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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2015/034115/1

IN THE MATTER OF AN APPLICATION BY JOANNA TONER FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS MADE BY LISBURN CITY COUNCIL ON 22 OCTOBER AND 28 OCTOBER 2014

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Counsel for the Applicant: **Ms Murnaghan QC**
Mr McQuitty BL

Counsel for the Respondent: **Dr McGleenan QC**
Mr Paul McLaughlin BL

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Key Personnel and Organisations

Joanna Toner	The Applicant
IMTAC	Impaired Mobility and Transport Advisory Committee
Andrew Murdock	Guide Dogs NI (Policy Engagement Manager)
Sue Sharp	Former Guide Dogs NI employee, Director of Royal London Society for the Blind
Claire Patience	Lisburn in Focus
David Mann	RNIB/Lisburn Access Group
Margaret Matthews	Disability Action
David Watkiss	Landscape architect for The Paul Hogarth Company
Paul McCormick	Lisburn Council (EDC), Assistant Director of Environmental Services
Colin McClintock	Acting Chief Executive of Lisburn City Council and line manager to Mr McCormick
RNIB	Royal National Institute for the Blind
Guide Dogs	Guide Dogs for the Blind

MAGUIRE J

A. INTRODUCTION

[1] In this judicial review application the applicant is Joanna Toner ("the applicant"). The applicant is a lady aged 39. She is blind and uses a guide dog called Nash to assist her when walking. She also on occasions uses a white cane. The applicant is married to a blind man and has in the past worked for the Royal National Institute for the Blind ("RNIB") as well as other employers. She values her independence. In the past, she has averred that she could walk around Lisburn city centre without difficulty, with the assistance of Nash, but as a result of the recent implementation of a Public Realm Scheme ("PRS") in the city centre, she now finds that she has lost confidence due primarily to the way in which the scheme has dealt with the issue of kerb heights in its central area.

[2] Conventional kerb heights, as most people would know them, would be in the region 100-130mm. Guide dogs would be familiar with them and would recognise that they represent the dividing line between the pedestrian footpath and the roadway. However, within the area covered by the scheme the kerb heights have in places been lowered to 30mm and it is this which has given rise to these proceedings.

B. THE PRS[1]

[3] Like many local authorities, Lisburn City Council wants to keep its city centre commercially competitive, up-to-date, and as an amenity for visitors and those who live in the local area. This means that from time to time it has been necessary for the Council to consider how to upgrade and regenerate the city centre so that it presents as an attraction to those who might wish to use it as a place in which to shop, visit or use for leisure purposes. In 2008 a report commissioned by the Council was published as to how its central area – Market Square – could be regenerated *via* a public realm scheme. The Council decided to consider this and a landscape architect was given the task of preparing concept design works initially for the purpose of the economic appraisal of the project.

[4] The 2008 report had recommended that as part of the regeneration, Market Square would be pedestrianised but a level of vehicular traffic for a variety of purposes was essential. The report had favoured both an enhanced landscape design and surface treatments which included "single level" treatments wherever possible. Consequently, a design concept was considered which involved the notion

[1] On the former Department of Social Development's website the purpose of public realm and environmental improvements is put in the following terms: "Improving the appearance of an area is not just to make people feel good when they visit, shop or live there – although that is very important. If an area has been upgraded and is attractive it will be healthier, safer and cleaner and therefore more people will want to go there. It also means that businesses will be more likely to invest money, to build or to trade there, which improves the economy and creates jobs".

of creating "shared space", a concept which had first been developed in the Netherlands but which had been successfully deployed in many urban centres across Europe. Shared space involved the use of flush pavements and road surfaces accompanied by a complete change in the visual appearance of road surfaces at entry points to the shared space. The visual contrast created was to provide a strong indication to vehicle users of the presence of a pedestrian area. This should cause drivers to reduce speed and to navigate through eye contact with pedestrians.

[5] Initially the Council's landscape architect had been planning to utilise the shared space concept but later he decided to make use of kerbs. This decision, in itself, was welcomed by those representing blind persons and by those blind persons who took an interest in the PRS. It was and is not the subject of any challenge in these proceedings. Those concerned with the interest of blind pedestrians had been nervous about the idea of using shared space and generally favoured the use of kerbs. However, what has stimulated controversy and ultimately these proceedings is not the principle of using kerbs but the issue of their height.

[6] While there has been dispute about the way in which the height issues emerged and have been dealt with, which the court will comment on later, it is clear that in recent times a considerable battle has been fought over it, with what the court will refer to (respectfully) as the "blind lobby" mounting an ultimately unsuccessful campaign to have the height of the kerbs altered from 30mm to at least a height of 60mm. The Economic Development Committee ("EDC") of the Council on 22 October 2014 rejected their pleas to alter the kerb heights and this decision was later ratified by the Council itself on 28 October 2014.

[7] In these broad circumstances, the applicant initiated these proceedings on 8 April 2015. Leave to apply for judicial review was granted on 22 May 2015. No form of interim relief was sought or granted. The present position, therefore, is that the PRS has now been completed and the relevant kerb height of 30mm has been put in place. Nonetheless, on a wide range of grounds, the applicant maintains that the Council has acted unlawfully and seeks a ruling from the court that the two decisions referred to at the end of the last paragraph should be set aside.

[8] Before describing the grounds on which this judicial review has been mounted, and assessing these, it is necessary in this case to set out the relevant facts in more detail. In respect of these, the court has had put before it multiple affidavits, especially on the applicant's side, dealing in considerable detail with the evolution of events. The respondent Council has also responded in considerable detail. In the course of the hearing a great deal of court time was taken up by the rehearsal before it of numerous factual disputes between the parties. On occasions, the court was faced with multiple accounts of the same meeting reflecting the fact that those at the meeting had understood what had occurred at it in different ways. No application was made in the course of a six day hearing to cross-examine any witness and the court, in effect, has been asked to resolve the many disputes on the facts which have been debated.

[9] In these circumstances the court wishes to make clear to the parties that the Judicial Review Court will seldom be the right forum in which to seek to resolve areas of extensive factual dispute and the court will generally be unprepared to involve itself in an extensive process of fact finding for which the court's processes are not well fitted.

[10] The court will be guided in the approach which it takes to this application by the norm that where facts are alleged by an applicant, the onus of proof will be on the applicant to prove them on the civil standard of the balance of probabilities. If the court, having considered the evidence, does not consider that the onus of proof has been discharged it will normally assume, as the fall-back position, that the respondent's account in respect of the matter in question is to be preferred.

[11] The court below will set out the facts it finds in respect of this case having considered the totality of the evidence and submissions made.

C. FINDINGS OF FACT

[12] The sensible way in which to set out the facts in this case is to adopt a chronological approach.

[13] The starting point has already been described. In July 2008 the Council received the report it had commissioned on the question of the regeneration of Market Square.

[14] As already noted, a landscape architect was then appointed to prepare concept design work for the purpose of an economic appraisal. This architect, whose actions lie at the centre of this case, was a Mr Watkiss who was an Assistant Director of The Paul Hogarth Company ("TPHC").

[15] As it happens, at the same time as Mr Watkiss's appointment, TPHC had been appointed as a consultant in respect of another major development in the Lisburn area. This development involved the creation of a new village, including a village square, at Woodbrook, near Lisburn. In the course of working on this project, Mr Watkiss engaged in consultations with such user groups as the RNIB and Guide Dogs for the Blind Northern Ireland. There was a proposal for flush surfacing at Woodbrook Square, which was part of a shared space development. As already recounted, this type of development caused a degree of nervousness on the part of those representing persons with no or impaired vision. Accordingly, there was a need to consider all of the options, one of which was the use of kerbs. It appears that a study trip to Ashford in Kent was arranged to view a shared space scheme in operation there. In respect of this, Mr Watkiss was accompanied by two representatives of Guide Dogs for the Blind, a Ms Sharp and a Mr Murdock. A traffic consultant was also part of the group. Mr Watkiss, commenting on this study trip, has indicated that:

> "[T]he key issue which we learnt from this trip was that in public spaces blind users require navigational aids and that for those who use a stick, kerbs were important for this purpose."

[16] For the Woodbrook development Mr Watkiss avers that he prepared two alternative design options: one involved using 30mm kerbs around the periphery of the square and the other involved the use of guidance paving. Copies of each were provided to both Ms Sharp and Mr Murdock. Ms Sharp responded on 8 September 2009. It would appear she was speaking for Guide Dogs for the Blind NI. She said that having reviewed the options, she favoured the first option, that is the one involving the use of kerbs. There was, Mr Watkiss points out, no suggestion that the proposed 30mm kerbs were inadequate or presented any difficulty or danger for guide dogs or their users. The figure of 30mm in respect of the kerb height was provided in the diagram which Mr Watkiss had given to Ms Sharp and Mr Murdock.

[17] In respect of the city centre PRS, a list of consultees was drawn up by Mr Watkiss. This included RNIB. A consultation meeting was arranged for 22 January 2010. It was attended by a representative of Disability Action and by a Mr Mann and Ms McCambley for RNIB. The discussion at the meeting concerned general design principles, according to Mr Watkiss, as there were no detailed proposals yet in place regarding the city centre scheme. The meeting was also used, Mr Watkiss goes on to say, for consideration of the detailed design proposals for Woodbrook.

[18] The court has seen two versions of the minutes of this meeting. It is the court's view that primarily the meeting concentrated on the position at Woodbrook Village. In that context, the proposal for a perimeter kerb line of 30mm in height appears to have been discussed. There is nothing to suggest that this was objected to, though whether it was positively consented to in the context of Woodbrook (as the second set of minutes indicates), might be open to some doubt.

[19] Mr Mann has sworn an affidavit in these proceedings. In it, he refers briefly to the meeting. He frankly avers that he could not at the date of swearing his affidavit remember the details of it. While he does not positively make the case that the kerb heights were not discussed, he states that he had no recollection of them being discussed.

[20] The court is satisfied that the kerb height issue was discussed at this meeting in the context of the proposal for 30mm kerbs being used at Woodbrook and that no one at the meeting took issue with this. Thus it would not have been unreasonable for Mr Watkiss to have come away from the meeting at least with the view that as regards the Woodbrook development no one from RNIB was taking issue with the proposed 30mm upstand kerbing.

[21] Further confirmation of the view above may be found in a reply from Mr Mann to a detailed plan for Woodbrook sent to him by Mr Watkiss on 28 January 2010. The plan clearly noted on it the 30mm kerb line. Mr Mann replied, noting that Catherine [McCambley] also RNIB had also looked at it and that:

> "It appears to take account of all the points we made and we are pleased that your design concepts are so sympathetic to the needs of blind and partially sight people."

However, as he was not qualified as an access consultant, he felt unable to give what he described as "formal endorsement".

[22] It would appear that the same detailed plan was also sent after the 22 January 2010 meeting to the representative of Disability Action who had attended the meeting. She replied on 8 February 2010. This representative, Margaret Matthews, attached to her reply a recent research paper commissioned by Guide Dogs for the Blind which, to use her words, indicated that "a 30mm kerb is inadequate".

[23] The court has not seen any reply to this e-mail.

[24] What seems next to have occurred is that the TPHC provided, in the context of the Council's economic appraisal of the proposed PRS for Lisburn city centre, a "stakeholder consultation report". This document is dated April 2010.

[25] Thereafter the Council appear to have given the go ahead for the scheme to progress.

[26] At the end of 2011, the landscape architect, Mr Watkiss, was appointed as the lead consultant for the scheme.

[27] On 27 March 2012 a public consultation event was held at the Linen Centre in Lisburn. On this day Mr Watkiss, on three occasions, provided a slideshow and oral presentation. He maintained that his slides did show the proposed kerb and contained reference to the kerb height being set at 30mm. He also maintains that he told those at the presentations about the kerb heights. It is Mr Watkiss's position that he received no adverse comment at the event about the kerb height.

[28] There has, however, been dispute about what was contained in the presentations given.

[29] The applicant attended one of the presentations. In her affidavit she maintained that the slides or other presentation materials did not record the height of the proposed kerbs. Moreover, she says that she had no recollection of the issue being raised orally by Mr Watkiss. The impression conveyed by her affidavit is that no issue was taken with the height as it was not mentioned. If it had been

mentioned, in her view, issue would have been taken. She says that she left the meeting unaware of the 30mm figure.

[30] Mr Mann, also attended the meeting. He has averred that he recalled Mr Watkiss saying that he had dropped plans for a shared space solution and that kerbs would be retained. He said this was well received by those concerned with the position of blind or partially sighted users. He asserts he has no recollection of the figure of 30mm being mentioned.

[31] Claire Patience, a full-time employee of the Lisburn In Focus Group, which has an interest in working for blind and partially sighted persons, also attended. In her affidavit she recalls Mr Watkiss providing a slide show and presentation. She accepts that one of the slides allegedly from the show, which she had seen later, does show the upstand but she had no recollection of seeing the slide on the day. She appears to suggest that perhaps this slide was excluded from the show. However, there is nothing the court has seen which supports this suggestion. She recalls that Mr Mann did ask questions about the kerbs but their height, she maintains, was not discussed. In these circumstances she said she assumed that the height of the kerbs would be a conventional one.

