Neutral Citation Number: [2021] EWHC 3294 (Admin)

CO/4070/2020

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 07/12/2021

Before :

MR JUSTICE KERR

- -

Between :

(1) SM (a child, by his father and litigation friend, MZM)

(2) SDJ (a child, by his father and litigation friend, SDS)

Appl

- and -

LONDON BOROUGH OF HACKNEY

Respo

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Mr Stephen Broach and Ms Eleanor Leydon (instructed by **Rook Irwin Sweeney LLP**) for the **Applicants**

Mr Kelvin Rutledge QC and Mr Jack Parker (instructed by **London Borough of Hackney Legal Services**) for the **Respondent**

Hearing date: 1 November 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is

10:00am on 7 December 2021.

Mr Justice Kerr :

Introduction

1.
The two applicants are children with disabilities who, through their fathers as litigation friends, challenge the validity of two experimental traffic orders (**ETOs**) made by the respondent (**Hackney**) on 25 September 2020, eventually taking effect from 9 November 2020. The applicants complain that they are severely prejudiced by increased car journey times to and from their school.

2.
The two ETOs have long titles, which I will shorten as indicated:

(1)
the Hackney (Mount Pleasant Lane Area – Mount Pleasant Lane, Southwold Road and Springfield Gardens) (Traffic Management and Parking) (Experimental) Order 2020 (**the Springfield Gardens ETO**); and

(2)
the Hackney (Prescribed Routes and 20 mph Speed Limit) (School Streets – Harrington Hill Primary School) (School Streets – Pedestrian and Cycle) (Experimental) Order 2020 (**the Harrington Hill ETO**).

3.
The application is made under paragraph 35, Part VI, Schedule 9 to the Road Traffic Regulation Act 1984. It is not a judicial review; permission is not required but the challenge must be (and was) brought within six weeks from the date the order is made; and otherwise may not (see paragraph 37 of the same Schedule) be questioned in any legal proceedings whatever.

4.
The grounds of challenge are, however, founded on conventional principles of public, equality and human rights law frequently aired in judicial review proceedings. In this case, the grounds are failure to discharge the public sector equality duty, failure to consult and breach of article 8 or article 14 (read with article 8) of the European Convention on Human Rights (**ECHR**).

5.
Hackney resists the application. It contends that it properly discharged its duty to have "due regard" to the matters specified in section 149 of the Equality Act 2010; that it was under no obligation to consult more widely than it did prior to making the ETOs; and that there was no interference, or alternatively a justified interference, with the applicants' article 8 rights and no violation of their rights under article 14 read with article 8.

Relevant Law

6.
Local traffic authorities such as Hackney must, by section 16(1) of the Traffic Management Act 2004:

“manage their road network with a view to achieving, so far as may be reasonably practicable having regard to their other obligations, policies and objectives, the following objectives–

(a) securing the expeditious movement of traffic on the authority's road network; and

(b) facilitating the expeditious movement of traffic on road networks for which another authority is the traffic authority.”

7.
“Traffic” includes pedestrians (section 31 of the same Act). By section 16(2):

“(2) The action which the authority may take in performing that duty includes, in particular, any action which they consider will contribute to securing–

(a) the more efficient use of their road network; or

(b) the avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on their road network or a road network for which another authority is the traffic authority;

and may involve the exercise of any power to regulate or co-ordinate the uses made of any road (or part of a road) in the road network … .”

8.
The powers of a traffic authority to make traffic regulation orders are found in sections 1-4 of the Road Traffic Regulation Act 1984 (**ROTRA**) for roads outside Greater London. By section 6, orders “similar to” traffic regulation orders can be made for roads within Greater London. The orders in this case were made under section 6. Section 7 regulates their content, while section 8 makes it an offence to contravene one.

9.
Section 9 allows the making of ETOs, which may not last longer than 18 months and may be continued from time to time during the period of up to 18 months from the date the order first came into force. It is an offence to contravene an ETO (section 11 of the ROTRA).

10.
By section 122(1) of the ROTRA, a local authority must exercise its functions under the ROTRA:

“(so far as practicable having regard to the matters specified in subsection (2)…) 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 … .”

11.
The “matters specified” in subsection (2) 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) ….

(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 …. local authority to be relevant."

12.
By paragraphs 34-36 of Schedule 9 to the ROTRA (in Part VI of that Schedule), a person may "question the validity of" (among other types of traffic regulation order) an ETO or part of one only on the grounds that it is not within "the relevant powers" (as defined) or that any of the "relevant requirements" (as defined) has not been complied with.

13.
The procedures that must be followed before making a traffic regulation order are set out in the Local Authorities Traffic Orders (Procedure) (England & Wales) Regulations 1996 (**the 1996 Regulations**). By regulation 6, various bodies such as the local fire brigade and ambulance service provider must, normally, be consulted.

14.
There is no requirement in regulation 6 or anywhere to consult the general public but where the order may affect passage along any road the authority must consult the Freight Transport Association, the Road Haulage Association and:

"[s]uch other organisations (if any) representing persons likely to be affected by any provision in the order as the order making authority thinks it appropriate to consult."

15.
Further, under regulations 7 and 8 a notice stating the proposals must be published in the London Gazette. Members of the public may object and their objections must be considered. In some cases a public inquiry must be held, under regulation 9. However, that objection procedure does not apply in the case of ETOs (see regulation 22(1)). Instead, the published notice must include a process for written objections to be made during the first six months of operation of the ETO (by a combination of regulation 23 and Schedule 5).

16.
The making of ETOs is an exercise of "functions" within section 149(1) of the Equality Act 2010 (**the 2010 Act**), attracting the duty to have "due regard" to the legislative goals set out in sub-paragraphs (a) to (c) of section 149(1), which are well known and need not be repeated here. The section enacts what is known in shorthand as the public sector equality duty.

Facts

17.
The first applicant, SM, was born in 2005 and is now 16. He has a severe learning disability with a diagnosis of Attention Deficit Hyperactivity Disorder (**ADHD**), with other difficulties and mental health issues. His needs are complex and his behaviour difficult. He has an Education and Health Care (**EHC**) plan. He lives with his parents in Hackney with six of his siblings.

18.
The second applicant, SDJ, was born in 2016 and is now five. He lives with his parents in Haringey. He has been diagnosed with global developmental delay. His mobility and balance are affected. He struggles with walking long distances, can be unsteady on his feet and has delayed speech development. His toilet training has also been delayed. His parents are in the process of obtaining an EHC plan for him.

19.
Both applicants and their parents are members of the Orthodox Jewish community. Both applicants attend “S School”, as I shall call it; a fee paying special school in Hackney, access to which is affected by the two ETOs. The administrator of S School, Mrs Chani Gottesman, explains that it is the only Orthodox Jewish special school in London. It is planning to relocate in the next few years but no clear timescale for that is before the court.

20.
Mrs Gottesman explains that in November 2020 about 49 children would arrive on private school vans and 37 children would arrive with their parents in cars or taxis. Another nine children were arriving on local authority provided transport. A total of about 86 children, therefore, were affected by the ETOs when they took effect on 9 November 2020.

21.
Both applicants need to be driven to and from school by car because of their special needs and disabilities. The car journey times to and from S School are important to both because they become anxious, restless, difficult and challenging in various ways, the longer the journey takes. There is no doubt that it is best for them to have a swift, easy and uneventful car journey to and from school.

22.
Before the ETOs took effect, SM’s journey time to S School was about 10 to 15 minutes. After school, he would attend an after-school club to which the car journey time was about five minutes. SDJ’s journey time to and from S School before the ETOs was about six to ten minutes.

23.
It is reasonable to infer that due to the special needs of the children attending S School, others arriving and leaving by motor transport would likewise be better off with a quiet, uneventful and short journey, without getting stuck in traffic. Mrs Toby Junger, the special needs co-ordinator at S School, gives evidence of this by reference to three other children with complex needs, as examples, called Child A, Child B and Child C.

24.
Hackney’s principal witness is Mr Andrew Cunningham, a civil engineer and Head of Streetscene, Public Realm Division, Neighbourhoods and Housing. He it was who decided, under delegated authority, to make the two challenged ETOs. He explains that “Schools Streets Schemes” have been a feature of Hackney’s traffic policy since 2017, when they were a novel concept.

25.
Hackney’s School Streets policy is derived from the 2015 policy document called “Hackney Transport Strategy 2015-2025” in which policy LN20 was described thus in the delegated powers decision document relevant to this case, to which I am coming:

“Hackney will look to develop and trial School Streets proposals where roads, upon which schools are situated, are closed during certain times of the day.”

