NCN [2024] UKFTT 635 (GRC).

Case Reference: D/2023/50

First-tier Tribunal
General Regulatory Chamber
Transport

Heard on: 21 March 2024
Decision given on: 19 July 2024

Before

JUDGE KENNETH MULLAN
MEMBER DAVID RAWSTHORN
MEMBER RICHARD FRY

Between

GRAEME WILSON ROSS

Appellant

and

REGISTRAR OF APPROVED DRIVING INSTRUCTORS

Respondent

Representation:
For the Appellant: Ms Matheson
For the Respondent: Miss Jackson

Decision: The appeal is refused

Glossary

1. In these reasons:

   - "1988 Act" means the Road Traffic Act 1988;
   - "EA" means the Equality Act 2010;
   - "ECHR" means the European Convention on Human Rights
   - "HRA" means the Human Rights Act 1998;

Background

2. The Appellant's name had first been entered in the Register in January 2002 and in the normal course of events his registration would have expired on the last day of January 2026. The appellant failed the check test on three occasions, on 16 December 2021, 24 June 2022 and 25 November 2022. The Registrar has noted that the first two tests were conducted in accordance with Regulations by a check test trained DVSA Examiner from the Driver and Vehicle Standards Agency. Further, following each of the tests the Appellant was notified of the Examiner's findings during the debrief conducted at the end of the assessment and was advised to consider further personal development.

3. By way of a letter dated 1 September 2022, the Appellant was informed that he was required to take a further test on 25 November 2022 and the Registrar has submitted that he was urged to take account of the advice given in the previous tests.

4. On 25 November 2022, the Appellant undertook the test of continued ability and fitness to give instruction for a third time, in accordance with the provisions laid down in the Motor Cars (Driving Instruction) Regulations 2005. The test was conducted by a different Driving Examiner employed by the Driver & Vehicle Standards Agency. The Appellant's overall performance was again found to be below the required standard and he was notified of this finding at the conclusion of the test.

5. On 7 December 2022 the Appellant was advised that the Registrar was considering the removal of his name from the Register as the Registrar could no longer be satisfied that his ability to give driving instruction was of a satisfactory standard. The Appellant was invited to make representations. Representations, by way of correspondence dated 16 and 22 December 2022, were subsequently received.

6. On 11 January 2023 the Appellant was advised of the Registrar's decision that his name should be removed from the Register of Approved Driving Instructors and the Appellant was also advised of his right to appeal to the First-tier Tribunal.

7. A Notice of Appeal was subsequently received in the office of the First-tier Tribunal.

The remote oral hearing

8. The Appellant participated in the remote oral hearing and was represented by Ms Matheson. The Appellant gave oral evidence and Ms Matheson supplemented what was set out in the Notice of Appeal and in her further written submissions.

9. The Respondent was represented by Miss Jackson. She outlined the case for the Registrar by making reference to the reasons given by the Registrar for his decision to remove the Appellant's name from the Register.

Respondent's written reasons for decision

10. The Respondent's written reasons were as follows:

> 'On no less than three occasions, the Appellant undertook tests of continued ability and fitness to give instruction but failed each time to reach the required standard.
>
> Following each of the first two tests, the Appellant was advised of his shortcomings so as to give him the opportunity to consider these and to improve his standard of instruction. However, he still failed to reach the required standard on the third test.
>
> I therefore considered that the Appellant had been given adequate opportunity to pass the test but that he had failed to do so. Therefore, in the interests of road safety and consumer protection, I felt obliged to remove his name because he had been unable to satisfy me that his ability to give driving instruction was of a satisfactory standard.'

Aspects of the Appellant's notice of appeal

11. Attached to the Appellant's notice of appeal were two sets of submissions which were prepared by Ms Matheson. The substantive grounds of appeal were replicated in the further written submission forwarded after the oral hearing before us. For the moment, we extract the following from the notice of appeal:

> '**Background**
>
> The Appellant has been an Approved Driving Instructor since January 2002. He is experienced and well regarded in his local area. The appellant is currently suffering from a degenerative condition affecting his shoulder joints. He has been affected by this condition since

childhood with the onset of symptoms commencing in 1985 [pages 83-89 of bundle] and this condition has progressed over the years and is still progressing. He has had several surgeries on both shoulders. The Appellant has also been treated with nerve blocks, pain medication, physiotherapy and acupuncture. None of these have been successful. It is submitted that the Appellant has a long term impairment. Extracts from the Appellants medical records are produced and referred to at pages 16 to 89 of the bundle illustrating the progression of his condition. The Appellant's treating physician has stated that he is impaired. It is submitted that this impairment is less than trivial. The current medical position is that the Appellant is suffering with osteoarthritis and is undergoing further investigations. Although missing from his records the Appellant has undergone an MRI scan on his neck and shoulder on 14th May 2023 and will be seeing a consultant on 26th June 2023 for the results of the scan and to review his treatment plan. The Appellants symptoms include restricted movement in his arms, extreme pain, fatigue, difficulties concentrating and sleeping. The appellant can no longer partake in exercise or activities requiring him to have his arms unsupported. His social life has suffered as a result and he has difficulties carrying out day to day activities like carrying objects and moving his arms above head height. It is submitted that the Appellant's impairment has a substantial effect on his ability to carry out day to day activities. For example see pages 14 and 31 of the bundle where the Appellant states that he cannot lift his 2 year old son. It is submitted that the Appellants impairment is a disability in terms of Section 6 of the Equality Act 2010. The claimant has the protected characteristic of disability and is subject to the protections afforded to him by that act. Due to the protected characteristic of the Appellant being disable the DVSA must take steps involved in meeting the needs of disabled persons that are different from the needs of those who are not disabled. It is submitted that the Appellant's disability does not cause any risk or danger to the public as he can manage its effect with treatment and reasonable adjustments which are set out at par 2 below.

The Appellant is able to work with adjustments. The adjustment are as follows:

(i) he takes more frequent breaks.

(ii) has a car with armrests

(iii) he works reduced hours.

The Appellant requires these adjustments so that he can manage his symptoms. Sitting for prolonged periods can cause his symptoms to worsen. The Appellant is self-employed and has implemented these adjustments which allow him to continue working. The Appellant's pupils are aware of the adjustments and he has never received a complaint arising out of them. The adjustments have not inhibited the

appellant's ability to teach, however, he would be placed at a disadvantage to those who do not share his disability if the adjustments were not made or not possible. The Appellant is an experienced instructor of 20 years and is held in a high regard by his pupils and in his local area.

The Appellant is being treated by his general practitioner and has been referred to a specialist at the Queen Elizabeth Hospital in Glasgow. He attended an appointment with a consultant on 22nd February 2023 [pages 26-27). The consultant suspects that the Appellant may be suffering from arthritis in his neck and shoulders and has noted some deterioration. The consultant has referred the Appellant for further investigations including an MRI which was carried out in May 2023 and the results are awaited. The Appellant's condition is treatable and can be managed. The Appellant's prognosis and treatment as at 17 March 2023 is described in the medical report at pages 10 and 11. The Appellant has osteoarthritis in his neck causing pain and has a long history of bilateral degenerative shoulder pain. He has managed to work but has tried to avoid painkillers which could impact his ability to work. He is currently treating his condition with paracetamol as it will not cause drowsiness. The pain management regimen recommended by the Appellants doctor is one which avoids any drugs likely to impair his ability to work. The appellant's function has remained the same for a number of years but his impairment is one which has been present for a number of years and managed with adjustments. The Appellant is continuing to work with his treating physicians and his consultants and is managing his condition. The Appellant has been proactive in the management of his condition.

