Neutral Citation Number: [2026] EWHC 1479 (KB)

Case No: KA-2025-000074

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT
CENTRAL LONDON CLAIM NO. L00CL806 (HHJ BLOOM)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 June 2026

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MR PATRICK ASIIMWE **Appellant**

- and -

Respondent

THE LONDON BOROUGH OF LAMBETH

- -
- -

Nick Bano (instructed by **Southwark Law Centre**) for the **Appellant**
Lindsay Johnson (instructed by **The London Borough of Lambeth**) for the **Respondent**

Hearing date: 13 May 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Heather Williams:

Introduction

1. This is an appeal from the order of HHJ Bloom ("the Judge") sitting in the County Court at Central London, dated 17 April 2025. The Judge dismissed the Claimant's claim following the trial on 7 April 2025. Permission to appeal was granted by Coppel J on 20 February 2026 at an oral renewal hearing. I will refer to the parties as they were known below.

2. The claim began life as an application for judicial review in which it was alleged that the Defendant was in breach of the statutory duties it owed to the Claimant as a homeless person under the Housing Act 1996 ("HA 1996"). The Claimant made a homelessness application to the Defendant on 21 October 2021, but although Lambeth acknowledged it owed him the interim housing duty, he was not provided with temporary accommodation until 24 January 2022. The Defendant had assessed the Claimant as requiring accommodation within the borough of Lambeth or within a 30 minute public transport commute of St Thomas' Hospital, where he was receiving treatment. The temporary accommodation he was offered was in North Finchley and did not meet these criteria. In February 2022, the Defendant accepted that the Claimant was owed the main housing duty, however he remained in the North Finchley accommodation until the Defendant offered him suitable social housing within the borough of Lambeth on 7 September 2023 (after permission to apply for judicial review had been granted).

3. The Claimant is a disabled person within the meaning of the Equality Act 2010 ("EqA 2010"). His application for judicial review included a claim that in the exercise of its public functions, the Defendant had failed to comply with a duty to make reasonable adjustments pursuant to sections 20 and 21 EqA 2010. The remainder of the judicial review claim was withdrawn after the Claimant was provided with the secure tenancy in Lambeth and the reasonable adjustments private law damages claim was transferred to the Central London County Court.

4. The reasonable adjustments claim was formulated as follows. The Claimant relied upon a provision criterion or practice ("PCP") that Lambeth placed a considerable proportion of its homelessness applicants in out-of-borough temporary accommodation. It was said that this put people with disabilities at a substantial disadvantage because they are more likely to have location specific needs in respect of care, social support and medical treatment. The Claimant identified the following adjustments as reasonable steps the Defendant should have taken to avoid this disadvantage:

    i) Placing people with disability-related needs in the areas in which those needs can be met ("the first adjustment");

    ii) Where that is not possible, taking very active steps to move people with disabilities into accommodation that is suitable, in terms of location, within a very short timeframe ("the second adjustment");

    iii) Investigating whether to use the council's social housing stock under Part 6 of the HA 1996 ("the third adjustment"); and/or

iv) Commissioning additional *ad hoc* accommodation to meet disability-related needs ("the fourth adjustment").

5. Broadly speaking, the Judge accepted the Claimant's case as to the PCP that was applied and his case on the "substantial disadvantage" issue (see paras 20 - 22 below). However, she found that the proposed adjustments had either been undertaken by the Defendant or were not reasonable steps for it to take. As to the former, she distinguished between what she found to be the reasonable systemic steps the Defendant had undertaken and ad hoc failures that had occurred in the Claimant's case, finding that these individualised failings did not give rise to a breach of the duty to make reasonable adjustments.

6. As anticipated by Coppel J's grant of permission to appeal, the Claimant's Grounds of Appeal were amended to add what is now Ground One. The Amended Grounds contend as follows:

i) The Judge erred in respect of section 21(2) EqA 2010. The Defendant's failure to make reasonable adjustments in relation to the Claimant's individual case amounted to a contravention of section 20 of the Act and the Court below was wrong to hold the Defendant had complied with the section 20 duty on the basis that the failures in his case had been an "individual ad hoc matter" ("Ground One");

ii) Further or alternatively, the Court failed to apply the reverse burden of proof provision in section 136(2)-(3) EqA 2010, in concluding that the Defendant's failures in the present case were a "one-off" and consequently, that the Defendant had not discriminated against the Claimant contrary to sections 20 and 21 EqA 2010 ("Ground Two").

The material circumstances

7. The chronology of the events involving the Claimant was largely agreed between the parties.

The claimant's housing

8. In January 2018, the Claimant suffered a serious acquired brain injury following a stroke. He was in Rwanda at the time. The stroke led to him having memory impairment, sight loss and mobility difficulties. On his return to the UK some months after the stroke, he found he had been evicted from his flat. He moved into accommodation that was shared with his ex-wife, his adult child and his ex-wife's new partner, in what were very cramped conditions. He attended a rehabilitation unit connected to St Thomas' Hospital.

9. In April 2019, he approached the Defendant and was placed in Band B medical priority on the waiting list for housing. He continued to live with his ex-wife and in October 2021, he applied to the Defendant as a homeless person. On 22 October 2021, the Defendant accepted that it owed the Claimant the duty under section 188(1) HA 1996 to provide interim accommodation in case of apparent priority need. The statutory duty requires the provision of "suitable" accommodation for the applicant and their household. In an undated assessment of his housing needs, sent to the Claimant on 21

November 2021, Lambeth accepted that he needed two-bedroomed accommodation in Lambeth or within a 30 minute public transport commute of St Thomas' Hospital, where he had his treatment. The Defendant's assessment also recognised that the Claimant needed support because of his physical and mental health needs.

10. In November 2021, Lambeth considered placing the Claimant in temporary accommodation in Croydon, but the Defendant's Temporary Accommodation Placements Officer said he needed to be in Lambeth. No temporary accommodation was in fact provided for the first three months and, accordingly, the Claimant made a formal complaint to the Defendant about the failure to house him. His complaint was upheld and it was accepted that the Defendant had breached its statutory duty in failing to provide him with temporary accommodation, having accepted the duty to do so in October 2021.

11. On 21 January 2022, the Defendant provided the Claimant with temporary accommodation in North Finchley. This was not within the Borough of Lambeth nor within a 30 minute commute of St Thomas' Hospital. The offer letter was not included in the bundle of documents before me, but the Judge referred to the letter as stating that Lambeth "may take into account the interim nature of the accommodation when assessing whether it was suitable, as accommodation may be suitable for a few days or weeks that would not be suitable for a longer-term placement" (para 8). It was intended that the Claimant's adult daughter would live with him at this accommodation as his carer.

12. On 14 February 2022, the Defendant accepted that it owed the Claimant the full housing duty pursuant to section 193 HA 1996, as he was found to be in priority need and not homeless intentionally. Fulfilment of this duty also requires the provision of "suitable" accommodation for the applicant and their household. However, the Defendant did not offer the Claimant any alternative accommodation at that stage and he remained in the North Finchley flat. Accordingly, on 29 November 2022, the Claimant wrote to the Defendant asking that they re-assess the suitability of the North Finchley accommodation. The Defendant did not undertake this assessment until 21 June 2023, when it was found that the Finchley accommodation was unsuitable because of the Claimant's acknowledged need to be in the Lambeth area.

13. As there had been no substantive response to the request to re-assess suitability by March 2023, the Claimant's solicitors sent a pre-action protocol letter. This did not elicit a response and the application for judicial review was issued in June 2023. This appears to have prompted the June 2023 suitability assessment that I have just referred to.

14. Permission to apply for judicial review was granted on all grounds on 31 August 2023. As I have already noted, the Defendant made the Claimant an offer of suitable social housing within the borough on 7 September 2023, which he accepted. The parties then reached agreement upon the Claimant withdrawing his claim for judicial review, save that Ground Two, the alleged failure to make reasonable adjustments, was transferred to the Central London County Court.

The proceedings below

15. By subsequent order of HHJ Monty KC, the Statement of Facts and Grounds ("SFG"), insofar as it related to Ground Two, was to stand as the Particulars of Claim. The Defendant filed a Defence on 10 December 2024.

16. At the trial, the Judge sat with an Assessor experienced in discrimination claims, Mr David Kendall. Evidence was given by Claimant and by Mr Ode Ogwu, the Defendant's Temporary Accommodation Team Manager.

The Housing Placements Policy

17. In defending the claim, the Defendant relied upon its "Housing Placements Policy", ("HPP") which addresses the allocation of temporary accommodation under the homelessness provisions of the HA 1996. The document says it is to guide officers in making placements in temporary accommodation (para 2.2). However, the contents are guidelines only and the individual circumstances of each case, including the time likely to be spent in the accommodation, must always be taken into account when determining the suitability of an offer of temporary accommodation (para 3.5). The HPP states the Defendant is committed to securing suitable temporary accommodation within Lambeth whenever possible, but this is not always achievable (para 3.1). All placements are subject to a suitability assessment to determine the type and location of temporary accommodation that should be offered (para 3.6).

18. The HPP then sets out various categories of prioritisation. Group A identifies those households that will be prioritised for accommodation in Lambeth. It includes:

> "Households with significant disabilities or medical needs, including mental health, where their health or welfare may be significantly adversely affected by moving out of the borough, as assessed by the Council's Housing Medical Adviser. For example, this may include the following:
>
> - The applicant needs to live in a particular locality to give or receive care.
>
> - The applicant is in receipt of a significant care package or receiving specialised healthcare that cannot be transferred elsewhere.
>
> - The applicant has a severe and enduring mental health problem where a transfer of care would severely impact on the ability to engage with treatment."