26.
In the same 2015 policy document, policy LN15/C33 is described thus in the same later decision document:

“Filtered Streets - Reducing motor traffic on residential streets. Hackney Council will continue to work with local residents and key stakeholders to identify, trial and rollout additional filtered streets schemes across the borough in order to reduce rat-running and through motor traffic.”

27.
The first five such schemes were regarded as pilots. They were introduced by ETOs from June 2017 to June 2018, after pre-implementation public consultation using an online facility. Hackney then, Mr Cunningham says:

“moved towards a practice of formal public consultation prior to the implementation of School Streets schemes by way of ETOs because in general the Council expected that the schemes would eventually be made permanent, even though no decision to do so had been made.”

28.
A further four School Streets Schemes were introduced up to the end of 2019, making a total of nine such schemes. Hackney was in the process of consulting on a tenth when the coronavirus pandemic struck, from early 2020. As everyone in London knows, there was a general lockdown from late March 2020 and people’s everyday lives changed suddenly and radically.

29.
On 9 May 2020, the Secretary of State issued guidance under section 18 of the Traffic Management Act 2004, to which traffic and highway authorities must have regard. The Department for Transport (**DfT**) expected local authorities to “give more space to cyclists and pedestrians … help embed altered behaviours and demonstrate the positive effects of active travel”. After the health emergency, there was to be a “lasting legacy of greener, safer transport.”

30.
Under the heading “Reallocating road space: measures” the guidance document stated:

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

31.
The suggested measures included pop up cycle facilities, cones and barriers to widen footways, encouraging walking and cycling to school, introducing a 20 mph speed limit, creating pedestrian and cycle zones and “modal filters”, closing roads to motor vehicles to create “neighbourhoods that are low traffic”.

32.
That was followed a week later by Transport for London’s (**TfL**’s) “London Streetspace Plan – Interim Guidance to Boroughs” published on 15 May 2020. It was intended to “complement and follow on from the DfT guidance and set the London context for delivery”.

33.
Among the measures recommended were “Low Traffic Neighbourhoods” or **LTNs**. These could be temporary or experimental, i.e. delivered by ETOs:

“Interventions could include simple modal filters with temporary materials or bollards, with cost effectiveness and flexibility in mind. Where schools are present, School Streets should form an integral part of temporary LTNs.”

34.

The “School Streets” concept was then explained in more detail. The idea was to reduce congestion at school gates once schools reopened and to encourage fewer car journeys to school and more children arriving on foot or by bicycle or scooter. To achieve this, as TfL explained in its guidance:

“School Streets generally restrict traffic directly outside the school for 30-90 minutes at either end of the school day. Signs, barriers and/or cameras stop non-residents driving through the School Street. Residents and blue badge holders have access.”

35.
The document went on to urge that School Streets “should be considered outside all primary schools in London”. Access should be maintained for residents and “blue badge” holders; but “other exemptions should be kept to a minimum … to prevent the effect of the intervention being diluted”. School Streets schemes should be “included as part of all proposals for [LTNs]”, with “[r]apid roll out”. Hackney was cited as a pre-Covid pioneer of the concept: its “[t]oolkit for professionals” included “a series of case studies, delivered prior to COVID-19”.

36.
Hackney then proceeded with further ETOs, ceased its practice of pre-implementation public consultation and switched to public consultation undertaken (as Mr Cunningham explains) “concurrently with the experimental period” of the relevant ETO. However, before making the tranche of ETOs that included those challenged here, Hackney did undertake consultation under regulation 6 of the 1996 Regulations.

37.
Among the bodies consulted was the Interlink Foundation, a membership organisation for Orthodox Jewish organisations, which in turn was in contact with other organisations within its constituency, including the S School and the Hatzola volunteer ambulance service. It was through the Interlink Foundation that the applicants’ parents later became aware of the potential for a legal challenge to the two ETOs.

38.
The other bodies consulted were: Harrington Hill School; the Hackney SEND Transport team; the emergency services; the Homerton Patient Transfer service; Age UK; Hackney’s Community Safety and Waste Services departments; the London Cycling Campaign; a body called Living Streets; the Freight Transport Association; Disability Backup (a local Hackney disability advocacy group); the Royal National Institute for the Blind; and Wheels for Wellbeing (a group representing cyclists with disabilities).

39.
On 8 September 2020, an officer of Hackney, Mr Tyler Linton, wrote to Mr Motty Pinter of the Interlink Foundation with details of ten School Streets schemes then being considered, in preparation for a video meeting to be held on 14 September. The video meeting was attended by Hackney officers, including Mr Cunningham, and by Mr Gerald Lebrett, the headteacher of S School. Mr Lebrett expressed concern that S School would be “cut off”.

40.
Mrs Gottesman’s account refers to this being the first of two such meetings and that she too attended, as did representatives from the Hatzola ambulance service, representatives from the board of trustees of S School, councillors from the Orthodox Jewish community and drivers of school vans.

41.
Mr Cunningham responded to Mr Lebrett's concern about S School being "cut off", saying that the proposals would leave S School accessible, but would reduce the route options. He was not persuaded to refrain from making the two ETOs. He decided later the same day, 14 September 2020, to approve the proposals and signed the 20 page "delegated powers decision" document (**the decision paper**) stating in detail the rationale for the two schemes.

42.
The two schemes approved in that document were, first, the Harrington Hill Primary School Street (Pedestrian and Cycle Zone) and Mount Pleasant Lane Low Traffic Neighbourhood; and second, the Southwold Road banned turn at Upper Clapton Road. The second of these proposals later fell away for reasons unrelated to these proceedings (to do with a gas supply issue). The first was the scheme later embodied in the two ETOs now challenged.

43.
The avowed purpose of the proposals, as set out in the decision paper, was to:

"● Reduce congestion in the street associated with school opening and closing.

● Improve local air quality and reduce emissions around the school gates.

● Increase road safety and accessibility for non-motorised users.

● Encourage active travel to school for pupils and parents.

● Provide pupils, parents and staff with more space for social distancing outside the school gates."

44.
The effect of what became the Springfield Gardens ETO and the Harrington Hill ETO was then described in the decision paper. The gist was as follows. Part of Mount Pleasant Lane would become a pedestrian and cycle zone Mondays to Fridays from 8.30 to 9.30am and 3 to 4pm. Vehicles would not be allowed to enter the zone from the south during those hours. The Harrington Hill Primary School buildings lie to the west and east of Mount Pleasant Lane.

45.
At the northern end, a barrier would block entry to Mount Pleasant Lane from the north, not just during those hours but all the time. The barrier would also prevent vehicle travel north along Mount Pleasant Lane into Springfield Gardens and Big Hill, where the S School is situated in a cul de sac. The route to S School from the south via Mount Pleasant Lane (and the same route in reverse, out of S School) would therefore no longer be viable at any time.

46.
There would now be only one way to S School by car, driving east along Springfield Gardens and turning left, northwards into Big Hill. Car traffic destined for S School would, therefore, no longer weave its way through back streets leading to Mount Pleasant Lane. It would be channelled instead onto Springfield Gardens which you can only reach by turning east off the main road, Upper Clapton Road. There is no access to S School from the north, for there is no road; nor from the east, where the way is blocked by the River Lea.

47.
There would be exemptions for residents' access, "blue badge" holders, and emergency services vehicles. The decision paper went on to explain that consultation would take place during the 18

month experimental period of the traffic orders, as is permitted. The impact on school transport providers was addressed and commonly raised objections such as displacement of traffic were discussed.

48.
Some increase to journey times to and from schools was acknowledged; but Mr Cunningham considered that achieving the School Streets objectives would:

“4.21 …benefit pupils attending all schools in Hackney; including SEND, religious and independent schools; in the long term. This is because reducing private vehicle traffic and the associated harm benefits all residents in Hackney by improving air quality, reducing road danger and ensuring that essential travel can take place without being delayed by congestion and gridlock.

4.22. The School Streets scheme would not be achieving its objectives if it created a problem elsewhere for children with extensive needs in their journey to school. The Council needs to ensure that residents who require motor vehicle transportation are still able to get around in a way which is consistent with the Council’s transport strategy objective to ‘ensure that the needs of’ older people and those with visual and mobility impairments are considered in all plans and proposals to upgrade the public realm.”

49.
Section 6 of the decision paper was an equalities impact assessment. It was not called a draft but it would be “kept under review and updated throughout the decision-making process.” The equalities impact of the decision was thought to be “generally positive”. The primary beneficiaries would be “children enabled to travel by active and sustainable modes to school”. Their parents and siblings would also benefit. The benefits would extend to “all EQIA groups”.

