once the wheelchair user had managed to get into the taxi they were then faced with the problem of turning the chair around to use the safety harness. This was impossible in the two standard, London taxis even for the manual wheelchairs (and the electric wheelchairs could not be accommodated at all). The occupant, therefore, was forced to ride sideways to the direction of travel and without a safety harness. During this study no vehicle was allowed to move off where it was felt that the occupant was unsafe or the seating arrangement illegal.

The drivers said, however, that on the street they would be prepared to carry a wheelchair user in a sideways position without a safety harness if the passenger was prepared to take the risk. Consideration should be given, not only to the safety and legal issues, but also the validity of insurance under these circumstances.''

49 The second new piece of material is the strikingly different approach displayed to both equal opportunities assessment by the council in an application which is presently outstanding for a licence for another vehicle for approval as a taxi cab. This is a Mercedes vehicle, which has a larger rear space available for wheelchairs than the London-style taxi although the space is still smaller than the E7. Like the E7, it has sliding doors, though those are button rather than manually operated. It appears from the DVD supplied to the court that Mrs Lunt cannot properly access even the Mercedes vehicle, although it could be said that the committee's consideration of that vehicle is moving in the right direction.

50 It is noticeable that this is a vehicle with sliding doors, although it appears that none of the safety concerns about exiting from sliding doors were noted by Mr Gore in his comment on that vehicle. The Mercedes vehicle does however

meet the turning circle requirements of the Public Carriage Office, and in that respect is similar to the London taxi.

51 The third, is the information collected by the second claimant from a number of local councils, including those adjacent to Liverpool itself, indicating that no safety concerns arose regarding the E7 either as regarding sliding doors, turning circle or anything else. Particularly cogent amongst that material is a report prepared for Edinburgh District Council in May 2006 examining whether the turning circle requirement of the standard London taxi gives rise to safety considerations. The relevant part of that report provides as follows:

> "2.8.8. If it is was shown that the TRC was unequivocally unsafe, we would recommend a licensing condition that forbids the use of U-turn manoeuvres by taxis. However we agree with the PCO conclusions that there is no overriding evidence either way regarding the safety risks of U-turns against 3 point turns. Nevertheless, unlike the PCO, we do not consider this a reason to retain the TCR.
> 2.8.9. In any case, all vehicles used as taxis must meet the appropriate standards for European Whole Vehicle Type approval. This includes vehicles used as taxis that do not have the TTC property. Although very useful, the results from our surveys our consultation exercise and the details and arguments from the PCO report reviewed above have not persuaded us that the TCR is essential to the taxi trade in terms of providing a safe working environment. Given that its inclusion may be detrimental to the broader interests of the trade, especially in the longer term, we adhere to our original recommendation that Condition 181 should be removed from The City of Edinburgh Council's taxi licensing conditions."

52 On reconsideration of this matter, all this material will be available along with the material originally supplied. I therefore propose to quash the decision and remit it for reconsideration. What then follows in this judgment are my conclusions on the disputed legal issues that should inform that reconsideration.

6. Relevant class under ss.21B and 21(E)

53 A detailed exposition of the DDA s.21 is not now necessary. Ms Patterson did not dispute Ms Rose's suggested six-step approach to s.21 that a court and a public authority will need to address in making decisions under it:

1. Did the council have a practice policy or procedure?
2. Did that practice policy or procedure make it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be, conferred by the council?
3. If so, is it under a duty to take such steps as is reasonable in all the circumstances of the case for it to change that practice policy and procedure so it no longer has that effect?
4. Has the council failed to comply with its duty to take such steps?
5. If so, is the effect of that failure such as to make it unreasonably difficult for Mrs Lunt to access such benefit?

6. If so, can the council show that its failure to comply is justified in that either—(a) it reasonably holds an opinion that the non-compliance is necessary in order not to endanger the health or safety of any other person; or (b) its failure is justified as a proportionate means of achieving another legitimate aim?

