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Case No: CA-2023-000688

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ Jarman KC
CO/1273/2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

Between:

THE KING (on the application of SARAH LEADBETTER) Appellant
- and -
SECRETARY OF STATE FOR TRANSPORT Respondent

Jamie Burton KC and Sarah Steinhardt (instructed by Bindmans LLP) for the Appellant
Robert Williams (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 23 November 2023

Approved Judgment

This judgment was handed down remotely at 3pm on 20 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal from an order made by HHJ Milwyn Jarman KC, sitting as a Deputy Judge of the High Court ('the Judge') after the hearing of an application for judicial review of guidance published by the Secretary of State on 10 January 2022 ('the Guidance'). The Judge held that the consultation leading up to the publication of the Guidance was unlawful. He did not, however, quash the Guidance. The Appellant (the Claimant below) appeals with the permission of Andrews LJ against the Judge's decision to dismiss her two other grounds for judicial review. The Secretary of State was refused leave to cross-appeal against the Judge's decision that the consultation was unlawful.
2. The Guidance replaced earlier guidance issued in 1998 ('the 1998 Guidance'). Both sets of guidance refer to a minimum kerb height of 25mm. Those references in the Guidance are the focus of the Appellant's objection to the Guidance. In short, she argues that in promulgating the Guidance which referred to this minimum (or in not changing this aspect of the Guidance from the recommendation in the 1998 guidance) the Secretary of State breached his duty of inquiry and acted irrationally.
3. On this appeal, the Appellant was represented by Mr Burton KC and Ms Steinhardt. Mr Williams represented the Secretary of State. I thank counsel for their oral and written submissions. Paragraph references are to the Judge's judgment ('the judgment'), or if I am referring to an authority, to that authority, unless I say otherwise.
4. For the reasons given in this judgment, I would dismiss the appeal. I do not consider that the Judge's decision on either of the Appellant's remaining arguments was wrong. Each was open to him on the evidence. Further, I have also considered the slightly different arguments put forward on the appeal, and some of the underlying material, in order to understand the context of those arguments. The Judge's conclusion was plainly open to him on that material, also.

The facts

5. I take this summary of the facts from the judgment. The Judge recorded that the Guidance 'deals with the public built environment' and comprises two documents. The first document is a guide to inclusive mobility. The Appellant challenged the first document, but this appeal does not concern that challenge. She challenged one aspect of the second document, 'Guidance on the use of Tactile Paving Surfaces'. As it happens, both documents replaced earlier guidance. The first document replaced guidance issued in 2002.
6. The Judge described the relevant history in paragraphs 9-35. The 1998 Guidance referred to a minimum kerb height of 25mm. The Secretary of State was not able, in the application for judicial review, to adduce any evidence showing how that figure was reached, other than to say that it was based on research, although he gave no details of that research.
7. Since 1998, concern has grown about whether visually impaired people can detect such a kerb, or, indeed, a higher kerb (paragraph 9). In 2009, Guide Dogs UK commissioned

research by University College London ('the UCL research'), to find out what minimum kerb heights could be detected by visually impaired people. The research only considered that question, and did not consider wider questions, such as what kerb heights might create obstacles for wheelchair users. The study was done in controlled conditions indoors. 36 people took part. 11 used guide dogs, 17 used long canes and eight used no aids. 120mm is the height of a standard kerb. When they were stepping up or down, approaching in a straight line, or at an oblique angle, they could all detect kerbs which were 60mm, 80mm or 120mm high. Some could not detect kerbs which were lower than 40mm or lower when they were stepping up or down. The conclusion of the UCL research was that to be confident that visually impaired people could detect kerbs, those responsible for their installation should make them 60mm or higher. As the Judge observed, that UCL research was the only research which has considered whether visually impaired people can detect kerbs, and if so at what heights (paragraph 10).