50.
Under the heading of disability, the decision paper stated as follows:

“6.3. Disability: Hackney has lower than average rates of residents who identify as having a disability. In November 2017, 4.1% of the local population (11,234 people) were claiming Disability Living Allowance or Attendance Allowance. The main modes of transport used by disabled Londoners at least once a week are walking (78%), bus (55%), car as a passenger (44%) and car as a driver (24%). Therefore, the number of mobility impaired residents potentially affected by School Streets is low. However, consideration has been given to the impact on disabled residents living within the School Street Zones (including SEND pupils), and disabled visitors to the area.

6.4. There would be minimal impact on access for disabled residents to their properties within the School Streets zone, as they would be eligible for an exemption. Provision has been made for Blue Badge holders who require access to the zones as visitors to be added to the list of approved vehicles if they contact the Council to request this. However, Blue Badge holders who have not registered in advance would not be automatically able to enter during the times of operation.

6.5 For those with limited mobility who would need to access a property within the zone during the restricted times, and who have not registered in advance for an exemption, the maximum walking distance from an address in the centre of the zone to the edge of the zone would be kept to a minimum. A pedestrian access survey, assessing the quality of the walking route from the edge of the zone to the furthest property within the zone, would be conducted at the School Streets location post-implementation and any findings would be flagged for remedial action.

6.6 Discussions have been held with Hackney Learning Trust, who provide school transport for disabled pupils, to mitigate the impact of School Streets schemes on their journey times and provide a School Streets exemption where no other alternatives are feasible. This also includes taxis and private hire vehicles operating the service on behalf of the Learning Trust. These vehicles then have access at all times both to the pupils' home address and their school."

51.
On 25 September 2020, Mr Linton wrote to Mr Pinter informing him that the decision had been made to proceed with the proposals. Mr Pinter forwarded the correspondence to Mr Lebrett. Ms Dominique Humbert, another Hackney officer, wrote to Mr Lebrett the same day, reiterating that access to S School was not blocked and offering a further meeting to discuss the School's concerns.

52.
Mr Lebrett sought confirmation (later provided on 1 October) that the proposed traffic orders would not prevent a left turn from Springfield Gardens into Big Hill, where S School is located. Also on 25 September 2020, the two ETOs were formally made.

53.
On 29 September 2020, Hackney adopted its own 122 page "Emergency Transport Plan", subtitled "responding to the impacts of Covid-19 on the transport network". It was recently challenged, unsuccessfully, in judicial review proceedings brought by a company representing concerned residents; see the judgment of Dove J in R (HHRC Ltd.) v. Hackney Borough Council [2021] EWHC 2440 (Admin).

54.
Among the measures mentioned in the emergency transport plan was the "London Streetspace Programme tranche 1", nearly complete, comprising ten LTNs including a road closure at Springfield Gardens to "close off rat runs and help secure the [LTN] east of the Upper Clapton Road". Under "School Streets", a further 40 timed pedestrian and cycle zones were envisaged.

55.
The Emergency Transport Plan featured an equalities impact assessment at section 5 which referred to section 149 of the 2010 Act. Each scheme individually would be the subject of "[a] fuller analysis of the Equalities Impacts … at the design stage". A table then set out "some of the considerations that will be included". Again, the overall impact was thought to be generally positive, including that of School Streets schemes:

"While children enabled to travel safely by active modes to school will be the primary beneficiaries of this objective, these schemes will have positive impacts for parents and children in particular. In addition as the school run has such a large influence on peak traffic flows with their attendant negative consequences, so the benefits of this should extend to all EQIA groups. However consideration has to be given to "white listing" residents including Blue Badge holders - the latter needing access to their designated parking spaces. More detailed equalities assessments will be done for each individual School Street."

56.
As for LTNs, the impact assessment continued:

"Low Traffic Neighbourhoods will have positive impacts on all equality groups in terms of congestion, air quality and health. The majority of Hackney's households (70%) do not own cars. Any measures to

provide alternatives to private ownership will benefit them. It is recognised that some residents including disabled and older people and carers will continue to require the use of a car particularly where the use of Community Transport or Dial A Ride cars or car clubs are unsuitable. We are also aware that behaviour change may be more challenging among groups with large families such as the Charedi Jewish population who in some cases are currently quite car dependent."

57.
On 2 October 2020, the making of the two ETOs challenged in this case was publicised by the required notices in the London Gazette. The notices explained that they were for a "trial period" of 18 months and that objections should be made within six months of their entry into force, then thought to be 8 October 2020, but subsequently delayed to 9 November 2020. The six month period for objections therefore expired on 8 May 2021. The 18 month period of the ETOs is due to expire on 8 May 2022.

58.
On 26 October 2020, a further meeting took place attended by Hackney officers, including Mr Cunningham, and a special needs co-ordinator at the S School, Mrs Rivka Schlesinger. She raised concerns about increased journey times, children missing scheduled medication, emergency services attending in the event of an emergency and likely staff recruitment problems, all consequent on the closure of the route to S School from Mount Pleasant Lane. Mrs Schlesinger suggested that Springfield Gardens was too narrow for two way traffic, especially bus traffic.

59.
Hackney officers expressed willingness to consider permitting buses to use Mount Pleasant Lane if Springfield Gardens was too narrow; and indicated that they were willing to consider exemptions for transport of special needs children on a case by case basis. Emergency vehicles, they explained, were already exempt and able to pass through the barrier between Mount Pleasant Lane and Springfield Gardens. Mr Cunningham's evidence is that Hatzola first responders have also, since, been added to the list of exempt vehicles.

60.
Mrs Gottesman gives evidence of a meeting two days later, on 28 October 2020 (which she followed up with a letter to the Mayor of Hackney dated 8 November 2020), attended by her, the Mayor, groups from Stamford Hill including representatives of the Hatzola ambulance service, the S School board of trustees, Orthodox Jewish community councillors and drivers of school vans. Hackney was not willing to rescind the ETOs.

61.
The S School was at that time consulting with parents and staff about the blocking of access via Mount Pleasant Lane. The present claim was brought by the first claimant, SM, on 5 November 2020. The second claimant, SDJ, was added later. The correspondence continued in emails and letters during November between Hackney and the S School.

62.
Hackney sought from Mr Lebrett the registration numbers of specific special needs transport vehicles that could be the subject of case by case exemption requests (in an email from Ms Humbert dated 6 November 2020). Mr Lebrett's response (in his email of 26 November) was that this was not a practical solution because "different cars are constantly used".

63.

The evidence about the impact of the two ETOs on the applicants' car journey times to and from S School was not common ground. A small amount of rough and ready journey logs have recently begun to be kept by the applicants' parents or carers. Hackney too has compiled some evidence of monitoring journey times as part of its ongoing monitoring of the effect of the ETOs.

64.
The evidence for SM is that the morning journey now takes up to 45 minutes and, as of September 2021, between 25 and 40 minutes; while the afternoon journey to his after school club now takes at least 15 minutes, causing serious difficulties with his behaviour.

65.
For SDJ, the evidence is that car journey to school since the ETOs took effect has increased to at least 20 minutes and occasionally, on a bad day, has taken as long as 45 minutes. This leads to real difficulties with his complex needs including, unfortunately, sometimes wetting himself during the journey as he has incomplete toilet training.

66.
SDJ's mother, AD, fairly points out that not all the increase in the journey time can be attributed to the two ETOs. She cites as the "primary cause" of the increase a different road closure near their home, causing adjacent roads to become congested. However, she describes as the "final straw" the impact of the two ETOs which is that often they are delayed substantially when only a short distance from S School, causing SDJ the frustration of knowing the School is near but not yet being able to get out of the car.

67.
Hackney does not accept these estimates as accurate. They are not, Hackney says, supported by any systematic or detailed contemporaneous logging of journey times over a significant period. Hackney submits that on the basis of its monitoring information, the average journey time to S School for SM is about eight minutes and for SDJ is between seven and eight minutes.

68.
It is common ground that SM's timetable changed from early in 2021 so that he no longer attended the S School first thing in the mornings; instead, he was driven to the school from the synagogue, outside the morning school run period. However, his morning attendance resumed from September 2021.

69.
Hackney provided an interim analysis of the impact of the two ETOs as at 23 March 2021, based on feedback received on its online consultation facility (called "Commonplace") from 9 November 2020 to 23 March 2021. The applicants' parents do not use the internet at home and are therefore not in a position to contribute to this online forum.

