Neutral Citation Number: [2021] EWCA Civ 1197

Case No: C1/2021/0227/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
THE HON MRS JUSTICE LANG
C/2854 and 2995/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LORD JUSTICE BEAN
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
SIR STEPHEN IRWIN

- -

Between

THE QUEEN ON THE APPLICATION OF **(1) UNITED TRADE ACTION GROUP LTD** **(2) LICENSED TAXI DRIVERS ASSOCIATION LTD**	**Claimants/ Respondents**
- and -	
(1) TRANSPORT FOR LONDON **(2) MAYOR OF LONDON**	**Defendants/ Appellants**

- -
- -

Ben Jaffey Q.C. and **Celia Rooney** (instructed by **Public and Regulatory Law Team, Transport for London**) for the **Appellants (Defendants)**
David Matthias Q.C. and **Charles Streeten** (instructed by **Chiltern Law**) for the **Respondents (Claimants)**

Hearing dates : 15 and 16 June 2021

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Approved Judgment

Lord Justice Bean, the Senior President of Tribunals and Sir Stephen Irwin:

Introduction

1. This is the judgment of the court, to which we have all contributed.

2. In the early days of the Covid-19 pandemic, in May 2020, did Transport for London ("TfL") and the Mayor of London ("the Mayor") act unlawfully in preparing and publishing the London Streetspace Plan ("the Plan") and the London Streetspace Plan – Interim Guidance to Boroughs ("the Guidance"), because when doing so they failed – it is said – properly to consider the interests of licensed taxi drivers? And did TfL, in making the A10 GLA Roads (Norton Folgate, Bishopsgate and Gracechurch Street, City of London) (Temporary Banned Turns and Prohibition of Traffic and Stopping) Order 2020 ("the A10 Order") in July 2020, fall into error in the same way? These are the basic questions in this case.

3. The appellants are TfL and the Mayor; the respondents, United Trade Action Group Ltd. ("UTAG") and Licensed Taxi Drivers Association Ltd. ("LTDA"), which are trade bodies representing licensed taxi drivers. The appeal is brought, with permission granted by Warby L.J. on 25 March 2021, against two orders of Lang J. dated 20 January 2021, by which she allowed two consolidated claims for judicial review bought by UTAG and LTDA – one challenging the Plan and the Guidance, the other the A10 Order – and also ruled inadmissible parts of the appellants' evidence.

4. In a judgment handed down on 20 January 2021 the judge concluded that in producing the Plan and the Guidance TfL and the Mayor had failed to distinguish London taxis – traditionally known as "Hackney carriages" or more colloquially as "black cabs" – from "general traffic", and in doing so had neglected the role of taxis in providing accessible transport for those with impaired mobility (paragraph 278 of the judgment). When producing the Plan and the Guidance and when making the A10 Order, TfL had failed to discharge the public sector equality duty under section 149 of the Equality Act 2010 (paragraph 279). It had breached taxi drivers' legitimate expectation "to pass and repass on London's roads, and to use lanes reserved for buses" (paragraph 281). And it had acted irrationally (paragraph 282). The judge quashed the Plan and the Guidance in their entirety, and also the A10 Order, "because of the nature and extent of the unlawfulness", which, she said, "affects not only taxi drivers, but also their passengers" (paragraph 283).

5. In a separate judgment, handed down on the same day, the judge considered the parties' objections to certain evidence being admitted. UTAG and LTDA had objected to the admission of parts of the evidence of Mr Sam Monck, TfL's Head of Network Sponsorship, in his two witness statements. With the parties' agreement, the judge received and considered this evidence "de bene esse". Having done so, she held (in paragraphs 14 to 55) that several passages in Mr Monck's witness statements were either inadmissible or only partially admissible.

6. In their appeal to this court TfL and the Mayor contended that the judge made significant errors not only in her analysis of the merits of the two claims but also in her approach to the admissibility of evidence. UTAG and LTDA sought to sustain the judge's conclusions, essentially for the reasons she gave.

7. At the end of the hearing, having heard full argument on both sides, we announced our decision that the appeal would be allowed. We indicated the terms of the order we would make, and said that our reasons would be given later. We now give those reasons.

The issues in the appeal

8. The five grounds of appeal are these: that the judge's ruling on admissibility of parts of TfL's witness evidence was erroneous (ground 1); that she was wrong to hold that the respondents had failed to have regard to the distinct status of taxis as a form of public transport or to the needs of people with mobility difficulties when preparing the Guidance (ground 2); that she was wrong to find that the appellants failed to have due regard to the public sector equality duty (ground 3); that she was wrong to find that the appellants breached the respondents' legitimate expectation that taxis would be allowed to drive in all TfL bus lanes except where to do so would cause significant delay to buses or materially worsen the safety of road users (ground 4); and that she was wrong in law to apply an "anxious scrutiny" test on the question of rationality, and her conclusion that the Plan, the Guidance and the A10 Order were all irrational was in any event plainly wrong (ground 5).

9. It is logical, and convenient, to deal first with the issues arising from grounds 2, 3, 4 and 5 in the light of the judge's conclusions on the Plan and the Guidance, before turning to her conclusions on the A10 Order. Ground 1, which concerns the admissibility of evidence, was not addressed separately by Mr Ben Jaffey Q.C. on behalf of the appellants. In countering the respondents' contention that the appellants had failed to have regard to material considerations, he relied almost entirely on the primary documents. In our view, however, it is appropriate to consider that ground separately, having dealt with the others on their merits.

10. So the three main issues for us are these, and in this order. First, did the judge err in concluding that the Plan and the Guidance are unlawful because the decision to produce them was irrational, and also because TfL and the Mayor failed to take into account material considerations, failed to comply with the public sector equality duty, and acted in breach of a legitimate expectation? Second, was the judge wrong to conclude that the A10 Order was also vitiated by irrationality, a failure to comply with the public sector equality duty and breach of legitimate expectation? And third, was she at fault in the approach she took to the admissibility of evidence and the conclusions she reached on that question?

11. We should add here that, in tackling those three main issues, we have had well in mind that this court is exercising an appellate jurisdiction in proceedings for judicial review, not sitting at first instance to determine the claims. Our approach to the exercise of that jurisdiction has been entirely conventional, and consistent with familiar principles (see the judgment of May L.J. in *Dupont de Nemours (EI) & Co. v S.T. Dupont (note)* [2003] EWCA Civ 1368; [2006] 1 W.L.R. 2793, C.A., and the note to CPR r. 52.21 in the White Book (2021)).

GLA roads and bus lanes

12. Section 14A(1) of the Highways Act 1980 gives the Secretary of State the power to designate highways or proposed highways as "GLA roads". Mr Monck (in paragraph

13 of his first witness statement) describes GLA roads – some 580 kilometres of road and 124 kilometres of bus lanes – as "… the most important and busiest roads in Greater London, carrying around a third of London's traffic despite comprising only 5% of its road network length". TfL is the traffic authority for GLA roads (under section 121A(1A) of the Road Traffic Regulation Act 1984), as well as being the highway authority (under section 1(2A) of the Highways Act). It is the duty of TfL to manage the GLA roads network, otherwise known as the Transport for London Road Network ("TLRN"), with a view to securing "the expeditious movement of traffic" (under section 16(1) of the Traffic Management Act 2004). Responsibility for roads other than GLA roads in London and Greater London, including any bus lanes on these routes, rests with individual borough councils.

13. Bus lanes are created by traffic management orders under the Traffic Management Act. Under section 14(1) of the Road Traffic Regulation Act, traffic management orders can be temporary – as is the A10 Order in this case. Under regulation 3 of the Road Traffic (Temporary Restrictions) Procedure Regulations 1992, as amended by the Traffic Orders Procedure (Coronavirus) (Amendment) (England) Regulations 2020, a number of procedural requirements must be complied with before a traffic management order can come into force. Broadly, the regulations require the publication of an intention to make the traffic management order; within 14 days of making the order, the publication of a notice of the order in a newspaper; the placing of copies of that notice on the affected parts of the relevant road if it would be desirable in the interests of giving adequate publicity to the order; and the placing of appropriate signs on the affected road before the order comes into force.

The special status and role of taxis

14. Because of their status as public transport, London taxis and their drivers are subject to a different legislative scheme from private hire vehicles, generally known as "minicabs", which are not a form of public transport and are not authorised to ply for hire – to be hailed on the street or at taxi ranks.

15. As the judge said (in paragraph 114 of her judgment):

> "114. The legislation subjects hackney carriages and their drivers to onerous regulatory requirements and restrictions, including the following:
>
> i) Taxis are subject to "compellability", that is to say where a taxi at a rank or having been hailed accepts a passenger, it must take the passenger anywhere that they wish to go within a prescribed distance or up to a prescribed journey time (see section 35 of the London Hackney Carriage Act 1831 and section 7 of the London Hackney Carriage Act 1853).
>
> ii) Taxis must comply with the strict Conditions of Fitness (made pursuant to paragraphs 7 and 14 of the 1934 Order) which contain a number of standards, prescribing for instance, a turning circle of 8.535 metres, a partition separating passenger from driver, an overall length of no

more than 5 metres, and a flat floor in the passenger compartment for which there are minimum height limits. For this reason, there are only a small number of particularly expensive vehicle models capable of being licensed as taxis.

iii) All taxis must be wheelchair accessible, as well as providing sight patches and induction loops to assist passengers with disabilities (see conditions 3.2, 15, and 16 of the Conditions of Fitness).

iv) Taxis must be fitted with an approved taximeter (see paragraph 35 of the 1934 Order) and are required to only charge set fares (see section 1 of the London Cab and Stage Carriage Act 1907 and paragraph 40ff of the 1934 Order).

v) Prospective taxi drivers must pass "The Knowledge" which has been a requirement since 1865. The Knowledge requires lengthy study and considerable personal investment. It is based upon knowing and being able to navigate by road the shortest route between two points. There are two types: the All London Knowledge entitles drivers to ply for hire anywhere in the Greater London Authority area, whereas the Suburban Knowledge only permits drivers to ply for hire in one of the nine sectors in the suburbs of the Greater London Authority area. The All London Knowledge involves learning approximately 25,000 streets and 30,000 landmarks and places of interest within a six-mile radius of Charing Cross plus an overview of suburban areas. Suburban drivers need to learn a similar level of detail for whichever suburban area they wish to be licensed for. On average, it takes an All London driver approximately four years to complete the Knowledge and a Suburban driver approximately two years.

vi) Taxi drivers must hold a taxi driver's licence, valid for only 3 years. The fee is currently £300. It is granted subject to compliance with the provisions of the 1869 Act, the London Cab and Carriage Act 1907 and any orders made thereunder. An Enhanced DBS Check, at a cost of £52, is required. Taxi drivers also have to obtain an annual vehicle licence at a cost of £110."