8. In the light of the UCL research, a memorandum published in Northern Ireland in May 2015 recommended a kerb height of 125mm in general, and exceptionally, it recommended that, where a lower height was wanted, that should be 60mm (paragraph 11). The Judge noted that there were several reports between 2015 and 2021, which he summarised in paragraphs 13-18, 'each of which essentially came to the conclusion that further research is needed' (paragraph 12). In 2018, the Secretary of State wrote to local authorities asking them to pause schemes for shared spaces which were designed with a level surface (paragraph 18).
9. In paragraphs 19-35 the Judge described the process which led to the issuing of the Guidance. This was relevant, in part, to the Appellant's challenge to the consultation which preceded the issuing of the Guidance. As I have said, that challenge succeeded. It is not necessary to repeat all that material here, except to the extent that it is relevant to the grounds of appeal. In November 2017, the Secretary of State instructed independent consultants, Transport Research Laboratory Limited ('TRL') to advise on whether the 1998 guidance needed to be brought up to date. TRL reviewed about 50 documents, including the UCL research, and consulted 'stakeholders'. TRL produced its first report in July 2018. TRL recommended further investigation of shared spaces, with a view to new guidance about inclusive mobility and tactile surfaces. TRL noted that the UCL research did not deal with the impact of kerb height on wheelchair users and on others with mobility difficulties, nor with the impact on children or those with learning disabilities. TRL's view was the UCL research had 'very limited relevant information'. TRL chose six documents for further review. They did not include the UCL research, or two of the reports the Judge referred to in his account of other reports in paragraphs 13-18.
10. TRL noted that visually impaired people had difficulties in responding to consultations because they could not get access to printed documents. TRL recommended that there should be guidance about making information accessible. TRL was then commissioned to do further research, which the Judge described (paragraph 20). On 12 July 2019, an on-line survey was sent to the National Federation for the Blind UK ('the NFB') for it to circulate to its members, with a response time of 12 days. Neither Braille nor any other accessible format was used. The NFB asked for an extension of time, as that would give time for the people who were most affected to respond. That request was not addressed.

11. TRL published a second report in February 2020. It recommended, among other things, that whether the height of 25mm was appropriate should be considered further. TRL concluded that a firm recommendation about the height of kerbs could not be made without more research.
12. Transport Scotland and the Secretary of State jointly commissioned a further report which was published in February 2021. While it noted the UCL research, its conclusion was that no firm recommendation could be made about the height of kerbs unless there was further quantitative research about kerb heights with and without tactile paving and taking into account street users with all kinds of disabilities. Transport Scotland then commissioned more research. In spring 2021, the Secretary of State joined that project. They commissioned TRL to update the guidance to include all their recommendations, at a stage when that research had not been done. As the Judge observed, that was still the position at the date of the hearing (paragraph 23). By the time of the hearing in this court, a report about the first phase of that research had been published (in 2023). Curiously, perhaps, it is dated November 2021.
13. No feedback was given to the three relevant charities after the survey in July 2019. They heard nothing further until an email dated 1 April 2021, inviting them to comment on the draft guidance and giving them less than two weeks in which to do so. The charities replied, and relying on the UCL research, questioned the 25mm height which was recommended in the draft. There were remote workshops on 26 and 27 April 2021. At least one representative from each charity was allowed to take part. The Judge described the discussion, in those workshops, of the recommendation about kerb heights in paragraphs 28-29, and the charities' articulate written protests about the flaws in the consultation process, in paragraphs 30-31. In May 2021, TRL published its consultation report. It described the charities' strong objections, but said 'No change required: refer to client to consider messaging around this'. The report added that this question was contentious and that the Secretary of State might want to say that it would be considered in the future. There was a meeting between officials and one of the charities in October 2021. Officials said that stronger evidence was needed to change the guidance. One of the charities wrote to the Secretary of State in November 2021 asking that the references to 25mm kerbs be removed and replaced with references to 60mm at least until the report on the current research was available in 2022 or 2023.
14. Officials prepared a ministerial submission dated 25 November 2021. It suggested that potential negative reactions would be 'manageable' if the Guidance were published with reassuring messages such as that the Guidance 'would not be untouched for another 20 years' (paragraph 33). The submission noted that the Royal National Institute for the Blind ('the RNIB') and Disability Rights UK wanted further 'technical changes – the evidence for which remains equivocal' and full public consultation. On 9 December 2021, the Secretary of State wrote to the RNIB saying it was necessary to find evidence to support a change and that further relevant research was being done.
15. The Guidance is 'widely used and intended to be a guide to best practice by public or private bodies with a role in the provision, design and improvement of the public realm'. The Guidance covers many topics: 'the height of kerbs which can be readily detectable by visually impaired people is a small, but important, point included in the Guidance'. As the Judge observed, visually impaired people 'need to be able to detect where the footway ends and the carriage way begins. Tactile paving surfaces leading to