There is no risk presented by the Appellant to public safety and other road users because his condition is well managed and he follows the instructions of his treating doctors. As per the report by his treating physician the Appellant specifically avoided medication which would stop him driving or impair his concentration. Further there is no impact on the Appellants ability to teach and the quality of his teaching. This is due to him following the advice of his treating physicians and making reasonable adjustments which alleviate his symptoms but do not affect the learning experience of his pupils.

The Appellant is required to undergo regular testing of his competence. He was suffering from his condition impairments during the time of his tests. The Appellant's symptoms cause pain which can affect his concentration and his sleep. He works currently with adjustments by way of reduced hours. The Appellant's symptoms can be aggravated by stress and he can experience difficulties with the confines of the car if adjustments are not made. The Appellant has managed to work with reduced hours and more frequents breaks which are adjustments made to remove any disadvantage to him due to his symptoms. The test have

comprised of his teaching being assessed. The Appellant teaches with adjustments and he believes these adjustments ought to have factored into the test to remove the disadvantage faced by the Appellant whilst teaching. The Appellant was not offered any adjustments in respect of his test and this contributed to his poor performance and test failures. The Appellant was at a disadvantage to persons without his disability because no account was taken of his disability and no steps were taken to remove that disadvantage during the tests.

The Appellant has sat three tests on the following dates 16 December 2021, 24 June 2022 and 25 November 2022. It is accepted the appellant failed these tests. The Appellant was experiencing the symptoms of his condition during the period of December 2021 and December 2025 [*sic*]. The Appellant's condition to date has not resolved and is still under investigation. The Appellant can work with adjustments by way of reduced hours, frequent breaks and the use of an arm rest. No adjustments were made in place for the Appellant during his tests nor were any enquires made into the appellants medical condition by the respondents.

Test number 1

During the test on 16 December 2021 the Appellant undertook the check test. The appellant failed the test for a series of minor errors. There were no serious or dangerous incidents. Whilst the appellant was sitting the test he experienced pain and numbness. The Appellant believed that his symptoms caused his poor performance. It is submitted that the Appellant's poor performance was caused by the symptoms arising from disability. No adjustments were made for the Appellant in connection with Test Number 1.

Test number 2

A second test was scheduled for the 24 June 2022. The Appellant contacted the DVSA booking service to request that the test be postponed. The reason he gave was that he was experiencing symptoms and was unwell. This request was refused and the Appellant proceeded to sit the test. The Appellant failed the test for the same reasons as the first. The appellant believed that his symptoms caused his poor performance. When seeking the postponement due to his health no adjustment were discussed with the Appellant nor offered to him.

Test number 3

A thirs test was scheduled for the 25 November 2022. During the intervening period since the last test in June the appellant continued to experience symptoms. Due to his request for a postponement on health grounds being declined previously the Appellant sat the test. He failed for the same reasons as tests 1 and 2. The Appellant believed that his health condition affected his performance. No enquiries were made into

the Appellant's health nor were any adjustment discussed with him. It is submitted that his symptoms arose from his disability.'

12. The Appellant attached a significant volume of medical evidence to his notice of appeal.

The substantive submissions advanced on behalf of the Appellant

13. In her written and oral submissions advanced on behalf of the Appellant, Ms Matheson began by noting that Section 128 (2) (d) (the 1988 Act) gives the Registrar the power to remove an instructor from the Register who has failed a check test and that this is a discretionary power which the Registrar is exercising. The Registrar is not obliged to remove an instructor from the Register after failing the tests.

14. She asserted that there '… has been no attempt by the Registrar to challenge the evidence lodged by the Appellant. It is submitted that the Appellant's medical evidence should be accepted and taken as read but reference to particular parts of the evidence lodged will be referred to .' We turn below to the issue of the Registrar's knowledge of the Appellant's medical condition and, accordingly, his disability for the purposes of the relevant legislation.

15. Turning to the Appellant's position she submitted that:

'The Appellant accepts that he failed the test in question. He submits that he took account of the feedback provided by the examiner. The points he failed on were relatively minor and none of these cause the examiners any safety concerns **[Replacement Test sheets**]. We would refer the panel to our replies at parts 1 and 5. The Applicant's evidence in respect of the criticisms made of him during his test 1 was in summary that he could not recall exactly but he was required to take extra training. He had not communicated a fault at the time. He was advised he was not dangerous. The Appellant was advised to undertake additional personal study and online training which he undertook. The concern for the Appellant was that his impaired performance arose from his medical condition. It is submitted that despite reflecting on the feedback and undertaking additional training by way of online training videos the underlying medical condition had not resolved. The nature of the feedback the Appellant received was broadly similar to that given to him in test 1. The Appellant was still adjusting his hours and working with his GP in respect of treatments **[page 27-28**]. The Appellant cannot take strong medications as this would render him unable to drive due. The Appellant has been working with his GP to maintain his pain levels without the need for strong medication. It is submitted that the medical position has moved on for the Appellant and he is now on a waiting list for surgery. It is hoped that this operation will be successful in alleviating his condition. It is submitted that on that basis the Appellant may make a recovery or at least considerable improvement the Appellant is taking steps to ensure his performance improved.'

16. We return below to the scores awarded in respect of each of the failed check tests and our jurisdiction in respect of same. We have noted the assertions have

been made on behalf of the Appellant that his medical condition has 'moved on', and that he is on a waiting list for surgery which, it is hoped, will alleviate his medical condition. That is good development for him. We observe, however that we are considering the decision of the Registrar which is dated 6 February 2023.

17. Ms Matheson then considered the response from the Registrar to the notice of appeal as set out in the Statement of Case. She observed that the Registrar confined himself to consideration of the email correspondence from the Appellant dated 16 December 2022 following notification to the Appellant on 7 December 2022 that the Registrar was considering the removal of the Appellant's name from the Register. Ms Matheson observed that in the email correspondence of 16 December 2022, the Appellant had intimated '… how his condition had affected him. He cited the adjustments he had made in order to work safely. In essence the Appellant had requested what was in effect a reasonable adjustment. He set out that changes to his pain management were having a positive effect.' Ms Matheson submitted that the Appellant's submissions were supported by a report prepared by his General Practitioner and, further, the Registrar failed to allow the Appellant additional time to provide more detailed medical evidence which was appropriate given that he had raised his health condition with the Registrar. Accordingly:

> 'This ought to have been taken to sign post the possibility of rights under the Equality Act 2010 being engaged. At its lowest, however, the Appellant brought a health condition to the attention of the Registrar which it is submitted requires a degree of further enquiry in order to exercise their discretionary powers reasonably and proportionately. At the very least the Registrar could have asked relevant such as "do you have an impairment and if so how does this affect you?". This nature of enquiry is absent which we submit show that no enquiry or consideration was made.'