16. It is common ground in these proceedings, and indeed it has been TfL policy for many years, that taxis have a special role in facilitating the mobility of disabled, frail, and elderly passengers. This is not simply because of the requirement for every taxi to be wheelchair accessible but also because they are generally able to provide a door-to-door service.

17. The judge found, and it is not disputed, that for those at high risk from Covid-19, taxis are significantly safer than other forms of public transport (paragraph 116 of the judgment). There is a fixed partition between the driver's compartment and the passenger's compartment, so that drivers and the passengers need have absolutely no physical contact. They are kept two metres apart and will communicate through an intercom system. The passengers can pay by card on a payment terminal within the passenger's compartment, and unlike other forms of public transport the passengers are not obliged to share their compartment with other people.

TfL's policy for bus lanes

18. Because of the particular status of taxis, TfL (and its predecessors) have historically treated them differently from private hire vehicles and other forms of private transport. For example, taxis have been permitted to travel along bus lanes, whilst private hire vehicles have not.

19. TfL's policy for bus lanes ("the Bus Lane Policy") was challenged by operators of private hire vehicles in *Eventech Ltd. v The Parking Adjudicator and others* [2012] EWHC 1903 (Admin). Burton J. set out the terms of the Bus Lane Policy (at paragraph 13):

> "13. TfL's Bus Lane Policy has been in place since before its own creation in 2000, and the TfL Public Carriage Office Taxi and Bus Lanes Policy (2007) records that the policy is to *"allow for taxis in all bus lanes unless their inclusion would cause significant delay to buses or would materially worsen the safety of road users including pedestrians, and taking account of the effects on safety of excluding taxis from the bus lane"*. This latter aspect relates to the fact that taxis (black cabs) can be hailed by pedestrians from the pavement - according to the 2009 survey …, 52% of taxi journeys result from passengers hailing them in the street."

20. Burton J. dismissed the claim, and his decision was subsequently upheld by the Court of Appeal and the Court of Justice of the European Union. He accepted TfL's justification for the policy, saying (in paragraph 60):

> "60. There is to my mind a clear distinction between the need of black cabs (and their passengers and the public) for them to be in the bus lanes, by way of visibility and availability of, and access to, black cabs for those hailing a cruising taxi. I do not reach this conclusion simply or mainly by reference to the disabled - though there are many people who are disabled, but are not in wheelchairs. … I am certainly not persuaded that the problem for the disabled of hailing a taxi which is not in a lane adjacent to the pavement is "vanishingly small". In any event, from the point of view of the public generally, I consider it makes entire good sense for black cabs to be travelling in bus lanes. Minicabs just do not have the need to use the bus lane, and black cabs do."

21. TfL's "Taxis and Bus Lanes: Policy Guidance" ("the Bus Lane Policy Guidance"), published by the Public Carriage Office in 2007, states:

> "1. Taxi access to bus lanes reflects the recognition in the Mayor's transport strategy that taxis are "a vital part of London's integrated transport network, fulfilling demands that cannot be met by the bus, train or tube".
>
> 2. The Mayor has stated that TfL's general policy should be to allow taxis in all bus lanes except where specific safety or bus operational issues made this impractical.
>
> 3. This policy applies for the purposes of taxis driving in bus lanes as through-routes and entering bus lanes to pick up and set down. 'Pick up' and 'set down' mean that there is an intended passenger waiting at the kerbside or that an existing passenger wishes to be set down.
>
> …
>
> 5. Taxi access to other priority measures will be considered case-by-case, taking account of the impacts on public transport operations and the safety of all road users.
>
> …"

22. The Bus Lane Policy and the Bus Lane Policy Guidance apply only to GLA roads. Whether individual borough councils choose to apply, modify or reject this policy and guidance to roads within their own responsibility is a matter for them.

23. The judge (at paragraphs 123 to 129) set out numerous policy statements issued by the Mayor supporting the right of London taxi drivers to use bus lanes and ply for hire.

The Mayor's Transport Strategy

24. In March 2018, in accordance with section 142(1) of the Greater London Authority Act 1999, the Mayor published his Transport Strategy. The Transport Strategy sets out the Mayor's strategic policy aims for London's transport network. Section 144(1) of the Greater London Authority Act requires that London boroughs and other specified authorities and persons exercising statutory functions for Greater London must "have regard" to the Transport Strategy when exercising "any function".

25. The Transport Strategy stresses the importance of London's bus network, acknowledging that "[buses] are London's most heavily used form of public transport and are also accessible …", and that delays in bus journey times are "particularly problematic" for "older and disabled people". It says that "the greatest threat to journey times … is from road congestion caused by cars and other traffic" and "[buses] therefore need to be given greater priority on London's streets". Proposal 58 says that the Mayor "will protect buses from congestion", including by "[prioritising] buses alongside walking and cycling provision in day-to-day management of disruption on the street network".

26. In a passage emphasising the role played by London taxis Policy 20 says the Mayor will "seek to ensure London has a safe, secure, accessible, world-class taxi and private hire service with opportunity for all providers to flourish". The accompanying text emphasises that "[taxis] can expand travel horizons for those requiring safe, accessible travel options".

27. In chapter 3, "Healthy Streets and healthy people", the Mayor's aim to "[use] street space more efficiently", reducing traffic levels and car trips, is confirmed, together with his objectives that streets are designed "for people, rather than cars", and that "[walking], cycling, and public transport should be prioritised, …". Under the heading "Reducing car use", this is said:

> "Cars are a relatively inefficient means of moving people around. Cars, taxis and PHVs take up nearly half of all the street space in central London, but account for just 13 per cent of the distance travelled. In comparison, buses and coaches take up less than 10 per cent of the street space but account for nearly 40 per cent of distance travelled.
>
> … To achieve a meaningful switch in travel habits away from car use, London will need a wide-ranging approach to ensure there are the right alternatives to enable people to get around."

28. The judge described the "Healthy Streets" policy (at paragraph 128) in this way:

> "128. In its "Healthy Streets" policy, the Transport Strategy 2018 advocated a shift away from private car use to public transport, cycling and walking, as a way of improving air quality and health, and reducing congestion. However, it did not signal a departure from previous policy on the use of bus lanes or any intention to restrict access for taxis in London. On the contrary, it acknowledged the important role played by taxis, and indicated that taxi services would be enhanced, and become part of a green public transport network, with the move to ZEC taxis."

TfL's cycle-route "quality criteria"

29. In May 2019 TfL published the "New cycle route Quality Criteria". This document "[describes] expected levels of provision on all proposed cycle routes in London" and "[focuses] on whether conditions are appropriate for routes to be designed to mix people cycling with motor traffic …". In part 4, "Full List of Quality Criteria", under the heading, "Criteria 1: The degree of separation for people cycling is appropriate for the total volume of two-way motorised traffic", the "target level" is stated to be that "new cycle routes should only mix people cycling with motorised traffic where there are fewer than 500 motor vehicles per hour (vph – two-way) at peak times, and preferably fewer than 200vph". The "required level" is "as an absolute minimum, a light segregated cycle lane where there are more than 1000 motor [vph]".

The Covid-19 pandemic

30. The Plan and the Guidance are part of the appellants' response to the Covid-19 pandemic, by which – as was stated in their press statement published on 6 May 2020, the "Mayor's bold new Streetspace plan will overhaul London's streets" – they sought "rapidly [to] transform London's streets", and to promote walking and cycling after lockdown restrictions had begun to ease.

31. The judge provided a clear account of the early stages of the pandemic (in paragraphs 17 to 31 of her judgment), which both sides accept as accurate. A similar narrative appears in the judgment of this court in *R. (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 (in paragraphs 3 to 10).

32. On 23 March 2020 the Government announced the first of a series of "lockdowns" to combat the pandemic. The restrictions – the most severe imposed on daily life in peacetime – included a requirement for "social distancing", which extended to public transport. TfL, like other public authorities, had to make and implement judgments on the appropriate means of compliance with the Government's restrictions. And those judgments had to be made in the light of existing policies and guidance.

TfL's recovery strategy

33. In April 2020, about a month after the first lockdown came into effect, officers of TfL gave an internal presentation entitled "'Recovery Strategy' – Active travel & the healthy streets approach". Under the heading "Managing the exit from lockdown in London", the presentation stated:

> - "With reduced capacity on public transport in order to maintain social distancing and potential anxiety about its use, travel by car could become more attractive (traffic is already increasing). A car-based recovery could result in delays to essential journeys, increased air pollution (with implications for COVID-19 vulnerability), reduced active travel and delays to economic recovery.
>
> - However, with a reduced service running on public transport more will need to be done to ensure that there are good alternatives to car use, with an urgent need to reconsider our use of road space to provide safe and appealing spaces to walk and cycle …".

The Plan – the press statement issued on 6 May 2020

34. On 6 May 2020 the Mayor and TfL announced the Plan in the press statement to which we have already referred. The press statement referred to the reduced capacity of London's public transport network and the need for "millions of journeys a day … to be made by other means", including walking and cycling. It also said that TfL would "rapidly repurpose London's streets to serve this unprecedented demand for walking and cycling" and noted that "[the] temporary schemes will be reviewed by TfL – and could become permanent".

