Neutral Citation Number: [2022] EWHC 469 (Admin)

Case No: CO/3505/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

ROBERT TCHENGUIZ	**Claimant**
- and -	
WESTMINSTER CITY COUNCIL	**Defendant**

- -
- -

Tim Buley QC and Charles Streeten (instructed by **Grosvenor Law**) for the **Claimant**
Ruth Stockley (instructed by **Bi Borough Shared Legal Services**) for the **Defendant**

Hearing dates: 16, 17 & 18 February 2022

- -

Approved Judgment

Mrs Justice Lang :

1. This is a statutory challenge by the Claimant, made under paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 ("the 1984 Act"), to two traffic management orders ("TMOs") made by the Defendant under sections 6 and 22C of the 1984 Act. The TMOs were made on 6 September 2021, and came into force on 13 September 2021.

2. The TMOs significantly restrict access to the Claimant's family home, at 26, Kensington Gore (West) ("KGW"), hereinafter "No. 26", which is in the immediate vicinity of the Royal Albert Hall ("RAH").

3. The Defendant is the traffic authority for the relevant area, within the meaning of the 1984 Act.

Grounds of challenge

4. The Claimant submitted that the Defendant acted unlawfully in making the TMOs in the following respects:

   i) The Defendant failed to have regard to the public sector equality duty ("PSED") under section 149 of the Equality Act 2010. Contrary to the Defendant's own policy, the restrictions were imposed without any equalities impact assessment.

   ii) The Defendant failed to have regard to the interference with the Claimant's rights under Article 8 and Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights ("ECHR") and/or reached a decision resulting in a disproportionate interference with those rights.

   iii) The Defendant improperly exercised powers under section 22C of the 1984 Act for purposes other than avoiding or reducing dangers connected with terrorism, namely, facilitating a parking area for the RAH, and avoiding the restrictions on preventing vehicular access to premises in section 3 of the 1984 Act.

The TMOs

5. The City of Westminster (A Zone) (Amendment No. 23) Order 2021 ("TMO1") was made by the Defendant on 6 September 2021 under sections 6, 45, 46, 49 and 124 of the 1984 Act. It was not made under the counter-terrorism powers in section 22C of the 1984 Act.

6. The order has the following primary effects:

   i) It removes the six pay-by-phone parking bays from KGW;

   ii) It shortens the motorcycle parking bay outside No. 26 KGW by 6 metres and relocates it to Kensington Gore South West;

   iii) It relocates the two "Blue Badge" disabled persons' parking bays on KGW to Kensington Gore South West;

iv) It replaces the "Blue Badge" disabled parking bay and six pay-by-phone parking bays on the south side of the north-west to south-east arm of Kensington Gore with double yellow line "at any time" waiting and loading restrictions;

v) It introduces double yellow line "at any time" waiting and loading restrictions on the west side of KGW, except for a length outside No. 26 and the Royal College of Art where single yellow line waiting restrictions are to operate between 8.30 a.m. and midnight on Mondays to Saturdays and between 11.30 a.m. and midnight on Sundays, and loading restrictions are to operate between 11.30 a.m. and midnight throughout the week;

vi) It introduces "at any time" loading restrictions at the junctions of Kensington Gore (the eastern and western arms) with Kensington Gore (the northern arm).

7. The City of Westminster (Prescribed Routes) (No. 12) Traffic Order 2021 ("the ATTRO") was made under sections 6 and 22C of the 1984 Act and is accordingly an Anti-Terrorism Traffic Regulation Order ("ATTRO").

8. The ATTRO repeats the parking and waiting/loading restrictions in TMO1. It also has the following primary effects:

i) It prohibits vehicles from entering KGW, adjacent to the RAH, between noon and midnight every day, by means of gates at either end which can only be unlocked by RAH security staff;

ii) It prohibits vehicles and pedestrians from entering KGW and the forecourt on the southeast corner of RAH at such times as considered necessary by and at the discretion of the police as set out in the Explanatory Note;

iii) It prohibits heavy goods vehicles and buses from entering Bremner Road, part of Jay Mews, and part of Kensington Gore.

9. The restrictions in paragraph 8(i) and (ii) above do not apply "to any person authorised by the Commissioner of the Metropolis or to any person acting on her behalf" by virtue of Article 8 of the Order.

Factual background

10. In 2017, the UK experienced a rise in terrorist attacks involving vehicles being used as a weapon against the public e.g. at Westminster Bridge and London Bridge. To protect against such attacks, temporary Hostile Vehicle Mitigation measures ("HVMs") were introduced at a number of locations which were perceived as potential targets.

11. In 2017, the RAH and the Defendant installed temporary HVMs, in the form of removeable bollards and barriers, at the front of the RAH, and along its eastern side. The flow of vehicles was not obstructed.

12. The Westminster Ceremonial Streetscape Project is a protective security scheme to install permanent HVM measures at appropriate locations within Westminster. It is led by the Metropolitan Police Service ("MPS") with contributions from the Defendant, Transport for London, and various government bodies. It convened monthly throughout

2017 with the objective of installing permanent security solutions to mitigate the increased threat of vehicle-based terrorism. On one occasion, Inspector Boutcher, who is a Counter Terrorism Security Coordinator at the MPS, had a discussion with the Defendant's then Director of Highways, Mr Kevin Goad, about venues in the Westminster Council area which could benefit from HVM measures. The RAH was identified as a priority venue for consideration for additional HVMs on the basis that it is an iconic building which regularly holds large public events. Due to its assessed status, it is afforded specialist counter terrorism security asset and resource. Mr Goad invited Inspector Boutcher to advise the RAH and its architectural design team, which she did until the scheme reached operational readiness.

13. At that time, as part of a 20-year plan, the RAH was seeking to undertake substantial improvements to enhance the experience for visitors and artists within and around the building, and to improve security and safety. Those proposals, known as the "Royal Albert Hall Protective Security and Public Realm Improvement Scheme", include internal and external improvements to the building, together with extensive enhancements to surrounding private land and the public highway.

14. The RAH conducted two rounds of public engagement, as part of this project, between May - July 2019, and January - February 2020. On 4 June 2019 a member of staff at the RAH met the Claimant, and made a note of the discussion. I accept the account given in the Claimant's first witness statement, at paragraphs 16 and 17 as follows:

> "16. … The concepts put forward to me at that meeting were starkly different to what has now been designed and implemented under the TMO. The idea that was discussed between Ms Halliday and myself at that meeting was the idea of a pedestrianised area at the southern half of the Royal Albert Hall with the western side of Kensington Gore remaining accessible by vehicles. I had proposed that the road be turned into a cul-de-sac with a turning circle by my house. I was accepting of the prospect of reducing the traffic outside my front door, but that was because I was assured that full time vehicular access to my house would remain in place through gates or bollards, that there would be the same number of car parking spaces available and that my concerns about accessing my house and security would be addressed. This is not what has transpired in the TMO.
>
> 17. At that meeting I understand that Ms Halliday noted that I said, "I can walk". That comment was made in respect of walking from the nearest parking place on what I imagined to be a cul-de-sac or turning circle, rather than a statement that I did not require kerbside access for deliveries, pick up and drop off. I did not say that I and others who visit my home could always walk from streets away to access my home, Certainly, it was not an endorsement of the proposals within the traffic orders that have been made."

15. On 15 January 2020, a further meeting took place between the Claimant and representatives from RAH. It was indicated that the Council intended to make an experimental traffic order under section 9 of the 1984 Act. The proposal of gates

limiting access to KGW was raised. The Claimant said he was content in principle with the proposal of a pedestrianised area, but on the basis that he wanted to maintain a parking space outside his house. He was told that the RAH was open to discussion about the location of a "no access sign", and the position of any gates.