70.
The comments are intended to be considered by Hackney when it decides whether to make the two ETOs permanent, in a little under six months from now. There were 19 consultation responses relating to the Harrington Hill ETO and 161 responses relating to the Springfield Gardens ETO. The comments were mostly negative. One mentioned the impact on the S School of the closure of Mount Pleasant Lane.

71.

In September 2021, while this challenge was proceeding towards trial, Hackney sought feedback from Mr Lebrett so that Hackney could take it into account as part of its ongoing assessment of the impact of the two ETOs and the eventual decision whether to make them permanent. This included a request for an indication of when S School intended to relocate to a different site. There is no clear indication of when that will take place.

72.
On 4 October 2021, Hackney carried out a further equalities impact review of the impact of the two ETOs, with the purpose:

“to provide an update on specific equalities considerations that have been raised or otherwise come to light so far during the experimental period of the above schemes. This review is intended to inform both the need for any interim modifications to these schemes in the light of equalities considerations and also the final Equalities Impact Assessment (EIA) that will be published in due course alongside the experimental scheme review. This document is not a replacement for that final EIA. In carrying out the review all protected characteristics have been considered.”

73.
The review was signed by Mr Cunningham. He noted that the public sector equality duty is “a continuing duty” and referred to specific representations made about the “disparate impact” the ETOs were having on certain disabled pupils at S School, whose needs were such that had to travel to school by car, with increased journey times detrimentally affecting their health and wellbeing.

74.
Mr Cunningham then referred to monitoring in the form of automatic and manual traffic count figures, a review of the LTN site and correspondence with school transport operators. The tabulated results contradicted the figures reported by representatives of the children affected, such as the applicants (as I have already explained, above). It was noted that lockdowns and easing of lockdowns affect traffic levels and that further monitoring is required.

75.
Five particular pupils were considered; the two applicants, Child A, Child B and Child C. It was pointed out that they would not qualify for exemption under the current criteria. There was no recommendation that the criteria should be modified; however, exemptions could be considered on a case by case basis. Hackney had in September 2021 reiterated its offer to consider exempting “larger minibus vehicles conveying a number of pupils”, if the S School could provide their registration numbers, but the S School had rejected that.

76.
Mr Cunningham accepted that some disabled pupils at S School were disadvantaged by the ETOs and that this had to be weighed against the benefit derived from them by others:

“The Council accepts that as a result of restricting route choice for pupils to and from [S] school that there is a risk of an impact, however infrequent, to certain disabled children who experience detrimental impacts due to their disability. The Council has to weigh the risk of this harm to a certain cohort of disabled residents against the benefits of the scheme, including benefits to other disabled residents identified in the initial impact assessment.”

77.

Mr Cunningham concluded that “exempting school transport vehicles from the restrictions on Mount Pleasant Lane to be a proportionate response to minimising the effect of the ETOs for a number of reasons.” These reasons were then set out, in paragraphs 57-68 of the review, which I will not set out in full.

78.
The main point was that it was proportionate to exempt group school transport vehicles, but to exempt private vehicles and allow them to arrive via Mount Pleasant Lane would undermine the LTN; it would increase the number of vehicles travelling past Harrington Primary School at school drop off and pick up times; that would be a “disbenefit” (or detriment) to 300 pupils attending that school; while the reported reduction in journey time for the private vehicles carrying children to S School would only be about 10 or 15 minutes, at most.

79.
An exception might be made for those (not including either applicant in this case) living to the south east of Mount Pleasant Lane, who would have the longest detour to arrive at S School if not allowed to use Mount Pleasant Lane. That could be considered; but otherwise, the overall conclusion was:

“72.Whilst the evidence gathered to date on journey times and traffic volumes does not indicate any increase, it may be the case that, on balance, a small increase in journey times would be considered tolerable and proportionate (even when the special educational and physical needs of these pupils are taken into account) in order to achieve the wider benefits of the School Streets and LTN schemes for pupils of Harrington Hill Primary School and local residents.

73.The Council accepts that as a result of restricting route choice for pupils to and from Side-by-Side school that there is a risk of an impact, however infrequent, to certain disabled children who experience detrimental impacts due to their disability. The Council continues to weigh the risk of this harm to a certain cohort of disabled residents against the benefits of the scheme, including benefits to other disabled residents identified in the impact assessment.

74.In any case, it is understood that Side-by-Side school will be relocating from the existing site on Big Hill, north of the traffic filter on Mount Pleasant Lane to a new site at Avigdor Mews, Lordship Road, N16. Therefore, any amendment of the ETO’s now would not materially affect these pupils' journeys to school when the move is complete. As such, it would be disproportionate at this time at least to consider any amendment to the ETOs in relation to these pupils’ journeys to school.

75.The recommendation of this review is continued monitoring of the impact of each ETO on the Protected Groups following the publication of the final delegated powers decision report, and ongoing review of the Council's exemptions policies and processes across the School Streets and Low Traffic Neighbourhood schemes to ensure a consistency of approach and application.”

80.
Such was the position when the matter came before me at trial. There was some disagreement about whether the applicants should be permitted to update their evidence of journey times. An unexpected late application for permission to put in further evidence was before the court and was initially opposed but at the hearing it was eventually agreed that I should consider that evidence.

81.
Although I had concerns about the need for procedural rigour which includes avoidance of late unexpected applications of that kind, both parties made brief written submissions after the hearing, at

my invitation (which I will consider shortly), on the relevance of post-decision evidence in a challenge of this kind, which includes human rights arguments. It was therefore acceptable to have up to date evidence from both parties.

Issues, Reasoning and Conclusions

First ground of challenge: failure to comply with the public sector equality duty

82.
I paraphrase the applicants' main submissions as follows, supported by the familiar authorities. The applicants' submissions began from conventional premises. First, to carry out an impact assessment does not guarantee performance of the "due regard" duty. Second, the equality issues examined must be identified and recognised. Third, while some regard was had to relevant disability considerations, it fell short of the regard that was "due".

83.
Specifically, section 6 of the decision paper did not address the impact on those such as the applicants affected not by impeded access to their homes within the LTN, but by impeded access to their school. While paragraph 6.6 mentioned transport of disabled children to school, it only referred to school transport provided by the Hackney Learning Trust, i.e. the equivalent of local authority transport. It said nothing about private transport to school of disabled children.

84.
Disabled children attending special schools including S School formed a "significant cohort" with "very substantial needs", the applicants submitted. It was essential to performance of the "due regard" duty that the impact of the two ETOs on that class of children must be conscientiously considered; and that was not done, the applicants submitted by reference to Underhill LJ's judgment in R (Unison) v. Lord Chancellor [2016] CMLR 25, CA, at [116] (not appealed to the Supreme Court on this point):

"To the extent that views are expressed on matters requiring assessment or evaluation the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or misjudgments cannot constitute or evidence a breach of the duty."

85.
Next, the applicants said, there was a failure to enquire adequately. The Tameside duty was not properly performed; consequently, the authority possessed inadequate knowledge to perform, in turn, the "due regard" duty. Talking to the local authority school transport provider was not good enough; Hackney should have talked to, not just S School's administration, but also families or at least representatives of families of disabled children, such as the applicants, using private transport to this independent school.

86.
It is for the court, not Hackney, to determine whether the "due regard" duty was performed or not, submitted the applicants. The duty is not tested by applying a rationality threshold. However, it was irrational to leave out this line of enquiry, given the impact of the two ETOs on S School's disabled children. Hackney lacked a proper appreciation of the impacts of the ETOs on the equalities objectives in section 149 of the 2010 Act, especially the elimination of discrimination and the advancement of equality of opportunity.

87.
This is not a case where there was any conscious decision to undertake a “rolling” assessment of equalities impacts. The section 149 duty must be performed at the time the function is exercised, not as a “rearguard action” after the event. The ETOs were made in September 2020; it was therefore too late in September 2021 to assess the impact on the children travelling privately to S School. Reliance on ongoing monitoring of the experiment does not alter that.

88.
Hackney too relied on conventional propositions: the way in which section 149 will apply on the facts will be different in each case, depending on what function is being exercised (R (End Violence Against Women Coalition) v. Director of Public Prosecutions [2021] 2 Cr App Rep 2, per Lord Burnett LCJ at [85]-[86]). There should be no micro-management by the court; the duty is one of process, not outcome (R (SG) v. Secretary of State for the Home Department [2016] EWHC 2639 (Admin) per Flaux J, as he then was, at [329]).