[32] The slides used in the slide show on 27 March 2012 have been exhibited to Mr Watkiss's affidavit. One of these clearly shows the proposed 30mm kerb and the height is marked not inconspicuously on it. The court rejects the implicit suggestion in Ms Patience's affidavit that Mr Watkiss may have not shown this slide and is satisfied that it was shown and was there to be seen. There is no dispute that Mr Watkiss spoke when going through the slides and that there was an opportunity at the presentation for points to be raised by those who were at it. The evidence presented to the effect that no one recollected there being reference to the 30mm upstand fails to convince the court on the balance of probability. In these circumstances, the court will accept the evidence provided by Mr Watkiss that he did refer to the figure of 30mm as the kerb height.

[33] The court accepts that the issue of the height was not the subject of debate at the consultation presentation. This was not in dispute.

[34] On 9 May 2012 Mr Watkiss had a meeting with Disability Action in respect of the PRS. According to a written record prepared by him of his consultations with various groups, at this meeting he drew attention to the fact that the original proposal for a flush surface had been omitted following consultations with Road Service. However, the relevant entry notes that Mr Watkiss did highlight the change to a 30mm kerb. There is no evidence before the court which contradicts this.

[35] In or about this time, there was also contact between TPHC and Road Service. A note from the company dated 9 May 2012 refers to a meeting with Road Service of 27 March 2012. It stated that "we noted the reduced kerb show and this was received as being acceptable".

[36] In the six weeks period after the consultation meeting of 27 March 2012 it is common case that the presentational materials were available to be consulted at various locations in Lisburn until the end of May 2012. This does not appear to have elicited any unfavourable reaction in relation to the kerb height which was contained within the presentational papers. Ms Patience refers in her affidavit to "large scale drawings" being on display.

[37] On 25 June 2012 a meeting was held between TPHC and Transport NI. The record of this meeting (prepared by Road Service) shows that the height of the kerb show was under consideration by them.

[38] In respect of the proposals constituting the PRS an application for planning permission was made to Planning Service by the Council on 4 July 2012. In respect of this, one of the consultees was Road Service (for this purpose now Transport NI). On 30 July 2012 Road Service (according to its own internal record) decided that the kerb height proposed of 30mm was acceptable. Consequently, in its consultation response to the planning application, Road Service raised no objection though some conditions (not germane to the issue before the court) were suggested. No objections were made to the application for planning permission. Later, on 9 January 2013, planning permission was granted.

[39] On 10 October 2013 a seminar was held in respect of the issue of urban regeneration and accessibility. It took the title ""Walk My Way" and was run by Lisburn In Focus which, as noted earlier, is linked to RNIB. At this seminar Mr Watkiss made a presentation in respect of the PRS again with the use of the slides he had used before. Mr Watkiss says that he referred to the 30mm kerb detail showing the slide with this information on it.

[40] The applicant, who attended the seminar, accepts that on this occasion the kerb height was referred to. She says this was the first occasion where she can recall being told what the kerb height was to be.

[41] Mr Mann also attended the seminar and for him this was, he believes, the first time he had learned of the kerb height. In his affidavit, he says that many of those present expressed concern. He went on to say:

> "During the discussion, Andrew Murdock, Policy Officer for Guide Dogs, was able to clarify to myself and others how low such a kerb would be and how it compared with the norm. He also referred to research that had been commissioned by Guide Dogs which showed that the minimum height for a kerb to be detectable by a guide dog or a long cane user was 60mm. He made these points openly during the meeting."

[42] Claire Patience, who was the project co-ordinator for Lisburn In Focus, was also in attendance. She agrees that there was a slideshow which highlighted the kerb height of 30mm. She avers:

> "At this point, the room literally stopped and people audibly remarked 'what'. I believe it was clear that the kerb height came as a genuine surprise to many of those present. Mr Andrew Murdock then sought clarification from David Watkiss and explained to others present what 30mm actually meant. He also referred to the research by Guide Dogs … I can't recall Mr Watkiss's response but I do recall that he was quite blasé about our concerns …"

[43] Mr Murdock, who is a policy and engagement manager for Guide Dogs in Northern Ireland, in his affidavit also makes reference to the seminar of 10 October 2013. He refers to Mr Watkiss mentioning the 30mm kerbs and indicates that he had responded by referring to the findings of a research paper published by University College, London in 2009. He said:

> "This research [established] that people who are blind and partially sighted require a minimum of 60mm kerb. I recall indicating to Mr Watkiss that I would welcome further discussions with him on the issue."

[44] The court accepts that at this seminar the issue of the height of the kerbs did become a matter of controversy and that Mr Murdock openly raised with Mr Watkiss the impact of the UCL research upon what was being proposed. This would appear to have been the first time the issue was raised, notwithstanding the court's earlier finding that the height had been referred to on various earlier occasions and in documents.

[45] On 18 November 2013 a request was made, on the part of Guide Dogs NI, for a meeting with Mr Watkiss. This request was signed by Mr Murdock and was in reasonably convivial terms. There appears to have been some delay in the meeting being organised, though it was eventually set for 4 February 2014.

[46] An e-mail is found in the papers, which was sent by Mr Mann (RNIB) to an organisation called the Impaired Mobility and Transport Advisory Committee[2] ("IMTAC"), in advance of the meeting seeking advice. In it, Mr Mann explained that "an issue (or a storm) had arisen concerning acceptable kerb heights in the regeneration of Lisburn city centre". He therefore sought official guidance, especially as he "couldn't swear that [he] hadn't at some stage inadvertently implied

[2] This is a publicly funded body which advises Government Departments on transport and mobility issues.

that 30mm is okay". The response to this e-mail came from IMTAC on 22 January 2014. It stated that there were significant problems with the height. In particular "research shows that 30mm is simply too shallow". The e-mail then went on to describe problems for other pedestrians presented by this kerb height but indicated that there were "no straightforward answers to this specific issue".

[47] At the meeting of 4 February 2014 various interests were represented including RNIB, Guide Dogs NI, the Council and TPHC in the form of Mr Watkiss. There was a dispute over the extent to which, if at all, the 30mm kerb height had been dealt with during the consultation process with opposed views (largely as described above) being expressed. According to Mr Watkiss, Mr Mann commented that he might have been presented with the 30mm kerb height information in the past but had not appreciated its significance at the time. In his affidavit, Mr Mann does not deal with this point but he avers that the meeting evinced considerable concern among those represented about the kerb height based on the Guide Dogs research. According to Mr Mann, a Council representative indicated at the meeting that the cost of altering the plans would be such as to prohibit the kerbs being redesigned to be higher. According to Claire Patience, who attended the meeting, Mr Watkiss and those representing the Council at the meeting made no constructive suggestions. In her affidavit she states that she "was … flummoxed by their attitude as I consider that a solution clearly needed to be found but the Council … did not appear to be interested in finding one". Ms Patience also maintains in her affidavit that Mr Watkiss at the meeting did not suggest that the Guide Dogs research could not be relied on.

[48] Whatever the detail of what was said at the meeting of 4 February 2014, it seems to the court that it had become clear that a substantial disagreement on the kerb height, if it was not evidenced before, now existed with the issue being that of the suitability of the 30mm upstand for those who were blind or partially sighted.

[49] There is evidence that Mr Watkiss did take the issues raised at the meeting seriously. On the same day he made enquiries about the costs of various options for dealing with the problem which had been exposed.

[50] It also seems to be clear that IMTAC raised the issue of the kerb height with Transport NI. This is evidenced by a letter from the former of 27 February 2014.

[51] A response from Transport NI to the above letter on 25 March 2014 indicated that the proposal for the 30mm kerbs had been accepted on the basis "that design standards would be met and that other stakeholder groups, including disability groups, had agreed to them". However, it was noted that this issue relating to the potential use of 30mm kerbs had been highlighted and was being given attention.

[52] At or about this time there is also evidence of various complaints from members of the public and local politicians in relation to the issue and in relation to

the disruption which the construction of the scheme was causing. It is unnecessary to deal with these in detail.

[53] On 2 May 2014 a meeting was convened in the local MP's office. While a representative of the Council was at the meeting, Mr Watkiss was not. It appears that arrangements were made to provide the Council with the 2009 research (which arrived with the Council on 9 May 2014). While the issue of the kerbs was discussed, the meeting achieved no resolution of it.

[54] On 6 June 2014 there was a further meeting at an MLA's office. Mr Watkiss was not at this meeting and the discussion, which encompassed the kerb height issue, involved the Council which was represented at the meeting, and persons reflecting the interests of the blind and partially sighted. On behalf of the Council, it was made clear by Mr McCormick, the then Assistant Director of Environmental Services, that any change to the scheme would have to go before the EDC which was due to meet shortly. Evidence could be put before it, including the 2009 research paper and other evidence submitted. Mr McCormick in his affidavit indicated that he "was concerned by the suggestion that the proposed kerb heights had not been fully explained to the blind organisations" and wanted to see a copy of Mr Watkiss's presentation, which later was provided to him. It was subsequently arranged that the matter would be placed on the agenda of EDC for its meeting of 16 June 2014. In advance it was agreed that representatives of organisations representing the blind and visually impaired would attend and make a presentation to members of the Committee. Mr McCormick would provide the Committee with a report. Mr Watkiss would attend the meeting to deal with any issues raised.

[55] It appears that prior to compiling his report Mr McCormick discussed the matter with Mr Watkiss. Mr McCormick's report was circulated to the members on 11 June 2014.

[56] The report of Mr McCormick, having provided the background, indicated that Council officials had discussed the issue with representatives of the various groups over the past number of months. The Council's position, it was recorded, was to continue with the design as originally agreed. The reasons for this position were set out in the report as follows:

> "
>
> - These concerns were not raised as part of the consultation process.
> - The professional recommendations of the landscape architect for the scheme have not raised these concerns as an issue.
> - The concerns were raised after a substantial part of the kerbs were built in Market Square.

- The scheme which included 30mm kerb show was approved in full by the Planning Service which included sign off from Road Service."

[57] Two appendices accompanied the document. One contained a letter from Mr Murdock (Guide Dogs) to an MLA outlining the various concerns. The second was a report which highlighted how the scheme had developed over the last few years. This included "details of the consultation undertaken" and the landscape architect's professional opinion. The report also noted the Council's equality officer would be in attendance at the meeting.

[58] An issue dealt with in the report was that of cost if there was to be a change in respect of the kerb shows which, Mr McCormick indicated were "now substantially built". Change would, the members were told, involve "substantial additional cost to the overall scheme, which would have to be borne by the Council".

[59] Mr McCormick's report contained a recommendation which was that the members "consider and note the contents of the presentations and agree an appropriate way forward" but it is clear from the tenor of the report overall that officials did not favour change in relation to the kerb height.

[60] In the event, Mr McCormick was unable to attend the meeting of the Committee and Mr McClintock, his line manager, was the lead official present.

[61] As far as the court can see, the meeting was conducted in a way which enabled all concerned to make their cases. The Committee's minutes indicate that the Committee decided to continue with the original design of the PRS, *viz* to keep the 30mm kerbs.

[62] Two points of particular interest may be gleaned from the minutes. First, both Mr Murdock and Mr Mann addressed the Committee. The former referred, *inter alia*, to equality issues whereas the latter dealt with the challenges that visually impaired and blind people experience when in the city centre. Mr Mann is reported in the minutes as acknowledging that "the consultation on the … PRS had included the proposals to include 30mm height for kerbs in Market Square but that this element of the design had not been picked up at the time and accordingly no formal objection had been lodged". Secondly, it appears that Mr Watkiss, following the Murdock/Mann presentations, read out what can be described as the Sue Sharp letter (in fact, an e-mail), on behalf of Guide Dogs NI. She had, it was suggested, albeit in respect of another scheme in Lisburn, "affirmed that a kerb height of 30mm was acceptable".

[63] In his affidavit, Mr Mann takes issue with the two aspects of the EDC's proceedings which are referred to above. He indicated that he had noted from the newspapers that he was alleged to have acknowledged at the meeting that the Council had comprehensively consulted on the proposals and in relation to the

introduction of the 30mm kerb. In his view, this was not correct, and he had only made a comment about the Council's perception of their consultation. In his view "if the consultation had indeed been comprehensive and the 30mm kerb referred to explicitly, and views canvassed on it, then concerns would undoubtedly have been raised at the time".

[64] Secondly, Mr Mann complained about the fact that Mr Watkiss had read out the Sue Sharp letter. This was, he thought, unfair as neither Mr Murdock nor he had any prior sight of the letter and there was no opportunity to question Mr Watkiss on it. Subsequently Mr Mann says that he took the issue up with the Committee chairman. Having obtained a copy of the Sharp letter, he has averred that it had been misrepresented at the meeting by Mr Watkiss. Ms Sharp had preferred the use of kerbs over the use of a textured guiding surface, but she had not endorsed the particular kerb height.