16. I accept the Claimant's evidence that he never agreed to proposals which would prevent vehicular access to No. 26. In so far as the RAH notes suggested otherwise, I consider that they were inaccurate.

17. In January 2020, the RAH produced a document entitled "Public Realm Design Update". It set out the proposals for public realm improvements as part of the RAH's vision for the future. It also included a risk assessment of attacks by hostile vehicles, before and after the temporary HVMs. Various options were considered. The "Current Proposed Scheme" advised that a phased approach to the delivery of HVM measures was necessary. The proposals for KGW stated:

> "Two temporary security gates will be installed to allow the managed closure of the road, preventing public vehicle access during agreed times (12 pm – 12 am). These would be operated by the RAH and would be managed to allow access for loading, disabled visitors etc."

18. In February 2020, the MPS commenced formal contact with the Defendant and notified it that a permanent ATTRO for the RAH would be forthcoming, even though temporary physical measures were already deployed. Between March and September 2020, the MPS worked on the drafting of the ATTRO, in liaison with the RAH and the Defendant.

19. On 22 September 2020, Assistant Commissioner Neil Basu of the MPS wrote to Mr Goad, then Executive Director of City Management & Communities, formally recommending an ATTRO, pursuant to sections 6, 22C and 22D of the 1984 Act.

20. A delegated officer's report, dated 22 December 2020, presented the proposals for the TMOs. The statutory "Statement of Reasons" was set out in the report.

21. On 13 January 2021, the Defendant gave formal notice of the proposal to make TMO1 and the ATTRO. Any objections were required to be sent by 3 February 2021. On 11 January 2021, the Defendant's agents wrote to "the occupier" at No. 26 inviting observations on the proposals. From the wording, it appears that the author of the letter believed that No. 26 was a business, not a residence.

22. On 3 February 2021, the Claimant's previous solicitors replied setting out detailed objections to the proposals. The letter was accompanied by a report from traffic consultants, Momentum. The report challenged the difference in treatment between KGW and Kensington Gore East.

23. On 16 July 2021, the Defendant notified the Claimant's solicitors that, following consideration of the responses to the consultation, it had decided to make the orders, as proposed. A copy of the Defendant's consultation report was attached.

24. The Delegated Authority Consultation Report was published on 14 July 2021. It set out the proposals and noted the relocation and loss of parking spaces, including the Blue

Badge parking spaces. In the light of the responses to the consultation, it made some provision for waiting and loading along a length of the west side of KGW.

25. In response to the objections from the Claimant, the Defendant's officers made the following points:

i) The Claimant met with representatives of the RAH in June 2019 and January 2020. The scheme presented in 2020 included the timed closure of KGW and "at that time, the Claimant appeared to support the proposals to close this length of road (a record of the discussions is available)".

ii) The Defendant and its consultants were fully aware that No. 26 is a residential property. The letter that was sent was using a template which caters for both businesses and private residences.

iii) A road closure that prevents vehicular access is considered to offer a high level of protection against the risks associated with vehicle-borne terrorism at this high-profile venue, and so these measures are in the public interest.

iv) It was not considered possible to provide a workable and secure closure of Kensington Gore East which contains in the region of 120+ residences at Albert Hall Mansions and a high number of residents' parking spaces. Such a closure would necessitate the removal of about 18 residents' parking spaces; impact deliveries; and require a degree of flexible vehicle access control management for exceptions which would effectively nullify the benefits of installing gates. The installation/retention of security barriers on the east side of the RAH formed the most workable form of security. A survey in 2018 showed that traffic flows were approximately 71% higher on Kensington Gore East than KGW.

v) The proposals provide reasonable access to the Claimant's property. Waiting will be permitted between midnight and 8.30 am on Mondays to Saturdays, and between midnight and 11.30 am on Sundays. Loading will be permitted between midnight and 11.30 am on Mondays to Saturdays. At other times, parking, waiting and loading can take place in Kensington Gore South West, subject to restrictions. It is a common requirement for residents living in Westminster and in the vicinity of high profile buildings to have to park in a nearby road.

vi) The duty under section 122 of the 1984 Act, to secure and maintain reasonable access to premises, is exercised "so far as practicable" and the local authority should have regard to other relevant matters. There is no obligation to provide parking outside a resident's property if the safe movement of pedestrians or vehicles could be compromised. The proposals are a proportionate exercise of its duty under section 122 of the 1984 Act.

vii) The provision of additional carriageway space for patrons of the RAH to arrive and disperse after a show is a secondary benefit of the closure of KGW.

26. The TMOs were made on 6 September 2021, and came into force on 13 September 2021. The measures were then implemented.

Statutory framework

27. The relevant statutory framework is contained in the 1984 Act. Section 6 empowers the Defendant, as a traffic authority for roads in London, to make a traffic order for controlling or regulating vehicular and other traffic, including pedestrians. Section 6(1) and (3) provide:

> "(1) The traffic authority for a road in Greater London may make an order under this section for controlling or regulating vehicular and other traffic (including pedestrians). Provision may, in particular, be made—
>
> (a) for any of the purposes, or with respect to any of the matters, mentioned in Schedule 1 to this Act, and
>
> (b) for any other purpose which is a purpose mentioned in any of paragraphs (a) to (g) of section 1(1) of this Act.
>
> …
>
> (3) Any order under this section may be made so as to apply—
>
> (a) to the whole area of a local authority, or to particular parts of that area, or to particular places or streets or parts of streets in that area;
>
> (b) throughout the day, or during particular periods;
>
> (c) on special occasions only, or at special times only;
>
> (d) to traffic of any class;
>
> (e) subject to such exceptions as may be specified in the order or determined in a manner provided for by it."

28. The relevant purposes in section 1(1) of the 1984 Act are contained in paragraphs (a) and (b) which state:

> "(1) The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a "traffic regulation order") in respect of the road where it appears to the authority making the order that it is expedient to make it—
>
> (a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or
>
> (b) for preventing damage to the road or to any building on or near the road…"

29. Section 3(1) and (2) of the 1984 Act place restrictions on traffic orders, as follows:

> "(1) … a traffic regulation order shall not be made with respect to any road which would have the effect—
>
> (a) of preventing at any time access for pedestrians, or
>
> (b) of preventing for more than 8 hours in any period of 24 hours access for vehicles of any class,
>
> to any premises situated on or adjacent to the road, or to any other premises accessible for pedestrians, or (as the case may be) for vehicles of that class, from, and only from, the road.
>
> (2) Subsection (1) above, so far as it relates to vehicles, shall not have effect in so far as the authority making the order are satisfied, and it is stated in the order that they are satisfied, that—
>
> (a) for avoiding danger to persons or other traffic using the road to which the order relates or any other road, or
>
> (b) for preventing the likelihood of any such danger arising, or
>
> (c) for preventing damage to the road or buildings on or near it, or
>
> (d) for facilitating the passage of vehicular traffic on the road, or
>
> (e) for preserving or improving the amenities of an area by prohibiting or restricting the use on a road or roads in that area of heavy commercial vehicles,
>
> it is requisite that subsection (1) above should not apply to the order."

30. Section 9 of the 1984 Act makes provision for experimental traffic orders which may not continue for more than 18 months.

31. Section 22C of the 1984 Act governs traffic orders made for purposes connected with terrorism, known as ATTROs. It provides (so far as is material):

> "**Terrorism**
>
> (1) An order may be made under section 1(1)(a) for the purpose of avoiding or reducing, or reducing the likelihood of, danger connected with terrorism (for which purpose the reference to persons or other traffic using the road shall be treated as including a reference to persons or property on or near the road).
>
> (2) An order may be made under section 1(1)(b) for the purpose of preventing or reducing damage connected with terrorism.