The Department for Transport's guidance issued in May 2020

35. On 9 May 2020 the Department for Transport published statutory guidance entitled "Traffic Management Act 2004: network management in response to COVID-19". This guidance was revised on 23 May 2020. In the foreword to it, the Secretary of State for Transport said:

> "When the country gets back to work, we need them to carry on cycling, and to be joined by millions more. With public transport capacity reduced, the roads in our largest cities, in particular, may not be able to cope without it.
>
> We also know that in the new world, pedestrians will need more space. …
>
> The government therefore expects local authorities to make significant changes to their road layouts to give more space to cyclists and pedestrians. …".

36. Under the heading "Reallocating road space: measures", the guidance stated that "Local authorities in areas with high levels of public transport use should take measures to reallocate road space to people walking and cycling, both to encourage active travel and to enable social distancing during restart …". One of the suggested measures was "[introducing] pedestrian and cycle zones: restricting access for motor vehicles at certain times (or at all times) to specific streets …".

The Plan – the press statement issued on 15 May 2020

37. On 15 May 2020 the Mayor and TfL released a further press statement, "Car-free zones in London as Congestion Charge and ULEZ reinstated". The press statement said that the Mayor and TfL "[plan] to transform parts of central London into one of the largest car-free zones in any capital city in the world", and "[this] is necessary to enable safe social distancing on public transport in London as lockdown restrictions are eased, and will help support increased walking and cycling …". It added that "[some] streets will be converted to walking and cycling only, with others restricted to all traffic apart from buses …", adding that "[access] for emergency services and disabled people will be maintained …".

The Guidance

38. The Guidance was also issued on 15 May 2020. It was intended to "complement and follow on from" the Department for Transport's guidance.

39. The Guidance stated that the "Mayor's Streetspace plan will transform London's streets, by: [providing] temporary cycle routes …[; providing] additional space for people walking and cycling …[; and accelerating] delivery of low traffic neighbourhoods and school streets …". It predicted that "[as] lockdown lifts, demand for travel will increase", requiring TfL and the Mayor "urgently [to] reconsider use of street space to provide safe and appealing spaces to walk and cycle as an alternative to car use …". It went on to say that "[suppressing] motorised traffic while allowing

essential journeys to take place is key to ensuring we manage our road and public transport networks to maximise our ability to keep people moving safely".

40. Together, the Plan – as represented by the two press statements issued on 6 and 15 May 2020 – and the Guidance comprise a single entity of policy and guidance. Although the two press statements constituting the Plan were the Mayor's and the Guidance was issued by TfL, they were plainly intended to be read together, and nothing turns on the distinction between the authorship of the Plan on the one hand and the Guidance on the other.

41. In the claim form the date of the decision to be reviewed is given as 15 May 2020. This may be because the claim was not issued until 13 August 2020, which was at the very end of the three month period for judicial review of the 15 May document and out of time for the 6 May document. However, the appellants have not taken any point either on delay or on lack of promptness. Nor did the judge. In the circumstances we have considered the appeal on the basis that the claim as a whole was not brought too late.

Are the Plan and the Guidance flawed by irrationality?

42. We begin by recording the irrationality challenge to the Plan and the Guidance as it was set out in the claim for judicial review. After reference to the other substantive grounds of challenge, the Statement of Facts and Grounds of Claim continued (in paragraph 46):

> "46. The Streetspace Plan is, in any event, irrational and accordingly unlawful in the Wednesbury sense. In particular, the reasonableness of the Streetspace Plan falls to be judged in the context of the extent to which it impacts adversely on disabled and elderly people and/or infringes the rights of hackney carriage drivers and others under A1P1 of ECHR, and/or breaches a legitimate expectation on the part of hackney carriage drivers, and/or in the light of the global COVID-19 pandemic, has the effect of excluding hackney carriages from using carriageways otherwise reserved for buses and from driving along roads including arterial routes along which they have previously been permitted to drive, notwithstanding the fact that hackney carriages are very significantly safer than any other form of public transport. The driver's compartment is completely sealed such that drivers and passengers need have absolutely no physical contact. They will communicate through an intercom system and the passengers will pay by card on a payment terminal located within the passenger's compartment, and unlike other forms of public transport the passengers are not obliged to share their compartment with other people."

43. The irrationality issue was put similarly in paragraphs 94 to 97 of the respondents' skeleton argument before the judge, again focussing on the position of taxi drivers and their passengers, especially those who are disabled or elderly. In effect, both the grounds of claim and the skeleton argument argued that the irrationality consisted of

the more specific failings set out in grounds 1 to 4 relating to the special position of taxis and their elderly and disabled passengers.

44. The judge's findings on irrationality are set out at paragraphs 260 to 276 of her judgment. She began by noting the submission of Mr David Matthias Q.C., for UTAG and the LTDA, that the test to be applied was essentially one of proportionality, and noted that she had applied that test to the human rights claim under Article 1 of the First Protocol to the European Convention on Human Rights (which she had rejected) and to the legitimate expectation claim (which she had upheld). She stated that on ground 5 she proposed "to apply the rationality test with anxious scrutiny as [she had] found that human rights are engaged". Having recapitulated in paragraphs 263 and 264 the adverse findings she had made on the other grounds, she continued:

> "265. It follows from the findings above that the decision-making process was seriously flawed. Nonetheless, was the outcome a rational response to *the transport issues* which arose as a result of the COVID-19 pandemic? [emphasis added]
>
> 266. In my judgment, the flaws identified were symptomatic of an ill-considered response which sought to take advantage of the pandemic to push through, on an emergency basis without consultation, "radical changes", "plans to transform parts of central London into one of the largest car-free zones in any capital city in the world", and to "rapidly repurpose London's streets to serve an unprecedented demand for walking and cycling in a major new strategic shift" (Mayor's statements on 6 and 15 May 2020). This approach was consistent with the additional guidance from the Secretary of State for Transport dated 9 May 2020 where he advocated a shift to walking and cycling and said:
>
> > "We recognise this moment for what it is: a once in a generation opportunity to deliver a lasting transformation in how we make short journeys in our towns and cities…"
>
> 267. The scale and ambition of the proposals, and the manner in which they were described, strongly suggest that the Mayor and TfL intended that these schemes would become permanent, once the temporary orders expired. However, there is no evidence to suggest that there will be a permanent pandemic requiring continuation of the extreme measures introduced by the Government in 2020.
>
> 268. The Guidance advised that, pursuant to the Plan:
>
> > "We need to urgently reconsider use of street space to provide safe and appealing spaces to walk and cycle as an alternative to car use in the context of reduced capacity on the public transport network. Suppressing motorised traffic while allowing essential journeys to take place is

> key to ensuring we manage our road and public transport network to maximise our ability to keep people moving safely."

269. The stated justification for the restrictions on vehicle access, namely, that after lockdown, because of the limited public transport capacity, there would be a major increase in pedestrians and cyclists, and excessive traffic with consequent risks to safety and public health, was not evidence-based. It was mere conjecture, which was not a rational basis upon which to transform London's roads. It must have been apparent to the Mayor and TfL that people were responding to the pandemic by staying at home, especially office workers, and so it was possible that they would continue to do after lockdown, to avoid infection. Central London was deserted during lockdown. Even once the lockdown was relaxed, and the government exhorted people to return to work to boost the city centre economies, people chose to remain at home where possible. There was no evidence to indicate that the predicted five-fold increase in the number of pedestrians and ten-fold increase in the number of cyclists in central London occurred.

270. Traffic levels in central London, especially in the City where the A10 Order operates, fell dramatically during the first lockdown, and have remained well below pre-COVID levels. This was apparent from TfL's data, prior to making the A10 Order. On 15 May 2020, the Mayor also announced a significant increase to congestion charges and to the hours and days of operation of the charging scheme, which was intended to deter vehicles from entering central London.

…

273. If the Mayor and TfL had proceeded more cautiously, monitoring the situation and acting upon evidence rather than conjecture, their proposals would have been proportionate to the difficulties which needed to be addressed. As it was, the measures proposed in the Plan and the Guidance, and implemented in the A10 order, far exceeded what was reasonably required to meet the temporary challenges created by the pandemic. It was possible to widen pavements to allow for social distancing, and to allocate more road space to cater for an increase in the number of cyclists, without seeking to "transform" parts of central London into predominantly car-free zones.

274. In my judgment, it was both unfair and irrational to introduce such extreme measures, if it was not necessary to do so, when they impacted so adversely on certain sections of the public. The impact on the elderly and disabled who rely heavily on the

> door-to-door service provided by taxis is described at paragraphs 130 - 136 above. See also the adverse impacts identified in the EqIA (paragraphs 189-192 above). Taxis are a form of public transport. Travellers may wish to travel by taxi for legitimate reasons. Taxis have been valued by the NHS and vulnerable groups during the pandemic because they are safer than trains, buses and private hire vehicles. The detriment suffered by taxi drivers and the potential impact on their A1P1 rights, is set out in Ms Proctor's first witness statement, paragraphs 26 - 30, and Mr Da Costa's first witness statement at paragraphs 10 - 11. These impacts were either not considered, or automatically discounted because they were considered to be in conflict with the objectives of the Plan.
>
> 275. I conclude that the decision-making processes for the Plan, Guidance and A10 Order were seriously flawed, and the decisions were not a rational response to the issues which arose as a result of the COVID-19 pandemic.
>
> 276. Therefore permission to apply for judicial review is granted on Ground 5, and Ground 5 succeeds."

45. We remind ourselves that in a claim for judicial review the court does not require a claimant, as a pre-requisite for undertaking a review of the allegedly unlawful decision or action of a public body, to demonstrate that the decision or action has immediate or direct legal consequences. The court has held that press statements such as those with which these proceedings are concerned are susceptible of judicial review (see, for example, *Liverpool City Council, ex parte Baby Products Association* [2000] L.G.R. 171, at p. 179; *R. v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd.* [1998] Env. L.R.). In our view the Plan – comprised in the two press statements – embodies a policy of the Mayor's and TfL, which is supported and amplified by the Guidance. Even applying a strict rather than broad understanding of the concept of "policy", we therefore accept that the press statements, as an articulation of the Mayor's general strategy for transport in London, during the Covid-19 pandemic, are open to review by the court on the application of well-known public law principles (see the judgment of Lord Sales and Lord Hodge, with whom the other members of the Supreme Court agreed, in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52, at paragraph 106). There may also be a further issue based on the observations of Green J. (as he then was) in paragraph 118 of his judgment in *R. (on the application of Letts) v Lord Chancellor* [2015] EWHC 402 (Admin); [2015] 1 W.L.R. 4497, approved by this court in *R. (on the application of Bayer plc) v NHS Darlington CCG* [2020] EWCA Civ 449, that there is a distinction between guidance and settled policy, and that guidance should not be held to be unlawful unless it would lead to, permit, or encourage unlawful acts. But we do not need to decide that point and there is no need to consider it further.