89.
The ancillary (Tameside) duty to acquire the necessary knowledge and information properly to perform the section 149 duty, Hackney submitted, is subject to a rationality threshold; the obligation is only to take such steps to inform itself as are reasonable. It is not an illegitimate “rearguard action” to revisit equality issues during the currency of an ETO. The section 149 duty is a continuing one and must be performed in the course of monitoring the output of the experiment, to see whether to make the ETOs permanent.

90.
Thus, submitted Hackney, in the context of an ETO the notion of “rolling” equalities impact assessment merely expresses the content of the Tameside duty of enquiry, together with the content of the continuing section 149 duty, which requires the relevant equalities considerations to be considered from time to time as knowledge of the fruits of the experiment increases during the period (up to 18 months) of its currency.

91.
Mr Cunningham had considered the very points the applicants accuse him of overlooking: impact on journey times of disabled pupils travelling to and from their school; and displacement of traffic outside the LTN zone making it more difficult for some parents to drive to school. Only by misplaced detailed forensic analysis could Hackney be required to direct express attention to the indirect effect on the sub-cohort of disabled children travelling to and from school including the applicants, i.e. those privately driven by a parent or carer.

92.
Further, the decision paper referred to the first six months of operation of the ETOs as the consultation period, after which Hackney would consider responses made in the light of actual experience. Hackney had sought as far as possible to “anticipate” any negative consequences of the ETOs for those with protected characteristics and made sure that they would as far as possible be eliminated or mitigated, but “[t]he EQIA will be kept under review and updated throughout the decision-making process” (paragraph 6.1 of the decision paper).

93.
Furthermore, Hackney submitted, it took account of the circumstances of the children attending S School in its ongoing monitoring and equalities review, among many other things. The attempt to single out the S School children as a basis for asserting a failure to make proper enquiries was no

more than a disguised irrationality challenge to the decision what enquiries to make at the initial stage; the duty was conditioned by the statutory consultation requirements (addressed under the second ground), which were carried out.

94.
I come to my assessment of these rival submissions. My starting point is that it was legitimate for Hackney to proceed further and urgently with LTN and School Streets proposals. Not only were they part of Hackney's existing policy; more were needed to respond quickly to the public health emergency and consequent DfT and TfL guidance and advice.

95.
Further, as noted by Dove J in the broader judicial review challenge to Hackney's emergency transport plan of 29 September 2020, that plan "was addressing the impact of the LTNs at a borough wide level as an overall framework", with "individual impact assessments …. in respect of individual schemes, bearing in mind the detailed local circumstances of the proposal"; see his judgment in R (HHRC Ltd.) v. Hackney Borough Council, at [53].

96.
The degree of "regard" had to equalities goals is not necessarily to be found only by examining the text of the decision paper. Regard to disability issues is also evidenced by Hackney consulting with bodies regarded as appropriate to be consulted, under regulation 6 of the 1996 Regulations. Those bodies included Disability Backup, the Royal National Institute for the Blind and Wheels for Wellbeing, as well as the Hackney SEND transport team.

97.
Next, a video meeting with representatives of S School and the Hatzola ambulance service, among others, was held on 14 September 2020. There is no evidence that a specific complaint about the impact of increased journey times on children attending the school with disabilities of a particular type was made during that meeting. It was not a point then drawn to Hackney's attention; the concern was the access route and that the school could be "cut off".

98.
Since S School is a special school attended by children with special needs and disabilities, the meeting on 14 September contributed to the regard Hackney had to disability issues. It did not need to be mentioned in the decision paper to qualify as "regard" had. The impact assessment is only an evidential tool. Just as performance of the duty is not guaranteed by conducting an impact assessment, non-performance is not shown just because something done is not mentioned in the assessment.

99.
In the decision paper, some increase in journey times to and from schools was acknowledged. This was a negative feature, but Mr Cunningham considered that achieving School Streets objectives would benefit pupils generally "including SEND, religious and independent schools; in the long term." The S School is SEND, it is religious and it is independent. Its pupils are therefore, as a generality, included within the compass of that anticipated benefit.

100.
Section 6 of the decision paper specifically addressed disability issues. These would be "kept under review and updated". There is some similarity with the "rolling" review of equalities issues in Sheakh v. London Borough of Lambeth [2021] EWHC 1745 (Admin) (subject to appeal on this point). The

Sheakh case calls attention to the experimental nature of the exercise, as context for assessing performance of the “due regard” duty and the prior ancillary duty of enquiry.

101.
Since the ETOs were made, Hackney has done further assessments of equalities issues, including disability issues, including consideration of the specific complaint of the applicants about the impact of increased journey times on the sub-group of pupils at S School adversely affected, the point not expressly considered or drawn to Hackney’s attention before the ETOs were made.

102.
The applicants say this is a rearguard action and that failure to consider that specific issue before the ETOs were made means the regard had to the equalities goals in section 149 of the 2010 Act fell short of what was “due”. Hackney counters that this submission proceeds from a misplaced and over elaborate forensic examination of the documents and that continuing review was always a planned part of the regard to be had to the equalities objectives.

103.
It is a curiosity that the Tameside duty of enquiry attracts a rationality threshold and the steps needed to perform it are therefore (subject to rationality) a matter of judgment for the decision maker; but the section 149 duty sets an objective standard and the court, not the decision maker, must decide whether the standard has been met or not. I keep in mind that different standards apply to the two duties; and that in the context of a temporary experimental decision, the decision maker by definition does not know all it needs to know to make a final decision.

104.
In the factual context of the public health emergency and the clear need for accelerated decision making, I reject the applicants’ submission that Hackney should have conferred with the families, or representatives of the families, of the class of affected pupils at S School. It was not irrational to confine the enquiries made in relation to S School to those made on 14 September 2020. Hackney did not breach its duty of enquiry by failing to ask further questions of Mr Lebrett or Mrs Gottesman about journey times to S School and the impact of any increases on some disabled children attending that school.

105.
As for the “due regard” duty, I prefer Hackney’s submission that it was adequately performed, even though it did not, at the initial stage of the experiment, include drilling down to consideration of the specific impact on a particular sub-cohort of disabled children who could be adversely affected by increased journey times. The impact on those with protected characteristics including disability was considered carefully and there was to be ongoing monitoring and assessment. I therefore reject the first ground of challenge.

Second ground of challenge: failure to consult

106.
The applicants’ main submissions on the issue of consultation were, in my paraphrase, the following. First, the applicants submitted that the common law supplements and is not supplanted by the statutory consultation obligations under the 1996 Regulations, regulation 6.

107.

Second, my decision in Sheakh v. London Borough of Lambeth (under appeal but not on this point) that there was no legitimate expectation in that case is wrong and should not be followed; see at [187]: “[t]he claimant cannot fashion from a supposed legitimate expectation an obligation to consult going above and beyond the limited obligations imposed under the 1996 Regulations. The two communications … do not begin to support such an expectation”.

108.
Third, alternatively, Sheakh is distinguishable because the factual basis for the legitimate expectation relied on in that case (two communications from the Secretary of State) was found insufficient; whereas here, the applicants’ legitimate expectation that they (or representatives of their families and other families in a similar position) would be consulted, is established by Hackney’s past practice of consulting publicly before making ETOs.

109.
Fourth, to the minimal extent that Hackney consulted the S School, it did not do so properly and fairly, as required on the authority of R v. North and East Devon Health Authority ex p. Coughlan [2001] QB 213; see e.g. Baker LJ’s judgment in R (Article 39) v. Secretary of State for Education [2021] PTSR 696, at [78]:

“the case law is clear that, whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly: R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213. In my judgment, the obiter observations of the Divisional Court in R (Christian Concern) v Secretary of State for Health and Social Care [2020] EWHC 1546 (Admin) to the effect that a legitimate expectation of consultation arising out of past practice is capable of being overridden by the need to act swiftly in the context of the pandemic are of little if any relevance in the present case where the Secretary of State in fact chose to carry out a consultation.”

110.
Fifth, Lang J’s decision in Tompkins v. City of London Corporation [2020] EWHC 3357 (Admin), at [91] is also distinguishable on the facts because there the Corporation had consulted residents of the Barbican in the past “on some occasions but not others”; while here, Hackney’s practice of pre-implementation consultation had been consistent across nine School Streets ETOs from 2017 to 2020, against the same statutory background, regulation 6 of the 1996 Regulations.

111.
If the submission is necessary in a procedural legitimate expectation case such as this, the failure to consult “families such as the Applicants’ families” demonstrated unfairness amounting to an abuse of power because it denied them the opportunity to raise the concerns about their children’s welfare that are now before the court. As in the Article 39 case, the pandemic and government guidance did not preclude “at least a short informal consultation”. The present case is, indeed, stronger in that regard.