The judgment below

19. After summarising the factual background, the Judge set out the relevant statutory provisions, passages from the Equality and Human Rights Commission's ("EHRC") Statutory Code of Practice "*Services, Public Functions and Associations*" ("the Code") and citations from the judgments in *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, [2014] 1 WLR 445 ("*Finnigan*") and *R (Rowley) v Minister*

for the Cabinet Office [2021] EWHC 2108 (Admin), [2022] 1 WLR 1179 ("*Rowley*"). I address this material under the "Legal Framework" section below.

The PCP

20. The Judge recorded that the Defendant had conceded that 70% of applicants who are owed the interim housing duty go into temporary accommodation outside the borough. She considered this was evidence of a practice which could fall within the EqA 2010 definition of a PCP (para 23). She described the PCP as "a practice of accommodating those who have been assessed under the Housing Act as in need of temporary accommodation outside the borough" (para 25). The Defendant did not contest the PCP issue at the trial.

Substantial disadvantage

21. The Judge then turned to the question of "substantial disadvantage" which was, at that stage, in dispute. She held that the appropriate class to consider was disabled persons who required carers in the broad sense (para 40). She identified the question for her as whether the Claimant had proved that without the provision of in-borough accommodation, disabled persons with carers would be at a more than trivial or minor disadvantage as compared to those who are not disabled regarding the provision of temporary accommodation to the homeless (para 41). She answered this question in the affirmative. If housed outside of the borough, the disabled person would be either separated from their caregivers or their caregivers may not be able to manage caring for them and continuing with their jobs. Accordingly, there was a very serious risk that the care support would fail, with serious consequences for the disabled person (para 48). The Judge considered it was plain that this was a "substantial" disadvantage (para 49).

22. There is no cross appeal against the Judge's findings on the "substantial disadvantage" issue. Accordingly, the Defendant accepts the Judge was correct to find that it was subject to the section 20(3) EqA 2010 duty to take such steps as it was reasonable for it to have to take in order to avoid the substantial disadvantage she had identified.

Whether the Defendant breached the duty to make reasonable adjustments

23. The Judge then turned to the question of whether this duty had been breached. She agreed with the Defendant that the Claimant had to rely on the pleaded adjustments, rather than any wider case advanced during the trial (paras 50 and 53). In this regard, she referred to para 33 of Fordham J's judgment in *Rowley* (para 71 below) and to the fact that it was for the claimant to raise adjustments and then "it is up to the Defendant to establish or prove that they have made the necessary adjustment, provided they are reasonable" (para 50). The Judge also cited para 29 of *Rowley* (para 70 below). She said, "one then has to look at what are the adjustments the claimant seeks and consider whether they are reasonable and whether the defendant has been able to demonstrate that they are not" (para 52). The Judge noted at para 53 that it was essential for a defendant to know what adjustments were relied upon by a claimant, as the burden then shifted to the defendant, who could only provide evidence if it knew what adjustments were being raised.

24. Rightly, there is no ground of appeal against the Judge's decision to focus on the Claimant's pleaded case.

25. The Judge then considered the four alleged reasonable adjustments which had been identified in the Claimant's SFG (para 4 above). She summarised the parties' submissions between paras 54 – 59.

26. In relation to the second adjustment, she noted Mr Bano contended that no active monitoring had taken place in the Claimant's case, which, in turn, showed there was no system in place for doing so, in circumstances where he had been assessed as requiring in-borough accommodation but had been placed out of the borough. There had been no response to the request for a review of the suitability of the accommodation and the Defendant was not aware that his daughter had left the accommodation. Mr Bano argued that all this would have been found out if there had been a proper structure and monitoring (para 55). It is apparent from the Judge's summary, that the Defendant countered this by referring to its transfer list for those who are not in suitable accommodation, which was monitored and the fact people could seek reviews and/or contact customer services. People were accorded different priority bands (para 56). The Judge then noted that "it was accepted that within the context of this particular claimant, things did not go according to the system or plan", but the Defendant's position was that this was an individual failure, rather than a structural problem. In a similar vein, she said Mr Ogwu had recognised that some things had gone wrong in the Claimant's case but "that was an ad hoc failure, not a systemic failure".

27. The Judge set out her conclusions on the question of whether the Defendant was in breach of the duty to make reasonable adjustments between paras 60 – 74. In light of the arguments before me, it is necessary to set this out fairly fully. She began with the following over-arching observations:

> "60. I remind myself that in this context, what I am considering is not what went wrong for this particular claimant personally, but the structural issues and whether the defendant has anticipated the disadvantage and made reasonable adjustments. As was said by Fordham J in *Rowley*, it is about 'planning in advance' and 'reviewing the reasonable adjustments in place'. It is about giving some latitude to the service provider. One is looking to see whether the defendant has made available the alternative facilities on which it relies, so that the duty was discharged by the provision of reasonable alternative methods.
>
> 61. Also...I have to bear in mind what is said in the Code about effectiveness, practicality, cost, disruption and resources and consider what is the reasonable approach and the reasonable steps for the Local Authority to take."

28. In relation to the first adjustment, the Judge concluded that, given the limited housing available within the borough, the Defendant could not provide temporary accommodation for all disabled people with caring needs within this area. She considered that the HPP was a reasonable approach for the Defendant to take in the circumstances. She expressed her conclusions as follows:

> "62....it is acknowledged by the defendant that this was reasonable, and, indeed, of course, it is a statutory requirement that not only disabled people, but all people have to be accommodated by the Local

> Authority. However, certainly if it has been decided that what is suitable accommodation is in-borough, there is a reasonable requirement to do that where those care needs cannot be met out-of-borough...there is no evidence to suggest that the defendant did not recognise that.
>
> 63. However, I accepted the defendant's evidence that they have taken reasonable steps to seek to place people who need to be in-borough, in-borough. They have a placement policy where they prioritise disabled persons with care needs to ensure that they get priority to be accommodated within the borough. I do not agree with Mr Bano that this is ad hoc; it is plainly not. It is an anticipatory general policy. It is planned to assist those who have a disability and to remove barriers so that those people get in-borough accommodation by giving that class an enhanced status within the policy that applies for accommodating applicants...it is not reasonable or practical for them to accommodate every disabled person with caring needs in-borough. However, they have a policy that recognises that people with caring needs face a disadvantage and they have taken practical steps, in my assessment, to try and overcome that. However, it is not practical or possible to ensure or guarantee in-borough accommodation in every single case.
>
> 64. There is clear evidence as well that the defendant recognises that this is a policy that had to be reviewed...it was Mr Ogwu who told me that it is reviewed every couple of years..."

29. In relation to the second adjustment, the Judge said:

> "65....This is an extremely wide-ranging proposition, and it is arguable that, as framed, it is not a reasonable step. What the defendant admitted in its defence was that active steps should be taken to maintain dynamic movement for all the homeless. However, as regards this particular class of disabled persons with carers, what actual steps are reasonable? Is it suggested that there should be some sort of monthly monitoring or quarterly monitoring? It is all extremely vague and the proposals by the claimant are wide ranging.
>
> 66. In any event, what I was told by Mr Ogwu is that there is a transfer list on which the Local Authority place those in temporary accommodation whose accommodation is only suitable for a very short period of time or where they become aware that the accommodation has become unsuitable, and they get priority...This is outside the housing register, and it is monitored by the Local Authority. In addition to that, Mr Ogwu told me there are both formal and informal methods of review and complaint that can lead to suitability being reconsidered. It is correct, on the facts of this case, that they were not effective and were ignored. However, that shows on an ad hoc basis there was a failure, but that cannot lead to a

conclusion there is a systemic failure to consider suitability review requests.

67. Confusion has arisen in this case, in my view, between the fact that no active steps were taken for this claimant as indicative of proving somehow that there were no active steps existing at all. We know that there is a complaints procedure that exists, and we know, in this case, the fact that when he complained about not being housed in TA, very quickly, this gentleman's stage-two complaint was acknowledged and he was placed in temporary accommodation.

68. If one considers the number of people in temporary accommodation, which Mr Ogwu said was rising to about 5,000 people at the moment, it is impossible to say that one can monitor them all. I do not know the number of those who have a disability and care needs, but one can see that Group A is a very wide group, and that there would be a need to monitor numerous people in temporary accommodation to see who had care needs and who would require to be in-borough. There has to be a system as to who gets priority, and the system that the Local Authority have adopted is the transfer list, where they monitor those who they consider are most in need of moving urgently, and they have a special list for that. That seems to me a reasonable step. The transfer list is for the most urgent cases. It is a system which prioritises within the class of disabled people with care needs.

69. In addition, there are other steps. One has the fact that the applicant can contact the defendant and have suitability assessments or make complaints, and the Defendant also has bandings and groups. It would be, in my view, taking into account all the costs and practicalities and resources, unduly onerous and financially unviable to say that every disabled person with care needs who is accommodated outside Lambeth Borough, even if they were on the borders of Lambeth and Wandsworth had to be monitored proactively by the defendant. What is reasonable is to ensure that there are systems in place to enable challenges to the suitability of complaints and to monitor those most urgent cases by putting them on the transfer list. It is, of course, not perfect, but it is reasonable in the context of a hard-placed Local Authority with limited housing and where demand grossly exceeds supply and where there are serious financial restraints.