46. It cannot be said that the judge's findings about the Plan and the Guidance were couched in restrained terms. The "measures" are variously described as based not on evidence but on mere conjecture, and as being "extreme", "unfair", and "irrational". With respect, it is not entirely clear which "measures" were being thus criticised.

47. The first main target of the judge's criticisms seems to have been the Mayor's announcement in his 15 May 2020 press statement that he was intending "to transform parts of central London into one of the largest car-free zones in any capital city in the world". But no such transformation had taken place by the time of the hearing before the judge (nor has it to this day), nor was there any evidence of detailed proposals. The announcement did not define "car-free" – whether this meant no motorised traffic at all, or simply no cars – nor where or how large the car-free zone would be. The announcement was in this respect plainly a long-term or at least medium-term aspiration, setting the trajectory for future policy decisions.

48. The judge's observation in paragraph 273 of her judgment that "the measures" proposed in the Plan and the Guidance far exceeded what was reasonably required to meet the temporary challenges of the pandemic seems to be directed to the measures as a whole, rather than focussing on those which allegedly failed to give due recognition to the special position of London taxis relative to cars, vans or other motorised vehicles except buses. This interpretation is consistent with the terms of the judge's question, in paragraph 265 of her judgment, asking herself whether the measures were a rational response to "the transport issues" which arose as a result of the pandemic.

49. The opening headline of the press statement announcing the Plan was this: "Transformation of London's roads to be fast-tracked, giving space to new cycle lanes and wider pavements to enable social distancing". Each of these – the creation of new cycle lanes and the widening of pavements – reduced available road space and thus affected all users of motorised transport, including buses, lorries, vans, cars and taxis. Each was in accordance with the policy not only of the Mayor and TfL but also of the Secretary of State for Transport of encouraging walking and cycling rather than other means of travel. They were not universally popular, but we think it would be extraordinary and not right for a court to condemn them as extreme or ill-considered, especially during the pandemic (see the judgment of the court in *Dolan,* at paragraph 90).

50. In paragraphs 266 and 267 of her judgment the judge made a finding that the flaws she had identified were "symptomatic of an ill-considered response which sought to take advantage of the pandemic to put through, on an emergency basis without consultation, radical changes and plans to 'transform parts of Central London into one of the largest car-free zones in any capital city in the world'". In the next paragraph she said that the scale and ambition of the proposals "strongly suggest that the Mayor and TfL intended that these schemes would become permanent once the temporary orders expired".

51. In oral argument in this court Mr Matthias said that UTAG and LTDA were not alleging bad faith. But those two passages of the judgment below seem to us to come very close to a finding of bad faith. Certainly they amount to a finding of an ulterior motive. The Guidance was, as its title suggests, interim guidance to borough councils, introduced as a matter of urgency at a time when London and the rest of the country had been in lockdown for some eight weeks at the start of a pandemic whose course and duration were unpredictable. Neither the claim form, nor the respondents' skeleton argument had alleged that the Mayor and TfL were seeking to take advantage of the pandemic to push through measures, on an emergency basis and without consultation, which could then be made permanent. Moreover, if that had been the

case put in the claim form and skeleton argument, it would have called for a response in evidence from the relevant decision-makers as to whether they did indeed have such motives for acting as they did on 15 May 2020. The judge's approach to admissibility, namely that the Mayor and TfL could not be allowed to give evidence of what they considered relevant factors except in so far as the contemporaneous documents set that out, would have been clearly inappropriate. Paragraphs 266 and 267 seem to us, with respect, to fall short of due process.

52. The first press statement, after referring to the construction of a strategic cycle network, the transformation of local town centres by widening footways on high streets, and the creation of low traffic neighbourhoods to reduce traffic on residential streets, and a reference to temporary cycle lanes in Euston Road and possibly Park Lane, does say that "the temporary schemes will be reviewed by TfL – and could become permanent". But any attempt to turn temporary road closures or restrictions into permanent ones would itself have to follow appropriate statutory processes and be liable to legal challenge if that were not done. The Plan does not suggest otherwise.

53. Returning to the other aspects of the judge's findings on irrationality, the first error, it seems to us, was to consider that the rationality test had to be applied with anxious scrutiny because human rights were engaged. This was at least a questionable approach since the judge had, rightly in our view, rejected the claim based on Article 1 of the First Protocol. This is not properly classified as a human rights case.

54. The next error of principle, once one rejects the ulterior motive argument, is that the judge seems to have given no or almost no weight to the fact that the impugned decisions were made on or by 15 May 2020 at a time when the duration and future course of the pandemic were wholly unpredictable. Apart from the general risk to public health at a time when, it should be remembered, no vaccines were available nor even expected to be available soon and the rate of deaths linked to coronavirus was high, the need for social distancing reduced the capacity of each TfL bus by about two-thirds. The more congested the bus routes, the greater the journey time, and thus the time that passengers would spend at risk of infection from fellow-passengers. Office workers were, for the time being, prohibited or at least strongly discouraged from travelling in London. Schools were closed to all but the children of certain key workers. There was no reliable forecast of when and to what extent all this would change.

55. If the decision on 15 May 2020 had been that all motorised traffic other than buses would be immediately prohibited from entering a large part of central London (and "suppressed" in that sense) then this case might have been very different. But it is not in our view a tenable reading of the Plan and the Guidance taken together that this is what was being proposed. Moreover, even if an anxious reader of the documents of May 2020 had somehow interpreted the reference to suppression in that way, it must have been clear by the time the main claim for judicial review was issued on 13 August 2020, and clearer still when the case was heard in November 2020, that this was not what was happening. The evidence before the judge showed that the A10 Order relating to Bishopsgate (which we discuss below) is the only scheme introduced on GLA roads since the start of the pandemic which has excluded taxis while permitting buses. But this is not apparent in the judgment below.

56. These errors, taken together, lead to the conclusion that the judge's finding of irrationality in the production of the Plan and the Guidance cannot stand.

57. The pleaded allegation of irrationality was that the Plan and the Guidance were irrational in their failure to take account of the special status of taxis and the special needs of their passengers, especially disabled or elderly passengers, the failure to carry out any or any adequate equality impact assessment in respect of those passengers, and the breach of the legitimate expectation of taxi drivers to pass and repass on London's roads, and to use lanes reserved for buses. These contentions bring us to grounds 2 to 4 of the appeal before us.

Are the Plan and the Guidance flawed by a failure to have regard to material considerations?

58. The judge said in paragraph 139 of her judgment that while the statutory duties of the Mayor and TfL confer a broad discretion, she was "satisfied that, in making policy statements and issuing guidance on road use, they were required to take into account the potential impact of the proposed scheme on the existing rights of all classes of road users, including taxi drivers and their passengers". As we understand it, this is not controversial and the appellants have never suggested otherwise.

59. Apart from the reference to "suppressing" motorised traffic, the focus of Mr Matthias' argument was more on what the Plan and the Guidance failed to say than on what they did say, and in particular on the absence of specific mention of taxis.

60. Although this was never made explicit by the respondents, in reality it was not their contention that the appellants had overlooked the position of taxis through simple lack of attention. Rather, the true contention is that the appellants had formed a predetermined policy to push aside or override the interests of taxi drivers, and disabled passengers who rely upon taxis, in settling on their approach.

61. The judge said repeatedly that that the Plan did not mention taxis, and concluded accordingly that it failed to take into account their long-established status as a form of public transport. But it is wrong, with respect, to say that because taxis were not expressly mentioned it follows that they were not taken into account.

62. There are three points to be made here. First, it is not necessary in a high-level policy announcement such as the Plan – which consisted of two quite brief press statements on 6 and 15 May 2020 – to recite what factors have and have not been taken into account. Nor was it necessary for there to be such recitals in the recovery strategy (the Powerpoint presentation to policy-makers within TfL) or in the Guidance, which was addressed to policy-makers in the borough councils. These audiences were well-aware of the different functions and characteristics of taxis, private hire vehicles and buses.

63. The second reason is that the Plan and the Guidance scarcely changed the position of taxis at all. The judgment (at paragraph 129) cites a statement by the Mayor at Mayor's Question Time on 26 March 2020 that taxis could access 95% of bus lanes on the TLRN and 93% of all bus lanes across London. There was no evidence that this situation had changed in the course of 2020, other than in the specific case of Bishopsgate. We find it hard to understand what the decision was, contained in the Plan and the Guidance, that failed to take the position of taxis into account.

64. Thirdly, even if there was a modest reduction in the access of taxis' access to bus lanes, we accept Mr Jaffey's submission that it was part of a difficult balancing exercise. The policy-makers at TfL had to decide what weight to give to the mobility of the disabled and frail elderly against what they saw as the imperative demands of maintaining a regular but socially distanced bus service, and the danger to the health of bus users caused by their being exposed to a risk of infection during journeys prolonged by congested traffic.

65. The recovery strategy Powerpoint presentation of 27 April 2020 was also heavily criticised in the judgment, in particular the proposal for bus and cycle corridors, which the judge said (in paragraph 146) "plainly went far beyond the limited exceptions" in paragraph 2 of the Bus Lanes Policy. But the recovery strategy was no more than an internal presentation, its pages marked with warnings about confidentiality. And it was not itself the target of the claim for judicial review, whether for that reason or because the claim issued on 13 August 2020 would have been out of time.