18. The emphasis here is our own.

19. Ms Matheson noted the Registrar's comments in paragraph 8 of the Statement of Case that 'Whilst the has stated that he has to considerably reduce his working hours, his attendance with learner driving test pupils at his local test centres would suggest he is providing a full programme of professional tuition.' Ms Matheson submitted that attendance at local test centres was not indicative of a full programme of tuition. She noted that the Appellant had lodged evidence of his diary which demonstrated that he was providing tuition to 2-4 pupils per day with significant gaps between the lessons. Other factors, such as the impact of the pandemic and the demand for tests at short notice should also have been considered. Accordingly, the Appellant was arranging his diary to prioritise pupils with a pending test.

20. Ms Matheson asserted that:

> '… the Appellant is disabled in terms of the Equality Act 2010 (EA). He has a long-term physical impairment that has a substantial impact on his day to day activities as per S.6 of the EA. This is supported by the medical evidence provided and summarised by the GP report at **[pages 27-28].** We submit that this test is a different one than applied to disabled instructors and those provisions are not relevant to this case as it is disability status under the act which affords protection to disabled people under the Equality Act 2010. This RTA provisions serve a different purpose of protecting the public where there is a potential danger. We would submit that not all disabilities are such that they would cause danger to the public. Had parliament's intention been to require all drivers with disabilities in terms of the Equality Act 2010 to be registered then they would have legislated accordingly. It has not done so and there is accordingly a class of persons who are covered by the Equality Act 2010 but not by the requirements the RTA. It is submitted that the Appellant is such a person.'

21. Ms Matheson submitted that not allowing the appeal would call into question the robustness of the Register. The response by the Registrar to the Appellant's circumstances could lead to the following consequences:

> 'Public confidence could be damaged by unduly harsh decisions taken by Registrars in circumstances where there is new information available and in particular where it relates to those with genuine ill health impacting their ability to sit and pass their tests. It is submitted those who fail three tests with health related impairments are more likely to be disabled than not and therefore there is a real risk of discrimination occurring. Decisions taken by Registrars that fail to 1) make enquiries as to the genuineness of medical conditions and 2) consider the nature of medical evidence provided, could undermine public confidence in that there is no scrutiny being applied and there is a lack of consideration of potential Equality Act issues. It is submitted that Equality Act obligations on decision makers are an important factor in maintaining public confidence. We submit that society has determined that these matters of such importance that parliament has legislated.'

22. Ms Matheson submitted that the DVSA is a public authority for the purposes of the EA and the Human Rights Act 1998. Further there was a duty to have due regard to the Public Sector Equality Duty (PSED). The Appellant's submission was that the Registrar did not have due regard to the PSED. There was no reference to the EA 2010 in the Registrar's response. Accordingly, the Registrar had failed in his obligations under the EA and, in particular, the PSED set out in section 149(1). Ms Matheson submitted that support could be derived from the case of *Rosebery Housing Association Ltd v Williams & Anor* (2021) EW Misc 22 (CC) and *McMahon v Watford BC,* 2020 WL 01694914 (2020).

23. Ms Matheson asserted that the email correspondence from the Appellant to the Registrar:

'… had all the hallmarks of a reasonable adjustment request. A disabled person was setting out their impairment, the effect on them and a possible adjustment to reduce that impact. It is submitted that this ought to have been sufficient to have alerted the Registrar's obligations in terms of the Equality Act 2010. It is submitted that the Registrar did not approach the decision to remove the Appellant with an open mind nor did they carry out a proper process. The Appellant's submission is that the decision to remove him was discriminatory and therefore unlawful …'

24. Accordingly, the Registrar's decision was discriminatory and was wrong. In addition Ms Matheson submitted that the Registrar had applied a 'PCP'.

25. We observe that this is a reference to section 19(1) of the EA which provides:

'(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B's.'

26. Ms Matheson asserted that the PCP was:

'… to remove a person who had failed three tests. This PCP disadvantaged disabled people and places them at a disadvantage to those who are not disabled. A disabled person is more likely to have an impairment which could affect their performance over the period of time their tests are sat. The lack of flexibility demonstrated by the Registrar places disabled people at a disadvantage. This disadvantage could have been removed by allowing an additional test which would have been an adjustment capable of removing the disadvantage to the Appellant.'

27. Ms Matheson submitted that that the decision of the Registrar should be set aside because their decision did not have due regard to s.149 and or the Appellant's decision amounted to unlawful discrimination which is prohibited by the EA.

28. Ms Matheson then turned to an assessment of a 'proportionality' test and the potential impact of the HRA. We note that the HRA implemented the ECHR. Miss Matheson referred to Article 6 of the ECHR and submitted that the Appellant was '… not given a fair hearing by the Registrar as he was unable to provide relevant medical evidence.' Further, the effect of the Registrar's decision was to remove the Appellant's right to earn a living which, in turn, was a significant interference with the Appellant's ECHR rights. There were two aspects to this. The first was a failure to allow the Appellant to have adequate time to provide relevant medical evidence. The second was a failure to engage with the evidence which had been provided. The Registrar, in using terms such as 'cannot ignore' and 'obliged' fettered his own discretionary power and failed to balance the check test failures '… against the impact on the Appellant, the reasons for the impaired performance and the relevant evidence.' Accordingly, the decision was disproportionate.

29. The Registrar had not provided any evidence or statements concerning road safety concerns. Accordingly, the balancing exercise had not been carried out. Ms Matheson asserted that there was a 'power' to suspend which the Registrar had not exercised. Finally, the Appellant had 'been deprived of his right to adequate reasons as to why the Registrar decided to use their discretion to remove him.' The submitted reasons did nothing more than set out the power exercised. The Registrar, in exercising his discretion, could have decided not to remove the Appellant's name from the Register, which was a less restrictive option.