that line are designed to give underfoot warning of where it is' (paragraph 2). He explained how tactile paving works in more detail in paragraph 3. He also explained that while tactile paving might support the independent mobility of visually impaired people, it could, at the same time, 'have a negative effect on the experience of wheelchair users and people with walking and other difficulties, and accordingly should not be over used'. The Guidance deals with six types of tactile surface.

16. In paragraph 4, the Judge quoted paragraph 1.6 of the Guidance. This advises authorities and other agencies to 'carry out appropriately diverse engagement' in relation to schemes with tactile surfaces, with the aim of ensuring that 'the information received reflects the needs of the population as a whole'. National organisations should be consulted about technical solutions, as they are more likely to know about solutions which have worked elsewhere. Local organisations should be consulted 'to prioritise where tactile paving is to be installed', for example by identifying routes which are often used by visually impaired people. It is 'especially important' to ensure that any 'guidance path surface' is installed 'where it will be of real benefit'.
17. The Judge summarised the law about the duty of inquiry in paragraphs 36-45. The Appellant does not criticise this summary. The Judge referred to *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014. The question is whether the decision-maker has asked the right question and has taken reasonable steps to find out relevant information to enable him to answer it. He cited paragraph 100 of the judgment of the Divisional Court in *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261. He referred to paragraph 121 of *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); [2014] PTSR D18 (Popplewell J (as he then was)) (a case about asylum support) to support the proposition that the extent of inquiry which is required will depend on the importance of the decision.
18. He then quoted section 149 of the Equality Act 2010 ('the 2010 Act') noting that visual impairment is a protected characteristic for the purposes of section 149. He cited paragraph 85 of the judgment of Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506: "'due regard" to the need to take account of the needs of people with disabilities requires "due regard to the need to gather relevant information in order that it can properly take into account the disabled persons' disabilities in the context of the particular function under consideration"
19. In paragraph 40, he reminded himself that an application for judicial review is not an appeal against a decision of a public authority, citing various decisions. The same approach applies to the duty of inquiry which is ancillary to section 149 (paragraph 41). Whether or not a public authority has breached that duty is subject to 'normal principles of rationality'. How that test applies on the facts will depend on the context. He gave several examples from the cases, including *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin); [2010] RTR 5. In that case a decision of a licensing committee refusing to approve a new wheelchair-friendly vehicle as a taxi was based on a fundamental mistake about the minimum turning circle for wheelchairs. The decision was quashed. Blake J held that a proper understanding of the facts was a mandatory relevant consideration (paragraphs 43 and 44). In paragraphs 44 and 45 the Judge quoted two paragraphs of *Re Toner's Application for Judicial Review* [2017] NIQB 49,

a judgment given after a six-day hearing. In their arguments on this appeal, Mr Burton and Mr Williams agreed that this case was not relevant, so I say no more about it.