[65] The court is unimpressed with Mr Mann's first point and accepts what is contained in the Council's minutes on this issue. It is not clear from Mr Mann's affidavit whether he actually had seen the minutes at the time when he swore his affidavit but the court sees no reason not to accept them. The press reports, to which he refers, appear to, at least substantially, mirror the minutes, which suggest to the court that the minutes are probably correct.

[66] In respect of the second point, the court accepts that there may be some force in Mr Mann's view in so far as the Sharp letter can be interpreted in different ways. On one view the letter may be viewed as only endorsing the use of kerbs without endorsing any particular kerb height but it is also possible to regard the letter, when read with the accompanying drawing sent by Mr Watkiss to Sue Sharp, as going further. The matter is discussed in more detail below.

[67] The EDC's recommendation came before the full Council on 25 June 2014 and was adopted.

[68] The above, however, did not mean that the dispute ended and there continued to be correspondence about it. This led to a still further meeting on 19 September 2014 between the applicant, Claire Patience and the applicant's husband and Mr McClintock of the Council. A request was made at this meeting for the establishment of a further consultation exercise. It was also suggested that the Council's June decision had been made on grounds of costs, which was denied by Mr McClintock who maintained that cost was only one of the factors considered. Mr McClintock indicated that the requests for a further consultation exercise would have to be dealt with by the Council and not officials. The scene was therefore set for the matter to be placed again before the EDC.

[69] Speaking of the meeting of 19 September 2014, Claire Patience in her affidavit refers to remarks made by Mr McClintock at the meeting. It is alleged that he said that the Council wanted to complete the scheme and that "none of the councillors

would approve any proposal that would further delay implementation of the scheme". Moreover, she quotes Mr McClintock as saying that the Council "should be allowed to finalise the scheme, and then if people were not happy they would be prepared to re-do it". These remarks have not been denied anywhere in the papers.

[70] In advance of the meeting of the EDC, which was scheduled for 22 October 2014, a report was compiled for the members written by Mr McCormick (Assistant Director of Environmental Services).

[71] The report contained an outline of the process which would have to be followed if a decision to re-consult was made. It is noted that the effect of re-consultation would be time delay and compensation. The matter was put bluntly as follows:

> "To consider amending the kerb heights now will have significant implications and the project would become unviable as a consequence unless additional funds was contributed to the budget …
>
> Without carrying out a full engineering and design review and site investigation work it is difficult to provide full details of the works which would be needed. At least these would include:
>
> - The entire area would have to be redesigned and rebuilt to accommodate alterations, falls and drainage.
> - Road Service would require new deeper kerbs to be installed as these would not be the required embedment depth.
> - Dependent on the road make up, full road construction may be required …
>
> These would all have considerable cost implications."

[72] While no recommendation was made in the report, it unmistakeably was a negative report from the point of view of those who sought to have a further consultation exercise commenced.

[73] The EDC met to consider the matter on 22 October 2014. Mr Watkiss was in attendance to answer any questions which might arise. There were no presentations to the Committee as such. The Committee agreed that the Council should maintain its existing design including kerb heights of 30mm, having been briefed further by two Council officials. The idea of having a re-consultation was rejected because of the significant impact this would have on the scheme.

[74] The matter came before the full Council on 28 October 2014. It ratified the Committee's decision without debate.

[75] On 27 November 2014 the applicant made a complaint to the Council. The gravamen of this was that the Council had failed to screen its change of policy from shared space design to the installation of a 30mm kerb within the PRS for the purpose of its equality scheme.

[76] A pre-action protocol letter was sent to the Council by the applicant's solicitor on 1 December 2014. The object of this was to enable the Council to respond to the applicant's threat of judicial review proceedings.

[77] The Council responded to the pre-action protocol letter on 23 December 2014.

[78] These proceedings were issued by the applicant on 8 April 2015. This was nearly 6 months after the Council's ratification of the EDC's decision. Leave to apply for judicial review was granted by Coghlin LJ on 22 May 2015.

D. SUMMARY OF KEY CONCLUSIONS

[79] The following key conclusions in respect of the facts relating to this case can usefully be recorded at this stage:

(i) It is evident that Mr Watkiss was aware of the UCL research in relation to kerb heights from at least around 8 February 2010.

(ii) The main public consultation carried out by Mr Watkiss on behalf of the Council began in March 2012. It was projected to last for 6 weeks.

(iii) The court is satisfied that this consultation was conducted with disclosure of the height of the kerbs and that information in relation to this was to be found in relevant drawings and presentational materials. It is likely also that Mr Watkiss mentioned the figure of 30mm in the course of his presentations.

(iv) There was no opposition to the use of 30mm kerbs expressed to Mr Watkiss during the consultation process.

(v) The Council therefore proceeded to apply for planning permission for the PRS on the basis that there was no known opposition to the kerb height.

(vi) No objections were made in the course of the Council's planning application relating to the kerb height.

(vii) Ultimately, there was no objection to the kerb height expressed by Transport Northern Ireland, the relevant roads consultee.

(viii) Unsurprisingly, in these circumstances, planning permission was granted for the project on 9 January 2013.

(ix) It was not until October 2013 that the controversy over the kerb height emerged at the Walk My Way seminar.

(x) By this stage work on the ground had already begun.

(xi) The controversy centred on the UCL research.

(xii) The Council became more directly involved in the process from in or about February 2014.

(xiii) The Council officials first had sight of the UCL research on 9 May 2014.

(xiv) It soon became clear that councillors would need to become involved in making decisions. Hence the matter came before the EDC in June 2014. The Committee, however, declined to change course after hearing from speakers reflecting the different viewpoints.

(xv) The Council itself adopted the Committee's recommendations without discussion later in June 2014.

(xvi) The matter, however, did not end there, and came back before the Committee again in October 2014.

(xvii) Ultimately the Committee declined to go down the road of a re-consultation and chose to maintain its earlier view, a position ratified by the Council without debate.

E. THE UCL RESEARCH

[80] As is clear from the above, much of the controversy in relation to this case owes its origin to concerns which have arisen from research about kerb heights as they affect blind and partially sighted persons which was carried out at University College London ("the UCL research"). This was carried out in October 2009 and had been commissioned by Guide Dogs for the Blind.

[81] The published report in respect of this research is some 30 pages in length. For present purposes, it is enough to concentrate on its key aspects.

[82] What appears to have stimulated the research was the very sort of activity that Lisburn City Council was engaged in *viz* the redesign of a town centre or part of

same using the concept of shared space which often would require the removal of traditional vertical upstand kerbs. As the report put it:

> "The removal of the kerb takes away the vital clue used by blind and partially sighted people to help them navigate the pedestrian environment and identify when they have reached the edge of the footway" (page 4).

[83] An important conclusion reached was that as a result of experiments "it was found that a kerb height of 30mm was not sufficient to be reliably detected by blind and partially sighted people (*ibid*) 30mm was "too low".

[84] The principal recommendation contained in the research was that "for confidence that a kerb is detectable by blind and partially sighted people, it is recommended to install a kerb of 60mm or greater" (page 5). This finding had been foreshadowed by a report of 2007 where it had been concluded that a 30mm kerb was "not sufficiently reliable for blind and partially sighted people" (page 6). Guide Dogs for the Blind had asked the question of the researchers as to at what height the kerb becomes detectable.

[85] The conclusions of the researchers were set out at page 30 and read as follows:

> "Kerb heights of 60mm and above were detectable when stepping up and stepping down and induced the greatest confidence in what they were and what they signalled.
>
> Kerb heights of less than 40mm appear to be less consistent in detection rates and thus consideration should be given to avoiding them if possible.
>
> Epidemiological tests would be required to determine if 50mm kerbs would be a problem in the wider population of people who are blind or partially sighted."

[86] The conclusions were based on experiments which had been carried out at London's Pedestrian Accessibility Movement and Environment Laboratory. Some 36 blind and partially sighted people were involved with the experiments. They involved the participants being positioned at set points. They were asked to walk until they were told to stop or they encountered a kerb following the experimenter's voice to help with orientation. If the participant did not detect a kerb where there was one, the experimenter would class the trial as a fail. If a kerb was encountered, the participant was asked to give a score relating to the confidence they had that

what has been encountered was a kerb. Kerbs were tested at heights from 20mm to 120mm.

[87] The results were, in summary, that all participants detected the kerbs of 60mm, 80mm and 120mm when stepping up or stepping down from the kerb as well as when approached straight on and at an oblique angle. "One participant consistently did not detect the 50mm kerb when going down approached from either straight on or at an angle. This participant was a guide dog owner. There were no failures when going up this kerb. The first failure to detect when stepping up a kerb was for the 40mm height. This participant had cone dystrophy, only using a symbol cane when walking in the street. The other participant to fail the 40mm kerb (stepping down) was someone who used a long cane. In addition to those already mentioned, two guide dog owners failed the 30mm kerb, both stepping up and down. In total, four guide dog owners, six long cane uses and three people who didn't use any aid, failed to detect 20mm kerb" (page 19).

F. MR WATKISS'S RESPONSE TO THE RESEARCH

[88] Mr Watkiss was the landscape architect who was appointed by the Council to design the Lisburn PRS. He has filed a substantial affidavit in these proceedings and it is helpful to note at this point what he had to say about the UCL research.

[89] It will be recalled that there is evidence that he was provided with a copy of this research in February 2010 (by Margaret Matthews of Disability Action: see paragraph [22] *supra*). At paragraph 15 of his affidavit Mr Watkiss makes reference "upon receipt of the research" to him and a colleague reading it and meeting to discuss it. No date for this meeting is given. The meeting is described as "an internal meeting" (*ibid*). It was not minuted. In the light of the discussion, they did not see any need to change course *vis a vis* the use of 30mm kerbs. In his view, "the study did not reach a clear conclusion that kerbs of less than 60mm presented a danger to blind users". He further avers that "there were also limitations in the way the study had been carried out" *(ibid*).

[90] At paragraphs 16 and 17 of his affidavit, Mr Watkiss provided the following further account of he and his colleague's view of the research:

> "16. We noted that the study had involved only a small pool of participants, all of whom were blind or visually impaired. No other disability groups participated. It involved only blind users with a guide dog and not those with a stick. It was therefore directed solely at the interests and needs of this one grouping. The study involved tests carried out in indoor conditions, rather than within a streetscape environment where other navigational aids would normally be present. We considered this to be

> important in light of the feedback during consultation on Woodbrook to the effect that blind stick users were unlikely to use a kerb edge to navigate in a street environment in light of the presence of street furniture. Similarly, for guide dog users, other navigational aids are likely to be present such as shop frontages, street furniture, other pedestrians and the colour/tactile contrast between materials used on the pavement and those on the road surface. We had also been advised that guide dog users would never attempt to cross a road in the middle of a pavement, but would always use a dedicated crossing point. All of these features of the consultation exercise suggested to us that safe navigation within public spaces for blind users could be achieved by a balanced design incorporating a range of measures and was not exclusively dependent upon a kerb height of a[t] least 60mm.
>
> 17. We also considered the way in which the study had been conducted and concluded that there were limitations in the methodology. First we noted that the tests involved participants walking towards kerbs of different heights with a view to ascertaining those kerb heights which guide dogs had difficulty identifying. All of these tests involved using the same finish surfaces, without any colour or texture changes between the raised and lower surfaces. This provided a very different environment to a normal streetscape. Similarly, none of the range of additional navigational aids within a streetscape were used (e.g. shop frontages, street furniture, signage or dedicated crossing points). To this extent the study did not fully reflect the conditions in which blind persons were likely to encounter kerbs".

[91] Mr Watkiss, at a later stage in his affidavit, went on to assert that "the results … showed that even in test conditions, only 5-5.5% of users had difficulty detecting a 30mm kerb height" (paragraph 18).

[92] It is clear that none of the above views about the UCL research or the research itself were supplied by Mr Watkiss to the Council at the time when it was received by him or thereafter. The evidence clearly is that the first time the Council itself was told of this research was in May 2014 when the matter arose at a meeting at which the Council was represented. At that time one of the representatives of the blind

and visually impaired who was at the meeting agreed to send the Council a copy of it.

G. CHANGING STANDARDS

[93] The court notes that since the initiation of these proceedings guidance has been made available by Transport NI in relation to kerb heights in public realm schemes. This would appear to be a development in the position of Transport NI as it is clear, as referred to above, that at the time when planning permission was being sought by Lisburn City Council for the proposed PRS, Transport NI raised no objection to 30mm kerbs, notwithstanding that there had been specific consideration given to this issue.

[94] The guidance takes effect from 28 May 2015 and there is no suggestion that the EDC or the Council could have known about it at the time when the impugned decisions were made in this case.