70. To some extent, the Local Authority have to rely on applicants bringing to their attention that accommodation is no longer suitable, or care arrangements may have broken down, or whatever is the issue which has rendered their accommodation unsuitable. It is not reasonable to expect the Local Authority to monitor each and every such disabled person and actively take steps to move every disabled person with caring needs if not in-borough. They have to prioritise those where it has been brought to their attention or they know that

> there is an element of unsuitability that is urgent. What they do is they prioritise those where a suitability assessment has occurred and the accommodation is not suitable, or those where they know that when they put them in the accommodation, they know it is not suitable, save for a very short space of time. They do that with their transfer list. Otherwise, it seems to me it is reasonable to expect the applicant to notify them if the property has become unsuitable, even if that is in the short term.
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> 71. It is notable in this case that the systems did work in the sense that once the Local Authority carried out a suitability assessment and reassessed this property as unsuitable, the applicant was quickly rehoused in-borough in accommodation that was suitable. Accordingly, the system does enable in-borough placements and reviews the suitability. System-wise, there are reasonable steps which will lead to an individual being accommodated in-borough. On an individual basis, regrettably, in this case, when the suitability assessment was sought, it did not happen. However, that is an individual, ad hoc matter. It is not about the systemic system."

30. I will refer to the third and fourth adjustments more briefly, since, as Mr Bano accepted, the focus of the appeal was on the first and second adjustments.

31. The Judge found that the third adjustment was not a reasonable step for the Defendant to take when someone first comes into temporary accommodation and they cannot be accommodated in the borough. If that were the case, the Defendant's stock of Part 6 housing accommodation would all be used up as temporary accommodation and this would defeat the purpose of Part 6 accommodation. The reality was that the Defendant would use Part 6 accommodation when it was reasonable to do so, as had been done when the Claimant was granted a secure tenancy in Lambeth (para 72).

32. The Judge found that the fourth adjustment was a challenge to the Defendant's approach to procurement which, if advanced, would need to be the subject of judicial review proceedings. Furthermore, whilst it might sometimes be necessary to purchase accommodation because the authority is responsible for a disabled person whose needs cannot be met in any other way, this was not a reasonable step that a local authority would be expected to take on a structural basis (para 73).

33. Accordingly, in light of these findings, the Judge concluded that the Defendant had taken reasonable steps to deal with the substantial disadvantage that she had identified and thus the claim failed (para 74).

The legal framework

The statutory provisions

34. Section 29(7) EqA 2010 provides that a duty to make reasonable adjustments applies to a service provider and to a person who exercises a public function that is not the provision of a service to the public or a section of the public. It is accepted that the exercise of the Defendant's statutory duties under Part 7 of the HA 1996 are "public functions" for these purposes.

35. The nature of the duty to make reasonable adjustments is identified in section 20 EqA 2010. It is important to appreciate that this provision is common to all situations where the Act imposes a duty to make reasonable adjustments, including, but not limited, to section 29(7). The way the duty applies in the various fields, which include work, education, premises and services and public functions, is then addressed in the respective applicable Schedules to the Act.

36. Section 20(1) provides that where the Act imposes a duty to make reasonable adjustments on a person (A), sections 20 – 22 and the applicable Schedule applies. The duty comprises three requirements. I am only concerned with the first requirement, which is set out in subsection (3) as follows:

> "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

37. Section 20(13) identifies the applicable Schedules. In relation to the provision of services and public functions covered by Part 3 of the Act, it is Schedule 2.

38. Section 21 EqA 2010 provides:

> "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

39. Schedule 2, para 1 says this Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part.

40. Schedule 2, para 2(1) states that A must comply with the first, second and third requirements. Importantly, para 2(2) provides:

> "For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally."

(Section 20(4) and (5) identify the second and third requirements, which, as I have explained, do not arise in this case.)

41. The effect of para 2(2) in respect of section 20(3), is that the first requirement arises where a PCP of A's "puts disabled persons generally at a substantial disadvantage in

relation to a relevant matter"; in turn, the duty is to take such steps as is reasonable to have to take "to avoid the disadvantage".

42. Schedule 2, para 2(4) explains that "the relevant matter" for these purposes is the "provision of the service, or the exercise of the function, by A".

43. Schedule 2, para 2(5) provides that being placed at a "substantial disadvantage" in relation to the exercise of a function means: (i) if a benefit may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit; and (ii) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to that detriment.

44. Section 136 EqA 2010 provides for the reversal of the burden of proof. For present purposes, the material provisions are:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

45. Section 15(4) Equality Act 2006 states that a failure to comply with the provision of a statutory code issued by the EHRC shall not of itself make a person liable to criminal or civil proceedings, but the Code shall be admissible in evidence in criminal or civil proceedings and "shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant".

The caselaw

46. As Elias LJ explained in *MM v Secretary of State for Work and Pensions* [2013] EWCA Civ 1565, [2014] 1 WLR 1716 ("*MM*") at para 35:

> "The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life. This requires not merely outlawing discrimination against the disabled; it also needs those who make decisions affecting the disabled to take positive steps to remove or ameliorate, so far as is reasonable, the difficulties which place them at a disadvantage compared with the able bodied."

47. *Roads v Central Trains Limited* [2004] EWCA Civ 1541 ("*Roads*") was decided under the earlier provisions of the Disability Discrimination Act 1995 ("DDA 1995"). It is necessary to consider this case in some detail, as Mr Bano placed particular reliance upon it in his oral submissions. The leading judgment was given by Sedley LJ (Jacob and Buxton LJJ agreeing).

48. In *Roads*, the key statutory provision was section 21(2) DDA 1995, which provided that where a physical feature "makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable" for them to have to take to remove or alter the feature or provide a reasonable means of avoiding it. Accordingly, in that instance, as well as in the present case, the question of whether the duty to make adjustments arose, depended upon the impact on "disabled persons" rather than simply the individual claimant. Giving the leading judgment, Sedley LJ explained the operation of this provision as follows:

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

49. Mr Bano places particular significance upon para 12 of *Roads* and I consider this when addressing the submissions on Ground One.

50. Sedley LJ also explained that in order to trigger the section 21(2) duty, it was not necessary for the feature in question to cause unreasonable difficulty for all or most disabled persons; "any significant impact on, say, wheelchair users as a class will in my judgment suffice" (para 26).

51. The claimant in *Roads* was a disabled wheelchair user who had difficulty in gaining access to platform 1 (the eastbound Norwich line) at Thetford Railway station. He could not use the footbridge and the alternative was a half-mile route via Station Lane passing under the track, which was very difficult to negotiate in a wheelchair. The claimant argued that Central Trains were required to provide him with a suitably adapted taxi to take him via Station Lane to enable him to access platform 1. The defendant did not

accept this was a reasonable step, pointing out that by going west to Ely, Mr Roads could cross in safety to the Norwich line. The claimant appeal against the trial judge's conclusion that it was not reasonable for the defendant to make the adjustment he had identified.

52. Sedley LJ said that in light of the statutory provisions, the trial judge should have "addressed the question of impeded access in relation to wheelchair users as a class before asking and answering in relation to Mr Roads". The trial judge should have asked: is it impossible or unreasonably difficult for wheelchair users to use the Station Lane route to get to platform 1; and, if it is, had Central Trains taken such steps as it was reasonable for them to have to take in order to provide an alternative means of access for wheelchair users? (para 14). He went on to say that if both of those questions were answered against Central Trains, the trial judge's findings meant that the claimant would be entitled to succeed under section 19(1) DDA 1995, which made it unlawful for a provider of services to discriminate against a disabled person in (as relevant) "failing to comply with a duty imposed on him by section 21 in circumstances where the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service...".

53. Sedley LJ was satisfied that if he had asked the correct question, the trial judge would have found that the circumstances for accessing platform 1 would have caused significant difficulty for disabled wheelchair users as a class (para 28). He went on to find that the proposed adjustment was a reasonable one in the circumstances (para 35) and thus allowed the appeal (para 36).

54. In *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), [2010] RTR 38 ("*Lunt*") at paras 53 – 54, Blake J observed that counsel's suggested six-step approach to section 21 DDA 1995 was consistent with Sedley LJ's analysis in *Roads*. The six steps were as follows:

> "1. Did the council have a practice, policy or procedure?
>
> 2. Did that practice, policy or procedure make it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be, conferred by the council?
>
> 3. If so, is it under a duty to take such steps as is reasonable in all the circumstances of the case for it to change that practice policy and procedure so it no longer has that effect?
>
> 4. Has the council failed to comply with its duty to take such steps?
>
> 5. If so, is the effect of the failure such as to make it unreasonably difficult for Mrs Lunt to access such benefit?
>
> 6. If so, can the council show that its failure to comply is justified..."

55. The claim in *Finnigan* arose from three occasions when police officers had searched the claimant's home pursuant to warrants obtained under the Misuse of Drugs Act 1971.

The claimant was profoundly deaf, as the police were aware, but no British Sign Language ("BSL") interpreter was present on any of these occasions. The claimant claimed unlawful disability discrimination, arguing that the absence of an interpreter constituted a breach of the Chief Constable's duty to make reasonable adjustments. The trial judge found that the police had been able to effectively communicate with the claimant during two of the searches and on the third occasion the claimant had deliberately refused to co-operate. He rejected the claim as a result of the particular practice, policy or procedure ("PPP") that he identified. However, the trial judge went on to find, in the alternative, that if the PPP was communicating in spoken English, this was unreasonably adverse to the claimant, so that the duty to make adjustments arose, but he dismissed the claim on the basis the defendant had done what she reasonably could to ensure the PPP did not have an unreasonably adverse effect upon him.

56. The leading judgment was given by Lord Dyson MR (with whom the other members of the Court agreed). Lord Dyson explained that the DDA 1995 provisions applied to the first search and the EqA 2010 to the second and third searches. However, it was common ground that there was no significant difference between the statutes for the purposes of the case (para 9). Provisions addressing discrimination in the exercise of public functions were added to the DDA 1995 by the Disability Discrimination Act 2005. Under section 21E, where a public authority had a PPP which made it "unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person is or may be subjected to" by the carrying out of a function of the authority, it was the authority's duty to take "such steps as it is reasonable in all the circumstances of the case for the authority to have to take" in order to change the PPP so it no longer had that effect.