20. The parties had dealt with grounds 1 and 3 together, because they were linked. The Judge did the same (paragraphs 46-54).
21. Mr Burton submitted to the Judge, in short, that the Secretary of State could not make a firm recommendation about kerb heights without further research. It made no difference that that research had now been commissioned. Until any updating guidance, the Guidance would be relied on by people who were designing infrastructure. The 'identification' of a minimum kerb height had 'potentially extremely serious implications' for all disabled road users. The Judge recorded that he accepted that 'balances had to be struck' (presumably between the needs of different users of footways and carriageways). But the relevant parts of the Guidance did not do that, 'but instead set[s] out the minimum kerb height to provide for the safety of visually impaired people'. That should not have been done 'without an adequate evidential basis regarding the risks involved'.
22. Mr Williams submitted to the Judge that 'as the 25mm minimum kerb height was contained in the 1998 guidance' it was reasonable to keep it in the Guidance pending the results of the research. The Guidance deals with many issues and it was reasonable to up-date it without waiting for this narrow point to be determined.
23. The Judge held that the fact that the 25mm figure had been in the 1998 guidance for 28 years did not, of itself, 'justify the lack of inquiry in deciding that the figure should be maintained in the Guidance. This is especially so given that lack of clarity as to what the figure was originally based upon and given the subsequent findings of the UCL report' (paragraph 50). Nonetheless, the UCL report had its limitations (paragraph 51). There was a 'clear consensus' in the reports that more work was needed before a clear recommendation about minimum kerb height could be made. The research had been commissioned. It might have been sensible to adjust the figure, particularly given the likely delay (paragraph 53). Three main factors 'in particular' showed that 'it was a matter of political judgment for the Secretary of State' to keep the 25mm figure in the meantime. Mr Burton and Mr Williams agreed in this court that what the Judge meant by this was that this was a policy judgment. First, the results were expected in a year or so. Second, the 25mm figure was a small part of the Guidance, which needed a general up-date. Third, the Guidance makes clear that there should be relevant engagement schemes for tactile paving. The Judge understood the Claimant's concerns, and those of the charities which support her, but could not 'be satisfied that the high threshold of irrationality has been reached to enable the court to interfere' (paragraph 54).
24. In paragraphs 55-61, the Judge considered the parties' arguments about consultation. He held that the consultation was unlawful, in essence because the charities had not been given enough time to respond and because they had not been consulted when the proposals were at a formative stage (paragraphs 60-61). There was a realistic prospect that there might have been further evidence, and it might have had an effect on the 25mm figure (paragraph 61).
25. The Judge recorded (paragraph 62) that Mr Burton had accepted that success on the consultation argument was not enough to result in the quashing of the references to

25mm in the Guidance, when the results of the research were expected soon and ‘an early review of the Guidance might then be undertaken’ (paragraph 62). It is convenient to note here that the Secretary of State was refused permission to appeal against the Judge’s conclusion on ground 2. The Claimant did not appeal against the Judge’s decision not to quash the Guidance.

The 1998 Guidance

26. The background to the 1998 Guidance, and some of its text, are topics which featured in the submissions on the appeal, but which the Judge only touched on briefly. It is convenient to say something about these now.

The background to the 1998 Guidance

27. One of the Claimant’s witnesses is Ms Sarah Fothergill. She has been the Senior Legal Adviser to the RNIB since 2008. The RNIB is one of the charities which supported the application for judicial review. She acknowledges in her witness statement that the needs of wheelchair users, and of other people with mobility difficulties can conflict with those of visually impaired people (see, for example, paragraph 12).
28. She describes the background to the publication of the 1998 Guidance. In 1986, the Secretary of State issued a circular to help visually impaired people with tactile paving. She explains that the guidance in the circular was expanded in the 1998 Guidance, ‘following research into the use of tactiles by blind and partially sighted people and other pedestrians including those who were disabled for other reasons such as wheelchair users and those with walking difficulties’. She says that ‘The aim was to develop a range of surfaces that could convey different messages to blind and partially sighted people’. In paragraph 13, she says that the RNIB, represented by the Joint Mobility Unit Access Partnership, and in association with the Guide Dogs for the Blind Association, ‘assisted with this research and the 1998 Guidance was drawn up in full consultation with the Access Partnership and with our full support’. The aim of the 1998 Guidance was to enable people who design streets to understand the needs of visually impaired people and to ensure that tactile paving was ‘correctly installed and in a simple logical and consistent manner across the country’.