[95] The following passages in the guidance have resonance for the issues in this case. It is noted that "the kerbed separation of footway and carriageway can also offer protection to pedestrians and assist blind or partially-sighted people to navigate the pedestrian environment safely … low kerb heights present problems for those who are blind or partially sighted, particularly those who are assisted by guide dogs or use canes. Both use the kerb to locate the edge of footway and need at least 60mm to do so". The guidance goes on:

> "For Public Realm Schemes, and in line with best practice, it is recommended that a 'standard' kerb height of 125mm should be generally used, though this may be reduced to a desirable minimum of 100mm to suit local site circumstances. Exceptionally, however, where there is a desire to incorporate a lower standard kerb height to that either stipulated here or in DMBR…such as in a public realm scheme where a shared surface street is envisaged, it is recommended that kerb heights should not be less than 60mm. It is also recommended that these lower kerb heights should only be introduced following meaningful consultation with organisations representing the accessibility needs of local people, particularly those with a disability...".

[96] While this guidance is of interest, it should not be overlooked that (a) it is only guidance – no more and no less (b) it proceeds by way of 'recommendations' (c) it must not be thought that it is a source of law and (d) it has nothing to say about any action being required in the case of shared spaces and lower kerbs than those recommended in public realm schemes which already enjoy the grant of planning permission or which have already been constructed.

H. THE JUDICIAL REVIEW APPLICATION

[97] It is important in this judicial review application to achieve clarity as to the scope of the challenge before the court. This is because it is obvious from the discussion of the facts found above that the history of this matter has extended over a substantial period and by the date of proceedings a great deal of water had already flown under the bridge. A judicial review application is not a licence for the holding of a generalised inquiry into everything which has led to a particular decision, irrespective of the passage of time. It must be focussed on identifiable decisions and on grounds of challenge which relate to those decisions.

[98] The decisions under review in this case are two-fold and are found specified in the amended Order 53 Statement. The first challenged decision is that of the EDC which is dated 22 October 2014 and the second is that of the Council itself, in effect, ratifying the first decision. This latter decision was made on 28 October 2014. In substance what these decisions amount to were determinations by the Committee, endorsed by the Council, not to re-commence a consultation process which long ago had run its course and to continue on with the PRS on the basis that it included a kerb height of 30mm.

[99] The grounds of judicial review must in turn be related to the legality of the decisions which are impugned. The court will indicate at this stage that it will approach this aspect with an appropriate degree of strictness and will not permit its proceedings to be used to impugn aspects of the administration of this scheme which long ago could have been challenged, but were not, in the event, challenged. The requirement of finality is a well-recognised aspect of public law proceedings and the court is of the clear opinion that it will not allow a grant of leave to apply for judicial review to be used as cover for attacking acts or omissions which fall well outside the temporal parameters of Order 53 Rule 4.

[100] In this case the grounds, as pleaded, are numerous and have been formulated in a diffuse manner, involving numerous sub-grounds, which makes it difficult for the court to expose what indeed are the central issues.

[101] For expositional reasons the court will seek to crystallise the issues by, where necessary, grouping particular grounds together under more general heads. Approaching the matter in this way, the main grounds appear to be as follows:

(a) It is alleged that a flawed consultation process was conducted in this case as it is said that the proposed use of 30mm kerbs was not sufficiently or adequately disclosed or explained at the formative stage of the process.

(b) It is alleged that in making the impugned decisions the respondent failed to comply with the requirements of procedural fairness.

(c) It is alleged that the Acting Chief Executive of the Council in the context of the impugned decisions was guilty of actual or apparent bias by reason of his behaviour at a meeting which the applicant attended on 19 September 2014.

(d) It is alleged that the Committee fettered its discretion by reason of its refusal to properly consider any increase in the proposed 30mm kerb height.

(e) It is alleged that the Council by the impugned decisions has breached section 75 (1)(c) of the Northern Ireland Act 1998 by failing to carry out an Equality Impact Assessment to measure the impact of the scheme on disabled, particularly blind, persons.

(f) It is alleged that the Council fettered its discretion by refusing to consider the case for re-consultation.

(g) It is alleged that the impugned decisions breached the applicant's human rights in relation to Article 8, Article 11 and Article 14 of the ECHR.

(h) It is alleged that the respondent has acted contrary to various sections of the Disability Discrimination Act 1995.

(i) It is alleged that the respondent's decisions were Wednesbury unreasonable and/or took into account irrelevant considerations.

(j) It is alleged that there was a failure by the respondent to give reasons for the impugned decisions.

I. THE COURT'S ASSESSMENT OF THE GROUNDS

(a) Alleged flawed consultation process

[102] In the court's opinion, this ground of challenge is without merit. The alleged flaw in the consultation process is said to be that there was a failure on Mr Watkiss's part to disclose the height of the kerbs until after the process was complete. As is clear from the discussion of the facts of this case, the court rejects the factual premise on which this argument is based. In simple terms, the court is of the view that there was adequate disclosure of the kerb heights at the outset of the consultation process. What occurred was that this did not produce opposition until well after the consultation process had ended and indeed after planning permission had been granted. In these circumstances, there is no basis for judicial intervention.

[103] In any event, the court is of the view that it would be wrong for it now to entertain this ground of challenge as the alleged failures in the consultation process could have been the subject of judicial review a long time ago and it would be unfair to the Council to allow this issue to be raised now.

(b) **Procedural fairness**

[104] This ground of challenge was not extensively developed in the oral argument but encompasses no less than seven particulars in the amended Order 53 Statement.

[105] The applicant's primary submission is concerned with the requirements of procedural fairness "in making the impugned decisions". These are the decisions made in October 2014. There are three particulars of alleged unfairness which refer to these decisions and this round of decision making but, confusingly, there are then set out some four particulars of procedural unfairness which appear to relate to the process of decision making of the EDC in June 2014 – which resulted in decisions which are not challenged in these proceedings.

[106] The court has already in the opening part of this judgment sought to review the broad factual position relevant to the applicant's challenge. Without repeating what has earlier been said, it is useful to summarise the arrangements which were put in place in respect of the Committee and the Council's consideration of the issues in June and, later, October 2014.

[107] As regards the meetings in June it would appear that the primary forum for the consideration of the complaints which had been advanced by the applicant and others in relation to the kerb height issue was the EDC. This, to the court's mind, was unexceptional, as it was this committee which appears to have had responsibility for overseeing the PRS.

[108] In advance of the matter coming before the committee on 16 June 2014 the plan was that the councillors on the committee would receive copies of the UCL research (which they did). In addition, they were also to receive a report from officials, which was prepared by Mr McCormick. This included two appendices: one containing a letter from a representative of Guide Dogs for the Blind setting out their concerns and a second containing information as to how the scheme had, over time, developed. In respect of the meeting itself, there was to be a presentation on behalf of the blind and partially sighted. This, in fact, involved two speakers, who dealt with the problems which the 30mm kerb height presented. Mr Watkiss was to attend the meeting and address the committee which is indeed what occurred. While originally it had been thought that Mr McCormick would present his report to the committee, in fact he was unavailable to attend the meeting, and Mr McClintock, his line manager, undertook this role.

[109] In the light of all of the above, the committee was then to deliberate and reach a decision.

[110] In the event, as already recorded in this judgment, the committee made a decision which involved it recommending to the Council that it should continue with the existing PRS design. The meeting of the committee was duly minuted and a letter dated 9 July 2014 was sent to those concerned indicating the outcome of the meeting.

[111] That recommendation came before the full Council on 25 June 2014. The chairperson of the EDC proposed that it be accepted and, without debate, it was duly accepted. A record of its acceptance is found in the minutes of the Council for that meeting.

[112] Between the date of the EDC meeting and the meeting of the full Council discontent was expressed to the Chairman of the committee about Mr Watkiss's use of a document – in fact an e-mail – at the meeting. The gist of this e-mail had been read to the committee members. In essence, Mr Watkiss told that committee that in 2010 the author of the e-mail, a representative of Guide Dogs for the Blind, Sue Sharp, had agreed to the use of 30mm kerbs in respect of another development of a similar type. This, it was argued, was a misrepresentation of the e-mail writer's position as all she had in fact done was to prefer a design which favoured the use of a kerb line without necessarily approving of its height.

[113] This complaint about what Mr Watkiss said did not elicit a response from the Chairman, though it does appear that it was the subject of further investigation. The outcome of that investigation appears to the court to have been desultory in the sense that it is possible to see that the e-mail could be read in a way which is capable of supporting different interpretations.

[114] In August and September, as already recounted, there were further contacts between the applicant and officials of the Council and it was these which led to the matter coming before the committee again on 22 October 2014. Technically, the issue which was put before the committee was the question of whether a new consultation process should be initiated but there can, the court believes, be little doubt that in reality the committee was looking again at their earlier decision in June.

[115] On this occasion the committee appear in advance to have received written representations on behalf of the blind and visually impaired. From the affidavits before the court it can be seen that in advance of the committee meeting the proponents of change sought to lobby members of the council. A report was prepared for the committee's meeting by Mr McCormick. The thrust of this report was unmistakeable in that it strongly advanced the case that if the committee was to agree to beginning a new consultation process this would involve substantial delay

and additional costs. Notably, the report said nothing of substance about the merits of the case advanced by the applicant and others.

[116] On this occasion, no presentations were sought, save for those of officials. It is clear that Mr Watkiss was present at the meeting, which was largely conducted in private, and that he did answer some questions from councillors. Ultimately, the councillors decided that, in view of the significant impact which a re-consultation would have on the scheme, the original PRS design should continue, including a kerb height of 30mm. Minutes of the meeting were subsequently prepared and published.

[117] When the matter came before the full Council a few days later, the decision of the committee was ratified without debate.

[118] The applicant has advanced a substantial critique of the above events. In short summary, she contends that unfairness is evidenced in this case by reason of the following main factors:

(a) Those representing the interests of blind people were not able to have adequate input into the EDC's meeting of 22 October 2014.

(b) Mr Watkiss was present and participated in this meeting which meant that the committee was only hearing one side of the story.

(c) The committee sat in private so excluding public scrutiny.

(d) The earlier decision of the committee of 16 June 2014 was unfair in that Mr Watkiss had been able, without prior disclosure that he was going to do so, to refer to the Sue Sharp document and those representing the interests of the blind were unable in the circumstances to rebut this.

(e) The Chairman of the committee subsequently ignored complaints about (d) directed to him.

(f) The Chairman failed to re-convene the committee following the complaints received and he also failed to inform the full Council about the position.

Assessment

[119] It is trite for the court to observe that when assessing an issue concerning alleged procedural unfairness it must look at what occurred holistically and in its due context. This is important in this case as the complaints made above need to be set against the substantial history of this matter as it evolved over time. It is also important not to lose sight of the fact that the proceedings impugned under this

head were proceedings being conducted as part of the business of local government. The relevant model is not that of a criminal or civil trial.

[120] In the sphere of local government it should not be forgotten that the use of committees of councillors to transact significant elements of the Council's business is not unusual. Nor, moreover, is it unusual that such committees report to the full Council which often will simply approve or ratify the outcome of what occurred in a committee without comment. Councillors at a full Council meeting can, of course, intervene if they wish, but the reality, the court suspects, is that there is widespread acceptance that the expectation will often be that the recommendations of committees will commonly be endorsed without controversy or debate.

[121] In this particular case, it seems to the court that it is unrealistic to regard what occurred before the EDC and the Council in first, June, and later, October, as separate and unrelated events. In the court's estimation, while it might go too far to say that the second set of proceedings (in October) were simply the continuation of those which begun in June, they are so closely related, both in time and content, to be viewed as relevant to one another.

[122] Dealing with the particular complaints advanced, the court is not persuaded that there was procedural unfairness in the way in which the decision making in October 2014 was taken. Given that the EDC had dealt with the issues just 4 months before, and taking into account the fact that in June presentations were made to the committee by representatives of the interests of blind or partially sighted persons, it was unnecessary for an oral hearing to be afforded to the applicant or others similarly situated. The applicant and others in advance of the meeting in October were able to, and did, lobby the councillors and provide written communications to them. It was not unfair, the court holds, for a professional adviser of the Council or Council officials to be in attendance or for the councillors to receive a report from a senior official. In the court's estimation, it is wrong to assert, as the applicant does, that the councillors were provided only with one side of the story, as they had been addressed fully about the matter in June and had been reminded by the lobbying activities of the applicant and others, of the position as it was perceived by those who felt the original consultation had been defective and those who did not support a kerb height of 30mm.

[123] As regards the proceedings before the EDC in June, the court sees no unfairness in the way in which the meeting was set up or conducted. While there has been controversy about the remarks made by Mr Watkiss in respect of the position of Sue Sharp four years before, the court is of the opinion that this does not render what otherwise appear to be fairly conducted proceedings unfair. The Chairman of the committee cannot reasonably be held responsible for the content of the presentations of those who presented their views to the committee. This applies as much to the content of the presentations of Mr Murdock and Mr Mann as to Mr Watkiss's presentation. While, no doubt, it would have been better if Mr Watkiss had informed those advancing the case for higher kerbs of what he proposed to say

and the precise basis for it, so as to enable them to respond to it, the court does not consider that Mr Watkiss's apparent omission in this regard has rendered the proceedings procedurally unfair. However, even if the court was wrong in the estimation it has just given, and even if the failure of Mr Watkiss to give notice of his intention to use the Sharp e-mail, breached the requirements of fairness, the court would be slow to set aside the proceedings before the EDC in June as, it seems to the court, it cannot be said that Mr Watkiss was, in doing what he did, advertently or inadvertently, misleading the committee. The fact is that having considered the content of the exchanges which led to the Sharp e-mail, an interpretation that she was in fact approving of a 30mm kerb in the case under discussion is tenable, though the court can see that it is also tenable to say that she was approving the use of kerbs *simpliciter* rather than a particular kerb height.