66. Much emphasis was placed by the respondents on one piece of information in the recovery strategy presentation on 27 April 2020. This was the fact that although traffic levels on the TLRN had reduced at the start of lockdown, typically by 40 to 45% on weekdays and 60% at weekends, traffic across London had started to increase again. The presentation then made a comparison of traffic levels on two consecutive Mondays, 13 and 20 April, showing an increase of between 12% and 18% in various parts of London between those two dates. Since 13 April 2020 was a Bank Holiday (Easter Monday), it was submitted, one would expect traffic levels to be unusually low. The comparison is therefore of limited value. That is a fair point as far as it goes, but in our judgment it does not go far at all. As the judge noted (at paragraph 142), both dates were within the lockdown period. So the traffic levels on either of them could not provide much insight into what traffic levels would be when lockdown was lifted. Certainly this comparison would come nowhere near discrediting the recovery strategy document, even if it had been the subject of judicial review in its own right.

67. The judge went on, in paragraph 142, to dismiss as "superficial and inadequate" what might be thought a powerful piece of evidence included in the 27 April presentation, namely that data from China had indicated the return of 90% of pre-pandemic congestion levels already. China was "first in and first out" of the pandemic, and at this early stage of its progress in London the decision-makers were plainly entitled to attach significance to any data emerging from the Chinese experience. The calculation of TfL was that if all car-owning commuters who had used public transport during the pandemic took to their cars after lockdown the volume of cars in the streets of London would double, which would create unacceptable congestion.

68. Looking at the whole picture, and taking the respondents' case at its best, we consider that the argument based on an alleged failure to take account of relevant considerations was unsound and should have been rejected.

Are the Plan and the Guidance flawed by a failure to comply with the public sector equality duty?

69. The Guidance contained a section headed "Equalities, Accessibility, Security and Inclusion", which takes up about one page of the 30 pages of text. It noted that Covid-

19 had disproportionately affected vulnerable populations. After referring to the benefits of walking and cycling, it continued:

> "It is however important that any interventions … walking and cycling are designed holistically to ensure that all Londoners can move around in safety. When making any street layouts boroughs are asked to use existing guidance to ensure that these changes don't detract from current accessibility levels and enhance them."

70. After setting out section 149 of the Equality Act which established the public sector equality duty, it continued:

> "Part 3 of the Equality Act 2010 gives disabled people the right of access to goods, facilities, services and premises and makes it unlawful for service providers to treat disabled people unfavourably to non-disabled people for a reason for reason related to their disability …
>
> Officers should ensure that all impacts on protected characteristics will be considered at every stage of the programme. This will involve anticipating the consequences on these groups and making sure that, as far as possible, any negative consequences are eliminated or minimised and opportunities for promoting equality are maximised. The creation of an inclusive environment is one of the key design considerations of projects and it is expected that the overall target groups will be positive."

71. This was a relatively brief consideration of the public sector equality duty. But it must be remembered that the Guidance was a high-level document. We accept the submission of Mr Jaffey that, at the stage of publishing general interim guidance to boroughs, there was no more that could sensibly be done. It is well established that the weight and extent of the public sector equality duty are highly fact-sensitive and dependant on individual judgment (see the judgment of Lord Neuberger, with whom Lords Clarke, Wilson and Hughes agreed, in *Hotak v London Borough of Southwark Council* [2015] UKSC 30, at paragraph 74); that "what is required by the section 149 duty will inevitably vary according to the circumstances of the case" (see the judgment of Underhill J., as he then was, in *R. (on the application of Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWHC 233 (Admin), at paragraph 26); and that the duty operates differently as between a broad statement of principle and a detailed policy document (see, for example, the judgment of Ouseley J. in *R. (on the application of Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin), at paragraph 10).

72. The circumstances prevailing in March, April and May 2020, and the context in which those circumstances arose, need not be rehearsed again here, but they are critical to understanding whether the Plan and the Guidance complied with the public sector equality duty. As a matter of judgment, the Mayor and TfL plainly, and understandably, regarded it as important that boroughs should start implementing the Plan and the Guidance without delay. To this end the Mayor and TfL chose to provide

general guidance to local authorities on how, when implementing individual schemes, they were to comply with the duty. The Plan and the Guidance could only be given real effect, with tangible consequences, if translated into specific traffic management decisions, which would necessarily require compliance with the public sector equality duty in every instance where that duty was engaged. The Guidance did what was required of it by referring boroughs to the public sector equality duty, explaining what should be done, and stating that proposals should be carefully assessed for their impact on people with protected characteristics. We think this was a sensible approach, and indeed a sufficient and lawful approach. We cannot agree with the judge (at paragraph 186 of her judgment) that the relevant passage of the Guidance "fell far short of the detailed and conscientious scrutiny which was required". In the circumstances, and given the status, level and scope of the Guidance, we are unable to accept that it fell below a standard adequate for compliance with the section 149 duty.

Are the Plan and the Guidance flawed by a breach of a legitimate expectation?

73. UTAG and LTDA submitted that the Plan and the Guidance breached their legitimate expectation to pass and repass on London's roads. The appellants' response was that there was no clear unambiguous statement giving rise to a legitimate expectation, and that even if there were, an emergency measure in response to a pandemic was a paradigm example of a case where the public interest was a powerful reason why the legitimate expectation should not be binding.

74. The judge set out the well-known case law on substantive legitimate expectation. The most important point which emerges from it is that the promise or practice relied upon must be "clear, unambiguous, and devoid of relevant qualification" (see the judgment of Bingham L.J., as he then was, in *R. (on the application of Inland Revenue Commissioners) v MFK Underwriting* [1990] 1 W.L.R. 1545, at p. 1570). UTAG and LTDA cannot point to any clear, unambiguous and unqualified promise that every bus lane in London which taxis were permitted to use prior to the publication of the Plan and the Guidance would remain accessible to taxis for all time and in all circumstances. The Bus Lane Policy, which was published in 2007 and considered in *Eventech*, allowed taxis to be excluded from bus lanes if "their inclusion would cause significant delays to buses or would materially worsen the safety of road users including pedestrians". The Bus Lane Policy Guidance, published in the same year, stated that taxis should be allowed in all bus lanes "except where specific safety or bus operational issues made this impractical". Once again, we return to the striking fact that in March 2020 taxis were permitted to use 95% of bus lanes on the TLRN, and 93% of all bus lanes in London, and that, apart from the A10 Order, there was at the time of the hearing before the judge no example of taxis being excluded from any bus lane which they had previously been permitted to use.

75. UTAG and LTDA cannot plausibly argue that the 2007 policy documents, or the repeated statements by the Mayor in support of the special status of taxis, gave rise to a legitimate expectation that no bus lane anywhere in London could be closed to them even if the appellants had reasonably considered that buses must be given absolute priority during the pandemic. In the absence of any such promise, this ground of claim fails, either because the promise was not sufficiently clear, unambiguous and unqualified or because there was nothing in the Plan and the Guidance which constituted a breach of any legitimate expectation that could conceivably have been generated by the Bus Lane Policy or by the Bus Lane Policy Guidance.

The A10 Order

76. We now turn from the broader claim to the judge's conclusions on the lawfulness of the A10 Order – or the "Bishopsgate scheme", as it was occasionally referred to in argument before us.

77. The A10 at Bishopsgate is a single lane highway, much of which runs alongside Liverpool Street station. As the judge noted (in paragraphs 52 and 53 of her judgment), the "Bishopsgate corridor", as it was known, had very heavy vehicle and pedestrian use, giving rise to a proposal to restrict traffic long predating the pandemic. Planning for such steps culminated in the production of the "A10 Bishopsgate … Director Briefing" of January 2020.

78. In 2019, before the Covid-19 pandemic, TfL had undertaken modelling of the traffic in the "Bishopsgate corridor". This stretch of road served 21 bus routes and was traversed by more than 340 buses per hour at peak times. 24,000 motor vehicles, 6,000 cyclists and approximately 56,000 pedestrians used it each day. The modelling suggested that taxis comprised 43% of the traffic on the "Bishopsgate corridor", once buses and cycles were excluded. That figure was calculated using a particular established method during the peak one-hour period between 8 a.m. and 9 a.m. on a weekday. The judge noted (in paragraph 56 of her judgment) that the respondents' challenge to it based on Automatic Number Plate Recognition ("ANPR") evidence relating to the whole congestion charging zone, where taxis comprised 17.8% of "all vehicles". The judge herself went on to add "… as I observed above, ANPR is likely to capture the same taxi on more than one occasion during a single day." She also recited one or two other points of criticism in the evidence as to the methodology of the modelling and analysis, but acknowledged the reliance by the appellants on that material when making the A10 Order.

79. It is not contentious that the relevant post-Covid planning for the "Bishopsgate corridor" took place in the light of the recovery strategy of April 2020, and of the statutory guidance from the Secretary of State and the Plan, both in May 2020.

80. Proposals for the A10 Order were initially considered by TfL's Road Space Performance Group at a meeting on 3 June 2020. The "Bishopsgate corridor" was one of a number of topics discussed. In respect of this meeting, the judge observed (in paragraph 65) that "taxis were referenced only in the context of making access arrangements." The relevant minutes are rather fuller, stating that "the designs have been confirmed as facilitating taxi access to Liverpool Street station taxi ranks. Confirm what routes taxis can take when leaving the rank." The minutes state that the "Bishopsgate corridor" "[pre-Covid] saw 19,000 bus passengers and 6000 cycles over 12-hour period" and this "([placed] it in top 5% for cycling demand)". Under the heading, "Summary of decisions agreed", they state that "[a] decision was taken to approve the principle as presented to the group to deliver a bus, cycle and pedestrian corridor along Bishopsgate, and to progress with the scheme to next stages of concept design".

81. There was also before the judge a document of 3 June, entitled "Bishopsgate bus/cycle/walk corridor-principles", used for the presentation to the meeting. Part of the text included a series of bullet points identifying matters which would affect taxis

beyond access to the rank, including side road access, ongoing development activity and "taxi arrangements".

82. A further meeting of the Performance Group took place on 11 June. Under the proposal, two sections of road would not be accessible by motorised vehicles, other than buses, namely Liverpool Street to Middlesex Street and Leadenhall Street to Fenchurch Street. Two presentations were given to the Performance Group at this meeting. The first presentation, entitled "Central London: the challenge of balancing social distancing measures with essential traffic and TPH services", recognised that "[taxi], private hire and private cars enable mobility for those unable to use active modes or [public transport]". But it also pointed out that taxis "make up a very high proportion of the flow on some routes (including Bishopsgate)" and "may take up any road space created by restricting other traffic".