Some material from the 1998 Guidance

29. The introduction to the 1998 Guidance describes the different ways in which a visually impaired person can find his or her way round the streets. ‘It is clear’ that such a person who does not have an aid, such as a long cane, or a guide dog, ‘may only recognise the edge of the footway by stepping off a conventional kerb’. It was also the case that, whatever aid is used, ‘a kerb upstand is an essential indicator of the edge of the footway’. But, to recognise the needs of other pedestrians, ‘it is accepted that it is necessary to have level or ramped crossings’ in some places. In such places, ‘tactile paving compensates for the absence of a kerb’.
30. A further passage on page 14 of the 1998 Guidance says ‘The advice in this document has been compiled after full discussion and in full consultation with interested groups and it aims to provide consistency in the use of tactile paving surfaces throughout the country’. This second passage is supported by the account in paragraph 13 of Ms Fothergill’s witness statement (see paragraph 28, above). It also explains what is meant

by a passage at the start of the Guidance ‘The research behind the original guidance involved people with a wide range of other impairments. This identified the negative effects of tactile paving on the experience of wheelchair users and people with walking difficulties. This, in turn, highlighted the general desirability of minimising tactile paving used, subject to ensuring that it performs its vital functions for vision impaired people’.

31. In the light of that material three things about the 1998 Guidance are clear.
 - i. It was the product of full discussions between officials and various different groups representing people with different disabilities.
 - ii. Its advice reflects judgments which balance the conflicting interests of people with different disabilities, about best practice in relation, among other things, to the design of the footway in places where a level or ramped crossing of the footway is necessary.
 - iii. When it was introduced, it had the full support of the RNIB.

The three impugned passages of the Guidance

32. Section 1.3 makes it clear that the Guidance only applies to the six types of tactile paving listed there. A ‘blister’ surface for pedestrian crossing points is one of those six types of surface. A blister surface consists of rows of flat-topped blisters 5mm high which are arranged in straight lines.
33. Section 2 is headed ‘Blister surface for pedestrian crossing points’. Section 2.1 is headed ‘Purpose’. It explains that this type of paving is only used at ‘designated pedestrian crossing points’. It has two purposes. Its general purpose is to warn visually impaired people ‘who, in the absence of a kerb upstand greater than 25mm high, may otherwise find it difficult to differentiate between where the footway ends and the carriageway begins’. It then says that the ‘absence of a kerb upstand at crossings is essential for wheelchair users’ and for some other people, but potentially hazardous for visually impaired people ‘who generally rely on a kerb upstand as a warning that they have reached the edge of the footway. The surface is therefore an essential safety feature for vision impaired people at pedestrian crossing points where *the footway is flush with the carriageway*’ (my emphasis).
34. Section 2.5.4 is headed ‘Vehicle crossovers and vehicle accesses’. Under the heading ‘General layout’, this recommends that at all such crossovers, ‘a minimum 25mm upstand should be provided between the carriageway and the vehicle crossover. This upstand should help to ensure that vision impaired people do not inadvertently venture into the carriageway’. The next heading is ‘Vehicle crossovers with traffic flows’. The text recommends that where the traffic flow is high enough, a vehicle crossover should be treated as an uncontrolled crossing at a side street, and a blister surface should be installed. Local authorities should exercise judgment in deciding whether the surface should be installed, and should consult with local groups.
35. Section 2.5.5 is headed ‘Raised crossings for traffic calming’. It deals with features which are often called ‘speed bumps’. Where there is a speed bump and the carriageway has been raised to the level of the footway, the blister surface should be installed on the footway. That advice is qualified when a large area of carriageway has been raised. The Guidance says that it is not appropriate in such cases to install a blister surface for the

entire length of the raised carriageway. It should only be applied to the main crossing points. The next paragraph deals with the rest of the length of the speed bump. It says ‘Where the remaining interface between the footway and the raised carriageway is flush, or has an upstand of less than **25mm**, it is vital to ensure that vision impaired people are not able to stray inadvertently into the carriageway. This could be achieved by creating a level difference between the footway and the carriageway of at least **25mm** (so that the transition is not actually flush), or by using an appropriate form of physical barrier’ (original emphasis).