54 That sequence of decisions is identified in the legislation and is supported by the decision of the Court of Appeal in *Roads v Central Trains Ltd* [2004] EWCA Civ 1541. In that case a wheelchair user sued the train company because he complained that he could not cross over from one track to another in order to catch a train to Norwich. It was common ground that he could not use the footbridge. There was a track that crossed the line that could be used, but the uneven ground presented perils to wheelchair users in general and the claimant in particular.

55 The train company contended that it did not have to provide a wheelchair accessible vehicle to enable the claimant to cross the line but that a reasonable adjustment was to require him to travel in the opposite direction and change trains there in order to continue his journey.

56 Sedley L.J. upheld the finding of discrimination made in the county court and made the following observations:

> ''11. It is desirable first to say something about the cross-appeal. Manifestly no single feature of premises will obstruct access for all disabled persons or - in most cases - for disabled persons generally. In the present case, for instance, the footbridge is not likely to present an insuperable problem for blind people. The phrase 'disabled persons' in section 21(2) must therefore be directing attention to features which impede persons with one or more kinds of disability: here, those whose disability makes them dependent on a wheelchair. The reason why it is expressed in this way and not by reference to the individual claimant is that section 21 sets out a duty resting on service providers. They cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability - impaired vision, impaired mobility and so on. Thus the practical way of applying section 21 in discrimination proceedings will usually be to focus the question and the answer on people with the same kind of disability as the claimant.
>
> 12. The personal right created by section 19 of the DDA operates by fastening a cause of action on to the section 21 duty if the effect of a breach of the duty is 'to make it impossible or unreasonably difficult for the disabled person to make use' of the service in question. Thus there is a double test, albeit both limbs use the same phraseology: first (in paraphrase), does the particular feature impede people with one or more kinds of disability; secondly, if it does, has it impeded the claimant?''
>
> ''26. . . . I do accept, however, that it is not necessary, in order to trigger the section 21(2) duty, for the feature in question to cause unreasonable difficulty for all or most disabled persons: any significant impact on, say, wheelchair users as a class will in my judgment suffice. The question

> may often have to be answered without reference to direct evidence from which some kind of statistical analysis can be made: indeed the assembly of such evidence, whether pro or con, may well be invidious or arbitrary and therefore an inappropriate exercise to attempt. Judges are likelier to be assisted by their own appraisal and, where necessary, expert evidence.''

57 In my judgment, Sedley L.J. was not there stating that, as a matter of law, in every case of this sort the relevant class was the group of wheelchair users as a whole, and for s.21(2) to bite there has to be a denial of access to a benefit by that class as a whole undifferentiated as to the size of the chair or the particular disability that may distinguish one group of wheelchair users from another. I observe that the distinction between types of wheelchairs was not the issue in that case, and such an approach would be contrary to the whole tenor and purpose of the Act.

58 The court has been assisted by the intervention of the intervenor (now called the Equality and Human Rights Commission). Ms Genn appeared for them and drew the court's attention to some material, including the Code of Practice issued by the former Disability Rights Commission that is an aid to decision-making in this field. Paragraphs 6.4 and 6.36 provide as follows:

> ''6.4. The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. Accordingly, the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.''
>
> ''6.36. However, when considering whether services are unreasonably difficult for disabled people to use or whether disabled people's experiences are unreasonably adverse, service providers should take account of whether the time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties . . .''

I note that paras 7.11 and 11.40 of the Code reflect a similar approach.

59 The intervenor emphasises the importance of access to public transport by people with disabilities if the policies and purposes of the Act are to be promoted and not frustrated. It is not, in my judgment, a minimal duty, but seeks broadly to put the disabled person as far as reasonably practicable in a similar position to the ambulant user of a taxi. That submission is also reflected in another passage of the judgment of Sedley L.J. in the case of *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 at [13]:

> ''Where there is only one practicable solution, it may have to be treated as reasonable even if it is demeaning or onerous for disabled people to use it. If on the other hand there is a range of solutions, the fact that one of them, if it stood alone, would satisfy section 21(2)(d) may not be enough to afford a defence. This is because the policy of the Act, as I would accept, is what

it was held to be by Mynors Ch (albeit by way of restricting the duty) in *In re Holy Cross, Pershore* [2002] Fam 1 [105]: 'to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large'. While, therefore, the Act does not require the court to make nice choices between comparably reasonable solutions, it makes comparison inescapable where a proffered solution is said not to be reasonable precisely because a better one, in terms of practicality or of the legislative policy, is available. That was this case.''