> (3) An order under section 6 made for a purpose mentioned in section 1(1)(a) or (b) may be made for that purpose as qualified by subsection (1) or (2) above.
>
> …
>
> (6) In this section "terrorism" has the meaning given by section 1 of the Terrorism Act 2000."

32. Section 1(1) and (2) of the Terrorism Act 2000 state:

> "(1) In this Act *"terrorism"* means the use or threat of action where–
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or an international govermental organisation or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this subsection if it–
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system."

33. Section 22D of the 1984 Act makes supplementary provisions relating to orders made under section 22C. It provides:

> "(1) An order may be made, and a notice may be issued, by virtue of section 22C only on the recommendation of the chief officer of police for the area to which the order or notice relates.
>
> (1A) Any statutory requirement to publish a proposal for, or a notice of, the making of an order does not apply to an order made by virtue of section 22C if the chief officer of police for the area to which the order relates considers that to do so would risk undermining the purpose for which the order is made.

> (2) The following shall not apply in relation to an order made, or a notice issued, by virtue of section 22C–
>
> > (a) section 3,
> >
> > (b) section 6(5),
> >
> > (c) the words in section 14(4) from "but" to the end,
> >
> > (d) section 121B, and
> >
> > (e) paragraph 13(1)(a) of Schedule 9.
>
> (3) Sections 92 and 94 shall apply in relation to an order under section 14 made, or a notice under that section issued, by virtue of section 22C as they apply in relation to an order under section 1 or 6.
>
> (4) An order made, or a notice issued, by virtue of section 22C, or an authorisation or requirement by virtue of subsection (3) above, may authorise the undertaking of works for the purpose of, or for a purpose ancillary to, another provision of the order, notice, authorisation or requirement.
>
> (5) An order made, or a notice issued, by virtue of section 22C may–
>
> > (a) enable a constable to direct that a provision of the order or notice shall (to such extent as the constable may specify) be commenced, suspended or revived;
> >
> > (b) confer a discretion on a constable;
> >
> > (c) make provision conferring a power on a constable in relation to the placing of structures or signs (which may, in particular, apply a provision of this Act with or without modifications);
> >
> > (d) enable a constable to authorise a person of a description specified in the order or notice to do anything that the constable could do by virtue of this subsection."

34. Part IV of the 1984 Act concerns Parking Places. Section 45 empowers local authorities to designate parking places on highways, and in doing so places them under a duty to have regard to matters including (a) the need for maintaining the free movement of traffic; (b) the need for maintaining reasonable access to premises; and (c) the extent to which off-street parking accommodation is available in the neighbourhood or the provision of such parking accommodation is likely to be encouraged there by a designation of parking places under section 45.

35. Section 122 imposes general duties on local authorities exercising functions under the 1984 Act. It provides:

> "**122 Exercise of functions by [strategic highways companies or] local authorities.**
>
> (1) It shall be the duty of [every][strategic highways company and] local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off [the highway or, in Scotland the road].
>
> (2) The matters referred to in subsection (1) above as being specified in this subsection are—
>
> > (a) the desirability of securing and maintaining reasonable access to premises;
> >
> > (b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run; [(bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);]
> >
> > (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
> >
> > (d) any other matters appearing to [the strategic highways company or]... the local authority ... to be relevant.
> >
> > …"

36. Section 124 of the 1984 Act gives effect to Schedule 9 to the 1984 Act. Paragraphs 35 – 37 of Schedule 9 provide:

> "35. If any person desires to question the validity of, or of any provision contained in, an order to which this Part of this Schedule applies, on the grounds—
>
> > (a) that it is not within the relevant powers, or
> >
> > (b) that any of the relevant requirements has not been complied with in relation to the order,
>
> he may, within 6 weeks from the date on which the order is made, make an application for the purpose to the High Court or, in Scotland, to the Court of Session.

> 36. (1) On any application under this Part of this Schedule the court—
>
> > (a) may, by interim order, suspend the operation of the order to which the application relates, or of any provision of that order, until the final determination of the proceedings; and
> >
> > (b) if satisfied that the order, or any provision of the order, is not within the relevant powers, or that the interests of the applicant have been substantially prejudiced by failure to comply with any of the relevant requirements, may quash the order or any provision of the order.
>
> (2) An order to which this Part of this Schedule applies, or a provision of any such order, may be suspended or quashed under sub-paragraph (1) above either generally or so far as may be necessary for the protection of the interests of the applicant.
>
> 37. Except as provided by this Part of this Schedule, an order to which this Part of this Schedule applies shall not, either before or after it has been made, be questioned in any legal proceedings whatever."

Ground 1: PSED

Submissions

37. The Claimant submitted that the Defendant failed to have regard to the PSED under section 149 of the Equality Act 2010. Neither the officer's report, nor the Statement of Reasons made any reference to it, nor to the objectives which underlie it. Contrary to the Defendant's own policy, the restrictions were imposed without any equalities impact assessment. These failures were particularly surprising since the Claimant specifically raised in his objection the difficulties the TMOs would cause for disabled persons visiting his premises.

38. In response, the Defendant accepted that the protected characteristic of disability was engaged, together with that of age, in connection with decreased mobility. The removal and relocation of Blue Badge parking bays would have potential impacts upon those with such protected characteristics. Due regard to the Blue Badge parking bays was demonstrated in the officer's report. Furthermore, Article 8 of the ATTRO enables authorised persons from the RAH to permit entry to those where it is necessary for a vehicle to be parked directly outside the RAH.

39. In relation to the Claimant and his family, a parking place is not guaranteed to local residents immediately outside their premises.

Conclusions

40. Section 149(1) of the Equality Act 2010 Act provides:

> "A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

Subsection (3) goes on to state:

> "Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

41. The relevant protected characteristics in issue in this claim are disability and age (in so far as it is associated with decreased mobility).

42. The principles derived from the various authorities on the PSED were summarised by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [26]:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213, equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

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

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

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

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

> i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
>
> iv) The duty is non-delegable; and
>
> v) Is a continuing one.
>
> vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at 84, approved in this

court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at 74–75.)

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

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):
>
> > '….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree….""

43. The PSED does not require any particular outcome to be achieved by a public authority; rather it imposes a procedural duty to have due regard to various matters (see *Hamnett v Essex County Council* [2014] 1WLR 2562, per Singh J., at [76]).

44. The PSED does not require a formal impact assessment to be undertaken (see *R (Sheakh) v Lambeth LBC* [2021] EWHC 1745 (Admin), per Kerr J. at [148]). The Court is concerned with whether, in substance, the public authority has complied with section 149 of the Equality Act 2010, which it can do without expressly referring to the duty or the Act (see *R (End Violence Against Women Coalition) v DPP* [2021] EWCA Civ 350, per Lord Burnett, at [86]).

45. I turn to apply these principles to this case.

46. The Claimant made a request for further information under CPR Part 18, asking whether Mr Goad, then the Director of Highways, had regard to the duty under section 149 of the Equality Act 2010 when taking the decision to make the TMOs on 14 July 2021. In his response, Mr Goad said:

> "The Director of Highways, in making the decision to introduce the relevant Anti-Terrorism Traffic Regulation Order dated 14 July 2021, was aware of the specific statutory criteria under s.149 of the Equality Act 2010 and considered each of the specific criteria. The decision was further informed by the Part 2 Cabinet Member report seeking approval to the scheme and the

> traffic orders dated 7 October 2020 and the equalities impacts were assessed in detail."

After the Claimant criticised the lack of statement of truth, Mr Goad filed a further response with a statement of truth.