Submissions on the appeal

36. Mr Burton did not quarrel either with the Judge’s summary of the facts, or with his account of the law. He withdrew his initial objection to a recent witness statement for the Secretary of State, which provides an up-date on the stage which the current research has reached. One of the exhibits to that witness statement is the report to which I have referred in paragraph 12, above.
37. He submitted that the Guidance is important because, in its own words, it is guidance to ‘best practice’. While it was expressed not to change the principles of the 1998 Guidance, it was also said to supersede it. The publication of the Guidance was not a decision to leave the 1998 Guidance untouched, but a decision to issue new guidance, albeit guidance which did not differ from the old guidance in the relevant respects. The guidance had a wide application and was intended to help public authorities to comply with the duty imposed by section 149 of the 2010 Act.
38. By the time he made his submissions in reply, Mr Burton’s case had three facets.
39. First, in response to a question from Lewison LJ, he submitted that, on analysis, the challenge was not to a decision not to change the existing guidance, but a challenge to new guidance which superseded the 1998 Guidance. The Guidance should be considered on its own merits. The fact that the 1998 Guidance had not been challenged did not mean that it should be given any weight. It was not based on any empirical or expert evidence. The 25mm recommendation had no objective basis. By the time the Guidance was published, the Secretary of State knew that there was no evidence to support the technical advice about kerb heights. The *Tameside* duty could not be deferred pending the outcome of further research. If it could be deferred in that way, it was no duty at all. The only evidence about kerb heights was the UCL research. It was the best evidence, and the only rational course for the Secretary of State was to rely on it and to stipulate a kerb height of at least 30mm.
40. The next stage for the Secretary of State, he submitted, should have been to ask what should happen in the light of that absence of evidence. The Secretary of State had to act rationally if his decision was to make a recommendation about kerb heights. The 25mm recommendation was not rational, nor was it rational to keep it because of a desire for continuity pending the outcome of the research. The Secretary of State could have decided to make no recommendation, could have made it clear that there was no evidence to support the recommendation, or could have changed the recommendation.
41. Finally, Mr Burton relied on what the guidance in fact does. The first reference to 25mm was, in fact, superfluous. The Secretary of State did not need to refer to 25mm at all in

the first passage. He said that the second reference to 25 mm also now ‘seems to have been of very dubious utility’. It was ‘difficult to see’ why that reference was there. He then said that ‘One person is one too many’; it was not known how many people had had difficulty with these crossings. Just because the guidance was not very significant did not matter, as it is unlawful to promulgate unlawful guidance. It was the only guidance to promote the safety of visually impaired people, in circumstances where there were no other recommendations about kerb heights. Low kerbs have persistently caused problems in shared spaces, where there are no, or very low, kerbs. The sole purpose of the 25mm stipulation was to protect visually impaired people. That stipulation was ‘embedded within the Guidance’.

42. The Guidance was significant because its effect was that where there is a vehicle crossing with low traffic flows, tactile paving was not recommended, and the only thing keeping visually impaired people safe would be a 25mm kerb. There was a clear reliance on a technical judgment for the single purpose of protecting visually impaired people. This was not a case in which a balance was struck between different road users. The principal risk was that people would stray into the carriageway. An undetectable kerb was no kerb at all. The context was that tactile paving was to be used sparingly because of its negative effects on other road users. Mr Burton submitted that it was important to understand that ‘the 25mm stipulation is the only guidance across the board dealing with the question how high a kerb has to be to be detected by visually impaired people’. That had become a much bigger issue since 1998 because ‘shared spaces’ have proliferated. The relevant moratorium only affected flat spaces but did not apply to spaces with low kerbs. The gravamen of the issue was that the recommendation in the Guidance would be read across ‘more generally’.
43. The UCL research showed that 25mm was too low. There was no evidence to support the 25mm stipulation and it is irrational. The stipulation should be that the kerb should be at least 30mm high. At the very least, the reference to 25mm should have been qualified with a caveat that it was not supported by any evidence, and that more research was needed. There was no evidence that the Secretary of State had evaluated the risks associated with the 25mm stipulation. It was irrational to have accepted that more evidence was needed and then to have done the very thing for which that evidence was needed, that is, to stipulate the 25mm height. It was not appropriate to pretend that the 25mm stipulation was based on evidence, and to keep it. The 1998 Guidance was irrational on any view.
44. Mr Williams pointed out that the Guidance does not concern ‘shared spaces’ at all. It does not recommend minimum kerb heights across the ‘public realm’. Its sole purpose was to recommend ‘best practice’ for tactile paving schemes. It was no broader than that. It deals with three very limited situations which arise in relation only to one of the six types of tactile paving which it covers. He explained what those were, by reference to the text of the Guidance, the diagrams, and one diagram in the 1998 Guidance. The Secretary of State had not overlooked this point, and had not misunderstood the evidence, but had concluded that the existing evidence was not robust enough to justify a change to the 25mm figure, and that more research was needed. When the Guidance was published, it was expected that those research findings would soon be available. The relevant assessment required a balance between the needs of different road users. Mr Williams did not suggest that he could rely on delay to defeat the application for judicial review, but submitted that, in substance, the Secretary of State had decided not