[124] It follows from the court's conclusion above, that the other complaints put forward fall away. The failure of the Chairman to respond to the letters he had received may demonstrate a level of administrative inefficiency and/or an absence of good manners on his part, but it does not legally mean that the proceedings were legally unfair or should be set aside in these proceedings. It seems clear, moreover, that the Chairman did not see any need for any other form of action on his part as he did not either seek to re-convene the committee to deal with the issue which had arisen or draw it to the attention of the full Council when the matter was before it. There is no basis, the court thinks, for saying that he was bound, on pain of illegality, to take either course. In fact, he proposed to the full Council that it approve what the committee had recommended. For the reasons already given, the court sees no basis for intervening in respect of these aspects of the matter.

(c) The role of the acting Chief Executive

[125] This ground of challenge relates to a late stage in the chronology of events described above. The immediate context was a meeting on 19 September 2014 which had involved the applicant and others and Mr McClintock. By this stage the issue of the kerb heights had already been before the EDC and the Council in the preceding June and the Council's position had been established *viz* that it was proceeding with the PRS on the basis of the inclusion of 30mm kerbs. The specific involvement of Mr McClintock in respect of events in June 2014 has already been described.

[126] The meeting on 19 September 2014 was held in the light of the dissatisfaction of the applicant and others in relation to the June outcome. The applicant's complaint in this area arises, it appears, from events at the meeting. It is alleged that Mr McClintock, in the course of discussion, made statements which demonstrated that he was biased in his approach and that this bias should render the decisions now impugned in these proceedings unlawful.

[127] The statements, to which objection is made, were along the lines that Mr McClintock was of the view that the councillors would wish to complete the

scheme and would not want further to delay it and so would not want to go to a re-consultation process. Mr McClintock allegedly said, *inter alia,* that the Council should be allowed to finalise the scheme on the basis that if people were not happy they would be prepared to re-do it.

[128] It is the court's opinion that at the factual level it would be wrong to read too much into Mr McClintock's statements at this meeting. In the light of the long history of events in this case and, in particular, in the light of the outcome of the EDC and the Council's consideration of the matter as lately as June 2014, what Mr McClintock said was not very surprising. Given the context, the idea that the Councillors would want to complete the scheme and would not wish to delay it, as predictive assessments, were unexceptional and factually innocuous. While what he said about finalising the scheme and if necessary re-doing it later, was more controversial, this appears to have been no more than the expression of an unguarded personal view.

[129] In the above circumstances the applicant's contention that this was a case of bias which should lead to the setting aside of the impugned decisions is, to the court's mind, fanciful.

[130] In the court's judgment a fair minded and informed observer would not on these facts conclude that Mr McClintock's remarks would produce the conclusion that there was a real possibility of bias.

[131] But, even if the court was wrong in relation to the above conclusion, the applicant's claim in this area of the case should fail in any event by reason of the fact that Mr McClintock was not the decision maker in this case and the doctrine of apparent bias is concerned with the outlook and posture of the decision maker. The decision maker at all material times was the Council made up of elected councillors, who derived their authority from their democratically achieved status. While senior officials can advise the councillors and make recommendations, they do not decide.

[132] It follows from the above, that for this aspect of the judicial review to succeed it would have to be shown that the councillors themselves lacked objectivity and were beset with actual or perceived bias. There is no evidence that this was the case.

(d) Breach of section 75 of the Northern Ireland Act 1998

[133] This ground of challenge relates to the performance by the respondent of its public sector equality duty which finds expression in the above statutory provision. Section 75, as relevant to these proceedings, states that:

> "(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity (a)…

(b)…
(c) between persons with a disability and persons without;
(d)…".

[134] There is no dispute between the parties that the Council is a public authority and that it is carrying out a 'function' in the context of the delivery of a PRS for Lisburn City Centre. Accordingly, the Council must have due regard to the need to promote equality of opportunity *inter alia* as between persons with a disability and persons without.

[135] Guidance in relation to the operation of section 75 has been provided by the Equality Commission for Northern Ireland. Of interest are the following points:

- Due regard is not a determinant of final policy outcome but relates to the process of providing the appropriate level of consideration.

- A duty to give "due regard" to certain statutory goals means giving appropriate consideration to them *i.e.* the degree of consideration that is appropriate in the specific circumstances of the decision or policy being made. What is appropriate is likely to vary from case to case and from one public authority to another.

- As a general rule of thumb, where the level of relevancy is high, then a proportionately high level of consideration is required; and *vice versa*.

[136] Under Schedule 9 of the 1998 Act a public authority such as a Council is required to have in place an approved Equality Scheme. The Schedule provides for particular elements which the scheme must contain. It must, for example, outline the procedural arrangements it proposes to follow to fulfil its section 75 obligation.

[137] In relation to the Council it has published its approved Equality Scheme. Of importance to the present case, is that the Council has set forth a process for the consideration of policies which it proposes to adopt. In the first place, they are to be screened to identify whether they are likely to have an impact on equality of opportunity. This involves considering what may be the likely impact on equality of opportunity for those affected by the policy for each of the section 75 equality categories. The impact may be none or minor or major. For the purpose of determining impact the Council will gather relevant information and data. On the basis of this a screening decision is made and this will have the consequence of some policies (whose impact are viewed as major) going forward for a full equality impact assessment (EIA) and others being screened out as having no relevance to equality of opportunity. Reasons for deciding into which category the policy belongs will be provided.

[138] EIA is a thorough and systematic analysis of a policy and its primary function is to determine the extent of any impact the policy may have on one or more of the section 75 categories and to discover whether the impact is adverse. The assessment is carried out in line with Equality Commission guidance.

[139] There has been considerable litigation in England and Wales in respect of the operation of public sector equality duties. In a passage worthy of quotation from a recent decision of the Court of Appeal of England and Wales (Bracking and Others v Secretary of State for Work and Pensions [2013] EWCA Civ 1345) McCombe LJ summarised the principles at play based on a review of the authorities:

> "(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence … equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements…
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus the Minister or decision maker cannot be taken to know what his or his officials know or what may have been in the minds of officials in proffering their advice…
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard action' following a concluded decision…
>
> (5) These and other points were reviewed…as follows:
>
> (i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters.
>
> (ii) The duty must be fulfilled before and at the time when a particular policy is being considered.

(iii) The duty must be "exercised in substance with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument.

(iv) The duty is non-delegable; and

(v) Is a continuing one.

(vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria…

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty must not merely tell the Minister/decision maker what he or she wants to hear but they have to be "rigorous in both enquiring and reporting to them"…

(8) Finally … it is helpful to recall passages from the judgment of … Elias LJ in R (Hurley and Moore) … as follows:

> '[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then…it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.

…

[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Borough Council…and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown…

> "…the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant

> information in order that it can properly take steps to take into account disabled persons disabilities in the context of the particular function under consideration".
>
> [90] I respectfully agree…'."

[140] The task of this court is to apply the above principles to the events of this case. This court will seek to do so, but it acknowledges now that the central submission of the respondent in respect of this subject is that the court should decline to view the applicant's challenge in respect of section 75 as remediable by way of judicial review proceedings. The court will consider this point later.

The factual position in respect of observance of section 75

[141] It is important when considering this issue to separate out the Council's particular obligations in terms of section 75 from its management of the PRS project generally. While no doubt there may be cross over points where, in particular, those managing the project (such as Mr Watkiss) may feed information to the Council's officers about any relevant equality issues which may arise, the task of attending to performance of the public sector equality duty lies with the Council itself and, as noted above, is non-delegable.

[142] In this case there is little, if any, evidence that the Council did in fact perform its obligation in this area.

[143] If there had been performance of it, the court would have expected the matter to have been documented but there has not been produced to the court any information of recorded steps taken in the performance of the Council's duty. The object of such documentation is to evidence that the decision maker is or has been working to meet the statutory requirements but the reverse inference may be drawn where there is no such evidence, as here.

[144] It seems likely to the court that what may have happened in this case is that the Council has believed that it is fulfilling its section 75 obligation by reason of the process of consultation which at an early stage had been carried out by Mr Watkiss. This might explain why there is an absence of material to evidence that the duty was in fact performed, as it should have been, by the Council itself.

[145] The court has been told by counsel on behalf of the Council that in fact what occurred here was that the need for EIA was screened out because of the absence of material from the consultation exercise which highlighted any significant impact of the scheme on the position of the disabled. However, in the absence of evidence, the

court simply cannot accept this. It is impossible to see how a screening out, worthy of its name, could have occurred in this way. If the right question had been asked *viz* in relation to the impact of the proposals on the position of the blind and partially sighted, it is difficult to see how this would not have led to a consideration by the Council of the UCL research – which Mr Watkiss had been aware of since at least 2010.

[146] But, whatever may be the explanation for the omission on the part of the Council to assess the project from the point of view of section 75 at the stage when the PRS was originally being approved, events subsequently appear to the court to have compounded the problem, at least after objections to the kerb heights were raised by those representing the interests of the blind and partially sighted in October 2013. By this stage there was unmistakeable concern being expressed based on the UCL research, which, it appears, the Council had not seen until it was provided to it in May 2014.

[147] It is right to record that at this stage the Council did react to the opposition to the kerb heights which had been expressed but it does not seem to have been alive to its continuing duty under section 75. At this stage, however, there is no evidence of substance to suggest that the problem was being identified as related to the performance of the public sector equality duty, though, in the court's view, this would have been a correct analysis. While alarm bells within the Council did ring as a result of the lobbying of councillors by those concerned with the interests of blind persons, this appears to have been because the Council was being presented with a knotty problem which could be expensive to put right and could seriously delay the project.

[148] In the event, the matter did make its way on to the agenda of the EDC and the Council. It appears from the minutes of the meeting that an Equality Officer attended this meeting but his or her only contribution appears to be that he or she said by way of a reminder to the committee, that consultation with specific disability groups had been undertaken and that opportunities for feedback had been provided. With respect to the officer in question, this does not equate to the performance by the Council of its equality duties.

[149] This, it seems to the court, is not what should have happened. The matter should have been revisited with the public sector equality duty in mind and Council officials should have prepared for councillors advice in relation to the performance by it of its duties in this regard. A conscious approach to section 75 was required at this stage and officials should have appreciated the need for councillors to receive advice on the equality aspect of the matter now before them, which would have included or be likely to include an analysis of the UCL research and an assessment of the impact of the 30mm kerbs on the position of blind or partially sighted persons.

[150] The above did not occur with the result that as recently as the EDC and Council meetings of June and later October 2014, this aspect of the matter was neglected.

[151] The court is persuaded that the course which events took in this case involved a clear breach of the section 75 public sector equality duty. At no stage in this lengthy saga was there a rigorous enquiry by officials or the Council in relation to this aspect. Had this occurred, it does not necessarily follow that the decisions of the EDC and the Council in 2014 would have been different, as ultimately the weight to be attached to this aspect was a matter for the councillors. The failure, therefore, is one of process - but process of high relevancy in this case.

[152] In reaching its conclusion above the court does not accept it could be said that the duty here at issue was performed by reason of the fact that the councillors were provided with the UCL research. This step alone could not be viewed as performance of the section 75 obligation. The court has already indicated that it is not the view that the section 75 obligation could be satisfied by reason of the initial consultation process carried out by Mr Watkiss. The court also does not accept an argument put forward by the respondent which suggested that the duty owed was owed only to disabled persons generally and not to the blind or partially sighted. On the facts of this case, there is clear evidence that the blind or partially sighted as a group of disabled person were likely to be affected by the way the scheme was designed and built. Their position therefore fell within section 75(1)(c) and should have been the subject of consideration, alongside the interests of any other disabled group which might be affected.

The importance of the enforcement mechanism

[153] As already noted the respondent has argued that even if the applicant was correct in her claim that section 75 had not been fully complied with, the matter is not remediable by way of judicial review.

[154] On the face of it, this argument is unattractive, at least in the sense that it seems clear that similar duties to that contained in section 75, as the discussion at paragraphs [139] to [140] *supra* indicates, have been made subject to judicial review in England and Wales and judicial review remedies have been granted where appropriate in those proceedings. The case of Bracking and Others, already referred to, is a good example.