47. The Claimant submitted that this was *ex post facto* evidence that ought not be admitted, as it sought to correct an error in the Defendant's decision-making. I agree that ordinarily the Court is reluctant to admit such evidence. However, here the Claimant took the unusual course of expressly asking Mr Goad to state whether he had regard to the PSED when he made his decision, and then prompted him to add a statement of truth. In those unusual circumstances, it would be unfair to exclude Mr Goad's response. However, I accord it less weight because it is not a contemporaneous record, and has been made in response to a legal challenge.

48. The Cabinet Member report to which Mr Goad referred (which has a revised date of 3 November 2020) was written by a different Council officer (Mr Warner). Councillor Smith was invited to approve an initial phase of works to implement protective security and some highway improvements at the RAH. None of the works altered traffic flow or access to streets. In particular, this phase did not include any proposal for closure of KGW. Thus, although there was a section entitled "Equalities Implications" which set out the PSED and assessed the implications for persons with disabilities and pedestrians generally, it had no bearing on the quite different proposals which were under consideration from December 2020 onwards.

49. There were two officer's reports in connection with the current proposals, one dated 22 December 2020 and the other dated 16 July 2021. Neither of the reports referred to the PSED or any form of equality impact assessment. Neither is required to do so by law. I do not consider that the policy guidance to officers issued by the Defendant on when officers should undertake an equality impact assessment alters the legal position. The question is whether the substance of the duty under section 149 has been addressed.

50. Both reports identified that two Blue Badge disabled parking bays in KGW were to be relocated to Kensington Gore South West, and that there would be a net loss of one Blue Badge bay at the south east corner of the RAH. The locations were shown on the plans. The new bays would be approximately 33 metres from No. 26. The existing bays were approximately 50 metres from No. 26. The obvious inference was that Blue Badge holders would not be disadvantaged by the relocation. The relocation of the bays complied with the Department for Transport's statutory guidance (see the first witness statement of Mr Warner, at paragraph 28).

51. Both reports referred to the net loss of a single Blue Badge disabled parking bay on the south side of the forecourt area of Kensington Gore. This bay has been inaccessible since the introduction of a gate on that road in 2017, as part of the temporary security measures. It was further away from No. 26 than the relocated bays, yet obviously any reduction in disabled bays is disadvantageous as they are in short supply. I accept the Defendant's analysis that the loss of the bay was weighed against the public benefits of the security measures.

52. I am satisfied that the Defendant discharged the PSED duty in respect of Blue Badge parking bays. Ideally, the Defendant ought also to have considered the position of

disabled persons who previously arrived by taxi or car at No. 26, and could stop outside the front door, but now will have to walk or propel a wheelchair from the gates. However, I do not consider that the omission of this group renders the assessment inadequate or otherwise amounts to an unlawful failure to discharge the PSED.

53. Therefore Ground 1 does not succeed.

Ground 3: Improper motives

54. It is convenient to consider Ground 3 before Ground 2.

Submissions

55. The Claimant invited the Court to infer that the decision to make the ATTRO was materially influenced by improper motives. First, to facilitate the provision of a loading and parking area for the RAH. The Claimant produced a large number of photographs showing vehicles parked in KGW during restricted hours, sometimes overnight. Secondly, that the Defendant acted unlawfully in exercising powers under section 22C of the 1984 Act because the genuine purpose of the ATTRO was not to prevent or mitigate the risk of terrorism, but instead to avoid the need to comply with section 3(1) of the 1984 Act. Section 3(1) provides that a traffic regulation order shall not be made with respect to any road which would have the effect of preventing access for vehicles to any premises for more than 8 hours in any period of 24 hours. Section 3(1) would have prevented the Defendant from making an experimental traffic order which prevented access to KGW for 12 hours per day. However, section 22D(2) disapplies section 3 to notices issued under section 22C. The Claimant alleged that there was no evidence of any justification in the minds of the Council or the MPS for the ATTRO on the terrorism grounds set out in section 22C.

56. The Defendant submitted that there was ample evidence that the ATTRO was made for proper and justifiable reasons on the grounds set out in section 22C of the 1984 Act. Further, the Defendant could have relied upon the exceptions in section 3(2), including avoiding danger to persons or damage to building, to disapply section 3(1) of the 1984 Act. It was not necessary to make an ATTRO to disapply section 3(1) of the 1984 Act.

Conclusions

57. In my judgment, there is a considerable amount of contemporaneous evidence that the ATTRO was made for the purpose of preventing or reducing danger or damage connected with terrorism. This was confirmed in the witness statements filed in this claim by Inspector Boutcher and Mr Warner, Programme Manager at the Council.

58. In January 2020, the RAH produced a document entitled "Public Realm Design Update". It set out the proposals for public realm improvements as part of the RAH's vision for the future. However, it also included a risk assessment of attacks by hostile vehicles, before and after the temporary HVMs. Various options were considered. The "Current Proposed Scheme" advised that a phased approach to the delivery of HVM measures was necessary. The proposals for KGW stated:

> "Two temporary security gates will be installed to allow the managed closure of the road, preventing public vehicle access during agreed times (12 pm – 12 am). These would be operated by the RAH and would be managed to allow access for loading, disabled visitors etc."

59. The email dated 4 February 2020 from the RAH consultants, Kanda Consulting, to Councillor Robathan, Leader of the Council, which referred to proposals for timed closure of KGW, was consistent with the proposal in the January 2020 "Public Realm Design Update".

60. In February 2020, the MPS commenced formal contact with the Defendant and notified it that a permanent ATTRO for the RAH would be forthcoming, even though temporary physical measures were already deployed.

61. Between March and September 2020, the MPS worked on the drafting of the ATTRO, in liaison with the RAH and the Defendant. Several drafts were produced during this period. The most significant development was between the third and fourth drafts. In the first three drafts, the ATTRO was intended to be a "precautionary protective security measure …. during significant events; when intelligence dictates; or when the national threat level increases i.e. a raise to Critical – which means an attack is highly likely in the near future". The police could "rely on the order being generally available as an operational tool but on a contingency basis that could be "activated" at any time". However, from the fourth draft onwards, the measures in the ATTRO were to be in operation on a daily basis for the reasons set out in the final letter. Although Inspector Boutcher said the first four drafts were internal police drafts, Ms Stockley confirmed that throughout this process Inspector Boutcher and her colleagues at the MPS were in discussions with the RAH and the Defendant. In my view, the change of position between the third and the fourth versions of the letter did not amount to evidence that the purpose of the measures had ceased to be counter-terrorism.

62. In my view, the text of the letter of 22 September 2020, sent by AC Basu to the Defendant, recommending an ATTRO, pursuant to sections 6, 22C and 22D of the 1984 Act, demonstrates that the purpose of the ATTRO was in accordance with the statutory objectives of avoiding or reducing danger and/or damage connected with terrorism, in section 22C of the 1984 Act. The letter stated:

> "**Recommendation for a Permanent Anti-Terrorism Traffic Regulation Order (ATTRO)**
>
> **Royal Albert Hall**
>
> I have been made aware of plans to redesign the public space in the immediate vicinity of the Royal Albert Hall. Specifically, the desire to incorporate permanent protective security measures into the public realm to provide a safer space for people attending this iconic venue and communities working and living in the locality, from the threat of a vehicle borne terrorist attack.
>
> The use by terrorists of vehicles as a weapon is not a new tactic. Its ease of deployment and low technical threshold for use by

threat actors has led to a review of the protective security mitigation for this iconic venue in the context of the ongoing redevelopment and renovation of the building and immediate area.

Having seen and been briefed on the redevelopment proposals I can confirm I am supportive of, and therefore recommend the instigation of a permanent Anti-Terrorism Traffic Regulation Order (ATTRO) in relation to the closure of roads and public rights of way in the environs of the Royal Albert Hall. This will be at specified daily times, or for certain other occasions, for the locations listed below.