60 I accordingly conclude that it is misdirection for the council to consider that, because some wheelchair users can access the London taxi in dignity and safety, there is accessibility to wheelchair users as a class, and that any problem that Mrs Lunt has must be regarded as entirely individual to her. I accept that there must be a class of persons rather than mere problems encountered by a single individual, but the written and oral evidence presented to the committee and its officers upon its true construction, as in the witness statements on behalf of the claimants in this case, showed serious difficulties for a class of wheelchair users that was wider in extent than Mrs Lunt personally, and that of that class there are some, like Mrs Lunt, who could not access the safe and secure position at all. As already indicated, that evidence has increased with the post-decision material now available for consideration.

7. Duty to give due consideration under s.49A

61 Section 49A(1) of the DDA 1995 provides as follows:

''Every public authority shall in carrying out its functions have due regard to—(a) the need to eliminate discrimination that is unlawful under this Act; (b) the need to eliminate harassment of disabled persons that is related to their disabilities; (c) the need to promote equality of opportunity between disabled persons and other persons; (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons; (e) the need to promote positive attitudes towards disabled persons; and (f) the need to encourage participation by disabled persons in public life.''

62 Both sides accept that this is a mandatory relevant consideration to be considered, even apart from s.21 duties. Clearly a proper analysis of the s.21 duties on reconsideration may well reveal unjustified discriminatory treatment that requires addressing. The council's retention of the turning circle requirement in its policy is one that makes it more difficult for a class of wheelchair users to access public hire taxis.

63 It is agreed that the proper approach to s.49A is set out in the decision of the Divisional Court *R. (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) given on December 18, 2008. All of the judgment of Scott Baker L.J. at [79]–[96] is of interest, but the

passages at [90]–[96] are particularly relevant for the guidance of the decision-makers and provide as follows:

> "90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have 'due regard' to the identified goals that are set out in section 49A(1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have 'due regard' to the identified goals: compare, in a race relations context *R (Watkins - Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 at paragraph 114 per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that 'due regard' has not been given to them: see, in a race relations case, the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) at paragraph 45.
>
> 91. Secondly, the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 at para 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882 at paragraph 49.
>
> 92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of 'ticking boxes'. Compare, in a race relations case the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin) at paragraphs 24-25.
>
> 93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have 'due regard' to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in Baker at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non-statutory guidance in all cases where section 49A(1) is in play. 'In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced': Baker at paragraph 38.
>
> 94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is

charged with the section 49A(1) duty. In those circumstances the duty to have 'due regard' to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty. Compare the remarks of Dobbs J in *R (Eisai Limited) v National Instituted for Health and Clinical Excellence* [2007] EWHC 1941 (Admin) at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in *R (Bapio Action Limited) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) at paragraph 69, those of Dobbs J in *R (Eisai Ltd) v NICE* (*supra*) at 92 and 94, and those of Moses LJ in *Kaur and Shah* (*supra*) at paragraph 25.''

64 The duty is to have regard rather than merely to achieve the improvement of the equality considerations at stake, but it is to have *due* regard, which must mean proper regard and full weight to the issue must be given.

8. Is art.28 of the EC Treaty engaged?

65 The defendants have come a long way towards accepting the claimants' submissions since the lodging of the summary grounds and skeleton argument. In my judgment, the previous indications of the UK case law (namely the first instance the case of *R. v Wirral BC Ex p. Wirral Licensed Taxi Owners Association* [1983] 3 C.M.L.R. 150, and a decision of the Court of Appeal in *Quietlynn Ltd v Southend BC* [1991] 1 Q.B. 454) that were formerly relied upon by the defendants in their pleadings and skeleton argument can no longer be considered relevant in the light of the development of the jurisprudence of the European Court of Justice.

66 Two recent decisions of the European Court of Justice define and curtail the potential exemptions to the principle set out in *Cassis de Dijon* (120/78); *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] E.C.R. 649, as modified by the exclusions identified in *Criminal Proceedings against Keck* (C-267 and 268/91) [1993] E.C.R. I-6097.