[155] The position in Northern Ireland is different, says the respondent. This is because it is claimed that the appropriate mechanism for enforcement in this jurisdiction is a complaint to the Equality Commission pursuant to section 75(4) and Schedule 9 of the 1998 Act. It is pointed out that the powers of the Commission on receipt of a complaint include the power to investigate and make recommendations which, if not complied with, can be the subject of a direction by the Secretary of State for Northern Ireland. If such a direction is still not complied with, the matter can be

referred to the Northern Ireland Assembly for the purpose of politically holding the local authority to account.

[156] This point has been the subject of consideration by the Northern Ireland Court of Appeal in the case of Re Neill's Application [2006] NI 278. In that case the applicant sought to impugn by judicial review new legislation sponsored by the Northern Ireland Office ("NIO") on the basis that it had not been assessed in respect of its effect on young people, in accordance with section 75, as it should have been, by way of an EIA. Among the points taken by the NIO was that the appropriate enforcement mechanism was *via* the Equality Commission and not by way of judicial review. Speaking for the Court, Kerr LCJ (as he then was) said:

> "[24] For the appellant Mr Larkin QC submitted that NIO's decision not to conduct an equality impact assessment amounted to a failure to have due regard to the need to promote equality of opportunity, a central imperative of s.75. That omission invalidated the legislation, he claimed. Mr McCloskey QC for the respondent, while resisting the claim that NIO was obliged to carry out an impact assessment, contended that the scheme was not consistent with an extensive right to challenge failures by judicial review. Mr McCloskey did not suggest that judicial review would never be available to impugn a breach of s.75 but asserted that the circumstances in which such challenges might be made were extremely limited.
>
> …
>
> [26] Girvan J [the trial Judge] drew a contrast between the sanctions provided for in s.76 of the 1998 Act in relation to discrimination perpetrated by a public authority and the manner of enforcing an authority's duties under s.75. At paragraph [42] of his judgment he said:
>
> > 'The way in which the "due regard" duty [in s.75] is enforced is provided for in Sch 9. The history of the background to the drafting of the 1998 legislation…bear[s] out the clear impression emerging from the wording of s.75 that Sch 9 represented the legislature's decision as to how effect would be given to the enforcement of s.75 duties. The width, ambit and

> boundaries of the concept of equality of opportunity are not particularly clearly delineated. Parliament appears to have opted for a wide concept and recognised that giving effect to the obligation to have "due regard" to the need to promote equality of opportunity would call for structured assessment, consultation, monitoring and publicity. It has in Sch 9 set out a quite complex machinery for the introduction and approval of equality schemes and mechanisms for ensuring compliance with such schemes. Alleged breaches of schemes are to be the subject of investigation and reporting with political consequences. It appears that the legislature, no doubt by way of political compromise, opted for that route to remedy breaches of schemes rather than by conferring rights to be asserted by action or other litigious means. The consequence in the present instance is that the 2004 legislation is not open to challenge in the way provided for in s.76…'.

[27] It is important, we believe, to focus on the context of the present dispute in deciding whether judicial review will lie to challenge the validity of the 2004 order. At the kernel of this is the avowed failure of the NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Sch 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the commission. It is charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else explain why it has decided not to investigate) and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.

[28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the commission has the express statutory remit. We have

> concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of ss 75 and 76 with contrasting enforcement mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with s 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in s 76.
>
> …
>
> [30] The conclusion that the exclusive remedy available to deal with the complained of failure of the NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Sch 9 procedure ousts the jurisdiction of the court in all instances of breach of s 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Sch 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of the NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe s 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis".

[157] The respondent relies heavily on the above passages and makes the case that the primary means for enforcing the section 75 duty is by complaint to the Commission. The court should, therefore, decline to use its processes for this purpose.

[158] The respondent does, however, acknowledge that the decision in Neill has not in the context of alleged breach of section 75 closed the door to judicial review in

all circumstances, albeit that the Court of Appeal studiously did not identify the circumstances in which judicial review may be available.

[159] The applicant, on the other hand, encourages the court to the opinion that this is a case where the particular circumstances of the dispute between the parties suggests that judicial review would provide a far more effective remedy than would be the case in relation to a complaint to the Equality Commission.

The court's assessment

[160] It is clear that Neill is not to be viewed as saying that in no circumstances can the court entertain an application for judicial review in respect of an alleged breach of section 75. If that had been the position, no doubt, leave on this ground would have been refused. Counsel for the respondent in Neill did not, moreover, argue that judicial review was altogether ruled out and the court appears to have accepted this. That there may be occasions when a judicial review can be pursued by way of enforcement of the section 75 duty is explicitly acknowledged by the Court of Appeal, though without guidance as to what sort of cases might fall within this category.

[161] Notably, the Court of Appeal in Neill, left open the question of whether there may be a different approach to the availability of judicial review dependant on whether the alleged failure is deems to be procedural as opposed to substantive.

[162] This court must also factor into its consideration that the law of England and Wales in this area is more developed now than it was at the date of the Neill decision.

[163] Ultimately, the court believes that the correct approach for it to adopt in these circumstances is one which concentrates on the specific facts of the case before it. In the present case, the context is not unimportant. The underlying issue in this case is the substantive issue of the potential safety of a section of the public defined by a relevant disability when accessing a city centre. The appropriateness of a careful consideration of this issue for the purpose of section 75 could not be seriously questioned and it seems to the court that this is the sort of case where a high level of consideration of the position of the blind and partially sighted ought to have flowed from the relevancy of the issue to this group. Unfortunately, the court has concluded that the Council have failed to comply with their section 75 duty in a far greater way than some simple technical omission or procedural failing. In this case the failure appears to the court to have been longstanding in nature, as at no stage in the PRS's development, was the issue of the public sector equality duty subjected to a section 75 compliant process. Most particularly, when the matter came before the EDC and the Council (twice) in 2014 the opportunity was not taken to rectify the situation notwithstanding that the matter had by this stage become one of high controversy.

[164] The record of performance described above must be placed against the potential benefits which might have been obtained had the PRS been subjected by the Council to a careful section 75 orientated examination. A damning fact in this case is that the Council appear not even to have been aware of the UCL research until May 2014. If it had conducted a thorough analysis of the section 75 issues at an earlier date it seems reasonable to suppose that that analysis would have brought this research to light. In that circumstance the court suspects there would have been few difficulties in the Council's way if it wished to alter the design. The difficulties since that time, however, have grown as work began and the 30mm kerbs were installed. By June 2014 the obstacles to change had grown. But it is far from clear that if the section 75 duty had been rigorously performed even at that date that councillors would have reached the same conclusions as those which, in fact, they did reach.

[165] The applicant in this case wants the Council to do that which was their duty to do all along *viz* to have due regard to the need to promote equality of opportunity having regard to the various categories set out in section 75(1), in particular, in relation to the category to which she belongs. The applicant harbours the hope that if this duty is performed (even now) this may influence a change of view by the Council. A complaint to the Equality Commission is unlikely to achieve a potential change of view, in her view. None of this appears to the court to be fanciful or unreasonable and the court will bear in mind that this is not a case where the applicant stands alone: on the contrary, the court has no difficulty in accepting that there are many others in the same or a similar position to the applicant[3].

[166] Taking account of all of the above, the court is of the view that it should accept that this is a case where judicial review of the Council's conduct in respect of its duty under section 75 should be available due to the exceptional circumstances of this particular case.

(e) Fettering of discretion in respect of alteration to kerb height

[167] This ground of challenge involves the same factual material which has been discussed *supra* in relation to the charge of alleged bias against the Acting Chief Executive. In essence the applicant alleged in her affidavit that at a meeting which she and the Acting Chief Executive attended on 19 September 2014 the latter *inter alia* stated that the Council was very conscious of the bad publicity that the PRS had been bringing on a near daily basis and that none of the councillors would approve a decision that would potentially further delay the scheme.

[3] There is some material in the affidavit of Mr Mann as to the number of persons who might be affected in the Lisburn area. At paragraph 8, he refers to 2940 people living with sight loss in the Lisburn area, of whom, he avers, there are some 340 with severe sight loss. What exactly constitutes 'sight loss' is unclear from the affidavit.

[168] It has been submitted on the applicant's behalf that the language used by the Acting Chief Executive betokened a closed mind and a fettering of discretion in respect of the issue of whether kerbs higher than 30mm should be put in place.

[169] Notably, Mr McClintock has not filed an affidavit in these proceedings denying that he made the remarks attributed to him by the applicant in her affidavit grounding this application.

[170] It is the court's view that whatever the merits or demerits of Mr McClintock's divination of what the Council or the councillors might decide, the simple answer to this ground of challenge is that for it to get off the ground there would have to be evidence that the Council or the councillors had a closed mind. It is not evidence of this to quote what an official has said, even if it is right to say (upon which the court will not make any pronouncement) that that official had demonstrated a closed mind.

[171] The court is unaware of any evidential basis for saying that the Council as a whole or individual councillors had a closed mind and that as a result it or they failed to exercise discretion in this case. Accordingly, this ground of challenge must fail.

(f) Fettering of discretion in respect of a refusal to consider the question of re-consultation

[172] While this is stated as a separate ground of judicial review it was not addressed by the applicant in her skeleton argument or orally at the hearing.

[173] It may be that this argument is simply an extension of the reasoning developed in the context of the argument discussed under the immediately preceding heading above. If this is so, the court would reject it for the same reasons as it has given for rejecting that argument.

[174] In short, the court is unable to sustain any challenge based on this heading.

(g) Human Rights

[175] This aspect of the challenge involves the proposition that the failure of the decision maker to require a kerb height in excess of 30mm breaches the applicant's rights under Articles 8, 11 and 14 of the ECHR. Fundamental to these claims is the proposition that the proposal for 30mm kerb heights, and now the fact that they are in place, creates an unsafe environment for the applicant. This, it is alleged, affects the ability of the applicant to form and maintain relationships as an aspect of private life and also prevents the applicant and her blind husband from enjoying family life together by denying them access to the city centre (in breach of Article 8). In addition, it is argued that the inhibition placed on the applicant, by reason of the above situation, breaches the applicant's ability to exercise her right to freedom of

assembly and association (in breach of Article 11) and is discriminatory (in breach of Article 14 when read with Articles 8 and/or Article 11).

[176] The respondent rejects these arguments and puts the matter pithily in its skeleton argument as follows:

> "The Council does not accept that the design or construction of this scheme in any way amounts to an interference with the Applicant's private or family life or her right of free association with other persons. Even if it could do so, the limited evidence already before the court makes clear that any possible interference is of a very limited nature and is plainly justified by reference to the aims of the Council in promoting a major improvement of the City Centre for all citizens and the need to balance the interests of all user groups. In assessing the proportionality of the scheme, the Court is also entitled to take account of the consultation which took place, including consultation with representatives of the blind community, the stage of the development at which the request for a re-design was made and also the attendant expense."

[177] The court will consider each of the allegedly breached Articles in turn but it will bear in mind that an urban landscape is made up of many elements which can create difficulties for different categories of people who may use it. Sometimes the elements found are the result of careful planning and official endorsement at the planning stage but oftentimes what is encountered is the result of random human activity and piecemeal development. The presence of obstacles within the pedestrian environment is commonplace and these come in all sorts of shapes and sizes from street furniture to advertisement boards and much in between. The presence or absence of kerbs and, where they exist, the height of the kerbs, is also, it seems to the court, a variable rather than a constant. This is the common experience. As time passes, there have been advances as well as experiments in respect of how best to achieve safety for pedestrians, including for those who are blind or partially sighted, and those who have other disabilities, and those who simply are getting older and less sure of themselves. Navigational aids may be installed and different ways of promoting the interests of the differing groups of pedestrians may be devised involving a variety of devices, such as using different colouring and texturing of surfaces to mark out territory or signpost the way to controlled crossing points. Yesterday's orthodoxy, moreover, may give rise to today's and tomorrow's new ideas. What once was viewed as suitable or necessary may give way to a different method of doing things. The court must be careful not to render unlawful, unless compelled to do so, designs which met all the relevant standards at the time when they were the subject of approval by the authorities in the past. It should also

not apply standards of perfection to an evolutionary cityscape which, by necessity, has to accommodate such a wider range of people and uses. The court, in short, must strive not to stifle innovation or change while at the same time acknowledging that it must not sacrifice the interests of particular groups, especially the disabled, by allowing their interests, contrary to law, to be left out of account or ignored. As a public law court, at the forefront of its mind, must be a clear appreciation of its task. The court's role is concerned with the lawfulness of what has or has not occurred in a given case. It is not its job to determine the merits of one lawful design solution against another, a task for which the court lacks the requisite training and expertise.

Article 8

[178] This provision is well known and is headed "Right to respect for private and family life". It consists of two paragraphs. Article 8(1) indicates that everyone has the right to respect for his private and family life, his home and his correspondence. It will be noted that the right is to 'respect for' private and family life. Article 8(2) demonstrates that the right provided for in Article 8(1) is not absolute. It provides that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[179] It is important to consider this provision by way of a structured analysis. The court must look at whether the Article is engaged on the facts of this case; whether there has been 'interference' with the right and whether, if this is shown, there can be reliance by the respondent on the terms of Article 8(2).