57. The Court of Appeal held that the trial judge had erred in his identification of the PPP. Lord Dyson then considered the position in respect of the trial judge's alternative (and correct) PPP, namely that the usual practice of the Northumbria police was to communicate in spoken English. He found the trial judge had erred in focusing on the position of the claimant, rather than on the impact of this PPP upon deaf persons as a class and what steps the defendant was required to take to address the unreasonably adverse impact for those disabled people:

> "31. In so far as the judge may have considered whether the Chief Constable had failed to make reasonable adjustments by reference to the needs of Mr Finnigan rather than by reference to the needs of deaf persons as a class, he was in error. As Sedley LJ said in *Roads v Central Trains Ltd*...para 11(in the context of a case about the provision of services by a train operator): "[public authorities] cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability". The same point is made at paras 6.14 and 6.16 of the Disability Discrimination Act Code of Practice.
>
> 32.It is not in dispute before us that the duty to make reasonable adjustments is anticipatory. It is owed to disabled persons at large in advance of an individual disabled person coming within the purview of the public authority exercising the relevant function.

> 33. It follows that the Chief Constable was obliged to make reasonable adjustments to her PPP of conducting searches in spoken English so that it did not have a detrimental effect on deaf persons. It is clear that this duty could not be discharged by treating everyone as individuals and adopting communication styles to suit the circumstances of the particular case on an ad hoc basis. The anticipatory nature of the duty is inimical to the idea that reasonable adjustments may be made by deciding on an individual basis to conduct a search with or without a BSL interpreter in attendance or on standby according to exigencies of the particular situation."

58. Lord Dyson noted that the trial judge had made no findings as to the nature of any general adjustment that it was reasonable to make to the PPP so as to reduce or eliminate the detriment caused by it to deaf persons as a class. He said the trial judge had "lost sight of the anticipatory nature of the duty to make reasonable adjustment and focused on what occurred during the searches that took place on the facts of this case" (para 34). Lord Dyson discussed possible steps that the Chief Constable could have taken to reduce or eliminate the detrimental effect on deaf persons. He then emphasised:

> "36. ...It is important, however, to keep in mind the distinction between (anticipatory) changes to a PPP which are applicable to a category or sub-category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis. The duty to adjust a PPP is to be judged by reference to the former, and not the latter."

59. Lord Dyson said that the problem with the Chief Constable's evidence was that it did not address whether any anticipatory changes had been made to her PPP and such evidence as there was suggested no more than individual decisions being made as to how to effectively communicate with persons on an ad hoc basis (para 37). He concluded that on the evidence before the Court, it was not possible to decide what adjustment, if any, had been made "or what adjustment ought reasonably to have been made to the PPP to deaf persons as a class" and that the trial judge's finding that there was no breach of the duty to make reasonable adjustments could not be upheld (para 39).

60. Nonetheless, the Court dismissed the appeal in light of the particular facts found at trial. Lord Dyson noted it was common ground that the six-step approach identified in *Lunt* should be adopted in relation to the DDA 1995 claim and also in relation to the applicable provisions of the EqA 2010 (para 43). On the trial judge's findings, the Chief Constable's failure to adjust her PPP had caused no detriment to the claimant and so the answer to step 5 of the analysis was in the negative (paras 44 – 45).

61. During the course of his judgment, Lord Dyson also addressed the burden of proof, explaining that pursuant to section 136 EqA 2010, once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment was not a reasonable one to make shifted to the defendants (para 38).

62. The anticipatory nature of the duties imposed by sections 20 and 21 EqA 2010 in circumstances where Schedule 2 applies, was also explained by Elias LJ in *MM* at para 43:

> "The modification of the duty so that it applies to disabled persons generally creates what is frequently referred to as an anticipatory duty: the person exercising the public function has to anticipate the reasonable steps necessary to ensure that disabled persons generally, or of a particular class, will not be substantially disadvantaged."

63. The claimants in *MM* were individuals with mental health problems who had claimed Employment and Support Allowance. They contended the assessment process for the allowance, which typically involved undergoing a face-to-face interview, put persons with mental health problems at a "substantial disadvantage" in comparison to those who did not have such problems. The claim was begun by way of an application for judicial review in the High Court and subsequently transferred to the Upper Tribunal (Administrative Appeals Chamber). A number of the issues before the Court of Appeal in *MM* are unrelated to the matters I have to decide. However, Mr Bano places reliance upon what was said by Elias LJ about the operation of section 21(3) EqA 2010.

64. Counsel for the Secretary of State had argued that the effect of section 21(3) was that the Upper Tribunal had no power to grant relief at the behest of the claimants. Elias LJ explained the provision as follows:

> "50....In my view the effect of that subsection [section 21(3)] is that the duty must be treated as though it simply does not exist save for the purposes of establishing an act of discrimination against a disabled person. There can be no legal proceedings save in the context of establishing that a duty to make reasonable adjustments had been infringed in relation to a disabled person. I appreciate that the second limb of section 21(3) states that the effect of the first limb is that 'the breach will not be actionable in any other way'. But whatever meaning is given to the words 'actionable'...it cannot in my view cut back on the clear language of the first limb. In my judgment, therefore, any relevant proceedings must involve seeking to establish a claim of discrimination against at least one disabled person to whom the duty to make reasonable adjustment is owed."

65. Elias LJ went on to explain that counsel had contended that the claimants could not bring a claim under section 21(2) because even if there had been a breach of the duty in relation to those with mental health problems in general, this was not the case with the two claimants, who had received particular treatment under the rules because they were regarded as suicide risks (para 51). Elias LJ rejected this submission on the factual basis that the current policy applying to those deemed a suicide risk did not in fact overlap entirely with the adjustment sought in these proceedings (para 53).

66. *Rowley* involved an application for judicial review arising out of the Government's televised briefings during the Covid-19 pandemic. The briefings were broadcast live by the BBC and for the majority of these briefings, the BBC provided an "in-screen" BSL interpreter by superimposing the interpreter on the screen, but for two briefings that were given solely by Government scientific advisers (without any Government ministers involved) no BSL interpretation at all was provided. The claimant, a profoundly deaf BSL user, contended that: (i) the failure to provide any BSL interpreter for these two briefings; and (ii) the more general failure to provide "on platform" BSL

interpreters who were present on the stage with the speakers, constituted breaches of the reasonable adjustments duty identified in section 20(5) EqA 2010 relating to the provision of auxiliary aids (the third requirement). The claimant succeeded on the first part of his claim.

67. In para 18 of his judgment, Fordham J summarised the key provisions of the EqA 2010 for the purposes of the claim before him. He referred to the reasonable adjustments duty imposed by section 29(7). He then continued:

> "That statutory duty is breached when there is 'a failure to comply' with any one of three 'requirements' (section 21(1)). That breach constitutes discrimination 'against a disabled person' where the breach of the duty – by reason of the failure to comply with the requirement – is 'in relation to that person' (section 21(2))."

The Judge then summarised the three requirements identified in sections 20(3), (4) and (5).

68. Fordham J went on to note that by virtue of Schedule 2, para 2(2) EqA 2010, the trigger test of comparative substantial disadvantage involved comparing the position of "disabled persons generally"; and that by using these words Parliament had "ensured that the test is not individualised but class-based" (para 24). Fordham J cited passages from the judgments in *Roads, Finnigan* and *MM* that I have already referred to in support of this proposition. He also identified provisions of the Code, noting it would be an error to consider the reasonable adjustments duty by reference to the needs of the individual claimant, rather than by reference to the needs of the relevant class of disabled persons (para 24).

69. At para 30, Fordham J emphasised that the reasonable adjustments duty was an anticipatory duty, as Lord Dyson had stated five times between paras 32 and 37 in *Finnigan*. He cited passages from the Code, including paras 7.20 and 7.21 (para 73 below). He said that the anticipatory nature of the duty formed part of the explanation for the non-individualised "disabled persons generally" test he had referred to at para 24.

70. In a passage cited by the Judge, at para 29 Fordham J identified some "key points" about how the Court should approach the duty to take reasonable steps. He referred to *R (Imam) v Croydon London Borough Council (No. 2)* [2021] EWHC 739 (Admin), [2021] HLR 44 ("*Imam*"), *Royal Bank of Scotland Group plc v Allen* [2009] EWCA Civ 1213, 112 BMLR 30 ("*Allen*") and *R (VC) v Secretary of State of the Home Department* [2018] EWCA Civ 57, [2018] 1 WLR 4781 ("*VC*"). The paragraph includes the following:

> "(1) Asking what steps it was reasonable for the defendant to have to take to provide an auxiliary aid or service needs to be addressed in light of the conclusions reached as to the nature and extent of the comparative substantial disadvantage (see *Imam*...paras 87and 89).
>
> (2)The duty is to take 'such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments',

so that '[what] is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case' and 'will vary according to: the type of service being provided; the nature of the service provider and its size and resources; and the effect of the disability on the individual disabled person' (Code, para 7.29)....

(3) 'The question of the reasonableness of an adjustment is an objective one for the courts to determine' (Code, para 7.33): 'what is reasonable for the purposes of the test . . . must be judged objectively' (*Allen*, para 40).

(4) Because the test is a reasonableness test for the court to apply objectively, the ultimate focus is on substance rather than on reasoning process or decision-making procedure... The court will look to the evidence submitted by the defendant to explain the decision-making (*VC*, para 68)...