83. The second presentation, "Bishopsgate bus/cycle/walk corridor – designs", highlighted "taxi access discussions", amongst many other topics. By this stage, the mechanism of establishing "bus gate locations" had been decided upon to restrict through traffic on two sections of the Bishopsgate corridor. The relevant bullet points read:

- "preferred option based around bus gate/banned turn concept
- no taxis permitted through bus gate
- restricts through traffic, but maintains access for servicing and taxi set down/pick up
- bus gate locations create 2 sections were no motorised vehicles, except buses, are permitted
- this option reduces a) safety concerns with and b) practical arrangements of u-turning vehicles."

84. One of the important considerations addressed in this presentation was the conditions for cyclists using the Bishopsgate corridor. Under the proposed arrangements it was expected that there would be fewer than 500 (motorised) vehicles per hour on most of the corridor, that being the upper permitted limit with which cyclists could mix.

85. It was acknowledged at the meeting and recorded in the relevant minutes that:

> "[The] restrictions along Bishopsgate corridor, whilst removing through traffic, will still permit essential vehicle access to most premises and cul-de-sacs. Action [is needed] to clarify where those locations are and where is the closest a vehicle could reach that desired destination in the proposed layout."

It was acknowledged that some journeys "would have to be continued by foot at these locations to a maximum of 80 or 90 [metres] … if the destination is in the middle of both sections". There was further consideration of the limits on movements of taxis in the corridor leaving the rank at Liverpool Street.

86. Under the heading, "Summary of decisions agreed", the minutes state that "[a] decision was taken to approve the designs as presented … and to progress with the scheme to next stages of detailed design".

87. As the judge observed (in paragraph 59 of her judgment), part of the thinking at this meeting was that "if taxis are not restricted, they may take up any road space created by restricting other traffic". This consideration is known as "infilling", the consequence of expert knowledge of routes and bottlenecks on the part of professional taxi drivers. It was made explicit in a document entitled "Bishopsgate – design log" dated June 2020, which from its content can be taken to have been created following the meeting of 11 June. The design log quoted the "Design Brief", which recorded the "goal of this scheme" as being to limit traffic on Bishopsgate:

> "… creating a bus, walk and cycle only corridor. This forms part of the Mayor's measures in central London to create one of the largest car-free areas of any major city in the world".

The text continues:

> "Modelling from City Planning forecast that corridor closure to all motorised traffic except buses and taxis would significantly increase corridor (black) taxi numbers as they take advantage of newly released capacity. To ensure lower traffic volumes taxis were therefore not exempted from bus gate restrictions."

Mr Matthias did not challenge this conclusion, nor did the judge question it.

88. A note towards the close of this document records the view of its authors that the conclusions in the design plan represent a compromise:

> "… [Whereas] these proposals are not commensurate with an ambition to create an entirely traffic-free corridor, they represent a pragmatic and fair compromise in permitting taxi and freight access to local premises whilst prohibiting through traffic, and at the same time delivering a marked improvement in the public realm by providing additional space for pedestrians at the location where current footway widths are unable to suitably meet demand. Fully restricting traffic from accessing premises on the corridor (and the non-accessible cul-de-sacs off it) would require a more extensive engagement process to allow businesses time to rearrange deliveries and servicing activity, and access for staff and visitors with mobility impairments. These proposals will represent a starting point and serve as a steppingstone for ambitions that can go further in the future if it becomes evident that vehicular traffic continues to dominate the corridor."

The judge did not touch on this passage in her account of the evidence.

89. In an email of 1 July 2020 to colleagues, Mr Monck recorded that new guidance had come from the Department of Transport giving further detail on the use of temporary traffic management orders. The guidance emphasised two criteria which had to be fulfilled before such orders could properly be made. The first test was that, under section 14(1) of the Road Traffic Regulation Act, the road restriction must be on the basis that without the measure that would be "likelihood of danger to the public which

is not attributable to works". The second part of the test was that the traffic authority "must be satisfied the temporary order should be made for purposes connected to coronavirus", which definition might include measures made in response to or with the intention of mitigating risks arising from the pandemic. Mr Monck recorded that he was "absolutely content" that the Bishopsgate scheme fitted these criteria, but thought it important that "we specifically describe our decision about the scheme in the context of these 2 tests". He went on to do so, concluding that traffic restriction was necessary to reduce the risk of transmission of coronavirus if the footways remained narrow and if the public were "forced to continue to use public transport due to the lack of provision of a safe route to walk or cycle". The purposes connected to coronavirus included the widening of pavements and restricting of through traffic so as to reduce traffic levels to encourage cycling, meet cycle safety standards and improve bus journey reliability". Mr Monck went on to say that "all traffic will continue to be able to use the route for access only to premises on the road and cul-de-sacs and borough roads only accessible from Bishopsgate". The judge did not refer to this evidence.

90. On 1 July 2020 Mr Gareth Powell, TfL's Managing Director of Surface Transport, having considered the decision paper and the equality impact assessment, approved the notice of intent for the proposed A10 Order.

91. It is agreed that there was no obligation in law to consult the taxi trade or other interested parties prior to this decision. However, on the following day, 2 July, Mr Monck attended a regular meeting with TfL's officials and the taxi trade. He gave an overview of the plan and explained the proposed A10 Order. The relevant minutes of the meeting show that Mr Monck emphasised:

> "…. [This] is a temporary measure that we will be monitoring carefully to assess local and wider impact. … Care has been taken to maintain access to Liverpool Street station and also access to Bishopsgate is possible from side routes. Apologies that we were not able to come to you with plans earlier but will send out a drawing detailing the proposals early next week."

92. Mr Monck was asked at the meeting whether this plan was "about Mayor's healthy streets or Covid 19 response". The notes record his answer as being:

> "Measures are [very] much Covid 19 temporary measures that are not unrelated to the mayor's Transport Strategy and Healthy Streets in their nature. A key here is resisting a major shift to private car as related congestion would be damaging to all (this was supported)".

A representative of the taxi trade noted that taxis provided a door-to-door service, which was important for "people who cannot use other modes or live a long way from a bus stop". Mr Monck went on to acknowledge that there were "challenges presented by Bishopsgate", but offered to look at this further. He was asked how a wheelchair user could be safely dropped off, to which he replied that:

> "[This] is… the start of the engagement and we welcome such input. The scheme will be monitored so that issues can be addressed and it is temporary".

93. In a further internal email of the same day Mr Monck recorded that the taxi meeting had produced "decent points", which he passed on for consideration.

94. In another email, recording discussion at the same meeting, a colleague reported to Mr Monck points made by representatives of the LTDA. This note records Mr Monck reassuring the taxi trade representatives:

> "……[Despite] concerns about the press coverage we are not seeking to exclude taxi access in central London. There will be some restrictions but we are seeking to maintain a good level of overall access.….Any proposals to bring forward more permanent changes will be progressed in a more 'normal' fashion in terms of consultation etc."

95. Among the actions recorded to be taken following that meeting were the need for "a clear map of the Bishopsgate proposals that shows where taxis can go and where they cannot" and "better information to come through to the [taxi] trade about network changes coming in so they can adjust to them". The judge did not refer to this evidence.

96. Detailed maps were produced, which we have seen. There is no complaint about their accuracy or clarity.

97. There was a further meeting with the trade representatives on 6 July 2020, for the benefit of those unable to be present on 2 July. In the course of that meeting, details were again given of the Bishopsgate scheme. The relevant note records that Mr Monck reassured his listeners "we have no firm plans for London Bridge and Waterloo Bridge but the importance of both in terms of strategic taxi movement is recognised".

98. On 8 July the general secretary of the LTDA wrote to the appellants expressing concern about the Bishopsgate scheme and asking for full taxi access. Emails were sent to TfL by the Chairman of the London Cab Drivers Club, dated 9 and 10 July, also objecting.

99. The equality impact assessment for the Bishopsgate scheme was produced by early July The assessment takes a conventional form with columns of text and a colour coding. A number of relevant negative impacts are identified. The judge analysed them fully (in paragraphs 188 to 195 of her judgment). The removal of through traffic and the introduction of bus gates was specifically identified and recorded with the comment that "taxis… and those who need to service properties or require any other type of access along the corridor will continue to be able to access the majority of the corridor … ". The effects of the bus gates and creation of the corridor are noted, meaning that for two sections of the corridor access might require a walk of between 85 and 90 metres "from the closest point of access". It was noted that "blue badge holders, taxis and private hire vehicles … will not be allowed through the bus gates during the scheme hours of operation". Included in the mitigation was that access was

to be maintained to the taxi rank at Liverpool Street station, but it was noted that "those properties only accessible from Bishopsgate would become more difficult to access by car, taxi, private hire vehicle…". Under the rubric "implementation explanation" there is a further mention of access to the taxi rank at the station, then "conversely for those accessing the area by foot, cycle or bus, it is expected for access to be easier as a result of the reduced traffic levels". This impact – impact 7 – is coded orange.

100. Impacts 11 and 12 are linked. The impact is described as affecting those who:

> "… require dropping off close to their destination. If they are unable to be dropped off close enough and they may not be able to make the trip".

The description of the "provision made" repeats earlier entries. The "implementation explanation" records that the plan had retained:

> "… as much access to premises along the corridor, both for people and goods. … Certain premises and roads may only be accessed from Bishopsgate. … Proposed changes have been considered throughout the schemes development to maintain as much accessibility as possible".

These twinned impacts are coded partly green and party amber.

101. Impact 13 recognises that there will be impact on "taxi and private hire vehicle drivers". This, it was said:

> "…may make journeys longer and potentially more expensive. Possible mitigation would be the access through the bus gates for taxis and private hire vehicles and/or change location of the bus gates and banned turns."

The text under the rubric "implementation explanation" reiterates the need to improve carriageway conditions for cyclists, bus passengers and pedestrians.