[180] In respect of the issue of engagement, the applicant has relied on the decision of the Grand Chamber of the ECtHR in Pretty v United Kingdom (2002) 35 EHRR 1. At paragraph 61, the Court states that "… the concept of 'private life' is a broad term not susceptible to extensive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity … Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world".

[181] The court will approach the issue now under consideration with the above quotation in mind. However, it seems to the court to be important that it keeps the language employed by the Grand Chamber in Pretty in its due perspective. The concept of 'private life' cannot be extended indefinitely and the feature which is centrally at issue in this case, at least on one view, is more concerned with the applicant's interaction with part of the city environment, and less with the development of relationships with other persons. When viewed in this way, it is not straightforward for the court to conclude that Article 8 is engaged in this case when there is no evidence of substance that the applicant has been prevented from

developing her personality or is unable to establish relationships with others. Indeed, she appears able to sustain relationships with others without difficulty, so far as the court can see. Nor, it seems to the court, can resort easily be had to the notion that any adverse effect, however small, on the applicant in respect of her physical or moral integrity will give rise to an interference with the right to respect for private life. This would not be the general approach in Strasbourg: see, for example, Costello-Roberts v United Kingdom (1993) 19 EHRR 112 at paragraph 36. It is noticeable that the applicant's counsel has had to resort to the citation of extreme cases in support of the proposition that Article 8 is engaged in this case, such as the well-known case of Lopez Ostra v Spain (1994) 20 EHRR 277. It seems to the court that that case is somewhat remote to the facts of this case. Far closer to home is the case of Zehnalova v Czech Republic (2002) EHRLR 673 where, in the context of a disabled person's access to public buildings, allegedly due to failures to meet accessibility standards, the ECtHR held that Article 8 was not applicable, as the right being claimed was 'too broad and indeterminate'. To similar effect, involving a disabled person's access to a beach, is Botta v Italy 26 EHRR 241: see paragraphs 32 and 35, in particular. While the court accepts that the dividing line between Article 8 being or not being engaged may be difficult to draw in the abstract and will be dependent to a substantial degree on the particular evidence which is before the court, the court is of the opinion that in this case Article 8 is not engaged at all. The court is not persuaded that the construction of a city centre landscape in the circumstances which occurred here, initially without complaint, despite consultation and with the benefit of a recent planning permission, which was not objected to, could be viewed as an affront to the applicant's personal development and ability to develop relationships with others. The court is even less convinced that Article 8 is engaged in this case on the basis of the applicant's family life, as claimed, as there is nothing of substance which causes the court to accept the argument that this right is in any substantial way being affected.

[182] If the court is wrong about the view it has just expressed, it would be necessary then to ask if the respondent has displayed a failure to respect the applicant's private life.

[183] On this issue, the court is not persuaded that the facts of this case demonstrate a failure to respect the applicant's private life. The court if of this view because –

- There is plain evidence in this case that the Council had sought to obtain the opinions of those who represented the interests of blind persons and those of blind and partially sighted persons.
- The Council, through its landscape architect, in fact, amended the original proposed scheme, in order to quiet concerns which had been expressed on behalf of the blind and visually impaired about a shared space design. As a result it altered the design to one containing kerbs.
- There was for a considerable period of time apparent acceptance of the proposed 30mm kerbs.

- The kerb height issue itself was considered by the landscape architect. In the court's view, even taking into account the UCL research, it could not be said that at the time the case against 30mm kerbs could be viewed as clear-cut. The issue, it seems to the court, is multi-factoral for the reasons advanced at paragraph [177] *supra*.
- Certainly, the UCL research cannot reasonably be viewed as conclusive of the issue given, in particular, its limited scale and carefully composed conclusions. In terms, the research did not say that a kerb height of 30mm was or should be prohibited or would be bound to result in serious harm befalling a blind or partially sighted person. It is important, in the court's view, that the conclusions in the research are not over-read in a way which re-writes what the researchers said.
- The Council, at all material times, had to act in a way which balanced interests. Devising design plans involved taking into account the interests of a variety of road and pedestrian users of the environment created. A simple example of this is that what may best suit the interests of the blind and partially sighted may not best suit the interests of other disabled persons, such as wheel chair users.
- The Council was required to obtain planning permission for the landscape which it proposed to put in place. It sought such permission which included the use of 30mm kerbs. There was no objection to its application for planning permission; especially there was no objection from Transport NI, which was the government agency which dealt with the roads and footpaths environment.
- Planning permission was granted. In the light of this the Council were entitled to proceed with the work to implement it.
- When the issue of the kerb height arose the Council did not sweep it under the carpet but did try to find a solution and did engage in a reconsideration of the issue.
- In dealing with its reconsideration the matter cannot be viewed as admitting of only the solution which the applicant contends for.
- The Council was entitled to have regard to the full range of relevant circumstances when arriving at its view. This included the potential for delay in respect of the completion of the scheme and the potential for substantial further costs being incurred. While the council considered the UCL research and what those representing the interests of the blind and partially sighted had to say, it had to make a judgment in the round.

[184] The court, moreover, on the information before it, is of the firm view that the presence of a 30mm kerb in a public place cannot *per se* be said to render that place unsafe or mean that there will be a breach of a qualified right such as Article 8. If this was correct it would be likely that breaches of Article 8 could be found frequently in an urban landscape.

[185] In this context, the applicant was unable to provide any case authority in support of its submission that Article 8 is breached simply by the presence of such

kerbs as part of the PRS or otherwise or by reason of them being encountered by a blind or partially sighted person.

[186] The court is also of the view that this aspect of the applicant's case, for the reasons which have been set out at paragraph [183] above, would fail in any event as the court is not of the opinion that there has in fact been an interference with a right protected by Article 8(1).

[187] Even if there was such an interference, the court is of the opinion that in this case any such interference would be slight and would be proportionate in all the circumstances, again for the reasons already referred to. In particular, it should not be forgotten that the design was part and parcel of the grant of planning permission. That grant was not challenged at the time it was granted and such a grant is the method by which the state ensures that development is carried out in accordance with law. Additionally, in the court's estimation, the PRS as a whole serves legitimate aims *viz* the economic well-being of the local area and the protection of the health and rights and freedoms of others. In respect of how to give effect to these, the local authority must, in view of its local knowledge and elected make-up, enjoy a substantial area of latitude or discretion.

[188] The court, therefore, does not consider that the applicant has made out her case that there has been a breach of Article 8 in this case.

Article 11

[189] While Article 11 was pleaded in this case, it is difficult to see how it adds anything which is not already dealt with in the analysis the court has provided in the context of Article 8 *supra*.

[190] Accordingly, the court will deal with it briefly. First of all, the court is not satisfied that Article 11 is engaged on the facts of this case. At paragraph 49 of the applicant's skeleton argument, it is asserted that "[a]s part of that freedom [i.e. the freedom of association provided by Article 11] blind people in Lisburn need to be able to safely traverse the city centre, so as to meet with one another and to participate in community life". However, there is no evidence which the court considers is of any substance which makes good the suggestion that there has been any breach of the applicant's ability to associate with other blind or partially sighted people or to engage with them in community life. It is an unwarranted assertion to suggest that the applicant's right under Article 11, in fact, has been removed or abridged by reason of the existence of the PRS and its incorporation of kerb heights of 30mm. Secondly, even if the court was wrong in the view it has just expressed, it is not in dispute that Article 11 contains only a qualified right and that a public authority may rely upon the provisions of Article 11(2) to justify any interference there might be.

[191] Adopting the analysis the court has already engaged in, the court is of the view that even if Article 11 was engaged in this case and that an interference with the applicant's Article 11(1) right was established, such interference would be justifiable on the facts of this case for the reasons already given.

[192] The court's conclusion is that there has been no breach of Article 11 made out in this case.

Article 14

[193] Finally, the court must consider the terms of Article 14. The terms of this Article are also well known. It states that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

[194] The applicant argues that the actions of the Council in this case are within the ambit of Article 8 or, alternatively, Article 11, so engaging Article 14. Moreover, it is submitted that Article 14 has been breached on the basis of direct or indirect discrimination. In short, it has been submitted that the applicant has been treated differently and less favourably due to her disability. Her disability for the purpose of the correct analysis of Article 14 comes, the applicant argues, within the category of "other status" referred to in the last words of the Article.

[195] The court has already held that Articles 8 and 11 are not engaged in this case. It must follow from this that the impugned decisions cannot be viewed as within the ambit of these Articles. This in itself means that the court will reject the arguments that there has been a breach of Article 14 in this case. Notably, this was the outcome in the cases of Zehnalova and Botta where it was also argued by the disabled applicants that Article 14 had been breached.

[196] However, the court will continue with a structured analysis in respect of Article 14 in case it is wrong on this point. In doing so, it will accept that a disability, such as that which affects a blind or partially sighted person, is capable of being viewed as coming within the words 'other status' for the purpose of Article 14. While the applicant has cited no authority to support its submission in this regard, the court is in little doubt that the state of being blind or partially sighted constitutes a personal characteristic which is analogous to many of the grounds of discrimination set out in Article 14. Authority for this view can be found in the Strasbourg cases of Glor v Switzerland 80 ECHR (2009) and Cam v Turkey App No: 51500/08 (23 February 2016).

[197] It is well known that for the purposes of Article 14 discrimination involves treating differently, without an objective and reasonable justification, persons in relevantly similar situations. It has also been established that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group: see, for example, DH and Others v Czech Republic (2008) 47 EHRR 3 at paragraph 175. This aspect, it seems to the court, is of some relevance in this case as there is no suggestion that the Council has formed any intention to discriminate against the applicant on ground of her disability but it is suggested that this is a case of indirect discrimination in that there is, it is submitted on behalf of the applicant, a disproportionate impact on the applicant and those within her group by reason of the kerb height which has been put in place.

[198] When the court considers Article 14 in substance, it is unable to conclude that the present case is one in which it has been established that there has been a breach of it. The court's reasoning in this regard is that it does not accept the applicant's characterisation of the situation as being one in which it has been established that the use of the 30mm kerbs is a form of disproportionately prejudicial impact in respect of those who are blind or whose eyesight is partial or impaired. As is clear from the history of this matter, the original concept underpinning the proposal for a PRS involved shared space and the use of no kerbs. In fact, it was to meet objections to this proposal that the landscape architect deviated from the original concept and introduced the use of kerbs. This change was welcomed at the time by those who were against or were nervous about shared spaces, and for long there was no opposition to 30mm kerbs. As already recounted, planning permission was obtained without any objection relating to the use of a 30mm kerb, and work began on this basis. It was only after planning permission was in place and work was beginning that objections were made.

[199] The court does not consider, for reasons already discussed, that the UCL research has the effect of rendering the PRS a breach of Article 14. The research does not have the status of a legal requirement and a failure to follow it does not generate by itself a disproportionately adverse impact, in the court's opinion. In simple terms the evidence falls substantially short of establishing significant prejudice.

[200] In the above circumstances it is unnecessary for the respondent to prove objective and reasonable justification but, if the court is wrong about this, for the reasons given earlier in this judgment, the court would accept that such justification is established in this case. In particular, having regard to the late stage at which the applicant made her objection, the Council was entitled to make its own assessment and a permissible outcome open to it was to decide that the delay to the project and the expense which would be involved in reconstructing the kerb line constituted sufficiently weighty factors which could reasonably outweigh the factors in favour of altering the kerb line.

[201] The court therefore holds that there has been no breach of human rights established on the evidence before it.

(h) Breach of the Disability Discrimination Act 1995

[202] This ground of judicial review has fifteen paragraphs devoted to it in the applicant's skeleton argument. It would appear that initially the Order 53 Statement had referred to an alleged breach of sections 19, 21 and 49A of the above legislation, but by amendment after the grant of leave (to which the respondent took no objection), this issue has been expanded to cover, in addition to sections 21, 19 and 49A, sections 21B and 21E of the Act.

[203] Before looking at this head of challenge in any detail, the court reminds itself that it is exercising a public law jurisdiction which is concerned with reviewing, as a forum of last resort, the lawfulness of acts or omissions of a public authority.

[204] An important question which must be confronted in this case is whether the claim now before it falls outside the proper remit of this court given that there may exist an alternative remedy by which the issues now raised can be dealt with.

The statutory provisions

[205] The provisions relied on by the applicant defy simple description. It, therefore, is necessary to refer to the main provisions as they are found in the Act itself.

[206] Section 19 is part of Part III of the Act. It deals with discrimination in relation to goods, facilities and services. Section 19(1) indicates that "it is unlawful for a provider of services to discriminate against a disabled person" in four situations. The closest case to this case seems to be case (b) which refers to "in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service". Section 19(2)(a) makes clear that for the purpose of section 21 "the provision of services include the provision of any goods or facilities".

[207] In respect of section 19 a live question would appear to be whether a local authority when promoting, authorising or instigating funding for a PRS is providing goods, facilities or services. The court did not receive detailed submissions on this issue.