(5) Although an objective question of substance, the duty and its enforcement allow for an appropriate 'latitude' on the part of the service-provider. The objective standard is one of 'reasonableness'. That allows for the possibility of there being 'reasonable alternative methods', so that one way of putting the question is 'whether it was a sufficient discharge of [the] duty that the [defendant] made available the alternative facilities on which it relies', so that 'the duty [was] discharged by the provision of reasonable alternative methods' (*Allen*, paras 46 and 48). The statutory test concerns such steps as it is reasonable 'to have to' take (*Allen*, paras 33—35, 67). The standard is contextual, informed by practical reality, viewed at the relevant time. The court may have to 'determine whether the adjustment identified by the claimant is reasonable' and —where the burden of proof shifts (section 136 of EqA 2010) to determine whether the defendant has been able to 'demonstrate that it is not' (*MM*, para 82). Beyond that, the court has no 'freewheeling' function 'to determine for itself what constitutes a reasonable adjustment or to supervise the process of evidence-gathering'... (*MM*, para 82).

(6) As the Code recognises, 'some of the factors which might be taken into account when considering what is reasonable' include effectiveness, practicability, cost, disruption and resources (para 7.30), articulated as follows: 'whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question; the extent to which it is practicable for the service provided to take the step; the financial and other costs of making the adjustment; the extent of any disruption which taking the steps would cause; the extent of the service provider's financial or other resources; the amount of any resources already spent on making adjustments; and the availability of financial or other assistance.'"

71. Fordham J also addressed the burden of proof, saying the case law explained that once the claimant has given some indication of the adjustments it alleged should have been made, the claim would succeed if the Court concludes that in light of the evidence and submissions, the defendant has not discharged the burden of proof and demonstrated that it complied with the duty to make reasonable adjustments "for the relevant group in respect of the relevant matter" (para 33).

The Code

72. The Code addresses to whom the duty to make reasonable adjustments is owed, saying at para 7.19:

> "In relation to services and public functions, the duty to make reasonable adjustments is owed to disabled people generally. It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services or who is affected by the exercise of a public function..."

73. The heading above paras 7.20 and 7.21 is "An anticipatory duty: the point at which the duty to make reasonable adjustments arises". The text says:

> "In relation to all three areas of activity (services, public functions, and associations) the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual person seeking to use the service, avail themselves of a function or participate in the activities of an association.
>
> Service providers should therefore not wait until a disabled person want to use a service they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or render it too late to comply with the duty to make the adjustment..."

74. The Code goes on to say that service providers are not expected to anticipate the needs of every individual who may use their service, but "what they are required to think about and take reasonable steps to overcome are barriers that may impede people with different kinds of disability" (para 7.24).

75. At para 7.26 the Code states:

> "Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty."

76. Para 7.27 of the Code indicates that the duty to make reasonable adjustments is a continuing duty. Service providers should keep the duty and the ways they are meeting the duty under review, as what was "originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might then have to be considered".

The Claimant's submissions

Ground One

77. Mr Bano accepted that each of the elements of the section 20(3) EqA 2010 test are to be considered by reference to the relevant class of disabled persons, rather than simply the individual claimant, including the questions of whether there is "substantial disadvantage" and the steps that it would be reasonable for "A" to have to take to avoid that disadvantage. He submitted the effect of section 21(2) was that once an adjustment had been identified as reasonable by application of the section 20(3) test, a person within this class of disabled persons has a right of action for unlawful discrimination if that adjustment is not applied to them, even if A has generally made this adjustment for this class of disabled people. Whilst the duty required public authorities to anticipate and correct disadvantages on a class-based or systemic level, the duty also required them to implement those adjustments in every single case. Accordingly, even if A has a perfectly adequate system for adjusting the PCP to accommodate the needs of the relevant class of disabled people, if A failed to make the adjustment in a particular case, there would be a breach of the duty in relation to that person. In other words, it was unnecessary for a claimant to show that the breach of duty extended beyond their particular case. Parliament could not have intended that a defendant would escape liability in circumstances where A had not applied the adjustment to a particular person within the relevant class of disabled people.

78. Mr Bano said the effect of the Judge's findings in this case was that Lambeth had made adjustments to the PCP but those adjustments had not been applied in the Claimant's case. The Judge erred in failing to recognise that this situation involved a breach of the Defendant's reasonable adjustments duty owed to the Claimant.

79. Mr Bano relied on para 12 of *Roads*, where he said the Court of Appeal had distinguished between the personal right of action, where the adjustment in question had not been applied to the person bringing the claim, and the systemic duty (para 48 above). He also derived support from para 18 of *Rowley* (para 67 above), as he said Fordham J had not suggested that the right of action conferred by section 21 was subject to the anticipatory "trigger test" he discussed in para 24. Mr Bano submitted that if the Judge's approach was correct, it would mean that in a Schedule 2 EqA 2010 services or public functions case, a claimant could never succeed in a claim for breach of the duty to make reasonable adjustments unless they were able to show that they were not the only person who was adversely affected by A's failure to make the adjustment in question. However, *MM* showed that approach could not be correct, as the Court of Appeal decided the claim could be advanced by a single claimant. He said there was nothing in the judgments in *Roads*, *Finnigan* or *Rowley* which required a claimant to prove that the failure to implement the adjustment was itself a systemic failing.

80. Mr Bano submitted that the Judge's approach would lead to perverse outcomes. He gave the following example. A public authority operated a "no dogs" policy in relation

to particular premises. The anticipatory nature of the reasonable adjustments duty required a class-based exemption for blind people with guide dogs. The authority generally operated that adjustment on a structural level, but on a particular occasion a staff member wrongly refused admission to a blind person with a guide dog. On the Judge's analysis, the excluded person could not make a claim "even though they have obviously been discriminated against under sections 20 and 21". Mr Bano also suggested that claimants would face practical difficulties if the Judge's approach was correct, as usually they would not know whether the failure they had experienced was individualised or systemic.

Ground Two

81. Mr Bano submitted that the Judge's reasoning failed to reflect the fact that the burden of proof lay on the Defendant to show it had taken such steps as were reasonable for it to take in adjusting its PCP by way of the adjustments proposed by the Claimant. Specifically, the Judge failed to consider whether the admitted failings in the Claimant's case were in fact the product of systemic failings. Notably, the Defendant did not adduce any evidence as to how the systems it described actually worked in practice, including the operation of the transfer list and the re-assessment of the suitability of temporary accommodation when this was requested. Nor did the Defendant explain the failings in the Claimant's case or put forward a positive case that what had happened to him was an isolated instance, in the sense that it was exceptional or out of the ordinary; indeed Mr Ogwu's witness statement was to the contrary effect. In these circumstances, the Judge was wrong to find that the Defendant had discharged the burden of showing that reasonable adjustments had been made to the PCP.

82. Mr Bano highlighted paras 60, 66 and 67 of the Judge's reasoning as showing that she had wrongly treated the failings in the Claimant's case as incapable of bearing on the question of whether the Defendant had taken reasonable steps in a systemic sense; and she had done so in circumstances where she had no evidence to indicate whether or not they were the product of systemic issues.

83. Mr Bano said the Judge had decided that the system in Lambeth was working well when she had no evidence to that effect. The only information she had as to its operation in practice was the adverse experience of the Claimant and *R (Marte) v London Borough of Lambeth* [2024] EWHC 3267 (Admin) ("*Marte*"), a case in which the Defendant had failed to provide suitable accommodation to three claimants and their household, in breach of statutory duties and Court orders. In order for Lambeth to establish a positive case that it had made the appropriate reasonable adjustments, it needed to adduce evidence as to the usual timeframes for challenging the suitability of temporary accommodation, the usual timeframe for moving applicants on from unsuitable accommodation, the number of households presently in unsuitable temporary accommodation and how long they had been there and the proportion of these households with disabilities. However, none of this evidence was adduced and Mr Ogwu was unable to tell the Court how many households were living in unsuitable accommodation.

The Defendant's submissions

Ground One

84. Mr Johnson emphasised that the applicable statutory provisions were aimed at addressing structural or systemic inequalities for a class of disabled persons. If a reasonable adjustment had been made to address the systemic inequality, the reasonable adjustments duty was discharged and there was no discrimination, even if there had been individualised failings in a particular case.

85. Mr Johnson did not accept that *Roads*, *MM* or *Rowley* assisted the Claimant's argument in the way that Mr Bano had suggested. He submitted that the statutory wording provided the clear answer to the Claimant's contention. He emphasised that section 20(3) EqA 2010 does not create a wrong in itself; it identifies the elements of the duty to make reasonable adjustments in relation to the first, second and third requirements. Section 21(1) provides that a failure to comply with these first, second or third requirements is a failure to comply with the duty to make reasonable adjustments. In turn, section 21(2) provides that A discriminates against a disabled person if A fails to comply with "that duty". The duty referred to here was the duty to make reasonable adjustments, which operates on a systemic level, as the caselaw confirms. Section 21(2) did not provide for an additional right of action to the Claimant in circumstances where that duty to make reasonable adjustments had not been breached. Mr Johnson submitted that, consistent with section 20(3), 20(4) and 20(5), the reference to "a disabled person" in section 21(2), was a reference to disabled persons generally. Mr Johnson also submitted that the six-step approach identified in *Lunt* supported his analysis (para 54 above).

Ground Two

86. Mr Johnson said that the Judge's judgment showed she had correctly directed herself as to the shifting burden of proof. There was nothing to indicate that she had then failed to apply this self-direction.