112.
The post-implementation public consultation will not do because the proposals were not then at a formative stage; the decision was already made. Most members of the Orthodox Jewish community would be unable to partake in online consultation on the Commonplace website. The limited engagement with the School prior to making the two ETOs was not “Coughlan compliant”; it only took place through the intervention of the Interlink Foundation and was rushed.

113.

Further, Hackney did not conscientiously reconsider whether to impose the LTN restrictions. There was no proper consideration of increased journey times prior to making the two challenged ETOs. The S School did not have adequate time to raise the issue of journey times, which would require it to obtain information from parents. As in the Article 39 case, it was conspicuously unfair not to consult the S School and parents, or not to do so properly.

114.
Further, the applicants say Hackney had a statutory duty under regulation 6 to consult the S School. It is for the court, not the traffic authority, to determine objectively what bodies are "organisations representing persons likely to be affected". The S School was such an organisation; and it was irrational not to determine that it was appropriate to consult S School. That school represented the pupils, and their parents, who by reason of their disability needed to be driven to school by private transport.

115.
Hackney's main points (in my paraphrase) were as follows. First, the previous practice of pre-implementation consultation only applied to "School Streets" LTNs and therefore cannot apply to the Harrington Hill ETO, only to the Springfield ETO. Second, there is no justification for the common law adding to the statutory consultation requirements in regulation 6 of the 1996 Regulations. The past practice of pre-implementation consultation on School Streets LTNs does not qualify as tantamount to a promise.

116.
That practice was not "so consistent as to clearly imply, unambiguously and without relevant qualification that it will be followed in the future"; per Newey LJ in R (MP) v. Secretary of State for Health and Social Care [2020] EWCA 1634 at [53]; see also Lord Reed JSC in R (Moseley) v. London Borough of Haringey [2014] UKSC 56, at [35], referring to Sedley LJ's judgment in R (BAPIO Action Ltd) v. Secretary of State for the Home Department [2007] EWCA Civ 1139, at [43]-[47].

117.
This is far from being a case, Hackney submits, where "the change … of policy or practice is … unfair or an abuse of power" (per Laws LJ in R (Bhatt Murphy) v. Independent Assessor [2008] EWCA Civ 755, at [28]). "Unfairness and abuse of power march hand in hand…". "[T]he ascertainment of what is or is not fair depends on the circumstances of the case" (ibid.).

118.
Applying those standards here, the court should reject the claim to any legitimate expectation of consultation going beyond the terms of regulation 6 and requiring Hackney to create LTNs at a slower pace than that dictated by the health emergency and the resulting exhortation to accelerate the process and create them in a matter of weeks. The facts are far removed from those in the Article 39 case, where the statutory framework was entirely different.

119.
If necessary, Hackney submits that the strong and unusual public interest in swift action to reduce traffic and clear school streets of it, justified a departure from the policy of pre-implementation consultation; and that the engagement with the S School before the ETOs were made shows that a full consultation exercise would not have produced a different result because of the experimental nature of the ETOs and because the applicants and others affected would have the chance to make their views known through the objection procedure.

120.
As for statutory consultation, Hackney submitted that the S School is not an organisation "representing" persons likely to be affected, under regulation 6; but that it did consult with S School, without being obliged to do so. The decision to make the ETOs was not confirmed on 14 September 2020, when the first video meeting with Mr Lebrett and members of the Orthodox Jewish community took place; it was formally made on 25 September 2020; although Mr Cunningham did sign the decision paper on 14 September, after the meeting.

121.
Mr Cunningham took into account all the matters raised by the S School before deciding to approve the proposals and make the two ETOs. The S School was in contact with parents and representatives of the Orthodox Jewish community such as Mr Pinter. It had time to make further representations and informed comments between 14 and 25 September 2020 about the likely impact on the S School, pupils, staff and parents, but did not do so.

122.
The S School and others (using "freepost" or the telephone if not able to use an online facility) could also raise these issues after the ETOs were made, during the period of the formal written objection procedure and beyond it. The engagement that took place in September 2021, while the present challenge was pending (and at a time when the parties had been engaging in an alternative dispute resolution process) did not lead Hackney to change its mind. If it is relevant, the applicants have not been substantially prejudiced by the ETOs.

123.
Turning to my reasoning and conclusions, there is the usual embarrassment of riches in the case law on which to draw. For the most part, the principles are clear, though that does not make applying them easy. It is common ground that there is no general common law duty to consult a person affected by a proposed measure, for the reasons given by Sedley LJ in the BAPIO case at [43]-[47].

124.
The scope of the duty to consult is now often drawn from the judgment of the court (not attributed to any particular judge) in the Richard III case (R (Plantagentet Alliance) v. Secretary of State for Justice [2015] 3 All ER 261), at [98(2)]. The applicants rely on the first, second and fourth cases: a statutory duty to consult, an established practice of consultation and an exceptional case where a failure to consult would lead to conspicuous unfairness.

125.
It is common ground that Hackney had a statutory duty to consult to the extent provided for by regulation 6 of the 1996 Regulations and it is not disputed that Hackney consulted various bodies in accordance with that regulation. The question for me is whether either regulation 6 or a legitimate expectation of consultation enjoyed by the applicants (or both) and the demands of fairness meant that more extensive consultation than took place was required.

126.
Where there is a statutory duty to consult, the terms of the statute will ordinarily delineate the scope of the duty and, in particular, who must be consulted. The statutory consultation must be carried out properly and fairly, following the Sedley criteria (endorsed by the Supreme Court in R (Moseley) v. London Borough of Haringey) unless the relevant statutory provisions state otherwise. The consultation must be even handed and fair but need not normally go beyond the requirements of the statutory provisions.

127.
However, in the present case, Hackney undertook pre-implementation public consultation on some nine School Streets schemes from 2017 to 2019. That practice of general public consultation clearly went beyond what regulation 6 required. It was not restricted to the named consultees listed in regulation 6 and organisations representative of affected parties which, Hackney considered, were appropriate bodies to be consulted. The consultation was open to any member of the public, who could comment using the online facility.

128.
This case is different from Tompkins v. City of London Corporation, where the past practice of consultation was only intermittent, not continuous; and from Sheakh v. London Borough of Lambeth, where no past practice of consultation was relied on and the supposed legitimate expectation was founded only on two communications emanating from the Secretary of State, which were not sufficient to create a common law legitimate expectation of consultation going beyond the the 1996 Regulations.

129.
I accept the applicants' submission that there was, in this case, a settled past practice of consulting the general public in the area before making ETOs to give effect to School Streets schemes. A legitimate expectation that the public would be consulted on this occasion therefore "may (not must) arise", as this is a case "where a public decision-maker changes, or proposes to change, an existing policy or practice" (per Laws LJ in the Bhatt Murphy case, at [28]).

130.
The question may then become whether it was (ibid.) "unfair or an abuse of power", after the Covid-related DfT and TfL guidance in May 2020, to cease its practice and adopt a different one: namely, to consult before implementation more narrowly within the confines of regulation 6 and leave the wider public consultation process until after implementation, through the formal written objection procedure and the "Commonplace" online facility, or by telephone or freepost for those not digitally connected.

131.
If we ask the question whether the established practice was tantamount to a promise devoid of relevant qualification (per Newey LJ in R (MP) v. Secretary of State for Health and Social Care) we should include an implicit qualification for unlikely events of a force majeure or act of God character (such as an officious bystander might have insisted upon); for example a war, a pandemic, an earthquake, a biblical plague of locusts, and so forth.

132.
The answer to Newey LJ's question then becomes (with permissible hindsight) no. To reach the same conclusion by a different route, the circumstances here would seem to fit Laws LJ's formulation in Bhatt Murphy at [30] of an exception, with my emphasis:

"the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest … ."

133.
I do not find the Article 39 case of assistance in the present different factual context. It is said that here, as in that case, "the urgency was not so great as to preclude at least a short informal

consultation" (per Baker LJ at [77]). The perils of truncated informal consultation are well known to practitioners in this field who advised decision makers in the wake of the Coughlan decision, cited in Article 39 at [78] for the proposition that "whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly".

134.
As practitioners know, local authorities may be advised to avoid consulting or giving the impression of consulting, where they might otherwise wish to do so, to avoid falling into this "Coughlan trap". A "short informal consultation" is exactly the kind of exercise likely to lead to an allegation of voluntary but unfair consultation (cf. R (Shaw) v. Secretary of State for Education [2020] EWHC 2216 (Admin) at [108]-[115]). A likely objection is that the consultation is not "Coughlan compliant" because the proposals are not at a formative stage.