[208] Section 20 of the Act is a complex provision dealing with the meaning of discrimination in the context of section 19. It indicates that a "provider of services discriminates against a disabled person if (a) for a reason which relates to the

disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not apply; and (b) he cannot show that the treatment in question is justified". There is an extension to what is meant by discrimination found in section 20(2). It states that a provider of services also discriminates against a disabled person if (a) he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified. The meaning of justification is dealt with at section 20(3).

[209] Section 21 of the Act concerns the duty of providers of services to make adjustments. Sub-section (1) establishes the general principle. It states that "[w]here a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect". Section 21(2) relates to where a physical feature makes it impossible or unreasonably difficult for disabled persons to make use of such a service. In this situation, "it is the duty of the provider of that service to take such steps as it is reasonable in all the circumstances of the case for him to have to take in order to (a) remove the feature; (b) alter it so that it no longer has that effect; (c) provide a reasonable means of avoiding the feature; or (d) provide a reasonable alternative method of making the service in question available to disabled persons". It is notable, in the context of section 21, that sub-section (7) states that "Nothing in this section requires a provider of services to take any steps which would cause him to incur expenditure exceeding the prescribed maximum". Sub-section (5) is also relevant. It provides that regulations may be made for the purpose of the section. The scope of such regulations is wide. For example, the regulations may deal with the circumstances in which it is reasonable for a provider of services to have to take steps of a prescribed description and may also deal with the circumstances in which it is not reasonable for a provider of services to have to take steps of a prescribed description. It appears that there are a variety of regulations which have been made under the power conferred by sub-section (5). None of these were opened to the court in the course of these proceedings.

[210] Section 21B (1) states that it is unlawful for a public authority to discriminate against a disabled person in carrying out its functions. A local authority, such as the respondent in this case, would appear to be within the category of a public authority for the purpose of this case: see section 21B (2) of the Act. The meaning of "discrimination" for the purpose of section 21B is dealt with in section 21D. This follows a similar pattern as that discussed above in respect of section 19 but the provisions relating to complying with a duty to make reasonable adjustments are more detailed. Section 21E makes provision for a duty to make adjustments for the purposes of section 21D (2). It indicates that sub-section (2) is to apply where a public authority has a practice, policy or procedure which makes it (a) impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be

conferred, or (b) unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person is or may be subjected, by the carrying out of a function by the authority. Sub-section (2) provides that in the circumstances set out at 21E (1), "it is the duty of the authority to take such steps as it is reasonable, in all the circumstances of the case, for the authority to have to take in order to change that practice, policy or procedure so that it no longer has that effect". There are then further sub-sections dealing with the taking of reasonable steps where a physical feature is involved: see section 21E(3) and (4).

[211] Section 49A of the Act is in the nature of a general duty which is described in the following way:

> "(1) Every public authority shall in carrying out its function have due regard to –
>
> (a) the need to promote positive attitudes towards disabled persons; and
>
> (b) the need to encourage participation by disabled persons in public life."
>
> In connection with the above, it is provided for in sub-section (4) that the Equality Commission shall '(a) keep under review the effectiveness of the duty imposed by this section; (b) offer advice to public authorities and others in connection with that duty'."

[212] It seems clear from the above that the section 49A duty bears some resemblance to the provision found in section 75 of the Northern Ireland Act, which has been discussed above. It adds an element in the form of section 49A (1) (a). In view of the conclusions of the court in respect of the section 75 issue, it is not proposed specifically to deal with this provision.

[213] As regards the provisions found in sections 19 and 21, these appear to represent a form of anti-discrimination code.

Enforcement of the 1995 Act's provisions

[214] The enforcement of the obligations imposed by the 1995 Act is dealt with in section 25 and Schedule 3 of the Act. It is clear from these sources that the primary method of enforcement is by the issue of civil proceedings "in the same way as any other claim in tort … for breach of statutory duty" (section 25(1) of the Act). It is envisaged that proceedings in Northern Ireland will be initiated in the County Court (section 25(3)). The remedies available in such proceedings are those which are available in the High Court (section 25(5)). They include declarations, injunctions and damages, including for injury to feelings (section 25(2)). The details of the

enforcement regime are found in Schedule 3 Part II. This contains at paragraph 5 the following:

> "(1) Except as provided by section 25, no civil or criminal proceedings may be brought against any person in respect of an act merely because the act is unlawful under Part III.
>
> (2) Sub-paragraph (1) does not prevent the making of an application for judicial review".

[215] The model of enforcement, the court concludes from the above, will ordinarily be a civil trial model, much like in the case of any other tort. While the provisions above indicate that judicial review is not prevented, it seems to the court, that its appropriateness will be doubtful in most cases, as judicial review procedure is not well equipped to deal with the normal case in which a trial is required: where there will be an emphasis on the need for discovery, for fact-finding following the receipt of oral evidence and cross examination, for the testing of the evidence, including that of experts.

[216] When the above principles are applied to the present case, the court is of the clear opinion that it is not in a position to reach conclusions on the anti-discrimination law aspects of this case which involve Part III of the 1995 Act. As noted from the outset in this judgment, this case bristles with disputes of fact as to the history of what occurred. There has in these proceedings been no discovery, no oral evidence and no cross examination of witnesses. The court has had limited exposure to expert evidence (the only real such evidence coming in the form of the UCL research in respect of which there has been no cross examination and perhaps Mr Watkiss, who also has not been cross examined) and is restricted to dealing with the case on the basis of affidavit evidence, which is limited in its ability to deal with the myriad of detailed points that may arise.

[217] The issues which may arise if the court has to reach conclusions on Part III liability are likely to involve judgments as to what reasonable steps or adjustments ought to have been made in all the circumstances of the case; whether certain physical features make it impossible or unreasonably difficult for disabled persons to make use of the services provided and whether it is unreasonably adverse for disabled persons to have to experience being subjected to any detriment to which they may be subjected.

[218] The evidence before the court provides the court with little or no confidence that it could adequately deal with these sorts of issues, even if it was otherwise minded to. The court is, therefore, of the view that the disputes raised under the heading of the Disability Discrimination Act are not suited in this case to resolution by means of judicial review.

[219] In broad terms, the court agrees with the respondent's submissions on this point, recorded at paragraphs 49-58 of its skeleton argument.

[220] It is right to record that the applicant is of the view that the court should deal with these issues. She relies on the approach taken in England and Wales in the case of Lunt v Liverpool City Council [2009] EWHC 2356. However, that case, it seems to the court, was dealing with primarily legal issues and was factually focussed in a way which this case is not. In that case the level of factual dispute was much less than in the present case. Moreover, there was a substantial level of agreement in crucial areas. The evidence had been closely tailored to the issues, which is not the case here where most, if not all, of the affidavit evidence is not directed to the Part III issues, some of which have arisen at the very last moment. While the court accepts that usually the avoidance of a proliferation of litigation is a factor in favour of all issues being disposed of in one set of proceedings, this is not always possible or desirable. In the Lunt case the judge was of the view that he was not being asked to substitute his own conclusions on issues of disputed fact but it seems to this court this is what the court is being asked to do in this case. In effect, the court in the present case is being asked to determine issues of civil liability of the respondent. This is not ordinarily the function of a judicial review.

[221] It is the court's conclusion that Lunt is a case which depends on its own facts and cannot be viewed as governing the approach which this court considers to be appropriate in this case.

[222] If the applicant wishes to pursue civil action against the respondent that is her prerogative but the court holds that the forum of this judicial review is not the proper forum for this exercise.

(i) Wednesbury Unreasonableness

[223] This ground of challenge appears to be in the nature of a 'catch all'. In the applicant's skeleton argument it is alleged that "for reasons which have already been outlined … across the other grounds of challenge" the impugned decisions are neither rational nor proportionate.

[224] The applicant, in particular, submits that the court should apply a proportionality form of review which should focus on the necessity of using and retaining a 30mm kerb when balanced against the safety and needs of blind people.

[225] The respondent in its skeleton does not address this issue.

[226] The court does not consider that the impugned decisions in this case offend against either the traditional Wednesbury or the proportionality standard. The view which has been taken, expressed in the impugned decisions, is not only tenable but proportionate. As is plain from earlier parts of this judgment the court has been

anxious to place the respondent's decision making into context having regard also to the need to consider and weigh up the competing factors.

[227] In view of the above, the court finds it unnecessary to address what the applicant describes as "recent developments in public law" or the case-law referred to in the applicant's skeleton argument.

(j) Reasons

[228] While this issue is referred to in the Amended Order 53 Statement, it was not the subject of detailed submissions, with neither party developing the issue in their skeleton arguments. In these circumstances, it would not be appropriate for the court to make a ruling on this point. However, the court notes the fact that in respect of the meetings of the EDC, minutes of each meeting, providing an outline of what occurred at the meeting, were published. Minutes of full Council meetings were also published. In the case of the EDC meeting of 16 June 2014 the Committee Chairman later, on 9 July 2014, wrote to key personnel representing the interests of blind and partially sighted persons indicating what the outcome in the Committee and, later, before the full Council, had been. This letter clearly provided some insight into the committee's reasoning. On the face of it, it refers to the presentations received and the academic research conducted by UCL. There are then bullet points setting out the reasons why it was decided to continue with the existing design.

(k) Other Issues

[229] A variety of other issues have arisen in the course of argument which the court will briefly refer to.

[230] In the applicant's skeleton argument there is a section under the description "Misdirection". It is claimed that the EDC decision of June 2014 was flawed by reason of what is described as the misdirection based on what Mr Watkiss had said during the meeting about the Sue Sharp e-mail, which has already been the subject of consideration at various points in this judgment. The misdirection allegedly was in respect of Ms Sharp having approved the use of 30mm kerbs in respect of the Woodbrook Village development.

[231] The court has already rehearsed the rights and wrongs of this issue. In the court's view, as already expressed, the issue of what Ms Sharp's position was cannot be viewed as clear cut. It is a question of interpretation derived from the documents which passed between the parties at the time. The court believes that Mr Watkiss's view is tenable. Ms Sharp may have given the impression that she was agreeing to not just the use of kerbing but kerbing in line with a height of 30mm, as the document she was provided with showed the kerb height. On the other hand, Ms Sharp's view that she was only agreeing to the use of kerbs is also tenable. What cannot be denied is that there had been a situation in which 30mm kerbs had been used in the case in Woodbrook Village.

[232] In these circumstances the court is of the opinion that no true misdirection of fact can be said to exist in this case. But even if the court was wrong in this assessment, it is difficult to view any misdirection there may have been of being of the quality which leads to the conclusion that the proceedings were unfair or which could be characterised as amounting to an error of law which should render the committee's decision unlawful.

[233] The applicant also has claimed that the respondent did not even consider the UCL Research. In the court's view, this complaint cannot be sustained on the evidence before the court, especially given that it appears that the EDC in June 2014 had before them copies of the research and were addressed by two speakers who made presentations on behalf of the blind and partially sighted. It seems clear that at least one of these speakers directly drew the attention of the committee to the research, which is referred to in the committee minutes as well as in the letter sent to those representing the interests of the blind and partially sighted from the Chairman dated 9 July 2014. On this issue the burden of proof rests upon the applicant and the court has found no convincing evidence that the committee had left this factor out of account. Of course, the weight the committee decided to give to material before it is a matter for the committee, provided it acts consistently with the principles of public law.

[234] The court adopts the same analysis as above in respect of other alleged failures by the decision maker to consider: for example, that the committee did not consider representations made by or on behalf of blind or partially sighted persons or the health and safety of blind persons.

J. CONCLUSION

[235] The great bulk of the case presented to the court has failed to convince the court to the requisite standard that the respondent has acted unlawfully in the way in which it reached the decisions which have been impugned in these proceedings.

[236] The court has, however, formed the view that the Council did not perform its public sector equality duty in accordance with section 75 of the Northern Ireland Act 1998. For the reasons already set out at length above, the court is satisfied that there has been a failure in this regard which cannot simply be ignored. As the duty is a continuing one, it could and should have been conscientiously attended to in the context, albeit belatedly, of the decisions in June and October 2014. It still can be performed. If the duty was properly performed, it is conceivable that it may make a difference to the outcome, though equally the EDC and the Council may ultimately reach the same decision as before. It is a matter for them, subject to the lawful performance of the duty. In the context of any reconsideration by the Council, it goes without saying that among the material considerations which should inform the approach to be taken will be developments of significance since the impugned decisions, such as the Transport NI's change of standards; the evidence accumulated

in these proceedings as to the range of ways in which the urban landscape can be adjusted to meet the concerns of those like the applicant; the costs of different ways by which adjustments could be effected; and the duties which arise under section 49A of the 1995 Act, which the court has not ruled on but which should not be neglected.

[237] The appropriate remedy in view of the court's conclusions is that it should quash the decisions impugned in these proceedings. This will open the way for the matter to be reconsidered, in the manner already described, with full compliance with the section 75 duty.

[238] The court will hear the parties on the issue of costs.