The decision in D/2010/332 E Edis (*'Edis'*)

30. At the oral hearing we asked Ms Matheson to provide written submissions on the application of decision in ***Edis***. Her submissions were as follows:

> 'Having had the opportunity to consider the case of Edis in full. The Appellant's submissions are as follows. The case is not completely on all fours with the present case on the facts in that Mr Edis had refused to present himself for testing. In the Appellant's case he has presented himself for testing, but his results fell short. In his evidence the Appellant relayed the advice and feedback he received which in short was that he had failed to pick up on minor mistakes made by pupils when they occurred. The Appellant explained the reason for this was that he was experiencing pain due to his condition but that he would usually stop and go through these points at an appropriate time. Not necessarily instantly. His feedback was that he was not dangerous and was told that some of his lessons were in fact good lessons but just did not hit the test marks. He accepted what had been told to him and undertook the additional training recommended. The Appellant unlike Mr Edis does not wish to remain on the register without submitting himself for testing, nor does he challenge the test results. The Appellant is seeking an additional opportunity to sit his test and for the tribunal to use its discretion. It is submitted that the Appellant's performance was impacted by his medical condition which it is submitted is a disability. Evidence of this has been provided and it was not challenged. It is submitted that in a case where there is unchallenged medical evidence in mitigation of failed tests it would not have a detrimental effect on public confidence to allow one further test attempt. The Appellant is not asking for indefinite chances. This would be an entirely different question and one that could have a detrimental effect on public confidence. The Appellant is asking for two things. One is time to allow his condition to improve and to be allowed another chance to sit the test. It is submitted that this course of action would have no detrimental effect on public confidence and is a reasonable one in all the circumstances. There is no risk of a flood gate effect as was a potential concern in Edis as in order to succeed ADIs must produce evidence, and this be considered in light of the facts. The grounds proceeding on in this case differ considerably to those advanced in Edis. The question of

whether what is being asked would call into question public confidence and the robustness of the register is a valid on and the Appellant's submission is that what is being asked in this case would not undermine there. The register was not in a position to consider the evidence this tribunal had and this is the purpose of the appeal process.'

The powers of the First-tier Tribunal ('the Tribunal') in determining an appeal

31. The powers of the Tribunal in determining this appeal are set out in section 131 of the 1988 Act. Section 131(1) to (4) provides:

'131. Appeals.

(1) A person who is aggrieved by a decision of the Registrar—

(a) to refuse an application for the entry of his name in the register, or

(b) to refuse an application for the retention of his name in the register, or

(c) to remove his name from the register,

may appeal to the First-tier Tribunal.

(2) A person who is aggrieved by a decision of the Registrar—

(a) to refuse an application for the grant of a licence under this Part of this Act, or

(b) to revoke such a licence,

may appeal to the First-tier Tribunal.

(3) On the appeal the First-tier Tribunal may make such order—

(a) for the grant or refusal of the application or,

(b) for the removal or the retention of the name in the register, or the revocation or continuation of the licence,

(as the case may be) as it thinks fit.'

32. In summary, the Tribunal may make such order as it thinks fit.

33. When making its decision, the Tribunal stands in the shoes of the Registrar and takes a fresh decision on the evidence available to it, giving appropriate weight to the Registrar's decision as the person tasked by Parliament with making such decisions. In *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* ([2011] EWCA Civ 31) the issue was the powers of a Magistrates' Court on an appeal from a decision of a licensing authority to review a licence for the sale and supply of alcohol and for the provision of

entertainment and late night refreshment. Toulson LJ said the following at paragraphs 39 to 52:

39. Since Mr Glen accepted (in our view rightly) that the decision of the licensing authority was a relevant matter for the district judge to take into consideration, whether or not the decision is classified as "policy based", the issues are quite narrow. They are:

    1. How much weight was the district judge entitled to give to the decision of the licensing authority?

    2. More particularly, was he right to hold that he should only allow the appeal if satisfied that the decision of the licensing authority was wrong?

    3. Was the district judge's ruling compliant with article 6?

40. We do not consider that it is possible to give a formulaic answer to the first question because it may depend on a variety of factors - the nature of the issue, the nature and quality of the reasons given by the licensing authority and the nature and quality of the evidence on the appeal.

41. As Mr Matthias rightly submitted, the licensing function of a licensing authority is an administrative function. By contrast, the function of the district judge is a judicial function. The licensing authority has a duty, in accordance with the rule of law, to behave fairly in the decision-making procedure, but the decision itself is not a judicial or quasi-judicial act. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires. (See the judgment of Lord Hoffmann in *Alconbury* at para 74.)

42. Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, the economic benefit to the proprietor and to the locality by drawing in visitors and stimulating the demand, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on. Sometimes a licensing decision may involve narrower questions, such as whether noise, noxious smells or litter coming from premises amount to a public nuisance. Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. In any case, deciding what (if any) conditions should be attached to a licence as necessary and proportionate to the promotion of the statutory licensing objectives is essentially a matter of judgment rather than a matter of pure fact.

43. The statutory duty of the licensing authority to give reasons for its decision serves a number of purposes. It informs the public, who can make their views known to their elected representatives if they do not like the licensing sub-committee's approach. It enables a party aggrieved by the decision to know why it has lost and to consider the prospects of a successful appeal. If an appeal is brought, it enables the magistrates' court to know the reasons which led to the decision. The fuller and clearer the reasons, the more force they are likely to carry.

44. The evidence called on the appeal may, or may not, throw a very different light on matters. Someone whose representations were accepted by the licensing authority may be totally discredited as a result of cross-examination. By contrast, in the present case the district judge heard a mass of evidence over four days, as a result of which he reached essentially the same factual conclusions as the licensing authority had reached after five hours.

45. Given all the variables, the proper conclusion to the first question can only be stated in very general terms. It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal.

46. As to the second question, we agree with the way in which Burton J dealt with the matter in paragraphs 43-45 of his judgment.

47. We do not accept Mr Glen's submission that the statement of Lord Goddard in *Stepney Borough Council v Joffe*, applied by Edmund Davies LJ in *Sagnata Investments Limited v Norwich Corporation* is applicable only in a case where the original decision was based on "policy considerations". We doubt whether such a distinction would be practicable, because it involves the unreal assumption that all decisions can be put in one of two boxes, one marked policy and the other not. Furthermore, *Stepney Borough Council v Joffe* was not itself a case where the original decision was based on "policy considerations". In that case three street traders had their licences revoked by the London County Council after they were convicted of selling goods at prices exceeding the maximum fixed by statutory regulations. On appeal the magistrate decided that they were still fit to hold the licences. The county council unsuccessfully argued before the Divisional Court that the magistrate's jurisdiction was limited to considering whether or not there was any material on which the council could reasonably have arrived at its

decisions to revoke the licences. The court held that the magistrate's power was not limited to reviewing the decision on the ground of an error of law, but that he was entitled to review also the merits. It was in that context that Lord Goddard went on to say that the magistrate should, however, pay great attention to the decision of the elected local authority and should only reverse it if he was satisfied that it was wrong.

48. It is normal for an appellant to have the responsibility of persuading the court that it should reverse the order under appeal, and the Magistrates Courts Rules envisage that this is so in the case of statutory appeals to magistrates' courts from decisions of local authorities. We see no indication that Parliament intended to create an exception in the case of appeals under the Licensing Act.

49. We are also impressed by Mr Matthias's point that in a case such as this, where the licensing sub-committee has exercised what amounts to a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the magistrates' court that the sub-committee should not have exercised its discretion in the way that it did rather than that the magistrates' court should be required to exercise the discretion afresh on the hearing of the appeal.

50. As to article 6, we accept the propositions advanced by Mr Matthias and we agree that the form of appeal provided by s182 and schedule 5 of the Act amply satisfies the requirements of article 6.

51. Although the point is academic in the present case, we doubt the correctness of part of the district judge's ruling where he said:

> "I am not concerned with the way in which the licensing sub-committee approached their decision or the process by which it was made. The correct appeal against such issues lies by way of judicial review."

