Case Name: *Sheakh, R (On the Application Of) v London Borough of Lambeth Council* [2022] EWCA Civ 457 (05 April 2022)

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Commentary:
The Court of Appeal (the Court) has dismissed an appeal against the decision by the High Court that Lambeth LBC (the Council) had discharged its "public sector equality duty" under section 149 of the Equality Act 2010 when making experimental traffic orders (ETOs) for three low traffic neighbourhoods (LTNs).

The purpose of the ETOs was to restrict the amount of vehicular traffic and to promote physical exercise in the relevant areas, such as walking or cycling, in the context of pandemic lockdowns. When making the ETOs, the Council had to have "due regard" for the equality needs set out in section 149(1)(a) to (c) of the Equality Act 2010.

The appellant, Ms Sheakh, is severely physically disabled and lives in close proximity to one of the LTNs. Ms Sheakh is unable to use public transport and relies entirely on her car for all journeys. The LTNs, Ms Sheakh argued, had disproportionately and detrimentally affected her and others like her. Ms Sheakh claimed that the traffic that had been displaced by the LTNs had led to increased congestion in other local areas, thereby increasing her journey times.

The question for the Court to decide was whether Lambeth LBC had shown "due regard" for the considerations set out in section 149.

In dismissing the appeal, the Court considered five points, arising out of related jurisprudence, relevant to the interpretation of section 149. These were that section 149:

- does not require a substantive result,
- does not prescribe a particular procedure for assessment,
- implies a duty of reasonable enquiry on the decision-maker,
- requires a decision-maker to be informed of and to understand the main equality impacts (and not every conceivable impact) of a decision prior to adopting a policy, and
- should not be investigated in an unduly legalistic way by the courts when considering the way in which a local authority has assessed the impact of a decision on the equality needs.

The applicant forwarded two main submissions. Firstly, that the public sector equality duty could not be satisfied by monitoring the equality implications through a "rolling review" but that the duty had to be discharged on 9 October 2020 when the relevant

ETO decisions were taken. Secondly, Mr Buley, for the applicant, submitted that the decision maker, Mr Dosunmu, needed to grapple with the equality implications himself and not simply rely on the assessments of others with no understanding of their reasoning.

Mr Tim Mould Q.C., for the Council, emphasised that the public sector equality duty had been clearly explained in the report before Mr Dosunmu and was undoubtedly in the mind of Mr Dosunmu when making the ETOs in October 2020 . Mr Mould argued that the report on the basis of which Mr Dosunmu made his decision was unequivocal that the ETOs would not disproportionately affect those with protected characteristics, that harmful consequences would be monitored, and that consultation would continue for six months.

The Court rejected the applicant's approach, finding instead that the Mr Mould's submissions on behalf of the Council were essentially correct and the public duty under section 149 was satisfied. In coming to this decision, the court, at paragraph 56, emphasised the importance of "facts and context":

'*56. The authorities show that the concept "due regard" is highly sensitive to facts and context. How intense the "regard" must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in which the duty is engaged. What is "due regard" in one case will not necessarily be "due regard" in another. It will vary, perhaps widely, according to circumstances: for example, the subject matter of the decision being made, the timing of the decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as "due regard" is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental, and is itself conducive to a more robust assessment of equality impacts later in the process.*'

As already noted, the decision to introduce the ETOs for three LTN areas in Lambeth took place against the backdrop of the pandemic and lockdowns. This affected the timeframe for the ETO decisions to be made. The LTNs were initially approved in the Council's Transport Strategy Implementation Plan in November 2019, with the explicit expectation that the first three LTN's would be completed "within the next 3 years". However, the first national lockdown began on 9 May 2020, during which the SoS for Transport issued the statutory guidance, 'Traffic Management Act 2004: network management in response to COVID-19', which advocated the introduction of LTNs and for measures to be taken to give more space to cyclists and pedestrians "as swiftly as possible and in any event within weeks". Following the publication of this guidance, Mr Dosunmu was given authority by the Council to implement LTNs.

The LTNs were brought into effect by temporary traffic orders in May 2020 and August 2020 respectively, with renewed effect granted by an ETO in September 2020. However, the decisions were only actually authorised by Mr Dosunmu on 9 October 2020, with no quashing order applications made within the statutory challenge period allowing the ultra vires decisions to stand. The decisions were based on a report entitled "Implementation of London Streetspace Plan: First Tranche" prepared by Mr Dosunmu's fellow officers, which effectively acknowledged that further equality impacts assessment was needed but did address section 149 of the Act.

The report recommended approval for the LTNs and also recommended that "public consultation is carried out in the six months following each scheme's implementation to consider whether the provisions of the relevant Experimental Order should be continued in force indefinitely", which effectively meant that the Equality Impacts Assessment would be carried out on a rolling basis. The Court recognised that, "although the equality impact assessments for the experimental traffic orders had not yet been completed…section 149 of the 2010 Act was clearly taken into account. The statutory provisions were accurately represented in the report, including the "due regard" duty". The Court found no fault with the consultatory approach due to the "inherent uncertainty" of drivers' responses leading to ongoing public consultation being an appropriate method for assessment, finding, at paragraph 69 that:

"*69. Although some of the equality impacts of the Low Traffic Neighbourhoods could have been predicted, it is clear that there were cogent reasons for the council to use the experiment to gather data about the impact of the scheme, good and bad, and to use that information in deciding how to balance those impacts. The displacement and re-routing of traffic might well have unintended consequences for some residents of the borough, which could not at all be predicted with confidence…[s]uch effects would emerge during the "trial run*"".

The Court also took into account that the statutory guidance issued by the SoS for Transport urged expediency and recognised that ETOs were the most appropriate legislative mechanism to ensure speed of delivery.

Case summary prepared by Charlie Austin