67 First, there is a decision of the European Court of Justice in *Commission v Italy* (C-110/05), given on February 10, 2009 and reported at [2009] 2 C.M.L.R. 34, where the Grand Chamber distinguished between mere selling arrangements that fell outside the scope of art.28 and product requirements that were in it and therefore required justification.

68 Secondly, in the very recent decision in *Aklagaren v Mickelsson* (C-142/05) [2009] All E.R. (EC) 842 on June 4, 2009, where the ECJ has developed and explained the distinction between general non-discriminatory conditions attached to the selling of goods in a member state on the one hand, and conditions attached as to product requirements and restricting use of imported goods on the other. Paragraphs [26] and [27] of that judgment provide as follows:

> "26. Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State (see to that effect, *Commission v Italy*, paragraph 56).
> 27. Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, *Commission v Italy*, paragraph 57)."

69 Ms Patterson accepts that these rules apply to local emanations of the state such as local authorities, if the restrictions resulting from the maintenance of the licensing policy requiring the turning circle requirement to be met have the effect set out in the judgment of the ECJ, namely did they prevent or greatly restrict the use of the product?

70 There is some difficulty in applying these principles developed in case law that concerned national rules of scope and application to decisions of local authorities applicable in only one region of the state. I accept that Liverpool is one of the great cities of the United Kingdom and the market for public hire vehicles there is a significant one. Further, I am conscious that the policy applied by Liverpool is also applied by London and Manchester, and the consequences of this judgment is that there will be broader implications than merely the local ones.

71 I consider that the policy adopted by the defendant results in the prevention or greatly restricted use in the city of Liverpool of the Tepee Expert chassis base for the very purpose for which it is imported by the second claimant, namely as a public hire taxi.

72 I accept Ms Patterson's submission that this is not a product prohibition as the product can be used as a people carrier or private hire vehicle without conflict with the policy, and some vehicles were imported by the second claimant for this purpose. It does appear, however, that there are at present no private hire vehicles authorised by the defendant in Liverpool that consist of an E7-style taxi. However, a loss of access to a market of some 1,400 public hire vehicles is a considerable one.

73 In evidence submitted late in the hearing of this case that the defendants have not yet had a chance to check and respond to, Mr Gow for the second claimant explains how he reached the estimate of approximately 80 new registered taxi vehicles entering the market each year. He does that by reference to a postcode, which is accepted is somewhat broader than the city of Liverpool itself. Based on past experiences of the second claimant in cities of a similar size, if permitted to

do so, it would hope to be making sales of some 48 vehicles in the first year of opportunity in Liverpool. That represents some 7.5 per cent of its total UK sales of the E7 taxi. Such a level of sales would equate to an additional £1 million in turnover for the company.

74 In my judgment, the policy provides a substantial restriction on the use of the vehicle in Liverpool, as the E7 is designed specifically as a public hire taxi, but it cannot be sold for such a purpose in Liverpool because the policy being impugned prevents its use as such.

9. Justification

75 I do not accept Ms Rose's further submission that, as there is harmonising EU legislation in the field, the national or local authority has no right to conduct its own safety and proportionality assessment to justify the interference with the art.28 EC right.

76 In my judgment, the issue of the safety of the E7 as a public hire vehicle is different from its use as a passenger vehicle per se. Some support for such a distinction can be derived from a decision of the Divisional Court in *Chauffeur Bikes Ltd v Leeds City Council* [2005] EWHC 2369 (Admin); [2006] R.T.R. 7 at [17].

77 The fact that the Peugeot vehicle meets EU requirements for safety specification as a vehicle is thus not conclusive of the question of justification. It will be for the council on reconsideration of the case to justify the maintenance of the turning circle, or indeed any other requirement that it considers relevant if it continues to believe that, for example,sliding doors do represent a safety issue in Liverpool in public hire taxis. However, justification must be for a legitimate end. Here, it would be the safety of the public.