to change the 1998 Guidance on this point until the outcome of the research was known. The Judge had not erred in law in holding that the Secretary of State was actively discharging the duty imposed by the *Tameside* case, and had not acted irrationally.

Discussion

45. The Judge's consideration of the three grounds for judicial review is admirably succinct. I do not consider that he erred in law. As is sometimes the case on an appeal, however, the arguments which we have heard do not appear to have been, in all respects, identical to those which were heard by the Judge. It is clear that that the Claimant and the charities which have supported her in this claim are understandably anxious about the safety of visually impaired people, particularly in shared spaces, and concerned about the outcome of their challenge to the Guidance. I hope that I can allay those worries by assuring them that this court has carefully considered the written materials in this case in order to assure them that the Judge's conclusion does not have any implications for kerb heights in shared spaces. That question is still being considered by the Secretary of State, and its resolution will depend in part on the findings of the current research.
46. The arguments we have heard raise three issues.
- i. Is the Guidance unlawful because it repeats material from the 1998 Guidance for which there was, and is, 'no evidence'?
 - ii. Does the Guidance have any implications for kerb heights in shared spaces?
 - iii. In the light of those matters, was the publication of the relevant parts of the Guidance irrational, or based on a failure to make the reasonable enquiries required by the *Tameside* case and/or by section 149?

Are the relevant parts of the Guidance unlawful because they are based on no evidence?

47. Mr Burton submitted that there is 'no evidence' to support the references to 25mm in the Guidance, that they are contradicted by the only relevant evidence (the UCL research) and that, for that reason alone, those references are irrational, or were promulgated in breach of the Secretary of State's duties of inquiry. Whether this submission is correct depends, in part, on an analysis of the genesis of the 1998 Guidance, and of its provisions.
48. In the light of the three points I make in paragraph 31, above, I reject this submission. The relevant parts of the 1998 Guidance do not reflect, and were not required to reflect, a view or recommendation based on specific empirical 'evidence' about what height of kerb can be detected by visually impaired people. But those three points do mean that those parts of the 1998 Guidance had a rational basis. That is enough. Similar considerations mean that the existence of the UCL report does not show that the relevant parts of the 1998 Guidance, or the parts of the Guidance which repeat those, are irrational.

Do the relevant parts of the Guidance have any wider effect than they claim to have?

49. The next issue is whether or not the relevant parts of the Guidance can reasonably be interpreted as having any wider effect than they claim to have, and in particular whether they can be read as stating, or implying, that a kerb which is 25mm high can be detected by visually impaired people in every situation, including shared spaces, and/or that a

kerb of that height is therefore recommended for those spaces. As Ms Fothergill explains, consistently with the introduction to the 1998 Guidance, before the widespread introduction of dropped kerbs, visually impaired people had relied on kerbs to help them to walk safely along and across roads. She explains that when dropped kerbs were introduced to help people with mobility difficulties, tactile paving had to be introduced to help visually impaired people to negotiate those dropped kerbs.