102. The final relevant impact recorded – impact 15 – is that new road layouts can be confusing for people "with sensory impairments, neurodegenerative or new road dive urgent conditions and poor mental health". That difficulty, it is said, would be met by full information. The residual risk code here was orange.

103. Mr Powell approved the A10 Order on 15 July. The "request for decision" report, on which the decision was based, rehearsed the concerns "raised by the LTDA, as well as the London Cab Drivers Club set out below". The report recognised that there were "potential negative impacts around the increased time and distance, and therefore associated cost, for some journeys", but suggested that this was outweighed by the gains. The report recognised:

> "[The] taxi trade plays a role in providing access for some people with mobility issues. The design of the scheme carefully balances the need to reduce overall levels of motorised traffic on the corridor to allow for the reallocation of space for the

> purposes set out in this report. However, through the use of bus gates and banned turns the proposal allows access by the taxi and private hire trades … to the maximum number of properties on and adjacent to Bishopsgate …".

It went on to acknowledge that there would be:

> "… some impact on members of the public with certain protected characteristics arising from changes to bus stop locations, certain bus route stopping locations and localised access changes. Retaining as much access to premises along the corridor, both for freight and servicing and for taxi and private hire, has been a key principle…".

104. On 6 August 2020, Mr Monck wrote to the LTDA responding to the concerns which had been voiced in the meeting of 2 July and the letter of 8 July. This letter really recapitulates the position of the appellants.

Was the A10 Order flawed by irrationality?

105. The judge's conclusions were structured by reference to the grounds advanced for judicial review, rather than grouped together for the A10 Order. In short, she concluded that ground 1 (the alleged failure to take into account material considerations) did not succeed in respect of the A10 Order (paragraphs 167 to 172 of the judgment); that the equality impact assessment of July 2020 in respect of the A10 Order was inadequate, and that ground 2 was therefore made out (paragraphs 187 to 195); that the A10 Order was a breach of the legitimate expectation arising in favour of London taxi drivers, and accordingly that ground 4 was made out (paragraphs 254 to 259); and finally that the decision to promulgate the A10 Order was irrational, and that it should therefore be quashed (paragraphs 269 to 276).

106. As on the broader claim, we shall address the irrationality argument first. Once again, the contentions advanced by both sides can be summarised shortly. The respondents argue, in respect of the A10 Order as they do generally, that the appellants failed to pay any or any adequate regard to the interests of taxis and taxi drivers, to the status of London taxis as a form of public transport, and, by extension, to the interests of those with disability who depend on taxis. The appellants argue that the judge's conclusions were simply not open to her, on a fair reading of the evidence. TfL's approach to the making of the A10 Order was perfectly reasonable. Proper regard was had to the interests of taxis, taxi drivers and those who depend on the services of taxis, in very difficult circumstances and for a particular stretch of road presenting long-standing and acute problems of traffic management. Mr Jaffey freely acknowledged that the scheme brought difficulties for taxis and for some of those who rely on them. However, the decisions of the respondents were not merely rational, but a sensible compromise to achieve proper results, in an unprecedented and unpredictable emergency.

107. Again, there is limited dispute between the parties as to the primary facts, but very extensive dispute as to the proper interpretation and inferences to be drawn from those facts. In our view, as will be apparent, there is some relevant detailed evidence to which the judge seems not to have brought into account in considering the integrity of

the decision-making. We have rehearsed the salient facts as shortly as possible, to provide the appropriate context for considering the conclusions reached by the judge. In doing so we have focused on the contemporaneous documents. And we have adopted the same approach to the law as we did in dealing with the broader claim.

108. Mr Matthias accepted, as we understood him, that the judge adopted the wrong legal approach to the question of rationality in considering that she must examine the decision-making with "anxious scrutiny" rather than applying a straightforward rationality test. If this was conceded, the concession was in our view clearly correct.

109. The judge based her conclusion in part on the proposition that traffic levels "… have remained well below pre-Covid levels" , and that "[this] was apparent from TfL's data prior to making the A 10 order" (paragraph 270 of the judgment). Even if that was established in evidence before her, which is contested by the appellants, this surely misses the question of a rational concern on the part of experienced professional officers as to a future rise in car journeys, in the anticipated event that lockdown would be loosened and travel to work resumed on a large scale.

110. The judge also founded her conclusion by making a critical comparison of the 43% figure found by the appellants' modelling to be the proportion of non-bus and cycle traffic in Bishopsgate, with the 17.8% of traffic in the congestion zone comprised of taxis, generated by ANPR between 2 and 6 March 2020 (paragraph 271 of the judgment). It is difficult to understand how such a disparity, demonstrating as it does a very high level of taxi usage of Bishopsgate compared even with other parts of central London, could operate to make such a scheme as this irrational. Logically, it would weigh in the balance in favour of a specific scheme in Bishopsgate. Moreover, as we have seen, that figure leaves out of account the risk of "infilling" in response to the exclusion of other motorised traffic. In addition, as we have said above, the judge introduced her own reflection on the ANPR evidence to the effect that the same taxi might by that means be recognised more than once. She appears to have taken the view that this weakened the case for a special scheme for Bishopsgate. It is not clear to us how it might do so, since the level of traffic may well derive from repeat journeys by the same vehicle.

111. For these reasons, which align with those we have given in rejecting the allegation of irrationality in the broader claim, we consider that there was no proper basis for a conclusion that the A10 Order was irrational. In our view, the respondents' argument here is misconceived.

Was the A10 Order flawed by a failure to comply with the public sector equality duty?

112. The respondents criticised the equality impact assessment for the errors in colour coding, which, Mr Matthias submitted, constitutes a misleading understatement of the impact. Mr Matthias maintained that the colour coding should have been red for impacts 7, 11, 13 and 15, signifying that:

> "This impact will have a significant effect on the identified group(s) of people. This may create a barrier that prevents someone from completing their journey. There may also be an impact on mental health and wellbeing. This could result in

> discrimination due to the disproportionate impact on identified groups."

113. Mr Matthias argued that this may have been very significant, since the colour coding was there to capture the level of impact, and will have been important in the perception of impact by the planners. He also criticised the language employed in a number of passages of the text, suggesting that it downplayed the impact on those with a disability. He submitted that the equality impact assessment never explicitly identified the "disabled and elderly" as the protected characteristics concerned. He contended that other mitigations were never considered, for example admitting disabled persons' vehicles through the bus gates or taxis with particular passengers. He criticised the assessments of necessary walking distance, given the restrictions on traffic (80 metres or 90 metres respectively from the nearest point of vehicular access), as only arising provided the relevant taxi driver can find the nearest point of access.

114. The judge's conclusion as to the adequacy of this assessment was somewhat harsh:

> "193. In my judgment, the EqIA did not meet the required standard of a "rigorous" and "conscientious" assessment, conducted with an open mind. The mitigation entries (save for impact 13) and the implementation/explanation entries were perfunctory or non-existent, and failed to grapple with the serious negative impacts and high level of residual risks which emerged from the assessment. The residual risk assessment was inconsistent and irrationally understated the risks. Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken.
>
> …
>
> 195. … In my view, the weaknesses in the EqIA were not addressed and remedied by a conscientious and genuine consideration of the equality duties by TfL. The reports read as if the EqIA was merely a formality, and the outcome was a foregone conclusion".

115. Mr Jaffey submitted that there is no proper basis for criticism in those terms. He accepted that there may have been errors in colour coding, at least in respect of impacts 11 and 12. However, the overall thrust of the assessment was correct. There was no significant understatement in language, and there was a proper balancing exercise when assessing the risks and impacts.

116. We accept the submissions of the appellants. In our view this may not been a perfect equality impact assessment process, but it was at least adequate. The impacts were recognised and reasonably well defined. The colour coding error must be seen in the context of the language and the overall thrust of the assessment. In any case, we are clear in our view that there was no proper basis for the finding that this was "merely a formality" leading to a "foregone conclusion" (paragraph 194 of the judgment). Putting it at the lowest, such a formulation implies a serious disregard of duty, the equality impact assessment constituting no more, in effect, than window-dressing.

We see no basis for criticism of that severity. Moreover, in our view, if such an inference was invited to be drawn or was in contemplation, this should have been made clear and at, the very least, consideration given to an opportunity for the responsible witnesses for the appellants, perhaps Mr Monck, to address it directly.

117. For those reasons we cannot accept the judge's conclusion on the equality impact assessment.

Was the A10 Order flawed by a breach of legitimate expectation?

118. We turn to the question of breach of legitimate expectation. In large measure the application of this issue to the A10 scheme is governed by the broader conclusions we have already stated, which apply equally here but need not be repeated.

119. Mr Matthias relied upon the judge's findings as set down in paragraph 248 of her judgment as being "unassailable". In the relevant passage the judge concluded:

> "248. … [The] attempts by TfL to rely upon the exceptions in the Bus Lane Policy and Policy Guidance were impermissible *ex post facto* justifications. … In any event, the exclusion of taxis from the bus gates in the A 10 order went far beyond the limited policy exception, which has only been applied for specific space/safety reasons in a small number of locations, on a case-by-case basis…".

120. In paragraph 255 the judge went on to say:

> "255. … In my judgment, the measures proposed in the Plan and the Guidance, and Implemented in the A10 Order were extreme, and went beyond what was reasonably required to meet the temporary challenges created by the pandemic. It was possible to widen pavements to allow for social distancing, and to allocate more road space to cater for an increase in the number of cyclists without seeking to "transform" parts of central London into predominantly car-free zones. The stated justification for the restrictions on vehicle access, namely, that after lockdown there would be a major increase in pedestrians and cyclists, and excessive traffic with risks to safety and public health, was not evidenced-based in fact it was already clear by the time the A10 order was made, that many people were responding to the pandemic by staying at home, especially office workers. Traffic levels in central London especially the City where the A10 order operates, fell dramatically during the first lockdown and have remained well below pre-COVID levels. The assumption made by TfL that, if taxis were allowed in the Bishopsgate bus gates, there would be no appreciable reduction in traffic volume because taxis would divert into Bishopsgate from other routes, overlooked the fact that taxi use in central London has dropped considerably through lack of customers, and many taxis have been taken off the roads."