52. Judicial review may be a proper way of mounting a challenge to a decision of the licensing authority on a point of law, but it does not follow that it is the only way. There is no such express limitation in the Act, and the power given to the magistrates' court under s181(2) to "remit the case to the licensing authority to dispose of it in accordance with the direction of the court" is a natural remedy in the case of an error of law by the authority. We note also that the guidance issued by the government under s182 and laid before Parliament on 28 June 2007 states in para 12.6:

> "The court, on hearing any appeal, may review the merits of the decision on the facts and consider points of law or address both."

However, this point was not the subject of any argument before us.'

34. The decision in *Hope and Glory* was considered by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* ([2016] UKSC 60). At paragraph 45, Lord Reed stated the following:

'45. It may be helpful to say more about this point. Where an appellate court or tribunal has to reach its own decision, after hearing evidence, it does not, in general, simply start afresh and disregard the decision under appeal. That was made clear in Sagnata Investments Ltd v Norwich Corpn [1971] 2 QB 614, concerned with an appeal to quarter sessions against a licensing decision taken by a local authority. In a more recent licensing case, *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868, para 45, Toulson LJ put the matter in this way:

> "It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

35. The burden of proof in satisfying the Tribunal that the Registrar's decision was wrong rests with the Appellant.

SSWP v R (MM & DM)) ([2016] AACR 11) ('MM')

36. The background to this decision is that the applicants, who both had mental health problems, brought claims for judicial review under the Equality Act 2010 asserting that they were placed at a substantial disadvantage in comparison to claimants and recipients of employment and support allowance (ESA) who did not suffer from mental health problems. They sought adjustments under the 2010 Act requiring the decision-maker The Secretary of State for Work and Pensions, 'SSWP') either to obtain or to consider obtaining further medical evidence before reaching a decision on a claim by someone with mental health problems. A three-judge panel of the Administrative Appeals Chamber (AAC) of the Upper Tribunal (UT) was convened to consider the cases. In an interim decision it held that the Department for Work and Pensions' processes placed those with mental health problems at a substantial disadvantage and directed the Secretary of State for Work and Pensions to take defined steps to investigate and assess the implementation of changes he might make before it gave a final decision. On appeal by the Secretary of State against that decision the Court of Appeal ([2013] EWCA Civ 1565) decided, among other things, that (1) under section 21(3) of the 2010 Act 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 adjustments was owed, and (2) the UT had exceeded its powers by issuing those particular directions – its duty had been to determine whether the adjustments identified by the applicants were reasonable (not to determine a reasonable adjustment itself, or to supervise the process of evidence gathering). Applying the approach set by the Court of Appeal the relevant issue before the UT, on remittal, was whether, as required by section 21, either applicant could show that the Secretary of State had been in breach of duty to him or her individually (as opposed to disabled applicants as a class).

37. We begin with aspects of the decision of the Court of Appeal. In paragraphs 35 to 47, Elias LJ stated the following:

'Reasonable *adjustments and the Equality Act*

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. Baroness Hale identified the reason for this in *Archibald v Fife Council* [2004] ICR 954. After noting that traditional anti-discrimination law requires treating the relevant characteristic, for example, race or sex as irrelevant, she explained why this approach does not suffice with respect to the disabled:

> "The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment…..It is common ground that the 1995 Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others."

And the purpose of this is, as Sedley LJ noted in *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 at para 30:

> "so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public."

36. The concept of reasonable adjustment was first adopted in the Disability Discrimination Act 1995. The scope of that obligation was then extended

in 2005, and the Equality Act has consolidated, simplified and made certain amendments to the earlier legislation.

37. The Act is now structured, so far as reasonable adjustments are concerned, in the following way. First, section 20 of the EA 2010 sets out in generic terms the content of the duty to make reasonable adjustments. It provides as follows:

"20. Duty to make reasonable adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid."

38. This section does not impose the duty to make adjustments; it simply defines what may be required when the duty is imposed. However, not all three requirements are engaged in all cases; the scope varies depending upon the circumstance in which the duty arises and different schedules to the Equality Act apply to different situations, for example in the fields of education and premises.

39. The relevant schedule in this case is schedule 2. This must be read together with part 3 of the Act which applies to those providing services and exercising public functions. The task of assessing claimants for ESA involves the exercise of a public function.

40. Section 29(6) provides that a person exercising a public function "must not ... do anything that constitutes discrimination, harassment or victimisation." The obligation to make reasonable adjustments is applied to persons exercising public functions by section 29(7).

41. Schedule 2 to the Act then specifies the nature of the duty with respect to public service providers. Apart from applying all three requirements in sections 20(3), (4) and (5), it also modifies the concept of reasonable adjustment in certain ways. Two paragraphs are of particular relevance to this appeal. First, para 2(4) provides as follows:

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

Second, para 2(5) provides a specific definition of what constitutes a "substantial disadvantage" in this field of operation:

> "(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—
>
> (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or
>
> (b) 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 the detriment..."

42. The term "substantial" is defined in section 212(1) as meaning "more than minor or trivial." It is not, therefore, a particularly high hurdle to establish substantial disadvantage.

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.

44. The final provision to which reference should be made, and which is also central to a ground of appeal, is section 21 which is as follows:

> "(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 purpose 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."

45. Accordingly, by section 29(6) there is a duty not to discriminate; by section 21(2) discrimination includes, amongst other matters, a failure to make reasonable adjustments; and by section 21(1) this in turn arises where there is a failure to comply with any of the three requirements. In this case the alleged failure is only in respect of the first requirement in section 20(3).

The proceedings for enforcing breach

46. Generally, proceedings relating to a contravention of the Equality Act 2010 have to be brought in accordance with Part 9 of that Act: see section 113(1). Part 9 provides that discrimination claims relating to the exercise of public functions can be brought by a claim in the county court: see section 114(1). The county court has power to grant not only damages but also any remedy which could be granted by the High Court in a claim for judicial review: see section 119(2).

47. However, by section 113(3)(a), Parliament has provided that the obligation to bring proceedings in accordance with part 9 of the Act "does not prevent a claim for judicial review." Hence judicial review could properly be pursued here.'

What is a disability?

38. In paragraph 7 of its decision in *MM* a three-judge panel of the AAC, on remittal from the Court of Appeal, stated the following:

'What is a disability?

7. Disability is defined under section 6 of the Equality Act which is, as relevant to this appeal, as follows:

"**6. Disability**

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability –

(a) reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

"Substantial" is defined in section 212 to mean "more than minor or trivial".

8. It is immediately apparent that the use of the global description "mental health problem" is apt to describe a very wide range of mental impairments, from severe psychosis to minor adjustment disorders. Since "substantial" merely means "more than minor or trivial", an applicant may be able to succeed in a claim under the Equality Act even though the long term effect of his disability is small.'

39. In paragraphs 9 to 13, the three-judge panel stated:

'Discrimination and the duty to make adjustments

9. A person who carries out public functions is under a duty to make reasonable adjustments to prevent a disabled person from being disadvantaged by the manner in which he carries those functions out. This duty is both a continuing and anticipatory duty. The duty is imposed by Schedule 2, paragraph 2 whilst the content of the duty is set out in section 20, and in particular, section 20(3) of the 2010 Act.