135.
In this case, there was an exchange of views at the video meeting on 14 September 2020 between Hackney and staff at S School and others involved in the Orthodox Jewish community, before the ETOs were made. That could be described as consultation of a kind; indeed, Hackney itself submitted that it "consulted" the S School prior to the two ETOs being made. That willingness to listen to the views expressed during the video meeting should not be held against Hackney on the basis that it was consultation not properly carried out.

136.
Cases where there is a breach of the requirement to consult in a manner that is (as the applicants put it) "Coughlan compliant" should be confined to cases such as Article 39 where there is real unfairness in what was done; for example because, as in that case, there is a lack of even-handedness because crucial consultee organisations are left out. It should not extend to a case such as this where no formal consultation took place beyond performing the statutory obligation, but comments were informally entertained at a video meeting.

137.
I conclude that this is not a case like Article 39 and that there were good reasons in the public interest for departing from the established practice; namely, the advent of the pandemic, the ensuing lockdown, the guidance and advice urging authorities to accelerate School Streets and LTN schemes and the fact that the changed practice still accorded (subject to one further submission I consider below) with the 1996 Regulations including the objection process (ordained by regulation 23 and Schedule 5) and the right of challenge (under paragraph 35 of Schedule 9 to the ROTRA).

138.
As to the submission that Hackney acted in breach of regulation 6, I will assume in the applicants' favour that it is for the court rather than the local authority to determine, objectively, which bodies qualify as bodies "representing persons likely to be affected". Clearly, the decision as to which such bodies are thought "appropriate to consult" is that of the local authority and must be rational.

139.
I accept in part the submission that the S School is such a body, if (as I assume) that is a decision for me. I would accept that it represents its pupils, and their parents and carers, with regard to matters touching directly on the S School's responsibilities. It represents them in matters relating to the content of their education. I would accept, also, that it is responsible to parents, carers and pupils for maintaining access to the S School.

140.
However, I do not accept that the S School represents its pupils, parents and carers with regard to journey times to and from their homes to the School. The S School has no responsibility to parents to keep the roads open, and the journey to school short and swift. As we know from AD's evidence, most of the increase in SDJ's journey time is the result of a road closure near his home which has nothing to do with S School. It is not surprising that Mr Lebrett's concern at the meeting on 14 September 2020 was focussed on access to the S School.

141.
Based on that reasoning, I do not accept that it would have been irrational to exclude the S School from the list of regulation 6 bodies it was thought "appropriate to consult". The Interlink Foundation was a more natural candidate, since it represents members of the Orthodox Jewish community living in the area and likely to be affected by the ETOs. In any case, Hackney did hold a video discussion with S School staff.

142.
For all those reasons, the second ground of challenge must fail and I dismiss it.

Third ground of challenge: ECHR article 8, or article 8 read with article 14

143.
The applicants submitted that the ETOs interfered with their right to respect for their private and family life; that the interference was not in accordance with the law (because of the illegality under the first and second grounds of challenge, which I should uphold); and that the interference was not proportionate as it failed to strike a fair balance between the applicants' rights and the wider public interest. The detriment to the applicants outweighed any benefit to others.

144.
The standard of justification, the applicants said, was exacting because the interference involved what they called "engagement of the 'suspect' ground of disability" which "indicated a need for 'very weighty reasons'". The citation was of passages in Lord Reed PSC's judgment (dealing with article 14 discrimination rather than a stand alone article 8 claim): R (SC) v. Secretary of State for Work and Pensions [2021] 3 WLR 428, at [136], [142] and [158].

145.
The applicants argued that the interference could not be rendered proportionate by the possibility of exemptions from the prohibitions in the ETOs for certain types of vehicle traffic. The exemptions favoured local authority school transport but were not available for private cars such as those in which the applicants are driven to S School. The review of equalities considerations in September 2021 showed an unwillingness to widen the exemption criteria.

146.
Turning to article 14 of the ECHR, the applicants submit that they enjoy "other status" by reason of their disability; and that the ostensibly neutral ETOs had a disproportionate adverse impact on them because they were "more likely" to suffer distress and anxiety through increased journey times. I take that to mean that they are more likely to suffer that adverse impact than those not disabled or whose disability does not make them unusually vulnerable during car journeys.

147.

The applicants went on to submit that this indirect discrimination engaged article 14, read with article 8, and could not be justified for the same reasons as submitted under the heading of the stand alone article 8 claim: “[t]he potential benefits of an experimental traffic scheme do not outweigh the real and tangible detriment caused by the scheme to a highly disadvantaged sub-group of children”.

148.
In the present context, said the applicants, the court should consider, in its assessment of proportionality, events subsequent to the two ETOs. The “no hindsight” principle discussed in R(A) v Chief Constable of Kent [2013] EWCA Civ 1706 (in Beatson LJ’s review of the authorities at [67]-[92]) does not apply to facts the decision maker ought to have known; nor should it be applied where the only available remedy is a quashing order and remission back is not possible; cf. R (BAA) v Secretary of State for the Home Department [2021] 4 WLR 124, per Sir Stephen Irwin at [44]-[46].

149.
Hackney submitted, first, that while restricting the choice of route to S School is in principle capable of interfering with the article 8 rights of affected children, here there had on the facts been no material interference; the evidence on the issue of increased journey times did not establish a significant increase caused by the two ETOs. Alternatively, Hackney submitted that any interference was in accordance with the law and justified under paragraph 2 of article 8.

150.
The ETOs, Hackney emphasised, were “measures of economic or social strategy (i.e. the expeditious movement of traffic on its road network)”, commanding the court’s respect for Hackney’s policy making unless it is “manifestly without reasonable foundation” (R (SG) v. Secretary of State for Work and Pensions [2015] 1 WLR 1449, per Lord Reed JSC (as he then was) at [11]). Applying that standard, the ETOs comfortably pass the test of proportionality for many reasons.

151.
They are experimental and subject to monitoring and review; there is an objection process and a statutory right of challenge; they are consistent with Hackney’s own (pre-Covid) policy and with central government guidance and TfL’s advice; they aim to reduce air pollution and to promote improved safety, healthier modes of travel and improved accessibility; they benefit other road users; the Harrington Hill ETO is limited to the times of day in term time when school drop offs and pick ups occur; and exemptions are possible.

152.
As for the claim founded on article 14 of the ECHR, read with article 8, Hackney accepted that a traffic order having a significant impact on journey times is within the ambit of article 8 and that the applicants’ disability is “other status” within article 14. But, Hackney submitted, the applicants had not offered any comparator and thus had failed to address the requirement that they and the differently treated comparator group must be in “analogous situations”.

153.
Hackney suggested the court should concentrate on objective justification, adopting the approach of Lady Black JSC in R (Stott) v. Secretary of State for Justice [2020] AC 51, at [8]. The question was whether the difference of treatment complained of can withstand scrutiny, to which the answer is plainly yes because the ETOs are proportionate. The measures themselves, not their impact, are what must be justified, as in R (Salvato) v. Secretary of State for Work and Pensions [2021] EWCA Civ 1482 (per Andrews LJ at [94]).

154.
As for evidence of events subsequent to the making of the orders challenged, Hackney submitted that apart from any facts which it ought to have known when it made the ETOs (and there were none, it submitted), “it must be wrong in principle to condemn an earlier decision in relation to the rights in question, whether a matter of a decision as to proportionality or otherwise” (per Beatson LJ in R (A) v. Chief Constable of Kent Constabulary (cited above) at [77]).

155.
There was no continuing duty in relation to the traffic orders. Such an order can only be quashed if it is not within the relevant powers or taken in breach of the relevant requirements; and, in the latter case, only if the challenger has been “substantially prejudiced by the failure to comply with the relevant requirements” (paragraph 36(1)(b) of Schedule 9 to the ROTRA). The relevant requirements means “any requirement of, or of any instrument made under, any provision of this Act with respect to such an order” (paragraph 34(2)(b)).

156.
Hackney submits that post-decision evidence is not relevant to those grounds of review and the court should only take account of facts that ought to have been known to Hackney at the time the decisions were made. However, it also relied on Mr Cunningham’s evidence of post-decision events, not because its case on proportionality depended on that evidence but “to demonstrate that [Hackney] is doing what it said it would do”, i.e. monitor the ETOs and consider the equalities impacts, among other things.