78 Secondly, the council must show that its restrictions are proportionate and no more intrusive than is needed to give effect to the legitimate end. In this context, I accept the claimant's submission that little assistance can be derived from the approach of the House of Lords and Lord Bingham in *R. (on the application of Countryside Alliance) v Attorney General* [2008] 1 A.C. 719 at [50], where the justification of any restriction on the use of Irish horses was on morality grounds set out in a primary Act of Parliament that had been the subject of intensive and very prolonged debate.

79 There is recent guidance given by the European Commission, summarising the case law of the ECJ in its document ''Free Movement of Goods'' prepared in May 2009:

> ''6.1.2 . . . Protection of health and life of humans, animals and plants is the most popular justification under which Member States usually try to justify obstacles to the free movement of goods. While the Court's case law is very extensive in this area, there are some principal rules that have to be observed: the protection of health cannot be invoked if the real purpose of the measure is to protect the domestic market, even though in the absence of harmonisation it is for a Member State to decide on the level of protection; the measures adopted have to be proportionate, i.e. restricted to what is

necessary to attain the legitimate aim of protecting public health. Furthermore, measures at issue have to be well-founded - providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information.

. . .

6.4 . . . An important element in the analysis of the justification provided by a Member State will therefore be the existence of alternative measures hindering trade less. The Member State has an obligation to opt for the 'less restrictive alternative' and failure to do so will constitute a breach of the proportionality principle.''

80 In my judgment, the test for justification, both under the DDA and Community law, will be very similar, focusing on the legitimate aim established by the evidence and the proportionate means of reaching the relevant result.

81 I do not consider that the material identified by Ms Patterson as that relied upon by the committee to date is sufficient for it to discharge its duty of justification. In particular:

i. It is unclear what expertise Mr Gore, the force vehicle examiner, had to speak of the safety implications of turning circles and sliding doors. Examining a vehicle for road worthiness or compliance with the regulations is not the same as a comprehensive consideration of the merits or demerits of a particular design on safety grounds.

ii. There is a distinction between convenience and lack of familiarity with a sliding door and real concerns of safety. The new is not to be deprecated simply because it is a feature that may be unfamiliar to some. I have great difficulty in seeing how descent from a commercial vehicle designed to carry people which has a sliding door can be said to represent a safety issue given the scale of the use of such vehicles in London and elsewhere as private hire vehicles precisely for that purpose.

iii. The fact that the E7 is used as a public hire taxi extensively in the UK without reported incident is a compelling source of relevant evidence that would have to be addressed. It is particularly notable that no concerns have been reported in Liverpool itself resulting from the dropping off of passengers by E7 vehicles licensed in neighbouring authorities. Of course the turning circle is useful for the avoidance of three point turns in narrow streets where someone seeks to specifically hail a passing taxi. However, where a particular assessment has been made as to the safety consideration of this issue, as it has in the Edinburgh study, the Liverpool Council would have to consider whether it has a cogent basis for disagreeing with such evidence and why.

iv. Local knowledge is a well recognised virtue of local democracy, where decision-makers reach decisions on matters of broad policy: generally a political decision. It is not to be equated with expertise in a specialist area of assessment. The fact that other councils have different policies as to which vehicles types are authorised does not by itself suggest that Liverpool is wrong in maintaining its policy. If, however, the issue is

safety, then the practice and experience of other authorities over a reasonable period of time cannot be ignored. It is impermissible to speculate if the answer to the relevant inquiry can be ascertained by demonstrated experience.

v. What should weigh in the balance on any discussion of justification on safety grounds is the clear safety benefits for secure travel for all wheelchair users, irrespective of the dimensions of their chairs, that can be apparently accommodated in the E7. It is common ground that travelling unsecured sideways in a cab is unacceptable. The introduction of the E7 alongside but not in replacement of the TX is likely to make a substantial contribution to eliminating such practices.

Conclusions

82 Beyond these considerations it is of course for the defendant itself to re-determine this application on the merits in accordance with the law set out in the judgment. I conclude that no other claim for relief is made out, save for quashing with a view to reconsideration. For the reasons I have given, this application for judicial review succeeds.

Application granted.

Reported by Clare Noon, Barrister.