…

10. Paragraph 2(5) of Schedule 2 defines what being placed at a substantial disadvantage means and includes suffering an unreasonably adverse experience when being subjected to a detriment (we discuss this in our earlier decision).

11. The first requirement has two elements:

(i) that there is a provision criterion or practice that puts disabled persons generally at a substantial disadvantage, and

(ii) reasonable steps can be taken to avoid that disadvantage.

12. The decision of the Court of Appeal in this case is to the effect that to establish discrimination, the duty to the class of disabled persons generally is then narrowed down to an individual level under section 21(2):

"**21. Failure to comply with duty**

(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. [italics added]

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose 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."

13. At the discrimination stage the claimant needs to show that the failure to comply with the anticipatory duty to make reasonable adjustments is disadvantageous or detrimental to him (see for example *Finnigan v Chief Constable of the Northumbria Police* [2013] EWCA (Civ) 1191, [2014] 1 WLR 445; in particular the last two sentences of [45] of the judgment).'

40. In paragraphs 49 to 51, the three-judge panel stated the following:

'49. It is clear from the Court of Appeal's decision that sections 20 and 21 of the Equality Act create a two stage approach to determining whether an applicant can establish discrimination:

(i) has there been a failure to comply with a duty to make reasonable adjustments, and

(j) has the individual applicant shown a failure to comply with that duty in relation to him.

50. The first stage has two elements:

(i) are disabled persons generally (or a class of disabled persons) put at a substantial (ie more than minor or trivial) disadvantage by the disputed provision, criterion or practice, and

(ii) is it reasonable for steps to be taken to avoid that class disadvantage.

51. At the second stage the individual (and so here MM and DM, the only individual applicants) has to show that he or she is put at such a disadvantage by the failure to comply with the duty to make reasonable adjustments.'

41. The three-judge panel then turned to consideration of the question as to which issue needed to be decided first: reasonable adjustment or individual breach? In paragraphs 57 to 59, it stated the following:

57. The Court of Appeal held, however, that although the judge had erred by not taking this approach, the failure of the Chief Constable to adjust her

practice, policy or procedure caused no detriment to Mr Finnigan and this was fatal to his claim. This shows that the stepped approach approved by the Court of Appeal in *Finnigan* means that although generally a court or tribunal should address whether the adjustments advanced on a class basis are reasonable before going on to consider the position of the individual claimant, it can jump to the last stage and consider the position of the individual applicant on an assumption concerning the nature and extent of those adjustments and, based thereon, that there is or has been or will be a failure to comply with the duty to make reasonable adjustments (see the definition of substantial disadvantage in Schedule 2 paragraph 2(5) which refers to a benefit that is or may be conferred and a detriment that the person is or may be subjected to).

58. So it seems to us, and the contrary was not suggested, that it was permissible for Mr Chamberlain to argue first that the individual claimants could not show that the alleged failure of the Secretary of State to comply with his anticipatory duty by making the adjustments they say are reasonable (and others that can fairly be said to be included in that menu) has caused, is causing or will cause them any substantial (ie more than minor or trivial) disadvantage or has, is or will subject them to any detriment that caused them an unreasonably adverse experience, and that this was fatal to their claims for judicial review.

59. Additionally it seems to us that this approach reflects the direction of travel of the Court of Appeal in this case, namely that the grant of relief must depend on the claimants or one of them showing on that basis that they suffered substantial (ie more than minor or trivial) detriment.'

Does the EA apply to proceedings before the First-tier Tribunal?

42. In *LO'L v Secretary of State for Work and Pensions (ESA)* ([2016] AACR 31, in an appeal before the First-tier Tribunal (Social Entitlement Chamber), it was decided that a duty to make reasonable adjustments under section 29 of the EA did not apply as the Tribunal (and not the individual Chamber) was exercising a judicial function: paragraph 3(1) (a) and (b) and (2) of Schedule 3 to the Act. The decision in *DC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 218 (AAC) was wrong in so far as it relied on the existence of such a duty and should not be followed.

The Public Sector Equality Duty (PSED)

43. Chapter 1 of Part 11 of the EA makes provision for the PSED. Section 149 (1) to (7) provides:

'149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.'

44. The DVLA recognises that it has duties under the PSED provisions – see https://www.gov.uk/government/organisations/driver-and-vehicle-licensing-agency/about/equality-and-diversity#:~:text=Under%20the%20Equality%20Act%202010%2C%20we%20have%20specific%20duties%20to,plans%20for%202021%20to%202024.

45. Section 156 of the EA provides:

'156 Enforcement

A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law.'

46. No reason why it cannot be cited in support of other claims.

The purpose of the legislation

47. In D/2010/322 E. Edis, Upper Tribunal Judge Brodrick said the following, at paragraph 32:

'The fourth and final question is whether the Registrar's decision to exercise his discretion to remove the Appellant's name from the Register was correct. In answering that question it is helpful to consider the purpose of Part V of the Act. The main purpose of the Act is to regulate those who are paid to give instruction in the driving of a motorcar, (s.123 of the Act). The principle way in which that purpose is achieved is by requiring that those who give paid

instruction have their name on the Register of ADI's, which is kept by the Registrar. In order that the public can have confidence in the Register Parliament has put other provisions in place. For example there is a pre-condition to registration that an applicant has passed all three parts of the qualifying examination, there is a requirement that the applicant is and remains a 'fit and proper person to have his name on the Register', (which goes beyond ability as an instructor) and s.125(5) provides that: "*the entry of a person's name in the register shall be subject to the condition that, so long as his name is in the register, he will, if at any time required to do so by the Registrar, submit himself for such test of continued ability and fitness to give instruction in the driving of motorcars…..as may be prescribed*". The importance of this provision is that it ensures, by periodic testing, that driving instructors remain sufficiently competent to charge for instruction. It is therefore an important component in maintaining public confidence in the Register. It is important to note that the imposition of the condition is mandatory and that the terms of the condition are that the ADI 'will, if at any time required to do so by the Registrar' submit himself' for a check test. In my judgment once an ADI has been required by the Registrar to submit himself for a check test there is nothing in the Act with permits the ADI to seek to impose his own pre-conditions to submitting himself for a check test.'

48. In D/2011/010 Hussain, Judge Brodrick repeated his guidance concerning the purpose of section 125(5) of the 1998 Act by stating the following, at paragraphs 11 to 13:

'11. It is clear from the terms of s.125(5) of the 1988 Act that the entry of a person's name on the Register is subject to a condition that, as long as his or her name remains on the Register, he or she will submit themselves for a check test if required, at any time, to do so by the Registrar. Two points need to be stressed in relation to the wording of s.125(5).

12. First, the obligation to submit to a check test is firmly placed on each and every person whose name remains on the Register. I say that because the 1988 Act makes it a condition of being on the Register that such people submit to a check test.