87. It was apparent from para 57 of her judgment that Mr Ogwu had positively said during his evidence that something had gone wrong in the Claimant's case, which was in the nature of an ad hoc failure, rather than a systemic one. Furthermore, paras 67 – 70 of her judgment showed the Judge had carefully considered the Defendant's evidence as to the systems it had put in place and the practicalities and constraints it faced, before concluding that reasonable steps had been taken. As her reasoning displayed no error of law, the Judge's findings of fact were unassailable.

88. Mr Johnson suggested that the passages highlighted by Mr Bano showed the Judge was rightly reminding herself that, consistent with *Finnigan* and with *Rowley*, she must consider the position of the class as a whole when addressing the elements of the section 20(3) test. Further, the Judge was clearly satisfied that she could not extrapolate any systemic failures from the individual failings that had arisen in the Claimant's case; a conclusion she was entitled to arrive at.

Analysis and conclusions

Ground One

Preliminary observations

89. As Mr Bano accepted, the Claimant does not suggest that an individualised or bespoke adjustment should have been made in his case. It is clear from their terms, that each of the four adjustments he relied upon related to steps that it was said it was reasonable for the Defendant to have to take in respect of the disadvantaged class of disabled persons who required carers as a whole (para 4 above).

90. Whilst Ground Two challenges her conclusions in this regard, Ground One is predicated on the basis of the Judge's findings that the Defendant had taken reasonable steps to adjust the PCP at a systemic level but, due to ad hoc failings, had not applied these adjustments to the Claimant. Mr Bano argues that this situation constitutes a breach of the Defendant's duty to make reasonable adjustments so far as the Claimant is concerned and that the Judge erred in failing to appreciate this amounted to a good claim under section 21 EqA 2010. This may be a relatively unusual or somewhat artificial scenario; as I go on to discuss under Ground Two, failings at an individual level may provide good evidence that insufficiently reasonable steps have been taken to adjust the PCP at the general systemic level. However, Ground One focuses upon whether the Judge should have upheld the claim even on her own findings.

91. I am only concerned with the position in cases involving service providers or those exercising public functions within the meaning of section 29 EqA 2010, where Schedule 2 applies (paras 40 - 41 above). The analysis I set out below is specific to Schedule 2 cases.

The statutory wording

92. Both counsel were agreed that Ground One raised a question of statutory interpretation. My focus is upon the statutory language, considered in its context, including the purpose of these provisions (para 46 above). It is this which provides the guide to Parliament's intention.

93. Mr Bano accepts that where Schedule 2, para 2(2) has the effect that references in section 20(3), (4) and (5) to a "disabled person" are to "disabled persons generally" (para 41 above), the constituent elements of the section 20 requirements must be considered at a systemic level by reference to the class of disabled persons who are adversely impacted, or would be adversely impacted, by the PCP. Accordingly, once the PCP has been identified, a section 20(3) case involves asking at a systemic level: (i) whether the PCP puts the relevant class of disabled persons at a substantial disadvantage in relation to the provision of the service or exercise of the public function, in comparison to people who are not disabled; and, if it does (ii) what are the steps that it is reasonable for A to have to take "to avoid *the disadvantage*" (emphasis added); that is to say the disadvantage caused to this class of disabled persons by the PCP. This interpretation of section 20(3) is clear from the caselaw I have reviewed earlier, as is the related proposition that it is an error of law to consider these questions by reference to the needs of the individual claimant: see in particular, *Roads* (paras 48 and 52 above); *Finnigan* (paras 57 – 59 above), *MM* (para 62 above) and *Rowley* (paras 68 – 69 above).

94. Section 20 is to be read with section 21. Both Mr Bano and Mr Johnson sought to derive support from the wording of section 21. Section 21(1) provides that a failure to comply with the first, second or third requirements in section 20 "is a failure to comply with a duty to make reasonable adjustments". In other words, in a section 20(3) case, A will have breached the duty to make reasonable adjustments if A has not taken the systemic steps that it was reasonable for it to take in order to avoid the disadvantage caused to the relevant class of disabled persons. There is no suggestion in the statutory language that A may also have failed to comply with the duty to make reasonable adjustments as a result of the way it has acted or not acted towards a particular disabled individual.

95. The next stage in the analysis is section 21(2), the provision upon which Mr Bano founds his argument. However, this subsection says that A discriminates against a disabled person "if A fails to comply with *that duty* in relation to that person" (emphasis added). In context, "that duty" plainly refers to a breach of the reasonable adjustments duty identified in subsection (1), that I have discussed in the preceding paragraph. When I put this to Mr Bano, he did not disagree.

96. However, Mr Bano emphasised the use of the singular in the statutory words "A discriminates against a disabled person" and "in relation to that person". He submitted this indicates that an individual is able to bring a claim under these provisions if they are within the relevant class of disabled persons and an adjustment which has been identified as reasonable under the section 20(3) inquiry is not applied to them, for example through an ad hoc oversight, even if reasonable steps have been taken by A at a systemic level. However, this is not what section 21(2) says. Mr Bano's submission overlooks the fact that the subsection states that a disabled person is discriminated against "*if* A fails to comply with *that duty*" (emphasis added), that is to say the duty in section 21(1) I have just identified. There is no suggestion that they are discriminated against in other circumstances that would not constitute a failure to comply with the first (second or third) requirement.

97. The references to a person in the singular in section 21(2) are readily explicable. The effect of section 21(2) is that where A has failed to comply with the reasonable adjustments duty (as discussed above), a disabled person has been discriminated against if this failure is "in relation" to them. In other words, in a Schedule 2 case, a section 20(3) case, an individual can only have a claim for breach of the duty to make reasonable adjustments if they are within the class of disabled persons who are substantially disadvantaged by the PCP and thus owed the duty. Absent this provision, both in Schedule 2 and in other cases, it would not be clear who has a cause of action where there has been a failure to comply with a duty to make reasonable adjustments. On the other hand, there is no obvious reason for section 21(2) to mean what Mr Bano suggests it means, apparently giving a cause of action in Schedule 2 cases although there has not been a failure to comply with the first, second or third requirement. In other words, in Schedule 2 cases, section 21(2) confers a personal right to bring an action for those within the relevant class of disabled people where A has failed to comply with the systemic duty to make reasonable adjustments.

98. It follows that I do not accept Mr Johnson's suggestion that in Schedule 2 cases, the reference to "a disabled person" in section 21(2) should be read as "disabled persons generally". Schedule 2, para 2(2) does not list section 21(2) as a provision that should be read in this way, as it could have done if this was the legislative intention. However, for the reason I have just explained, my rejection of this submission does not assist Mr

Bano in circumstances where I am clear that section 21(2) has the purpose and effect I have just described.

99. During the hearing, Mr Bano sought to counter my suggested interpretation of section 21(2) with the proposition that it was section 21(3), rather than section 21(2) that conferred a right of action for discrimination (in turn, meaning that section 21(2) had to have some other purpose and meaning). This is plainly not the case. First, section 21(3) is a limiting provision. It says that where an applicable Schedule imposes a duty to comply with the first, second or third requirements, a failure to comply is only actionable for the purposes of establishing whether A has contravened the Act by virtue of section 21(2). Second, the very wording of subsection (3) confirms, rather than negates, the proposition that the right of action is conferred by subsection (2). Mr Bano argued that para 50 of Elias LJ's judgment in *MM* (para 64 above) showed that it was section 21(3), rather than section 21(2) that conferred the right of action. This is incorrect. As Elias LJ explained, the effect of section 21(3) was that a duty to make reasonable adjustments has no effective existence outside of a situation where a disabled person was discriminated against; and para 51 of his judgment shows that he recognised the right to bring a claim arose under section 21(2) (paras 65 above).

100. It also follows from my analysis of the statutory provisions that Mr Bano's submissions rested on a false premise. His arguments assume that which he needs to establish, namely that a breach of the duty to make reasonable adjustments exists where reasonable steps have been taken by A at a general, structural level, but they are not then applied to the particular individual. I have explained why the failure to apply the adjustment to the individual would not *of itself* amount to a failure to comply with the section 20(3) requirement. In his oral submissions, Mr Bano said it was unnecessary for a claimant to show that "*the breach of duty* extended beyond their particular case" (para 77 above) and also that *the breach of the reasonable adjustments duty* did not need to go beyond an ad hoc failure. However, as I have explained, there is no breach of duty in a Schedule 2 section 20(3) case unless there has been a failure to comply with the duty to take such steps as are reasonable to address the substantial disadvantage to the relevant class. On the Judge's findings in this case, which is the basis upon which Ground One proceeds, those steps had been taken.

The caselaw and the Code

101. The passages that Mr Bano relied upon in *Roads*, *MM* and *Rowley* do not assist his argument or alter what appears to me to be the clear position from the statutory wording.

102. Mr Bano placed particular reliance on para 12 of Sedley LJ's judgment in *Roads* ("all roads lead to *Roads*" he said during his submissions). I do not accept this passage bears the interpretation that he seeks to place on it. To the contrary, Sedley LJ referred to the "double test" the claimant had to meet under section 21 DDA 1995; he had to show that there had been a breach of the section 21 duty *and* that this had made it "impossible or unreasonably difficult" for him personally to make use of the service in question (para 48 above). Resolution of the first of these issues - whether the section 21 duty had been breached - involved asking both of the questions directed at wheelchair users as a class that Sedley LJ had identified at para 14 of his judgment, *before* coming on to consider the position of Mr Roads (para 52 above). Accordingly, whilst the point raised by Ground One did not arise on the facts of *Roads* (Central Trains had not made the

adjustment in respect of anyone), Sedley LJ's judgment supports the approach to the statutory provisions that I have identified.