121. In our view there are a number of difficulties with this passage. For the reasons we have given, we do not consider that a single scheme, with the justifications advanced at the time, could represent a breach of legitimate expectation. It might do so if the specific scheme could properly be said to arise from an exercise in bad faith. But as have we have already indicated, we do not see the basis for such an inference here.

122. A second point is that there appears to be a logical error in the judge's reasoning. At the time when the A10 order was in contemplation, the appellants were responding to a fear about future traffic levels. This was a perfectly reasonable and legitimate concern, whether it related to the Bishopsgate corridor or to other parts of the road network. Later evidence that traffic levels had not in fact risen cannot undermine the decision-making at the time. With respect to the judge, such evidence could not preclude a concern about a future dramatic rise in car journeys in London, if and when a more general return to work arose.

The admissibility of evidence

123. Mr Monck's evidence on behalf of TfL was contained in his two witness statements – the first dated 23 October 2020, the second, 9 November 2020. The evidence dealt, in detail, with various considerations relating to transport management in London before and during the pandemic, and with the decision-making under challenge in the two claims for judicial review. The first witness statement ran to 113 paragraphs, the second to 40. The respondents objected to several passages as inadmissible. In her judgment on admissibility, Lang J. excluded or partly excluded 23 paragraphs in the first witness statement, and four in the second, together with some of the exhibited documents referred to in those passages. Her conclusions were largely founded on Mr Matthias' submission that this evidence amounted to an impermissible "ex post facto" rationalisation of the Mayor's and TfL's decision-making.

124. In presenting his argument on the previous two issues in the appeal, Mr Jaffey did not place any reliance on the disputed evidence. He based his submissions only on the evidence admitted by the judge, and the largely agreed facts in that evidence. And as will be clear from our analysis and conclusions on those two issues, we would not have decided them differently if we had taken into account the evidence ruled inadmissible by the judge. That is enough to require the appeal to be allowed and the judge's decision reversed. So this issue is now academic, and the views we express upon it are strictly obiter.

125. The law governing the admissibility of "ex post facto" evidence in proceedings for judicial review is already mature. There is an ample body of authority to indicate the correct approach. Without seeking to be exhaustive, we can identify these seven points in the light of the relevant cases:

(1) The court will always be cautious in exercising its discretion to admit evidence that has come into existence after the decision under review was made, as a means of elucidating, correcting or adding to the contemporaneous reasons for it (see the judgment of Hutchinson L.J., with whom Nourse and Thorpe L.JJ. agreed, in *R. v Westminster City Council, ex parte Ermakov* [1996] 2 All E.R. 302, at pp. 315 and 316). The basis for this principle is obvious. Documents or correspondence or other explanatory evidence generated after the event cannot have played any part in the making of the challenged decision (see the judgment of Coulson L.J., with

whom Lewison and David Richards L.JJ. agreed, in *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, at paragraphs 27 to 30). The same may be said of the professional views of officers who were not involved in advising the decision-making body when it took its decision, or of those who were, but seek later to add to the advice they actually gave. The court must avoid being influenced by evidence that has emerged after the event, possibly when proceedings have been foreshadowed or issued. So the need for caution is plain.

(2) In the words of Green J., as he then was, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin), "[there] is no black and white rule which indicates whether a court should accept or reject all or part of a witness statement in judicial review proceedings". Witness statements can serve different purposes – making admissions, commenting on documents disclosed, explaining why an authority acted as it did or failed to act, or seeking, as Green J. put it, "to plug gaps or [lacunae] in the reasons for the decision or elaborate upon reasons already given" (paragraph 109). A claim for judicial review must focus on the reasons given at the time of the decision. Subsequent second attempts at the reasoning are "inherently likely to be viewed as self-serving" (paragraph 110).

(3) Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted (see the judgment of Jackson L.J., with whom Rimer and Lewison L.JJ. agreed, in *R. v Cornwall Council, ex parte Lanner Parish Council* [2013] EWCA Civ 1290, at paragraph 64). But in the absence of such contradiction, there is no reason in principle to prevent "ex post facto" evidence being admitted if its function would be "elucidation not fundamental alteration, confirmation not contradiction" (see the judgment of Hutchinson L.J. in *Ermakov*, at p.315h-j). That is the touchstone. As Elias J., as he then was, said in *Hereford Waste Watchers Ltd. v Herefordshire Council* [2005] Env. L.R. 29, at paragraph 46, it is "proper to allow further explanation in an appropriate case", if the decision-maker's reasoning lacks the "clarity or detail which is desirable".

(4) Sometimes elucidatory evidence will be appropriate and necessary, sometimes not. But even where the evidence in question is merely explanatory, the court will have to ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, as was emphasised by Singh L.J., with whom Andrews and Nugee L.JJ. agreed, in *Ikram v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 2, at paragraph 58, when the court is dealing with a challenge to a planning inspector's decision it will have in mind that "there is an express statutory duty … for a planning inspector to give reasons for his decision". Thus, in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin) Ouseley J. strongly discouraged the use of witness statements of inspectors to amplify or enhance the reasons given in their decision letters. He stressed that "[the] statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge", that "[a] witness statement should not be a backdoor second decision letter" (paragraph 51), and that such a witness statement "would also create all the dangers of rationalisation after the event …" (paragraph 52). The Court of Appeal in the same case approved, obiter, Ouseley J.'s observation at paragraph 51 ([2014] EWCA Civ 1432, at paragraph 41).

(5) It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends (see *R. (on the application or Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152; [2018] PTSR 43, at paragraphs 35 and 36).

(6) When the admissibility of evidence is in dispute in a claim for judicial review, the court's approach should be realistic, and not overly exacting. Rarely will it be necessary for a judge to carry out a minute review of every paragraph and sentence of a witness statement, paring the statement down to an admissible minimum and formally excluding the rest, or admitting evidence for some grounds of the claim and ruling it out for others. The court should not be drawn too readily into an exercise of that kind. It finds no support in the case law. Excising passages of text from an otherwise admissible witness statement may be a somewhat artificial exercise to perform, and it may serve no useful purpose. It may make no difference to the judge's consideration of the issues in the claim. Or it may risk the loss of valuable context or clarification.

(7) Judges will usually be able to distinguish between genuine elucidation of a decision and impermissible justification or contradiction after the event, without having to rule on applications to exclude parts of the opposing party's written evidence or documents it seeks to adduce. It follows that the best way for the court to proceed may be to receive the contentious evidence "de bene esse", and, having heard argument on the issues in the claim, simply to disregard any of the evidence that is irrelevant or superfluous, rather than embarking on a painstaking assessment of strict admissibility.

126. With those seven points in mind, we turn to counsel's submissions.

127. In his skeleton argument Mr Jaffey maintained that the judge should not have excluded the evidence she did. It was not "ex post facto" rationalisation. It explained contemporaneous documents and the decision-making under challenge, helping the court to understand why those decisions were taken, and to assess their lawfulness. Mr Jaffey pointed to the observations made by Singh L.J. in *R. (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) on the "duty of candour and co-operation which falls on public authorities … to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide" (paragraph 20).

128. Mr Matthias supported the judge's conclusions. She had – he argued – understood and applied the relevant legal principles. She had reviewed the relevant material with precision, excluding only the evidence that went against principle or did so for individual grounds. The conclusions she reached were open to her, and well within the ambit of the wide discretion she had (see the judgment of Singh L.J. in *Ikram*, at paragraphs 60 and 81).

129. Had this issue been live, we would have been reluctant to hold that the judge exceeded her wide discretion on the admissibility of evidence, enabling us, as an appellate court, to interfere with her ruling. She did not, we think, misdirect herself on

the law. She had in mind and applied the relevant jurisprudence. And in our view the conclusions she reached cannot be said to be plainly wrong.

130. With respect, however, we doubt that it was necessary for her to take upon herself the burden she did: working with great care through Mr Monck's two witness statements – as Mr Matthias submitted – "line by line", to delete the particular paragraphs and sentences that she regarded as inadmissible. At least in the circumstances of this case, this was not, we think, a necessary task to undertake. We would have been inclined to admit the excluded evidence.

131. We should briefly explain why. It seems to us – as Mr Jaffey submitted – that each piece of excluded evidence falls into one or more of several categories of admissibility. Much of it seems hard to detach from the evidence the judge was willing to admit, in witness statements otherwise left largely intact.

132. Some of it is close to a statement of the obvious, or at least within the range of "judicial notice", or provides factual background and context. This may be said, for example, of the excluded evidence in paragraph 18 of Mr Monck's first witness statement, that "the efficient and reliable operation of London's bus network is therefore critical to the capital's transport system", and in paragraph 79(2), that "[if] other vehicles are excluded from a corridor, that will tend to generate an increase in taxi usage, which could undermine any beneficial outcomes expected from a reduction in traffic movement".

133. Some, including the excluded parts of paragraphs 18 and 56 to 61, which explain the purpose and effect of the Guidance, paragraph 79(2) in part, and paragraph 88, which says that TfL were "well aware of the role fulfilled by the taxi trade", may be seen as genuine and legitimate elucidation or explanation of the challenged decisions or of TfL's thinking and approach, even if it is not reflected explicitly in material contemporary with the decision-making itself.

134. Other passages, including paragraphs 44 and 45, which describe traffic levels in central London in July and August 2020, including the increased use of private cars and the reduction in the use of public transport, paragraph 79(2) in part, and paragraph 102, which states that "[the] needs of disabled people and those with mobility issues were, nonetheless, very much discussed when the Guidance was being formulated", though post-dating the decision-making itself, are consistent with contemporaneous documents and seem to confirm they are accurate. We therefore cannot accept that it was truly necessary to exclude those passages of Mr Monck's witness statements. They appear to us to have been properly admissible.

135. As we have said, however, none of that has any bearing on the outcome of the appeal – which turns on the previous two issues, not this.

Conclusion

136. In the result, for the reasons we have now set out, the judge's decisions both on the lawfulness of the Plan and the Guidance and on the lawfulness of the A10 Order had to be set aside. We therefore allowed the appeal and substituted an order dismissing both claims for judicial review.