157.
Alternatively, Hackney submitted that if the post-decision evidence should be taken into account, contrary to its primary position, Mr Cunningham’s evidence of post-decision monitoring of the impact, engagement with the S School and consideration of the equalities impacts, helps to support its case that the ETOs were and are proportionate and not in breach of the applicants’ rights under article 14 of the ECHR.

158.
I come to my reasoning and conclusions on the third and final ground of challenge. On the issue of whether post-decision evidence should be taken into account, the authorities do not clearly speak with one voice. There is a tension between the proposition that (i) a proportionality review is not the same as the court’s decision on the merits; and, on the other hand, the proposition that (ii) the court is required to make its own assessment of proportionality.

159.
Post-decision evidence is, in principle, relevant if the latter proposition predominates. If the former proposition is given most weight, post-decision evidence is not relevant unless it is of facts that the decision maker ought to have known before making the decision. I would add that (as has been decided in other contexts) post-decision evidence is in principle relevant as a cross-check against the reasonableness of a forward looking estimate of what the impact of the measure in question is likely to be.

160.
The particular legal context is also relevant. The question of substantial prejudice to the applicants (which would need to be assessed as at the trial date) is not at the forefront here. This challenge is, for the most part, not based on a breach of the “relevant requirements” but on the ETOs being outside the “relevant powers”.

161.
I accept Hackney's submission that there is no continuing duty in relation to the ETOs and that it would be wrong to quash them merely because their impact turned out to be unforeseeably different from what was expected. That is a matter to be considered in the course of the experiment and through the objection process.

162.
My conclusion on post-decision evidence is that I am willing to take it into account only to the extent of considering (i) facts that ought to have been known to Hackney before making its decision, and (ii) facts that are relevant as a cross-check against the reasonableness of Hackney's forward looking assessment of what the impact of the ETOs was likely to be.

163.
There is no difficulty about the legal approach to a stand alone article 8 claim. There must be a material interference with the exercise of the applicants' right. If there is, to be lawful the interference must be in accordance with the law and must be proportionate if it is to pass the test of being "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".

164.
The second of those three requirements – that the interference must be in accordance with the law – I have already decided in favour of Hackney. The applicants rely only in this regard on non-legality by reason of the first and second grounds of challenge, which I have already rejected. The battleground is therefore whether there was on the facts a material interference with the applicants' article 8 rights; and if so, whether the interference was proportionate. I will return to proportionality after considering the article 14 claim, where the issue arises in the context of the justification defence.

165.
As for material interference, I am unwilling to accept Hackney's contention that the impact on journey times is not significant. It is difficult to assess exactly the extent of the increase because the applicants' evidence of journey time increases is indeed sparse. But I think the interference is material. The applicants (and, I infer, other similarly affected S School pupils) are vulnerable and much upset even by relatively minor disruption to their journey which to others would be only a minor irritant.

166.
I come to the justification defence. The domestic case law on justification in cases of indirect discrimination under article 14 of the ECHR is now crowded and complex; in particular, concerning the shifting status of the "manifestly without reasonable foundation test" and the sliding scale of intensity of review depending on the nature of the measure that has to be justified and the type of discriminatory effect it has.

167.
I need not review the authorities because the Court of Appeal has recently produced a useful survey in R. (The Motherhood Plan) v. HM Treasury [2021] EWCA Civ 1703, in the judgment of Underhill and Baker LJJ at [99]-[102]. At [99], they cited Lady Hale JSC's judgment in R. (SG) v Secretary of State for Work and Pensions) [2015] 1 WLR 1449 at [189], explaining that where a neutrally worded measure adversely impacts on a protected group such as women, "it is the measure itself that has to be justified, rather than the fact that women are disproportionately affected by it".

168.
This seems to be the origin of the statement to the same effect of Andrews LJ in R (Salvato) v. Secretary of State for Work and Pensions [2021] EWCA 1482, at [94]. I accept that (though counsel were too polite to say so) this is contrary to what I said at [98] in R (MD and EH) v. Secretary of State for the Home Department [2021] EWHC 1370 (Admin) where a measure made in error had unintended consequences (though whether it would make any difference to focus on the measure itself rather than its consequences is another matter).

169.
In other indirect discrimination cases under article 14 the court has sometimes focussed on a "difference of treatment" resulting from a challenged measure. As Underhill and Baker LJJ pointed out in Motherhood Plan at [101], the fact that it is the measure that must be justified "does not mean that the disproportionate impact is irrelevant: justification involves weighing the importance of the measure against its discriminatory impact."

170.
Lady Hale JSC in In re McLaughlin [2018 1 WLR 4250 at [15] set out a four stage test of which the second, third and fourth stages all ask a question relating to a "difference of treatment" or "difference in treatment". And in R. (Stott) v Secretary of State for Justice [2020] AC 51 at [8], Lady Black JSC emphasised the interplay between the third and fourth questions:

"In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173. He observed that once the first two elements are satisfied:

'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

171.
In applying the tests expressed in these various ways, I must always bear in mind that in undertaking my assessment with the appropriate level of intensity of review, the court must do what is just and respects the boundary between rule of law and separation of powers (per Lord Reed PSC (as he had by then become) in the SC case at [146]). I must apply the principle of proportionality in a manner which "respects the boundaries between legality and the political process" (ibid. at [162]).

172.
Returning to the facts, the measure at issue here has some differential impact on the sub-group of disabled children comprising the applicants and other disabled pupils at S School adversely affected

by increased journey times. That is a form of discrimination on the ground of disability which is a "suspect" ground generally requiring "very weighty reasons" to justify a "difference in treatment" (cf. Lord Reed's analysis of the Strasbourg jurisprudence on the point in SC at [101]-[116]).

173.
On the other hand, the measure is, as Hackney rightly submits, a general measure of social strategy, historically attracting a wide margin of appreciation for the decision maker, in that body of Strasbourg cases, corresponding to the "manifestly without reasonable foundation" standard. Lord Lloyd Jones JSC pointed out in R (A) v. Criminal Injuries Compensation Authority [2021] 1 WLR 3746 at [81] that Lord Reed's detailed analysis in SC shows that:

"the ECtHR employs a flexible approach when deciding what standard is to be applied when considering justification … unless one factor is of overriding significance, it is necessary for the court to make a balanced overall assessment."

174.
In the present case, finding no one factor of overriding significance and attempting an "overall balanced assessment", I find the ETOs justified, for the following brief reasons.

175.
First, the degree of adverse impact by reason of disability is limited. It affects not disabled people generally or a high proportion of them (as would, for example, a lack of disabled access to a prominent public building). It affects a small sub-group of disabled children suffering from a particular kind of disability which is such that the measure affects them adversely. Further, the adverse effect of the ETOs on that sub-group comes about not directly but by the indirect route of increasing the journey time to and from the S School.

176.
The remaining reasons for finding the ETOs justified are those relied on by Hackney: they are experimental, subject to monitoring and review, there is an objection process and a right of challenge; they are consistent with Hackney's policy and with central government guidance and TfL's advice; they target air pollution and improved safety by inhibiting rat running; they support healthier travel and improved accessibility; they benefit others; the Harrington Hill ETO is limited to school hours in term time; and exemptions are possible.

177.
By the same reasoning, I reject the applicants' submission that "[t]he potential benefits of an experimental traffic scheme do not outweigh the real and tangible detriment caused by the scheme to a highly disadvantaged sub-group of children". However, I hope that an exemption will be explored, if not for individual private vehicles, for vehicles carrying several children and identified by registration number, to be considered on a case by case basis. Hackney has already expressed willingness to consider this.

178.
I do not find any further facts emerging in the post-decision evidence which Hackney ought to have known about before it took the decision to make the two ETOs which point to a contrary conclusion; nor anything that casts doubt, as a cross-check, on Hackney's estimate in September 2020 of the likely impacts of the ETOs. Judging Hackney's actions up to and the time they were made on 25 September 2020, I find the two ETOs to be justified despite the regrettable but limited adverse impact they have had and continue to have on the applicants.

179.
Although I have much sympathy for the applicants and other affected children at S School, I reach my conclusion without doubt or hesitation. It is striking that if the ETOs were quashed, not just the applicants but others without special needs or any disability and having nothing to do with S School would once again be able to make rat runs through the back streets south of Mount Pleasant Lane and to drive through the barrier at the northern end of it.

180.
That would dilute and, indeed, partially defeat the impact of the ETOs and reduce the benefits they are expected to deliver; a consequence that would have to be endured if the ETOs were not lawfully made; but, as I have decided they were lawfully made, one that need not ensue.

181.
For those reasons, I dismiss the third ground of challenge and, since the first and second grounds have also failed, I dismiss the claim.