103. Mr Bano argued that there was nothing in Sedley LJ's analysis in *Roads* that indicated a claimant had to show that others had been affected by the Defendant's failures whereas, this was the effect of the Judge's judgment. I disagree. As the duty is an anticipatory one, it does not matter whether the PCP has yet been applied to others within the class or whether anyone else has so far claimed to have suffered unlawful discrimination in consequence. To adapt Mr Bano's guide dog example, if A imposes a no dogs rule in relation to its premises and does not take the step of adjusting this PCP for guide dogs, the first blind person with a guide dog who was turned away from the building (B) would have a good claim. In this scenario, it is clear that A had failed to take reasonable steps to change the PCP to avoid the disadvantage and it is irrelevant that B could not show that, so far, any other blind person had been affected by the PCP. There is nothing in the Judge's judgment that suggests otherwise. The distinction between the Judge's conclusion and the example I have just given, is that the Judge found that Lambeth had taken reasonable steps at the systemic level, whereas A has not done so in the guide dog example. If there is a failure at the systemic level, such that the duty to make reasonable adjustment is breached, a claimant does not have to prove that others have also been affected. By contrast, if there is no failure to take reasonable steps at the systemic level, a Schedule 2 claimant does not have a claim.

104. In this regard, Mr Bano also relied upon Elias LJ's observation at para 50 in *MM* that proceedings must involve seeking to establish a claim of discrimination "against at least one disabled person to whom the duty to make reasonable adjustments is owed". However, for the reasons I have just explained, the fact that there may only be one person who has been impacted by the breach of duty and thus able to bring a claim under section 21(2) does not undermine my interpretation of the statutory provisions.

105. Para 18 of *Rowley* does not assist Mr Bano either. In this paragraph, Fordham J summarised the key statutory provisions. There is nothing in his description of the provisions that supports the proposition that section 21(2) operates to confer a right of action upon an individual within the relevant class of disabled persons if A has taken reasonable steps to adjust the PCP in relation to the class of disabled persons generally. To the contrary, Fordham J says in the passage I quoted at para 67 above, that the duty is breached when there is a failure to comply with any one of the three requirements and "*That breach* constitutes discrimination 'against a disabled person' where *the breach of duty – by reason of the failure to comply with the requirement* – is 'in relation to that person'" (emphasis added). As such, this supports my analysis of the statutory provisions. Mr Bano also appeared to suggest that the conclusions in *Rowley* supported his argument. I do not follow this point. *Rowley* involved adjustments that had not been made at all for any of the televised audience; as such, it is quite different from the factual scenario that I am addressing under Ground One.

106. The other cases I have cited earlier also tend to undermine, rather than support, Mr Bano's argument. Although the statutory wording has changed in a number of respects under the EqA 2010 provisions and there is no longer a justification defence, the six steps identified in *Lunt* underscore that the Court has to consider whether the PPP / PCP has caused the requisite disadvantage to the relevant class of disabled persons, whether there are reasonable steps that A is under a duty to take to change the effect of the PPP / PCP and whether A has failed to take "such steps" (i.e. those steps), *before* the Court

gets to the stage of considering the impact upon the individual claimant. This is underscored by the Court of Appeal's decision in *Finnigan* which endorsed the *Lunt* six-step approach (para 60 above). Moreover, Lord Dyson's reasoning clearly shows the distinction between the systemic questions the Court has to address and answer in the claimant's favour *before* it gets to the stage of considering the impact of the failure to adjust the PPP / PCP on the individual claimant (paras 57 – 60 above).

107. In his skeleton argument, Mr Bano suggested that para 7.26 of the Code supported his contention. However, when I put the point to him, he fairly accepted that this paragraph was concerned with a different situation which does not arise in the present case, namely one where a disabled claimant seeks bespoke adjustments to the PCP because of their particular needs. I have set out the other potentially relevant parts of the Code at paras 72 – 76 above; none of them provide support for Mr Bano's argument.

The Claimant's supplementary arguments

108. I turn to Mr Bano's perverse outcomes argument (para 80 above). The example he gives is a further instance of his submission assuming that which it needs to prove (as I discussed in para 100 above). It proceeds on the stated basis that the failure to admit the individual blind person with a guide dog ("B"), although the authority is generally making the reasonable adjustment of admitting people with guide dogs, means B has "obviously been discriminated against under sections 20 and 21" but is left without a claim. For reasons I have already explained, on these hypothetical facts, it does not follow that B has been discriminated against within the meaning of sections 20 and 21. As a secondary point, I also note that it does not follow that B is necessarily without a remedy under the EqA 2010 in this situation; the position is more nuanced than Mr Bano's example suggests and there are multiple different possibilities. The failure to admit B could be indicative of a more general failing (such as inadequate staff training or inadequate internal dissemination of the intended adjustment), in which case it may be that the authority would not discharge the burden of showing it had taken the steps it was reasonable to take to avoid blind people experiencing substantial disadvantage from the no dogs PCP. Alternatively, if the individual staff member acted from their own prejudices, B may have a direct discrimination claim. In the further alternative, as B has been refused entry because of his guide dog, which accompanies him because he is blind, he may have a claim under section 15 EqA 2010 for discrimination arising from disability. In short, Mr Bano's example does not provide reason in itself for adopting a construction of section 21 EqA 2010 that would run contrary to the statutory wording and the caselaw.

109. I also do not accept that the construction I have adopted would lead to particular practical difficulties for claimants. Once the substantial disadvantage to the relevant class has been identified and the claimant has identified the adjustments they say should have been made, the burden of proof shifts to the defendant to show either that the adjustment in question was not a reasonable one for it to have made or that it did take reasonable steps to adjust the PCP accordingly (paras 61 and 71 above). There is no onus on the claimant to show that there was a failure to make the adjustment at a general level, as Mr Bano suggested.

Conclusion

110. Accordingly, on the factual premise upon which Ground One rests, namely that the Defendant took reasonable steps to adjust the PCP of accommodating those assessed as in need of temporary accommodation outside the borough but simply did not apply those steps to the Claimant as a result of ad hoc failings, I consider the Judge was correct to dismiss the claim.

Ground Two

111. Ground Two challenges the Judge's treatment of the delay in providing the Claimant with accommodation within the borough as arising from ad hoc failings that did not bear on whether the Defendant had shown it had taken reasonable steps to avoid the substantial disadvantage she had identified as arising from the PCP.

Preliminary observations

112. I accept that the Judge correctly directed herself as to the application of the burden of proof at paras 50 - 53 of her judgment (para 23 above). She rightly recognised that the effect of section 136 EqA 2010 was that once a potential reasonable adjustment had been identified by a claimant, the burden of proof lay on a defendant to show the adjustment was not a reasonable one to make or that it had been made. As I explained at para 30 above, I am only concerned with the first and second adjustments identified by the Claimant. It is common ground that the burden of proof had shifted to the Defendant to show it had taken reasonable steps to avoid the identified group disadvantage.

113. I record that Mr Bano, rightly, accepted that there were aspects of the Judge's findings that, on any view, were unaffected by the errors he identifies. This must include that: (a) the terms of the Defendant's HPP accorded a reasonable level of priority to accommodating disabled people with care needs in-borough (Judge's para 63; para 28 above); and (b) it was not reasonable to expect the Defendant to proactively monitor every disabled persons with care needs who had been placed in temporary accommodation outside of the borough (Judge's paras 68, 69 and 70; para 29 above). However, these findings do not provide an answer in themselves to the Claimant's case regarding the first and second adjustment. In essence, the first adjustment was that the Defendant take reasonable steps to accommodate disabled people with carers within the borough. Where disabled people with carers were temporarily accommodated out of the borough, the second adjustment required that the Defendant take reasonable steps to move them to a suitable location.

The flaw in the reasoning

114. Mr Johnson accepts that there were failings in the Defendant's case. The Judge noted that Mr Ogwu had recognised some things had gone wrong in his case, but he had said "that was an ad hoc failure, not a systemic failure" (Judge's para 56; para 26 above). In terms of her discussion of these failings, the Judge's findings appear to be limited to the following:

i) Informal methods of review and complaint "were not effective and were ignored" and this showed "on an ad hoc basis there was a failure" (Judge's para 66; para 29 above);

ii) In his case "no active steps were taken" (Judge's para 67; para 29 above); and

iii) When the suitability assessment was sought, it did not happen and this was "an individual, ad hoc matter", not about the systemic system (Judge's para 71; para 29 above).

115. However, none of these findings explore, indicate or explain *why* these failings had occurred in the Claimant's case.

116. I will briefly recap the factual context. In November 2021, the Claimant was assessed as needing two-bedroomed accommodation within the borough (paras 9 – 10). On 21 January 2022, he was provided with temporary accommodation in North Finchley, the offer letter recognising that it might not be suitable for more than a short period of time (para 11 above). He then remained in that accommodation for nearly 20 months and despite a formal request for a suitability reassessment, there was a delay of over seven months before this was undertaken and it only occurred after permission to apply for judicial review had been granted (paras 12 – 14 above).

117. For present purposes, it is also pertinent to note that the Judge considered that the following steps would be reasonable ones for the Defendant to take (as opposed to finding that such actions would be too much to ask of the local authority):

i) There had to be a system of according priority and the transfer system under which those who are considered to be most in need of moving urgently was a reasonable step (Judge's para 68; para 29 above);

ii) It is reasonable to ensure that there are systems in place to enable challenges to the suitability of accommodation and to monitor the most urgent cases by putting them on the transfer list (Judge's para 69; para 29 above); and

iii) The authority has to prioritise cases which have been brought to its attention or where they know there is an element of unsuitability that is urgent (Judge's para 70; para 29 above).