Such security measures are often deployed to close roads to vehicles and control access, sometimes supported by physical measures. I consider a permanent ATTRO a precautionary protective security measure for the safety and security of persons in the locality of the Royal Albert Hall, for daily business, significant events, when intelligence dictates; or when the threat level increases. In the context of post COVID19 lockdown restrictions easing, the use of physical measures to protect members of the public attending the location is also considered a sensible approach.

Accordingly, police are recommending the following order for a permanent ATTRO used in a manner pursuant to s6 & s22(C) s22(D) Road Traffic Regulation Act 1984 (RTRA). This is to place measures in the following locations to allow for the closure of the roads to vehicular traffic, passengers of such traffic and pedestrians except those vehicles or pedestrians allowed at the discretion of a Police Constable or appropriately 'designated person' or 'authorise agent' acting on behalf of a constable.

- Kensington Gore (West) at the junction with Kensington Road
- Kensington Gore (West) where two temporary security gates will be installed (at point 2 on the map below)
- Kensington Gore (East) outside the entrance to No. 3 Albert Court (at point 3 on the map below)

…

Having a permanent ATTRO in place means that the police would rely on the order being available as an operational tool, in operation daily at agreed times but also on a contingency basis that could be activated at any time in response to a threat or intelligence.

The commencement or revival of the order will prohibit all traffic:

1. **On a daily basis,** In Kensington Gore West from 12pm until 12am daily. This is considered necessary to:

- Avoid or reduce, or reduce the likelihood of, danger connected with terrorism;
- Prevent or reduce damage connected with terrorism as defined by Section 1, Terrorism Act, 2000.

Daily closure times are considered crucial because the Royal Albert Hall holds over 400 events annually, all of which attract large crowds. Having consistent daily closure times will provide consistency to the local community and road users during these hours of operation.

2. **For other planned, significant events** - At dates and times advertised on site at least seven days in advance when significant events or entertainment take place in/around the Royal Albert Hall under the authority of a police Gold commander who is satisfied the implementation is necessary to:

- Avoid or reduce, or reduce the likelihood of, danger connected with terrorism; and
- Prevent or reduce damage connected with terrorism as defined by Section 1, Terrorism Act, 2000

It is proposed that the Royal Albert Hall's security staff will manage the opening and closing of any measures in Kensington Gore West at 12pm and 12am daily, and for other planned, significant events, as ' designated persons'; a delegated authority granted under Section 22D(5)(d) of the Road Traffic Regulation Act 1984.

3. ***On receipt of intelligence and/or on in response to an increased threat of danger or damage due to terrorism***. In this situation, commencement or revival of the order will be under the authority of a police Gold commander, or, in responding to a spontaneous terrorist attack or believing such an attack is imminent, the appropriate delegated authority will be the 'designated person' under Section 22D(5)(d) of the Road Traffic Regulation Act 1984.

When the order is being activated or resumed for any other planned, significant event or to counter an increased threat, it will remain in operation for an agreed stipulated period, or for a spontaneous incident only for as long as is absolutely necessary to deal with that incident. This will be necessary to prevent access to a defined area by a determined vehicle-borne attacker.

> Pedestrians, both resident and working within the closure area will continue to be facilitated access on discretion of a constable or designated person.
>
> When the ATTRO is activated, the Metropolitan Police, Westminster City Council, TfL and the Royal Albert Hall will work together to ensure that measures are deployed appropriates. Specific training and awareness will be provided to police officers and Royal Albert Hall security staff.
>
> These measures are considered precautionary, proportionate and necessary for the safety and security plan in place for this nationally iconic site and I regard these restrictions as an important part of our plan to avoid, or reduce the likelihood of, danger connected with terrorism.
>
> …"

63. A delegated officer's report, dated 22 December 2020, presented the proposals which formed the basis of the ATTRO. It stated:

> "The second tranche of measures would see a number of hostile vehicle mitigation (HVM) measures and associated parking amendments introduced in the roads on the east and west sides of the Royal Albert Hall. The HVM measures have been endorsed by the Assistant Commissioner of Specialist Operations for the Metropolitan Police Service who has recommended the City Council make an Anti-Terrorism Traffic Regulation Order under section 22C of the Road Traffic Regulation Order for this purpose."

64. The statutory "Statement of Reasons" was set out in the report.

> "**Statement of Reasons**
>
> The Royal Albert Hall Protective Security and Public Realm Improvement scheme includes the introduction of road closures (by means of security gates and vehicle barriers) and bus and heavy goods vehicle prohibitions around this venue in order to improve the safety and comfort of residents, visitors and workers.
>
> The introduction of daily road closures between noon and midnight in the western arm of Kensington Gore is considered necessary because the Royal Albert Hall holds over 400 events annually, all of which attract large crowds. Having regular closure times will provide consistency to the local community and road users during these hours of operation. This length of road may also be closed at the direction of the Metropolitan Police for other planned events or as circumstances dictate in

> order to mitigate the effects of and reduce the likelihood of danger connected with terrorism.
>
> The removal or relocation of certain parking places from the eastern and western arms of Kensington Gore and the introduction of double yellow line "at any time" waiting and loading restrictions are necessary to ensure these lengths of road are free of parked vehicles for the purposes of enhanced security for residents and the Royal Albert Hall."

65. On the basis of the evidence which I have set out above, I accept the Defendant's submission that the Defendant could have relied upon the exceptions in section 3(2) of the 1984 Act, including avoiding danger to persons or damage to buildings, to disapply section 3(1) of the 1984 Act. It was not necessary to make an ATTRO to disapply the road closure restrictions in section 3(1).

66. The Claimant submitted that the following emails supported its case that neither the Defendant nor the MPS was aware of any justification for an ATTRO.

67. In September and October 2020, Mr Warner and Mr Goad, then Director, City Highways, sent emails to Councillors updating them on the current proposals "highways and security improvements at RAH", in advance of a meeting, and seeking their agreement to issue a report to Cabinet. In addition to highway measures, the emails clearly referred to security measures, and summarised the recommendations for an ATTRO, including closure of KGW. They explained that it would be necessary to undertake a further public consultation in relation to the ATTRO.

68. On 27 April 2021, Mr Warner, Programme Manager at the Council, sent an email to AC Basu, referring to the ATTRO recommendation letter of 22 September 2020, and the Claimant's objection that the closure of KGW would have a significant impact on the life of his family. He said:

> "Before we decide how we are going to respond to the objection I would be interested to understand the justification from the MPS as to why there was a recommendation for a timed road closure on Kensington Gore West while the road remains open to vehicles on Kensington Gore East."

69. In response, Inspector Boutcher telephoned Mr Warner and sent an email on 28 April 2021 which stated as follows:

> "….it was not a usual ATTRO application – i.e. it was not the MPS approaching the authority with a police-led recommendation. Instead, the MPS was informed of the intention to redesign the highway and deploy HVM measures under an ATTRO by the RAH project team and WCC and based on the briefing provided to AC Basu, he supported the ATTRO recommendation – and that was reflected in the content of the letter."

> "So in essence the rationale for the position of the deployment of the measures been made through a series of consultation processes with the local community who in the main showed support for the scheme. The final positioning of the measures was after the initial consultation had taken place and feedback had been provided. It was felt the most proportionate outcome.
>
> The one premises to which you refer is inside the area defined by the ATTRO by some 20 metres. However this has absolutely no impact on pedestrian movement (save for in extremis).
>
> The issue regarding vehicle movement is one which may be managed through the use of discretion being applied and by this I mean that there could be scope for agreement between the RAH staff and the affected resident that with x minutes notice passage will be facilitated on production of a vehicle index, name of a driver and even a 'password'. These are just examples of how the resident can be facilitated if there were need for a delivery of a large item. In cases of emergency access being required, then again, access can be provided at the discretion of the operator…."