50. She accepts that the references to 25mm have been in the 1998 Guidance for many years, and that for many years, they were not really significant, because most kerbs were a standard height (120mm). The introduction of 'shared spaces' in the last 15 years has changed that picture. In paragraph 18 she cogently explains how difficult shared spaces are for visually impaired people. It is, she says, 'difficult to overstate the importance of detectable kerbs to the safe navigation of blind and partially sighted people...' She gives four reasons why. It seems from paragraphs 16-35 that the RNIB's principal concern is that the Secretary of State should issue clear guidance about minimum kerb heights in shared spaces, in particular. It is against that background that the RNIB was also concerned that the Guidance refers to kerb heights of 25mm. This concern also emerges from paragraph 61, headed 'Impact of 25mm kerb height'. She says that there is no guidance at present about shared spaces. The Guidance is the only document which 'touches on' kerb heights. She continues, 'As it stands, it effectively states that a 25mm kerb is detectable by blind and partially sighted people, when that is not the case. RNIB is concerned that it also potentially sends a signal that low kerbs are once again an acceptable street design intervention'. Paragraphs 12 and 45 of Ms Sarah Gayton's first witness statement express similar concerns.
51. Read as a whole, section 2.11 says nothing about a recommended kerb height. It describes one type of crossing which is flush with the pavement, as opposed to a second type of crossing, referred to in the next part of section 2.1 (that is, a crossing with a dropped kerb). In the former type of crossing, by design, there is no kerb at all, and no reasonable inference can be drawn from it about recommended kerb heights generally. The rest of section 2 then gives detailed advice about the installation of blister surfaces at a range of different pedestrian crossings.
52. Section 2.5.4 does not say that a 25mm upstand generally guarantees the safety of a visually impaired person, or that such an upstand can always be detected by a visually impaired person. Rather, this advice applies only to a vehicle crossover. Such an upstand will help to ensure that a person does not mistakenly stray into the carriageway.
53. Section 2.5.5 relates to a subset of speed bumps, which are flush with the footway, and which are longer than the width of a crossing which traverses them. The main advice is that it is not appropriate for the blister surface to be of the same length as the speed bump. The Guidance then suggests that in those cases in which the rest of the speed bump is flush with the footway, or has an upstand of less than 25mm, visually impaired people can be alerted to the transition between the footway and the carriageway by 'creating a level difference between the carriageway and the footway of at least 25mm, so that the transition is not actually flush', or by a physical barrier. The assumption in this passage is it is important either to mark the transition with a level difference which ensures that two surfaces are not flush, or physically to stop visually impaired people from crossing at that point. The implication of this passage is that, in this specific situation, an upstand of at least 25mm will make a transition palpably not 'flush', and

there is an assumption that that transition could then be detected by a person who is visually impaired. But what cannot be extracted from this passage is a wholesale recommendation that kerbs generally should be 25mm or more.

54. I do not consider that the relevant parts of the Guidance can or should be interpreted as having any implications beyond the three situations in which they are stated to apply. The impugned passages make no express or implied assertions that, in shared spaces, or elsewhere, visually impaired people are always able to detect kerbs which are 25mm high, and/or that kerbs of that height should therefore be installed in shared spaces, or more generally, elsewhere.

In the light of those conclusions, are the impugned passages irrational or did the Secretary of State breach his duties of inquiry?

55. My conclusion on Mr Burton's first argument partly answers this question. There was a rational basis for the limited references to 25mm upstands in the 1998 Guidance. The next question is whether, in the light of the UCL research, the Secretary of State could lawfully have issued guidance which continued to have the limited references to 25mm upstands which I have described in paragraphs 32-35, above, and which I have considered in paragraphs 51-54, above. On the facts, it does not matter whether what the Secretary of State did is better analysed as a decision not to change the 1998 Guidance, or a decision to replace the 1998 Guidance with the Guidance. I consider that the Secretary of State's position was lawful. He was not obliged to accept the UCL research as the last word. He had commissioned his own research, which was not yet complete, but which was expected relatively soon. That research was relevant, not only to the Guidance, but to the more controversial topic of shared spaces. He already knew that his own expert advice was that the UCL research had limitations. In those circumstances, it was not irrational to issue the Guidance in the terms in which he issued it. Nor did the Secretary of State breach his duties of inquiry. On the contrary, the Secretary of State appreciated that there was more work to be done about kerb heights generally, and was actively discharging his duties of inquiry.

Conclusion

56. For those reasons I would dismiss the appeal.

Lord Justice Singh

61. I agree.

Lord Justice Lewison

62. I also agree.