13. Second, the underlining of 'any', (in paragraph 11), is mine. The purpose is to stress that the timing of a check test is plainly a matter for the Registrar's discretion. It follows that it is not something which can be dictated by the Appellant. In exercising his discretion, it is obviously appropriate for the Registrar to consider the circumstances of each individual case, insofar as he has been made aware of them. It will be for him to decide whether or not a particular individual has made out a good case for postponing a check test. It will be for him to decide, if alternative dates are offered, whether such an offer should be accepted.'

Reasons

Our jurisdiction with respect to the EA

49. We noted above that the Court of Appeal said the following, at paragraphs 46 and 47 of its decision:

> *'The proceedings for enforcing breach*
>
> 46. Generally, proceedings relating to a contravention of the Equality Act 2010 have to be brought in accordance with Part 9 of that Act: see section 113(1). Part 9 provides that discrimination claims relating to the exercise of public functions can be brought by a claim in the county court: see section 114(1). The county court has power to grant not only damages but also any remedy which could be granted by the High Court in a claim for judicial review: see section 119(2).
>
> 47. However, by section 113(3)(a), Parliament has provided that the obligation to bring proceedings in accordance with part 9 of the Act "does not prevent a claim for judicial review." Hence judicial review could properly be pursued here.'

50. It is our view, therefore, that even if the Appellant can, following the stepped process described by both the Court of Appeal in *MM*, show that:

- The DVSA is, for the purposes of the EA, a person who carries out public function.
- He is, for the purposes of the EA, a disabled person.
- The DVSA, is accordingly, under a duty to make reasonable adjustments to prevent him, as a disabled person, from being disadvantaged by the manner in which the DVSA carries out those functions.
- The duty is both continuing and anticipatory.
- The DVSA has a provision, criterion, or practice (PCP) or physical feature, or the lack of provision of an auxiliary aid which places him at a substantial disadvantage in relation to the conduct of the check test which places the Appellant at a substantial disadvantage in comparison with persons who are not disabled, and the DVSA have not taken such steps as are reasonable to avoid the disadvantage.
- The 'substantial disadvantage', (meaning for the purposes of the EA), 'more than trivial or minor' criterion applies to him.
- Accordingly, the DVSA, for the purposes of the EA, has discriminated against him.

then the legislative path for enforcement is as described in sections 46 and 47 of *MM*, namely proceedings before the county court or by way of judicial review.

What would have been our conclusions with respect to the application of the EA in this case, absent our lack of jurisdiction?

51. Ms Matheson made detailed submissions with respect to the application of the EA in this case and we consider it useful to outline what our response to those submissions would have been had this issue had been within our jurisdiction.

52. We return to the stepped process set out in paragraph 50 above, and our conclusions on each step are as follows:

(i) We agree that the DVSA is, for the purposes of the EA, a person who carries out a public function.

(ii) We agree that the Appellant is for the purposes of the EA, a disabled person. As noted above, section 6 of the EA provides that a person has a disability (and hence is a disabled person) if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. At first glance, the latter appears to be a high bar, but the definition of 'substantial' is defined in section 212 of the EA as 'more than minor or trivial.' In arriving at these conclusions, we have taken into account the significant volume of medical evidence provided on behalf of the Appellant.

(iii) We agree that accordingly, the DVSA is under a duty to make reasonable adjustments to prevent a disabled person, from being disadvantaged by the way the DVSA carries out its public functions.

(iv) The duty is anticipatory. That means that it applies to disabled persons generally. As outlined in paragraph 43 of the decision of the decision of the Court of appeal in *MM*, 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. We are satisfied that the DVSA has taken steps to satisfy the anticipatory duty – see chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.publishing.service.gov.uk/media/5a7c339be5274a25a914123c/dsa-impact-assessment-adi-standards-check-assessment.pdf

(v) The duty is continuing one and is owed to individuals. The Appellant has submitted that he has been the subject of discrimination. In paragraph 49 of its decision in *MM*, the Three-Judge Panel noted that the earlier decision of the Court of Appeal had determined that sections 20 and 21 of the EA created a two-stage approach to determining whether an applicant can establish discrimination.

The first stage is to ask whether there has been a failure to comply with a duty to make reasonable adjustments. **The second stage is to ask whether the individual applicant (in this case the Appellant) can show a failure to comply with that duty in relation to him.**

The first stage has two elements. The first is to ask whether disabled persons generally (or a class of disabled persons) are put at a substantial disadvantage by the disputed provision, criterion or practice. The second is to ask whether it

is reasonable for steps to be taken to avoid that class disadvantage. At this stage the individual has to show that he or she is put at such a disadvantage by the failure to comply with the duty to make reasonable adjustments.

We have concluded, for the reasons set out above, that the first stage question must be answered in the negative. We have noted, as an aside, that in paragraphs 57 of the decision of the Tree-Judge Panel in *MM*, it was noted that the Court of Appeal, applying the decision in *Finnigan,* had decided although generally a court or tribunal should address whether the adjustments advanced on a class basis are reasonable before going on to consider the position of the individual claimant, it can jump to the last stage and consider the position of the individual applicant on an assumption concerning the nature and extent of those adjustments.

Accordingly, and based on our initial determination in the preceding paragraph, there is no requirement to answer the second stage question - see paragraph 58 of the decision of the Three-Judge Panel in *MM*.

(vi) If we are wrong about that, we would state that the second-stage question must also be answered in the negative. The basis for that conclusion is as follows:

In her submissions with respect to the first check test, Ms Matheson has asserted that 'No adjustments were made for the Appellant in connection with Test Number 1.'

Reminding ourselves that we are addressing the duty owed by the DVSA to the Appellant, as an individual, we cannot understand why it could be maintained that the DVSA was under any duty to make adjustments for the Appellant for this first test when the DVSA were wholly unaware of any possible requirements to make such adjustments. We have noted that the medical evidence which has been provided by the Appellant shows that he has had medical problems going back as far as 1988. There is no evidence that the DVSA was alerted to these general medical problems prior to 16 December 2022.

The same could be said for the arranging of the second check test. Ms Matheson has submitted that the Appellant had '… contacted the DVSA booking service to request that the test be postponed. The reason he gave was that he was experiencing symptoms and was unwell. This request was denied and the Appellant proceeded to sit the test.' There is no record of the Appellant's contact with the DVSA concerning the arrangements for second test. What we do know is that the Appellant asked for a postponement. The determination on the postponement was within the discretion of the DVSA and, we assume that requests for postponements of check test appointments are made on a regular basis. There is no evidence to suggest that the Appellant submitted that he could attend and participate in the test if reasonable adjustments were made. This is against a background where the Appellant gave evidence that he could provide tuition if he introduced his own adjustments. The Appellant failed the second check test and Ms Matheson submitted that this was because '… the

Appellant believed that his symptoms caused his poor performance.' In our view, there was no reasons for the DVSA to consider that there was a requirement to identify and make reasonable adjustments for the Appellant.

Pausing there to reconsider the narrative of the check test process. The Appellant has failed the check test on two occasions. He has submitted that his health problems and its symptoms were the cause of his poor performance in each test. His background working pattern was to make adjustments to enable him to provide tuition to his pupils. While accepting that he requested a postponement of the second check test, he participated in both tests and did not alert the DVSA to the fact that adjustments to the test might be beneficial to him.