70. The Claimant submitted that this exchange of emails indicated that neither the Defendant nor Inspector Boutcher were clear as to the purpose of the closure of KGW. However, Inspector Boutcher had been advising the Defendant and the RAH on HVM measures since 2017, and worked with both organisations on the details of the proposed ATTRO scheme. Taking the other evidence into account, I am satisfied that she was aware that restricted access to KGW, which runs down one side of the RAH, was a HVM measure as it prevented a vehicle attack on the building and on guests entering or leaving the building for shows. It is not clear to me what the extent of Mr Warner's involvement was in the discussions concerning closure of KGW, but his manager, Mr Goad, and no doubt other officers would have been aware of the reasons behind the ATTRO from their dealings with Inspector Boutcher in the period leading up to the MPS letter of 22 September 2020.

71. The Claimant also submitted that Inspector Boutcher was mistaken when she referred in this email to "a series of consultation processes with the local community who in the main showed support for the scheme" because the closure of KGW was not part of the RAH's public engagement consultation in 2019 and 2020. I reject this submission as the closure of KGW was included as part of the "Current Proposed Scheme" in the "Public Realm Design Update", published in January 2020.

72. In my judgment, the evidence shows that the proposal for closure of KGW originated from the RAH, but it was subsequently approved by the MPS, who included it in its formal ATTRO recommendation letter of 22 September 2020. It was subsequently approved and adopted by the Defendant when it made the ATTRO. The evidence also shows that the RAH, the MPS and the Defendant worked together on the formulation of the proposals. In my view, this approach may have been unusual but it was not unlawful.

73. The RAH took responsibility for funding all the security proposals while the Defendant met the cost of the highway amendments. The funding arrangements were disclosed in the consultation report, and were lawful.

74. In my judgment, the Claimant has mistakenly inferred that because the proposals emanated from the RAH, they were solely motivated by design considerations, rather than protection against terrorism attacks. However, whilst design and improvements to the visitor experience were at the heart of the RAH's "vision" for the RAH, it is clear that, after 2017, the RAH was also seeking to take protective measures against potential terrorist attacks. Temporary HVM measures were introduced in 2017. Thereafter the Defendant asked Inspector Boutcher to act as an adviser to the RAH and its architects on more permanent HVM measures from 2017 onwards, which she did. The RAH's "Public Realm Design Update", published in January 2020, included a risk assessment of attacks by hostile vehicles, an assessment of various options, and a "Current Proposed Scheme" which included gates to close off KGW.

75. In my judgment, it was not unlawful for the MPS or the Defendant to proceed on the basis of RAH proposals, provided that the MPS's recommendation was based on its independent assessment of the proposal.

76. I accept that the Claimant's photographs demonstrate that the RAH is using KGW as an overflow car park during restricted hours, even allowing overnight stays. However, the evidence simply does not support the Claimant's view that this was the motive for making the ATTRO. It seems more likely that the RAH is simply taking advantage of the restrictions that have been imposed for other reasons.

77. Therefore Ground 3 does not succeed.

Ground 2: Human Rights Act 1998

Submissions

78. The Claimant submitted that the Defendant failed to have regard to the interference with the Claimant's rights under Article 8 and A1P1 of the ECHR and/or reached a decision resulting in a disproportionate interference with those rights. Further, the way in which the Claimant's position was reported by the Defendant's officers was materially misleading.

79. In response, the Defendant submitted that the TMOs do not result in a material interference with the human rights of the Claimant or his family. Further, the Delegated Authority Consultation Report set out the reasons why any interference was both proportionate and justified. The Defendant was not present at the meeting between the RAH and the Claimant and therefore does not know precisely what was stated. However the reference in the officer's report was not significantly or seriously misleading and had no bearing on the Defendant's decision to make the TMOs, applying the principles in *Mansell v Tonbridge and Malling BC* [2019] PTSR 1452.

Conclusions

80. By section 6 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

81. Article 8 of the ECHR provides:

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

82. A1P1 to the ECHR provides:

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

83. For interferences in qualified rights to be justified, in addition to being prescribed by law, they must also be in pursuance of one of the legitimate aims laid down in the Article, and "necessary in a democratic society". For an interference to be "necessary in a democratic society" it must fulfil a pressing social need, and must be proportionate to the legitimate aim relied upon.

84. In *Bank Mellat v HM Treasury* [2013] UKSC 39, Lord Sumption reviewed the authorities on proportionality, at [20], and set out the test to be applied:

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether

> a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

85. The role of the Court in adjudicating on Convention rights under the HRA 1998 is helpfully summarised in *Human Rights Practice: Patrick (Sweet & Maxwell)* at paragraph 18.004.1:

> "**18.004.1 Intensity of review**. In adjudicating on Convention rights under the HRA, the Courts recognise the importance of their role as guardians of human rights. In relation to judicial review, the HRA requires a greater intensity of review than that under the doctrine of *Wednesbury* unreasonableness. The nature of this new standard of review was explained by Lord Bingham of Cornhill in *R. (Daly) v Secretary of State for the Home Department:*
>
> > "Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy."
>
> The standard for determining proportionality under the HRA was established in *R. (Daly) v Secretary of State for the Home Department,* in which Lord Steyn stated:
>
> > "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck. not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R. v Ministry of Defence Ex p. Smith,* is not necessarily appropriate to the protection of human rights."
>
> Depending on the nature of the case, the courts may afford a degree of latitude, known as "deference" or the "margin of discretion" to the legislature or executive in the protection of the Convention rights. In *R. v Lambert (Steven)* Lord Woolf noted that when considering the compatibility of legislation with

> Convention rights the courts should take into account its democratic origins:
>
> > "Legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention."
>
> Such deference is not unlimited, however, since an independent judiciary is itself fundamental to democracy, and since the Human Rights Act accords the judiciary a democratic mandate to adjudicate on the Convention rights.
>
> The degree of deference shown will depend on the subject-matter, and on the relative institutional competence of parliament, the executive or the courts in relation to it. It will also depend on the nature of the right concerned and the degree to which it is intruded upon.
>
> …"

86. In his oral submissions, Mr Buley QC decided not to press his argument on A1P1 and Ms Stockley did not address A1P1 in her submissions. Therefore I have not considered the application of A1P1 in this judgment.

87. For some 27 years, the Claimant has lived at No. 26, which is a Grade II listed building, originally constructed for the Royal College of Organists. He recently purchased the freehold of the property, having previously held it on a long lease. Currently, there are five family members residing there (including two teenage children), and a housekeeper. Two members of staff attend on a daily basis. The Claimant also has a young child, aged 6, who resides elsewhere but visits him regularly at No. 26, and celebrates birthdays and other special occasions there.

88. No. 26 is the only residential property situated on KGW. The front door faces on to KGW and it is the sole entrance and exit point for the property. There is no back entrance as the property backs directly on to the building behind it. The only access to Jay Mews, which runs behind KGW, is via a fire escape across neighbouring properties. Thus, the Claimant and his family and their visitors, as well as the staff, all use the front door on to KGW, and KGW is their only means of access to No. 26. KGW is also the only place from where delivery vans and workmen carrying out services at the property can access the property and park their vehicle.

89. The ATTRO authorises the police to prevent pedestrians from entering KGW when it is considered necessary for the purposes of avoiding or reducing, or reducing the likelihood of, danger connected with terrorism. If that power were exercised, the Claimant and his family would be prevented from accessing their home.

90. Normal access to No. 26 has been significantly restricted by the TMOs. Vehicle access is now prohibited in KGW between the hours of 12 noon and midnight every day, and gates have been installed at either end of KGW to enforce this ban. There is no general dispensation for the Claimant's household. Limited access is given, in exceptional circumstances, by the RAH security staff.