118. It is self-evident that failings experienced by an individual within the relevant class of disabled persons *may* be indicative of a broader general failure to take the reasonable steps that are required to avoid the disadvantage arising from the relevant PCP. Returning to the example discussed under Ground One of the blind person with a guide dog ("B") who is refused entrance. Amongst other possibilities, the reason for this may be because the member of staff has simply failed to do as they have been instructed or it may be because their managers did not tell them to implement an exception to the 'no dogs' rule. Determining whether the authority had discharged the burden of proving it had taken reasonable steps to avoid the disadvantage arising from the 'no dogs' rule would likely entail considering *why* B had been refused entry.

119. Similarly, it is difficult to see how a decision could be reached as to whether the Defendant had shown it had taken reasonable steps to avoid the disadvantage to

disabled people with carers that arose from the PCP without understanding *why* the substantial delays in him being housed in-borough had occurred in the Claimant's case. All the more so, as the Judge (understandably) found it was incumbent on the Defendant to ensure there are systems in place to enable challenges to the suitability of accommodation and to monitor the most urgent cases by putting them on the transfer list (para 29 above).

120. Mr Johnson contended that the Judge had addressed this area of the case in making a positive and unassailable finding that the failings in the Claimant's case were ad hoc in nature. However, the Judge's finding in this regard appears to have stemmed directly from a material misdirection as to the approach she should take. The language she used indicates she misunderstood the effect of passages from *Finnigan* and *Rowley* (which she had cited earlier) as indicating she was only to have regard to the way the Defendant treated the material class of disabled persons in general and not to take account of the things that had gone wrong in the Claimant's case. I am driven to this conclusion by the combined effect of the following passages:

i) The Judge began her analysis of whether the Defendant had shown it had taken reasonable steps to avoid the disadvantage in question by saying, "I remind myself that in this context, *what I am considering is not what went wrong for this particular claimant personally, but the structural issues* and whether the defendant has anticipated the disadvantage and made reasonable adjustments" (Emphasis added; Judge's para 60; para 27 above);

ii) Having said that informal methods of review were ignored in the Claimant's case, the Judge continued, "However, that shows on an ad hoc basis there was a failure, but that *cannot lead to a conclusion there is a systemic failure* to consider suitability review requests" (Emphasis added; Judge's para 66; para 29 above);

iii) In the next paragraph, the Judge said that confusion had arisen between "the fact that no active steps were taken for this claimant as indicative of proving somehow that there were no active steps existing at all" (Judge's para 67; para 29 above); and

iv) Having noted that the suitability re-assessment did not happen in the Claimant's case, the Judge continued, "However, that is an individual, ad hoc matter. It is not about the systemic system" (Judge's para 71; para 29 above).

121. All of these passages suggest a demarcation in the Judge's mind between what had gone wrong in the Claimant's case and the question of whether the Defendant had complied with the duty to make reasonable adjustments to the PCP. She appears to have proceeded on the basis that what had gone wrong in the Claimant's case was *not capable* of indicating that there were failings at a systemic level in terms of the efficacy of the Defendant's processes for reviewing suitability and placing urgent cases on the transfer list. This impression is reinforced by the fact that, as far as I can see, there is no part of the Judge's reasoning that does in fact consider *why* the failings had occurred in this case and what this might indicate about the reasonableness and effectiveness of the Defendant's system. The absence of any discussion of this topic is, however, consistent with her apparent misunderstanding that it was not relevant for her to do so. Mr Johnson suggested that in the passages I have highlighted in paras 60 and 66 of her

judgment, the Judge was doing no more than reminding herself that she must consider the class of disabled persons as a whole when addressing section 20(3). However, that is not what the Judge said.

122. There is nothing in *Finnigan*, *Rowley* or any of the other cases I discussed earlier that indicates or suggests that what went wrong in the individual's case may not have a bearing on the Court's assessment of whether the defendant has shown it has taken such steps as it is reasonable for it to take to alleviate the group disadvantage. If the Chief Constable in *Finnigan* had claimed there was a policy of using BSL interpreters when searches under warrant were conducted of homes occupied by those who were known to be deaf, the question would have arisen as to *why* no BSL interpreter had attended any of the three searches of the claimant's address.

123. Of course, upon examination, it may turn out that failings in an individual case do not indicate that the alleged discriminator has failed to take reasonable steps to alleviate the disadvantage for the relevant class of disabled people, but given the onus is on the defendant to establish that reasonable steps have been taken, a defendant in such circumstances would be expected to address why the individual failings had occurred and what this indicated, if anything, about the practical effectiveness of the adjustments it described instituting.

124. In the present case, as Mr Johnson accepted, the Defendant did not adduce any evidence as to how the systems described by Mr Ogwu actually operated in practice, for example as to what steps were taken and within what timeframe after a request for re-assessing suitability of their temporary accommodation was made by someone in the disadvantaged class. The Judge knew that it took over seven months for the Claimant's accommodation to be re-assessed and for him to be put on the transfer list as an urgent case and that this had only occurred after he had issued judicial review proceedings challenging the delay and the Court had granted permission for his application to proceed. She also accepted (in her para 68) that it was reasonable to expect Lambeth to ensure it had systems in place that enabled challenges to suitability of accommodation and monitoring of the most urgent cases by putting them on the transfer list. In these circumstances and in light of the burden of proof that lay on the Defendant, Lambeth would be expected to explain what had gone wrong in the Claimant's case and to address whether and to what extent this indicated that Lambeth's system did not in practice provide timely re-assessments of suitability and placing of appropriately urgent cases on the transfer list. On the face of it this directly bore, or at least was capable of bearing, on the question of whether the Defendant had taken reasonable steps to adjust the PCP to avoid the disadvantage to the class of disabled persons with carers.

125. Unfortunately, neither party had obtained a transcript of Mr Ogwu's evidence. Mr Bano's position was that his evidence did not explain the failings in the Claimant's case and nor had Lambeth put forward a positive case that what happened to him was an isolated incident. This is certainly true of Mr Ogwu's witness statement. Mr Ogwu must have amplified matters in his oral evidence, at least to some degree, as the Judge observed he said what had gone wrong in the Claimant's case was an ad hoc failure (para 26 above) and this does not appear in his witness statement. However, I cannot tell from this brief reference in the Judge's reasoning whether his evidence went any further than mere assertion to that effect. Mr Bano's position was that it did not. Whilst he was unable to recall the specifics of his evidence, given the intervening passage of

time, Mr Johson accepted that Mr Ogwu had not put forward an explanation as to why things had gone wrong in the Claimant's case.

126. In the circumstances, I do not accept Mr Johnson's suggestion that having evaluated the evidence on this issue, the Judge was satisfied that she could not extrapolate any systemic failings from the individual failings in the Claimant's case. For reasons I have highlighted, it appears the Judge did not embark on this inquiry, because she wrongly believed it was irrelevant to consider why things had gone wrong in the Claimant's case when assessing whether the Defendant had taken reasonable steps to avoid the group disadvantage. Mr Johnson rightly accepted that if the Judge had erred in this way (contrary to his primary position), then her factual conclusions were flawed by legal error.

127. I therefore uphold the Claimant's Ground Two.

Summary and outcome

128. Ground One alleges the Judge erred in law in dismissing the claim even on the basis of her findings that the Defendant took reasonable steps to adjust the PCP for the disadvantaged class but simply did not apply those steps to the Claimant as a result of ad hoc failings. I have rejected this ground for the reasons explained at paras 89 – 110 above.

129. Ground Two challenges the Judge's treatment of the delay in providing the Claimant with accommodation within the borough as arising from ad hoc failings that did not bear on whether the Defendant had shown it had taken reasonable steps to avoid the group disadvantage she had identified as arising from the PCP. For reasons I have explained at paras 111 – 127, I have concluded that the Judge did err in this regard and that her approach failed to reflect the burden of proof that lay on the Defendant.

130. I therefore allow the appeal on the basis of Ground Two. It follows that I will quash the Judge's order dismissing the claim.

131. I discussed with counsel during the hearing the course I should take if I allowed the appeal on this basis. Mr Bano submitted that if I reached this conclusion, it followed that the Defendant had failed to show it had taken reasonable steps to avoid the group disadvantage arising from the PCP (given it had adduced no evidence below as to how often Lambeth's systems were failing other applicants within the relevant class) and I should enter judgment for the Claimant, directing the provision of written submissions as to quantum. Mr Johnson opposed this course, arguing that in such circumstances the case had to be remitted for further findings to be made.

132. I have decided that the appropriate course is to remit the claim, given I do not have a transcript of Mr Ogwu's evidence and thus do not know precisely what was or was not said at trial about the failings in the Claimant's case and the possible interlinkage between them and the way that Lambeth's system operated in practice for others in the same class of disabled persons.

133. However, I am most anxious to avoid unnecessary delay and expense. Neither counsel objected to the proposition that if I did decide to remit the case, this should be to the Judge who had the benefit of hearing the trial and who in all other respects arrived at a

clear and unassailable decision. The parties accepted that the Judge's conclusions on the PCP and the substantial disadvantage issues would stand; and Mr Johnson fairly accepted that the Defendant should not have a second bite at the cherry in terms of calling further evidence, so that the Judge should determine the reasonable steps issue on the basis of the evidence she heard previously. I will therefore remit the question of whether the Defendant took such steps as it is reasonable for it to have to take to avoid the identified disadvantage, to be re-determined in accordance with the basis upon which I have allowed Ground Two. The parties accept that the Judge's conclusion on this issue will determine whether or not the claim succeeds. In terms of the evidence, either the Judge will be able to work from her own notes of the trial, or the parties will be able to provide her with a transcript of Mr Ogwu's evidence.

134. I have given the parties an opportunity to address other consequential matters, including costs, by way of written submissions.