Then, by way of correspondence dated 1 September 2022 the Appellant was alerted to the requirement to take the check test for a third time on 25 November 2022. Given this history until then, it is our view that if the Appellant had an opportunity to inform the DVSA of the extent of his medical condition and symptoms, the impact that this had on his first two failed check tests, and the possibility that he would benefit from the making of adjustments to the test process (parallel, perhaps, to those which he had introduced to his tuition) then this was it. The reality is that he did nothing further and failed the check test for the third time. There was, accordingly, in our view, no duty on the DVSA to make adjustments for the third check test.

We consider further aspects of the Appellant's performance below.

We also note that the reasonable adjustments referred to by the Appellant are:

(i) He takes more frequent breaks.

(ii) He has a car with arms rests.

(iii) He works reduced hours.

In reverse order, adjustments (2) and (3) are within the control of the Appellant.

The Appellant is assessed giving a lesson in the appellants car. Neither the DVSA nor the Registrar provide the car for the use of the Appellant. Thus, the provision of arm rests is a matter for the Appellant alone.

The number of hours the Appellant works (giving tuition) is solely within his control. He can decide how many pupils to accept and how much tuition he gives. There is no minimum number of tuition hours mandated by the Registrar. Thus, the number of hours worked is a matter for the Appellant alone.

As regards the first adjustment, there is no evidence that this was alerted to the DVSA across the arrangements for and conduct of three separate check tests.

53. We have also noted that Ms Matheson has asserted that '… it would be unjust to deprive the Appellant of his livelihood as a consequence of a health condition which it is submitted amounts to a disability'. With respect, we

cannot agree. The basis of the removal of the Appellant's name from the Register was that he had failed the check test on three successive occasions. We have already concluded that there has been no breach of the EA duties in respect of the conduct of those tests.

Our jurisdiction with respect to the PSED

54. The answer to this issue is very straightforward. As noted above, Ms Matheson has made important submissions with respect to the PSED. She has argued that the Registrar did not have due regard to the PSED. We have set out the provisions of Chapter 1 of Part 11 and section 149 of the EA above. We have also noted that the DVSA has recognised that it has duties with respect to the PSED under the relevant legislative provisions.

55. Nonetheless, we cannot ignore section 156 of the EA which provides:

    '156 Enforcement

    A failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law.'

56. Accordingly, even if we were to accept Ms Matheson's substantive submissions on failure to have regard to the PSED, which we do not, there is no practical remedy which we can afford.

HRA

57. As was noted above, Ms Matheson has made submissions with respect to the application of the HRA. To repeat, the principal purpose of the HRA was to incorporate the ECHR into United Kingdom law. Article 6 of the ECHR provides that:

    > 'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

58. Ms Matheson has submitted that the Appellant was not given a fair hearing by the Registrar. There were two aspects to her assertions. The first was a failure to allow the Appellant to have adequate time to provide relevant medical evidence. The second was a failure to engage with the evidence which had been provided. There was also, by implication, an argument concerning the adequacy of the Registrar's reasons.

59. We have set out in some detail above a description of the proper role and function of the First-tier Tribunal, in considering an appeal again a decision of the Registrar. Section 131(3) of the 1988 Act permits the First-tier Tribunal to make such order as it thinks fit. More significantly, the jurisprudence cited above, confirms that when making its decision, the Tribunal stands in the shoes of the Registrar and **takes a fresh decision on the evidence available to it,** giving appropriate weight to the **Registrar's decision** as the person tasked by Parliament with making such decisions.

60. We acknowledge that the reasons which have been set out in the Registrar's Statement of Case are brief. Nonetheless, the basis for the Registrar's decision is clear. It was that the Appellant had failed to pass the check test on three occasions.

61. Turning to the assertions by Ms Matheson that the Registrar failed to permit the Appellant to have adequate time to provide medical evidence and, further, that the Registrar has failed to engage with the evidence. Even if we were to accept these arguments, the suggested failures, and the assertion that they go to a failure to an entitlement to a fair hearing, they have been rectified by the further appeal to the First-tier Tribunal. The First-tier Tribunal, in line with its proper role and function, has stood in the shoes of the Registrar, but, unlike, the Registrar, has had access to significant medical evidence, has heard from and seen the Appellant and has had the benefit of detailed argument from Ms Matheson. Our fresh decision has been based on all of that. In our view, the right of appeal to an independent First-tier Tribunal, hearing the matter afresh with the advantage of further evidence and legal argument, rectifies any suggested error based on a breach of the Article 6 of the ECHR.

Other aspects

Possibility of suspension

62. In D/2011/146 Parry and others, Judge Brodrick gave guidance to ADIs who, for various reasons, including, in the particular case which was before him, a prolonged period of illness, is not providing instruction. Judge Brodrick stated, at paragraphs 7(xii):

> '(xii) The correct course for an ADI to take when faced by a situation, such as that described by the Appellant, is to explain the position to the Registrar and to request that his or her registration should be suspended. If the Registrar agrees to suspend the registration it means that he no longer has the right to require the ADI to attend for a check test. On the other hand while an ADI's name remains on the register the Registrar has the right, at any time, to require the ADI to attend for a check test and the ADI is then obliged to attend on the given date, unless he can persuade the Registrar that there is good reason to change the date.'

63. In her written submissions, Ms Matheson made the following submission with respect to suspension:

'We also note that there are powers to suspend where there are road safety concerns, and we note that this has not been done.'

64. The right to seek suspension of registration lies with the ADI and not with the Registrar. The Appellant did not seek a suspension and, as such, his name remained on the Registrar and was subject to the obligation to attend for a check test when the Registrar imposes such a requirement.

The appellant's check test record

65. In her written submissions, Ms Matheson notes that the Appellant does not seek to challenge the check test results. Against that she asserts that the failures of all three check tests were due to '… a series of minor errors.' We cannot agree. The scores for each check test was well below the required threshold. Further, Ms Matheson submitted that following the initial check test failures the Appellant took account of the feedback which he was given by the examiners. The scores in the second and third check tests do not reflect this. The Appellant was given ample time between the check tests to prepare and to seek additional training and, given that he was aware of the test score sheets from the initial failed tests and comments from the examiners, was aware of the specific areas which required attention. In this respect, we have also noted that there is an Official Register of Driving Instructor Training (ORDIT) which the Appellant could have consulted to get specialist training to help him to reach the required standard. Further, the Appellant was given sufficient notice of pending check test appointments.

The Appellant's driving instruction record

66. From the statistical evidence which has been provided by the registrar, we have noted that the Appellant's pupils who have been presented for examination have 92 fails and 32 passes over the period from 28 August 2020 to 20 July 2023. This a failure record of 74% (92/124). It is axiomatic that we cannot ignore this.

Our substantive decision

67. The appeal is disallowed and the Registrar's decision to remove the Appellant's name from the Register is confirmed.

Kenneth Mullan
Judge of the Upper Tribunal
19 July 2024