91. The "Public Realm and Gate Operations Strategy Document" ("the Strategy Document") has been agreed by the Defendant and the RAH. It sets out in general terms the arrangements for access. As explained by the Defendant, access will only be authorised by RAH security staff in exceptional cases where it is essential, for example, delivery of a large load which cannot be carried from the gates and cannot be delivered outside of the prohibited hours. The gates are not manned, and a request has to be submitted to the RAH security staff by email at least one working day in advance, before 1500 hours. So, for access on a Monday, the request must be submitted before 1500 hours on the preceding Friday.

92. Within the Strategy Document, some passages are confidential and have only been disclosed to the Court and the lawyers for the parties. Therefore I cannot refer to them in any detail. In respect of arrangements for emergency vehicles, I consider that their efficacy is dependent on the availability of the RAH security staff, if and when needed. In respect of arrangements for accessible parking for the disabled, I note that there is no provision suitable for visitors to No. 26 and/or KGW.

93. Prior to the TMOs, there was a section of single yellow line, approximately 8.5 metres in length outside the front door of No. 26. Anyone could park on the single yellow line before 8.30 am and after 6.30 pm on Mondays to Saturdays, and all day on Sundays. Waiting (for brief pick up and drop off of passengers), was permitted on the single yellow line at all times. Deliveries and loading/unloading of bulky items was permitted on the single yellow line at all times, but was subject to a time limit duration of 20 minutes between 11.00 am and 6.30 pm.

94. Prior to the TMOs, about 9 metres from No. 26, there were six pay-by-phone parking bays, which permitted parking for 4 hours during controlled hours (8.30 am to 6.30 pm Mondays to Saturdays), with unlimited parking at all other times. If the Claimant held a residents' parking permit, he would additionally have been able to park in those bays up to 9.30 am and from 5.30 pm on Mondays to Saturdays.

95. There was also a motorcycle bay (6 metres from No. 26) and two Blue Badge disabled parking bays (50 metres from No. 26).

96. The parking bays have now been replaced by double yellow line restrictions. However, pay-by-phone parking bays are available in Kensington Gore South West (48.5 metres from No. 26), as are Blue Badge bays (33 metres from No. 26) and motorcycle parking (67.5 metres from No. 26). The Claimant and his family are also eligible for the residents' parking in Kensington Gore South West.

97. A length of single yellow line, with single kerb blips denoting additional restrictions, has been introduced on the western side of KGW, outside No. 26 and the Royal College of Art. Parking and waiting is permitted at limited times only: overnight between midnight and 8.30 am on Mondays to Saturdays, and between midnight and 11.30 am

on Sundays. Loading is only permitted from midnight to 11.30 am the following day, throughout the week, and it is subject to a maximum period of 20 minutes.

98. The result of these restrictions is that the residents of No. 26 and visitors to No. 26, can no longer arrive at No. 26 by car or taxi between 12 noon and midnight. Furthermore, the permitted hours for parking and waiting have been curtailed to between midnight and 8.30 am even during times when the gates are open. The Claimant who is aged 60, and has had surgery on his knee, can walk to and from the gates at present, but is concerned that he may not be able to do so later in life. There may be occasions where the Claimant and members of his household are carrying suitcases or purchased items which are heavy and bulky, and it is not convenient to walk any distance with them. The Claimant has a driver who will only rarely be able to deliver and collect him from No. 26. On one occasion when the gates were open, a traffic warden issued him with a ticket for briefly stopping the car on the yellow line outside No. 26 to enable someone to walk in and out of the house.

99. The Claimant has many visitors, who visit for both social and business reasons. Some of them are elderly or disabled, and were previously driven to the front door of No. 26. Now disabled visitors must be dropped off at the gates, and either walk or propel their wheelchairs to No. 26. If they come in their own vehicles and are Blue Badge holders they may still park in the relocated Blue Badge bays, which are closer to No. 26 than the original Blue Badge bays.

100. When the Claimant's children and their friends came to the house, they were usually driven to the front door. That is no longer possible. In the case of the younger children who will be accompanied to the door of No. 26, the driver must find parking, which may or may not be available. If the children are old enough to be unaccompanied, they can be dropped at the gates and walk.

101. When a car or taxi comes to collect someone from No. 26, if they cannot park nearby, they will have to telephone or text the passenger, and wait at the gate for the passenger to walk down, if s/he can do so unaccompanied. There is no authorised waiting area at the gate; it has double yellow lines.

102. There are frequent deliveries of groceries and other items, both large and small, and previously delivery vans were able to stop outside the house and unload. Now, unless the delivery is in the morning, delivery vehicles must park at Gate 4, and walk. Gate 4 has double yellow lines, but the Defendant states that commercial vehicles that are loading and unloading would be permitted to do so, provided it was only for a short period.

103. The ATTRO also confers power on a police constable to prohibit the Claimant and his family from entering or proceeding along KGW on foot to No. 26. According to the Explanatory Note, this power may be exercised "when it is considered necessary for the purposes of avoiding or reducing, or reducing the likelihood of, danger connected with terrorism".

104. In my judgment, these new restrictions on access to No. 26 are clearly an interference with the Article 8 rights of the Claimant and his family to respect for their private and family life and home. Therefore, the Defendant erred in concluding that "the part-time road closure does not impinge on [the Claimant's] privacy or family life as he is able

to access his property on foot" (Delegated Authority Consultation Report, internal page 33). I consider that this was an unduly narrow interpretation of the scope of the Article 8 rights.

105. I have found under Ground 2 that the ATTRO was made for the purpose of preventing or reducing danger or damage connected with terrorism. Thus the interference was for the legitimate aim of national security and public safety in Article 8(2).

106. I now turn to the issue of proportionality. In my judgment, the key issues are "whether a less intrusive measure could have been used" and "whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community" (per Lord Sumption in *Bank Mellat* (*supra*)).

107. In his letter of recommendation for an ATTRO, dated 22 September 2020, AC Basu concluded that "the measures were considered precautionary, proportionate and necessary for the safety and security plan". However, he reached this conclusion on the erroneous assumption that the measures had already been in place for several years, and were now being put on a permanent footing.

108. In her first witness statement, Inspector Boutcher said at paragraphs 23 and 24 that it was usual practice for the MPS to recommend an ATTRO to the highway authority. However, she said that it was different in the case of KGW because "the measures were already deployed in their physical state at the time of making the formal recommendation for a permanent ATTRO and therefore could potentially be seen as retrospective in its application".

109. In her third witness statement, Inspector Boutcher said at paragraph 10:

> "I recall speaking with AC Basu when the recommendation letter was ready for sign off and asking him if he required a briefing from WCC on the public realm scheme. This was because [of] the way in which he was making the recommendation, it appeared retrospective in nature. He advised that this was not necessary as he was more than content in making the recommendation for the order to be made."

110. At the hearing, Ms Stockley explained that there was a retrospective element as there were already temporary measures in place at the front and east of the RAH. However, she accepted that this ATTRO did not replace or revise those temporary measures, save in respect of an access restriction at the south east corner of the RAH. Importantly, this ATTRO concerned access restrictions to KGW which had not previously been the subject matter of any order, and could not properly be described as retrospective. In my view, wholly new and untested restrictions are likely to require closer examination.

111. The earlier drafts of this letter reveal that initially the proposal was that the ATTRO was intended to be a "precautionary protective security measure …. during significant events; when intelligence dictates; or when the national threat level increases i.e. a raise to Critical – which means an attack is highly likely in the near future". The police could "rely on the order being generally available as an operational tool but on a contingency basis that could be "activated" at any time".

112. The reasons given for the significant change to daily closures from 12 noon to midnight in the final MPS letter of 22 September 2020 was that "Daily closure times are considered crucial because the Royal Albert Hall holds over 400 events annually, all of which attract large crowds. Having consistent daily closure times will provide consistency to the local community and road users during these hours of operation". The Claimant's evidence is that the RAH holds far less than one significant event per day, with only 91 such events listed on the RAH website, and some of these start outside the restricted hours. I agree with the Claimant's submission that consistency to the local community and road users is not a counter-terrorist requirement, and it does not rationally justify the severe impact on the access to the Claimant's home.

113. Others who are potentially affected by counter-terrorism proposals at the RAH, namely RAH visitors and residents in Kensington Gore East, are subject to less intrusive and more favourable measures than the Claimant and his family, without convincing justification for such inconsistent treatment. This calls into question the Defendant's proportionality assessments.

114. The Claimant's photographs clearly show that the RAH is permitting a large number of vehicles to enter KGW and park there, at times when the Claimant and his family and visitors are prohibited from doing so, even to drop off and pick up.

115. Mr Warner explained in his second witness statement, at paragraphs 6 to 10:

> "6. The RAH security team are permitted to allow access and egress to the security areas for vehicles with a genuine business need and in accordance with the OMP and strictly on a prearranged basis. This can include vehicles relating to shows or events held at the venue and for contractors conducting maintenance or repairs to the building. In both examples it is necessary for the company to demonstrate the necessity for the vehicle to be present in advance, to provide details of the vehicle, times of entry and therefore be permitted access.
>
> 7. There is clearly a significant and ongoing servicing and maintenance requirement at this venue which will necessitate the need for vehicles to be close by and therefore this will result in both vehicle presence and vehicle movements in the security zone. The purpose of the physical security measures and ATTRO are to reduce the risk of a terrorist attack from a hostile vehicle. In managing any vehicle access point, there should be assurance that the vehicle is there for a legitimate purpose, for example, a preregistered vehicle from known a contractor. The extent of search and screening arrangements will be determined by the risk and threat to a particular site and/or event.
>
> 8. RAH operate a scheme whereby parking identifier permits are issued to vehicles approved to enter the security zones and need to park on the public highway. These parking identifier permits will only be issued to vehicles where there is a genuine business need for that vehicle to be close to the venue, identifier permits will not be issued simply for convenience, the operator has 10

> identifier permits to use for this purpose. This scheme is approved by the City Council and has been in operation for a number of years. The display of a validated permit on a vehicle will inform marshals responsible for enforcing parking regulations on the public highway that the vehicle has permission to be there.
>
> 9. Within the security areas the land comprises public highway and RAH private land and RAH manage access to both. RAH utilise areas of their private land to accommodate vehicles required for servicing and maintenance and also operate an accessible parking scheme whereby patrons with a disability or mobility impairment, who are attending events at RAH, are able to pre book a parking space in the accessible parking area located on RAH private land in the north-west quadrant of the venue. In both situations access is managed on the same basis as for vehicles requiring access to areas of the public highway located within the security areas. Vehicles parked on RAH private land are not required to display an identifier permit, this requirement only applies to vehicles parked on an area of public highway.
>
> 10. The City Council may also grant direct permission or dispensation for vehicles to park on the public highway where there is a genuine business need to do so, this will generally be for servicing or maintenance reasons and can include areas of public highway located in the security areas in proximity of RAH. Where a vehicle has been granted permission by the City Council, and access is required to the security zone, the company or driver of the vehicle is still required to arrange access with RAH in accordance with the OMP. A record of vehicles granted direct permission by the City Council will be notified to a parking marshals hand held device."

116. This evidence demonstrates that it is apparently considered safe by the Defendant, the RAH and the MPS for the RAH to allow large numbers of vehicles and people into the restricted area provided that they are identified and have a legitimate purpose for being there. In my view, the Defendant could and should have considered taking a similar approach to the Claimant and members of his household. They can be vetted, their names put on a security staff list, and individuals and their vehicles can be given approved passes. Details of occasional visitors and their vehicles (for example, visitors with impaired mobility or those accompanying young children) can be provided to security staff in advance of arrival. The security staff can open the gates when needed, either manually, or remotely, just as they do for vehicles on RAH or Council business. Moreover, as No. 26 is the only residence in KGW, and the only property whose sole access is from KGW, the Defendant would not be burdened with multiple similar requests from other properties.

117. Crucially, the Defendant should have considered whether the Claimant and his household should be able to come and go as they wish, in a vehicle, for the purposes of their daily lives, just as RAH visitors and contractors are allowed to come and go for the purposes of their businesses. I cannot see any justification for treating contractors

more favourably than residents, bearing in mind the Convention rights accorded to family life and the home under Article 8.

118. The current requirement to give a working day's notice of a request for vehicle entry is particularly onerous. I note that in an email dated 28 April 2021 to Mr Warner, Inspector Boutcher envisaged access being provided by RAH staff within "x minutes".

119. The Claimant's traffic consultants, Momentum, questioned the difference in treatment between KGW, which is now gated, and Kensington Gore East which has no gates, only security barriers. They pointed out that there is a primary access door on each side of the building. There is no basis for assuming that there would be any difference in the number of pedestrians or the sufficiency of footpaths as between the west and east sides of the RAH. If it is necessary to close KGW to mitigate the risks of terrorist attacks, that would surely apply equally to Kensington Gore East. If Kensington Gore East can be adequately protected by security barriers, whilst allowing normal traffic flow, then why cannot KGW be protected in this less intrusive and restrictive way?

120. In the Delegated Report on Consultation, the Defendant explained its reasons for treating KGW and Kensington Gore East differently. It said that it was not considered possible to provide a workable and secure closure of Kensington Gore East which contains in the region of 120+ residences at Albert Hall Mansions and a high number of residents' parking spaces. Such a closure would necessitate the removal of about 18 residents' parking spaces; impact deliveries; and require a degree of flexible vehicle access control management for exceptions which would effectively nullify the benefits of installing gates. The installation/retention of security barriers on the east side of the RAH formed the most workable form of security. A survey in 2018 showed that traffic flows were approximately 71% higher on Kensington Gore East than KGW.

121. The Defendant's reasoning is understandable from the perspective of a manager who is reluctant to take on the burden and expense of closing Kensington Gore East because of the number of residents living there. However, the Defendant did not then go on to undertake a Convention-compliant proportionality exercise to consider the issue from the perspective of the human rights of the Claimant and his family. In particular the Defendant did not re-consider whether the less intrusive measures which were adequate for Kensington Gore East were also adequate for KGW; whether there was inconsistency between the treatment of the residents in the two streets; and whether the proposal failed to strike a fair balance between the rights of the residents in KGW and the interests of the community.

122. Taking all these factors into account, I consider that the Defendant's decision -making was flawed, and in consequence the current scheme operates in a manner which is disproportionate.

123. Finally, I consider that the statement in the Delegated Report on Consultation that the Claimant "appeared to support the proposals to close this length of road" was a misstatement. The Defendant accepts that its officers were not present at the meetings with the RAH and do not know what was said. This was a regrettable error. It is possible that the MPS was also under the mistaken impression that the Claimant agreed to the proposals. However, by the time the Defendant came to decide whether or not to make the TMOs, its officers must have been aware that the Claimant did not agree to the proposals, because of the objections lodged by the Claimant's solicitors, which were

fairly set out in the report. Therefore I do not consider that this error made any material difference to the eventual decision.

124. Therefore, Ground 2 succeeds.

Final conclusion

125. For the reasons set out above, the claim is allowed on Ground 2 only. Grounds 1 and 3 are dismissed.